Date: 20080626

Docket: T-27-07

Citation: 2008 FC 811

OTTAWA, ONTARIO, JUNE 26, 2008

PRESENT: The Honourable Justice Johanne Gauthier

BETWEEN:

PIERRE-PAUL POULIN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] Mr. Poulin seeks judicial review of the decision of the Commissioner of the Correctional Service of Canada (CSC), rejecting his grievance filed in respect of the Deputy Commissioner's refusal to allow him to acquire a scanner for his personal computer. The applicant, who is visually impaired, alleges that the decision was made without regard for the requirements of procedural fairness, that the decision was *ultra vires* the Commissioner's authority under the *Corrections and Conditional Release Act*, S.C. 1992, c.20, ("the Act") and that the decision contravenes his equality rights under subsection 15(1) of the *Canadian Charter of Rights and Freedoms* (the Charter).

BACKGROUND

[2] Mr. Pierre-Paul Poulin is a 60 year-old inmate at Mission Institution, a federal penitentiary. Mr. Poulin suffers from marked myopia and severe amblyopia, particularly in his right eye. Although he is not legally blind, this means that he has a serious visual impairment. Since 2001, he has been a "client" of the Canadian National Institute for the Blind (CNIB).

[3] In February of 2006, Mr. Poulin was assessed (apparently at the request of CSC) by a CNIB adaptive technology specialist, Mr. Stephen Heaney, in order to evaluate large print adaptive options to assist him with accessing his Windows-98 based computer, as he was experiencing visual strain and fatigue when using his computer and was finding that the text quality using BigShot magnification software was too grainy (he apparently obtained this software as well as other equipment such as an increased size monitor subsequent to a 2002 CNIB assessment[1]). In his assessment report, Mr. Heaney discussed three options which may be summarized as follows:

> (1) The MAGic Magnification software package would allow Mr. Poulin to have computer documents and screens read to him, which would rest his eyes as "using both vision and hearing together allows for reduced vision strain." Coupled with a standard scanner with adaptive software, e.g. Text Cloner Pro, he would also be able to convert printed documents into computer text if he so wished, and have them rendered into speech. In response to the security concerns raised by the parole officer present at the assessment, that the scanner could be used to scan images such as identification badges, Mr. Heaney suggested that the scanner driver could be configured with the adaptive reading software only and not the typical scanning applications. In terms of cost, this option was assessed at $595 - $640 for the MAGic software; $130 for the scanner; and $130 for the Text Cloner software for total of approximately $855-$900.
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> (2) A dedicated reading machine would also allow Mr. Poulin to have print materials read to him. Such devices start in the range of $2500. There is no information as to whether used models could be purchased.

[1] It appears from this document that at the time, Mr. Poulin was rarely reading print material but was spending "up to six hours per day on his computer".

(3) Print materials could also be accessed using a closed circuit television (CCTV) coupled with a video magnifier. These start in the range of $1700 for a new model but Mr. Heaney noted that used models are also available.

[4] Mr. Heaney concluded his assessment by noting that "[t]he choice of adaptive technologies will depend on the state of Mr. Poulin's vision. For the foreseeable future, the computer-MAGic Magnification solution will allow for flexibility in providing a solution that is workable even if there is future vision loss. A CCTV for document magnification is also preferred for the same reasons. The scanner-software option is best if the CCTV no longer provides proper access to documents, or if extensive document reading is required."

[5] Subsequent to the assessment, Mr. Poulin prepared a 7-page proposal for improving access to computers for inmates with physical and visual impairments[2], which he submitted to the Assistant Commissioner of Correctional Operations and Programs in May of 2006. Mr. Poulin noted that his proposal was to be read in conjunction with the 2005 proposal of the Advisory Committee on Inmate Access to Computers (a working group wherein CSC, inmates, academics and prisoner's rights groups were represented.) There is no mention in the record as to the actual status of these proposals and what if any response was made.

[6] Although the issue will be discussed in greater detail below, it should be noted at this stage that the possession of scanners by inmates is strictly prohibited by CSC as a matter of policy per Commissioner's Directive 90 (CD-90)[3]. Despite this general prohibition, the

[2] There is little evidence as to the number of inmates who are visually impaired. However, this document and the reference to another visually impaired inmate who obtained equipment at CSC's cost indicate that the applicant's situation is not unique.

[3] The respondent states that inmates' possession of personal computers has been regulated under CD-90 since 1987 and that scanners have always been prohibited, although the directive has been amended numerous times since then, as noted by this Court in *Poulin v. Canada (AG)*, 2005 FC 1293, at para. 2. In 2007, it was replaced by policy CD 566-12.

directive lists as allowable "hardware, software, and peripherals required to provide computer accessibility for those with visual or physical impairment when reviewed and approved by the Deputy Commissioner of the region." Similarly, the Assistant Commissioner, Correctional Programs and Operation, Irving Kulik acknowledged in a letter dated July 28, 2003 that Mr. Poulin requires a computer because of his disability, and informed him that notwithstanding a CIC moratorium on the updating of inmates' computers (in force as of October 2002), any updates Mr. Poulin might require by reason of his vision problems would be evaluated on a case-by-case basis on their merits.

