Date: 20080925

Docket: A-81-07

Citation: 2008 FCA 285

CORAM: **DÉCARY J.A.**
BLAIS J.A.
RYER J.A.

BETWEEN:

JEFF EWERT

Appellant

and

THE ATTORNEY GENERAL OF CANADA AND
THE COMMISIONER OF THE CORRECTIONAL SERVICE OF CANADA

Respondents

Hearing held by videoconference
between Vancouver and Agassiz, British Columbia, on September 17, 2008.

Judgment delivered at Ottawa, Ontario, on September 25, 2008.

REASONS FOR JUDGMENT BY: DÉCARY J.A.

CONCURRED IN BY: BLAIS J.A.
RYER J.A.

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REASONS FOR JUDGMENT

DÉCARY J.A.

[1] The appellant has been engaged in various legal battles challenging the process of risk assessment of Aboriginal inmates in Canadian correctional institutions. This is one of those challenges.

[2] The appellant has been incarcerated in a federal institution since 1984, serving two concurrent life sentences for second degree murder and attempted murder. In April 2000, he filed a

grievance alleging that some tools of assessment used by the Correctional Service of Canada (the Service) systemically discriminate against Aboriginal inmates. The grievance was denied at all levels. On September 13, 2004, the appellant filed a second third level grievance, which was dismissed on June 10, 2005 in the following terms:

> "Mr. Ewert you submitted a grievance concerning the use of actuarial tests on native offenders in the Correctional Service of Canada. Please accept our apologies for the delay in responding to your grievance.
>
> You submitted a grievance on the above issue in 2003. At that time, you were advised in writing that the Correctional Service of Canada was in the process of having these instruments reviewed and evaluated through its Research Branch. On June 13, 2003 you received a letter from Ms. Shereen Benzvy Miller, the Director General, Rights, Redress and Resolution, Correctional Service of Canada. This correspondence provided you with a detailed explanation regarding the use of actuarial instruments on offenders, the process of assessment CSC follows and the current initiative being undertaken by the Research Branch to review the appropriateness of CSC intake assessment tools for Aboriginal offenders. This process is currently ongoing.
>
> Once the evaluation of these measurements has been undertaken CSC will then determine whether any changes or modification(s) will be required to the current actuarial scales being used for assessment purposes.
>
> Until such time as this review is completed, **no further action** is required."
>
> (A.B. vol. 5, p. 1418)
> (emphasis in the original)

[3] The decision is signed by Mr. Gerry Hooper, the Principal Advisor of the Commissioner of the Correctional Service of Canada. Just above his signature, are six boxes which indicate the status of the grievance : rejected (non grievable), denied, upheld, upheld in-part, resolved/No further action required, and deferred. The box marked is "resolved/No further action required".

[4] On November 1st, 2005, the appellant filed a notice of application for judicial review

> "…in respect to the Respondents' violations of laws and policies governing the decisions of Correctional Service of Canada (CSC) to assess Applicant's risk to Escape, risk to Institutional Adjustment, risk to Public Safety, and concomitant overall Security Level, in whole or in part upon the use of so-called actuarial and non-actuarial risk assessment instruments which have not been standardized or 'normed' for use on Aboriginal offenders and have never been empirically proven reliable or to have any predictive validity."
>
> (A.B. vol. l, p. 59)

[5] On April 3, 2006, the appellant filed a Notice of Constitutional Question which expands over ten pages. The range of the questions is, and this is an understatement, overwhelming. It includes, amongst others, an attack on the requirement to serve a Notice of Constitutional Question on the Attorney General of Canada and the Attorney General of each Province while "it excludes a requirement for service upon the Attorney General of the Yukon, the Northwest Territories and Nunavut"; an attack "on the subordination and 'devolution' of the Yukon, the Northwest Territories and Nunavut to a single, central authority while Canada is a federalist state"; an attack on the validity "of any Correctional Service of Canada rules that provide for the use of actuarial and non-actuarial risk assessment instruments and practices on Aboriginal people…" and an attack on the validity of section 1 of the *Charter* "in light of Canada being a State Party to the International Covenant on Civil and Political Rights…".

