Court File No C70956

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

FRANK DORSEY and GHASSAN SALAH

Applicants
(Appellants in Appeal)

- and -

THE ATTORNEY GENERAL OF CANADA

Respondent
(Respondent in Appeal)

- and -

THE JOHN HOWARD SOCIETY OF CANADA, BLACK LEGAL ACTION CENTRE, CANADIAN ASSOCIATION OF ELIZABETH FRY SOCIETIES, CANADIAN CIVIL LIBERTIES ASSOCIATION, CANADIAN PRISON LAW ASSOCIATION

Interveners

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FACTUM OF THE CANADIAN PRISON LAW ASSOCIATION

PART I: OVERVIEW

1. The contrast between the constitutional and statutory mandate that federal inmates be placed in the least restrictive environment possible, and the reality of how placement decisions are made, is significant. Consequently, the liberty interests of federal inmates are extremely vulnerable, which is a relevant contextual factor for understanding the importance of access to the remedy of *habeas corpus.*

2. Both the *Charter* and sections 4(c) and 28 of the *Corrections and Conditional Release Act* ("*CCRA*") mandate that a federal inmate be placed in the least restrictive housing environment possible. However, the Correctional Service of Canada ("CSC") has historically been resistant to that principle, and remains so today. CSC's resistance to the least restrictive principle, and reliance on extraneous factors to contravene it, has enormous implications for the entire federal inmate population.

3. The writ of *habeas corpus* is one of the only tools federal inmates can use to protect and uphold their statutory and constitutionally protected liberty interests. Transfer and placement decisions within federal prisons have an enormous impact on the day-to-day lives and release prospects of all federal inmates. When their protected interests become vulnerable to disregard by penal authorities, their liberty is jeopardized.

PART II: LAW & ARGUMENT

a) The history of the 'least restrictive' principle

4. Section 28 of the *CCRA* sets out an enforceable legal obligation on CSC, which arises directly from constitutionally protected liberty interests under s. 7, 9, and 10(c) of the *Charter*. The Supreme Court emphasized in *May* that these sections of the *CCRA* create mandatory, rather than discretionary, obligations:

> As a matter of principle, CSC must use the "least restrictive measures consistent with the protection of the public, staff members and offenders": s. 4(d) of the *CCRA*. Where a person is to be confined in a penitentiary, CSC must provide the "least restrictive environment for that person" taking into account specific criteria: s. 28 of

the *CCRA*.[1]

5. Section 28 of the *CCRA* codifies a continuing obligation on CSC to uphold offenders' residual liberty rights by periodically recalibrating the degree of restriction imposed on an offender to ensure that an offender's liberty interests are impaired only to the degree necessary to achieve valid correctional purposes.[2] The least-restrictive principle is not merely a "privilege" granted to prisoners, but it is a legislative expression of offenders' protected liberty rights. While institutional transfer decisions are "discretionary" in the sense that they involve the exercise of a statutory power, that statutory discretion must be exercised in accordance with its purpose, and in a manner that is constrained both by the statutory language of s. 28, and by the *Charter* rights and values that apply where s. 7 liberty interests are engaged.[3]

6. Sections 4(c) and 28 of the *CCRA* are an expression of the continuing constitutional obligation to ensure that any restrictions on liberty are consistent with fundamental justice and rest on a proper legal foundation. As the Court states in *May*:

> Section 7 of the *Charter* provides that an individual's liberty cannot be impinged upon except in accordance with the principles of fundamental justice. Administrative decisions must also be made in accordance with the common law duty of procedural fairness and requisite statutory duties. Transfer decisions engaging inmates' liberty interest must therefore respect those requirements.[4]

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[1] *May v. Ferndale Institution*, 2005 SCC 82 at par. 55 [emphasis added].

[2] *Murray v. Canada (Correctional Service, S.H.U. National Review Board Committee)*, 1995 CanLII 3533 (FC), [1996] 1 FC 247, 1995 CarswellNat 1296 at par. 47; *Bonamy v. Correction Service Canada (Commissioner)*, 2000 SKQB 385 (CanLII), par. 17-21; *May, supra*, par. 55.
[3] *R. v. Bird*, 2019 SCC 7 (CanLII), at par 66; *Mission Institution v. Khela*, 2014 SCC 24 (CanLII), *supra*, par. 45; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (CanLII), par 108, and generally, par 105-135 [*Vavilov*].
[4] *May, supra*, par. 77.