[7] Referring to this letter from Assistant Commissioner Kulik, on May 18, 2006 Mr. Poulin wrote to the CSC Deputy Commissioner for the Pacific Region, Mr. Demers, requesting approval to purchase a scanner with limited scanning (text only) capabilities, to address the concerns raised by the parole officer at the time of his CNIB assessment. In that document, Mr. Poulin referred to the scanner as "one solution" and did not discuss the CCTV option. Mr. Poulin also indicated that "in order to mitigate threats to CSC, staff, inmates and the public, and/or any security concerns" he would consent to the search protocol recommended by CSC's Advisory Committee on Inmate Access to Computers in its 2005 report; this protocol contemplates various "levels" of searches, from visual inspection through forensic examination. This letter also appears to indicate that Poulin made an earlier request for a scanner which was turned down, although the Court has no information in this regard and does not know what if any information about security risks was disclosed to Mr. Poulin at that time.

[8] The request of May 18 was turned down because "[scanners] raise significant security concerns." In his brief letter dated June 8, 2006, Deputy Commissioner Demers suggested that Mr. Poulin pursue instead the alternative option of a CCTV video magnifier for reading printed text, "as this option poses far less security concerns".

[9] Mr. Poulin replied to this refusal by letter dated June 19, 2006, wherein he requested particulars as to the security concerns referred to by the Deputy Commissioner, reiterated his consent to a search protocol including forensic inspection, and affirmed that his request should be evaluated with regard to several Commissioner's directives (including CD-90) and various provisions of the Act.

[10] Mr. Poulin also wrote that "all of my requests to assist my impairment (…) should be evaluated on the basis of merit and with respect to all relevant *Laws* and authorities," and set out why he would prefer a scanner to a CCTV device, noting that a CCTV would be inappropriate because his cell was already overloaded with larger accessories, and that he wondered who would pay for it. He commented that "a dedicated reading machine starts in the $2500.00 range". That said, elsewhere in the same letter Mr. Poulin noted that he was aware of another inmate having been provided computer software and vision aids, the cost of which was covered by CIC. Finally, the applicant also suggested that he be transferred to a minimum security institution, where he might have easier access to a scanner.

[11] In his reply dated July 7, 2006, the Deputy Commissioner confirmed his initial refusal, again on the basis that "there are specific security concerns regarding your having a scanner. Information Technology Services has been consulted (…) It was determined that

there is no way to mitigate the security concerns this item would present in an institutional setting." In response to Mr. Poulin's concerns about space in his cell, the Deputy Commissioner mentioned that the penitentiary has larger "handicapped" cells which might be available to him. As for the cost of a CCTV-video magnifier device, the Deputy Commissioner responded that although such devices start at $1,700.00, they are often available on consignment, noting that overall the price is comparable to the price of a new computer, whereas unlike a computer the CCTV-video magnifier would not become obsolete. In respect of a possible transfer, Mr. Demers indicated that the medium security rating of Mr. Poulin had been confirmed in March 2006 and that in any event, it was not likely that a scanner would be manageable at a minimum security institution.

[12] Finally, the Deputy Commissioner stated that Mr. Poulin's request had been considered individually on the basis of merit, and noted that "[r]ights and freedoms enshrined within the Charter are subject to reasonable limits, and this limitation is entirely reasonable given the circumstances within an institution."

[13] On September 7, 2006, Mr. Poulin filed a third-level grievance seeking the reversal of Deputy Commissioner Demers' refusal. Mr. Poulin substantially reiterated his earlier submissions, and specified that his grievance should be considered in light of subsection 15(1) of the Charter, various provisions of the Act, as well as policy CD-90. He wrote that **"CSC's efforts to accommodate me, particularly that I may use their scanner as needed, the purchase of a CCTV and/or moving to a larger cell, cannot be considered as an option …** [t]hese measures would not accommodate my disability as completely as

the scanner would … [t]he CCTV does not have the same capability as the scanner and as such cannot read the document to you … **[it] would only be a short term solution and would create additional strain and fatigue, as well as further deterioration of eyesight"** (my emphasis).

[14] Hence, it would appear that CSC offered Poulin access to an institutionally owned scanner at some point prior to his grievance. It is also notable that although Mr. Poulin dismissed the CCTV as a short-term solution[4], there is no evidence before the Court that his vision has been assessed for deterioration in the time since the CNIB assessment. In fact, the most recent optometrist's report in the record dates back many years. Nor is there evidence that Mr. Poulin actually engages in extensive print document reading (see note 1), or that he recently had more difficulties reading print materials (see 2002 CNIB assessment). And as noted, the 2006 CNIB assessment was initially meant to deal with issues arising from extensive computer use. (Mr. Poulin did in fact proceed to purchase the recommended MAgic Magnification Software, allowing on-screen computer documents to be read to him.)

[15] In his grievance, the applicant also alleged that insufficient details as to CIC's security concerns with scanners had been shared with him, and that as a result, it was difficult for him or the CNIB specialist to comprehend them.

[16] Mr. Poulin's grievance was formally denied on January 4, 2007. The Commissioner's denial letter notes that CD-90 strictly prohibits scanners, and details the security concerns they raise:

[4] This in itself somewhat contradicts the CNIB assessment; see para. 4 above.

> "First, scanners present a significant risk because they can be used to manipulate and reproduce documentation. For the same reasons you would install software excluding the scan of images as you suggested, would one also exclude text. As well, scanners may be used to digitize and encrypt documentation in order to impede searches for unauthorized software.
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> "Second, there is significant risk that the scanner or scanning software will be used by another individual than you for malicious purposes. It is not practicable for an Officer to be posted in your cell to monitor your computer to prevent inappropriate usage. There is significant potential danger even if numerous precautions are taken, and those needed are not operationally feasible.
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> "Third, if the scanner were maintained in the possession of a staff member, various liability issues could be raised should something of a destructive nature occur."

