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Administrative Segregation and the Charter of Rights and Freedoms

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Case Commented On: *R v Prystay*, 2019 ABQB 8 (CanLII)

On January 4, 2019, Madam Justice Dawn Pentelechuk found that Mr. Ryan Prystay's lengthy stay in administrative segregation at the Edmonton Remand Centre breached section 12 of the *Charter*. Consequently, she granted him enhanced credit of 3.75 days for each day spent in administrative segregation.

Administrative segregation is used in remand centres to keep an inmate away from the general population for safety or security reasons. It is not intended to be used as a punishment and can be indefinite, while disciplinary segregation is imposed as a penalty and has to be for a specified period of time.

Unlike in disciplinary segregation, inmates in administrative segregation have the same rights and privileges as other inmates, however, the operational reality is that one's experience in either form of segregation is drastically different from that of inmates in the general population (at para 27). Inmates in either form of segregation are kept in a cell alone for 23 hours a day. They have two half-hour blocks outside of their cell during each 24 hour period where they can shower, exercise, watch television or use the phone in the "fresh air" room. Inmates stay alone during those activities. Administrative segregation inmates may have visits via CCTV (closed circuit television) (at paras 28-29).

On October 16, 2018, the Honourable Ralph Goodale, Minister of Public Safety and Emergency Preparedness, introduced in the House of Commons Bill C-83, *An Act to amend the Corrections and Conditional Release Act and another Act*. The purpose of the bill is to strengthen the federal correctional system in a number of ways including ending administrative segregation and disciplinary segregation and creating "structured intervention units."

Facts

On August 2, 2016, Mr. Prystay was arrested after failing to stop his vehicle for police, and after police found methamphetamine, a loaded firearm and a hand gun in his vehicle. He was placed in the Edmonton Remand Centre (ERC), where he remained for the next 28 ½ months (at para 2).

On March 30, 2017, following an assault on another inmate, Mr. Prystay was placed in administrative segregation. He remained there until May 15, 2018, a total period of 13 ½ months (at para 3).

On October 1, 2018, Mr. Prystay pleaded guilty to possession of methamphetamine, to failing to stop a motor vehicle while being pursued by a peace officer, to unlawfully wounding a law enforcement animal, to possessing a loaded firearm, and to possessing a handgun for a dangerous purpose (at para 1). Mr. Prystay did not challenge his placement in administrative segregation related to his assault on another inmate, but he alleged a breach of his rights under sections 7 and 12 of the *Charter* for his indefinite placement in administrative segregation and sought a stay of proceedings or a sentence reduction under section 24(1) of the *Charter* (at para 4).

Issues

This case dealt with two issues:

1- Whether there was a violation of section 12 of the *Charter*.
2- Whether the court should grant Mr. Prystay a stay of proceedings or a sentence reduction under section 24(1) of the *Charter*.

Decision

Regarding the first issue, Justice Pentelechuk found that Mr. Prystay's rights under section 12 of the *Charter* were violated due to his extended stay in administrative segregation between April 2017 and May 2018. She noted that Mr. Prystay's placement in administrative segregation constituted cruel and unusual punishment for the excessive length of his placement (13.5 months); for the adverse effects administrative segregation had on his physical and psychological health; and finally, because Mr. Prystay was not afforded procedural fairness and his indefinite placement was not imposed in accordance with ascertainable standards (at para 17).
As for the second issue, Justice Pentelechuk noted that the situation in this case was not the clearest of cases to grant a stay of proceedings under section 24 of the *Charter*. However, she reduced Mr. Prystay's sentence and awarded him enhanced credit of 3.75 days for each day spent in segregation, and 1.5 days for each day served in general population. His global sentence was four years and 10 months. He had spent 363 days in administrative segregation and 217 days in general population at the ERC before being sentenced. Consequently, Mr. Prystay had 77 days of remaining time to serve (see Appendix "A" of *Prystay*).

Discussion

***Section 12 of the* Charter**

Justice Pentelechuk stated that she would focus on *Charter* section 12, which was breached, therefore it was unnecessary to assess any breach under section 7 of the *Charter*, citing the Supreme Court of Canada in *R v Malmo-Levine*, 2003 SCC 74 (CanLII) (*Malmo-Levine* at paras 159-160), which states that the standard is the same whether assessing a potential breach under section 7 or section 12 (*Prystay* at paras 9-10). Section 12 of the *Charter* provides that everyone has the right not to be subjected to any cruel and unusual treatment or punishment. The question here was what constituted a breach of section 12 of the *Charter*.

