Federal Court | Cour fédérale

CANADA

Date: 20070202

Docket: T-2284-06

Vancouver, British Columbia, February 2, 2007

PRESENT: The Honourable Mr. Justice Blanchard

BETWEEN:

KENNETH ADAM GATES, JOHN JAMES ST. JEAN, RICHARD ARLISS FOX, NEIL ROBERT SIMPSON and SHELDON KENNETH SHALER

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

ORDER

UPON motion dated January 14, 2007, on behalf of the Applicants, for:

1. An interim order pursuant to s. 18.2 of the *Federal Courts Act,* R.S.C. 1985, c. F-7 (the *Federal Courts Act*), requiring the Correctional Service of Canada (CSC) to:

   (a) maintain the Temporary Detention Unit of Matsqui Institution in Abbotsford, British Columbia (the TD Unit) at a temperature not lower than 20 degrees Celsius between the hours of 8:00 a.m. and 12:00 midnight, and 16 degrees Celsius between the hours of 12:00 midnight and 8:00 a.m., measured from the floor in the centre of each cell, pending the final disposition of the application for judicial review;

(b) install an accurate thermometer in the corridor of the TD Unit, approximately half-way between the back door and the entrance to the TD Unit, in plain view of prisoners and staff, within seven business days of the order;

(c) provide prisoners in the TD Unit with outdoor parkas and extra blankets upon request.

In the main application, the Applicants seek a declaration that CSC has failed to meet the requirements of the *Corrections and Conditional Release Act*, R.S.C. 1992, c. 20 (the CCRA), the *Corrections and Conditional Release Act Regulations* (the Regulations), the *Human Rights Act* and ss.7 and 12 of the *Charter*, a mandatory injunction requiring CSC to ensure that its actions regarding this matter are in compliance with these obligations and, *inter alia*, an order in the nature of *mandamus* compelling CSC to maintain reasonable temperatures in the TD Unit.

The evidence establishes the TD unit, which previously served as the segregation unit of Matsqui Institution, has poor ventilation and an inadequate heating system. While prisoners are not permitted to smoke in the unit, the evidence establishes that prisoners do smoke and the CSC has been unsuccessful in its attempt to stop the smoking. Exposure to second-hand smoke was determined to be problematic and, in order to address the concerns of staff and to ensure a healthy environment for all, the institution adopted a policy on December 8, 2006, which required outside doors to the unit to be opened for short predetermined intervals of time in order to clear the smoke when the inmates were locked in their heated cells. The policy is referred to as the "open door" policy.

The evidence of the Applicants who are held in the TD Unit is to the effect that the doors were kept open more often than the posted times, particularly the back door which was kept open from 3:00 a.m. until 10:00 p.m. in addition to the times posted. The evidence of the Applicant Mr. Gates is that a few days after December 13, staff began keeping the back doors open all night on occasion. While the Respondent disputes this evidence, it provided no direct evidence to counter

these specific allegations regarding the times the doors to the TD Unit remained open. Nor did the Respondent adduce any evidence regarding the temperature inside the unit to counter the evidence of the Applicants to the effect that they have felt extremely cold when the doors were opened and have variously experienced shaking, cold hands, runny and sore noses, red faces, and cold ears, despite all of their efforts to bundle up in the clothes and blankets that are available to them. The Applicants evidence alleges that they have suffered as a result of the impugned policy. I will deal with the evidence of the alleged harm below, when I consider the parties arguments on irreparable harm.

The Respondent's evidence essentially addresses the problem with second-hand smoke on the TD Unit and the implementation of the policy to open doors to ventilate the unit when necessary. I note that the policy makes no provision for exceptions when the weather outside is extremely cold. The Respondent had the means to adduce evidence before the Court which could have established beyond doubt the relative temperature in the unit. No such evidence was adduced. The Applicants filed charts which provided the Court with the maximum and minimum outdoors temperatures for the applicable times. This evidence, which is not disputed, shows that temperatures outside the TD Unit were well below zero degrees Celsius on many occasions during the time period under consideration.

To succeed on this motion, the Applicants must satisfy all three branches of the conjunctive test for an interlocutory injunction set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at paragraph 43. The Applicants must establish that there is a serious issue to be tried in the underlying application, that they would suffer irreparable harm if the application is refused and that the balance of inconvenience is in their favour.

It is widely accepted that the threshold under the first branch of the tripartite test is low. This is particularly so when *Charter* issues are raised. The motions judge must make a preliminary assessment of the merits of the case, and once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third test, even if the judge

is of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable *(RJR MacDonald*, above, at paragraph 78).

