Federal Court		Cour fédérale

Date: 20100812

Docket: T-1530-09

Citation: 2010 FC 818

Ottawa, Ontario, August 12, 2010

PRESENT: The Honourable Justice Johanne Gauthier

BETWEEN:

MARVIN JEFFREY TEKANO

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Tekano seeks judicial review of the decision of the Canadian Human Rights Commission (the Commission) dismissing his complaint against the Correctional Service of Canada (CSC) which included allegations that (i) the CSC failed to accommodate his mental disabilities by repeatedly placing him in segregation, and (ii) that the CSC has a security classification policy or practice that systematically discriminates against inmates suffering from mental disabilities. More particularly that, in this case, although Mr. Tekano's rating on the classification scale was "medium, this was overridden to maximum security in part because of his mental disability and its consequences such as head-banging.[1]

[2] According to the Commission, pursuant to paragraph 44(3)(b) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the *Act*), having regard to all the circumstances of the complaint, no further inquiry by the Canadian Human Rights Tribunal (the Tribunal) was warranted.

[3] Having considered the arguments of the parties, the Court agrees that the decision in respect of the allegations relating to the accommodation of Mr. Tekano's disabilities contains reviewable errors that justify setting it aside. However, the Commission's conclusion in respect of the policy aspect of his complaint is reasonable.

Background

[4] Mr. Tekano is a federal offender who is currently serving the remainder of a 21 year sentence at the Chilliwack Community Correction Centre. The applicant's statutory release date was September 29, 2009, but he remains under CSC's supervision until his warrant expiry date of November 19, 2016. At the time of his complaint, Mr. Tekano had served 13 years of his sentence and was incarcerated at the Kent Institution, a maximum security penitentiary in British Columbia. He also spent time at the Pacific Regional Treatment Centre (PRTC) in Abbotsford, British Columbia. At the Kent Institution, and for a variety of reasons mostly related to his mental disabilities, the applicant was periodically placed in the segregation unit or in isolation, meaning that he was locked in his cell for 23 hours a day, most of the time with nothing but a mattress. Sometimes, the Institutional Emergency Response Team (IERT) was requested to extract him from

[1] The complaint also included an allegation that certain members of CSC staff had harassed Mr. Tekano but this allegation was not investigated. This was not raised as an issue in this proceeding.

his cell (or from the PRTC) or simply subdue him with the use of force, chemical agents and/or restraints.

[5] It is agreed that Mr. Tekano suffers from multiple mental disorders that require special accommodation by the CSC. The parties do not agree, however, as to the nature of his disabilities or as to what would have constituted appropriate accommodation prior to March 23, 2009.[2] One of the undisputed consequences of the applicant's mental condition is that he engages in head-banging when he experiences anxiety or frustration, which can lead to serious self-injury such as disfigurement, brain damage, bleeding and possibly death. Between June 19 and July 16, 2008, the applicant had 46 head-banging incidents allegedly due to his anxiety about being held in isolation.

[6] He remained in segregation until August 20, 2008, allegedly because the Segregation Review Board would not transfer him until he could demonstrate stable behaviour and remain free from self-injurious conduct.[3] According to Mr. Tekano, between July and August, 2008, he had another 32 incidents of head-banging.

[7] In his complaint filed on August 29, 2008, the applicant focuses on the events that took place between June and August, 2008. He contends that he suffers from varying frontal lobe deficit, attention deficit hyperactive disorder (ADHD) and some form of post-traumatic stress disorder (PTSD). According to him "he requires positive social interaction and a stable environment where

[2] Mr. Tekano was certified March 23, 2009.
[3] Applicant's complaint form at page 13 of the Applicant's Record.

he feels safe",[4] something which segregation does not provide. The remedies he was seeking included that CSC accommodate his disability by agreeing not to put him in segregation **which makes his condition worse**, that he be provided regular psychological counselling and **that he be compensated for the pain and suffering caused by the discrimination he has suffered**. He also mentions that the CSC staff at all level should be trained regarding their duty to accommodate prisoners with mental disabilities and that CSC should change its **policy of classifying prisoners with mental disabilities as a higher security risk because of their disabilities**.

[8] The respondent, as mentioned, agrees that Mr. Tekano has a paranoid personality disorder and may have a complex neuro-developmental disorder and a form of ADHD; CSC neither confirms nor denies the diagnosis of PTSD.[5]

[9] According to the CSC, any accommodation made for Mr. Tekano necessitates that the applicant be put in an environment where staff can intervene immediately when he engages in a self-harming behaviour. It further points out that the applicant must also be protected from the inmate population, noting that on February 4, 2008, while housed in Unit E at the Kent Institution, he was stabbed in the throat and in the right lung by another inmate. On other occasions, he was abused verbally because of his self-injuring behaviour.

[4] See para. 13 of the investigator's report at page 19 of the Applicant's Record.
[5] This is founded on the opinion of Dr. Healy, a psychiatrist and Director of the psychiatric hospital at the PRTC (see paras. 23-24 of the investigation report).

[10] Although Mr. Tekano had a self-injuring history in the past five years, as mentioned the issue raised in the complaint mainly started after June 2008 when he was forcibly transferred back from PRTC to the Kent Institution because he had been violent towards the mental health staff and threatened the said staff with various objects (such as broom and mop handles, in addition to glass from a broken television).

[11] The Commission designated an investigator pursuant to subsection 43(1) of the *Act* to investigate the complaint. In conducting his investigation, the investigator examined all documentary evidence provided by the parties. While the respondent does not indicate which, if any, documentation was provided to the investigator, the applicant reports having sent on April 7, 2009, a package of documents which contained among other things: a psychological report from Dr. Peggy Koopman; a psychological assessment by Kevin Wildeman; a report by psychiatrist Dr. Smith; a psychological report by Dr. Melady Preece; and a brief report by psychiatrist Dr. Hechtman. Although it is not clear if the investigator reviewed the report of Dr. Murphy, acting on behalf of CSC, dated May 11, 2009 and the notes of Dr. Mater (also employed by CSC) dated March 24, 2009, it is clear that the investigator and/or the Commission were/was aware of their involvement given the references made to these medical experts.

[12] Thus, the investigator considered the changes in the accommodation provided to Mr. Tekano in the spring of 2009 after a new three-step plan was put in place and following the various medical opinions referred to above that had been sought by the applicant and later on by the CSC.

[13] In addition, one witness − Dr. Healy, Psychiatrist and Director of the Psychiatric Hospital at the PRTC was interviewed. Although, it is somewhat surprising that the investigator did not meet with any other witnesses[6], the applicant did not challenge the thoroughness of the investigation *per se*.

[14] In the report, the investigator summarized the situation concerning the allegations with respect to the accommodation of the applicant's mental disabilities as follows:

> 57. The evidence indicates that although the parties disagree as to the complainant's diagnosis and accommodation needs, both parties agree that the complainant has multiple mental disabilities for which he requires treatment. Both parties further agree that if the complainant persists in his self-injurious behaviour and continues to bang his head, he may suffer permanent brain damage and even death.
>
> 58. The evidence suggests that the complainant has not fully cooperated with the respondent in the search for accommodation by refusing treatment at times and by exhibiting violence toward mental health staff at the Regional Treatment Centre.
>
> 59. The evidence indicates that although the complainant is not getting his preferred accommodation, the respondent **has and continues** to accommodate his disabilities **as best it can under the circumstances**.
>
> (my emphasis)

[6] Such as any other medical experts involved or Dr. Moore, a CSC doctor who treated him and who allegedly was the first to tell him that segregation was not indicated in his condition.

