Federal Court  Cour fédérale

**Date: 20120306**

**Docket: T-356-11**

**Citation: 2012 FC 291**

**Ottawa, Ontario, March 6, 2012**

**PRESENT: The Honourable Mr. Justice Near**

**BETWEEN:**

**DAVID BAGSHAW**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant, David Bagshaw, contests a February 10, 2011 letter of the Senior Deputy Commissioner, Correctional Service of Canada (CSC) advising that classification to other than maximum security for a convicted murderer as provided under Commissioner's Directive CD-705-7, paragraph 12 remained with the Warden of Millhaven Institution. He alleges an improper delegation of decision-making authority and failure to provide reasons.

[2] Having reviewed the submissions of both parties on these matters, I dismiss this application for the reasons set out below.

## I. Background

[3] The Applicant was convicted of first degree murder in 2009. He was sentenced to life imprisonment without eligibility for parole for ten years.

[4] Initially he served that sentence at a youth maximum security facility, Sprucedale Youth Centre. On his twenty-first birthday, January 5, 2011, he was to be taken to Millhaven Assessment Unit for classification and placement before entering the adult federal penitentiary system.

[5] When offenders convicted of murder arrive in federal custody, CSC's policy is to place them in a maximum security facility for at least the first two years of federal incarceration. Paragraph 12 of CD-705-7 provides for an exceptional override of this policy at the discretion of the Assistant Commissioner, Correctional Operations and Programs.

[6] Anticipating the Applicant's upcoming transfer, his solicitor, John Hill, requested that Assistant Commissioner, Chris Price grant a paragraph 12 override of the two-year maximum security policy in a letter dated December 10, 2010. Mr. Hill insisted that the override was an appropriate remedy for the Applicant having already served in a maximum security facility and transferring into federal custody. His letter concluded that given the Applicant "remains immature

emotionally despite his chronological age, placement at a maximum security institution would be disruptive of the gains he has made at Sprucedale."

[7] The Assistant Commissioner responded in a letter dated January 5, 2011, noting that prior to rendering a decision on the exceptional override the case must be prepared by the Intake Assessment Unit. He stated that Mr. Hill's letter would be forwarded to the Millhaven Assessment Unit for their information and consideration during the penitentiary placement process.

[8] An intake parole officer completed a Custody Rating Scale (CRS) for the Applicant on January 18, 2011. He scored 118 on institutional adjustment and 169 on security risk for an overall rating of maximum. In her Assessment for Decision, the intake parole officer referred to the Applicant's participation in acts of violence and belligerence in youth custody, his immaturity and the need "for a highly structured environment in which individual or group interaction is subject to constant and direct supervision." She recommended that he be placed in a maximum security facility. No recommendation was made on granting an exceptional override.

[9] The Penitentiary Placement Board reviewed the parole officer's assessment and also recommended maximum security placement at Millhaven Institution on January 20, 2011.

[10] In a second letter to the Assistant Commissioner on January 25, 2011, Mr. Hill reiterated concerns regarding the Applicant's emotional immaturity and requesting discretion be exercised to place him in a medium security institution.

[11] In a follow-up letter dated February 8, 2011, Mr. Hill questioned why the Applicant was being placed in J Unit at Millhaven Institution and his rebuttal was not accepted. He referred to the earlier request that the Assistant Commissioner intervene in this exceptional case by way of a paragraph 12 override. He questioned "[i]f you[r] decision is not to intervene, will you kindly provide me with your reasons for refusing the override?"

[12] Mr. Hill received a response to his second January 25 letter in a fax on February 10, 2011, this time from Senior Deputy Commissioner, Marc-Arthur Hyppolite. Although Mr. Hill's concerns regarding the Applicant's placement were acknowledged, the Deputy Commissioner stated:

> In keeping with Commissioner's Directive (CD) 705-7 – Security Classification and Penitentiary Placement, the decision-making authority for offender security classification and placement remains with the Warden. As such, I am forwarding copies of your correspondence and my replies to the appropriate Warden for consideration in further decision-making. I would in addition, point out that the institution is to provide an offender with the reasons for the proposed placement in writing two days prior to the final decision; then, the offender has an opportunity to provide a rebuttal which is to be considered by the decision-maker. As well, if an offender disagrees with the final decision, he or she can appeal the decision using the grievance process.

