Date: 20070108

Docket: T-997-03

Citation: 2007 FC 14

Ottawa, Ontario, January 8, 2007

Present: The Honourable Mr. Justice Blanchard

BETWEEN

GEORGE FLYNN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] While he was incarcerated at the La Macaza Correctional Institution, applicant George Flynn's contact visits with his common-law wife were suspended.

1. Introduction

[2] This is an application for a writ of *mandamus* under sections 18 and 18.1 of the *Federal Courts Act*, L.R. (1985), c. F-7, s. 1; 2002, c. 8, s. 14, in respect of the decision dated June 6, 2003 by the Commissioner of the Correctional Service of Canada (the CSC) in the matter of a

third-level grievance. That decision upheld the indefinite suspension of the applicant's contact visits with his common-law wife, Elizabeth Boucher.

[3] The applicant seeks the following orders: an order setting aside the CSC Commissioner's decision; an order to share all information held by the CSC for all proceedings initiated in respect of the La Macaza Warden's decision to suspend the applicant's contact visits and in respect of the subsequent second- and third-level determinations upholding the Warden's decision; an order compelling the respondent to correct the applicant's record so as to expunge all erroneous information concerning the allegations made against the applicant and his common-law wife. Finally, the applicant seeks any other relief that the Court may deem appropriate.

[4] At the hearing, the parties informed the Court that the applicant, having served out his sentence, is no longer incarcerated at La Macaza Institution. Although the parties acknowledge that the principal request in this judicial review, namely, the issuance of a writ of *mandamus*, is now moot, they are nevertheless asking the Court to consider the arguments of the parties and to rule on the issues at bar based on their merits. The Court has been informed that the applicant has initiated a civil action in this Court against the respondent and that the matter is currently in abeyance pending the outcome of this judicial review application. In *R. v. Grenier*, 2005 FCA 348, at paragraph 20, the Federal Court of Appeal held that "…a litigant who seeks to impugn a federal agency's decision is not free to choose between a judicial review proceeding and an action in damages; he must proceed by judicial review in order to have the decision invalidated." The Court of Appeal also recognized that a decision of a federal agency retains its legal force and authority, and remains juridically operative and legally effective, so long as it has not been

invalidated. Therefore, although the Court is not in a position to issue a writ of *mandamus* in the circumstances, it is appropriate to determine whether a reviewable error was committed with respect to the La Macaza Warden's decision to suspend the applicant's contact visits and with respect to the second- and third-level determinations to uphold that decision.

2. Factual background

[5] The applicant served a sentence of imprisonment at La Macaza Institution, in the province of Quebec, that started in April 2002. From the time of his arrival, he was entitled to physical-contact visits with his common-law wife, Ms. Boucher. The applicant and Ms. Boucher also participated regularly in the private family visiting program (PFV).

[6] An investigation concerning the applicant was conducted by Mr. Pilette, the institutional preventive security officer. Having collected intelligence from various informants, the institution's preventive security department obtained authorization to wiretap the applicant's telephone conversations. This authorization was given by the Warden, Ms. Prévost.

[7] The respondent asserts that the intelligence was to the effect that the applicant was lending tobacco, making money transactions and smuggling narcotics and cash into the institution through his private family visits. According to the intelligence, the applicant's spouse, Ms. Boucher, was involved in this illicit activity. The investigation concluded that the unlawful activities of the applicant and Ms. Boucher posed a threat to the security of the institution.

[8] The applicant and Ms. Boucher deny the allegations against them.

[9] On February 21, 2003, the respondent alleges that the preventive security officer and the unit manager met with Ms. Boucher and informed her of the grounds for suspending the contact visits. She was informed that her access to the institution would be suspended until the investigation was completed. Immediately following the meeting with Ms. Boucher, the respondent alleges, the applicant was interviewed and the same information was communicated to him orally, specifically that:

1. He was the subject of a preventive security investigation and electronic audio surveillance;

2. He was suspected of having taken part in illicit acts with Ms. Boucher's assistance, i.e., smuggling pills, money and narcotics into the institution;

3. He was also suspected of making tobacco loans and money transactions in the institution.

[10] However, the applicant asserts that no such details were communicated to him until his counsel was given this information in a letter from the Warden dated March 12, 2003.

