SUPREME COURT OF NOVA SCOTIA

Citation: *Gogan v. Nova Scotia (Attorney General)*, 2015 NSSC 360

Date: 20151207
Docket: Hfx No. 445712 and
Hfx No. 445780
Registry: Halifax

Between:

Dylan Robert Douglas Gogan

Applicant

v.

The Attorney General of Nova Scotia representing her Majesty the Queen in right of the Province of Nova Scotia and Central Nova Scotia Correctional Facility

Respondent

and

Dylan Roach

Applicant

v.

The Attorney General of Nova Scotia representing her Majesty the Queen in right of the Province of Nova Scotia and Central Nova Scotia Correctional Facility

Respondent

Decision

Judge:	The Honourable Justice Gerald R.P Moir
Heard:	December 2 and 7, 2015, in Halifax, Nova Scotia
Written Release:	December 16, 2015
Counsel:	Dylan Gogan, on his own Dylan Roach, on his own Peter McVey Q.C. and Glenn Anderson Q.C., for the Crown

Moir J. (Orally):

[1] Mr. Gogan and Mr. Roach made *habeas corpus* applications. They are confined to their cells in Burnside twenty-three hours a day. This is not because they are being disciplined. This is not because they need protection. This is not because they need to be investigated for classification.

[2] Mr. Gogan and Mr. Roach are confined twenty-three hours a day for reasons that have nothing to do with them as individuals. These gentlemen have been sentenced to penitentiary, and they are in Halifax temporarily because they have further business with the courts. They are between arraignments and trials, and they have been remanded to Burnside rather than back to Renous, the federal penitentiary.

[3] A year ago, the Burnside Institution adopted a policy. The only written record of the policy that has been produced to the court by the government is an e-mail by the Assistant Deputy Supervisor of Operations at Burnside to numerous members of staff, including Mr. Richard Verge, Captain of the West 5 range at Burnside.

[4] The email is dated December 18, 2014. It is titled "Federal Placement". It reads:

> On a going forward basis, any offender who arrives to the facility with a federal status (sentence, fed for Court, fed parole susp), will be housed in West 5. If the offender is considered to be protective custody, they will be housed in a different lockdown unit other than West 5. Federal offenders should not be placed in an open dayroom. There are some offenders housed in open dayrooms who are considered federal. These particular offenders' cases have been reviewed and have been considered to be "grandfathered" into these dayrooms. It will be discussed and if necessary these offenders will be removed from the dayroom at a later time. We are attempting to eliminate the fact of having federal offenders in open dayrooms. When it may be possible to have provincial sentenced offenders be placed there instead. Immigration offenders will be placed temporarily in a lockdown unit until their case can be reviewed and it be considered they are not high risk. Please note that for the time being high profile offenders also can be housed in West 5. If an offender who is admitted is considered federal and they deem they cannot go to any lockdown unit, please contact your immediate supervisor for further direction.

[5] The government responded to the applications by filing an affidavit of Mr. Verge and supplementing it with some documents proved as exhibits at the *habeas corpus* hearing, which was quickly organized in the usual way. I assume the government complied with Rule 7.09, and all records of the decision to put federal prisoners in twenty-three hour lockdown cells are before me.

[6] Through cross-examination of Mr. Verge, Mr. Gogan established that the sentence, "We are attempting to eliminate the fact of having federal offenders in open dayrooms, when it may be possible to have provincial sentenced offenders be placed there instead", means that overcrowding at Burnside is being alleviated by

making the common room more available for the so-called provincial offenders. Therefore, overcrowding is the only reason found in the written record for the twenty-three hour a day confinement of federal prisoners.

[7] Mr. Verge offers hearsay evidence about other reasons, and I will come back to those when I deal with reasoning path as part of the deferential analysis of the institution's decision.

[8] Mr. Gogan is serving a thirty-nine month sentence in penitentiary. He was brought to Burnside on November 17, 2014 for a Provincial Court appearance. He was remanded back to Burnside pending a trial scheduled for December 21, 2015. However, Mr. Gogan understands new trial dates will be set at that time. He is expecting to be here until next spring.

[9] Mr. Roach was brought here on October 27, 2015. He was bound over to this court, and we remanded him to Burnside pending his trial on January 21, 2016. He is serving a life sentence without parole for thirteen years.

[10] Mr. Gogan described the cell in which he is locked alone for twenty-three hours a day. It is about seven by nine feet. There is a set of bunks but only one mattress. He has a stool and a toilet. That is it.

