Federal Court of Canada
Trial Division

Section de première instance de
la Cour fédérale du Canada

Date: 19991008

Docket: T-2119-97

Between:

**MARC GRAVEL, currently an inmate
at the Port Cartier institution,
located on the Chemin de l'aéroport,
C.P. 7070, Port Cartier, province of Quebec,**

Applicant,

- and -

ATTORNEY GENERAL OF CANADA,

Respondent.

REASONS FOR ORDER

PINARD J.

[1] This application for judicial review is from a decision by Brendan Reynolds, Deputy Commissioner of Penitentiaries, on May 26, 1997 dismissing at the final level the grievance of the applicant (I35001000884) from his placement in segregation, the upward adjustment of his security level and his subsequent transfer against his wishes from the Cowansville medium security institution to the maximum security institution at Port Cartier.

[2] The applicant essentially objected that the respondent had not given him sufficient information and also that he had not seriously considered his representations before arriving at the decision at issue of May 26, 1997, which reads as follows:

> [TRANSLATION]
>
> Your grievance I35001000884 received at the head office on May 12, 1997 has been considered.
>
> First, you object to your placement in segregation on February 6, 1997. You further object to the raising of your security level, and finally, you object to the recommendation of involuntary transfer from the Cowansville institution (medium) to the Port Cartier institution (maximum). As correctional measures you ask that your security level continue to be medium, and you also ask that you be transferred to another medium security institution, and finally, that the information which you describe as lies be removed from your record. You object to the information from preventive security and continue to protest your innocence.
>
> To begin with, at the time you were placed in segregation on February 6, 1997 you had become a matter of concern to preventive security in respect of drug trafficking. Additionally, you had been told that the information contained in your security file showed that you might escape by underground tunnels. Finally, it was established that you had put such "pressure" on a fellow inmate that the latter had had to ask for protection.
>
> Based on the analysis contained in your record, we support the decision of the Director of the institution in accordance with Commissioner's directive No. 590, paragraph 3(a)(1), which provides: "The institutional head may order that an inmate be confined in administrative segregation if the institutional head believes on reasonable grounds that the inmate has acted, has attempted to act or intends to act in a manner that jeopardizes the security of the institution or the safety of an individual, and that his or her continued presence in the general inmate population would jeopardize the security of the institution or the safety of any person . . .".
>
> Second, based on the information contained in your preventive security file and your placement in segregation, your security level was raised. The factors relating to *adjustment to the institution* were raised to high; the factors relating to *risk of escape* were raised to high; and finally, the factors relating to *public safety* were raised to high, resulting in an overall security rating of maximum. After reviewing the relevant documents, we support this decision. You will understand that the determination of a security level is based on an assessment of the risk and related requirements of an inmate. Correctional Service Canada will ensure that this rating is the subject of ongoing review and is amended if necessary.
>
> Consequently, the Director of the RRC noted that the recommendation to transfer you to the Port Cartier institution was relevant and approved it. As a result, you will continue to remain in segregation pending transfer as soon as it is possible to make one.
>
> In the circumstances, we agree with the response given to you at the preceding level. We are also satisfied with the results of the review of your security level, which increased it. This review seems to us to have been essential and justified. Your involuntary transfer was based on legitimate and valid grounds. We also conclude that the procedure followed in this transfer was consistent with Commissioner's Directive 540, Paragraph 15.

Your grievance is rejected.

* * * * * * * * * * * *

[3] The relevant legislation is contained in ss. 27 to 37 of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 ("the Act") and ss. 11 to 23 of the Corrections and Conditional Release Regulations, SOR/92-620 ("the Regulations"). Also applicable are Commissioner's Directives Nos. 081, dealing with inmate complaints and grievances, 540 on inmate transfers and 590 on administrative segregation.

[4] The decision to transfer an inmate to one institution rather than another is a discretionary decision (*Kelly v. Attorney General of Canada* (1987), 12 F.T.R. 296), carrying with it a duty to observe the requirements of procedural fairness (*Maple Lodge Farms v. Government of Canada*, [1982] 2 S.C.R. 2). The general rule on the standard of control applicable to such a discretionary decision was succinctly stated by McIntyre J. in *Maple Lodge Farms, supra*, at 7 and 8:

> It is, as well, a clearly-established rule that the courts should not interfere with the exercise of a discretion by a statutory authority merely because the court might have exercised the discretion in a different manner had it been charged with that responsibility. Where the statutory discretion has been exercised in good faith and, where required, in accordance with the principles of natural justice, and where reliance has not been placed upon considerations irrelevant or extraneous to the statutory purpose, the courts should not interfere.