Here, the Respondent argues that the Applicants have not established that there exists a serious issue in the main application for judicial review. The Respondent contends that the CCRA and the Regulations prescribe a comprehensive and multi-level grievance procedure which an inmate may employ if he is dissatisfied with an action or a decision by a staff member. It is the Respondent's position that the Court should decline to hear any request for relief which may have been sought through the administrative process. The Respondent further argues that the Applicants have not filed an official complaint pursuant to the statutory grievance procedure. While this may be so, the Applicants attest that two complaints were filed about the cold conditions in the unit and there is in evidence a detailed letter from counsel for the Applicants to the Warden of Matsqui Institution on the issue.

While there is a body of jurisprudence that supports the principle that an applicant must first exhaust his internal remedies before coming to Court, there are recognized exceptions in circumstances where the internal remedies are not adequate. The Supreme Court has stated that an alternative remedy must be adequate (see *Matsqui Indian Band v. Canadian Pacific Limited*, [1995] 1 S.C.R. 3, at paras. 32 to 39). Here evidence was adduced to challenge the adequacy of he alternative remedy particularly with respect to the timeliness of the response. Further, in the Applicants' submission, section 81(1) of the Regulations indicates that the regulator contemplated the possibility that the inmate may choose to pursue a legal remedy by providing, in such cases, that the complaint or grievance be deferred until a decision on the alternate legal remedy is rendered.

Given that the argument in relation to this issue consumed nearly all of the hearing with both sides presenting forceful and compelling arguments for their respective positions, I am persuaded that the low threshold for serious issue is met. In the circumstances, I do not believe that the applicability of the principle of alternative remedy or the adequacy of the alternative grievance

process are issues that should be decided on a motion for interlocutory relief. The issue should be resolved in the context of the application.

I am satisfied that the Applicants have provided some evidence that their *Charter* rights may have been violated. This evidence shows that the extreme cold the Applicants have experienced in the TD Unit as a result of staff keeping the doors open during cold weather has had an adverse impact on their health. There is also some evidence to support the Applicants' contention that staff was implementing the "open door" policy in such a manner as to punish the inmates for smoking on the TD Unit. In my view, the Applicants have brought sufficient evidence relating to the various allegations to demonstrate to me that there are serious issues to be tried for the purpose of the within interlocutory application.

The second question to be answered is whether the Applicants would suffer irreparable harm if the relief sought is not granted. Here, the term irreparable refers to the nature of the harm suffered rather than its magnitude. All of the Applicants except one have left the TD Unit at the time this motion was argued. John James St. Jean is the sole remaining Applicant residing on the unit. Irreparable harm must then be assessed based on his evidence.

I reproduce below certain paragraphs of his affidavit evidence.

> ...3. The ventilation in the TD Unit is poor. When I put my hand against the vent in my cell, I can barely feel any air coming out of it.
>
> 5. Beginning approximately the end of November or beginning of December, the staff working in the TD Unit (the "Staff") started to fasten the back doors of the TD Unit open all day. Originally, Staff used plastic garbage bags to tie the doors open. Later Staff used a chair, a shovel, and then black twine to keep the doors open.
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> 6. On December 6 and 8, 2006, I contacted Prisoners' Legal Services regarding the cold conditions in the TD Unit.

7. On or about December 8, 2006, Staff posted a schedule of when the doors would be open, which basically corresponds to the times when prisoners are locked up in our cells. The front doors of the TD Unit have been kept open on a regular basis since approximately December 8, 2006.

8. Since approximately December 13, 2006, Staff have been opening the back doors again all day, and on occasion, all night.

9. The prisoners in the TD Unit are becoming frustrated with this situation and some are yelling at Staff. Staff just laugh at us and say that they will close the doors when the smoking stops. I believe that certain Staff are keeping the doors open to punish all the prisoners because some are smoking inside.

...

11. The weather has been very cold for periods of time since the Staff have been keeping the doors open. On one such day, I was watching the weather network which said that the temperature was minus 13 degrees Celsius with the wind chill. In mid-December, the high winds have also made it cold in the TD Unit.

12. The cells in the TD Unit are concrete and steel and get extremely cold during cold weather. The cell doors have a gap at the bottom that is approximately six inches tall and the width of the cell door. There is an inch wide gap that goes up the height of the door, which is approximately seven feet.

...

14. Although I am a smoker, on occasion the smoke in the TD Unit bothers me.

...

17. On the days that it has been really cold and the doors have been open, my nose felt like it was burning red, but it was cold when I touched it.