7. The least restrictive principle was first legislatively articulated in the 1992 *CCRA*, although the principle had been expressed by the Supreme Court of Canada as early as 1980 in *Solosky*,[5] The enactment of the *Canadian Charter of Rights and Freedoms* in 1992 had a significant impact on correctional reform. Professor Jackson explained the history in his report:

> It was in 1980, just a year after the Supreme Court of Canada placed his imprimatur on the necessity for judicial review of correctional decision-making in the *Martineau* case, in its clarion call that "The Rule of Law must run within penitentiary walls", that the Court took a further step in the Solosky case, by expressly endorsing the proposition that "a person confined to prison retains all of his civil rights, other than those expressly or impliedly taken away from him by law". In the same case, the Court stated that the courts had a balancing role to play in ensuring that any interference with the rights of prisoners by institutional authorities is for a valid correctional goal; it must also be the least restrictive means available and no greater than is essential to the maintenance of security and the rehabilitation of the prisoner.
>
> Both the retained rights and the least restrictive measures principles found their way into the guiding principles of the 1992 *CCRA* as principles flowing from the application of the Charter and its emerging jurisprudence to the correctional context.[6]

8. As Professor Jackson explains, it was understood that new legislation would need to strike an appropriate balance between correctional authority and prisoners' rights, as mandated by the *Charter*. The rationale for the new legislative framework was set out in the Department of Justice's Correctional Law Review Working Group's fifth working paper, entitled "Correctional Authority and Inmate Rights" as follows:

> The view that an individual in prison does not lose "the right to have rights" is recognized in Canadian law. Even before the Charter, in *R. v. Solosky*, the Supreme Court of Canada expressly endorsed the view that inmates retain rights, except for those necessarily limited by the nature of incarceration or expressly or impliedly taken away by law. Moreover, the Supreme Court endorsed the "least restrictive means" approach which recognizes that any interference with inmate rights by

[5] *Soloski v. The Queen* [1980] 1 S.C.R. 821 at 823.
[6] *Jackson Report,* Appeal Book, Volume 1, Tab 8d, at p. 67; *Solosky v. The Queen*, [1980] 1 S.C.R. 821 at 823; *Martineau v. Matsqui Institution*, 1979 CanLII 184 (SCC), [1980] 1 SCR 602 at 622.

> institutional authorities must be for a valid correctional goal and must be the least restrictive means available.
>
> In effect, the "retained rights" principle means that it is not giving rights to inmates which requires justification, but rather, it is restricting them which does. Undoubtedly, some individual rights of inmates, such as liberty, must be limited by the nature of incarceration, in the same way that the rights of non-inmates in open society must be limited in certain situations. The important point, however, is that it is limitations on inmate rights which must be justified, and that the only justifiable limitations are those that are necessary to achieve a legitimate correctional goal, and that are the least restrictive possible. [7]

9. Professor Jackson further details the legislative history of ss. 4(c) and 28 of the *CCRA* in his report, describing the unsuccessful push by the CSC Review Panel in 2012 to replace the constitutionally derived "least restrictive measures" test with a policy-derived test of "appropriate" measures. As Professor Jackson observed, it is troubling that CSC adopted the "appropriate" standard as a matter of practice even while the "least restrictive" provisions remained in force:

> It was an indication of how completely the Correctional Service of Canada embraced the Roadmap panel's recommendations, that prior to any legislative change to the *CCRA* senior managers advised correctional staff that the least restrictive measures was no longer an operational principle. Indeed in conversations with correctional managers it seemed that the least restrictive measures language had been downgraded from a fundamental correctional principle to a form of correctional heresy.[8]

10. Parliament eventually rejected the language proposed by the Panel and adopted a differently worded standard for these sections (a standard of necessity) in its 2012 amendments to the

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[7] Correctional Authority and Inmate Rights, Correctional Law Review Working Paper No. 5, October 1987 pp. 171-2: https://www.publicsafety.gc.ca/lbrr/archives/ke%209410%20c6i%202002-eng.pdf quoted in *Jackson Report* at p. 6-7; Solosky *v.* The Queen, [1980] 1 S.C.R. 821 at 823; the full details of the constitutional lineage of ss. 4(c) and 28 of the *CCRA* are set out in Professor Jackson's report at p. 5-14

[8] *Jackson Report,* Appeal Book, Volume 1, Tab 8d, at pp. 71-72.