* * * * * * * * * * * *

[5] The following facts emerged clearly from the record as a whole, including the record of each party:

- the applicant is currently an inmate at the Port Cartier institution, a maximum security penitentiary, and has been there since June 20, 1997;
- the applicant is serving a term of life imprisonment for second-degree murder with eligibility after twelve years' detention;
- prior to June 20, 1997 the applicant was an inmate at the Cowansville institution, a medium security penitentiary;
- on February 5, 1997, when the applicant was an inmate at the Cowansville institution, he was informed that his security level had been reviewed and raised to HIGH following the receipt of confidential information from the institution's preventive security branch regarding his involvement in an escape plot;
- on that date the applicant was also informed that he could challenge the security level through the inmate grievance procedure;
- on February 7, 1997 the applicant was informed in writing by the Director of the Cowansville institution that he would henceforth be placed in administrative segregation for the following reasons:

[TRANSLATION]

You have become a matter of concern to preventive security in respect of drug trafficking.
We have information that you might escape by underground tunnels.
You have put such "pressure" on a fellow inmate that the latter has had to ask for protection.

. . . . .

Continuing in administrative segregation to protect the security of the institution. Inmate whose security level was set at maximum and so can no longer be incorporated in the general population. His case will be considered for a transfer to an institution corresponding to his security level;

- on February 20, 1997 the applicant was informed in writing that his case management team recommended him for a transfer to the Port Cartier institution, a maximum security penitentiary;

- on February 24, 1997 a "Notice of Involuntary Transfer Recommendation" was accordingly given to the applicant, in which he was told the reasons for the recommendation:

[TRANSLATION]

The review of your classification was prompted by the receipt of reliable information by preventive security. All this information taken together indicated that you could no longer be confined in a medium security institution such as this one. We are therefore recommending your transfer to the Port Cartier institution.
The gist of the information is as follows:
August 1996:
Pressure on fellow inmate to change statement incriminating him. After this inmate had to request protection as you had told the other inmates that he was an informer.
September 1996:
Seizure of six-foot electric wire in your cell.
October 1996:
Information that you were intending to escape through underground tunnels with the aid of an inmate who would be released;

- at the same time the applicant was also told that he was entitled to the services of counsel and could submit reasons for a review of the case in 48 hours;
- on February 24, 1997 the applicant submitted reasons in writing challenging the notice recommending involuntary transfer to the Port Cartier institution;
- on March 3, 1997 the applicant was informed by the Director of the Cowansville institution that after reviewing the documentation submitted by the case management team and the applicant's representations, the latter upheld the recommendation and was forwarding the file to the Director of the regional reception centre for a final decision;
- on March 27, 1997 the applicant received a document titled "Notice of decision of involuntary transfer", in which he was informed that after reviewing the record as a whole the Director of the Regional Reception Centre had decided to transfer him to the Port Cartier institution as soon as possible;

- on that date the applicant was further informed that he could challenge the decision by the procedure laid down for grievance settlement with the Deputy Commissioner, Québec region;
- this grievance procedure had already been initiated by the applicant on March 10, 1997, challenging both his security classification and his involuntary transfer to the Port Cartier institution;
- on April 9, 1997 the Deputy Commissioner, Québec region, responded to the applicant's grievance regarding his transfer and informed him that his grievance had been rejected;
- on April 27, 1997 the applicant filed a grievance at the third level in respect of his transfer;
- on May 26, 1997 the Assistant Commissioner, Organisational Development of Correctional Service Canada made the decision at issue rejecting this final grievance.

[6] It is not in dispute that the following documents were given to the appellant at the proper time:

- "Applicant's Progress Summary Report", dated February 5, 1997, prepared when his security classification was reviewed;
- "Twenty-four hour review of inmate's segregation status"; and
- "Notice of Involuntary Transfer Recommendation" given to the applicant on February 24, 1997.

[7] In the first document on review of the applicant's security classification there are the following statements:

[TRANSLATION]

- August 1996:
Pressure on fellow inmate to change statement incriminating him. As a result inmate had to request protection as Marc Gravel had told the other inmates he was an informer.

- September 1996:
Seizure of six-foot electric wire in his cell.

- October 1996:
Information that Marc Gravel intended to escape through underground tunnels with the help of an inmate who would be discharged.

- December 1996:
Information that the inmate Gravel was one of the inmates involved in the attempt to escape by underground means. He and a fellow inmate allegedly closed the lid after the inmates in question were in the underground tunnels.

- January 1997:
Marc Gravel brought in drugs (300 valiums) during the holidays and at the next FFV he was to bring in a zip-gun and ammunition to take revenge on a fellow inmate.

