Federal Court of Appeal | Cour d'appel fédérale

Date: 20180928

Docket: A-63-18

Citation: 2018 FCA 175

CORAM: **RENNIE J.A.**
DE MONTIGNY J.A.
LASKIN J.A.

BETWEEN:

JEFF EWERT

Appellant

and

ATTORNEY GENERAL OF CANADA
(Correctional Service of Canada)

Respondent

Heard at Ottawa, Ontario, on September 6, 2018.

Judgment delivered at Ottawa, Ontario, on September 28, 2018.

REASONS FOR JUDGMENT BY: RENNIE J.A.

CONCURRED IN BY: DE MONTIGNY J.A.
LASKIN J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20180928

Docket: A-63-18

Citation: 2018 FCA 175

CORAM: **RENNIE J.A.**
DE MONTIGNY J.A.
LASKIN J.A.

BETWEEN:

JEFF EWERT

Appellant

and

ATTORNEY GENERAL OF CANADA
(Correctional Service of Canada)

Respondent

REASONS FOR JUDGMENT

RENNIE J.A.

[1] This is an appeal from a decision of the Federal Court 2018 FC 47 (*per* Martineau J.). The Federal Court dismissed the appellant's application for judicial review of a decision by the Senior Deputy Commissioner (SDC) of the Correctional Service of Canada (CSC), denying his grievance with respect to an inter-regional transfer in December 2014.

[2] The appellant is an inmate at La Macaza Institution (La Macaza), a federal penitentiary northwest of Montréal.

[3] On December 17, 2014, the appellant began a return voyage to La Macaza from the Pacific Institution in Abbotsford, British Columbia following a Federal Court hearing. The appellant was strip-searched when leaving the Pacific Institution. Under an inter-regional transfer warrant, he then boarded a plane destined for Montréal, with scheduled stops in Edmonton, Saskatoon, Winnipeg and Trenton. While on board, the appellant was handcuffed and secured in shackles and a body-belt.

[4] Upon arrival in Trenton, the appellant was removed from the plane along with several other inmates, while those inmates in the Special Handling Unit (SHU) continued on to Montréal. This was done in accordance with CSC policy, which stipulates that all non-SHU male inmates travelling from Western Canada to Québec must overnight at the Collins Bay Institution in Kingston.

[5] The appellant was then driven to the Collins Bay Institution where he was housed in the facility's segregation unit. The appellant was strip-searched when entering the unit.

[6] The next day, the appellant was strip-searched when leaving the Collins Bay Institution segregation unit. He then boarded a second flight in Kingston en route to Montréal, with scheduled stops in Québec City, Moncton and Port-Cartier. The appellant's restraints mirrored those of the previous day's flight.

[7] Upon arrival in Montréal that evening, the appellant was taken to Ste-Anne-des-Plaines for the night where he was strip-searched for a fourth time.

[8] The appellant finally returned to La Macaza on December 19, 2014.

[9] The appellant subsequently filed a grievance under section 80 of the *Corrections and Conditional Release Regulations*, SOR/92-620. The grievance was denied by the SDC on March 31, 2017 with respect to all claims.

[10] In this appeal, the role of the Court is to determine whether the Federal Court judge correctly identified the standard of review and applied it properly (*Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 45–46, [2013] 2 S.C.R. 559).

[11] The judge correctly identified the standard of review as reasonableness. The Federal Court's task was to determine whether the SDC's decision, viewed as a whole, was reasonable (*Wilson v. Canada (Attorney General)*, 2013 FCA 182 at paras. 7–8, 454 N.R. 209). Where the decision engages the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 (the Charter), reasonableness review involves an assessment of whether the decision reflects a proportionate balancing of the Charter protections at play and the relevant statutory mandate (*Doré v. Barreau du Québec*, 2012 SCC 12 at para. 57, [2012] 1 S.C.R. 395 (*Doré*); *Loyola High School v. Québec (Attorney*

General), 2015 SCC 12 at para. 39, [2015] 1 S.C.R. 613 (*Loyola*)). The analysis is concerned with whether the decision respects the values enshrined in the Charter.

[12] I am of the view that the SDC's decision was unreasonable and therefore the appeal should be allowed. I reach this conclusion based on the decision-maker's failure to give any consideration to Charter values when assessing the appellant's grievance, as required under the *Doré*/*Loyola* framework and as recently affirmed by the Supreme Court in *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 (*TWU*).