[15] With respect to the alleged discriminatory policy or practice, the investigator reviewed how the security classification of inmates is done. She mentions that she applied the steps analysis commonly referred to as the *Meiorin* test (*Superintendent of Motor Vehicles v. British Columbia Council of Human Rights,* [1999] 3 S.C.R. 868).

[16] The investigator concluded that:

(a) the applicant's violent behaviour while incarcerated and the need for a high degree of supervision are the reasons for which he was classified as a maximum security inmate and not his disability as claimed by Mr. Tekano[7]. Considering all of the evidence, it does not appear that CSC systematically classifies disabled inmates as maximum security inmates;

(b) while the physical and/or mental illness may be a factor in the determination of an inmate's security classification, the evidence suggests that there are a number of other factors considered, such as the inmate's background, institutional history and behaviour, all as provided for in sections 17 and 18 of the *Corrections and Conditional Release Regulations* S.O.R./92-620 (the *Regulations*).

[17] Finally, the investigator recommended that the Commission dismiss the complaint on the basis that:

(i) the CSC is accommodating the complainant's disabilities;

[7] See para. 82 of the investigator's report.

(ii) the evidence does not support the allegation that the respondent systematically classifies disabled inmates as maximum security inmates; and

(iii) having regard to all the circumstances of the complaint, further inquiry by the Canadian Human Rights Tribunal is not warranted.

[18] On May 29, 2009, this report was sent to the parties for review and comments. While the CSC did not make any further submissions, the applicant sent extensive comments to the Commission on June 23, 2009.

[19] On August 11, 2009, the Commission issued its decision simply adopting the recommendations of the investigator's report referred to above (see para. 17).

[20] The relevant provisions of the *Act*, the *Corrections and Conditional Release Act*, S.C. 1992, c. 20, and the *Corrections and Conditional Release Regulations*, S.O.R./92-620, are included in Annex A to these reasons.

Analysis

[21] Before looking at the main issues, the Court must deal with a preliminary objection raised by the respondent in respect of documentary evidence filed by Mr. Tekano as exhibits to the affidavit filed in support of the present application claiming that they were not part of the Certified Record, i.e. the evidence actually before the Commission, although they may well all have been

before the investigator or the Commission (Respondent's record, para. 24 and Mr. Tekano's affidavit, para. 13)**.**

[22] The applicant did not respond to this objection *per se*. The Court does not believe that its conclusion on this preliminary issue can be determinative of its finding on any of the main questions raised by the applicant. In effect, it became quite apparent during the hearing that the important points for which the applicant sought to rely on this documentation are referred to in either his submissions to the Commission or the investigation report itself.

[23] That said, the Court agrees with the respondent that the general rule set out in *Paul v. Canadian Broadcast Corporation*, 2001 FCA 93; *Canada Human Rights Commission v. Pathak*, [1995] 2 F.C. 455 (F.C.A.); and *Niaki v. Canada (Attorney General)*, 2006 FC 1104 should apply here.[8]

[24] Mr. Tekano did not raise an issue of procedural fairness nor did he contest the neutrality or thoroughness of the report so as to justify looking at evidence not actually considered by the Commission, acting in its capacity as decision-maker as opposed to in its investigative role.

[25] Although the applicant attempts to frame one of the issues as a pure question of law which could be viewed as an excess of jurisdiction − the Commission adjudicated on the complaint as opposed to applying the threshold set out in section 44 of the *Act* – the Court does not accept this as

[8] There is no need to discuss here other decisions of the Court such as in *Clark v. Canada (A.G.)*, 2007 FC 9.

a proper framing of the issue as will be further discussed in reviewing the standard of review to be applied.

[26] In the circumstances, although the Court did not consider *per se* the said exhibits, it did take into consideration the actual references made to these documents in the Certified Record and which form part of the parties' records.

[27] Turning now to the merits of the application, the first task of the Court is to properly characterize the issues raised by the applicant in order to determine what standard of review should be applied. The parties disagree on this point. The applicant insists that the Court should apply the standard of correctness because he raises three questions of pure law, whereas the respondent views the issues before the Commission as questions of fact or mixed fact and law which should be reviewed on the standard of reasonableness.

[28] To properly characterize the questions before the Court, it is useful to say a few words about the role of the Commission and the threshold it must apply to determine whether a complaint should be referred to the Tribunal or not.

[29] The Supreme Court of Canada addressed these issues on a number of occasions (for example, *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Human Rights Commission)*, [1989] 2 S.C.R. 879 (paras. 23-27) (hereinafter *SEPQA*); *Bell v. Canada (Canadian Human Rights Commission; Cooper v. Canada (Canadian Human Rights Commission)*, [1996] 3

S.C.R. 854 (paras. 48-58) (hereinafter *Bell*). The Federal Court of Appeal also had the opportunity to review them more recently in *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2006] 3 F.C.R. 392 (F.C.A.).

[30] It is clear that the Commission's role under subsection 44(3) of the *Act* is a screening function. Still, it constitutes an important threshold in accessing "the remedial powers of the Tribunal under section 54: a decision at this stage by the Commission not to deal with a complaint is a decision which effectively denies the complainant the possibility of obtaining relief under the *Act*" (*Sketchley*, para. 75). The investigator is essentially engaged in a fact-finding mission, but the Commission itself, when it takes action on the basis of the investigator's report, is nevertheless applying the facts in the context of the legal requirements of the *Canadian Human Rights Act*. The resulting decision will, in general, be one of mixed fact and law, calling "for more deference if the question is fact-intensive, and less deference if it is law-intensive" (*Sketchley*, para. 77, quoting *Dr. Q. v. College of Physicians and Surgeons of British Columbia,* 2003 SCC 19 , [2003] 1 S.C.R. 226, at para. 34).[9] It is clear from *SEPQA* that the decision to either dismiss a case or send it to the Tribunal for consideration is intimately linked to the Commission's perception of the merits of the case. As noted in *Slattery v. Canada (Human Right Commission)*, [1994] 2 F.C. 574 (T.D.) at paras 72-78, this reasoning continues to apply to the new version of the legislation under subsection 44(3) of the *Act*.

[9] At that time there were three possible standards of review.

[31] In *Bell* at paragraph 53, Justice La Forest viewed the role of the Commission in performing a screening analysis as somewhat analogous to that of a judge at a preliminary inquiry and held that it was not the function of the Commission to determine if the complaint is made out. Rather, its duty is to determine if an inquiry is warranted, considering all the facts and to assess the sufficiency of the evidence.

[32] In *Larsh v. Canada (Attorney General)*, (1999) F.C.J. No. 508 (T.D.) (QL), Justice John Evans made it clear that the "Commission is entitled and obliged to subject the evidence to a hard look before deciding whether in the circumstances of a complaint a Tribunal hearing is warranted" (para. 33). In that sense, the Commission is not bound to refer the matter to the Tribunal whenever credibility is a central issue, this will particularly be so in cases where there is a "he said, she said" situation. As noted by the Alberta Court of Appeal in *Callan v. Suncor Inc.*, 2006 ABCA 15 at para. 16 (hereinafter *Callan*), "mere conflicts in the evidence of the parties, or issues of credibility, do not always require a full hearing. Sometimes, in the context of all the evidence, particular areas of conflict may lose their apparent importance."