CCRA. However, while the legislative standard was not watered down, there was concern that this message had not been received by CSC staff, given the considerable emphasis that had been placed on the anticipated removal of the "least restrictive" language within CSC. [9] Unfortunately, that concern appears to have been a valid one.

11. The "least restrictive" language was restored to s. 28 of the *CCRA* in 2019. However, without effective oversight, the constitutional imperative expressed in this key provision is vulnerable to being disregarded by correctional decision-makers.[10] As both Professor Jackson and Robert Clark outline in their materials, it is routinely disregarded. It is noteworthy that CSC's own affiant in this case describes neither the content of s. 28 nor its significance in her otherwise very detailed account of the law and policies governing the security-classification and transfer regime.[11]

b) The precarious nature of the liberty interests at stake: the structural pressures to disregard the statutory criteria and deny transfer

12. The liberty interests at stake in voluntary transfer decisions are vitally important, both for an offender's day-to-day liberties and for their prospects of eventual release. While the restriction of such vital interests is governed by a statutory scheme that rests on constitutional principles of necessity and minimal impairment of liberty, considerations external to the statutory criteria can often overwhelm the decision-making process in practice. Without access to meaningful and timely judicial oversight, these important liberty interests are all too easily disregarded.

[9] *Jackson Report,* Appeal Book, Volume 1, Tab 8d, at p. 72.
[10] *Cross examination of Robert Clark,* Appeal Book, Volume 2, pp. 661-664.
[11] See *Cross Examination of Katherine Belhumeur*, Appeal Book, Volume 2, Tab 16.

13. Individuals who have been designated as "dangerous offenders" ("DO's") and those serving life sentences ("lifers") both experience considerable barriers in their efforts to "cascade" to lower levels of security. While some of these obstacles arise legitimately from the proper application of the statutory scheme, others arise from "political" and non-statutory considerations. When such offenders are unreasonably denied the opportunity to transfer to minimum security, they are in practice also blocked from the possibility of eventually obtaining conditional release.[12] Professor Jackson explained:

> For prisoners serving indeterminate or life sentences the correctional journey to any form of conditional release, including escorted, unescorted passes and day or full parole is described as 'a structured gradual release'. In this case the language is not semantic camouflage but accurately describes what is a multi-year process, typically extending far beyond the initial 7 year periodic review by the Parole Board. The necessary bridge that an offender must cross to have any reasonable prospect for conditional liberty is transfer to a minimum security institution. It would not be hyperbole to characterize such a transfer as a correctional passport. To achieve such a transfer requires that the offender be rated as low for institutional adjustment, low escape risk and low for the risk to public safety. Commissioners Directive 705 sets out the criteria for security classification.[13]

14. As Professor Jackson details in his report, "there is a dissonance between the language of the law and correctional reality."[14] This is particularly the case in the classification and placement of lifers and DO's, as he explains that such decisions have been "infused with political considerations" that are extraneous to the statutory criteria.[15] For most inmates, the decision to authorize a transfer to a minimum security institution is made by the institutional head. However, due to a 2009 policy change, Dangerous Offenders face a further barrier:

> However, for dangerous offenders, while the recommendation of the institutional head is necessary it is not a sufficient prerequisite for transfer to minimum-security. For these offenders the reclassification and transfer to minimum security must be approved by the Regional Deputy Commissioner and Assistant Deputy

[12] *Jackson Report,* Appeal Book, Volume 1, Tab 8d.
[13] *Jackson Report,* Appeal Book, Volume 1, Tab 8d, p. 93.
[14] *Jackson Report,* Appeal Book, Volume 1, Tab 8d ,at 92, 115.
[15] *Jackson Report,* Appeal Book, Volume 1, Tab 8d, at 102, 100-118.

Commissioner, Correctional Operations and Programs, in Ottawa.[16]

15. The Affidavit of Robert Clark sets out specific considerations that he has observed decision makers to rely on in practice which depart from the legislative criteria. In his three decades with CSC, Mr. Clark was involved in hundreds of security assessments, transfer recommendations and decisions, participating directly at all levels of the assessment and decision-making process.[17] He describes three extraneous factors that undermine the integrity of transfer decisions in practice:

> (1) a bureaucratic aversion to risk that goes beyond the criteria in the legal framework,
>
> (2) the presence of overriding political considerations external to that legal framework, and
>
> (3) the considerable room for bias and human error with respect to the accuracy and reliability of information [relied on by decision-makers].[18]