18. When it is cold and the doors are open, I wear my thermal shirt and long underwear, a t-shirt, a toque and jeans during the day. At night I sleep wearing thermal long underwear, a shirt and socks.

19. On approximately the second or third day that the doors were open, I caught a cold. I was sick until approximately December 11, 2006.

20. On September 22, 2006, before returning to custody in the TD Unit, I was seriously injured. I broke my pelvis, hip and foot, and was in the hospital. Since the doors have been open I have been experiencing more pain as a result of my injuries. I saw the doctor about the pain and he said that the cold weather was likely causing the pain.

21. Normally prisoners in the TD Unit are not issued outdoor coats. Staff require us to leave coats outside and coats are shared among the men in the TD Unit. On one occasion, when the doors were being kept open, I wore a coat into the TD Unit and a Staff member directed me to take it off.

22. I was never offered a coat to wear inside or an extra blanket by Staff.

...

24. I made a number of verbal complaints regarding the doors being open and Staff refused to close the doors. Staff responded by telling me to make complaints against other prisoners for smoking inside.

The Respondent argues that Mr. St. Jean contributed to the living condition of which he complains, namely cold temperatures, by requesting that the back door to the TD Unit be opened and by opening the door himself. The evidence shows that this would have occurred on a day where the outdoor temperature was between 2.3 and 9 degrees Celsius. The evidence also shows that Mr. St. Jean also stood next to the back door on January 25, 2007. The Respondent further contends that it is premature for the Applicant Mr. St. Jean to argue that he will suffer irreparable harm since it is not known that the current low temperatures will continue, and it can be assumed that outdoor temperatures will become warmer.

The Respondent's latter argument is without merit. It is reasonable to expect that, given the evidence before the Court on outdoor temperatures, temperatures in January outside the TD Unit are

likely to be cold, particularly at night, and may more often than not be well below zero degrees Celsius.

Further, it matters not, in my view, whether Mr. St. Jean opened the doors of the TD Unit or assisted in attempting to air out the unit at any given point. Subsection 83(3) of the Regulations, regarding inmates living conditions, provides that the CSC is obligated to "...ensure a safe and healthful penitentiary environment." Implicit in this obligation is a requirement that the inmates' living quarters be adequately heated. It is no answer to suggest that the inmates are the cause of the problem, because of their unauthorized smoking, and therefore adopt a policy that results in their cells being cooled to a point where their health is being affected. I am left with the Applicants' evidence which, in Mr. St. Jean's case, establishes that he did suffer as a result of the cold as attested to in his above-noted evidence. On the evidence, I am of the view that the conditions experienced by the Applicant Mr. St. Jean go well beyond discomfort as suggested by counsel for the Respondent.

The evidence establishes that there is a problem with smoking and ventilation in the unit. It is not for this Court to resolve the problem. While many options may be open to the Matsqui Institution to address the situation, it is not open to the CSC to implement a policy that has the potential to directly and adversely affect the health and well-being of inmates. There is, here, evidence to support the Applicants' allegations that the impugned policy is having this effect on inmates and the Applicants in particular.

The Respondent contends that the conditions complained of can be alleviated simply by wearing additional clothing and using additional blankets provided by the institution. Even if I were to accept the Respondent's evidence that this additional clothing and blankets were made available to the inmates, this is not an acceptable solution to keeping the unit temperature as cold as described in the evidence of the Applicants. Further, in Mr. St. Jean's case, his evidence establishes that he was already sleeping with thermal long underwear, a shirt and socks.

I am therefore satisfied that the Applicant Mr. St. Jean has established that he will suffer irreparable harm should the relief sought not be granted.

In the circumstances, the balance of inconvenience favours the Applicants.

I am prepared to grant the following relief which, in the circumstances, I consider sufficient to address the potential harm that is likely to result if the impugned policy is maintained.

THIS COURT ORDERS that:

Correctional Services Canada is prohibited from allowing the temperature at the Temporary Detention Unit at Matsqui Institution in Abbotsford, British Columbia, to drop below 20 degrees Celsius between the hours of 8:00 a.m. and 12:00 midnight, and 16 degrees Celsius between the hours of 12:00 midnight and 8:00 a.m., pending the final disposition of the application for judicial review.

"Edmond P. Blanchard"
Judge

I HEREBY CERTIFY that the above document is a true copy of the original filed of record in the Registry of the Federal Court the 02 **day of** February **, A.D. 200**7

Dated this 05 **day of** February **, 200**7

Tamsin Ramsay

Tamsin Ramsay, Registry Officer