- January 1997:
Marc Gravel allegedly made a homemade pick similar to a hunting knife. This weapon was seized outside near room 10.

- January 1997:
Information that Marc Gravel was to be part of an escape plot through underground tunnels and expected that the first inmates would succeed in their escape and he could then escape.

- January 1997:
The inmate admitted to his CMO that his urine test would be positive because he had taken two valiums.

- January 1997:
The inmate Gravel met with the PSO Rénald Dubois to discuss information linking him to an escape plot. He said he was not guilty and mentioned that he would handle his own investigation and prove what he said. He was told by the ASP not to implicate inmates without proof and not to put any pressure on staff in order to achieve his ends. He disregarded the ASP's warning and put pressure on an inmate to make the latter exonerate him and incriminate himself in Gravel's place. A member of staff was also harassed by Gravel to give him an alibi on the evening of the escape attempt.

. . . . .

In view of the presence of confidential information, we are led to conclude that there is a need for a more restrictive and secure environment.

. . . . .

In view of the present situation and the confidential information, we must take into account the fact that if the subject escaped the safety of the public would be endangered and as the plans appeared serious we are led to give this party a high classification.

[8] In the second document, on the applicant's administrative segregation, it states:

[TRANSLATION]

Further to a review of your security level, this has been revised upwards and is now high.

For the following reasons:

You are a matter of concern to preventive security as regards drug trafficking.
We have information that you could escape by underground tunnels.
You have put such "pressure" on a fellow inmate that the latter has had to request protection.

[9] Finally, in the third document regarding the applicant's involuntary transfer, it states:

[TRANSLATION]

The review of your classification was prompted by the receipt of reliable information by preventive security. All this information taken together indicated that you could no longer be confined in a medium security institution such as this one. We are therefore recommending your transfer to the Port Cartier institution.
The gist of the information is as follows:

- August 1996:
Pressure on fellow inmate to change statement incriminating him. After this inmate had to request protection as you had told the other inmates that he was an informer.

- September 1996:
Seizure of six-foot electric wire in your cell.

- October 1996:
Information that you were intending to escape through underground tunnels with the aid of an inmate who would be released.

- December 1996:
Information that you were one of the inmates involved in the attempt to escape by underground means. You and a fellow inmate allegedly closed the lid after the inmates in question were in the underground tunnels.

- January 1997:
You brought in drugs (300 valiums) during the holidays and at the next FFV you were to bring in a zip-gun and ammunition to take revenge on a fellow inmate.

- January 1997:
You allegedly made a homemade pick similar to a hunting knife. This weapon was seized outside near room 10.

- January 1997:

Information that you were to be part of an escape plot through underground tunnels and expected that the first inmates would succeed in their escape and you could then escape.

- January 1997:
You admitted to your CMO that your urine test would be positive because you had taken two valiums.

- January 1997:
You met with the ASP Rénald Dubois to discuss information linking you to an escape plot. You said you were not guilty and mentioned that you would handle your own investigation and prove what you said. You were told by the ASP not to implicate inmates without proof and not to put any pressure on staff in order to achieve your ends. You disregarded the ASP's warning and put pressure on an inmate to make the latter exonerate you and incriminate himself in your place. A member of staff was also harassed by you to give you an alibi on the evening of the escape attempt.
The reasons given for your transfer are indicated primarily under the heading "Reasons for Transfer" in your PSR for transfer from Cowansville on February 20, 1997, a copy of which you received at the same time as this notice and which forms an integral part of this notice.

[10] In my opinion, the documentary evidence is that the applicant received the information necessary to submit his various grievances. In *Camphaug v. Canada* (1990), 34 F.T.R. 165, at 166 and 167, my brother Strayer J. found that sufficient:

> It is established by the decision of the Federal Court of Appeal in **Trono v. Gallant** [see footnote 1] and other cases that there is a requirement of procedural fairness in the taking of such decisions to transfer inmates to a higher security prison. This arises both under common law requirements of fairness and under s. 7 of the **Canadian Charter of Rights and Freedoms** which requires that such decisions be taken in accordance with the principles of fundamental justice. I respectfully accept the way in which the requirement was described by Marceau, J.A., in the **Trono** case [see footnote 2]. He said that what is involved is the audi alteram partem principle. This principle requires some participation of the person in respect of whose rights or interests the decision is being taken, such participation allowing him to bring forth information that can help the decision-maker to reach a fair and prudent conclusion. The content of the fairness requirement will be the same whether it is ascribed to the common law or to the **Charter**. . . .
>
> In the present case, I am satisfied that the inmate has had sufficient opportunity to make such representations. First, it appears to me from the internal evidence that he did have the Progress Summary available to him when he drafted his submissions on January 22. . . .