Mr. Clark detailed the pressures that result in decision makers denying inmates transfers to minimum security institutions despite the statutory criteria for the transfer being met.[19]

16. He noted that this was a pervasive aspect of the correctional culture: "one of the first things you learned was that you'll never get in trouble for locking a door, and you'll never get in trouble for saying no."[20] The pressure to deny a transfer regardless of legislative criteria is even stronger when there is a risk of media attention for the decision itself, as is often the case for

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[16] *Jackson Report,* Appeal Book, Volume 1, Tab 8d, p. 92.
[17] Affidavit of Robert George Clark ["*Clark Affidavit*"], Appeal Book, Volume 1, Tab 9 at paras 5-11.
[18] *Clark Affidavit,* Appeal Book, Volume 1, Tab 9, at para 32.
[19] *Clark Affidavit* Appeal Book, Volume 1, Tab 9, at paras 36, 39.
[20] *Cross examination of Robert Clark,* Appeal Book, Volume 2, p. 646.

'lifers' and dangerous offenders.[21] Accordingly, Mr. Clark recalls warning dangerous offenders whose transfer application he recommended that their application would likely be denied due to considerations unrelated to the statutory criteria.[22]

17. This problem has been compounded by policy changes in 2009,[23] which now require a series of increasingly higher-ranking CSC officials – from the Warden, to the Regional Deputy Commissioner (RDC) to the Assistant Commissioner of Correctional Operations and Programs (ACCOP) at CSC National Headquarters – all to approve a DO's proposed transfer to minimum security. A negative decision at any stage is considered final and is not reviewed. However, if the Warden and/or the RDC approve the reclassification to minimum, the decision is taken out of their hands and their "recommendation" is passed on to a higher official.[24]

18. The three-stage approval structure for a transfer to a reduced security facility has been characterized by the Respondent as "quality control" – but notably, it only operates in one direction. Only decisions which grant increased liberty are reviewed. Those which deny increased liberty are not.

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[21] *Clark Affidavit* Appeal Book, Volume 1, Tab 9, at paras 49-50. For a detailed analysis of how political considerations led to a CSC policy (with respect to the initial placement of those serving a sentence for murder) that directly conflicted with the statutory criteria for security classifications and the principles set out in the *CCRA*, see *Jackson Report* at 106-109, 120-121.
[22] *Clark Affidavit* Appeal Book, Volume 1, Tab 9, at paras 52-55.
[23] *Commissioner's Directive* 705-7, s. 22, 2018-01-15. CD 705-7
[24] *Commissioner's Directive* 705-7, s. 22, 2018-01-15. CD 705-7, *CD* 710-6, ss. 1-3; *Bellhumeur Transcript,* Appeal Book, Volume 2, Tab 16, at 487-489. Note that an even more recent (2019) policy change has imposed a similar asymmetrical decision-making structure that applies to a much larger segment of the inmate population, including sexual offender, lifers and other serious-harm offenders: see *Interim Policy Bulletin* 642, 2019-12-19 and *Bellhumeur Affidavit,* Appeal Book, Volume 1, Tab 12, paras 38, 43 at 232, 233-234

19. An even more recent (2019) policy change has imposed a similar asymmetrical decision-making structure that applies to a much larger segment of the inmate population, including all sexual offenders, as well as lifers and many other serious-harm offenders[25]. Similar asymmetrical decision structures apply to the initial placement of people with life sentences for murder anywhere other than maximum security.[26] This is a very troubling approach to the determination of questions that engage s. 7 liberty interests, particularly in a context where CSC has a statutory obligation to ensure that prison conditions are minimally restrictive. Such an approach to liberty rights is unheard of in any other administrative context.

20. The challenge posed by this asymmetrical review structure is threefold:

    a. While decisions restricting liberty can be made by anyone, decisions granting increased liberty must be approved by three different levels of bureaucracy;

    b. Decisions to grant increased liberty are made by people further and further removed from contact and experience with the prisoner; and

    c. As Professor Jackson explains, transferring authority up to the less politically insulated layers of CSC sends the message that "political considerations can override the statutory framework".[27]

21. Beyond the unusual and troubling asymmetry of this structure, Professor Jackson describes the shift of lens that occurs when such decision-making responsibility is transferred upwards:

> If the Warden approves the transfer and the case moves to the Regional Commissioner and the Assistant Commissioner there is a subtle shift in the lens through which the evaluation of the risk to public safety is viewed. However, it is not one that is articulated in any policy document. These officials, who work at the highest echelons of the correctional establishment, operate much closer to the political currents of the criminal justice system. Protecting the reputation and

[25] *Interim Policy Bulletin* 642. Interim Policy Bulletin 642
[26] As Professor Jackson explained in his report, "In the same way that a transfer to minimum-security for a lifer attracts particular degree of scrutiny from a Warden, it is a decision which has particular significance for a lifer. As I have already explained the transfer is the necessary bridge for any prospect of conditional release. *Jackson Report,* Appeal Book, Volume 1, p. 102.
[27] *Jackson Report,* AR Tab 4-D at 122.

> integrity of the Correctional Service is an operational reality for these officials. It is within these upper echelons rather than at the individual Warden level that responsibility for public and media relations and communications is located and where the need to be able to defend decisions that evoke public criticism is felt more acutely. It is for this reason that an offender may be able to demonstrate to their Warden that, based upon his/her staff recommendations, a transfer to minimum-security is justified, yet be unable to pass through the further scrutiny of the [RDC] where the unarticulated factor of protecting the reputation and integrity of the Correctional Service is more in play.[28]

22. The danger of this policy is not merely that upper-level bureaucrats who have had no contact with an offender may veto a decision concerning his liberty interests without seeing or hearing from him; it also diminishes respect for the statutory criteria vis-à-vis concerns of public optics. As Professor Jackson explains, this structure sends the more diffuse message that "political considerations can override the statutory framework."[29] Unfortunately, the policy results in the decision-making process being "infused by considerations which are not reflected in the law or in the policy".[30] In his cross examination for this appeal, Professor Jackson described it as follows:

> When you walk into 340 Laurier, you walk into a very different culture of national headquarters than you do when you walk into an institution. As I say in my report, the national headquarters are much closer to the political currents. Even though there's the same criteria applied, even though there is a level of scrutiny at the national level, it's informed by a different context at the national level.
>
> While I haven't quoted that specifically, based upon dozens of conversations with the commissioner and with deputy commissioners on both policy and individual cases, I am convinced that at the national headquarters, and understandably, there is a way of looking at individual cases in which you are looking not simply at the individual case. You're looking in the context of having to uphold the integrity of a system which often comes under criticism.[31]

He continued:

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[28] *Jackson Report,* Appeal Book, Volume 1, Tab 8d, at 101.
[29] *Jackson Report,* Appeal Book, Volume 1, Tab 8d at 118.
[30] *Cross examination of Mark Jackson,* Appeal Book, Volume 2, p. 467.
[31] *Cross examination of Mark Jackson,* Appeal Book, Volume 2, pp. 451-452.

> The deputy commissioner is looking at the media. He's looking at questions in the House of Commons, and that's something which may explain – it doesn't explain everything, but it may explain those cases where the politics and the optics comes into the question.[32]

23. In addition to political considerations, careerist motivations, or human error,[33] Mr. Clark noted that racism and bias may undermine the integrity of such decisions, observing "[i]ndigenous and black prisoners were, in general, more likely to be assigned to higher levels of security, while white prisoners generally had a greater likelihood of making it to minimum security."[34]

24. Data from recent years demonstrates just how difficult it is for a prisoner to successfully make it through all three levels of the approval process needed to be classified to a minimum security institution. For example, over a five year period from 2016 to 2021, only 53 of 106 transfers to minimum security that were recommended by a prisoner's CMT were ultimately approved. In 2019-2020, *none* of the 12 recommended transfers in Ontario were approved.[35]

25. As both Professor Jackson and Mr. Clark illuminate, transfer decisions are not subject to effective internal oversight to ensure compliance with the statutory criteria.[36] In this context,

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[32] *Cross examination of Mark Jackson,* Appeal Book, Volume 2, pp. 454-455. Also see *Jackson Report*, Appeal Book, Volume 1, p. 100.
[33] See *Clark Affidavit* Appeal Book, Volume 1, Tab 9 at paras 63-64.
[34] *Clark Affidavit* Appeal Book, Volume 1, Tab 9 at para 59-62; See also *Ewert v. Canada*, 2018 SCC 30, at para 60: "relative to non-Indigenous offenders, Indigenous offenders are more likely to receive higher security classifications"; and para 57: "Numerous government commissions and reports, as well as decisions of this Court, have recognized that discrimination experienced by Indigenous persons, whether as a result of overtly racist attitudes or culturally inappropriate practices, extends to all parts of the criminal justice system, including the prison system." [citations omitted]
[35] *Supplementary Belhumeur Affidavit,* Appeal Book, Volume II, Tab 13.
[36] *Clark Affidavit* Appeal Book, Volume 1, Tab 9 at para 39-42; *Jackson Report,* Appeal Book, Volume 1, Tab 8d at 107-114.