[33] It is also clear that the Commission must look and consider the sufficiency of the evidence as a whole. However, the threshold it must apply to determine whether considering all the circumstances a referral is warranted has repeatedly been described as low, see for example *Bell Canada v. Communications, Energy and paperworks Union of Canada*, [1999] 1 F.C. 113 (F.C.A.) (hereinafter *Bell Canada*) at para. 35. Justice Sopinka in *SEPQA* describes it at paragraph 27 as whether or not there is a reasonable basis on the evidence for proceeding to the next stage. As the

respondent puts it at paragraph 35 of his Memorandum, it can also be translated as: "whether the evidence is sufficient to suggest a possibility that some discrimination had occurred".

[34] With these principles in mind, the first issue raised by Mr. Tekano is whether the Commission erred in concluding that "although the complainant is not getting his preferred accommodation, the respondent has and continues to accommodate his disabilities as best it can under the circumstances", particularly considering that to reach such a conclusion it clearly had to exceed its jurisdiction and act as an adjudicator, weighing complex and conflicting evidence including several medical opinions.[10] This included making findings such as "there is no conclusive evidence with regard to [Mr. Tekano's diagnosis]".

[35] In *Callan* [11] the complainant was arguing that the Chief Commissioner erred in law by acting as an adjudicator as opposed to simply assessing the whole of the evidence. The Alberta Court of Appeal made it clear in that case that it was not useful to focus on such distinction. Rather, it found that the decision was to be reviewed by determining if the ultimate conclusion not to refer a matter to the Tribunal was reasonable or not. Using such approach, the Court noted that:

> " … If the Chief Commissioner is faced with a complaint that is bristling with issues of credibility and conflicts on the facts, it will in many cases be unreasonable for him not to refer the matter to a human rights panel. However, his decision should be assessed in

[10] It appears that the investigator accepted Dr. Healy's opinion that all medical experts consulted by Mr. Tekano had a limited understanding of his case given that they had not consulted his whole file and the particular circumstances that apply in carceral institutions.

[11] Although this case was based on the provincial human rights legislation, it is evident that the role of the Chief Commissioner was exactly the same as that of the Commission (see para. 14).

> light of its reasonableness, not based on any perceived distinction between assessing evidence and adjudicating." (*Callan*, para. 15)

[36] Like in *Callan*, Mr. Tekano really contests the findings of fact on which the Commission based its conclusion that a referral was not warranted. It is quite evident, when looking at paragraphs 40 to 43, 50 and 51 of the applicant's memorandum for example, that what he is really saying is that in light of the evidence on the record (particularly the medical opinions he submitted, the other options that were available to CSC and that in fact were used several months later after Mr. Tekano suffered what one of the medical experts describes as "something akin to mental torture", serving only to exacerbate his discomfort and distress)[12] and having regard to all the circumstances, there was a reasonable basis in the evidence for proceeding to the next stage and thus the conclusion of the Commission is unreasonable. His counsel argues that the investigator failed to consider the inordinate delay in adopting the three-step plan described in the report and the fact that without access to the Tribunal, Mr. Tekano could not benefit from its remedial powers − damages to compensate him for the pain and suffering he suffered between June 2008 and March 2009.[13]

[37] In my view, the manner in which the Commission applied the test set out in subsection 44(3) of the *Act* to the facts underlying the complaint in respect of the accommodation (including the issue of consent and cooperation or the lack thereof) is a mixed question of fact and law where there is no real extricable question of law to be decided. The standard of review applicable to such question is

[12] See para. 21 of the investigation report.
[13] Indeed Mr. Takeno was also put in segregation on other occasions up to the middle of March 2009.

reasonableness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, *Bateman v. Canada (Attorney General)*, 2008 FC 393 at para. 19).

[38] I have come to a similar conclusion in respect of the Commission's conclusion on the policy aspect of the complaint which Mr. Tekano also challenges. The details of his argument will be discussed later on.

i) Accommodation and consent

[39] The respondent argues that much deference should be given to the Commission especially when the decision involves the exercise of the Commission's discretion as to the better use of its limited resources. Here, by the time the investigation was completed and the report issued, the complaint had been resolved as the three-step plan put in place by the PRTC essentially put an end to the applicant's segregation. This effectively took care of Mr. Tekano's complaint and the main redress he was seeking.

[40] The respondent submits that with respect to the alleged delay in providing an accommodation that actually satisfied Mr. Tekano, the Commission clearly felt that given the constraints imposed on CSC and the particular duty it had to perform, and considering the lack of cooperation of the applicant, the accommodation provided, including Mr. Tekano's segregation or isolation from June - August 2008, was appropriate. The case law is clear that one's duty is not to

provide perfect or a preferred accommodation. In the circumstances, and after considering the entirety of the evidence, the Commission's decision was reasonable.

[41] The standard of review already takes into account the deference to be given to the Commission. The Court will simply note that when the complainant seeks damages for the pain and suffering allegedly caused by the failure to provide appropriate accommodation of his disabilities in a timely fashion, it is not clear how the Commission's use of its resources is a relevant consideration.

[42] It is not really disputed that the plan described in the May 5, 2009 document prepared by Dr. Healy which was established after the certification of Mr. Tekano[14] constituted reasonable accommodation. Had this been done in July 2008, it is quite unlikely that a complaint would have been filed or the various medical and psychological expert opinions in this file would have been sought.

[43] Thus, the Court will focus on the Commission's decision in respect of the core or main aspect of the complaint, that is, the accommodation provided prior to April – May 2009 and, more particularly, what measures were actually taken to accommodate Mr. Tekano in the period June – August 2008.[15]

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[14] Declaration that he is incompetent to make decisions in respect of his proper treatment.
[15] CSC continued to use segregation, gas and force between September 2008 and March 2009.

[44] The applicant insists that he has provided a strong evidentiary basis in respect of this aspect of his complaint and given that there were such serious conflicts in the evidence, the Commission was bound to give him access to the remedial powers of the Tribunal in respect of his claim for compensation of his pain and suffering. To illustrate his point, he referred the Court to a more recent decision of the Commission in *Woronkiewicz v. Correctional Service of Canada*, 20080845 (C.H.R.C.) 23 September 2009 issued after the filing of his complaint, which is a case, he says,quite similar to his. In *Woronkiewicz,* the Commission rejected the recommendation of the investigator because there were a number of key factual issues that were in dispute between the parties in respect of the medication (Ritalin) and treatment required by a disabled inmate. The Commission accepted the following statement in the complainant's submissions:

> Insofar as the evidence presented by the respondent is in conflict with the evidence presented by the complainant, such conflict should be explored in the forum of a hearing, through the calling of expert evidence and cross-examination of witnesses. To accept that the denial of mental health treatment was reasonable and not discriminatory, as the respondent asserts, the Commission would have to favour one version of the record over another.[16]

[45] Here, in addition to Mr. Tekano's views and the comments of Dr. Moore, a CSC specialist, he reports in his complaint,[17] there was evidence at the very least *prima facie* from a number of independent expert sources to support Mr. Tekano's allegation that segregation as it was used

[16] Filed by consent of the parties.
[17] The said doctor allegedly told Mr. Tekano that segregation was counter-indicated for his condition.

during that period was simply not an appropriate accommodation for his mental disabilities even in a penitentiary context.

