Federal Court of Appeal  Cour d'appel fédérale

Date: 20160803

Docket: A-421-15

Citation: 2016 FCA 203

CORAM: **NADON J.A.**
DAWSON J.A.
WEBB J.A.

BETWEEN:

HER MAJESTY THE QUEEN
IN RIGHT OF CANADA
(THE COMMISSIONER OF THE
CORRECTIONAL SERVICE OF CANADA,
THE WARDEN OF KENT INSTITUTION and
THE WARDEN OF MISSION INSTITUTION)

Appellant

and

JEFFREY G. EWERT

Respondent

Heard at Vancouver, British Columbia, on June 13, 2016.

Judgment delivered at Ottawa, Ontario, on August 3, 2016.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: NADON J.A.
WEBB J.A.

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] The Correctional Service of Canada employs certain psychological tests, referred to as assessment tools or actuarial tests, to assess the risk of criminal recidivism and to assess psychopathy in inmates. The respondent in this Court, Jeffrey Ewert, commenced an action in

the Federal Court in which he alleged that the assessment tools are unreliable when administered to Aboriginal inmates such as himself and that, in the result, their use violated rights protected by section 7 and 15 of the Canadian *Charter of Rights and Freedoms*. At trial, he sought injunctive and declaratory relief.

[2] For reasons cited as 2015 FC 1093, a judge of the Federal Court found that the use of the assessment tools in respect of Aboriginal inmates was contrary to subsections 4(*g*) and 24(1) of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (Act) and also violated section 7 of the *Charter* in a manner that could not be justified. The Federal Court found it unnecessary to consider the application of section 15 of the *Charter* noting that "[t]he facts in this case are not sufficiently developed to usefully engage in the nuanced analysis called for in s 15" (reasons, at paragraph 109).

[3] In consequence, the Court stated its intent "to issue a final order enjoining the use of the assessment tools in respect of the Plaintiff and other Aboriginal inmates until, at minimum, the Defendant conducts or has conducted a study that confirms the reliability of those tools in respect to adult Aboriginal offenders" (reasons, at paragraph 114). Meanwhile, the Federal Court issued an interim order that:

i. enjoined the defendant from using results obtained from the use of five specified assessment tools in respect of Mr. Ewert; and,

ii. required the parties to "file written briefs in respect of the type, methodology and other relevant matters in respect of the study to be conducted to assess the reliability of these psychological tests in respect to adult Aboriginal offenders".

[4] This is an appeal from the interim order of the Federal Court. For the reasons that follow, I conclude that the Federal Court erred in law in finding that Mr. Ewert had established both a breach of the Act and a violation of section 7 of the *Charter*. It follows that I would allow the appeal and dismiss Mr. Ewert's action. In the circumstances, I would not award costs.

I. The Decision of the Federal Court

[5] After setting out the factual background and describing the five assessment tools at issue, the Federal Court described the expert evidence tendered by Dr. Hart for Mr. Ewert and Dr. Rice for the defendant. The Court preferred the evidence of Dr. Hart, finding Dr. Rice's evidence to be of little assistance (reasons, at paragraphs 26, 47 and 53). Dr. Hart's evidence was summarized; the Federal Court described his salient testimony as follows:

i. the assessment tools are more likely than not to be "cross culturally variant" (reasons, at paragraph 28);

ii. given the pronounced differences between Aboriginal and non-Aboriginal groups, Dr. Hart would not apply scores derived from the assessment tools to Aboriginal persons (reasons, paragraph 31);

iii. in Dr. Hart's view, the better approach is a structured clinical assessment of an Aboriginal offender, which would include some consideration of the information derived from the assessment tools, seen in the totality of the circumstances known about the offender (reasons at paragraph 32); and,

iv. there are three methods to establish that an assessment tool is free from cross cultural bias. None of the methods had been applied to the assessment tools (reasons, at paragraphs 34-36).

[6] The Federal Court accepted what it characterized to be Dr. Hart's evidence that the assessment tools "are not good predictors of recidivism in Aboriginals … [t]hey suffer from cultural bias" (reasons, at paragraph 53). It followed that the "expert evidence establishes that the test scores, in and of themselves, ought not to be relied upon" (reasons, paragraph 56).

