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Piche v. Canada (Solicitor General) (F.C.A.)

Between
Frank Robert Piche, Gaylord Steven Neufeld, David Siegried Daher, Raymond Joseph Breland and Michael Smyth, (Plaintiffs) Appellants, and
The Solicitor General of Canada, The Commissioner of Corrections, and the Institutional Head of Stony Mountain Institution, (Defendants) Respondents

[1989] F.C.J. No. 204

98 N.R. 148

36 Admin. L.R. 225

47 C.C.C. (3d) 495

41 C.R.R. 162

7 W.C.B. (2d) 233

Action No. A-1417-84

Federal Court of Appeal
Winnipeg, Manitoba

Urie, Marceau, and MacGuigan JJ.

Heard: February 27, 1989
Judgment: March 2, 1989

Constitutional law -- Administrative decision not reviewable for fairness -- No constitutional right to privacy requiring one person per cell -- Canadian Charter of Rights and Freedoms, s. 7.

This was an appeal by the plaintiffs from a judgment dismissing their action for a declaration, injunction and other relief. The issues on appeal were whether the trial judge erred in failing to hold

that the respondents breached the common law right of fairness and whether he erred in failing to hold that by depriving the appellants of the enjoyment of basic privacy and personal dignity the respondents had breached the principles of fundamental justice under s. 7 of the Canadian Charter of Rights and Freedoms. For the facts in this case see 85 D.R.S. P27-449.

HELD: The appeal was dismissed. Between purely ministerial decisions which were not subject to review on the grounds of the principles of fairness and those actions subject to judicial review was a spectrum of administrative decision-making subject to the requirements of fairness. The double bunking decision was a purely policy decision not subject to review for fairness. The inmates failed to establish that any harm might flow from double bunking. It changed status quo but did not interfere with existing rights. There was no practice of prior consultation with inmates on matters of policy. There was no right to one person per room in society or in custody.

Arne Peltz, for the Appellants.
Craig Henderson, for the Respondents.

The judgment of the Court was delivered by

MACGUIGAN J.:-- This appeal relates to the introduction of double-bunking at Stony Mountain Institution ("SM" or "SMI"), a federal medium security penitentiary classified in terms of security as S-5, the highest level of security in the medium security category, with a rated capacity of 470 inmate cells (A.B., Vol. 7 at 990) [Footnote: The top security level, for special handling units, is classified at S-7, and maximum security institutions are S-6 (A.B., Vol. 8 at 1130).]. SMI is located 10 miles from Winnipeg.

Double-bunking may be defined as the confinement of two inmates in a prison cell designed and previously utilized for single occupancy. At SMI the average cell size is 53.2 square feet with a ceiling height of 8 feet.

Faced with an overall inmate population in excess of available facilities, on June 3, 1982, the Correctional Service of Canada ("CSC") decided to adopt a contingency plan including the use of double-bunking. Regions were ordered to expedite the repair of all cells not then usable, to reconvert to cell use any cells utilized for purposes other than inmate accommodation, to liaise with the Parole Board with a view to increasing the number of inmates to be granted day parole and full parole, and to progressively increase the utilization of community residential centres (A.B., Vol. 8 at 1138-9). The contingency plan in relation to the Paririe Region of the CSC was as follows: to increase the use of community residential centres to 90; to double bunk 90 cells in the Saskatchewan Penitentiary, 50 cells at Drumheller Institution, and 30 cells at SMI, to install

services for trailers at Bowden Institution (40 beds), Saskatchewan Farm (40 beds) and Rockwood Institution (40 beds) (A.B., Vol. 8 at 1140).

There was no consultation with or notice to inmates of federal institutions prior to the taking of this decision by the CSC, although, the appellants argued, ready-made institutions of consultation existed in the inmate commitees approved by Commisioner's Directive 231 (May 10, 1982), with the following mandate:

> CONSULTATION
>
> 11. The Director shall ensure that the Inmate Committee is consulted about, and has an opportunity to comment on, the preparation of the Social and Cultural Development budget and expenditures for equipment and activities in this case. Some inmates are contributing to the maintenance of recreational activities from their inmate pay, it is vital that their needs are addressed through such input.
>
> OPERATION
>
> 12. Terms of reference, instructions and procedures for the operation of each Inmate Committee, shall be developed in accordance with this policy, and promulgated under the direction and with the approval of the Director.

The functions of the Inmate Welfare Committee set up at SMI by the Director of that institution were as follows (A.B., Vol. 1 at 43):

> THE FUNCTIONS OF THE COMMITTEE ARE:
>
> (a) To provide a medium between staff amd inmates with reference to programs and activities.
> (b) To afford leadership training for its members, and
> (c) To provide a democratic basis for inmate organization structures that can achieve ends recogizable as valid or constructive by values in the community outside the walls.
> (d) To provide a democratic basis which enables participants to have a voice in the organization, administration and financing of inmate programs; and generally to have a voice with respect to all matters affecting or detrimental to the prison social order.

