Federal Court  Cour fédérale

Date: 20201106

Docket: T-1234-20

Citation: 2020 FC 1037

Ottawa, Ontario, November 6, 2020

PRESENT: Mr. Justice Norris

BETWEEN:

ROBIN GRAY

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

I. OVERVIEW

[1] Robin Gray, the applicant, is an inmate at Nova Institution for Women ("Nova"), a federal penitentiary operated by the Correctional Service of Canada ("CSC"). It is located in Truro, Nova Scotia.

[2] On September 21, 2020, the Deputy Commissioner for Women approved the applicant's involuntary transfer to Grand Valley Institution ("GVI"), which is located in Kitchener, Ontario. The transfer was ordered because of the presence of an incompatible inmate at Nova.

[3] The applicant has applied for judicial review of the transfer decision. She now seeks an interlocutory injunction preventing her transfer to GVI until the final determination of the application for judicial review.

[4] For the following reasons, I am granting the request for an interlocutory injunction. CSC shall not transfer the applicant from Nova to GVI prior to the final determination of the application for judicial review of the September 21, 2020, transfer decision.

II. BACKGROUND

[5] The applicant received a 24 month sentence of imprisonment on March 11, 2020. She commenced serving that sentence at Nova on or about March 24, 2020. The applicant is currently designated as medium security. She has been eligible for day parole since September 11, 2020. She will be eligible for full parole on November 9, 2020.

[6] The applicant will be sixty years of age this month. She did not finish elementary school and has difficulty reading and writing. CSC considers her to be illiterate. While she has an extensive and lengthy criminal record that began in 1990, her present sentence is her first federal sentence.

[7] The applicant traces her roots to the historically African Nova Scotian community of North Preston. She has lived her entire life in Nova Scotia. All her family and other supports are in the Halifax and Windsor, Nova Scotia, areas.

[8] On July 28, 2020, a Security Intelligence Officer ("SIO") at Nova prepared a report recommending that the applicant be designated as incompatible with another medium-security inmate at Nova. The incompatible inmate had arrived at Nova in or around June 2020. The SIO's report was based on information the officer obtained from, among other sources, the applicant, the incompatible inmate, police officers "familiar with the persons involved," and Central Nova Scotia Correctional Facility ("CNSCF"), an institution where both the applicant and the incompatible inmate had previously been incarcerated. The SIO concluded that the incompatible inmate "was particularly vulnerable to retaliation and manipulation" by the applicant.

[9] The identity of the incompatible inmate has not been confirmed to the applicant by CSC staff, although the applicant claims to know who it is.

[10] The applicant and the incompatible inmate were at CNSCF together for some nine months in 2019. The applicant was being held there on remand. The applicant states in her affidavit in support of this motion that she and the incompatible inmate saw each other regularly in the hallways and when they lined up to receive their medications.

[11] The applicant and the incompatible inmate were considered to be incompatibles at CNSCF. As a result, the institution took steps to keep the two apart. No incidents between them at CNSCF were reported. According to the applicant, they just minded their own business. There is no information suggesting otherwise.

[12] No order was made as part of the applicant's sentence prohibiting her from having contact with the incompatible inmate. There is no suggestion that the incompatible inmate is a victim of the offences for which the applicant is serving her sentence at Nova.

[13] In connection with the preparation of the incompatibility report at Nova, the incompatible inmate reported to the SIO that she had been victimized by the applicant in the past and, as a result, "being around" the applicant was negatively affecting her mental health. No psychological or psychiatric assessments of the incompatible inmate were filed on this motion.

[14] There is evidence on this motion that the incompatible inmate has engaged in self-harm behaviour at Nova. There is no evidence on this motion that this is as a result of the presence of the applicant there, because of other reasons, or because of some combination of both.

[15] According to the SIO in her public affidavit on this motion, the "attitude" of the incompatible inmate towards the applicant poses a threat to the applicant's safety, "as it creates a potential for conflict between the two inmates and their supporters within the Institution."

[16] Movement of inmates within Nova is currently restricted because of the COVID-19 pandemic. In any event, CSC staff have made efforts to keep the two apart since the incompatibility determination was made in July if not before. No incidents between the two have been reported.

[17] The applicant states in her affidavit in support of this motion that she and the incompatible inmate have seen each other on the grounds at Nova but they just ignore each other and do not make eye contact. The applicant also states that the two have not communicated with one another in any way, either directly or indirectly. The respondent has not offered any evidence to contradict these statements.

[18] At some point following completion of the July 28, 2020, incompatibility report, the applicant's Parole Officer, Jeff Ramsay, was tasked with preparing an assessment for decision regarding the involuntary transfer of the applicant from Nova to GVI. After conducting a thorough review of the circumstances and relevant information, Mr. Ramsay concluded that he did not recommend the involuntary transfer.