[11] On February 26, 2003, the results of the security investigation led the institutional authorities to conclude that the contact visits between the applicant and Ms. Boucher were compromising the security of the institution. The visits committee decided that the applicant's

contact visits privilege should be withdrawn and that only non-contact visits would be authorized. Ms. Boucher was notified by letter that the decision would be reviewed every six months for as long as the risk continued.

[12] During a search of the applicant's cell, CSC officers found the same type of pills that Ms. Boucher had had in her possession at the meeting of February 26, 2003, specifically, Motrin (200 mg, brown).

[13] As of February 27, 2003, the applicant met with Ms. Boucher numerous times in non-contact visits. On March 12, 2003, the Warden of La Macaza upheld the suspension of the applicant's contact visits, as well as an indefinite suspension of his participation in the private family visiting program with Ms. Boucher. On March 13, 2003, a behaviour contract was proposed to the applicant, but he refused to sign.

[14] On May 6, 2003, the Regional Deputy Commissioner rendered his decision in respect of a second-level grievance against the Warden's decision. He found that the security intelligence had been scrupulously checked and that it left no doubt as to the involvement of the applicant and his spouse in unlawful activities within the Institution, the details of which were protected information. He upheld the Warden's decision. The applicant then submitted a third-level grievance.

[15] On June 6, 2003, the third-level grievance was rejected for the same reasons as those found in the second-level decision. The applicant received the third-level decision on June 12, 2003.

[16] The applicant alleges that the suspension of visits between his common-law wife and him has adversely affected their health.

3. Issues

A. Did the Correctional Service of Canada comply with the rules of procedural fairness in terms of sharing the information that gave rise to the decision to suspend contact visits between the applicant and Ms. Boucher?

B. If the answer is yes, was that decision patently unreasonable, considering the circumstances of this case?

4. Analysis

A. *Did the Correctional Service of Canada comply with the rules of procedural fairness in terms of sharing the information that gave rise to the decision to suspend contact visits between the applicant and Ms. Boucher?*

[17] The relevant sections of the *Corrections and Conditional Release Act* (the Act) and the *Corrections and Conditional Release Regulations* (the Regulations) are set out in the Appendix.

[18] Subsection 91(1) of the Regulations empowers the institutional head, i.e., the warden, to authorize the refusal or suspension of an inmate's visits. Paragraph 91(2)(*b*) is particularly relevant in this case. It provides that "the institutional head or staff member shall promptly inform the inmate and the visitor of the reasons for the refusal or suspension and shall give the inmate and the visitor an opportunity to make representations with respect thereto." Subsection 27(1) of the Act provides for the communication of relevant information to an offender when a decision is to be taken regarding him. This provision stipulates that the person responsible for taking the decision must give the offender, within a reasonable period before the decision is to be taken, all the information to be considered or a summary of that information. This provision is subject to subsection 27(3), which provides that the Commissioner may authorize information to be withheld if he has reasonable grounds to believe that disclosure would jeopardize the safety of a person or the security of the penitentiary.

[19] The applicant maintains that he received no details concerning the allegations against him. It was only after the application for judicial review was made that the details of those allegations were disclosed to him.

[20] The respondent, on the other hand, contends that at the meeting of February 21, 2003, the following information was shared orally with the applicant:

1. He was the subject of a preventive security investigation and electronic audio surveillance;

2. He was suspected of having taken part in illicit acts with Ms. Boucher's assistance, i.e., smuggling pills, money and narcotics into the institution;
3. He was also suspected of making tobacco loans and money transactions in the institution.