[7] The Federal Court went on to find that psychologists and the Correctional Service rely on the test scores produced by the assessment tools (reasons, at paragraph 58). The use of the scores adversely impacted institutional decisions that affected Mr. Ewert's eligibility for parole, his security classification and his ability to be granted escorted temporary absences (reasons, at paragraphs 60-65, and 75).

[8] The Federal Court then moved to its legal analysis, finding that:

i. while Mr. Ewert "framed his case principally as a Charter breach", more properly the case involved a breach of statutory duty (reasons, at paragraph 76-77);

ii. by "relying upon questionable tests and in failing to ensure that the tests are reliable" the Correctional Service breached subsection 24(1) of the Act which required it "to take 'all reasonable steps' to ensure that information about [Mr.] Ewert … is accurate, up-to-date and as complete as possible" (reasons, paragraph 81);

iii. it was not necessary on this issue for Mr. Ewert to establish definitively that the tests are biased. It was sufficient "if he raises a reasonable challenge to their reliability pursuant to the aforementioned statutory requirements" (reasons, at paragraph 82);

iv. contrary to Mr. Ewert's submission, the Correctional Service did not owe an "overarching fiduciary duty to him" (reasons, at paragraph 86);

v. with respect to section 7 of the *Charter*, Mr. Ewert's liberty interests were engaged because the assessment tools were used to restrict or deprive his liberty by making parole "virtually impossible", by setting his security classification at a high level and by negatively affecting requests for escorted temporary absences (reasons, paragraphs 88-89);

vi. Mr. Ewert's security of the person interest was engaged because he had been labelled psychopathic (reasons, at paragraph 92);

vii. there was no evidence that the scores and the conclusions that flowed from the use of the assessment tools predicted recidivism in Aboriginal offenders as accurately or reliably as they did for non-Aboriginal offenders (reasons, at paragraph 99);

viii. the "continued use of the assessment tools is overbroad of the purpose and objective of the legislation and of [the Correctional Service's] decision making responsibilities" (reasons, at paragraph 102);

ix. using "infirmed [sic] factors upon which to make decisions that affect s 7 rights is clearly arbitrary" (reasons, paragraph 105);

x. it was unnecessary to engage in a section 15 analysis (reasons, paragraph 109);

xi. the use of the assessment tools was not justified under section 1 of the *Charter* (reasons, at paragraph 112); and,

xii. an interim order would issue enjoining the defendant from using the results of the assessment tools in regards to Mr. Ewert and a remedies hearing order would

issue to address the best and fairest manner of implementing a final order (reasons, at paragraphs 115 and 116).

II. The Issues

[9] In my view, the following issues are raised on this appeal:

1. Did the Federal Court err in finding that the defendant breached the statutory obligation imposed by subsection 24(1) of the Act?
2. Did the Federal Court err in finding that the defendant violated Mr. Ewert's liberty and security interests contrary to section 7 of the *Charter*?

III. Standard of Review

[10] I agree with the parties that the standard of review to be applied to the decision of the Federal Court is that articulated in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. Thus, questions of law are to be reviewed on the standard of correctness. Findings of fact, inferences of fact and findings of mixed fact and law may only be reversed if the trial judge has made a palpable and overriding error, or erred in law on an extricable question of law.

[11] Having considered the standard of review, I now turn to the application of that standard to the issues raised on this appeal.

IV. Did the Federal Court err in finding that the defendant breached the statutory obligation imposed by subsection 24(1) of the Act?

[12] Subsection 24(1) provides:

24 (1) The Service shall take all reasonable steps to ensure that any information about an offender that it uses is as accurate, up to date and complete as possible.	24 (1) Le Service est tenu de veiller, dans la mesure du possible, à ce que les renseignements qu'il utilise concernant les délinquants soient à jour, exacts et complets.

[13] The appellant, which I will refer to as the Correctional Service, advances two arguments with respect to this issue that on my analysis of the case I need not address. First, the Correctional Service argues that the Federal Court misconceived the purpose and scope of subsection 24(1) of the Act: properly understood, the provision does not impose any duty on the Correctional Service to conduct scientific research or investigate. Second, citing *Holland v. Saskatchewan*, 2008 SCC 42, [2008] 2 S.C.R 551, at paragraphs 7 to 9 and 11, the Correctional Service argues that the Federal Court erred by granting a private law remedy for a breach of a public law.