[46] According to this evidence, not only did it not help to stabilize his condition − a term often used in the investigation report and by Dr. Healy particularly, but it was qualified as mentioned earlier as "akin to mental torture" for someone with ADHD,[18] a diagnosis that does not appear to be in dispute.[19] In that sense, although this measure commonly used by CSC to protect an inmate from the inmate population or from injuring himself (such as suicide watch) is not generally intended to be a punitive measure, it may well have become so for Mr. Tekano given his mental disabilities and the fact that he continued, despite his efforts, to bang his head on the walls to the point of causing himself serious injuries.[20]

[47] Although Dr. Healy opined that segregation was the **only** way to protect Mr. Tekano[21] and to monitor his behaviour[22]. There was also evidence that other alternatives were available to CSC such as those actually adopted much later on and described in full in paragraph 26 of the investigation report (see particularly the measures under "Stabilization of mood and behaviour"). There was no evidence, or at least nothing in the investigation report and before the Commission, as

[18] Para. 21 of the investigation report.
[19] The disputed diagnosis is in respect of PTSD.
[20] Dr. Healy confirms that there was evidence of brain injuries (para. 25 of the investigation report).
[21] From the investigation report it would appear that the verbal abuses and the violent incident between Mr. Tekano and other inmates was related to his disabilities, particularly his self-injurious behaviour. It certainly could be argued that the best protection would be to actually stabilize his mood and behaviour before putting him back with the general inmate population.
[22] Para. 25 of the investigation report.

to why these measures including certification[23] could not have been used as early as June 2008. This is especially so when one considers that the medication dosage administered to Mr. Tekano between June 2008 and March 2009 was clearly not working adequately to control his anxiety or frustrations and to prevent his self-injurious behaviour, as well as his violent behaviour during crises situations.[24] According to Mr. Tekano, Dr. Moore had assessed as early as January 2008 that segregation was counter-indicated for his condition[25] and according to CSC he had a long history of refusing treatment or withdrawing his consent after initially agreeing to counselling or psychiatric treatment.

[48] From the applicant's submissions based on Dr. Murphy's own report, it was clear that the *Mental Health Act* contains provisions that were to be used for cases just like this one. In fact, the words used by Dr. Murphy[26] appear to be almost in direct contradiction with the position taken by Dr. Healy that a more effective plan could not be adopted well before April 2009 because of Mr. Tekano's lack of consent or cooperation. Again, why was certification of the applicant not initiated earlier?

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[23] There is no indication that Mr.Tekano's crisis in March 2009 shortly before his certification was any different than the one he had in June 2008.

[24] For example, why were Pinel restraints and stronger medication not used at PRTC when Mr. Tekano became agitated and warned the medical staff of his condition in June 2008?

[25] It appears from the complaint that CSC did not deny this rather it said that at the Kent Institution they "had no information … that would suggest that Dr. Moore feels that segregation is detrimental to TEKANO's health." (Page 13 of the Applicant's Record) There is nothing about Dr. Moore in the report.

[26] "[A]t times when [Mr. Tekano] is banging his head and is risking imminent death, his treatment team should be prepared to take over completely, certify him, and do what needs to be done to preserve his life as much as it is possible to do so …

Involuntary treatment provisions must be used whenever needed. They exist for just this reason – to treat persons who can not make reasonable treatment decisions…" (extract from Dr. Murphy cited in June 23, 2009 submission to the commission).

[49] It is apparent from the reasons given by the Commission (including the investigation report) that this issue of failure to cooperate or consent to treatment was of particular importance in coming to the conclusion that the CSC has accommodated the complainant's disabilities as best as it could under the circumstances during the period from June to September 2008. However, here again there were serious conflicts in the evidence. While Dr. Healy appears to see this behaviour as a form of manipulation or as a paranoid personality tendency to focus on litigation or conflicts, her view was disputed by other experts who opined that what was characterized as lack of cooperation was in fact the normal and foreseeable consequences of his mental disabilities. This view appears to be corroborated by the fact that the BC Mental Health Board did certify Mr. Tekano as incompetent to make decisions regarding his treatment.

[50] Moreover, a closer look at the circumstances included in the report[27] as evidence of this lack of cooperation, also raises questions as to how this really impeded the use of the measures set out in the May 5th plan to stabilize his mood and behaviour.

[51] Mr. Tekano allegedly refused to take an MRI (Magnetic Resonance Imaging) test that would allow Dr. Healy to assess the extent of his brain injuries and determine the scope of his brain activity. The very fact that Mr. Tekano was asked to submit to this test by Dr. Healy is contested and, in any event, it is not clear why the measures adopted later on could not have been implemented earlier despite the lack of MRI results, especially since it is undisputed that

[27] The respondent succinctly summarized them at para. 52 of the respondent's Memorandum**.**

Mr. Tekano suffered from severe mental disabilities and could kill himself if his self-injurious behaviour did not stop.

[52] Mr. Tekano refused to meet with Dr. Murphy through a glass wall after initially consenting to meet with her in a face to face interview. Dr. Murphy later stated that such a meeting was not necessary for her to issue a report and she was able to advise CSC on appropriate treatment and measures to be taken.

[53] Turning to the next incident of lack of cooperation, the applicant refused to go back to Unit E[28] because he feared for his own safety despite CSC's assurances that he would be all right. Again, it is not clear how this prevented the use of the alternative measures set out in the May 5th plan for stabilizing his mood and behaviour prior to transferring him to the general inmate population.

[54] Finally, the respondent relies on the violent behaviour exhibited towards the medical staff during the June 2008 crisis. As noted earlier, why were Pinel restraints and stronger medication not used? There is no evidence that they were ever considered.

[55] As can be appreciated from these few comments, there was conflicting evidence:

- at least in respect of the PTSD diagnosis;
- on the impact of segregation on the applicant;

[28] As mentioned, Unit E is where he was stabbed in February 2008. It is not clear if he was offered to move to other units.

- as to whether there were alternative measures available even in the correctional facility context and as of June 2008;
- considering his mental disabilities as to whether it was reasonable that Mr. Tekano would simply agree or consent to all the proposals made by CSC or PRTC and whether his behaviour really impeded the use of alternative measures such as those set out in the May 5th document;
- as to whether steps should have been taken earlier to certify him if indeed his lack of cooperation impeded the stabilization of his mood and behaviour.

[56] While there is no doubt that the applicant has been found guilty of very serious crimes and that the CSC has many constraints given the duty imposed on it, one must also consider that a disabled inmate in a maximum security correctional facility is in a uniquely vulnerable situation (*Drennan v. Canada (Attorney General)*, 2008 FC 10, [2008] F.C.J. No. 14 (T.D.) at para. 41.).