[13] Subsequent to this decision on March 20, 2011, it should be noted that the Applicant was involved in a knife attack on a fellow inmate at Millhaven Institution and has been charged with attempted murder. He claims to have been bullied into approaching the inmate. CSC guards used force to resolve the incident and the Applicant is recovering from a bullet wound to the stomach.

## II. Legislative and Administrative Framework

[14] The *Corrections and Conditional Release Act*, SC 1992, c 20 (the *Act*) empowers the CSC to assign security classifications to federal inmates by way of section 30 stating:

| Service to classify each inmate | Assignation |
|---|---|
| 30. (1) The Service shall assign a security classification of maximum, medium or minimum to each inmate in accordance with the regulations made under paragraph 96(z.6). | 30. (1) Le Service assigne une cote de sécurité selon les catégories dites maximale, moyenne et minimale à chaque détenu conformément aux règlements d'application de l'alinéa 96z.6). |
| Service to give reasons | Motifs |
| (2) The Service shall give each inmate reasons, in writing, for assigning a particular security classification or for changing that classification. | (2) Le Service doit donner, par écrit, à chaque détenu les motifs à l'appui de l'assignation d'une cote de sécurité ou du changement de celle-ci. |

[15] Under subsection 96(z.6) of the *Act*, the Governor-in-Council has the authority to make regulations setting out the factors that must be considered by the CSC in determining that classification. The Governor-in-Council has exercised this authority with the *Corrections and Conditional Release Regulations*, SOR/92-620, ss 17-18 (the *Regulations*).

[16] The initial two-year maximum security rule and the exceptional override under CD-705-7 are part of CSC's internal administrative policies and are not specifically referred to in either the *Act* or *Regulations*. Paragraph 11 of CD-705-7 provides:

| | |
|---|---|
| 11. Institutional Heads and District Directors are responsible for authorizing an offender's security classification. This authority may be delegated to the Deputy Warden or Area Director except for an offender who is subject to a dangerous offender designation, or in those cases where the security classification is related to a transfer decision and/or involves an offender serving a life sentence for first or second degree murder, or an offender convicted of a terrorism offence punishable by life. | 11. Les directeurs d'établissement et les directeurs de district sont chargés d'autoriser la cote de sécurité attribuée au délinquant. Ce pouvoir peut être délégué au sous-directeur de l'établissement ou au directeur de secteur, sauf dans le cas d'un délinquant déclaré dangereux ou lorsque la décision concernant la cote de sécurité est reliée à un transfèrement et/ou que le délinquant en cause purge une peine d'emprisonnement à perpétuité pour meurtre au premier ou au deuxième degré ou a été reconnu coupable d'une infraction de terrorisme passible d'une peine d'emprisonnement à perpétuité. |

[17] Paragraph 12 allows for the possibility of the exceptional override requested by the Applicant in this case as follows:

| | |
|---|---|
| 12. The decision-making authority for initial classification to other than maximum security for an offender convicted of first or second degree murder is the Assistant Commissioner, Correctional Operations and Programs. | 12. Le commissaire adjoint des Opérations et des programmes correctionnels a le pouvoir de décision concernant l'attribution d'une cote initiale autre qu'une cote de sécurité maximale à un délinquant reconnu coupable de meurtre au premier ou au deuxième degré. |

[18] In 2007, Assistant Commissioner, Ross Toller issued a memorandum entitled Initial Penitentiary Placement – Offenders Serving a Minimum Life Sentence for First or Second Degree Murder (also referred to as the Toller Memo) where he elaborated on the procedure for assessing exceptional cases under paragraph 12:

> 1) Institutional Parole Officer prepares an Assessment for Decision;
> 2) Intake Warden reviews as to whether an exception is warranted, then forwards recommendation to their respective RDC [Regional Deputy Commissioner]
> 3) RDC assures quality control and compliance with all aspects of policy and forwards recommendation for an "exception" and relevant documentation to ACCOP [Assistant Commissioner] for review and decision; and
> 4) ACCOP notifies RDC of decision results.