[17] The letter then states that any exceptions to policy CD-90 Mr. Poulin might be entitled to invoke on account of his disability are themselves subject to restrictions consistent with the principle expressed in the Act that "the protection of society be the paramount consideration in the corrections process." The letter concludes with a suggestion that Mr. Poulin pursue "alternatives made available to you in prior correspondence," and notes that Health Services will provide additional visual aid equipment if they assess a need for it "to carry on the activities of daily living"[5]. The letter also states that Mr. Poulin is "entitled to exceptions considered to present a lower risk."

[18] It is this decision which is the subject of the present application.

ISSUES

[19] It became clear at the hearing, after the Court specifically sought clarification in this respect, that the applicant's allegation of procedural unfairness relates only to Deputy

[5] Presumably, it is on that basis that the costs of software and other visual aids referred to in Mr. Poulin's letter of June 19, 2006 were paid by CSC.

Commissioner Demers' failure to provide information that would have allowed him to exercise his rights. In that respect, both parties agreed in post-hearing submissions that the decision of the Federal Court of Appeal in *Canada (Attorney General) v. Flynn*, 2007 FCA 356 (at paras. 28 and 47) is binding, and that any information provided by CSC at a later stage would not cure an initial breach.

[20] The applicant also challenges the decision on other grounds, submitting that the Commissioner exceeded his jurisdiction under the Act, and that the refusal to grant the exemption sought violated his rights under subsection 15(1) of the Charter.

LEGISLATIVE FRAMEWORK

[21] The following legislative provisions are relevant here:

Constitution Act, 1982, **Part 1,** ***Canadian Charter of Rights and Freedoms***	***Loi constitutionnelle de 1982*** **Partie I** ***Charte canadienne des droits et libertés***
1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. (…) 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.	1. La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique. (…) 15.(1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.
Corrections and Conditional Release Act, **S.C. 1992, c. 20**	***Loi sur le système correctionnel et la mise en liberté sous condition*** **1992, ch. 20**

3. The purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful and safe society by (*a*) carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and (*b*) 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.	3. Le système correctionnel vise à contribuer au maintien d'une société juste, vivant en paix et en sécurité, d'une part, en assurant l'exécution des peines par des mesures de garde et de surveillance sécuritaires et humaines, et d'autre part, en aidant au moyen de programmes appropriés dans les pénitenciers ou dans la collectivité, à la réadaptation des délinquants et à leur réinsertion sociale à titre de citoyens respectueux des lois.
4. The principles that shall guide the Service in achieving the purpose referred to in section 3 are (*a*) that the protection of society be the paramount consideration in the corrections process; (…) (*d*) that the Service use the least restrictive measures consistent with the protection of the public, staff members and offenders; (*e*) that offenders retain the rights and privileges of all members of society, except those rights and privileges that are necessarily removed or restricted as a consequence of the sentence; (…) (*g*) that correctional decisions be made in a forthright and fair manner, with access by the offender to an effective grievance procedure; (*h*) that correctional policies, programs and practices respect gender, ethnic, cultural and linguistic differences and be responsive to the special needs of women and aboriginal peoples, as well as to the needs of other groups of offenders with special requirements; (*i*) that offenders are expected to obey penitentiary rules and conditions governing temporary absence, work release, parole and statutory release, and to actively participate in programs designed to promote their rehabilitation and reintegration; and (…)	4. Le Service est guidé, dans l'exécution de ce mandat, par les principes qui suivent : *a*) la protection de la société est le critère prépondérant lors de l'application du processus correctionnel; (…) *d*) les mesures nécessaires à la protection du public, des agents et des délinquants doivent être le moins restrictives possible; *e*) le délinquant continue à jouir des droits et privilèges reconnus à tout citoyen, sauf de ceux dont la suppression ou restriction est une conséquence nécessaire de la peine qui lui est infligée; (…) *g*) ses décisions doivent être claires et équitables, les délinquants ayant accès à des mécanismes efficaces de règlement de griefs; *h*) ses directives d'orientation générale, programmes et méthodes respectent les différences ethniques, culturelles et linguistiques, ainsi qu'entre les sexes, et tiennent compte des besoins propres aux femmes, aux autochtones et à d'autres groupes particuliers; *i*) il est attendu que les délinquants observent les règlements pénitentiaires et les conditions d'octroi des permissions de sortir, des placements à l'extérieur et des libérations conditionnelles ou d'office et qu'ils participent aux programmes favorisant leur réadaptation et leur réinsertion sociale; (…)

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 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*). (…)	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 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. (…)
70. The Service shall take all reasonable steps to ensure that penitentiaries, the penitentiary environment, the living and working conditions of inmates and the working conditions of staff members are safe, healthful and free of practices that undermine a person's sense of personal dignity. (…)	70. Le Service prend toutes mesures utiles pour que le milieu de vie et de travail des détenus et les conditions de travail des agents soient sains, sécuritaires et exempts de pratiques portant atteinte à la dignité humaine. (…)
76. The Service shall provide a range of programs designed to address the needs of offenders and contribute to their successful reintegration into the community.	76. Le Service doit offrir une gamme de programmes visant à répondre aux besoins des délinquants et à contribuer à leur réinsertion sociale. (…)

(…) 87. The Service shall take into consideration an offender's state of health and health care needs (*a*) in all decisions affecting the offender, including decisions relating to placement, transfer, administrative segregation and disciplinary matters; and (*b*) in the preparation of the offender for release and the supervision of the offender.	87. Les décisions concernant un délinquant, notamment en ce qui touche son placement, son transfèrement, son isolement préventif ou toute question disciplinaire, ainsi que les mesures préparatoires à sa mise en liberté et sa surveillance durant celle-ci, doivent tenir compte de son état de santé et des soins qu'il requiert.