[6] On January 12, 2007, Mr. Justice Beaudry, of the Federal Court, dismissed the application for judicial review (2007 FC 13).

[7] The first part of the reasons is devoted to the grievance as such. As I read the reasons, the Judge found on the one hand that the appellant had not made out his case – there was conflicting

expert evidence with respect to the applicability of the assessment tools on offenders, and the Judge preferred that of the respondent, and there was no evidence from the appellant that he would have been classified at a lower level if the assessment tools had not been applied to him. The Judge found on the other hand that the decision of Mr. Hooper had not denied the grievance but had, rather, suspended further action on it because it would be premature to deny it or uphold it while "the process to review the appropriateness of CSC intake assessment tools for Aboriginal offenders was still ongoing" (paragraph 66 of the reasons). In other words, judicial review was denied on grounds of insufficiency of evidence and prematurity.

[8] These findings are findings that escape appellate scrutiny. It is true, as argued by the appellant, that the Judge erred in applying the standard of patent unreasonableness : subsequent to the Judge's decision, that standard was set aside by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9. The Judge's error, however, is more an error of form than an error of substance. The standard of reasonableness which was ultimately preserved in *Dunsmuir* comprises a wide range of deferential norms. It is fair to say that in the case at bar the decision of Mr. Hooper was entitled to a very high degree of deference as it was reached on the basis that the Service was not yet in a position to fully answer the complaints of the appellant. The Judge did not err in deferring to the Service in the circumstances.

[9] The second part of the reasons is devoted to the *Charter* arguments of the appellant. Assuming, for the sake of the discussion, that the Judge had to do a *Charter* analysis notwithstanding his findings on the grievance itself and the unfocused and extravagant ambit of the

constitutional questions set out by the appellant, he limited himself to deciding, again on the basis of the evidence before him, that the appellant had failed to demonstrate that race was the applicable ground of discrimination. The comparator group being not that of Aboriginal inmates *per se* but that of Aboriginal inmates having the same past course of conduct as that of non-Aboriginal inmates, the Judge was justified, absent evidence of discriminatory treatment, in refusing to go further in his *Charter* analysis.

[10] At paragraph 67 of his reasons, the Judge urged the Service to "explain to the Applicant the initiative undertaken by the Research Branch and the results obtained, if any". At the hearing counsel for the respondent informed the Court that some explanation would be given to the appellant during the fall. That may prove to be very little very late for the appellant, but it is not an issue that can be addressed in these proceedings.

[11] For the above reasons I have reached the conclusion that the appeal should be dismissed. I would not, however, grant the respondents their costs in view of the time that has elapsed since the undertaking, more than three years ago, of a follow-up.

[12] I want to make it clear, however, that these reasons are not to be understood as being a rejection of the *Charter* arguments raised by the appellant. Some of the arguments raise legitimate concerns and depending on the course of events it may be that a full examination of these arguments will be warranted in a proper procedural setting and with up to date evidence. The appellant would help himself and the Court if he were to confine his constitutional questions to those that relate

directly to his alleged discriminatory treatment in the risk assessment process used by the Correctional Service of Canada

"Robert Décary"
J.A.

"I agree.
Pierre Blais J.A."

"I agree.
C. Michael Ryer J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-81-07
STYLE OF CAUSE:	Jeff Ewert v. AGC et al
PLACE OF HEARING:	Vancouver, British Columbia via videoconference
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CONCURRED IN BY:	BLAIS J.A. RYER J.A.
DATED:	September 25, 2008

APPEARANCES:

Jeff Ewert	ON HIS OWN BEHALF
Curtis Workun Liliane Bantourakis	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

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