[21] The applicant argues that the authorities have an obligation to treat offenders fairly, and relies in that regard on *Demaria v. Regional Classification Board*, [1987] 1 F.C. 74. Part of that obligation is to provide the offender with sufficient information to afford him a fair opportunity to respond to the allegations against him. Hugessen J.'s decision in *Demaria*, at pages 76 and 77, describes the obligation:

> […] The only real question in the present case is as to the content of that duty. More narrowly still, it is to know whether the appellant was given adequate notice of what was being alleged against him and a fair opportunity to answer those allegations.
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> […]
>
> […] The purpose of requiring that notice be given to a person against whose interests it is proposed to act is to allow him to respond to it intelligently. If the matter is contested, such response will normally consist of either or both of a denial of what is alleged and an allegation of other facts to complete the picture. Where, as here, it is not intended to hold a hearing or otherwise give the person concerned a right to confront the evidence against him directly, it is particularly important that the notice contain as much detail as possible, else the right to answer becomes wholly illusory. […]

[22] The respondent counters that the reasons of Nadon J. in *Cartier v. Canada (Attorney General)*, [1998] F.C.J. no. 1211, apply in the case at bar. In that judgment, Nadon J. refers to

pages 341 to 344 of Marceau J.A.'s reasons in *Gallant v. Canada (Deputy Commissioner, Correctional Service of Canada)* (C.A.), [1989] 3 F.C. 329. The learned judge of appeal explained that in order to appreciate the practical requirements of the *audi alteram partem* principle, it is wrong to put on the same level all administrative decisions involving inmates in penitentiaries. He wrote as follows at pages 342 and 343:

> Not only do these various decisions differ as to the individual's rights, privileges or interests they may affect, which may lead to different standards of procedural safeguards; they also differ, and even more significantly, as to their purposes and justifications, something which cannot but influence the content of the information that the individual needs to be provided with, in order to render his participation, in the making of the decision, wholly meaningful. In the case of a decision aimed at imposing a sanction or a punishment for the commission of an offence, fairness dictates that the person charged be given all available particulars of the offence. Not so in the case of a decision to transfer made for the sake of the orderly and proper administration of the institution and based on a belief that the inmate should, because of concerns raised as to his behaviour, not remain where he is. In such a case, there would be no basis for requiring that the inmate be given as many particulars of all the wrong doings of which he may be suspected.

[23] In the case at bar, we are dealing with an alleged infringement of a right to contact visits, provided for in subsection 90(1) of the Regulations. The Regulations also provide for how this right may be limited, notably in paragraphs 90(1)(*a*) and (*b*), which stipulate that the institutional head must have reasonable grounds to believe that a physical barrier is necessary for the security of the penitentiary or the safety of a person and that no less restrictive measure is available.

[24] Here, the facts are altogether different from those in *Gallant*. This is not an inmate transfer. One may argue that the decision deals with an issue relating to the maintenance of order

within the institution, but the decision also has a significant impact on an established right—one that is provided for in the Regulations and that cannot be affected except in specific circumstances also provided for in the Regulations. Considering the personal interests and rights at stake in this case, it is not appropriate to limit the obligation to share the particulars of the wrongdoings the inmate is suspected of having committed. I am of the opinion that he should have all the information he needs to render his participation in the decision-making process wholly meaningful. I am of the opinion that the information actually provided to the applicant in these proceedings has not allowed such participation. I shall explain myself in the following paragraphs.

[25] The issue is whether the CSC provided the applicant, as required by section 27 of the Act, with all the information to be considered in making the decision, or with a summary of that information.

[26] In the instant case, the information sought by the applicant was given to him after this application for judicial review was filed, but well before the applicant's release from the penitentiary. Thus, it cannot be asserted that it would not have been possible to disclose the information prior to making the decision because of the reasons referred to in subsection 27(3) of the Act, i.e., because there were grounds for believing that disclosure would jeopardize the safety of a person, the security of the penitentiary or the conduct of a lawful investigation. In this case, there was never any question of refusing to provide the sought-after information on the basis of subsection 27(3) of the Act. Besides, in the reports entered in evidence, several passages

containing information considered protected were struck out. The expunged evidence is not the subject of the present application.