ANALYSIS

[22] As a preliminary matter, it should be noted that both parties to this application filed affidavit evidence which was not before the Commissioner (even though he had to deal with the breach of procedural fairness and the subsection 15(1) arguments), particularly evidence relating to the security issues presented by scanners in the institutional setting and the possibility of mitigating them through various technological means. Mr. Poulin retained the services of an expert in this respect. He also included an affidavit of Mr. Heaney, the CNIB adaptive technologies specialist who evaluated him in 2006. In proceedings on judicial review such evidence is generally inadmissible because a review is not intended as a trial *de novo*: *Bekker v. Canada*, 2004 FCA 186, at para. 11. In pre-hearing submissions, the applicant noted that by including new evidence, the respondent was unlawfully trying to supplement the Commissioner's reasons. The parties ultimately agreed at the hearing that except for Mr. Poulin's affidavit of March 20, 2007, the record should not be supplemented with new evidence, and that the Court should confine itself to material which was actually before the decision-maker.

[23] With respect to the appropriate standard of review, as mentioned the applicant attacks the impugned decision among other things on grounds of procedural fairness and

alleged non-compliance with the Charter. Thus, it is unnecessary to have recourse to the administrative law analysis to determine the standard of review; in *Sketchley v. Canada* [2005] F.C.J. No. 2056, the Federal Court of Appeal stated that a defect in procedural fairness is reviewable independently of the pragmatic and functional analysis (as it was then known), and in *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, at paras. 15-17, a majority of the Supreme Court of Canada stated the same with respect to an alleged incompatibility of an administrative decision with the Charter.

[24] Otherwise, the *vires* of the decision is evidently a question of law reviewable for correctness.

Procedural Fairness

[25] Although as noted above, it was agreed that the sufficiency of disclosure should be assessed with reference to the decision of Deputy Commissioner Demers of July 7, 2006, Mr. Poulin argues that even if the Deputy Commissioner had provided him with those details contained in the Commissioner's decision on his grievance, these details would still have been insufficient to meet the duty of procedural fairness in this case.

[26] It is well-established that procedural fairness requirements are variable in the prison context and will depend on factors such as the nature of the decision at issue and the seriousness and duration of its consequences: *Flynn*, at para. 15; *Gallant v. Canada (Deputy Commissioner, Correctional Services Canada)*, [1989] FCJ No. 70, at para. 28. This is in

line with well-known principles of fairness articulated by the Supreme Court of Canada in *Baker v. Canada*, [1999] 2 S.C.R. 817, at paras. 21-28.

[27] In *Gallant*, the Court of Appeal articulated a basic distinction between disciplinary and administrative decisions in the penitentiary context which remains useful:

> 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. Indeed, in the former case, what has to be verified is the very commission of the offence and the person involved should be given the fullest opportunity to convince of his innocence; in the latter case, it is merely the reasonableness and the seriousness of the belief on which the decision would be based and the participation of the person involved has to be rendered meaningful for that but nothing more.

[28] The decision before the Court clearly falls into the administrative category, with the added particularity that here, Mr. Poulin himself initiated the scanner request and the exemption it necessarily entailed with his letter of May 18, 2006. Only after the request had been denied a first time by Mr. Demers (letter of June 8, 2006) did Mr. Poulin request disclosure of particulars. Moreover, the 2003 letter for Assistant Commissioner Kulik which sets out that updates to Mr. Poulin's computer required by reason of his visual disorder would be approved or refused on a case-by-case basis clearly contemplates an administrative assessment, and not an adversarial process.

[29] As for the importance of the decision to Mr. Poulin, the Court is prepared to accept that in theory, the decision has a possible bearing on his autonomy and is potentially heavier

in consequence than would be, for instance, the suspension of conjugal visits that was at issue in *Flynn.*

[30] That said, the circumstances of Mr. Poulin's request considered as a whole (which include the existence of lower risk options) would point towards relatively minimal disclosure requirements (still sufficient to ensure meaningful participation in the process but nothing more) if it were not for the potential applicability of s.27 of the Act, which imposes on CIC an "onerous disclosure obligation," as it was described by the Supreme Court of Canada in *May v. Ferndale Institution,* 2005 SCC 82, at para. 95, albeit in a very different factual context. Subject to certain limitations listed at subsection 27(3) of the Act, subsection 27(1) expressly establishes inmates' right to disclosure of information, either in full or in summary form, in cases where they are entitled by the Act or Regulations to make representations with regard to a decision affecting them. Although it is far from clear to the Court that s. 27 was actually engaged when Mr. Poulin made his request to Deputy Commissioner Demers, both parties have made representations on the basis that it was.