[19] The nub of Mr. Ramsay's reasons for not recommending the applicant's involuntary transfer is as follows:

> An analysis of high risk behaviors or patterns observed during her sentence have resulted in no incidents being recorded that were not able to be managed through dynamic security interventions. There have been minimal evidence of her behaviors which would indicate that she is a specific threat to the incompatibility identified. As such this writer was unable to identify any specific pattern or incidents of high risk behaviors that would indicate that her risk could not be managed within the institution. The concerns

> being expressed are more aligned to her actual presence in the institution. This is viewed as more of a mental health issue and the current policy is void of guidelines addressing mental health well being or in this case from a women's centered perspective. Her behaviors to date have generally been acceptable not so negative or out of the typical behaviors of female offenders. Viewed within the broader context of her overall institutional performance this writer is not of the opinion that this case meets the threshold of an Involuntary Transfer, as outlined in the Introductory Statement of this report. Her institutional behavior is consistent with that she had exhibited in the provincial system. This writer is not able to provide the various alternatives that have been explored to manage the risk. This is reported to be due to Covid19 restrictions as being the primary intervention to manage the risk. However, it should be noted that her institutional adjustment is not indicative of someone who is a significant security concern. Within the context of her cultural history and the dysfunction of her social history Robin Gray has displaced relatively stable behaviors within the institution. Those issues that have arisen are not considered to be out of the norm which is reflective of female offenders at Nova.

[20] On the other hand, Julia Rudderham, the Acting Manager of Assessment and Intervention, who is Mr. Ramsay's supervisor, dissented from this recommendation. In her view, the incompatibility issue had been managed through the institutional restrictions adopted in response to the COVID-19 pandemic. However, the institution's ability to manage the incompatibility issue "is dissipating as program resumption and more open offender movement to programs begins which will increase the potential unsupervised interaction." For Ms. Rudderham, the involuntary transfer "will address the incompatibility issue."

[21] On Wednesday September 16, 2020, the applicant met with Ms. Rudderham, Mr. Ramsay and another Parole Officer. The applicant was given a copy of the Assessment For Decision (colloquially referred to as an "A4D") and Notice of Involuntary Transfer/Movement Recommendation ("NOIT") recommending that she be transferred from Nova to GVI. The sole

basis for the recommendation to transfer the applicant out of Nova was the presence of the incompatible inmate there.

[22] The applicant was informed that if she wished she could provide a rebuttal to the proposed involuntary transfer. The applicant confirmed that she did wish to provide a rebuttal. Ms. Rudderham told her that she would be given two days – that is, until Friday September 18, 2020. The applicant requested an extension of time to provide her response.

[23] According to the NOIT she signed at this meeting, the applicant indicated that she wished to provide a rebuttal and that she wished to do this in person as opposed to in writing. The applicant also confirmed at the meeting that she wished to obtain assistance from the Elizabeth Fry Society in preparing her rebuttal. CSC records indicate that after the meeting at which she signed the Notice of Involuntary Transfer, a call to the Elizabeth Fry Society was facilitated for the applicant so that she could obtain legal advice. At the time she signed the NOIT, the applicant had not had the benefit of any legal advice.

[24] On September 17, 2020, the applicant met with Emma Halpern, the Executive Director of the Elizabeth Fry Society of Mainland Nova Scotia. Among other things, the Elizabeth Fry Society assists female offenders through housing supports and programming initiatives. It also assists female offenders in their dealings with CSC and with the Parole Board of Canada.

[25] The applicant immediately engaged this organization to prepare a written rebuttal to the transfer recommendation on her behalf. The same day, she spoke on the telephone with Jessica

Rose, a staff lawyer with Elizabeth Fry Society. She confirmed that she wanted to retain Ms. Rose to prepare a written rebuttal to the transfer recommendation. Subsequently, Ms. Gray retained Ms. Rose as her counsel in legal proceedings relating to the transfer decision, including the underlying application for judicial review.

[26] As well, the applicant engaged Ms. Halpern to act as her parole assistant before the Parole Board.

[27] Returning to the transfer decision, the Acting Warden granted the applicant an extension of time to provide her rebuttal to the end of the day on Sunday, September 20, 2020 – that is, an additional two days. Under the Commissioner's Guidelines dealing with Inmate Transfer (Guidelines 710-2-3), the Acting Warden had the authority to grant an extension of up to ten working days (see para 66). In the decision granting the extension dated September 16, 2020, the Acting Warden states that an extension of only two days could be given because of "the short turnaround times required" in her case. Thus, the applicant was given until the end of the day on Sunday, September 20, 2020.

[28] While there is no evidence to this effect on the record in this motion, it appears that a CSC flight was scheduled to leave Nova Scotia for Ontario on September 24, 2020.

[29] I pause to note that the applicant contends that, in effect, the Acting Warden's decision did not grant the applicant any extension at all. This is because a "working day" does not include weekends: see subsection 2(1) of the *Corrections and Conditional Release Act*, SC 1992,

c 20 ("CCRA") ("***working day*** means a day on which offices of the federal public administration are generally open in the province in question. (*jour ouvrable*)"). While this may be an important issue in the underlying application, it is not necessary to resolve it now.

[30] According to CSC records, Ms. Rudderham informed the applicant on Friday September 18, 2020, that she had been granted a two day extension. There is no evidence in the record to explain why it took two days to inform the applicant of the Acting Warden's decision.