[11] Although certain documents refer to confidential information which for obvious security reasons was not shared with the applicant, the information given to him was nonetheless sufficient as he was given the gist of the reasons for all the decisions relating to him. In this

connection we need only refer to *Gaudet v. Marchand et al.*, [1994] A.Q. No. 375 (not reported), in which the Quebec Court of Appeal clearly stated the rules applicable in such a situation:

> In the present case, appellant contends that his transfer to administrative segregation and to the special handling unit was unlawful because he did not obtain a fair hearing prior to the transfer. . . . Appellant's counsel makes it equally plain, in his letter of November 10, 1993, that what appellant wished to have was an oral hearing at which he could cross-examine the witnesses, including the confidential sources, who had provided information to the prison authorities against him. . . .
>
> The identities and statements of police informers is, of course, protected by a well-established rule of confidentiality. (*Bisaillon v. Keable et al.*, [1983] 2 S.C.R. 60) In a prison context, the reasons for the rule are too obvious to need elaboration. Suffice it to say, there would be few prison informers if their identities were not protected. Further, while the penitentiary authorities did have a duty to act fairly and to afford appellant an opportunity to know the reasons for the transfer and an opportunity to be heard or to make representations on his behalf, the prison context must be borne in mind. . . .
>
> In this case, appellant was given the opportunity to consult counsel and to make representations in person and in writing as to the reasons for the transfer. In my view, the authorities satisfied their obligation to act fairly, as indicated by the Supreme Court in *Cardinal and Oswald*. . . .
>
> In my respectful opinion, the authorities had no duty to provide appellant with copies of the statements given by informers, nor to afford appellant an opportunity to cross-examine these witnesses or the penitentiary authorities themselves. In a prison context, such a hearing would go considerably beyond procedural fairness into the realm of an unreasonable intrusion into the administration and security of the penitentiary. I am mindful that it is not always an easy matter to balance the need for procedural fairness to a prisoner with the contextual requirements of prison administration and safety, as well as the duty to protect the identities and safety of informers and other confidential sources. . . .
>
> In this case, I believe the balance was struck and the requirement of procedural fairness was met. Appellant was serving a life sentence for participating in an escape in which a prison guard was murdered. He has tried to escape several times and he has already been transferred to a special handling unit on 4 or 5 previous occasions. All of the assessments in the record indicate that he constitutes a danger to the public and that the risk of escape in his case is high.
>
> While the authorities have not provided appellant with statements of the confidential sources, he has been provided with a reasonably detailed summary of the reasons for his transfer and the substance of what the authorities have been told about his involvement in an escape plot. And while appellant has not been given an opportunity of confronting or cross-examining the confidential sources or the penitentiary authorities, he has been given an opportunity of making representations in person and in writing.
>
> (My emphasis).

[12] As to the applicant's argument that his representations were not properly considered, I see nothing in the decision in question or in the earlier decisions to which it refers that enables me to agree with him. First, it was not in dispute that the applicant had an opportunity before each of those decisions to make full representations, and made use of that opportunity. The applicant had a duty to show that the respondent did not consider all the evidence before him, including his representations. In the case at bar, each decision expressly mentions that the applicant's representations were taken into account and there is nothing in them that conflicts with particular points of the evidence. I agree with the respondent that the fact a decision does not allow a party's claims does not necessarily mean that it did not take the representations the latter may have made into account. As I see it, it is clear that the penitentiary authorities took the representations made by the applicant into account, both in the final decision at issue and in the earlier decisions to which it refers.

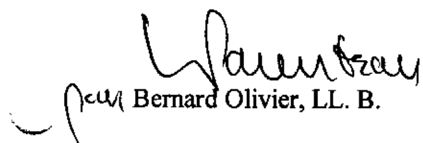
[13] Finally, the alternative argument submitted by counsel for the applicant at the hearing in this Court, as to the inadequacy of the reasons in the decision at issue of May 26, 1997, falls down simply on reading that decision, reproduced at the start of these reasons. The applicant received a decision with reasons which was both concise and complete.

[14] For all these reasons, the application for judicial review must be dismissed.

YVON PINARD
JUDGE

OTTAWA, ONTARIO
October 8, 1999

Certified true translation



Bernard Olivier, LL. B.

FEDERAL COURT OF CANADA
TRIAL DIVISION

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT No.:	T-2119-97
STYLE OF CAUSE:	Marc Gravel v. Attorney General of Canada
PLACE OF HEARING:	Montréal
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REASONS FOR ORDER BY:	Pinard J.
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