[27] The respondent contends that an appropriate summary of the information was shared orally with the applicant at the meeting of February 21, 2003, before the decision was taken. According to the respondent, this summary was sufficient in the circumstances in terms of affording the applicant a fair opportunity to respond to the allegations against him.

[28] In order to assess whether the respondent actually complied with the disclosure obligations under section 27 of the Act, it useful to review the information in question.

[29] The La Macaza Warden's decision to suspend the applicant's contact visits with his common-law wife was based in part on information set out in the Security Intelligence Report dated March 17, 2003. In that report, which was not disclosed to applicant before the decision was taken, we read the following:

> [TRANSLATION]
> PIR 2003/01/08; Source XXX met with his PO to tell him that he has a tobacco debt with inmate FLYNN, who is putting the pressure on to get paid by spreading it around the inmate population that he is a deadbeat who doesn't pay his debts. He adds that FLYNN bought a *dépanneur* XXXX. Finally, the source indicated that FLYNN is going to smuggle some pot into the institution on the occasion of his next PFV.

The source of this information received a reliability rating of "believed reliable."

[30] In the record, there is also a Protected Information Report from January 8, 2003, referred to in the Security Intelligence Report. The report from January 8 was not disclosed to the applicant before the decision was taken. In that report, also from a source believed reliable, we read the following information:

> [TRANSLATION]
> LAMA 0389 indicated to me that FLYNN, FPS: 132893A is putting pressure on him. XXX LAMA 0389 was indebted to inmate Flynn, and LAMA 0389 was tired of inmate Flynn blackening his reputation among the other inmates, saying he was a deadbeat. They had been informed that both of them were implicated in illicit activity (loans, borrowing). Both had agreed not to let it happen again and that they would not talk behind each other's backs to the other inmates. Today, LAMA 0389 reported that every time he talks to a fellow inmate, Flynn shows up and informs the fellow inmate that LAMA 0389 is a deadbeat. He stated that inmate Flynn also spread the word around among the general population that LAMA 0389 is a deadbeat. As a result, he says that his fellow inmates avoid him and call him less-than-flattering names. He says that now that Flynn has ruined his reputation, he refuses to pay him the debt of three units of tobacco.
>
> He added that before he was placed in administrative segregation, inmate XXX had told him he was going to collect from him, saying he would be right there beside him at canteen time to make sure he paid his debt to Flynn. Inmate Flynn apparently also told him the exact amount he had spent on canteen purchases and told him he had better pay him back for the tobacco instead of spending money. During the interview, LAMA 0389 told me that Flynn passed by the interview office three times, right near the office window.
>
> LAMA 0389 indicated that Flynn is going to try to smuggle some pot into the institution on the occasion of his next PFV. He also said that Flynn bought the "*dépanneur*" belonging to a black inmate from Block C named XXX. He said that Flynn has a lot of goodies like soft drinks, chips, chocolate, smokes, and that he makes loans with interest.

[31] The Protected Information Report from January 8, 2003 contains important information about the applicant's alleged drug trafficking activity, including the allegation that he was going to smuggle "pot" into the institution on the occasion of his next Private Family Visit (PFV) and, particularly, the source of that information. The tip came from inmate Lama, who, according to his own statements, held a grudge against the applicant. It goes without saying that the reliability of such evidence could be considered suspect. The respondent is not disputing the fact that this information was received and considered by the Warden before she made her decision; nor is the respondent disputing the fact that the information was not disclosed to the applicant before the Warden made her decision. The applicant was unaware of this evidence. He therefore had no opportunity to challenge it or present contrary evidence. I would add that the summary of the information, shared orally by the respondent, contained no particulars that would allow the applicant to challenge the reliability of the evidence and defend himself. In my opinion, the summary in this case was utterly insufficient and did not in any way meet the respondent's obligation under the Act to provide a summary of all information to be considered in the decision. The applicant had no fair opportunity to defend himself against the allegations which, on the face of it, seem at least in part to have served as the basis of the Warden's decision.