[31] In her affidavit in support of this motion, the applicant denies that she was informed of the September 20th deadline. While this factual dispute may be important in the underlying judicial review, it is not necessary to resolve it for present purposes.

[32] At mid-day on Thursday September 17, 2020, Mr. Ramsay faxed Ms. Rose a copy of the A4D concerning the applicant's proposed transfer.

[33] At 3:12 p.m. on Friday September 18, 2020, Ms. Rose emailed Mr. Ramsay. She thanked him for sending her the involuntary transfer paperwork. She also confirmed that the applicant had retained her to assist with a written rebuttal. She stated that she would need to speak with the applicant the following week before she could prepare the rebuttal. Ms. Rose therefore asked Mr. Ramsay if he could advise her of the deadline for submitting the rebuttal and whether she could submit the rebuttal to him by email once it was ready.

[34] Apparently Mr. Ramsay was not in the office on Friday. As a result, he did not see Ms. Rose's email until the morning of Monday September 21, 2020. He responded at 7:24 a.m. that he understood that a decision had been made on the request for an extension of time but he did not know what it was. He suggested that the rebuttal should be sent to Ms. Rudderham, who is his immediate supervisor, who could then pass it along to senior management. Mr. Ramsay added Ms. Rudderham to his reply, stating that perhaps she could advise Ms. Rose of the deadline for the submission of the rebuttal. Ms. Rose replied by email immediately, stating that she would "very much appreciate" if Ms. Rudderham "could verify the extended deadline selected for Ms. Gray's rebuttal."

[35] At 9:02 a.m. on Monday September 21, 2020, Ms. Rudderham responded by email to Ms. Rose. She informed her that the deadline for rebuttal "was until the end of the day yesterday." Ms. Rudderham also states that the applicant was advised of this deadline on the morning of Friday September 18, 2020, and was offered a call to her lawyer. According to Ms. Rudderham, the applicant stated that she would go see her mental health worker. As noted above, the applicant denies that she was informed of the new deadline.

[36] While the precise time is not in evidence, sometime on the morning of Monday September 21, 2020, the applicant was called into a meeting with the Acting Warden. A CSC mental health worker was also present by phone as a support person for the applicant. The Acting Warden informed the applicant that this was her opportunity to provide reasons why she should not be transferred to GVI. The applicant states in her affidavit that she "did [her] best" to explain why she wanted to stay at Nova.

[37] The Acting Warden and the Regional Transfer Board recommended the applicant's involuntary transfer to GVI the same day.

[38] In her recommendation, the Acting Warden noted that the applicant's parole officer did not support the transfer, being of the view that the risks of the applicant and the incompatible inmate being together at Nova were being managed. The Acting Warden, however, was of the view that this was only because of the Pandemic Plan – i.e. the restrictions in place at the institution as a result of the COVID-19 pandemic. That said, the Acting Warden did acknowledge that the applicant had not caused any "institutional adjustment concerns" since her arrival at Nova.

[39] Also on September 21, 2020, the Deputy Commissioner for Women, approved the transfer.

[40] When the decision to approve the transfer was made, no representations on the applicant's behalf had been made by her legal counsel.

[41] On or about September 24, 2020, on her own application, the incompatible inmate was registered with CSC and the Parole Board of Canada as a "victim" of the applicant under section 26 of the *Corrections and Conditional Release Act*, SC 1992, c 20 ("*CCRA*"). The SIO explains the basis for this designation in her public affidavit on this motion as follows: "under section 26 of the *CCRA*, a person is a victim of crime if she has made a complaint to the police or the Crown Attorney's office or has Laid an Information under the *Criminal Code*, even if the

person who harmed them has not been prosecuted or convicted." Having been recognized as a victim under section 26 of the *CCRA*, the incompatible inmate is entitled to – and has received – personal information pertaining to the applicant and the sentence she is serving. According to the SIO, this information may become the subject of discussion in the institution "and expose the Incompatible Inmate or the Applicant to retaliation."

[42] This development and the SIO's assessment of it were not before the decision makers when the question of involuntary transfer was being considered.

[43] The applicant initially sought to challenge the involuntary transfer decision by way of an application for a writ of *habeas corpus* in the Supreme Court of Nova Scotia. That application was filed on September 23, 2020. On September 29, 2020, the applicant obtained an interim order on an emergency, *ex parte* basis prohibiting her transfer from Nova until a motion for an interlocutory injunction was determined by the Court.

[44] Beginning in early October, Ms. Halpern attempted to contact CSC officials to discuss initiating the parole application process for the applicant. Among the ways Ms. Halpern intends to assist the applicant is in developing a release plan that will address her community supports and programming needs in the community. She confirmed that a halfway house in Halifax had space available. She advised CSC by email that if the applicant were to be released to this halfway house, the Elizabeth Fry Society would "provide wrap around support programming and ensure Robin has access to mental health services and connections to both her Indigenous and African Nova Scotian communities."

[45] On October 16, 2020, the applicant commenced an application for judicial review of the transfer decision in this Court.

[46] On October 22, 2020, the applicant discontinued her *habeas corpus* application in favour of proceeding by way of judicial review in the Federal Court.

