# SUPREME COURT OF NOVA SCOTIA

**Citation:** Germa v. Correctional Service Canada, 2014 NSSC 273

**Date:** 20140324
**Docket:** SAM No. 424733
**Registry:** Amherst

**Between:**

Justin Germa

Applicant

v.

Correctional Service Canada

Respondent

| | |
|---|---|
| **Judge:** | The Honourable Justice James L. Chipman |
| **Heard:** | March 24, 2014, in Amherst, Nova Scotia |
| **Oral Decision:** | March 24, 2014 |
| **Written Release of Decision:** | July 14, 2014 |
| **Counsel:** | Mr. Justin Germa, self-represented<br>Ms. Jill Chisholm, for the Respondent |

**By the Court: Orally**

**Introduction**

[1] As I indicated prior to our recess, I am prepared to render an oral decision today. *Habeas corpus* applications are time sensitive matters, and it is important to give a decision as quickly as possible. In the time from today's date in rendering this oral decision, I reserve the right in the event a transcript of my decision is requested, to edit and expand upon my reasoning. This will in no way impact on the substance of my decision. And so in my decision I will endeavour to summarize the relevant background, the respective position of the parties, review specific findings made on the facts before me, review the relevant law I took consideration of in rendering my decision, and explain the reasons for my decision.

[2] At the outset I want to thank both Mr. Germa and counsel, Ms. Chisholm, for the materials filed in advance, for our telephone recorded pre-trial conference call on Friday, and for their submissions made today. They were very helpful. I have considered all the evidence and submissions very carefully before rendering this, my decision.

[3] By way of background, the court file will reflect that we were in this Honourable Court one month ago, and it is a matter of record that I rendered a decision at that time in respect of Mr. Germa's initial *habeas corpus* application. Under that application, I determined that Mr. Germa's placement in involuntary segregation was lawful.

[4] The question for today is whether his increased security classification from medium to maximum is lawful or unlawful, and he of course has made the application and alleges it is unlawful. At this time, Mr. Germa remains in segregation awaiting potential transfer to the Atlantic Institute in Renous, New Brunswick. It's the Court's understanding that the Atlantic Institute is the only maximum security institution in Atlantic Canada.

[5] Mr. Germa's placement in segregation and increased security classification is a deprivation of his residual liberty, and the respondent Crown has conceded this, so the burden shifts to the respondent to argue the deprivation is lawful.

**Justin Germa's Position**

[6] Mr. Germa maintains his deprivation is unlawful, and that he should retain medium classification. He says he has not been afforded due process, that there has been inadequate or no disclosure, and in the specific points to the lack of a scoring matrix provided in a timely fashion. Mr. Germa goes on through argument and through evidence of himself and Mr. Bruce (one of the Springhill Medium Security Institution chaplains) to assert that the disclosure is inadequate, because the matrix was given to him four days after the final decision on reclassification. Among other factors he cites in argument as to why he should not be reclassified, he points to the evidence of Mr. Bruce, concerning his behaviour. In Mr. Germa's words "…my behaviour witnessed by those within the facility, the chaplains and others… all good things were said about me". Mr. Germa further points to the improper or lack of time and date in some of the allegations in the A4D, and he did not quite say it this way, but it is almost like he is saying: "I didn't even get a gist. There's no gist to those allegations, so how can I defend myself?" Having regard to all of this, Mr. Germa argues that he has not been afforded procedural fairness, and therefore the reclassification decision should not stand.

**Correction Services Canada's Position**

[7] The Crown respondent has another view of the case. They maintain the decision to place Mr. Germa in segregation and reclassify was lawful and reasonable. Through their counsel's arguments Correction Services Canada says that Mr. Germa was treated fairly throughout the process, and was afforded due process. They point to the detailed and thorough affidavits of Ms. Henderson (Mr. Germa's correctional officer), the latest sworn (with attached exhibits) March 14, 2014. The Crown says this affidavit sets out in detail the facts and circumstances that were taken into consideration in respect of the reclassification and the security rating increase. The Crown adds that the affidavit clearly sets out the provisions of the *CCRA* and the regulations and directives that were considered throughout the decision making process.