## III. Issues

[19] The issues before this Court are as follows:

(a) Did CSC improperly sub-delegate decision-making authority or breach the duty of fairness in its classification and placement of the Applicant in light of CD-705-7?

(b) Is this application moot as a result of the incident on March 20, 2011 and charges of attempted murder?

## IV. Standard of Review

[20] The primary task of the Court is to assess the requirements outlined in CD-705-7 and the related question of the scope of the duty of fairness in this instance.

[21] In considering the standard of review for inmate grievance decisions, *McDougall v Canada (Attorney General)*, 2011 FCA 184, [2011] FCJ no 841 at para 24 concluded that "a standard of correctness applies to issues of law, including the interpretation of the *Act* and *Regulations* and of the Commissioner's Directives, as well as to issue of procedural fairness." This reasoning is equally applicable to the decision of CSC generally in its handling of the Applicant's classification and placement.

[22] This approach is also consistent with the leading cases of *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 50 and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, 2009 CarswellNat 434 at para 43-44 that maintain the correctness standard for questions of law and procedural fairness.

## V. Analysis

### A. *Did CSC Improperly Sub-delegate Decision-Making Authority or Breach the Duty of Fairness in its Classification and Placement of the Applicant in Light of CD-705-7?*

[23] To properly address this issue, I must consider four concerns raised in the application as to whether: (i) any decision by CSC was in accordance with CD-705-7; (ii) the doctrine of *delegatus*

*non potest delegare* applies; (iii) the Applicant's submissions triggered a duty to reach a decision on the exceptional override and provide reasons; and (iv) the Applicant had failed to exhaust internal remedies.

(i) Decision in Accordance with CD-705-7

[24] While paragraph 11 of CD-705-7 provides that Institutional Heads and District Directors are generally responsible for authorizing an offender's security classification, for the purposes of an exceptional override under paragraph 12 in the case of those offenders convicted of first or second degree murder, the Assistant Commissioner is the responsible decision-maker.

[25] The Assistant Commissioner has established a four-step process in his internal memorandum on Initial Penitentiary Placement (Toller Memo) referred to above, enabling him to address exceptional cases warranting a classification and placement other than maximum security. This begins with an Assessment for Decision by the Institutional Parole Officer and proceeds through the Warden and Regional Deputy Commissioner prior to the fourth and final stage involving a notification of decision by the Assistant Commissioner.

[26] This internal administrative process facilitates the identification of exceptional cases warranting consideration by the Assistant Commissioner. It does not represent an improper sub-delegation of authority, but a further elaboration of the process under CD-705-7, paragraph 12 for ensuring appropriate inmate classification. Consistent with the Directive, the Assistant Commissioner remains the primary and final decision-maker in this process.

[27] The response of the Assistant Commissioner on January 5, 2011 to Mr. Hill's initial submissions requesting an exceptional override was also in line with this internal process. He informed him that "[i]n cases where an offender convicted of first or second degree murder is being considered for placement to other than maximum security, the decision maker is, as you have noted, the Assistant Commissioner of Correctional Operations and Programs. However, prior to this decision being rendered, the case must be prepared by the Intake Assessment Unit."

[28] According to the Respondent, no decision was made regarding the exceptional override as the intake parole officer did not provide that recommendation. She supported placement in maximum security at Millhaven Institution. Neither the Assistant Commissioner nor the Warden of Millhaven Institution were required to make a decision in this regard. The Senior Deputy Commissioner's letter of February 10, 2011 was not an improper sub-delegation of authority to the Warden, but recognition that the initial security classification of the Applicant had been made and it was within the domain of the Warden going forward.

[29] I am prepared to accept that no formal decision was made regarding the override and that there was no improper sub-delegation of authority. Although the Senior Deputy Commissioner could have more clearly articulated why the decision now rested with the Warden of Millhaven Institution, the CSC's approach was generally consistent with its internal policies.

[30] I do express some concern, however, that under the current process a failure of the intake parole officer to recommend consideration of an exceptional override conceivably ends the matter.

This approach vests significant responsibility for an eventual decision on the exceptional override in the hands of the intake parole officer. The Respondent's interpretation suggests there can be no decision without that initial recommendation. Since this is the policy approach adopted by CSC with respect to the exceptional override, in my view, the so called Toller Memo could be made clearer in this regard, i.e. that absent a recommendation from the intake parole officer in step 1, there is no decision to be made by the Assistant Commissioner.