III. THE TEST FOR AN INTERLOCUTORY INJUNCTION

[47] As noted, the applicant has applied for judicial review of the transfer decision. She now seeks an interlocutory injunction to prevent her involuntary transfer until her application for judicial review has been determined.

[48] The purpose of interlocutory relief like this is to ensure that the subject matter of the litigation will be preserved so that effective relief will be available should the applicant succeed on her application for judicial review: see *Google Inc v Equustek Solutions Inc*, 2017 SCC 34 at para 24.

[49] An interlocutory injunction is an extraordinary and equitable form of relief. A decision to grant or refuse this relief is a discretionary one that must be made having regard to all the relevant circumstances: see *R v Canadian Broadcasting Corp*, 2018 SCC 5 at para 27.

[50] The test for an interlocutory injunction is well-known.

[51] As the moving party, the applicant must demonstrate three things: (1) that the underlying application for judicial review raises a "serious question to be tried;" (2) that the applicant will suffer irreparable harm if the injunction is refused; and (3) that the balance of convenience (i.e. the assessment of which party would suffer greater harm from the granting or refusal of the injunction pending a decision on the merits of the judicial review application) favours granting the injunction: see *Canadian Broadcasting Corp* at para 12; *Manitoba (Attorney General) v Metropolitan Stores Ltd*, [1987] 1 SCR 110; and *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 at 334.

[52] Each part of the test is important, and all three must be met, but they are not discrete, watertight compartments. Rather, the test should be approached in a holistic fashion. Thus, strengths with respect to the merits of the underlying matter can off-set weaknesses with respect to other parts of the test: see *RJR-MacDonald* at 339; *British Colombia (Attorney General) v Alberta (Attorney General)*, 2019 FC 1195 at para 97; and *Wasylynuk v Canada (Royal Mounted Police)*, 2020 FC 962 at para 135. See also Robert J Sharpe, "Interim Remedies and Constitutional Rights" (2019) 69 UTLJ (Supp 1) at 14.

[53] As the Supreme Court stated in *Google Inc*, "The fundamental question is whether the granting of an injunction is just and equitable in all of the circumstances of the case. This will necessarily be context-specific" (at para 25).

[54] Taken together, the three parts of the test help the Court to assess and assign what has termed the risk of remedial injustice (see Sharpe, above). They guide the Court in answering the

following question: Is it more just and equitable for the moving party or the responding party to bear the risk that the outcome of the underlying litigation will not accord with the outcome on the interlocutory motion?

IV. THE TEST APPLIED

A. *Serious Question to be Tried*

[55] The threshold for establishing a serious question to be tried is generally said to be low. The applicant only needs to show that her application for judicial review is not frivolous or vexatious: *RJR-MacDonald* at 335 and 337; see also *Gateway City Church v Canada (National Revenue)*, 2013 FCA 126 at para 11 and *Glooscap Heritage Society v Canada (National Revenue)*, 2012 FCA 255 at para 25.

[56] The applicant challenges the transfer decision on the basis that it was made in breach of the requirements of procedural fairness and on the basis that it is unreasonable. For purposes of the present motion, counsel for the applicant focused on the alleged breach of procedural fairness. She submits that the requirements of procedural fairness were not respected because the transfer decision was made without giving the applicant's counsel a meaningful – indeed, any – opportunity to provide a rebuttal to the proposed transfer.

[57] The respondent submits that this issue does not reach even the very low threshold of not being frivolous or vexatious.

[58] On the basis of the record before me on this motion, I am satisfied that this ground is neither frivolous nor vexatious. In fact, and without in any way coming to a final determination on the merits of the underlying application, I would go farther and state that I am satisfied that the applicant has raised a clearly arguable ground for judicial review.

[59] The respondent counters that the application for judicial review is doomed to fail because it is premature. This is because the applicant brought her application without first exhausting other available remedies – namely, the internal CSC grievance procedure.

[60] I do not agree.

[61] There can be no doubt that, as a general rule, this Court ought not to deal with a matter before any effective and reasonably available alternative remedies have been exhausted: see *Strickland v Canada (Attorney General)*, 2015 SCC 37, [2015] 2 SCR 713, at paras 40-45. The offender grievance process has often been recognized as an effective alternative remedy with respect to actions or decisions by CSC: see, for example, *Nome v Canada (Attorney General)*, 2016 FC 187 at paras 19-26, and *Karas v Canada (Attorney General)*, 2020 FC 345 at para 9. However, the reviewing court retains a discretion to determine an application for judicial review on its merits despite the applicant's failure to exhaust other remedies: see *Froom v Canada (Minister of Justice)*, 2004 FCA 352 at para 12. Necessarily, this is a case-by-case determination that must be made on the basis of a complete record and having regard to all relevant considerations.

[62] The respondent has not persuaded me that the application for judicial review is doomed to fail because it is a foregone conclusion that the reviewing court will inevitably exercise its discretion to dismiss the application because the applicant failed to pursue the offender grievance process first. On the record before me, and without in any way reaching a final determination on the issue, I am satisfied that it is at least arguable that the applicant should not be required to exhaust the internal grievance process before proceeding with an application for judicial review of the transfer decision. This is sufficient to get over the very low hurdle of the first part of the tripartite test.