[8] The Crown says that it is true the scoring matrix was not provided before the decision was made, but it was provided, and so it is not like a *Bradley* situation when the scoring matrix was never received. In any event, they say there is a significant factual distinction between this situation and *Bradley* because this is not a case where the scoring matrix or SRS is relied on exclusively to justify

reclassification. The Crown directs the Court to the overall reasons as per the A4D and says that this document provides the background as to reclassification.

[9] The Crown also refers to para. 47 of Ms. Henderson's March 14, 2014 affidavit which reads,

> But for the incidents leading to Mr. Germa's segregation on January 31, 2014, Mr. Germa's security classification would not have been elevated from medium security to maximum security. The seriousness of distributing and selling shanks within the institution warranted that Mr. Germa's institutional adjustment rating be reassessed as high. As a result, he was reclassified as a maximum security inmate.

as rationale for the reclassification.

[10] The Crown goes on to point out that Mr. Germa asked for, and received, various documents throughout the process. Exhibit 6 and Mr. Germa's cross examination confirm that once he asked for documents, he was provided with them.

[11] With respect to Mr. Bruce, the Crown says on balance that his evidence should be regarded as helpful to the Crown's case. They note that Mr. Bruce's dissenting opinion on reclassification acknowledges that the opinion is within the confines of his experiences within the chaplain setting only. On cross examination Mr. Bruce acknowledged that he was afforded the opportunity to review other documents, but chose not to do so.

[12] The Crown also asserts that Mr. Germa was provided with, among other documents, the A4D. When one examines his rebuttal carefully, it is apparent that he must have read the A4D before he could have responded in the manner that he did.

[13] The Crown argues that the key factor in the decision to change the rating from medium to maximum is Mr. Germa's institutional adjustment rating. They say it is clear Mr. Germa requires a high degree of supervision and control within a penitentiary, which under the *CCRA* and regulatory framework, is consistent with a maximum security designation.

[14] With reference to the evidence, the Crown points out that Mr. Germa was provided with his recommendation for reclassification and information on transfer

on February 21, 2014. They note he filed his rebuttal a couple of days later, on February 23, 2014.

**Issue and Onus of Proof**

Bearing in mind the arguments of Mr. Germa and the Crown, I find the issue before me is whether the reclassification from medium to maximum, and the continuing and ongoing placement in segregation and potential transfer to a maximum security institution, is a deprivation of the liberty of Mr. Germa. The burden of proof is on Mr. Germa to establish that he has been deprived of his residual liberty, and the Crown agrees he has established this. Accordingly, because there has been a deprivation, the onus of proof with respect to reclassification rests on the detaining authority, the Crown.

**Law**

[15] Decisions of prison administrators, such as have been made by those at the Springhill Institution in this case, are afforded considerable deference by the Court, and the deference is afforded for good reason. In the result, my role as a Supreme Court Justice hearing a *habeas corpus* application is not to review all the evidence and make a new decision on the evidence. It is also not my role to determine whether the security reclassification, such as we have in this case, was the correct decision. In making reclassification decisions, prison administrators must take into consideration the safety and security of many stakeholders; the staff, other inmates, the public and so forth. Prison administrators, and particularly the SIO, have specific and sometimes special knowledge of the safety concerns. They are in a better position than the Court in assessing and mitigating the risks with respect to prisons. That is why in part they are afforded considerable deference. It is not the Court's role to second guess.

[16] My role is to determine whether the respondent had the jurisdiction to make the decision, and whether that decision was lawful and reasonable in the circumstances. In this analysis, I must consider whether the decision is within an appropriate range of outcomes. In other words, as has been asserted by both parties in argument, was the decision reasonable? Can it stand?

[17] The authority for my review of the law can be found in a number of authorities I was referred to this afternoon and before, but I will simply highlight what I consider to be the key authorities: the *CCRA* and the regulatory framework

and directives, the Supreme Court of Canada decisions, including *May v. Ferndale* 2005 SCC 82; *Khela v. Mission Institution* 2011 BCCA 450; *Bradley v. Canada (Correctional Service)* 2011 NSSC 503; *Bradley v. Correctional Service Canada* 2012 NSSC 173; and *Samms v. Leblanc* 2004 NBQB 140.