(ii) Doctrine of *Delegatus Non Potest Delegare*

[31] In support of his position, the Applicant has raised the specific doctrine of *delegatus non potest delegare*. This is a principle of statutory construction that when a named official is charged with making a decision, the official cannot re-delegate that responsibility. The Applicant relies on the discussion of the doctrine in *Kindratsky v Canada (Attorney General)*, 2006 FC 1531, [2006] FCJ no 1955 at paras 16-23 (although it should be noted that Justice Robert Hughes rejected the argument that a regulation was invalid due to this doctrine, since there was a "reasonable and necessary delegation of an appropriate portion of power to a suitable person").

[32] As the Respondent makes clear, the doctrine has no relevance in the present circumstances. The Commissioner's Directives "are no more than directions as to the manner of carrying out their duties in the administration of institutions where they are employed" as opposed to legislative instruments (see *Martineau v Matsqui Institution*, [1978] 1 SCR 118 at 129).

[33] More significantly, while delegated legislative and judicial powers must be exercised by the person to whom they were granted, administrative powers may be freely sub-delegated to others and represent an exception to this doctrine (see for example *Northeast Bottle Depot Ltd v Alberta (Beverage Container Management Board)*, 2000 ABQB 572, [2000] AJ no 980 at paras 44, 50-58). Since the powers delegated under CD-705-7 are administrative in nature, they would fall within the exception to *delegatus non potest delegare*.

(iii) Duty to Reach a Decision and Provide Reasons

[34] The Applicant insists that a request for the Assistant Commissioner to exercise discretion triggered a duty on the part of CSC to consider it and provide reasons for a refusal. He relies on the determination in *Jamieson v Canada (Commissioner of Corrections)* (1986), 2 FTR 146, [1986] FCJ no 171 where it was considered a breach of procedural fairness when an inmate was not given specific reasons for his intended transfer, it was also not clear that an inmate's response had been considered by a relevant decision-maker before a final decision was taken, and he was not advised as to that final decision. He also refers to the requirements regarding the provision of reasons that "the reasoning process followed by the decision-maker must be set out and must reflect consideration of the main relevant factors" (see *Via Rail Canada Inc v National Transportation Agency*, [2001] 2 FC 25, (2000) 193 DLR (4th) 357 at para 22).

[35] The Respondent contends that the Applicant is incorrect in asserting that there was a duty to consider the request. The Commissioner's Directives do not create an enforceable right on the part of an inmate (see for example *Bouchard c Canada (Procureur général)*, 2006 CF 775, [2006] ACF

no 963 at para 73-74). CD-705-7 and paragraph 12 in particular do not provide for submissions on the part of the inmate to require a decision on the exceptional override. The Directive is silent as to when, how or under what circumstances the Assistant Commissioner may grant an override of the two-year rule.

[36] With respect, I do not accept the Applicant's suggestion that *Jamieson*, above, creates an obligation to make a decision based on submissions to CSC in this case. There is no process in place for the Applicant to request the exceptional override, but it would seem he must contest decisions regarding his classification and placement through the grievance process, whether made as part of the normal process or based on a refusal of the Assistant Commissioner to exercise discretion.

[37] Nevertheless, the Assistant Commissioner's initial response that he "asked that [the] correspondence be forwarded to the Millhaven Assessment Unit for their information and consideration during the penitentiary placement process" implied that the submissions would be taken into consideration. While the Assessment for Decision prepared by the intake parole officer mentions the Applicant's emotional immaturity, it is not clear that the request for an exceptional override had been considered at this initial step. It is appropriate for the Applicant to question after being told that the request was forwarded for information and consideration why there was no further mention of it. On this narrow basis, the Applicant may have raised valid concerns regarding procedural fairness.

[38] In my view, however, the Court cannot assist the Applicant in this regard as he has failed to exhaust available internal remedies by pursuing the matter through the grievance process.