habeas corpus is a critical remedy to ensure that transfer decisions are made in accordance with the rule of law, rather than political expedience, racial bias, or other arbitrary considerations. Otherwise, as Professor Jackson concluded:

> It is for this reason that an offender may be able to demonstrate to their Warden that, based upon his/her staff recommendations, a transfer to minimum-security is justified, yet be unable to pass through the further scrutiny of the Regional Deputy Commissioner where the unarticulated factor of protecting the reputation and integrity of the Correctional Service is more in play.[37]

PART III: CONCLUSION

26. The liberty of federal inmates is extremely vulnerable to bureaucratic and systemic disregard for the least restrictive principle. As such, access to the remedy of *habeas corpus* is critical to protecting their constitutionally protected interests.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of March, 2023.

Alison Craig
Counsel for the CPLA

[37] *Jackson Report,* Appeal Book, Volume 1, Tab 8d, p. 101.

SCHEDULE A: LIST OF AUTHORITIES

Bonamy v Canada (Attorney General), 2010 FC 153

Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65 (CanLII)

Ewert v Canada, 2018 SCC 30

May v Ferndale Institution, 2005 SCC 82

Martineau v. Matsqui Institution, 1979 CanLII 184 (SCC)

Mission Institution v Khela, 2014 SCC 24

Murray v Canada (Correctional Service, S.H.U. National Review Board Committee) (T.D.), [1996] 1 FC 247 (FC)

R v Bird, 2019 SCC 7

Solosky v. The Queen, [1980] 1 S.C.R. 821

SCHEDULE B: RELEVANT LEGISLATIVE PROVISIONS

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act*, *1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11

Life, liberty and security of person
7 Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
…

Detention or imprisonment
9 Everyone has the right not to be arbitrarily detained or imprisoned.

Arrest or detention
10 Everyone has the right on arrest or detention

(a) to be informed promptly of the reasons therefor;
(b) to retain and instruct counsel without delay and to be informed of that right; and
(c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

…

Treatment or punishment
12 Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Constitution Act, *1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5

Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom…

Corrections and Conditional Release Act, SC 1992, c 20

Principles that guide Service

4 The principles that guide the Service in achieving the purpose referred to in section 3 are as follows:

(c) the Service uses the least restrictive measures consistent with the protection of society, staff members and offenders

Criteria for selection of penitentiary

28 If a person is or is to be confined in a penitentiary, the Service shall take all reasonable steps to ensure that the penitentiary in which they are confined is one that provides them with the least restrictive environment for that person, taking into account

(a) the degree and kind of custody and control necessary for

(i) the safety of the public,

(ii) the safety of that person and other persons in the penitentiary, and

(iii) the security of the penitentiary;

(b) accessibility to

(i) the person's home community and family,

(ii) a compatible cultural environment, and

(iii) a compatible linguistic environment; and

(c) the availability of appropriate programs and services and the person's willingness to participate in those programs.

Transfers

29 The Commissioner may authorize the transfer of a person who is sentenced, transferred or committed to a penitentiary

(a) to a hospital, including any mental health facility, or to a provincial correctional facility, in accordance with an agreement entered into under paragraph 16(1)(a) and any applicable regulations;

(b) within a penitentiary, from an area that has been assigned a security classification under section 29.1 to another area that has been assigned a security classification under that section, in accordance with the regulations made under paragraph 96(d), subject to section 28; or

(c) to another penitentiary, in accordance with the regulations made under paragraph 96(d), subject to section 28.

Correctional Service Canada, *Commissioner's Directive 705-7*: *Security Classification and Penitentiary Placement* (2018-01-15)

Initial Offender Security Level and Penitentiary Placement

23. A penitentiary placement recommendation is included in the same Assessment for Decision covering the security classification decision. When recommending a penitentiary placement for an inmate, the recommended institution will be one that provides an environment that contains only the necessary restrictions, taking into account, but not limited to, the following factors:

    1. the safety of the public, staff or other persons in the penitentiary and the inmate

    2. the inmate's individual security classification

3. the security classification of the institution (CD 706 – Classification of Institutions)

4. accessibility to the inmate's home community and family

5. the cultural and linguistic environment best suited to the inmate

6. the state of health and health care needs of the inmate

7. the availability of appropriate programs and services to meet the inmate's needs

8. the inmate's willingness to participate in programs.