Justice Pentelechuk stated that to establish a section 12 breach, treatment cannot be merely disproportionate or excessive. It must be "abhorrent or intolerable" or "outrage standards of decency" (at para 12), and cited the recent Supreme Court ruling in *R v Boudreault*, 2018 SCC 58 (CanLII):

> This Court recognized that treatment or punishment will rise to the level of being cruel and unusual where it 'is so excessive as to outrage standards of decency" (*R. v. Smith*, 1987 CanLII 64 (SCC), [1987] 1 S.C.R. 1045, at p. 1072, citing *Miller v. The Queen*, 1976 CanLII 12 (SCC), [1977] 2 S.C.R. 680). In *R. v. Nur*, 2015 SCC 15 (CanLII), [2015] 1 S.C.R. 773, McLachlin C.J. explained that a sentence will offend section 12 only where it is 'grossly disproportionate to the punishment that is appropriate, having regard to the nature of the offence and the circumstances of the offender' (at para 39). It is therefore not sufficient that a sentence be 'merely excessive'; to be cruel and unusual, it must be disproportionate to the point of being 'abhorrent or intolerable', such that it is incompatible with human dignity (*R. v. Lloyd*, 2016 SCC 13 (CanLII), [2016] 1 S.C.R. 130, at para 24; *Smith*, at p 1072; *R. v. Morrisey*, 2000 SCC 39 (CanLII), [2000] 2 S.C.R. 90, at para 26)." (*Boudreault* at para 126)

Justice Pentelechuk also cited *R v Smith*, 1987 CanLII 64 (SCC), by stating that a punishment will be cruel and unusual and in violation of section 12 if it has any one or more of the following characteristics:

> 1) the punishment is of such character or duration as to outrage the public conscience or be degrading to human dignity;
>
> 2) the punishment goes beyond what is necessary for the achievement of a valid social aim, having regard to the legitimate purposes of punishment and the adequacy of possible alternatives; or
>
> 3) the punishment is arbitrarily imposed in the sense that it is not applied on a rational basis in accordance brings with ascertained or ascertainable standards. (*Smith* at para 94)

According to Justice Pentelechuk, time served in remand or pre-trial custody is more onerous than time served in a penitentiary after sentencing. Not only is the environment harsher, with limited access to programs, but pre-trial custody does not count toward parole eligibility or statutory release (at para 19). She added that while any time served in remand is considered "hard time", time served in disciplinary or administrative segregation is particularly oppressive. It is defined by severe restrictions placed on an inmate's mobility, activity and meaningful human contact (at para 26).

Then, Justice Pentelechuk talked about the differences and similarities between disciplinary segregation (DS) and administrative segregation (AS). She stated that while DS is punishment, the ERC witnesses emphasized that AS is not punishment and that segregated inmates have the same rights and privileges as other inmates. However, the operational reality while in the ERC is that one's experience in either form of segregation is drastically different than one's experience in general population (GP) (at para 27).

Inmates in either form of segregation are confined to their cell for 23 hours a day. Most are in single cells. They have two half-hour blocks outside of their cell during each 24 hour period. If an inmate is designated a cleaner for the unit, they may have an additional one to two hours outside their cell. Movement is strictly controlled. ERC staff are separated from the inmates by a steel and glass wall (at para 28).

Those in segregation have no access to an outdoor courtyard or an exercise room, only a 10 by 20 foot "fresh air room". Access to fresh air is a seasonal concept, as the window often remains closed during the winter months. Each of the three tiers in the Max Pod unit has a fresh air room (at para 30).

Justice Pentelechuk cited *R v Blanchard*, 2017 ABQB 369 (CanLII), where the court was critical of the lack of physical exercise, fresh air, and mental stimulation afforded to inmates in AS (at para 32). Then she observed that the new ERC was not designed to provide an outdoor courtyard or an exercise room to inmates in segregation. "Fresh air" rooms met the minimum standard (at para 33). As a result, there is no logistical way to provide inmates in segregation with access to a secure, outdoor courtyard or a proper gym (at para 34). In DS, inmates cannot access canteen, and they may be limited in the programs, books and puzzles they can access, and the personal effects they can have in their cell. They are permitted to use the phone during their breaks, but are not allowed visits. The differences between DS and AS are indeed minor (at para 45).