[57] This case certainly falls within the complex cases bristling with issues of credibility and conflicting evidence (see *Callan* citation at para. 35 above) and I am convinced considering the applicable low threshold that the decision to dismiss this portion of the claim because it did not warrant further inquiry is not within the range of acceptable outcomes on the facts and the law.

ii) Systematic policy and practice

[58] This aspect of the complaint is raised in the last paragraph of the two-page complaint[29]. It reads as follows:

> CSC uses a Security Classification Scale that automatically gives prisoners with "psychological concerns" a higher security rating. This policy is discriminatory to people with mental disabilities. My July 2007 security classification scale is 26.5, which is a medium security classification. My medium security classification scale was overridden to maximum security in part because of my head-banging which I do because of my Post Traumatic Stress Disorder.

To put this allegation in context, it is useful to look at the remedy sought in respect of this portion of the complaint:

> 5. That CSC change its policy of classifying prisoners with mental disabilities as higher security because of their disabilities.

[59] At the hearing, the applicant focused on the fact that he never asserted that disabled inmates were automatically classified as maximum security. Thus, the Commission erred when it described his allegation as one relating to the systematic classification of disabled inmates as **maximum security** inmates and, because of this, it failed to properly apply the *Meiorin* test to the relevant facts. He also says that it is implicit that the Commission wrongly believed that he had to establish that one's mental disability was the only or the primary consideration to classify disabled inmates as a higher security risk to prove discrimination. This is contrary to the established case law cited in their written submissions to the Commission.

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[29] The third page deals with the remedies sought.

[60] One must first note that in his extensive submissions to the Commission on the investigation report, the applicant never claimed that the investigator had misunderstood the basis of his complaint. He never articulated that the classification of disabled inmates as maximum security was never the issue. It appears that back then he clearly understood the investigator to mean that there was no systematic policy of classifying disabled inmates "as higher security because of their disabilities". The reference to maximum security being simply a reference to his alleged own experience with the application of such policy. Obviously judicial review should not be used as an opportunity to change the focus of one's complaint or to bonify it.

[61] The Court is not persuaded that when read in the context of the complaint and, having regard to all the comments dealing with this succinct allegation (paras 60-79 of the investigation report, see particularly 63-64), the Commission misunderstood Mr. Tekano's complaint or failed to properly apply the law to the relevant facts. It did not fail to investigate the impact of the automated scale[30] used by CSC.

[62] It appears that the applicant did not file any evidence other than refer to the fact that the SRS (see note 28), one of the tools used in the process of reclassifying an inmate, does attribute one point for "psychological concerns noted" (one of 15 factors for which a numerical score is provided in that program). Apart from referring to his own experience, he did not file any evidence as to how this one point actually influences the classification of a disabled inmate. Certainly, in his case the

[30] In his complaint, Mr. Tekano simply refers to the Security Classification Scale (SCS) while it appears from the investigation report that there are different computerized tools and criteria used by CSC: first to do the Offender Intake Assessment (OIA) it uses the Custody Rating Scale (CRS) while for periodical reclassification it uses a tool called Security Reclassification Scale (SRS). It appears that Mr. Tekano meant to refer only to SRS in his complaint although this was not clear. The investigator looked at both.

use of this tool gave him a score of 26.5 that did not correspond to his actual classification confirming that CRS does not systematically or automatically determine the classification of an inmate.

[63] In that respect, it is not clear what evidence there was that only inmates suffering from mental disabilities would fall within the category "psychological concerns noted", or exactly what mental disability would always be noted. What is clear, however, is that there was evidence that whenever such concerns were noted (one point attributed) in respect of a mental health issue, this rating was **always** subject to a health care professional assessment. I understand this to mean that instead of obtaining a mental health assessment for all inmates to determine whether a note should be entered in the automated system, it is done only if a concern is actually noted in the system.

[64] There is also no evidence that the attribution of this one extra point assumes, as alleged by Mr. Tekano in his written submissions to the Commission, that mental disabilities are a safety risk. In fact, it could relate to the need for higher supervision, one of the criteria set out in the *Regulations* and which, among other things, is required for the protection of the inmate. This may explain why the applicant in fact also indicated in his June 23, 2009 submissions that he agrees that "mental disability should be taken into consideration in deciding a prisoner's security classification", more particularly because this can ensure that appropriate accommodation is given in prison. So as he noted, his issue is that classification should not be done by *automatically* assigning an individual with mental disabilities a higher SRS score.

[65] The applicant argues that the investigator erred by looking at the whole system from the initial classification (OIA) to the actual reclassification of an inmate because it put less emphasis on the real issue he raised.

[66] I cannot agree. In fact, looking at how classification and reclassification is done is useful to assess the context and carry out the required step-by-step analysis which acknowledges that the simple fact that a mental health issue was considered could be perceived as depriving inmates with disabilities from the same opportunities as other inmates (step one). It is clearly relevant to assess the impact, if any, of the automated addition of one point to the SRS score, and whether this impact is nullified by a specialist's determination of the real need associated with the particular mental disability (need for supervision, etc.), such that it would effectively have no impact on the security level assigned to disabled inmates. This is so, even if as submitted by the applicant, there is a difference between a higher score and a higher classification.

[67] That said, the investigator and the Commission used the appropriate test (*Meiorin* test) to assess the whole of the evidence and to determine if there was a reasonable basis (sufficient evidence) on which one could possibly conclude that systematic discrimination exists.

[68] The Court is not prepared to conclude that it is implicit that the Commission applied an improper burden of proof as suggested by the applicant (see para. 59 above).

[69] Although the Court agrees that certain portions of the report could have been better written, having considered the report as a whole as well as with the submissions made by the applicant, the Court is simply not convinced that the Commission's conclusion that this part of the complaint does not warrant further investigation by the Tribunal is unreasonable.

[70] In light of the foregoing, the application for judicial review is granted in part with costs to the applicant. The Court reserves its jurisdiction to fix the amount (lump sum) of the said costs. Thus, should the parties not be able to agree on an amount, written submissions (a maximum of 5 pages each) shall be filed. To allow time for discussion between the parties, the applicant shall have 15 days from the date of this judgment to do so while the respondent shall file his response 5 days later.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application is granted in part. The decision not to refer the complaint in respect of the events that took place between June – August 2008 is quashed. The matter shall be redetermined by the Commission.

The applicant shall have his costs in an amount to be fixed in a distinct order of this Court.

"Johanne Gauthier"
Judge

ANNEX A

Relevant Statutory Provisions

1. *Canadian Human Rights Act*, R.S.C. 1985, c. H-6

Designation of investigator	Nomination de l'enquêteur
43. (1) The Commission may designate a person, in this Part referred to as an "investigator", to investigate a complaint.	43. (1) La Commission peut charger une personne, appelée, dans la présente loi, « l'enquêteur », d'enquêter sur une plainte.
Manner of investigation	Procédure d'enquête
(2) An investigator shall investigate a complaint in a manner authorized by regulations made pursuant to subsection (4).	(2) L'enquêteur doit respecter la procédure d'enquête prévue aux règlements pris en vertu du paragraphe (4).
Power to enter	Pouvoir de visite
(2.1) Subject to such limitations as the Governor in Council may prescribe in the interests of national defence or security, an investigator with a warrant issued under subsection (2.2) may, at any reasonable time, enter and search any premises in order to carry out such inquiries as are reasonably necessary for the investigation of a complaint.	(2.1) Sous réserve des restrictions que le gouverneur en conseil peut imposer dans l'intérêt de la défense nationale ou de la sécurité, l'enquêteur muni du mandat visé au paragraphe (2.2) peut, à toute heure convenable, pénétrer dans tous locaux et y perquisitionner, pour y procéder aux investigations justifiées par l'enquête.
Authority to issue warrant	Délivrance du mandat
(2.2) Where on ex parte application a judge of the Federal Court is satisfied by information on oath that there are reasonable grounds to	(2.2) Sur demande ex parte, un juge de la Cour fédérale peut, s'il est convaincu, sur la foi d'une dénonciation sous serment, qu'il y a des motifs

believe that there is in any premises any evidence relevant to the investigation of a complaint, the judge may issue a warrant under the judge's hand authorizing the investigator named therein to enter and search those premises for any such evidence subject to such conditions as may be specified in the warrant.

raisonnables de croire à la présence dans des locaux d'éléments de preuve utiles à l'enquête, signer un mandat autorisant, sous réserve des conditions éventuellement fixées, l'enquêteur qui y est nommé à perquisitionner dans ces locaux.