[14] The first argument is based on a limited body of jurisprudence from the Federal Court that arose in an entirely different factual context. The second argument overstates the holding of the Supreme Court in *Holland*. Neither argument was considered by the Federal Court. In these circumstances, and when on my analysis these arguments need not be addressed, I prefer not to deal with these issues. This said, these reasons should not be seen to endorse the Federal Court's interpretation of subsection 24(1) of the Act.

[15] My concern with the Federal Court's analysis of this issue arises from the legal test it applied when considering whether Mr. Ewert met the burden upon him to establish his cause of action.

[16] As noted above, the Federal Court found that Mr. Ewert, the plaintiff, did not have to "establish definitively" that the assessment tools were culturally biased. In light of the statutory obligation on the Correctional Service to respect the special needs of Aboriginal persons in its policies, programs and practices and the statutory obligation on it to take all reasonable steps to ensure that any information about an offender that the Correctional Service uses is as accurate, up-to-date and complete as possible, it was sufficient that Mr. Ewert raise "a reasonable challenge" to the reliability of the assessment tools. Thus, for the Federal Court, the question was whether the Correctional Service's "lack of action is sufficient to fulfil the legislated standard of all reasonable steps to ensure accuracy, currency and completeness" of information (reasons, at paragraph 82).

[17] This was a question which the Federal Court answered in the negative.

[18] The Federal Court cited no authority for the proposition that Mr. Ewert was not required "to establish definitively" that the assessment tools were biased.

[19] However, a plaintiff bears the burden of establishing on a balance of probabilities the existence of each constituent element of the cause of action asserted by the plaintiff.

[20] In his third amended statement of claim, Mr. Ewert alleged that the assessment tools "generate false results and false conclusions when used on Aboriginal persons" (Third Amended Statement of Claim, at paragraph 14). Thus, Mr. Ewert bore the burden of establishing these facts on a balance of probabilities. The Federal Court erred in law when it required that Mr. Ewert establish only a reasonable challenge to the reliability of the results and conclusions generated by the use of the assessment tools in respect of Aboriginal persons.

[21] In the absence of evidence establishing, on a balance of probabilities, that the assessment tools produce or are likely to produce false results and conclusions, the Federal Court could not find that the Correctional Service failed to take all reasonable steps to ensure that information about Aboriginal offenders was as accurate as possible.

[22] Given that the Federal Court did not address the civil standard of proof, it is necessary for this Court to assess whether Mr. Ewert met the burden upon him to demonstrate that the assessment tools generated false results and conclusions when administered to Aboriginal persons. In doing this, I accept the Federal Court's characterization of Dr. Rice's evidence and will not rely upon it. Thus, the only expert evidence that I will consider is that of Dr. Hart.

[23] I begin with Dr. Hart's expert report. There, he opined that:

> 12. In the fields of clinical and forensic psychology, it is generally recognized that the reliability and validity of an assessment instrument may be biased by personal characteristics, such as age, gender, and culture. For this reason, it is considered important to systematically evaluate the extent to which measurements made using an assessment instrument are susceptible to bias, especially when those measurements are used to make high-stakes decisions.
>
> …

> 14. In Canada, one of the most important cultural characteristics that is likely to cause cross-cultural bias is status as an Aboriginal person. Status as an Aboriginal person is a general or higher-order characteristic that encompasses numerous specific characteristics, including such things as language, religion or spirituality, self-concept, and fundamental social norms and attitudes.
>
> 15. It is common practice in CSC to use instruments including the VRAG, SORAG, STATIC-99, VRS, and VRS-SO to assess violence risk in adult male offenders, including those who are Aboriginal people; and to use instruments including the PCL-R to assess psychopathic personality disorder in adult male offenders, including those who are Aboriginal people.
>
> 16. There is a large body of research evaluating and supporting the reliability or validity of assessment instruments such as the VRAG, SORAG, STATIC-99, VRS, VRS-SO, and PCL-R in heterogeneous groups of offenders in CSC.
>
> 17. There is no research evaluating the cross-cultural bias in reliability or validity of assessment instruments such as the VRAG, SORAG, STATIC-99, VRS, VRS-SO, and PCL-R due to status as an Aboriginal person using scientifically adequate procedures.
>
> 18. It cannot be safely assumed that research findings derived from a heterogeneous group apply equally to its constituent elements; this would be making the logical error of division. What holds true for a group does not necessarily hold true for individuals or sub-groups within that group.
>
> (emphasis added)

[24] I pause to note that the absence of research evaluating the cross-cultural bias in reliability or validity of the assessment tools does not establish on a balance of probabilities that the assessment tools generate, or are more likely than not to generate, false results and conclusions when administered to Aboriginal persons.