[11] Mr. Roach's conditions are similar except his is a single bed, there is no bench, and the room is equipped for a person with mobility problems. Mr. Roach is not such a person.

[12] Both men have experienced segregation units, and they say the present is not much different. They mentioned having a window presently. Mr. Verge pointed out several other differences, including no personal telephone in segregation, no personal telephone calls or visits.

[13] In cross-examination by Mr. Gogan, Mr. Verge agreed that there was no opportunity for Mr. Gogan or Mr. Roach to have their confinement reviewed within the institution. Reviews are only for those in the segregation unit. In cross-examination by Mr. Roach, Mr. Verge said he was in a lockdown unit "because you are a federal prisoner", and he pointed out that Mr. Roach could have been remanded to Renous instead of Burnside.

[14] When he was cross-examined, Mr. Gogan said he was unaware the court could have remanded him to Renous. He thought Burnside was automatic when out of province inmates have business with the Nova Scotia courts. Mr. Roach said he was aware of the possibility, but he was just lately assigned a lawyer here and he had not even had his first consultation.

[15] A prisoner has the right to challenge by *habeas corpus* a decision that "had the effect of depriving an individual of his liberty by committing him to a 'prison within a prison' ": *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602 at p. 622. The expansionary development of Justice (later Chief Justice) Dickson's approach in *Martineau* is described in *May v. Ferndale Institution*, 2005 SCC 82 starting at para. 27. Decisions that deprive the prisoner of "residual liberty" are typically reviewed when the decision is to put the prisoner into solitary confinement for disciplinary or administrative reasons (e.g., *Martineau*) or to reclassify the prisoner and send him to a more severe kind of prison (e.g., *May*).

[16] Less than two years ago, the Supreme Court of Canada released its decision in *Mission Institution v. Khela*, 2014 SCC 24. Justice LeBel wrote for a unanimous Court. He summarized the procedure on *habeas corpus* at para. 30:

> To be successful, an application for *habeas corpus* must satisfy the following criteria. First, the applicant must establish that he or she has been deprived of liberty. Once a deprivation of liberty is proven, the applicant must raise a legitimate ground upon which to question its legality. If the applicant has raised such a ground, the onus shifts to the respondent authorities to show that the deprivation of liberty was lawful (Farbey, Sharpe and Atrill, at pp. 84-85; *May*, at paras. 71 and 74).

[17] Many decisions refer to the deference the court must afford to institutional decisions for confinement or transfer. The government refers particularly to *Bradley v. Canada (Correctional Services)*, 2011 NSSC 503 at para. 11 ("decisions of administrators of penal institutions are entitled to considerable deference"), *Bradley v. Canada (Attorney General)*, 2012 NSSC 173 at para. 67 ("[T]he Court should be reluctant to second guess administrative decisions made by prison authorities"), and *Germa v. Canada (Correctional Service)*, 2014 NSSC 273 at paras. 15 and 16 ("Considerable deference" in para. 15 but also, in para. 16, "In other words … was the decision reasonable?").

[18] Justice Chipman's reference to reasonableness in *Germa* came three days before the Supreme Court of Canada released *Khela*. It brought deferential review on *habeas corpus* into line with deferential review in the rest of administrative law, as settled by *Dunsmuir v. New Brunswick*, 2008 SCC 9 and *Newfoundland and Labrador Nurses Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62. Para. 73 of *Khela* reads:

> A transfer decision that does not fall within the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" will be unlawful (*Dunsmuir*, at para. 47). Similarly, a decision that lacks "justification, transparency and intelligibility" will be unlawful (*ibid.*). For it to be lawful, the reasons for and record of the decision must "in fact or in principle support the conclusion reached" (*Newfoundland and Labrador Nurses' Union* … at para. 12 …).

Have Mr. Gogan and Mr. Roach Been Deprived of Liberty?

[19] The government submits that they have not. The argument would have the court treat twenty-three hours a day solitary confinement as a mere loss of privileges. The government says:

> The Applicants simply insist that all federal offenders in CNSCF should have free access to the "dayroom". They are simply saying this "should" be the policy. This is, with respect, more of a policy grievance than an application for *habeas corpus*. The Applicants are attempting to challenge a written policy directive enacted by the Superintendent or her delegate on December 18, 2014, a policy applying to all federal offenders. They are trying to do so by means of *habeas corpus*, an individual application offering only an individual remedy. Can they even do this?