Use of force

(2.3) In executing a warrant issued under subsection (2.2), the investigator named therein shall not use force unless the investigator is accompanied by a peace officer and the use of force has been specifically authorized in the warrant.

Usage de la force

(2.3) L'enquêteur ne peut recourir à la force dans l'exécution du mandat que si celui-ci en autorise expressément l'usage et que si lui-même est accompagné d'un agent de la paix.

Production of books

(2.4) An investigator may require any individual found in any premises entered pursuant to this section to produce for inspection or for the purpose of obtaining copies thereof or extracts therefrom any books or other documents containing any matter relevant to the investigation being conducted by the investigator.

Examen des livres

(2.4) L'enquêteur peut obliger toute personne se trouvant sur les lieux visés au présent article à communiquer, pour examen, ou reproduction totale ou partielle, les livres et documents qui contiennent des renseignements utiles à l'enquête.

Obstruction

(3) No person shall obstruct an investigator in the investigation of a complaint.

Entraves

(3) Il est interdit d'entraver l'action de l'enquêteur.

Regulations

(4) The Governor in Council may make regulations

(a) prescribing procedures to be followed by investigators;
(b) authorizing the manner in which complaints are to be investigated pursuant to this Part; and
(c) prescribing limitations for the purpose of subsection (2.1).
R.S., 1985, c. H-6, s. 43; R.S., 1985, c. 31 (1st Supp.), s. 63.

Règlements

(4) Le gouverneur en conseil peut fixer, par règlement :

a) la procédure à suivre par les enquêteurs;
b) les modalités d'enquête sur les plaintes dont ils sont saisis au titre de la présente partie;
c) les restrictions nécessaires à l'application du paragraphe (2.1).
L.R. (1985), ch. H-6, art. 43; L.R. (1985), ch. 31 (1er suppl.), art. 63.

Report

44. (1) An investigator shall, as soon as possible after the conclusion of an investigation, submit to the Commission a report of the findings of the investigation.
Action on receipt of report

(2) If, on receipt of a report referred to in subsection (1), the Commission is satisfied

(a) that the complainant ought to exhaust grievance or review procedures otherwise reasonably available, or
(b) that the complaint could more appropriately be dealt with, initially or completely, by means of a procedure provided for under an Act of Parliament other than this Act,
it shall refer the complainant to the appropriate authority.

Rapport

44. (1) L'enquêteur présente son rapport à la Commission le plus tôt possible après la fin de l'enquête.
Suite à donner au rapport

(2) La Commission renvoie le plaignant à l'autorité compétente dans les cas où, sur réception du rapport, elle est convaincue, selon le cas :

a) que le plaignant devrait épuiser les recours internes ou les procédures d'appel ou de règlement des griefs qui lui sont normalement ouverts;
b) que la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des procédures prévues par une autre loi fédérale.

Idem

(3) On receipt of a report referred to in subsection (1), the Commission

(a) may request the Chairperson of the Tribunal to institute an inquiry under section 49 into the complaint to which the report relates if the Commission is satisfied
(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is warranted, and

(ii) that the complaint to which the report relates should not be referred pursuant to subsection (2) or dismissed on any ground mentioned in paragraphs 41(c) to (e); or

(b) shall dismiss the complaint to which the report relates if it is satisfied
(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted, or

(ii) that the complaint should be dismissed on any ground mentioned in paragraphs 41(c) to (e).

Notice

(4) After receipt of a report referred to in subsection (1), the Commission

(a) shall notify in writing the

Idem

(3) Sur réception du rapport d'enquête prévu au paragraphe (1), la Commission :

a) peut demander au président du Tribunal de désigner, en application de l'article 49, un membre pour instruire la plainte visée par le rapport, si elle est convaincue :
(i) d'une part, que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci est justifié,

(ii) d'autre part, qu'il n'y a pas lieu de renvoyer la plainte en application du paragraphe (2) ni de la rejeter aux termes des alinéas 41c) à e);

b) rejette la plainte, si elle est convaincue :
(i) soit que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci n'est pas justifié,

(ii) soit que la plainte doit être rejetée pour l'un des motifs énoncés aux alinéas 41c) à e).

Avis

(4) Après réception du rapport, la Commission :

a) informe par écrit les parties à la plainte de la décision qu'elle a prise en vertu des paragraphes

complainant and the person against whom the complaint was made of its action under subsection (2) or (3); and
(b) may, in such manner as it sees fit, notify any other person whom it considers necessary to notify of its action under subsection (2) or (3).
R.S., 1985, c. H-6, s. 44; R.S., 1985, c. 31 (1st Supp.), s. 64; 1998, c. 9, s. 24.

(2) ou (3);
b) peut informer toute autre personne, de la manière qu'elle juge indiquée, de la décision qu'elle a prise en vertu des paragraphes (2) ou (3).
L.R. (1985), ch. H-6, art. 44; L.R. (1985), ch. 31 (1er suppl.), art. 64; 1998, ch. 9, art. 24.

2. *Corrections and Conditional Release Act*, S.C. 1992, c. 20

Service to classify each inmate

30. (1) The Service shall assign a security classification of maximum, medium or minimum to each inmate in accordance with the regulations made under paragraph 96(z.6).
Service to give reasons

(2) The Service shall give each inmate reasons, in writing, for assigning a particular security classification or for changing that classification

Assignation

30. (1) Le Service assigne une cote de sécurité selon les catégories dites maximale, moyenne et minimale à chaque détenu conformément aux règlements d'application de l'alinéa 96z.6).
Motifs

(2) Le Service doit donner, par écrit, à chaque détenu les motifs à l'appui de l'assignation d'une cote de sécurité ou du changement de celle-ci.

Agreements

81. (1) The Minister, or a person authorized by the Minister, may enter into an agreement with an aboriginal community for the provision of

Accords

81. (1) Le ministre ou son délégué peut conclure avec une collectivité autochtone un accord prévoyant la prestation de services correctionnels aux

correctional services to aboriginal offenders and for payment by the Minister, or by a person authorized by the Minister, in respect of the provision of those services.
Scope of agreement

délinquants autochtones et le paiement par lui de leurs coûts.
Portée de l'accord

(2) Notwithstanding subsection (1), an agreement entered into under that subsection may provide for the provision of correctional services to a non-aboriginal offender.

(2) L'accord peut aussi prévoir la prestation de services correctionnels à un délinquant autre qu'un autochtone.