[18] Having regard to the authorities, I must consider all of the evidence before me. This includes the *viva voce* evidence, affidavit evidence, and what has been submitted in argument. My decision of February 24, 2014, has been rendered, such that I find the premise contained at paragraph 47 of Ms. Henderson's affidavit to be correct. That is to say, my decision on *habeas corpus* made one month ago established that the segregation was appropriate in law. So the question now to be determined is whether Mr. Germa's reclassification was appropriate.

**Analysis and Disposition**

[19] Having regard to the evidence and law, I find the respondent Crown had the authority to make the decision challenged by the applicant. I find their decision to be clearly anchored in the legislation and the case law. I find the conduct of the prison administration and the steps taken were fair and appropriate and reasonable in the circumstances. I find that the witness, Ms. Henderson, was in effect the quarterback here, in that she led the fact finding and put it together and made her recommendations. Consistent with what I said about her one month ago (I have no reason to deviate), having witnessed her again on the witness stand, I found Ms. Henderson to be a credible, forthright and honest witness.

[20] I might say that I have some considerable sympathy with Mr. Germa in that in a perfect situation, in my view, he ought to have been provided with the scoring matrix in February, and perhaps mid-February-ish, as opposed to early March, but I do not regard the fact that he received it belatedly as catastrophic or fatal to the Crown's case. I might add that when he asked for it, he was furnished the document. Further, as Ms. Chisholm has persuasively argued, this case is different from such cases as *Bradley*, *supra*, when the decision was premised solely on the scoring matrix. Here we have the decision having been based on significant documentation, including the A4D, which I find to be a balanced and thorough document. I find that the decision (inclusive of the A4D) of the warden and the rationale for the decision is founded in the various documents in evidence. I find the A4D, while not perfect, is a thorough document which provides a rational explanation. Although there is not a gist for everything that is in the A4D, I found

that when pressed on cross examination, Ms. Henderson was able to give credible and explanatory answers for the incidents in question.

[21] I also refer to the critical piece of the warden's decision, which goes back to paragraph 47 of Ms. Henderson's affidavit:

> But for the incidents leading to Mr. Germa's segregation on January 31, 2014, Mr. Germa's security classification would not have been elevated from medium security to maximum security.

[22] I find that the above paragraph is straightforward, clear and easy to understand. Again, I have some sympathy for Mr. Germa on this point, because I know what he says about the Court's finding concerning the Crown's informant, Mr. Ouellette. Having mentioned this, I hasten to say that the decision made a month ago was based on a host of factors. Certainly, Mr. Ouellette's information was part of what the Court considered but the gist in question alluded to other informants. Given the confidential affidavits, as well as other documentation, the earlier decision did not simply come down to a contest of Mr. Ouellette versus Mr. Germa.

**Conclusion**

[23] On balance I find no merit in the assertions of the applicant that he was not provided with appropriate disclosure. On the issue of credibility, I have generally found Mr. Germa to be very straightforward and credible, but for the issue of his rebuttal. When I scrutinize the rebuttal, I conclude Mr. Germa must have had the documentation in question, and in particular the A4D in order to have furnished such a specific rebuttal. So on that score only I found his credibility to be lacking, but on other scores I found him to be very credible

[24] At the end of the day I find that the applicant received proper disclosure of the facts and circumstances regarding his reclassification. I find that the investigation by the SIO was thorough and careful. I find that the corrections officer, Ms. Henderson, was thorough and canvassed (counting Mr. Germa) in the order of seven other people as part of the team, including Mr. Bruce. At the end of the day I find Mr. Germa was afforded due process and was treated fairly throughout.

[25] To reiterate, Mr. Germa's placement in segregation while the matter was investigated, and while the security reclassification was reviewed, was reasonable and lawful. I find Mr. Germa's continued placement in segregation pending transfer is also reasonable and lawful. Accordingly, I dismiss the *habeas corpus* application and order Mr. Germa reclassified as a maximum security prisoner.

Chipman, J.