[20] To lock a man alone in a cell for twenty-three hours a day is not merely to deprive him of the common room. It is to deprive him of social interaction, of the simplest personal amusements such as cards or television, of the most rudimentary activities that keep us sane. "[S]olitary confinement (or segregation) for a prolonged period of time can have damaging psychological effects on an inmate …": *Boone v. Ontario (Community Safety and Correctional Services*), 2014 ONCA 515 at para. 21.

[21] As I read the authorities, solitary confinement is *ipso facto* a deprivation of residual liberty. Indeed, it may amount to a breach of s. 12 of the *Charter*

depending on "the conditions, duration and reasons for segregation": *R. v. Marriott*, 2014 NSCA 28 at para. 38. I emphasize "reasons for segregation".

[22] I am satisfied that Mr. Gogan and Mr. Roach are deprived of residual liberty.

Have Mr. Gogan and Mr. Roach Raised Legitimate Grounds Upon Which to Question the Legality of the Solitary Confinement?

[23] The government says that the applicable legislation gives the Superintendent full authority to make a policy that governs a class of prisoners. It relies especially on Reg. 79(3)(a), which allows "confining the offenders held in the correctional facility or those of them who are normally held in that part, as the case may be, to their sleeping areas".

[24] The government submits that the change in policy for federal prisoners is not arbitrary. It refers to paras. 78 to 86 of *May* for the proposition that "a change in policy across a facility, or the prison system, resulting in more restrictive conditions for some offenders under the new policy, cannot be said in and of itself to be 'arbitrary' and therefore unlawful." *May* was a transfer case and the discussion referred to by the government is not easily applied to a case of administrative confinement. Those are generally reviewable.

[25] Also, the government's argument does not address para. 81 of *May* and the first line of para. 82:

> 81 The respondents, however, stress that while the change in policy may have prompted the review of the appellants' security classifications, an individualized assessment was conducted of each inmate. The decisions were not arbitrary, they argue, since they were clearly effected in consideration of each inmate's personal circumstances and characteristics.
>
> 82 We agree with the respondents.

[26] In my view, Mr. Gogan and Mr. Roach have raised serious grounds upon which to question the legality of their solitary confinement. Those grounds relate to the severity of solitary confinement, the absence of an individual assessment, and the institution's stated reasons.

Is the Decision to Impose Solitary Confinement on all Federal Prisoners Reasonable?

[27] Under *Dunsmuir*, a decision to which deference is owed is reviewed only for its reasonableness. We look for justification, transparency, and intelligibility within the decision-making process, and we ask whether the decision is within the range of possibilities supported by the facts and the law. Is the decision defensible on the facts and the law? Not, is it right?

[28] Under *Nurses Association of Newfoundland and Labrador*, the *Dunsmuir* process extends to unarticulated reasons when the articulated reasons are deficient.

[29] I will explain why the decision to hold all federal prisoners in solitary confinement is unreasonable by reference to particular reasons given, or that could be given, by the institution. Before doing that, I will explain my conclusion in two general ways.

[30] First, the actual reasons and the speculative ones depreciate the severity of solitary confinement and the gravity of the prisoner's constitutionally protected interest in residual liberty. Second, provisions of the *Correctional Services Act* and the *Correctional Services Regulations* on close confinement are ignored as they are given an interpretation that is outside the range of possible rational outcomes.

[31] *Overcrowding*. This is the only reason in the written record. The government refers to the Court's reluctance to intrude into fiscal management. Not, if liberty is at stake.

[32] It is unreasonable to make prisoners pay for overcrowding, whether it results from fiscal restraint or minimum sentences or both, by making them submit to the agony of solitary confinement. All prisoners are forced to pay for the

government's choice of overcrowding by being housed in overcrowded jails and prisons. To compound that with solitary confinement when on remand is unreasonable because it is so unfair.

[33] *Drug Trafficking*. Mr. Verge swore in his affidavit that the policy is supported by other reasons besides overcrowding. "Federal offenders are housed on W5 in order to restrict them from associating with provincial offenders and each other in an open dayroom." This minimizes the risk that they will exchange drugs with provincial offenders and transport drugs to and from other institutions.

[34] The phrase "housed on W5" is a euphemism for kept in solitary confinement. The resort to a euphemism is telling of the unreasonableness of this line of reasoning. The phrase tends to duck the gravity of solitary confinement and the prisoner's right to residual liberty. There is no hint that these have been balanced against the risks referred to by Mr. Verge.