Placement of offender

Transfert à la collectivité

(3) In accordance with any agreement entered into under subsection (1), the Commissioner may transfer an offender to the care and custody of an aboriginal community, with the consent of the offender and of the aboriginal community.

(3) En vertu de l'accord, le commissaire peut, avec le consentement des deux parties, confier le soin et la garde d'un délinquant à une collectivité autochtone.

1992, c. 20, s. 81; 1995, c. 42, s. 21(F).

1992, ch. 20, art. 81; 1995, ch. 42, art. 21(F).

Regulations

Règlements

96. The Governor in Council may make regulations
(a) prescribing the duties of staff members;
(b) for authorizing staff members or classes of staff members to exercise powers, perform duties or carry out functions that this Part assigns to the Commissioner or the

96. Le gouverneur en conseil peut prendre des règlements :
a) fixant les fonctions des agents;
b) en vue d'autoriser les agents ou toute catégorie d'agents à exercer des pouvoirs et fonctions attribués par la présente partie au commissaire ou au directeur du pénitencier;

institutional head;
(c) respecting, for the purposes of section 22,
(i) the circumstances in which compensation may be paid,

(ii) what constitutes a disability,

(iii) the manner of determining whether a person has a disability, and the extent of the disability,

(iv) what constitutes an approved program,

(v) to whom compensation may be paid, and

(vi) the compensation that may be paid, the time or times at which the compensation is to be paid, the terms and conditions in accordance with which the compensation is to be paid, and the manner of its payment;

(d) respecting the placement of inmates pursuant to section 28 and their transfer pursuant to section 29;
(e) providing for the matters referred to in section 70;
(f) respecting allowances, clothing and other necessities to be given to inmates when leaving penitentiary either temporarily or permanently;
(g) respecting the administrative segregation of inmates;
(h) prescribing the contents of the notice to be given to an inmate under section 42, and

c) précisant, pour l'application de l'article 22 :
(i) les circonstances où une indemnité est versée,

(ii) la nature d'une invalidité,

(iii) la méthode de détermination d'une invalidité et de son taux,

(iv) les programmes agréés,

(v) les personnes pouvant être indemnisées,

(vi) le montant de l'indemnité ainsi que les conditions et modalités de temps et autres de son versement;

d) concernant l'incarcération des détenus conformément à l'article 28 et leur transfèrement conformément à l'article 29;
e) régissant les questions visées à l'article 70;
f) concernant les allocations, les vêtements ou objets de première nécessité à remettre aux détenus quittant, même temporairement, le pénitencier;
g) concernant l'isolement préventif;
h) précisant la teneur de l'avis visé à l'article 42 et son délai de transmission au détenu;

the time when the notice is to be given to the inmate;

(i) in connection with the disciplinary sanctions described in section 44,

(i) prescribing the maximum of each of those sanctions, which maxima shall be higher for serious disciplinary offences than for minor ones,

(ii) prescribing factors and guidelines to be considered or applied in imposing those sanctions,

(iii) prescribing the scope of each of those sanctions, and

(iv) respecting the enforcement, suspension and cancellation of those sanctions;

(j) providing for a review of the decisions of the person or persons conducting a disciplinary hearing;

(k) providing for

(i) the appointment of persons other than staff members to conduct disciplinary hearings or to review decisions pursuant to regulations made under paragraph (j), and

(ii) the remuneration and travel and living expenses of persons referred to in subparagraph (i);

(l) prescribing the manner in which a search referred to in

(i) paragraph (b) of the

i) concernant l'exécution, la suspension et l'annulation des sanctions disciplinaires prévues à l'article 44 et précisant :

(i) le maximum de chaque peine, lequel doit être, pour les infractions disciplinaires mineures, inférieur à celui prévu pour les infractions disciplinaires graves,

(ii) les facteurs et les grands principes à prendre en compte pour la détermination des peines,

(iii) la portée de chaque peine;

j) prévoyant la révision des décisions des personnes chargées d'instruire une accusation d'infraction disciplinaire;

k) prévoyant la nomination, la rémunération ainsi que les indemnités de séjour et de déplacement à verser à toute personne, autre qu'un agent, chargée d'instruire une accusation d'infraction disciplinaire ou conformément aux règlements d'application de l'alinéa j), de réviser une décision;

l) précisant la manière d'effectuer les inspections lors d'une fouille à nu, d'une fouille

definition “frisk search” in section 46,

(ii) paragraph (b) of the definition “non-intrusive search” in section 46, or

(iii) paragraph (b) of the definition “strip search” in section 46

shall be carried out;

discrète ou par palpation, au sens de l’article 46;

(m) prescribing the procedures to be followed in conducting a urinalysis and the consequences of the results of a urinalysis;

m) précisant la procédure à suivre pour les analyses d’urine et les conséquences des résultats de ces analyses;

(n) prescribing the effect that a visitor’s refusal to undergo a search can have on the visitor’s right to visit an inmate or remain at the penitentiary;

n) précisant les conséquences — en ce qui touche son droit de visite ou sa présence au pénitencier — du refus d’un visiteur de se soumettre à une fouille;

(o) respecting

(i) the submission of reports referred to in section 67, and

(ii) the return or forfeiture of items seized under section 65 or subsection 66(2) or otherwise in possession of the Service;

o) précisant à qui les rapports visés à l’article 67 doivent être remis et concernant la restitution ou la confiscation d’objets saisis en vertu de l’article 65 ou du paragraphe 66(2), ou dont le Service a autrement obtenu la possession;

(p) prescribing limits on the entry into a penitentiary, and the use by inmates, of publications, video and audio materials, films and computer programs;

p) fixant des limites à l’introduction dans un pénitencier et à l’usage par les détenus de publications, de matériel vidéo ou audio, de films et de programmes informatiques;

(q) providing for inmates’ moneys to be held in trust accounts;

q) prévoyant le dépôt, dans des comptes en fiducie, de l’argent des détenus;

(r) respecting inmates’ work and working conditions;

r) concernant le travail des détenus et les conditions afférentes;

(s) respecting penitentiary industry;

(t) respecting the conducting of businesses by inmates;
(u) prescribing an offender grievance procedure;
(v) for the organization, training, discipline, efficiency, administration and good management of the Service;
(w) providing for inmates' access to
(i) legal counsel and legal reading materials,

(ii) non-legal reading materials, and

(iii) a commissioner for taking oaths and affidavits;

(x) respecting inmates' attendance at judicial proceedings;
(y) respecting the procedure to be followed on the death of an inmate;
(z) prescribing the procedure governing the disposal of the effects of an escaped inmate;
(z.1) for the delivery of the estate of a deceased inmate to the inmate's personal representative in accordance with the applicable provincial law;
(z.1.1) prescribing the sources of income from which a deduction may be made pursuant to paragraph 78(2)(a) or in respect of which a payment may be required pursuant to paragraph 78(2)(b);
(z.2) prescribing the purposes for which deductions may be made pursuant to paragraph

s) concernant le secteur productif pénitentiaire;
t) concernant l'exercice d'activités commerciales par les détenus;
u) fixant la procédure de règlement des griefs des délinquants;
v) concernant l'organisation, l'efficacité, l'administration et la bonne direction du Service — y compris la formation et la discipline;
w) en vue d'assurer aux détenus l'accès à des textes juridiques ou non ainsi qu'auprès d'avocats et de commissaires aux serments;
x) concernant la présence de détenus à des procédures judiciaires;
y) concernant la procédure à suivre en cas de décès d'un détenu;

z) fixant la procédure régissant la disposition des biens d'un évadé;
z.1) concernant la remise — conformément aux lois provinciales applicables — des biens d'un détenu décédé;

z.1.1) précisant les sources de revenu qui peuvent faire l'objet des retenues prévues à l'alinéa 78(2)a) et des versements prévus à l'alinéa 78(2)b);

z.2) précisant l'objet des retenues visées à l'alinéa 78(2)a) et en fixant le plafond