Justice Pentelechuk relied on *British Columbia Civil Liberties Association v Canada (Attorney General)* (*BCCL*), 2018 BCSC 62 (CanLII) (currently under appeal), where the Court was urged to end the practice of AS as currently practiced in federal penitentiaries in Canada (at para 40). She affirmed that the essential characteristics of both forms of segregation are severe restriction on mobility, activity and the virtual elimination of meaningful human contact. Regardless of the name, both forms of segregation are a form of solitary confinement and are contraindicated to a successful return to GP and the outside community. The Court adopted (at para 46), the summary from *BCCL*:

> I have no hesitation in concluding that rather than prepare inmates for their return to the general population, prolonged placements in segregation have the opposite effect of making them more dangerous both within the institutions' walls and in the community outside (*BCCL* at para 330).

Justice Pentelechuk stated that inmates should not spend more time in AS than what is absolutely necessary (at para 47). She added that an inmate cannot be placed in DS for more than 14 days at a time, citing section 46 of the *Correctional Institute Regulation*, Alta Reg 205/2001. She added however, that neither the Corrections and Conditional Release Act, SC 1992, c 20 (*CCRA*) nor its regulations mandate any limit on placement in AS (at para 49). Section 31(2) of the *CCRA* reads: "the inmate is to be released from administrative segregation at the earliest appropriate time".

Justice Pentelechuk mentioned that for more than 20 years the indefinite nature of AS has been particularly challenging for inmates. She referred to the 1996 report of the *Commission of Inquiry into certain events at the Prison for Women in Kingston* (at para 52) where Justice Arbour severely criticized conditions in segregation in federal institutions:

> The most objectionable feature of this lengthy detention in segregation was its indefiniteness. The absence of any release plan in the early stages made it impossible for the segregated inmates to determine when, and through what effort on their part, they could bring an end to that ordeal. This indefinite hardship would have the most demoralizing effect and, if for that reason alone, there may well have to be a cap placed on all forms of administrative segregation. (Report at 81)

In *BCCL*, the court noted that the average stay in AS has declined from an average of 30 days in September 2015 to 22 days in March 2017 (*BCCL* at para 69). Justice Pentelechuk affirmed that Mr. Prystay remained in AS for over 400 days, and that neither Mr. Steven Phillips (Director of the ERC) nor Mr. Ian Lalonde (Director of Programs at the ERC) was able to provide the average length of stay in AS at the ERC. She added, relying on *BCCL*, that stays over a year are "not unheard of". In *BCCL*, extensive evidence was heard on the efficacy of the 15-day limit for AS. Notably, the government's expert, Dr. Genreau, recommended a 60-day limit (at para 56).

Justice Pentelechuk recognized that the challenges institutions like the ERC faces are significant. The ERC houses some extremely dangerous individuals. There are rival gang affiliates under the same roof. There are inmates with serious mental health issues and inmates who specifically request to be placed in segregation for their own safety (at para 59). However, during his placement in AS, Mr. Prystay demonstrated consistent good behaviour. Starting in April 2017, and every month thereafter, the correctional officers recommended his return to GS. But this carried no weight with ERC senior management. Instead, they focussed on Mr. Prystay's past behaviour as the justification for his indefinite placement (at para 61).

Mr. Prystay's complaints focused on the length of time he was kept in AS and the lack of feedback from ERC senior management as to what he needed to do or when his placement in AS would end if good behaviour continued. This triggered intense feelings of helplessness and hopelessness. Not until his review on December 3, 2017, almost nine months after being placed in AS, was Mr. Prystay provided feedback on the steps necessary for his return to GP. Justice Pentelechuk asserted that this lack of communication hardly incentivizes inmates to good behaviour. The longer an inmate is kept in AS, the more likely frustration and a sense of futility will trigger impulsive and negative behaviour, which in turn provides the evidence to justify continued indefinite placement (at para 65).

Justice Pentelechuk noted that Mr. Prystay suffered from extreme stress, anxiety, sleeplessness, depression and paranoia. He experienced auditory hallucinations and physical symptoms including chest pain, back pain and body aches, despite having a few additional hours outside his cell when working as a cleaner (at para 68). He was once placed on suicide watch in 2013, and he testified that reporting suicidal thoughts or severe mental health problems only made the situation in AS worse. Inmates were at risk of being placed in the mental health unit in a cell stripped of everything but a mattress and being forced to wear a restraint jacket or "baby dolls" (at para 71).