[32] I find that the information not disclosed was significant enough, considering the interests at stake in the decision, that it should have been disclosed to the applicant before the decision was taken so that he would have a reasonable opportunity to defend himself. The respondent therefore failed to fulfill the disclosure obligations under the Act. In light of this failure, I find that the institutional head did not comply with the rules of procedural fairness before rendering her decision.

[33] Owing to this breach of procedural fairness, the decision of the Warden and the subsequent second- and third-level grievance determinations upholding the Warden's decision must be set aside.

[34] In light of my determination with respect to the first issue, there is no need to address the second issue. The Court cannot comment on the reasonableness of the decision if it is determined that the rules of procedural fairness were not observed.

[35] The matter will be referred back to the CSC for reconsideration, but to an authorized person other than the Warden of La Macaza Institution.

ORDER

THE COURT ORDERS that:

1. The application for judicial review be granted.

2. The matter be referred back to the CSC for reconsideration, but to an authorized person other than the Warden of La Macaza Institution.

"Edmond P. Blanchard"
Judge

Certified True Translation

Stefan Winfield

APPENDIX

Corrections and Conditional Release Act

27. (1) Where an offender is entitled by this Part or the regulations to make representations in relation to a decision to be taken by the Service about the offender, the person or body that is to take the decision shall, subject to subsection (3), give the offender, a reasonable period before the decision is to be taken, all the information to be considered in the taking of the decision or a summary of that information.

(2) Where an offender is entitled by this Part or the regulations to be given reasons for a decision taken by the Service about the offender, the person or body that takes the decision shall, subject to subsection (3), give the offender, forthwith after the decision is taken, all the information that was considered in the taking of the decision or a summary of that information.

(3) Except in relation to decisions on disciplinary offences, where the Commissioner has reasonable grounds to believe that disclosure

La Loi sur le système correctionnel et la mise en liberté sous condition

27. (1) Sous réserve du paragraphe (3), la personne ou l'organisme chargé de rendre, au nom du Service, une décision au sujet d'un délinquant doit, lorsque celui-ci a le droit en vertu de la présente partie ou des règlements de présenter des observations, lui communiquer, dans un délai raisonnable avant la prise de décision, tous les renseignements entrant en ligne de compte dans celle-ci, ou un sommaire de ceux-ci.

(2) Sous réserve du paragraphe (3), cette personne ou cet organisme doit, dès que sa décision est rendue, faire connaître au délinquant qui y a droit au titre de la présente partie ou des règlements les renseignements pris en compte dans la décision, ou un sommaire de ceux-ci.

(3) Sauf dans le cas des infractions disciplinaires, le commissaire peut

of information under subsection (1) or (2) would jeopardize

(*a*) the safety of any person,

(*b*) the security of a penitentiary, or

(*c*) the conduct of any lawful investigation,

the Commissioner may authorize the withholding from the offender of as much information as is strictly necessary in order to protect the interest identified in paragraph (*a*), (*b*) or (*c*).

…

autoriser, dans la mesure jugée strictement nécessaire toutefois, le refus de communiquer des renseignements au délinquant s'il a des motifs raisonnables de croire que cette communication mettrait en danger la sécurité d'une personne ou du pénitencier ou compromettrait la tenue d'une enquête licite.

[…]

Corrections and Conditional Release Regulations

91. (1) Subject to section 93, the institutional head or a staff member designated by the institutional head may authorize the refusal or suspension of a visit to an inmate where the institutional head or staff member believes on reasonable grounds

(*a*) that, during the course of the visit, the inmate or visitor would

Règlement sur le système correctionnel et la mise en liberté sous condition

91. (1) Sous réserve de l'article 93, le directeur du pénitencier ou l'agent désigné par lui peut autoriser l'interdiction ou la suspension d'une visite au détenu lorsqu'il a des motifs raisonnables de croire :

a) d'une part, que le détenu ou le visiteur risque, au cours de la visite :

(i) jeopardize the security of the penitentiary or the safety of any person, or

(ii) plan or commit a criminal offence; and

(*b*) that restrictions on the manner in which the visit takes place would not be adequate to control the risk.