78(2)(a) and prescribing the amount or maximum amount of any deduction, which regulations may authorize the Commissioner to fix the amount or maximum amount of any deduction by Commissioner's Directive;

ou le montant, ou permettant au commissaire de fixer ces derniers par directive;

(z.2.1) providing for the means of collecting the amount referred to in paragraph 78(2)(b), whether by transferring to Her Majesty moneys held in trust accounts established pursuant to paragraph 96(q) or otherwise, and authorizing the Commissioner to fix, by percentage or otherwise, that amount by Commissioner's Directive, and respecting the circumstances under which payment of that amount is not required;

z.2.1) prévoyant les modalités de recouvrement de la somme prévue à l'alinéa 78(2)b), notamment le transfert à Sa Majesté de l'argent déposé dans les comptes en fiducie créés conformément à l'alinéa 96q), et permettant au commissaire de prendre des directives pour en fixer le montant — en pourcentage ou autrement — et pour prévoir les circonstances dans lesquelles le versement n'en est pas exigé;

(z.3) providing for remuneration and travel and living expenses of members of committees established pursuant to subsection 82(1);

z.3) prévoyant la rémunération ainsi que les indemnités de séjour et de déplacement à verser aux membres des comités prévus au paragraphe 82(1);

(z.4) for the involvement of members of the community in the operation of the Service;

z.4) en vue de la participation des membres de la collectivité aux activités du Service;

(z.5) prescribing procedures to be followed after the use of force by a staff member;

z.5) fixant la procédure à suivre en cas d'usage de force par un agent;

(z.6) respecting the assignment to inmates of security classifications pursuant to section 30, which regulations must set out factors to be considered in determining the security classification of an inmate;

z.6) concernant l'attribution — aux termes de l'article 30 — d'une cote de sécurité au détenu ainsi que les critères de détermination de celle-ci;

(z.7) providing for the monitoring or intercepting of communications of any kind between an inmate and another inmate or other person, where reasonable for protecting the security of the penitentiary or the safety of persons;

z.7) précisant les mesures d'interception ou de surveillance des communications ou des activités entre détenus ou entre un détenu et toute autre personne lorsqu'elles sont nécessaires pour assurer la protection de quiconque ou du pénitencier;

(z.8) respecting escorted temporary absences and work releases;

z.8) concernant les permissions de sortir avec escorte et les placements à l'extérieur;

(z.9) respecting the manner and form of making requests to the Commissioner under section 26 and respecting how those requests are to be dealt with;

z.9) concernant les modalités d'une demande faite au commissaire conformément à l'article 26 et concernant la manière de traiter cette demande;

(z.10) imposing obligations or prohibitions on the Service for the purpose of giving effect to any provision of this Part;

z.10) imposant des obligations ou des interdictions au Service pour l'application de toute disposition de la présente partie;

(z.11) prescribing anything that by this Part is to be prescribed; and

z.11) portant toute mesure d'ordre réglementaire prévue par la présente partie;

(z.12) generally for carrying out the purposes and provisions of this Part.

z.12) portant toute autre mesure d'application de la présente partie.

1992, c. 20, s. 96; 1995, c. 42, ss. 25, 72(F).

1992, ch. 20, art. 96; 1995, ch. 42, art. 25 et 72(F).

3. *Corrections and Conditional Release Regulations*, S.O.R./92-620

Security Classification

Cote de sécurité

17. The Service shall take the following factors into consideration in determining

17. Le Service détermine la cote de sécurité à assigner à chaque détenu conformément à l'article

the security classification to be assigned to an inmate pursuant to section 30 of the Act:
(a) the seriousness of the offence committed by the inmate;
(b) any outstanding charges against the inmate;
(c) the inmate's performance and behaviour while under sentence;
(d) the inmate's social, criminal and, if available, young-offender history and any dangerous offender designation under the Criminal Code;
(e) any physical or mental illness or disorder suffered by the inmate;
(f) the inmate's potential for violent behaviour; and
(g) the inmate's continued involvement in criminal activities.
SOR/2008-198, s. 1.

30 de la Loi en tenant compte des facteurs suivants :
a) la gravité de l'infraction commise par le détenu;
b) toute accusation en instance contre lui;
c) son rendement et sa conduite pendant qu'il purge sa peine;
d) ses antécédents sociaux et criminels, y compris ses antécédents comme jeune contrevenant s'ils sont disponibles et le fait qu'il a été déclaré délinquant dangereux en application du Code criminel;
e) toute maladie physique ou mentale ou tout trouble mental dont il souffre;
f) sa propension à la violence;
g) son implication continue dans des activités criminelles.
DORS/2008-198, art. 1.

18. For the purposes of section 30 of the Act, an inmate shall be classified as
(a) maximum security where the inmate is assessed by the Service as
(i) presenting a high probability of escape and a high risk to the safety of the public in the event of escape, or
(ii) requiring a high degree of supervision and control within the penitentiary;
(b) medium security where the inmate is assessed by the

18. Pour l'application de l'article 30 de la Loi, le détenu reçoit, selon le cas :
a) la cote de sécurité maximale, si l'évaluation du Service montre que le détenu :
(i) soit présente un risque élevé d'évasion et, en cas d'évasion, constituerait une grande menace pour la sécurité du public,
(ii) soit exige un degré élevé de surveillance et de contrôle à l'intérieur du pénitencier;
b) la cote de sécurité moyenne, si l'évaluation du Service

Service as
(i) presenting a low to moderate probability of escape and a moderate risk to the safety of the public in the event of escape, or
(ii) requiring a moderate degree of supervision and control within the penitentiary; and
(c) minimum security where the inmate is assessed by the Service as
(i) presenting a low probability of escape and a low risk to the safety of the public in the event of escape, and
(ii) requiring a low degree of supervision and control within the penitentiary.

montre que le détenu :
(i) soit présente un risque d'évasion de faible à moyen et, en cas d'évasion, constituerait une menace moyenne pour la sécurité du public,
(ii) soit exige un degré moyen de surveillance et de contrôle à l'intérieur du pénitencier;
c) la cote de sécurité minimale, si l'évaluation du Service montre que le détenu :
(i) soit présente un faible risque d'évasion et, en cas d'évasion, constituerait une faible menace pour la sécurité du public,
(ii) soit exige un faible degré de surveillance et de contrôle à l'intérieur du pénitencier.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1530-09
STYLE OF CAUSE:	MARVIN JEFFREY TEKANO v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Vancouver, BC
DATE OF HEARING:	April 21, 2010
REASONS FOR JUDGMENT:	GAUTHIER J.
DATED:	August 12, 2010

APPEARANCES:

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Ms. Jennifer Dagsvik	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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