Some consultations took place with the Inmate Committee at SMI immediately before and after

the announcement of the new double-bunking policy for that institution on August 11, 1982. That announcement set out the cells designated for double-bunking and stated that "only those inmates entering population will be required to double-bunk and only for a short period of time" (A.B., Vol. 1 at 45): As a result of several days of animated discussion (including inmate destruction of some of the added bunking) a compromise plan was worked out by which, in lieu of the imposition of double-bunking on new entrants, the inmates undertook to find volunteers for double-bunking among the existing population, who would double-bunk for an unspecified length of time which could be terminated at their request. It is common ground that the consultation which took place did not touch the principle of double-bunking, which in the light of instructions from headquarters was regarded by the SMI administration as a given, but concerned only the most satisfactory means of implementation of double-bunking.

The originating notice of motion brought by the appellants before Nitikman D.J. was transformed by agreement of the parties of the parties and of the Trial Judge into an action founded on a statement of claim. Voluminous evidence was thereafter adduced before Nitikman D.J., who eventually dismissed the action with costs on November 2, 1984. The learned Trial Judge thoroughly canvassed the evidence and the issues in the 163 pages of his reasons for judgment.

Given the dismissal of the respondent's application to quash by Mahoney J.A. on May 18, 1988, it was agreed by the parties and accepted by the Court that there should be no issue before this Court as to mootness. The appellants also decided not to raise before this Court any issue as to whether double-bunking constituted cruel and unusual treatment or punishment, under either subsection 2(b) of the Canadian Bill of Rights or section 12 of the Canadian Charter of Rights and Freedoms. The appellants also decided not to argue for the reopening of the trial for the purpose of adducing further evidence.

The issues argued before this Court may, then, be reduced to essentially two: whether the Trial Judge erred in failing to hold that the respondents breached the common-law right of fairness; and whether he erred in failing to hold that by depriving the appellants of the enjoyment of basic privacy and basic personal dignity, the respondents breached the principles of fundamental justice under section 7 of the Charter.

It was common ground that the following statement of Dickson J. (as he then was) in Martineau v. Matsqui Institution Disciplinary Board (No. 2) (1979), 50 C.C.C. 353 at 378, [1980] 1 S.C.R. 602 at 628-9, represents the applicable law:

> A purely ministerial decision, on broad grounds of public policy, will typically afford the individual no procedural protection, and any attack upon such a decision will have to be founded upon abuse of discretion. Similarly, public bodies exercising legislative functions may not be amenable to judicial supervision. On the other hand, a function that approaches the judicial end of the spectrum will entail substantial procedural safeguards. Between the judicial

> decisions and those which are discretionary and policy-oriented will be found a myriad decision-making processes with a flexible gradation of procedural fairness through the administrative spectrum.

Two relevant points emerge from this statement of the law. First, there is a spectrum of administrative decision-making, and the requirements of fairness will be more substantial at the judicial end of the spectrum. Second, at the initial extreme of the spectrum there are purely ministerial decisions, made "on broad grounds of public policy" where the principle of fairness has no application at all and which can be challenged only in terms of a want of jurisdiction (which has no application here). The question in the case at bar is precisely whether the respondents' decision as to double-bunking is "on" or "off" the spectrum of administrative fairness.

In Minister of National Revenue v. Coopers and Lybrand, [1979] 1 S.C.R. 495 at 504-5, Dickson J. provided further analysis of this issue in formulating four criteria for determining whether a governmental decision is appropriate for review under section 28 of the Federal Court Act, viz. (1) the presence or absence of express language mandating a hearing, (2) the nature and severity of the manner, if any in which individual rights are affected, (3) the presence or absence of an adversary process in the nature of a lis inter partes, and (4) the obligation to apply substantive rules to individual cases or to implement social and economic policy in a broad sense. There is, of course, no doubt that the decision in the case at bar is not reviewable under section 28, but the appellants urged that the existence of an effect on rights and obligations supported their contention that the decision herein was not "off the spectrum." They also argued that the decision herein was not like Dickson J.'s examples of determination inappropriate to judicial intervention, like the appointment of the head of a Crown corporation, or the decision to purchase a battleship, or the investigatory power of the Minister of National Revenue to audit and to authorize the search and entry of buildings.

The Trial Judge squarely found that the double-bunking decision was a purely policy decision not subject to review for fairness. He said (A.B., Vol. 10 at 146):

> It is not in dispute that the decision to institute double-bunking because of the necessity to accommodate the overall inmate population in excess of available facilities at S.M. was a policy decision by the Solicitor General.

Not only can I find no error in the Trial Judge's approach but it seems to me to be manifestly correct. The CSC was confronted in 1982 with a serious crisis of numbers. Additional construction was not an available solution since "it takes approximately five years to plan and construct new prison facilities from the date that a need is ascertained, and up to two years for additions to existing prisons" (A.B., Vol. 7 at 996). A contingency plan was adopted, of which the introduction of double-bunking was only a part. The decision was essentially one as to the best adaptation of governmental resources to a need of startling proportions.