[13] The threshold question is whether the SDC's decision engages the Charter by limiting Charter protections – whether rights or values (*Loyola*, at para. 39; *TWU*, at para. 58).

[14] In my view, the appellant's Charter rights under sections 8 and 9 were clearly engaged.

[15] Under section 8 of the Charter (protection against unreasonable search and seizure), a search will only be reasonable where it is authorized by law, the law itself is reasonable and the search was conducted in a reasonable manner (*R. v. Golden*, 2001 SCC 83 at para. 44, [2001] 3 S.C.R. 679).

[16] Here, the appellant was strip-searched four times over the course of his transfer from the Pacific Institution to La Macaza. Two of these searches were conducted under section 48 of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 upon the appellant entering and exiting the Collins Bay Institution segregation unit. This despite the fact that the appellant had no

opportunity between the search at the Pacific Institution and his arrival at Collins Bay Institution to access weapons, narcotics or other contraband.

[17] With respect to section 9 of the Charter (protection against arbitrary detention), a detention will be non-arbitrary only where it is authorized by a law which is itself non-arbitrary (*R. v. Grant*, 2009 SCC 32 at para. 56, [2009] 2 S.C.R. 353).

[18] Here, the appellant was travelling under an inter-regional transfer warrant to La Macaza. He was then removed from a flight destined to Montréal only to be detained in handcuffs and body restraints on a subsequent 12-hour journey to Montréal through Eastern Canada the following day.

[19] The SDC was therefore obliged to balance the protections that flow from these rights and the values that they represent in considering the application of the relevant legislation and CSC policies.

[20] I am not satisfied that this was done. The SDC's reasons for denying the appellant's grievance reflect a religious application of CSC policies. The reasons do not reveal, either explicitly or implicitly, any consideration of Charter values, let alone the balancing exercise which the jurisprudence requires.

[21] Given the passage of time, an affirmative order requiring the SDC to reconsider the appellant's grievance would serve no utility. There is no reason, however, why the appellant

should be denied the substantive point of his appeal because of the delay, most of which lies with the respondent. I would therefore allow the appeal with costs and set aside the SDC decision rejecting the appellant's grievance. However, consistent with the exercise of our remedial discretion, I would grant no further relief (*MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, at para. 51, [2010] 1 SCR 6).

"Donald J. Rennie"
J.A.

"I agree
Yves de Montigny J.A."

"I agree
J.B. Laskin J.A."

APPENDIX A

***Correction and Conditional Release Act* (S.C. 1993, c. 20)**	***Loi sur le système correctionnel et la mise en liberté sous condition* (L.C. 1992, ch. 20)**
Routine strip search of inmates	**Fouille à nu**
48 A staff member of the same sex as the inmate may conduct a routine strip search of an inmate, without individualized suspicion, **(a)** in the prescribed circumstances, which circumstances must be limited to situations in which the inmate has been in a place where there was a likelihood of access to contraband that is capable of being hidden on or in the body; or **(b)** when the inmate is entering or leaving a segregation area.	**48** L'agent peut, sans soupçon précis, procéder à la fouille à nu d'un détenu de même sexe que lui soit dans les cas prévus par règlement où le détenu s'est trouvé dans un endroit où il aurait pu avoir accès à un objet interdit pouvant être dissimulé sur lui ou dans une des cavités de son corps, soit lorsqu'il arrive à une aire d'isolement préventif ou la quitte.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF THE FEDERAL COURT DATED JANUARY 19, 2018, DOCKET NUMBER T-841-17 (2017 FC 47)

DOCKET:	A-63-18
STYLE OF CAUSE:	JEFF EWERT v. ATTORNEY GENERAL OF CANADA, (Correctional Service Of Canada)
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	SEPTEMBER 6, 2018
REASONS FOR JUDGMENT BY:	RENNIE J.A.
CONCURRED IN BY:	DE MONTIGNY J.A. LASKIN J.A.
DATED:	SEPTEMBER 28, 2018

APPEARANCES:

Jeff Ewert	THE APPELLANT
Émilie Tremblay	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Nathalie G. Drouin Deputy Attorney General of Canada	FOR THE RESPONDENT