B. *Irreparable Harm*

[63] In *RJR-MacDonald*, the Supreme Court held that "irreparable harm" refers to the nature of the harm suffered rather than its magnitude (at 341). It is harm which cannot be quantified in monetary terms or which cannot be cured for some other reason even if it could be quantified (e.g. because one party cannot collect damages from the other). This notion of what is or is not reparable is easily applied in private law and commercial disputes. It is perhaps more difficult to incorporate in a case where the underlying litigation is an application for judicial review, damages are not available, and other interests besides economic ones are paramount.

[64] To establish irreparable harm, the moving party must show that there is "real, definite, unavoidable harm – not hypothetical and speculative harm" (*Janssen Inc v Abbvie Corporation*, 2014 FCA 112 at para 24).

[65] Further, the moving party must adduce clear and non-speculative evidence that irreparable harm will follow if the injunction is refused. Unsubstantiated assertions of harm will not suffice. Instead, "there must be evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result" unless the injunction is granted: *Glooscap Heritage Society* at para 31; see also *Canada (Attorney General) v Canada (Information Commissioner)*, 2001 FCA 25 at para 12; *International Longshore and Warehouse Union, Canada v Canada (Attorney General)*, 2008 FCA 3 at para 25; *United States Steel Corporation v Canada (Attorney General)*, 2010 FCA 200 at para 7.

[66] The harm the applicant seeks to prevent by obtaining an interlocutory injunction would happen in the future, if at all, when she is moved to GVI in accordance with the transfer decision while her application for judicial review is pending. As Justice Gascon observed in *Letnes v Canada (Attorney General)*, 2020 FC 636, "The fact that the harm sought to be avoided is in the future does not necessarily make it speculative. It all depends on the facts and the evidence" (at para 57).

[67] In arguing that she will suffer irreparable harm, the applicant points to the increased risk of exposure to COVID-19 she would face if moved from a correctional institution in Nova Scotia to one in Ontario. She also points to the interference with her relationship with the local Elizabeth Fry Society that would be caused if she was moved to Ontario. The Elizabeth Fry Society in Halifax has agreed to assist and support the applicant in seeking day parole and full parole. She submits that the impediments she would face in working with that organization to plan for her release if she were transferred to Ontario would, given her own specific

circumstances, interfere with their working relationship to such an extent as to amount to a denial of access to justice.

[68] The respondent argues that any risk of contracting COVID-19 is too speculative to constitute irreparable harm. With respect to connections with family and other supports such as the Elizabeth Fry Society, the respondent submits that they can be maintained by telephone (which is largely how these connections are maintained now in any event). The respondent also notes that GVI has the facility to connect inmates and counsel via videoconference. The respondent also argues more broadly that the disruptions the applicant fears are simply an inherent part of being transferred.

[69] I am satisfied that, given the applicant's particular circumstances, the significant disruption to the manner in which she would be able to work with her Elizabeth Fry Society representatives, including her legal counsel, that would result from her transfer to GVI at this time constitutes irreparable harm in the requisite sense.

[70] The applicant's literacy challenges will pose significant difficulties in preparing and advising her in relation to the parole process and other legal processes, including the underlying application for judicial review. Given the applicant's particular circumstances, this work cannot be done effectively if it must be done entirely remotely.

[71] As noted above, Ms. Halpern has agreed to act as the applicant's parole assistant at her hearing before the Parole Board. She has also extended the assistance of her organization to

support the applicant in her release into the Halifax community. Moreover, Ms. Rose is acting for the applicant on her application for judicial review. The record for that application has not been perfected yet. I am satisfied that the applicant's literacy challenges would make it very difficult, if not impossible, for the applicant and her representatives to exclusively work remotely. As well, as Ms. Rose points out, having to seek the assistance of CSC staff at GVI in dealing with written materials would jeopardize the applicant's right to confidential and privileged communications with her legal counsel. All of this gives rise to serious access to justice concerns.

[72] I do not accept the respondent's submission that it would merely be "inconvenient" if the applicant were transferred at this time. Nor do I accept that the disruption to the working relationship with her representatives would simply be an inherent consequence of the applicant's transfer. When a serious issue has been raised about the lawfulness of the transfer decision, the significance of the impact of transferring the applicant cannot be dismissed so easily.

[73] Turning to the COVID-19 pandemic, one can certainly understand why the applicant would be apprehensive about being moved from a part of the country where the infection rate is relatively low to a correctional institution in another part of the country where the infection rate is much higher. However, since I have found irreparable harm in another respect, it is not necessary to determine whether the evidence before me is sufficient to establish irreparable harm in the form of an increased risk of contracting COVID-19 if the applicant is transferred to GVI.

C. *Balance of Convenience*

[74] At this stage of the test, as the moving party, the applicant must establish that the harm she would suffer if the interlocutory injunction is refused is greater than the harm the respondent would suffer if the interlocutory injunction is granted. This weighing exercise is neither scientific nor precise: see *Canada (Citizenship and Immigration) v Canadian Council for Refugees*, 2020 FCA 181 at para 17. But this is not to say it is unprincipled. On the contrary, it is at the heart of the determination of what is just and equitable in the particular circumstances of the case at hand.