The highest the appellants' case can be put, it seems to me, is that the decision must be located in

a broader context of human values in which a determinable toll is taken of their rights. But this contention cannot be made to square with the facts.

For one thing, as the CSC proposed to implement its plan at SMI (which is the matter before this Court) it would have applied only to new admissions and not generally to the appellants [Footnote: The only exception tothis would be with respect to general population inmates who subsequently soughtadmission into protective custody, where there was also to be some double-bunking. This was apparently the case with the appellant Breland.]. Sincethis is not a class action, the appellants (Breland excepted) are hard put to claim any effect on their rights.

More important, the Trial Judge's findings on the facts are directly contrary to the appellants' contention. He found that "there is no empiric evidence that double-bunking increases tension level" (A.B., Vol. 10 at 1454), and that "the physical and mental condition of the plaintiffs does not support [the] conclusion" (A.B., Vol. 10 at 1437) that from a psychiatric point of view double-bunking is a damaging, detrimental and dangerous form of incarceration. In other words, the Trial Judge found double-bunking neither physically nor psychologically harmful. It was an upsetting of the status quo, but not an interference with existing rights.

The appellants also relied on the legitimate-expectation-of-notice doctrine recently developed by the House of Lords in O'Reilly v. Mackman, [1982] 3 All E.R. 1124, [1983] 2 A.C. 237 and Council of Civil Service Unions v. Minister for the Civil Service, [1984] 3 All E.R. 935. As that principle was put by Lord Fraser of Tullybelton in the latter case (at 943-4):

> [E]ven where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have all legitimate expectation of receiving the benefit or privilege, and if so, the courts will protect his expectation by judicial review as a matter of public law.... The test... is whether the practice of prior consultation of the staff on sigificant changes in their conditions of service was so well established by 1983 that it would be unfair or inconsistent with good administration for the govermment to depart from the practice in this case.

But this principle can have no application to the case at bar, for there is nothing in the record to support a practice of prior consultation on matters of policy. In fact, it is a legitimate question whether, given the linked mandate of inmates' committees I recited above, such consultation would even fall under their terms of reference.

I can therefore find no fault with the conclusions of the Trial Judge, viz. (A.B., Vol. 10 at 1464):

> I am satisfied that the decision of the Solicitor General of Canada, in view of the overpopulation situation, was valid...
>
> As well, I am satisfied the institutional head of SM carried out in full and

> proper manner the responsibilities imposed on him by sec. 5(1) [of the Penitentiary Act] and the duty imposed on him by sec. 37 of the Penitentiary Service Regulations.

The second issue relates to section 7 of the Charter, which reads as follows:

> 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.

The appellants argue that section 7 protects the right of basic privacy and personal dignity. In the course of the argument the appellants defined basic privacy as"time alone" so that one can be secure physically, so that one can attend to personal functions, and so that one can have mental rest and respite.

For the moment and for the sake of the appellants' argument, I am prepared to assume, without deciding [Footnote: I am, however, mindful of the position taken by Strayer J. in Weatherall v. Attorney General and Solicitor-General of Canada (1987), 32 C.R.R. 273 (F.C.T.D.), against finding an abstract right of privacy in section 7.], that section 7 does protect the right of basic privacy and personal dignity. The appellants accept the Trial Judge's finding that "in a prison setting a certain loss of privacy is an inherent inciden[t] of confinement in the institution," but contend on the authority of Solosky v. The Queen, [1980] 1 S.C.R. 821, 50 C.C.C. (2d) 495 that those confined to prison retain their rights to privacy other than as expressly or impliedly taken from this by law. The appellants termed this a residual right to privacy.

I accept such a residual right to privacy and dignity as a theoretically tenable position, but for it to have any significance in the case at bar the appellants would have to establish that the lowest common denominator, as it were, of privacy and dignity in our society included a one-person-one-room component. What is not verified for those outside prison can hardly be taken to be required as a residual right for those within. Unfortunately for the appellants' case there is no such evidence in this record. Nor is it a matter of which a Court could take judicial notice. The plight of those confined through economic necessity for long periods of time to hospital wards would serve as a mute reproach to any such attempt. A Court could, I believe, take judicial notice of the fact that one-person-one-room is a deep-rooted aspiration of our society, but, beyond that, without sociological evidence, it could not go.

I can therefore find no fault with the conclusion of the learned Trial Judge (A.B., Vol. 10 at 1468):

> I am satisfied insofar as invasion of the right to privacy per se is concerned... that based on the evidence adduced and the case law I have referred to there was not at S.M. any invasion of the plaintiffs' right to privacy as claimed by them or at all.

In the light of the appellants' inability to establish this part of their section 7 argument, it is unnecessary to consider their submissions with respect to either the fundamental principles of justice or section 1 of the Charter.

The appeal should therefore be dismissed with costs.

MacGUIGAN J.