[31] Looking at the information Mr. Poulin did have, the CNIB assessment of February 2006 indicates that he was made aware of CSC's security concerns as regards image-scanning capabilities at least as early as the time of his evaluation. The respondent argues that notwithstanding the lack of evidence that Mr. Poulin was informed then or later of other security concerns discussed in the Commissioner's decision (namely the ability to manipulate and reproduce documentation (text) using a scanner, the ability to digitize and encrypt information to impede searches for unauthorized software, or concerns over liability

if the equipment was left in the custody of CSC's staff) , Mr. Poulin was certainly able to propose substantive measures to mitigate "threats to CSC, staff, inmates and the public, and/or any security concerns" in his request letter of May 18. A specific search protocol was proposed (visual inspection, internal system inspection, file content inspection and forensic inspection) in his letter of June 19, 2006. Thus, in the respondent's view, the applicant demonstrated a working knowledge of the risks as they existed in the institution. He made appropriate representations and was clearly able to exercise "his right of objection", as required by *Flynn*.

[32] With respect to Mr. Poulin's actual or imputed knowledge of the concerns associated with scanners, there is no evidence that the applicant was a member of the Advisory Committee on Inmate Access to Computers. Certainly according to the member list in annex B of that Committee's 2005 report, which was included in the record, he was not. Nor is there any evidence that details of the security concerns discussed by said Committee (CSC's Technology Division appears to have been represented) were shared with him. The Court notes moreover that the particular risks associated with scanners per se appear to be distinct from those associated with computers and software generally. These last topics were the only ones discussed in the report.

[33] It is not evident to the Court that Mr. Poulin necessarily has the knowledge required to appreciate that scanners may be used, for example, to digitize and encrypt documentation in order to impede searches for unauthorized software. Also, the specific objection raised by the parole officer during the CNIB assessment in February 2006, that CSC was concerned with image scanning capabilities, could reasonably have lead Mr. Poulin to believe that such

concerns did not extend to the scanning of text. It would thus clearly be speculative for the Court to conclude that Mr. Poulin had knowledge of the issues summarized in the Commissioner's decision. The Court cannot infer such knowledge for the purpose of its analysis of the alleged breach of procedural fairness. The respondent's argument that the applicant actually knew or should have known what Deputy Commissioner Demers meant by "security concerns" is unsubstantiated. The respondent had the burden of providing the necessary evidence in that respect, and Mr. Poulin was certainly not cross-examined in this regard.

[34] There is no direct information on file as to what particular security concerns Deputy Commissioner Demers himself had in mind, but given that he specifically refers to a consultation with CSC's Information Technology Services, the same source of information consulted by the Commissioner, the Court finds it reasonable to infer that the Deputy Commissioner had in mind the same concerns that were later summarized in the Commissioner's decision (except perhaps the liability issue which arose from Mr. Poulin's further comments in his grievance).

[35] The respondent also submits that information as to particular vulnerabilities associated with scanners falls within the exceptions set out at subsection 27(3) of the *Act*, which exempts from disclosure information the Commissioner has reasonable grounds to believe would jeopardize the safety of any person or the security of the penitentiary.

[36] The Commissioner certainly did not invoke that provision in respect of the details he included in his decision. Accordingly, the Court finds that paragraph 27 (3) was not in play, in so far as this particular summary of the security issues involved is concerned.

[37] Thus, there is no explanation of why Deputy Commissioner Demers could not have provided this or a similar summary to Mr. Poulin. As mentioned earlier, the eventual disclosure of the summary by the Commissioner does not cure the breach (see *Flynn* above); the Court must therefore conclude that the Deputy Commissioner did indeed fail in his duty to provide the information he relied upon **or** a summary thereof as required by paragraph 27 (1) of the *Act*.

[38] Given the applicant's position that a summary of the type provided in the Commissioner's decision would have been insufficient to meet the respondent's duty of procedural fairness in this case, it is worth noting that the Court agrees with the respondent that having regard to the nature of the decision sought by the applicant and the other relevant circumstances, a summary of the security concerns would have been sufficient to meet the particular duty imposed in this case, whether or not paragraph 27 (1) of the Act applies. This is particularly the case where the Deputy Commissioner's decision turned more on the availability of suitable alternatives presenting lower or no risk than on the possibility of mitigating risks associated with scanners. The Court also agrees that disclosure of more technical details (if not previously disclosed to the inmate population) would likely fall within the exception provided for at paragraph 27 (3). In the present context, there is no need to say any more, except perhaps to note that the respondent's disclosure of such details

by way of an affidavit filed in the present proceedings is not itself conclusive in that respect, as was argued by the applicant. The context has changed and the importance of adducing strong evidence for the Court may very well have outweighed the respondent's other legitimate concerns. Finally, it is worth noting that in general, Courts will show some deference to CSC's assessments of what information, not already made public, is liable to jeopardize institutional safety.

[39] To conclude, the Court is satisfied that given the parameters set out in *Flynn*, above, there was a breach of the duty of procedural fairness by Deputy Commissioner Demers. As a rule and subject only to a limited exception that does not apply here[6], the Court will intervene when such a breach has occurred, quashing the decision. However, the applicant has asked the Court not to simply remit this matter for re-determination but rather to consider the other issues which have been put into play, particularly the Charter challenge, in order to give specific directions in that respect or to issue the decision which should have been made. Given the particular circumstances of this case, the Court has decided to review the other issues raised by the applicant.