[75] In assessing the balance of convenience, in addition to the applicant's interests, the public interest must be taken into account in a case such as this which involves the actions of a public authority (*RJR-MacDonald* at 350). The transfer decision was made pursuant to statutory and regulatory authority granted to CSC generally and to its individual decision makers more particularly. It is therefore presumed that the decision is in the public interest. Consequently, it is also presumed that an action that suspends the effect of that decision (as would an interlocutory injunction) is detrimental to the public interest: see *RJR-MacDonald* at 346 and 348-49. Whether this is sufficient to defeat a request for an interlocutory injunction in a given case will, of course, depend on all the circumstances of the case. This can also depend on how long the effect of the transfer decision would be suspended: see *Canadian Council for Refugees* at para 27. As noted above, the apparent strength of the moving party's case in the underlying litigation must also be borne in mind.

[76] The public interest is not necessarily a monolithic concept that weighs exclusively on the respondent's side of the scale. The public's interest in the proper management of the relationship between the applicant and the incompatible inmate includes the applicant's general welfare and her successful re-integration into the community. These are also things with which CSC has been entrusted in the public interest. CSC is required under its enabling legislation to pursue these things, along with all other matters coming within its mandate, in accordance with the purposes and principles set out in the *CCRA*. This includes "assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community" (*CCRA*, section 3(b)). It also includes using "the least restrictive measures consistent with the protection of society, staff members and offenders" (*CCRA*, section 4(c)) and considering alternatives to custody in a penitentiary (*CCRA*, section 4(c.1)).

[77] Equally, the public has a clear interest in seeing that justice is done in this case. This includes providing the applicant with a meaningful remedy and effective relief should she succeed in the underlying application for judicial review. The applicant herself shares this interest not only with the public but also with the administration of justice.

[78] Thus, the assessment of which party would suffer greater harm from the granting or refusal of the injunction pending a decision on the merits of the underlying judicial review application is not necessarily a straightforward, binary determination.

[79] Further, the impact on the public interest of granting an interlocutory injunction is a matter of degree and this can vary depending on the subject matter of the litigation. As the Supreme Court noted in *RJR-MacDonald*, the impact on the public interest of exempting an individual litigant from the application of lawfully enacted legislation is less than suspending the effect of that legislation entirely. The impact of suspending temporarily the implementation of the Deputy Commissioner's decision concerning the applicant's transfer is arguably of an even lesser degree than this (although again the precise calibration of that impact will depend on the particular circumstances of the case).

[80] Similarly, the impact on CSC of an order to refrain from doing something is less than would be the case if the order required CSC to do something: see *Canadian Broadcasting Corp* at paras 15 and 16. It is less intrusive to restrain CSC from going ahead with the applicant's transfer than it would be to order CSC to perform some positive act. Nevertheless, I acknowledge that, if the injunction is granted, Nova will be required to continue to take steps to keep the applicant and the incompatible inmate apart, even though this is not a term of the order.

[81] On the record before me on this motion (including the confidential affidavit from the SIO), I am satisfied that the balance of convenience favours the applicant. More particularly, I am satisfied that the interests advanced by the respondent do not outweigh the harm the applicant would suffer if she were to be transferred before her application for judicial review has been determined. The transfer decision was presumably made in the best interests of the incompatible inmate and, more generally, to promote institutional safety and security (including the safety and security of the applicant). These are all important objectives. However, on the record before me,

I am not satisfied that they would be jeopardized to such a degree if the applicant is not transferred before her application for judicial review is determined that they outweigh the harm that would result if she were transferred at this time.

[82] A number of considerations have led me to this conclusion.

[83] There is no evidence of any conflicts or other types of adverse encounters between the applicant and the incompatible inmate. This was noted by Mr. Ramsay in the A4D prepared in mid-September. Nothing has changed since then.

[84] Ms. Rudderham, the Acting Manager of Assessment and Intervention, affirmed an affidavit on this motion on October 26, 2020. The SIO who prepared the original incompatibility report affirmed a public affidavit on this motion on October 27, 2020. Neither report any incidents between the applicant and the incompatible inmate. This is consistent with the applicant's evidence on this motion.

[85] The SIO states in her public affidavit that, because of the physical infrastructure at Nova, it is not possible to house the applicant and the incompatible inmate in separate units or ranges in the general medium-security population "because no such facilities exist." The SIO explains: "Nova's institutional design prevents it from completely separating medium security inmates. Medium security offenders at Nova reside in a campus-style open community in residential style, self-contained small group accommodations." Generally speaking, inmate movement and association are "regulated primarily through dynamic security involving regular monitoring and

a high degree of interaction between staff and inmates." This "dynamic security" is "heavily dependent upon inmates managing their own behaviour."

[86] On September 25, 2020, the applicant was observed sitting at a picnic table where she was not permitted to be. On October 2, 2020, the applicant was observed in another out-of-bounds area, between two housing units. There is no evidence that the applicant and the incompatible inmate encountered one another on either of these occasions. This is the only institutional misconduct reported about the applicant in the record on this motion. Neither incident led to anything more serious than counselling about rule violations.