Correctional Service Canada, *Commissioner's Directive 710-6: Review of Inmate Security Classification* (2018-01-15)

RESPONSIBILITIES AND PROCEDURES

1. The Assistant Commissioner, Correctional Operations and Programs, following consultation with the Deputy Commissioner for Women in cases of women inmates, and when supported by the Regional Deputy Commissioner, is the final decision maker:

    a. for the reclassification to medium security of an inmate serving a life sentence for first or second degree murder, or an inmate convicted of a terrorism offence punishable by life, who is currently classified as maximum security, prior to the first security classification review

    b. for the reclassification of a Dangerous Offender to minimum security

2. The Regional Deputy Commissioner will:

    a. forward a recommendation to the Assistant Commissioner, Correctional Operations and Programs, for final decision:

        i. for the reclassification to medium security of an inmate serving a life sentence for first or second degree murder, or an inmate convicted of a terrorism offence punishable by life, who is currently classified as maximum security, prior to the first security classification review

        ii. for the reclassification of a Dangerous Offender to minimum security

    b. be the final decision maker if he/she disagrees with the Institutional Head's recommendation to reclassify:

        i. to medium security an inmate serving a life sentence for first or second degree murder, or an inmate convicted of a terrorism offence punishable

by life, who is currently classified as maximum security, prior to the first security classification review

ii. a Dangerous Offender to minimum security.

3. The Institutional Head:

a. will authorize an inmate's security reclassification, which can be delegated to:

i. the Deputy Warden, except for cases where the security reclassification involves a transfer decision and/or an inmate serving a life sentence for first or second degree murder, an inmate convicted of a terrorism offence punishable by life, or a Dangerous Offender, or

ii. the Assistant Warden, Interventions, when the recommendation is to maintain the same security classification level, except for cases where the security classification involves a transfer decision and/or an inmate serving a life sentence for first or second degree murder, an inmate convicted of a terrorism offence punishable by life, or a Dangerous Offender

b. will forward the recommendation to the Regional Deputy Commissioner for decision for:

i. the reclassification to medium security of an inmate serving a life sentence for first or second degree murder, or an inmate convicted of a terrorism offence punishable by life, who is currently classified as maximum security, prior to the first security classification review

ii. the reclassification to minimum security of a Dangerous Offender

c. will be the final decision maker if he/she disagrees with the Case Management Team in the following cases:

i. for the reclassification to medium security of an inmate serving a life sentence for first or second degree murder, or an inmate convicted of a terrorism offence punishable by life, who is currently classified as maximum security, prior to the first security classification review

ii. for the reclassification to minimum security of a Dangerous Offender.

Correctional Service Canada, *Interim Policy Bulletin* 642 (2019-12-19)

ADCCO Approval of Security Classification (CD 710-6)

The Assistant Deputy Commissioner, Correctional Operations (ADCCO), following consultation with the Deputy Commissioner for Women (DCW) in the case of women inmates, is the final

decision-maker for the reclassification to minimum security of any inmate who meets the following criteria:

1. The inmate has been convicted of a sex-related offence (current sentence); or
2. The inmate:

- had an initial rating of maximum on the Custody Rating Scale; and
- is serving a sentence for an offence causing death or serious harm; and
- has three years or more before their day parole eligibility date.

In accordance with CD 710-6, the Assistant Commissioner, Correctional Operations and Programs, and the DCW, will retain their respective authorities as the final decision- maker for the reclassification of a Dangerous Offender to minimum security.

The decision- maker will consider the overall level of security indicated by the SRS/SRSW, as well as the factors that were considered by the Parole Officer when recommending the final security classification, which are linked to section 17 of the CCRR such as, but not limited to:

- history of escape/unlawfully at large/breaches of trust;
- inmate risk level as indicated by the Criminal Risk Index and the Static Factor and Dynamic Factor rating;
- inmate’s reintegration potential and level of engagement in their Correctional Plan;
- time to be served prior to being eligible for release.

COURT OF APPEAL FOR ONTARIO

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