Justice Pentelechuk affirmed that Mr. Prystay testified that he experienced suffering, frustration, depression and sense of hopelessness (at para 76). As unfolded in *BCCL*, debate continues on whether or not AS is harmful to inmates and the proper scientific method for determining that

issue. After summarizing the expert evidence in detail, the Court in that case concluded that inmates subject to AS are at significant risk of serious psychological harm:

> I find as a fact that administrative segregation as enacted by s. 31 of the *CCRA* is a form of solitary confinement that places all Canadian federal inmates subject to it at significant risk of serious psychological harm, including mental pain and suffering, and increased incidence of self-harm and suicide. Some of the specific harms include anxiety, withdrawal, hypersensitivity, cognitive dysfunction, hallucinations, loss of control, irritability, aggression, rage, paranoia, hopelessness, a sense of impending emotional breakdown, self-mutilation, and suicidal ideation and behaviour. The risks of these harms are intensified in the case of mentally ill inmates. However, all inmates subject to segregation are subject to the risk of harm to some degree. (*BCCL* at para 247)

Given his pre-existing mental health issues and the sheer length of time spent in AS, Justice Pentelechuk concluded that Mr. Prystay was at increased risk of suffering some degree of permanent impact (at para 82), and that while in AS, he suffered mental injury and physical symptoms and his placement put him at significant risk of permanent psychological injury (at para 83).

Justice Pentelechuk concluded that Prystay's placement was devoid of procedural fairness and appropriate oversight, and on the evidence, his ongoing placement was not justified (at para 84).

The Court invoked *Cardinal v Director of Kent Institution*, 1985 CanLII 23 (SCC) (at paras 85-87), where the Supreme Court of Canada concluded that prisoners are owed a duty of procedural fairness. In that case, the Supreme Court concluded the Director was not obliged to make independent inquiries regarding the prisoners' involvement and was entitled to rely on information he received from others. However, the Director *was* obliged to provide reasons for his decision to keep prisoners in segregation and give the prisoners, however informal, the opportunity to be heard. Also, in *BCCL*, the AS review process in federal institutions was reviewed for procedural fairness.

Justice Pentelechuk stated that the AS review process at the ERC is not independent and does not involve any type of hearing, let alone a hearing with counsel (at para 91). Despite completing multiple Request for Information forms (RFIs) asking why he was being detained in AS, the responses for the first eight months failed to provide Mr. Prystay with any reasons why management viewed him as an ongoing risk, or what he needed to do to return to GP. The response of April 19, 2017 was illustrative:

> You were involved in a serious assault on another inmate and at this time you will remain on A/S status. You continue to be reviewed weekly (at para 98).

Justice Pentelechuk added that Mr. Phillips repeatedly stated his concern rested with Mr. Prystay "downplaying, deflecting, and minimizing" his actions. He felt Mr. Prystay was not accepting full responsibility for his actions (at para 99), which was incongruent with the notes made by the correctional officers who dealt with Prystay on a regular basis (at para 104). Mr. Phillips suspected Mr. Prystay had some involvement in the murder of an inmate at the ERC in 2013,

despite the fact that the charges against Mr. Prystay were stayed and the police file was closed (at para 113) and that's why he decided to keep him indefinitely in AS. Justice Pentelechuk stated that Mr. Prystay should have been told of Mr. Phillips' suspicion and been given an opportunity to respond (at para 116).

Moreover, Mr. Prystay was never given an end date as to when, if his good behavior continued, he would be transitioned back to GP, or what steps he needed to take to facilitate this (at para 119). Until late 2017, the decision makers never asked Mr. Prystay to respond to particular questions or concerns. He was never interviewed. There was no hearing. Mr. Prystay's submissions were shots in the dark and he had no option but to hope something he wrote would resonate (at para 123).