[87] As of the date of the SIO's affidavit (October 27, 2020), the incompatible inmate was residing in the Structured Living Environment ("SLE"). This facility is staffed 24-hours a day with specialized correctional, rehabilitation, and mental health staff. Women are placed in the SLE voluntarily and, subject to restrictions that apply to the institution as a whole, have access to the rest of the facility, activities and programs.

[88] According to the SIO, CSC staff have been "making best efforts" to ensure that the applicant and the incompatible inmate do not encounter one another during recreation time, at appointments, in medication lines, or in programs. There is no evidence that these efforts have failed or that being required to make them has placed an undue burden on CSC staff or would do so in the foreseeable future. Further, the applicant is not permitted to visit, and will not be permitted to reside in, the area where the SLE is located in order to reduce the likelihood that the

two of them "will cross paths." There is no evidence that this directive has placed an undue burden on the institution or would do so in the foreseeable future.

[89] General restrictions on programming, group events, and inmate movement adopted as a result of the COVID-19 pandemic have also assisted in keeping the applicant and the incompatible inmate apart. The SIO states in her public affidavit that lifting these restrictions will make it more difficult to keep the applicant and the incompatible inmate apart. She even goes so far as to assert that CSC's ability to control the movement of the applicant and the incompatible inmate is "rapidly deteriorating" with the lifting of COVID-19 restrictions. However, the SIO also states that CSC will be adopting a "phased and gradual approach" to restoring interventions, programs and services. No schedule of when or how this is going to happen is provided. There is no evidence that the practice of dividing inmates into cohorts to minimize the risk of the infection spreading within the institution will be abandoned in the foreseeable future, even if more programs and services gradually become available. (There appears to be no question that the applicant and the incompatible inmate are in different cohorts.) Even assuming for the sake of argument that the gradual easing of general restrictions will require the adoption of more tailored restrictions to keep the applicant and the incompatible inmate apart, there is no evidence that this would be unduly burdensome or is likely to be ineffective, even if the applicant and the incompatible inmate both continue to be classified as medium security. Perhaps more to the point, in the absence of specific evidence as to when and how these general restrictions will be lifted, any concerns in this respect are speculative at best at this time.

[90] I accept that the incompatible inmate's status as a victim of the applicant under section 26 of the *CCRA* (obtained by her after the decision to transfer the applicant was made) poses an additional challenge for CSC staff at Nova. However, there is no evidence before me that anything untoward has happened in the time since that status was recognized (some six weeks now). Presumably there are a number of measures short of transferring the applicant that are available to CSC staff at Nova to mitigate any risks associated with the incompatible inmate having access to confidential information about the applicant (e.g. counselling the incompatible inmate about the importance of protecting the confidentiality of the information and taking appropriate action if she fails to do so). There is no evidence before me that any such measures have been attempted or, if they have, that they have failed to mitigate this new risk.

[91] There is an additional consideration that one might have thought would bear on the balance of convenience in the applicant's favour. This is that it would appear that CSC, in conjunction with the Parole Board, has other options for keeping the applicant and the incompatible inmate apart besides transferring the applicant to GVI. As noted above, the applicant became eligible for day parole on September 11, 2020. She will be eligible for full parole on November 9, 2020.

[92] The applicant has not applied for either day or full parole because she has not completed her Correctional Plan. Indeed, apparently her Correctional Plan is in the process of being revised by CSC even now. I do not have sufficient evidence to determine who is responsible for the fact that the applicant is not yet in a position to apply for day parole or full parole but neither is it necessary for me to do so. The evidence from Ms. Rudderham is that even if the applicant

applied for day parole immediately, her case is unlikely to be reviewed by the Parole Board until April 2021. Regrettably, this delay means that an alternative measure that would effectively separate the applicant and the incompatible inmate (while also facilitating the applicant's return to the community) is not available in this case. As a result, a factor that could have weighed on the applicant's side of the scale cannot do so directly. That being said, even if the applicant bears at least some responsibility for not having completed her Correctional Plan yet, the delays in accessing CSC programs and the delays at the Parole Board are entirely outside her control.

[93] The respondent submits that, given the resources available at GVI compared to Nova, the applicant would be in a better position to complete her Correctional Plan there. I view this as a neutral consideration. Other things being equal, it is CSC's responsibility to support the applicant in the completion of her Correctional Plan and to prepare her for release wherever she is incarcerated.

[94] In sum, I disagree with the respondent's categorical assertion that the balance of convenience favours the respondent because an injunction would prevent CSC from performing its statutory duties. Rather, in my view, the injunction would require CSC to perform those duties in a different manner than it has chosen, and even then only for the duration of the injunction. While this is a limitation on CSC's ability to act as it sees fit, this is a consequence of CSC's decisions being subject to judicial review and to the rule of law.