Jurisdiction

[40] Turning briefly to the jurisdictional issue, Mr. Poulin contends that the decision on his third-level grievance is *ultra vires* the Commissioner's authority under the Act, arguing

[6] That is, when it is absolutely clear that the underlying claim is "hopeless" in any case: *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202, paras. 52-54. In this case, although it is most likely that a fresh decision would be the same, the Court can not say it is an absolute certainty.

that it violates principles enunciated therein by denying him access to programs and personal growth opportunities that would assist in his rehabilitation and reintegration (s.3 and s.76); by not using the least restrictive means possible (s.4(d)); by unnecessarily removing his rights and privileges (s.4(e)), by undermining his sense of personal dignity (s.70), and by failing to accommodate and respect his disability (s.4(h) and s. 87). The applicant raises this issue independently of his Charter challenge, although obviously similar principles are engaged.

[41] The Court considers that this ground must fail. As the respondent points out, the Commissioner's decision of January 4, 2007 was made pursuant to policy CD-90. The applicant has not alleged that policy CD-90 itself contravenes the Act, and on its face, the directive falls squarely within the Commissioner's rule-making authority contemplated at s.97 and s. 98 of the Act. Moreover the Court agrees with Justice Martineau's observations in *Poulin v. Canada,* 2005 FC 1293, at para. 26, that "the adoption of a coherent and predictable policy on staff safety, and even the safety of the prison population, is of cardinal importance", and that "Directive 90, dealing with the possession of computers with certain peripheral equipment in cells, is thus very important."

[42] Policy CD-90's underlying conformity with the Act is instructive insofar as the impugned decision applies its rules. Annex A of CD-90 explicitly lists scanners as a prohibited item only after specifying that "the following requirements are based on CSC's ability to reasonably assess and regulate various risks associated with inmate-owned computers and electronic games in a correctional setting." In the Court's view, this language is consistent with a legitimate exercise of the discretion inherent in the application of the general principles set out at section 4 of the Act, particularly subsection 4(e) which enjoins

CSC to employ the least restrictive means *consistent with the protection of the public, staff members and offenders.*

[43] As for the other sections of the Act relied upon by the applicant in support of his jurisdictional argument, it is quite clear that none of them are so directive as to deprive CSC of its jurisdiction to decide Mr. Poulin's grievance in the way that it did. Suffice it to note that subsections 4(h) and 87(a) mandate that CSC take into account Mr. Poulin's disability in any decisions affecting him, but do not dictate any particular outcome in matters such as this one, where divergent policy goals and multiple considerations are engaged.

[44] Accordingly, the Court finds that the impugned decision of January 4, 2007 was properly within the jurisdiction of the Commissioner in terms of his authority under the Act. Moreover, had the reasonableness of the decision been contested on administrative law grounds, the Court would have found that the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law. (*Dunsmuir v. New Brunswick*, 2008 SCC 9).

Charter Conformity

[45] On the question of the conformity of the Commissioner's decision of January 4, 2007 with subsection 15 (1) of the Charter, that is, whether the guarantee of "equal benefit of the law without discrimination …based on …physical disability" has been infringed, both parties are in agreement that the tri-partite test set out by the Supreme Court in *Law* should be applied here. That test asks firstly, whether the measure complained of has as its object or

effect the imposition of differential treatment based on personal characteristics; secondly, whether the differential treatment is based on one of the grounds set out in subsection 15(1) or an analogous ground; and thirdly, whether the differential treatment is contrary to the purpose of subsection 15(1), namely the protection of fundamental human dignity (*Law*, supra, at para. 88; *Gosselin v. Québec (A.G.)* 2002 4 S.C.R. 429, at para. 17; *Veffer v. Canada (Minister of Foreign Affairs)*, 2007 FCA 247, at para. 39.)

[46] It also bears mention that in *Auton v. British Columbia*, [2004] 3 SCR 657, at para. 25, Chief Justice Beverley McLachlin cautioned against "an overly technical" approach to section 15 claims. Courts should be attentive to "the reality of the situation." Similarly, in *Law* itself Justice Frank Iacobucci was careful to comment, at para. 87, that he did not mean to suggest "that a court which articulated its analysis using a different structure would err in law simply by doing that, provided it addressed itself properly and thoroughly to the purpose of s. 15(1) and the relevant contextual factors." As noted in *Eaton v. Brant County of Board of Education*, [1997] 1 S.C.R. 241, at para. 67, the central purpose of subsection 15(1) in relation to disability is to effect recognition and reasonable accommodation of disabled persons' actual characteristics.

[47] It should be made clear that there is no suggestion here that Policy CD-90, which contemplates both a general prohibition on scanners and an exception for hardware, software, and peripheral equipment required to provide computer accessibility for those with visual or physical impairment, is unconstitutional. Rather, it is the specific refusal of the applicant's request to acquire a scanner which is said to infringe the Charter. In this respect, this case is similar to *Multani*, where a majority of the Supreme Court ruled that the

application of a normative rule may infringe the Charter where the decision-maker has acted pursuant to an enabling statute, even if the normative rule itself is not objectionable in terms of administrative or constitutional law. In such cases, an infringement of a protected right will be found to be constitutional only if it meets the requirements of s. 1 of the Charter, that is, if (a) the objective being pursued is sufficiently important to override a Charter right; and (b) the means employed are rationally connected to the objective in question, they are minimally impairing, and their deleterious effects are proportional to the importance of the objective in question (*R. v. Oakes*, [1986] 1 S.C.R. 103).