[25] Dr. Hart gave the following evidence on his direct examination before the Federal Court:

> Q Now, I want to focus now on the potential for bias in respect of the use of these actuarial tests on or for aboriginal persons in Canada. Can you speak generally about the circumstances in which a person considering applying, or using an actuarial test, should be concerned about cultural bias?

A Certainly. Test-users are always supposed to be concerned about cultural bias. Test developers are always supposed to be concerned about the possibility of culture bias. We know that culture bias can have either subtle or profound effects on the way that a test is used and the reliability and validity of those test scores.

…

Q In respect of aboriginal people, could you speak to the - - your paragraph 14 in which you write,

> One of the most important cultural characteristics that is likely to promote cross-cultural bias is status as an aboriginal person.

I wonder if you can unpack that a little bit and explain why status as an aboriginal person is likely to cause cross-cultural bias in actuarial data.

A Certainly. I think it's generally recognized and accepted both within the field of psychology but also outside, that there are major differences in life circumstances and the way that people live their lives, as a function of whether one is aboriginal versus non-aboriginal. We know that there is differences in history, in language, in child-rearing practices, in beliefs and attitudes and norms and these differences are so important that we make sure that we recognize them officially, and in fact we're required to do so as a matter of law in some cases. For example, with respect to sentencing in the *Criminal Code*, or that we know that when we're doing research on things like crime and delinquency, that we have massively different rates of some risk factors in aboriginal communities. For example, if we looked at things like history of victimization or the prevalence of substance use, we might find very different rates in aboriginal versus non-aboriginal communities. Even things like employment and income, or housing, and we can see massive differences between aboriginal and non-aboriginal communities with respect to some of these risk factors.

But also in the rates of perpetration of violence. We know that aboriginal communities are affected more by problems like violence than our non-aboriginal communities. And therefore, it's sort of a no-brainer to figure out that there is a good strong possibility that status as an aboriginal person may affect the way that a violence risk assessment test works. If you're going to develop it with people who are non-aboriginal it may not work the same in people who are aboriginal.

But I would say the same thing holds true for gender, of course. Men and women have very different rates of perpetration of violence. There is different sex roles, or expectations about behaviours as a function of gender, different life opportunities. So it's again kind of a no-brainer, that if we develop a test with men, it may not work the same with women. So, we have to assume that there may be problems.

And this is so obvious and clear that, for example, in some of the tests of risk, the assessment of risk for recidivism that are used even in the Correctional Service of

> Canada, they have gone back over the years and after developing them, tested out whether they worked the same way in aboriginal and non-aboriginal people, and they did not. So some of the tests they've said they can't use with aboriginal people, because it's clear that they don't work the same way, that they're not as effective and they don't yield good, meaningful information.
>
> Q You mentioned strong possibility, but I'm wondering in addition to the possibility of cultural bias, is there a probabilistic relationship between the extent of cultural differences and the likelihood of cultural bias when an actuarial test is used?
>
> A Yes. I'm not going to be able to give you a kind of a number probability, but if I can frame it in language, natural language, I'd say that as somebody who works in the field of risk assessment and works with offenders and so forth, and has worked with both aboriginal and non-aboriginal offenders, any professional who works in this field is alive to the distinct possibility that there is bias, and furthermore that we would assume that there is some from [*sic*] of bias. Now, it may be relatively small and it may be tolerable. But it could actually be large and it may be intolerable. The only question is really how big it is, and how big that bias is, and what impact it has.
>
> But I would say that, you know, my own professional opinion would be, it would be more likely than not that there is some kind of bias. It's just a matter of how big and what impact it has.
>
> (emphasis added)

[26] Read fairly, this evidence falls short of establishing that the assessment tools generate, or are more likely than not to generate, false results and conclusions when administered to Aboriginal persons. This is because Dr. Hart acknowledges that cultural bias may have only a subtle effect on the way a test is used and on the reliability and validity of the resulting test scores - the bias might be relatively small and tolerable. Notwithstanding this acknowledgement, Dr. Hart did not opine as to the magnitude of the impact caused by any cultural bias. Nor was any other evidence led on this point.