(2) Where a refusal or suspension is authorized under subsection (1),

(*a*) the refusal or suspension may continue for as long as the risk referred to in that subsection continues; and

(*b*) the institutional head or staff member shall promptly inform the inmate and the visitor of the reasons for the refusal or suspension and shall give the inmate and the visitor an opportunity to make representations with respect thereto.

(i) soit de compromettre la sécurité du pénitencier ou de quiconque,

(ii) soit de préparer ou de commettre un acte criminel;

b) d'autre part, que l'imposition de restrictions à la visite ne permettrait pas d'enrayer le risque.

(2) Lorsque l'interdiction ou la suspension a été autorisée en vertu du paragraphe (1) :

a) elle reste en vigueur tant que subsiste le risque visé à ce paragraphe;

b) le directeur du pénitencier ou l'agent doit informer promptement le détenu et le visiteur des motifs de cette mesure et leur fournir la possibilité de présenter leurs observations à ce sujet.

94. (1) Subject to subsection (2), the institutional head or a staff member designated by the institutional head may authorize, in writing, that communications between an inmate and a member of the public, including letters, telephone conversations and communications in the course of a visit, be opened, read, listened to or otherwise intercepted by a staff

94. (1) Sous réserve du paragraphe (2), le directeur du pénitencier ou l'agent désigné par lui peut autoriser par écrit que des communications entre le détenu et un membre du public soient interceptées de quelque manière que se soit par un agent ou avec un moyen technique, notamment que des lettres soient ouvertes et lues et

member or a mechanical device, where the institutional head or staff member believes on reasonable grounds

(*a*) that the communications contain or will contain evidence of

(i) an act that would jeopardize the security of the penitentiary or the safety of any person, or

(ii) a criminal offence or a plan to commit a criminal offence; and

(*b*) that interception of the communications is the least restrictive measure available in the circumstances.

(2) No institutional head or staff member designated by the institutional head shall authorize the opening of, reading of, listening to or otherwise intercepting of communications between an inmate and a person set out in the schedule, by a staff member or a mechanical device, unless the institutional head or staff member believes on reasonable grounds

(*a*) that the grounds referred to in subsection (1) exist; and

(*b*) that the communications are not or will not be the subject of a privilege.

(3) Where a communication is intercepted under subsection (1) or (2), the institutional head or staff member designated by the

que des conversations faites par téléphone ou pendant les visites soient écoutées, lorsqu'il a des motifs raisonnables de croire :

a) d'une part, que la communication contient ou contiendra des éléments de preuve relatifs :

(i) soit à un acte qui compromettrait la sécurité du pénitencier ou de quiconque,

(ii) soit à une infraction criminelle ou à un plan en vue de commettre une infraction criminelle;

b) d'autre part, que l'interception des communications est la solution la moins restrictive dans les circonstances.

(2) Ni le directeur du pénitencier ni l'agent désigné par lui ne peuvent autoriser l'interception de communications entre le détenu et une personne désignée à l'annexe par un agent ou par un moyen technique, notamment l'ouverture, la lecture ou l'écoute, à moins qu'ils n'aient des motifs raisonnables de croire :

a) d'une part, que les motifs mentionnés au paragraphe (1) existent;

b) d'autre part, que les communications n'ont pas ou n'auront pas un caractère

institutional head shall promptly inform the inmate, in writing, of the reasons for the interception and shall give the inmate an opportunity to make representations with respect thereto, unless the information would adversely affect an ongoing investigation, in which case the inmate shall be informed of the reasons and given an opportunity to make representations with respect thereto on completion of the investigation.

privilégié.

(3) Lorsqu'une communication est interceptée en application des paragraphes (1) ou (2), le directeur du pénitencier ou l'agent désigné par lui doit aviser le détenu, promptement et par écrit, des motifs de cette mesure et lui donner la possibilité de présenter ses observations à ce sujet, à moins que cet avis ne risque de nuire à une enquête en cours, auquel cas l'avis au détenu et la possibilité de présenter ses observations doivent être donnés à la conclusion de l'enquête

FEDERAL COURT

SOLICITORS OF RECORD

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