[48] It should also be said that the analysis required here is not duplicative of that conducted above on the question of jurisdiction, despite some similarities in the principles involved, such as the idea that correctional policies, programs and practices should respect among other things the needs of offenders with special needs (subsection 4(h) of the Act). As it was observed in *Multani*, at para. 16, "it is not surprising that the values underlying the rights and freedoms guaranteed by the *Canadian Charter* form part — and sometimes even an integral part — of the laws to which we are subject."

Differential Treatment

[49] The first step of the subsection 15(1) analysis set out in *Law*, at para. 88, asks whether the impugned law draws a formal distinction between the claimant and others on the basis of one or more personal characteristics or (b) fails to take into account the claimant's already disadvantaged position in Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics. Here, the impugned "law" is an individualized decision, and it is only in the sense that the decision of January 4, 2007 fails to adequately address or take into account Mr. Poulin's visual impairment that it might result in differential treatment.

[50] The Court appreciates that the prohibition of scanners in CD-90 engenders substantively differential treatment to the degree that the utility of a scanner to Mr. Poulin differs from its utility to members of the "appropriate comparator group," inmates who are not visually impaired. This special utility is clear in the CNIB assessment of February 2006, which explains that a scanner in combination with the Text Cloner Pro software allows printed materials to be converted to speech. The first step of the *Law* analysis is thus made out, because members of the comparator group would not normally need to make use of a scanner and appropriate software to access print materials.

Distinction on the Basis of Enumerated or Analogous Ground

[51] The second step of the *Law* analysis asks whether one or more enumerated or analogous grounds of discrimination are the basis for the differential treatment. Here, this is

entirely straightforward. Visual impairment is a physical disability, which is an enumerated ground.

Discrimination

[52] At the third and final step, the Court must determine whether the differential treatment in question has an effect that is discriminatory within the meaning of the equality guarantee. This is where the analysis becomes more complex, as the jurisprudence has established that differential treatment will offend subsection 15(1) only if it demeans a claimant's human dignity, which is not always a readily definable concept. One way of putting this is to ask whether the decision conforms to the concept of a society in which all persons enjoy equal recognition as human beings: *Law*, para. 99. What is required is a contextual analysis which incorporates both subjective and objective components; that is to say, not only the applicant's point of view, but also the point of view of the reasonable person similarly situated to the claimant who takes into account the contextual factors relevant to the claim (*Egan v. Canada*, [1995] 2 S.C.R. 513, at para. 58).

[53] As the subsection 15(1) jurisprudence makes clear, the existence of pre-existing disadvantage, stereotyping, prejudice or vulnerability is an important factor going to context. Mr. Poulin did not lead evidence on this point but he did not have to: *Law*, para. 77. The Court has no hesitation in taking judicial notice of the vulnerability and disadvantages to which the visually impaired have in the past been subject. As it was stated by Justice Gerard Laforest in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para 56, "it is an unfortunate truth that the history of disabled persons in Canada is largely one of exclusion and marginalization. Persons with disabilities have too often been excluded from

the labour force, denied access to opportunities for social interaction and advancement, subjected to invidious stereotyping and relegated to institutions (…) [t]his historical disadvantage has to a great extent been shaped and perpetuated by the notion that disability is an abnormality or flaw. As a result, disabled persons have not generally been afforded the "equal concern, respect and consideration" that s. 15(1) of the Charter demands."

[54] However, this factor alone is not necessarily conclusive of an affront to human dignity; as the Supreme Court points out in *Law,* at para. 67, there is no principle or evidentiary presumption that differential treatment for historically disadvantaged persons is discriminatory. In this case, there are other important contextual factors which must be brought into the picture, in particular the correspondence - or lack thereof - between the ground on which the claim is based and the actual need, capacity, and circumstances of Mr. Poulin.

[55] On this point, while no doubt visually impaired, it is not disputed that Mr. Poulin is not legally blind (which itself does not necessarily mean total loss of sight). As far as the Court is able to determine, Mr. Poulin's need for adaptive technologies to access print materials has not actually been evaluated as such or independently confirmed. The CNIB assessment of February 2006 was concerned with visual strain arising out of computer use, and it appears that the accessibility of print materials only came up incidentally, as an added advantage of the MAGic Magnification software package. Mr. Heaney, the adaptive technology specialist who conducted the assessment, is neither an optometrist nor an

optician. Moreover, as noted the most recent optometrist's report in the record before the Court is over ten years old. This is problematic from an evidentiary standpoint, since part of the factual basis to Mr. Poulin's claim is that his eyesight is deteriorating. Nor is there any evidence that Mr. Poulin has requested an assessment from CSC's Health Services to determine whether he requires additional visual aid equipment to carry on the tasks of daily living – which would no doubt include the ability to access print materials - and whether such equipment can be provided at CSC's expense. Until such an assessment is conducted, Mr. Poulin's contention that a CCTV or any other alternative proposed to him (such as a dedicated reading machine) is prohibitively expensive is of little consequence.