Justice Pentelechuk declared that there is no rational basis to this approach, nor can it be said an inmate's continued placement in AS is in accordance with ascertainable standards (at para 124). She found that Mr. Prystay's indefinite placement went far beyond what was necessary to achieve a legitimate penal aim of the safety and security of staff and other inmates. There was no objective basis supporting ERC's belief that he presented an ongoing risk, nor was his placement imposed under any ascertainable standards (at para 127). She noted that:

> Informed Canadians realize that indefinite placement in segregation thwarts an inmate's chance of successfully re-integrating into society. Certainly Canadians find it abhorrent that someone should remain in segregation for months or even years. Perhaps one day, segregation will be ended. Until then, recognizing that inmates have no political clout or influence, robust judicial oversight is the means of ensuring the constitutionally protected right to be free of cruel and unusual punishment or treatment is not sacrificed in the name of convenience or expediency (at para 129).

In summary, Justice Pentelechuk ruled that there was a breach of section 12 of the *Charter* due to the length of Mr. Prystay's placement in AS (13 ½ months), his evidence of the psychological and physical effects of that placement, and the absence of procedural fairness and ascertainable standards.

Remedies under section 24(1) of the **Charter**

Justice Pentelechuk noted that the gravity of Mr. Prystay's offences was high (at para 133). She added that she was satisfied that the joint submission presented by Crown and defence counsel, for a global sentence of 4 years and 10 months, was a fit and appropriate sentence that did not call the administration of justice into disrepute (at para 149).

Section 24(1) of the *Charter* reads: "Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances." Under section 24 of the *Charter*, when someone's *Charter* rights have been infringed, the court has discretion to grant whatever remedy it considers appropriate and just in the circumstances. When there has been an abuse of process in a criminal law proceeding prior to sentencing, the most common remedies are a stay in proceedings or a reduction in sentence (at para 153).

Justice Pentelechuk cited the Supreme Court of Canada in *R v Babos*, 2014 SCC 16 (CanLII), which remains the leading case on the test for granting a stay for an abuse of process. The Supreme Court noted that a stay of proceedings is a drastic remedy as it permanently halts prosecution of an accused, thereby frustrating the truth-seeking function of the trial and depriving the public at large of the opportunity to see justice done on the merits. Nonetheless, stays may be granted on rare occasions in the clearest of cases involving offensive conduct. A stay is not warranted to redress past wrongs but may be granted where no alternative remedy capable of adequately dissociating the justice system from the impugned conduct is available (at para 154). The Supreme Court added (*Babos* at para 41) that the final factor requires consideration of the nature and seriousness of the impugned conduct, whether it is isolated or, alternatively, reflects a systemic and ongoing problem. It also considers the circumstances of the accused, the charges he faces and the interest of society in having the charges determined on the merits. When the residual category is invoked as it is here, this balancing stage is particularly important (at para 157).

Justice Pentelechuk observed that Mr. Prystay's experience in administrative segregation was not an isolated incident. Alberta courts have previously focussed a lens on the use of administrative segregation at the ERC (at para 158). As a stay is only to be granted in the "clearest of cases," there are relatively few cases where a stay of proceedings was granted due to an abuse of process (at para 160).

Justice Pentelechuk noted that she would have reduced Mr. Prystay's sentence to time served, but it was not in Mr. Prystay's interests to do so. The sentence fashioned provided Mr. Prystay with appropriate time to engage with Alberta Health Services—Transition Team and to arrange for placement in a residential treatment facility. Mr. Prystay had expressed his desire to attend a residential rehabilitation facility, but he had never done so (at para 163).

Therefore, of the remaining 363 days served in AS between May 18, 2017 and May 15, 2018, Justice Pentelechuk concluded that an appropriate remedy is enhanced credit at a rate of 3.75 for each day served. The net sentence is 77 days remaining to be served (at para 165).

Conclusion

Justice Pentelechuk stated that if segregation is to remain as part of our correctional fabric, every effort should be made to improve the restrictions on mobility, mental stimulation and meaningful human contact. She added that there should be procedural fairness in the decision to place an inmate in segregation and that a robust process is in place to ensure the inmate is released to general population as soon as possible (at para 130).

In an interview with CBC News, Mr. Gavin Annett, a former inmate who spent months in solitary confinement at the Edmonton Institution, said "it's not that you want to be alone, but the longer that you spend in segregation, the more you don't feel that being with other people is OK." "The paranoia is so strong that you don't trust people. You're almost imagining things. Your dreams become so surreal, so you're thinking that if you get out of there you're in trouble, or your safety is at risk" he added.

Mr. Annett said his time in segregation has made him unemployable and left him with post-traumatic stress disorder. "It has really limited my ability to feel" he ended up saying.

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