(iv) Failure to Exhaust Internal Remedies

[39] As noted in *Marachelian v Canada (Attorney General)*, [2001] 1 FC 17, [2000] FCJ no 1128 at para 10:

> [10] The policy reasons for requiring applicants to exhaust their internal remedies are compelling. To hold otherwise is to undermine the legitimacy of alternate remedies by assigning them to a secondary position when there are many reasons why they should occupy a primary role in the resolution of disputes. In the context of correctional facilities, one could identify timeliness, familiarity with a unique environment, adequate procedural safeguards and economy as reasons for which internal remedies ought to be exhausted before approaching this Court. However, there will be circumstances in which the internal remedies are not adequate. […]

[40] Although the Court proceeded to conclude there was an exception to the general rule in that case, the reasoning remains relevant.

[41] Similarly, in *Gates v Canada (Attorney General)*, 2007 FC 1058, [2007] FCJ no 1359 at para 26, Justice Michael Phelan stated:

> [26] In my view, the Court should not lightly interfere with the complaints process. There are strong policy and statutory reasons for requiring inmates to use this process. It is in cases of compelling circumstances, such as where there is actual physical or mental harm or clear inadequacy of the process that a departure from the complaints process would be justified (this is not an exhaustive list of the circumstances justifying departure from the usual process).

[42] At paragraph 28, he held that "[i]t is consistent with this regulatory scheme that, where there are urgent substantive matters and evident inadequacy in the internal procedures, it is open to the Court to consider the issue of remedial action."

[43] The Applicant submits that this is one instance where the internal procedures are inadequate justifying the intervention of this Court as suggested in *Gates,* above.

[44] While an offender must be informed of the grievance process regarding classification and placement, under Paragraph 17 of CD-705-7, in cases "[w]hen the decision maker for the security classification is the Assistant Commissioner, Correctional Operations or Programs, or the Senior Deputy Commissioner, a grievance arising from the decision will be submitted directly to the third level." The Applicant insists that he has been frustrated in his ability to seek a third level grievance from a decision of the Assistant Commissioner and has been provided with no reasons to make an effective submission.

[45] He has not, however, been deprived of access to the grievance process regarding his classification and placement more generally. While there was no requirement for the Assistant Commissioner to make a decision regarding the exceptional override, the Applicant can still grieve the overall placement decision and the reasons provided by the intake parole officer through the normal three-level process. This provides him with the opportunity to address any procedural fairness concerns, such as a failure to consider his submissions on the possibility of an exceptional override as the Assistant Commissioner implied would be done in his initial response. The

Applicant's concern that he will not immediately benefit from a higher level review of his grievance is not sufficient to justify the intervention of the Court at this time.

### B. *Is this Application Moot as a Result of the Incident on March 20, 2011 and Charges of Attempted Murder?*

[46] The Respondent has also asserted that the incident on March 20, 2001 and the related attempted murder charges make this application moot. In accordance with section 17 of the *Regulations*, factors relevant to an inmate's classification include "any outstanding charges", "performance and behaviour while under sentence" and the "potential for violent behaviour." According to the Respondent, as a result of the incident the Applicant's CRS would likely be 35 points higher today than it was during the initial intake assessment process.

[47] As discussed in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342, [1989] SCJ no 14 at para 15:

> [15] […] The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot.[…]

[48] Given my discussion with respect to Issue A, it is not necessary for me to deal extensively with whether the application is moot. I leave it to the Applicant to grieve his initial placement and the CSC to consider how the March 20, 2011 incident impacts on any future classification.

## VI. Conclusion

[49] Since the Senior Deputy Commissioner's letter was in line with CD-705-7 along with CSC internal policies and the Applicant can pursue any remaining concerns regarding his placement through the internal grievance process, the application for judicial review is dismissed.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** this application for judicial review is dismissed.

" D. G. Near "

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | **T-356-11** |
| **STYLE OF CAUSE:** | **BAGSHAW v. AGC** |
| **PLACE OF HEARING:** | **TORONTO** |
| **DATE OF HEARING:** | **JANUARY 10, 2012** |
| **REASONS FOR JUDGMENT AND JUDGMENT BY:** | **NEAR J.** |
| **DATED:** | **MARCH 6, 2012** |

**APPEARANCES:**

| | |
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| Michael J. Sims | FOR THE RESPONDENT |

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