[95] Accepting, as I do, that the presence of both the applicant and the incompatible inmate poses management challenges for the staff at Nova, the impact of those challenges and the risk of

something going wrong can both be mitigated by ensuring that an interlocutory injunction is in place for no longer than is necessary. This, in turn, can be achieved by expediting the hearing of the application for judicial review. At the hearing of this motion, counsel for the applicant agreed that, whatever the outcome at this stage, it would be appropriate for the judicial review to proceed expeditiously. Counsel for the respondent advised that she would need to seek instructions from her client (although, to be fair, she also said she anticipated receiving instructions to support the expeditious scheduling of this matter).

[96] On October 28, 2020, the Chief Justice appointed me to case manage the underlying judicial review proceeding. In this role, it will be my responsibility, in consultation with the parties, to ensure that a feasible schedule for the timely disposition of this matter is set and adhered to.

[97] The respondent also submits that it would be neither just nor equitable to grant an interlocutory injunction because to do so would effectively give the applicant access to a remedy to which she is not entitled in the underlying application for judicial review – namely, "release" from incarceration at GVI.

[98] I do not agree.

[99] The respondent's attempt to analogize the present motion to an application for *habeas corpus* is not persuasive.

[100] The applicant is not currently incarcerated at GVI. She is incarcerated at Nova. If granted, an interlocutory injunction would only prevent her transfer from Nova to GVI until her application for judicial review has been determined. There is no meaningful sense in which it "releases" her from incarceration at GVI, an institution in which she is not, in fact, incarcerated at this time.

[101] Similarly, if the application for judicial review was determined in the applicant's favour before she was transferred to GVI, this would not "release" her from incarceration there for the simple reason that she was not incarcerated there.

[102] This brings me to the broader issue of the risk of remedial injustice.

[103] The specific relief the applicant seeks in her application for judicial review is to have the transfer decision set aside and the question of transfer be reconsidered. She seeks a meaningful opportunity to try to persuade the decision maker not to transfer her to GVI. She seeks what she contends she was unlawfully denied when the transfer was approved – namely, the right to state her case against transfer before she is transferred.

[104] I am satisfied that transferring the applicant now would deprive her of access to a meaningful remedy and to effective relief should she succeed in the underlying application for judicial review. The right the applicant claims would be irreparably lost if an interim injunction is denied. The countervailing interests reviewed above are insufficient to justify such an outcome in the particular circumstances of this case. In making this determination, I have also

considered that the applicant has raised a clearly arguably ground of judicial review relating to the requirements of procedural fairness and whether they were respected in her case.

[105] If the interlocutory injunction is refused and the transfer goes ahead, the applicant's transfer would be a *fait accompli*. There would appear to be little a reviewing court could do to restore the *status quo ante* even if it were satisfied that the decision to transfer the applicant was unlawful. Setting aside the decision and ordering that the question of involuntary transfer be reconsidered would be important steps but they would not fully capture the relief to which the applicant says she is entitled. The respondent contends that the applicant could submit her rebuttal from GVI. Respectfully, that would be a meaningless remedy in the circumstances of this case. Granting an interlocutory injunction is the only way to ensure that the applicant has access to the remedy that she seeks for the denial of procedural fairness she alleges – namely, having a fair opportunity to state her case against transfer before she is transferred. By preserving the *status quo* until the lawfulness of the transfer decision is determined, an interlocutory injunction ensures that the subject matter of the litigation is also preserved.

[106] For the sake of completeness, I note that there is no suggestion that CSC would voluntarily return the applicant to Nova if the transfer decision is set aside on review. Even if this were the case, the logistics that would be involved in moving the applicant from Ontario to Nova Scotia suggest that a return trip would take some time to arrange. As well, the wisdom of moving the applicant back and forth between Nova and GVI would be very much in doubt given the disruption that would be caused to the applicant's life and to her Correctional Plan, not to mention the expense to the public.

[107] Finally, while it hardly needs to be said given the case by case nature of decisions on requests for interlocutory injunctions, my determination of where the balance of convenience lies here depends on the specific circumstances of this case. How the balance of convenience might be determined in another case – even another case involving an involuntary transfer – will depend on the particular circumstances of that case. I therefore do not accept the respondent's submission that ruling in the applicant's favour in this case will somehow open the floodgates to other applications for interlocutory relief.

V. CONCLUSION

[108] For these reasons, I am satisfied that granting an interlocutory injunction is just and equitable in all of the circumstances of the case.

ORDER IN T-1234-20

THIS COURT ORDERS that

1. The applicant's motion for an interlocutory injunction is granted.
2. Correctional Service Canada shall not carry out the involuntary transfer of the applicant from Nova Institution for Women to Grand Valley Institution until the applicant's application for judicial review of the decision approving this transfer has been finally determined.
3. The applicant did not seek costs on this motion and none are ordered.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1234-20
STYLE OF CAUSE:	ROBIN GRAY V ATTORNEY GENERAL OF CANADA

HEARING HELD BY VIDEOCONFERENCE ON NOVEMBER 5, 2020 FROM OTTAWA, ONTARIO (COURT) AND DARTMOUTH/HALIFAX, NOVA SCOTIA (PARTIES)

ORDER AND REASONS:	NORRIS J.
DATED:	NOVEMBER 6, 2020

APPEARANCES:

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