[27] In the absence of evidence demonstrating that cultural bias affected or is more likely than not to affect test usage or the reliability and validity of the resulting test scores in a material way, Mr. Ewert failed to establish on a balance of probabilities that the assessment tools generate or are likely to generate false results and conclusions and failed to establish on a balance of probabilities any breach of statutory duty on the part of the Correctional Service.

[28] This conclusion is consistent with paragraph 114 of the reasons of the Federal Court where it expressed its intent "to issue a final order enjoining the use of the assessment tools in respect of the Plaintiff and other Aboriginal inmates until, at minimum, the Defendant conducts or has conducted a study that confirms the reliability of those tools in respect to adult Aboriginal offenders". Once the Federal Court concluded that it was uncertain whether the assessment tools were reliable in respect of Aboriginal offenders, it ought to have dismissed Mr. Ewert's action. The Federal Court could not as a matter of law, grant the remedy it did on the basis of an unequivocal evidentiary record.

V. Did the Federal Court err in finding that the defendant violated Mr. Ewert's liberty and security interests contrary to section 7 of the Charter?

[29] A plaintiff pursuing a remedy under the *Charter* must prove a violation of the *Charter* on a balance of probabilities (*Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at paragraph 21).

[30] The Federal Court did not expressly consider whether Mr. Ewert had established on a balance of probabilities that the scores and conclusions generated by the assessment tools were

inaccurate and unreliable when the assessment tools were administered to Aboriginal persons. Instead, it cited Dr. Hart's testimony that there was no evidence that the scores and conclusions predicted recidivism in Aboriginal offenders as accurately or reliably as they do when administered to non-Aboriginal offenders (reasons, at paragraph 99).

[31] In my respectful view, by relying on the absence of evidence proving the reliability of the assessment tools, the Federal Court erred in law by failing to require Mr. Ewert to establish his claim on a balance of probabilities. Moreover, as explained above, when the expert evidence of Dr. Hart is read in its entirety it is, as a matter of law, insufficient to establish on a balance of probabilities that the assessment tools generate results that are inaccurate or unreliable in a material way.

[32] It follows that the Federal Court erred by failing to conclude that Mr. Ewert had failed to establish a violation of his section 7 rights on a balance of probabilities. It further follows that I need not consider the other errors in the section 7 analysis alleged by the Correctional Service. It is sufficient to say that these reasons should not be seen to endorse the Federal Court's analysis of the liberty and security interests said to be engaged.

VI. Conclusion

[33] Mr. Ewert argued that, notwithstanding the Federal Court's assessment that the evidence was not sufficiently developed to allow for the analysis mandated by section 15 of the *Charter*, the remedy granted by the Federal Court could be supported under section 15 of the *Charter*.

[34] I disagree. I see no error in the Federal Court's characterization of the sufficiency of the evidence. Mr. Ewert failed to establish that the use of the assessment tools generated false results and conclusions when administered to Aboriginal persons. In consequence, his claim under section 15 of the *Charter* could not succeed.

[35] For these reasons, I would allow the appeal. Pronouncing the judgment that the Federal Court ought to have pronounced, I would dismiss Mr. Ewert's action. In the circumstances, I would not award costs.

"Eleanor R. Dawson"

J.A.

"I agree.
Marc Nadon J.A."

"I agree.
Wyman W. Webb J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-421-15
STYLE OF CAUSE:	HER MAJESTY THE QUEEN IN RIGHT OF CANADA, (THE COMMISSIONER OF THE CORRECTIONAL SERVICE OF CANADA, THE WARDEN OF KENT INSTITUTION and THE WARDEN OF MISSION INSTITUTION) v. JEFFREY G. EWERT
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	JUNE 13, 2016
REASONS FOR JUDGMENT BY:	DAWSON J.A.
CONCURRED IN BY:	NADON J.A. WEBB J.A.
DATED:	AUGUST 3, 2016

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