[35] Secondly, the decision to put Mr. Gogan and Mr. Roach and others into solitary confinement is devoid of any individual considerations. It is arbitrary.

[36] *Safety*. Mr. Verge claims to have been told that the new policy was adopted "to minimize the risk of federal offenders harming offenders and staff and compromising the security of the facility". The government bears the onus at this

stage and no evidence suggests federal prisoners are a greater safety risk. Also, there is no individual assessment. This line of thinking is unreasonable because it is not supported by evidence and it allows for arbitrary infliction of solitary confinement.

[37] *Remand to Renous*. There are serious problems with this idea. If the policy was adopted to encourage federal prisoners to seek federal remands, they have to be told about it. They have to understand the possibility.

[38] Secondly, those like Mr. Roach who need to consult Nova Scotia counsel are penalized with solitary confinement for exercising their constitutional right to counsel.

[39] Third, a remanded prisoner is at Burnside because he has business with the courts. This line of reasoning implicates the courts in the solitary confinement.

[40] *The Policy on Federal Prisoners Precludes Rights of Review*. There is a segregation unit at Burnside. Repeatedly during cross-examination, Mr. Verge made it clear that Mr. Gogan and Mr. Roach received no review of their solitary confinement because they are not in the segregation unit. Mr. Gogan put the irrationality of this thinking into high relief when he said in submissions "segregation is not a place".

[41] Let me return for a moment to the facts of Mr. Gogan's and Mr. Roach's confinement. They spend twenty-three hours a day in a nine by seven feet cell with a bed, a mattress, a window, maybe a stool or a bench, and no other amenities. The one hour exception is for showers, any visitors, and a little time in the common room with little or no social interaction. Mr. Gogan put it mildly when he said "it's certainly hard on your mind".

[42] It is also close confinement. Although it is common in decisions about solitary confinement to use that term, I have avoided the more appropriate phrase "close confinement" so far and for a reason.

[43] The *Correctional Services Act* does not define close confinement. It is the subject of s. 74 and 75 of the Act. The Superintendent has power to "place an offender in close confinement": s. 74. On doing so, she can restrict the offender's privileges: also s. 74. There has to be a review of the close confinement: s. 75.

[44] Sections 74 and 75 require the Governor-in-Council to make regulations on the power to place a person in close confinement and on reviews. The Regulations help us understand what they mean by close confinement, although they offer no definition either.

[45] Regulations s. 79(3)(a) speaks of "confining the offenders … to their sleeping areas". I think that refers to a general lockdown.

[46] For those "placed in close confinement" there must be a preliminary review within a day: Regulations s. 80(1). If close confinement continues, there must be a full review once every five days: Regulations s. 80(3). After fifteen days, the Executive Director has to give permission: same reference.

[47] Section 89(c) refers to "close confinement, including close confinement in segregation". Section 95(1) allows for close confinement as a disciplinary penalty. Offenders who are penalized by undergoing close confinement, as opposed to those who are in close confinement for other reasons, cannot correspond, communicate, or visit with others: Regulations s. 95(3).

[48] The Act restricts the use of close confinement to need for protection, "the offender needs to be segregated to protect the security of the correctional facility or the safety of other offenders", allegations of breach of "a rule of a serious nature", and prisoner requests.

[49] The ordinary meaning of close confinement is confinement in a close space or otherwise under close supervision. This is also the meaning that emerges from the words of the Act and Regulations. Withdrawal of privileges does not define

close confinement. A person on close confinement may have all, some, or none of the privileges enjoyed in the general population, as s. 75 of the Act makes clear. So, being able to make calls and have visitors, let alone look out a window, does not mean one is not on close confinement within the Act or the Regulations.

[50] Close confinement may be employed for risk management as well as discipline: Act, s. 74. It is not restricted to close confinement in segregation: Regulations s. 89(c). No rational interpretation of these words can lead to the conclusion that "close confinement" does not apply to a prisoner confined to his cell twenty-three hours a day. The line of thinking that restricts the rights of reviews to prisoners in the segregation unit is not within the range of rational interpretations of the Act and Regulations.

[51] The legislation takes the confinement now imposed on federal prisoners very seriously. Artificial distinctions about place of confinement and euphemisms do not override the clear legislative purposes. The lines of thinking that effectively override the Act and the Regulations are therefore unreasonable in the sense described in *Dunsmuir*.

Conclusion

[52] For all of these reasons, I will allow both applications. As agreed during the hearing, I will discuss remedy now.

Moir J.