[56] There are other contextual elements which further weaken the applicant's case. Firstly, even if the Court assumes that his need for technological assistance to access print materials is genuine, various alternatives to scanner ownership which would permit Mr. Poulin such access have been proposed, including the CCTV option, the use of an institutional scanner, and in the CNIB assessment itself, the acquisition of a dedicated reading machine[7]. All of this forms part of the "reality of the situation" before the Court, and in the Court's view must be noted at this stage if it is to address itself properly and thoroughly to the purpose of section 15(1) and relevant contextual factors, even if these

[7] It is clear from the February 2006 CNIB assessment that a dedicated reading machine is a different device than a CCTV magnifier.

same factors would obviously also have a bearing on the reasonableness and justification of the decision under section 1 of the Charter, should that provision become relevant.

[57] Secondly, in *Law*, at para. 70, it was stated that "legislation which takes into account the actual needs, capacity, or circumstances of the claimant (…) in a manner that respects their value as human beings and members of Canadian society will be less likely to have a negative effect on human dignity." Applying this observation *mutatis mutandis* to Mr. Poulin's case, the fact that the decision of January 4, 2007 explicitly notes that "[y]our visual disorder is recognized and the Institution as well as the CSC is required to assist you using the least restrictive measures possible," and that "you are entitled to some exceptions according to CD-90," points away from the existence of substantive discrimination.

[58] At this juncture it should be recalled that the onus is on Mr. Poulin to establish an infringement of subsection 15(1). In this regard, he asserted in his grievance that alternative measures "would not accommodate my disability as completely as the scanner would," and that these "cannot be considered as an option," but the evidence to support this contention is very thin. As Mr. Poulin contends, it may be significant that a scanner coupled with appropriate software can render text into speech, whereas a CCTV only magnifies text. But even if this is so, he has not explained how the differential effect operated by the prohibition on scanner ownership can be qualified as discriminatory in terms of substantive equality, where he has been offered access to an institutionally owned scanner[8].

[8] It is notable that under current policy, only inmates who already possessed computers prior to a 2002 moratorium on computer ownership are permitted computers as personal property. Although the context is different (but still relevant to inmates' access to programs and skills), it appears from the Proposal of December

[59] This is not a minor factual detail, but one which goes to the very existence of discrimination. That Mr. Poulin has effective access to a scanner distinguishes his situation from that of the claimants' in *Eldridge*, where the failure of the BC Medical Services Commission to provide sign language interpretation to deaf persons was found to violate subsection 15(1). In that case, interpretation was qualified by the Supreme Court as *indispensable* to effective communication in the provision of medical care (at para. 72). Likewise, in *Canadian Assn. of the Deaf v. Canada*, 2006 FC 971, Justice Richard Mosley described interpretation services as *necessary* for effective communication in the delivery of government services (at para. 118). In contrast, here the evidence simply does not demonstrate that personal ownership of a scanner is either indispensable or necessary for Mr. Poulin to access print materials.

[60] On this basis, the Court can only conclude that notwithstanding Mr. Poulin's argument, a reasonable person in his circumstances would not view the impugned decision as discriminatory, having regard to the purpose of subsection 15(1) of the Charter. In light of the overall context, there is insufficient evidence that the decision imposes a real burden, let alone a burden which offends Mr. Poulin's human dignity, by not recognizing his special needs or otherwise.

[61] If the Court had concluded otherwise, the onus would shift to the respondent to show that the subsection 15(1) infringement is justifiable pursuant to section 1 of the Charter. That the assurance of security in the penitentiary context may be a sufficiently important objective to justify overriding a Charter right is clear from the Act itself, at section 4(a),

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2005 that inmates who do not own approved computers (including those without the means to acquire them)

where it is enunciated that "the protection of society [is] the paramount consideration in the corrections process." Here, the respondent's argument that there is a rational connection between the prohibition on scanner ownership and security concerns in the institutional setting would have been accepted, on the basis of policy CD-90 itself and more particularly the reasons set out in the impugned decision. Moreover, the Court would have found that a strict prohibition on scanner ownership is minimally impairing where there is access to an institutionally owned scanner and ownership of alternative technologies providing similar functionality. In the circumstances of this case and considering the record before the Court, these measures would constitute reasonable accommodation.

CONCLUSION

[62] In view of the breach of procedural fairness, the decision must be quashed. That said, given the Court's conclusions on Charter conformity, it would serve little purpose to remit the matter back to the Commissioner for re-determination. This is especially so when one considers that Mr. Poulin's circumstances may well have changed, and that there is nothing precluding him from making a fresh request to the Deputy Commissioner if he deems it necessary on the basis of more current evaluations of his needs. In addition, the Court must be mindful of the need for judicial economy.

[63] The applicant will be entitled to his costs. The Court considered the parties' arguments that there should be no costs granted in relation to the new evidence, particularly the affidavits of Mr. Reinhardt and any affidavit filed by the applicant in response thereto.

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must make use of institutional computers in common areas.

Given that the respondent was really the first to file new evidence in respect of the security issues, the Court has concluded that no special directions will be issued in that respect.

ORDER

THIS COURT ORDERS that:

1. The application for judicial review is granted in part. The Commissioner's decision of January 4, 2007 is quashed.

2. The whole with costs to the applicant.

"Johanne Gauthier"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-27-07
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PLACE OF HEARING:	Vancouver, BC
DATE OF HEARING:	January 30, 2008 (1 day)
REASONS FOR ORDER AND ORDER:	The Honourable Justice Johanne Gauthier
DATED:	June 26, 2008

APPEARANCES:

Robin Gage	FOR THE APPLICANTS
Michelle Shea	FOR THE RESPONDENT

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