

**Date: 20080104**

**Docket: T-2241-07**

**Citation: 2008 FC 10**

**Ottawa, Ontario, January 4, 2008**

**PRESENT: The Honourable Madam Justice Mactavish**

**BETWEEN:**

**ISAAC DRENNAN**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA**

**Respondent**

**REASONS FOR ORDER AND ORDER**

[1] Issac Drennan seeks a mandatory interlocutory injunction to compel the Correctional Service of Canada to transfer him to the Regional Treatment Center at the Pacific Institution, where, he says, his disability can be properly accommodated. Mr. Drennan asks that the injunction be granted pending the resolution of the complaint that he has recently filed with the Canadian Human Rights Commission.

[2] For the reasons that follow, I am satisfied that Mr. Drennan is entitled to limited injunctive relief, but that this relief does not involve a transfer to a different facility within CSC.

## **Background**

[3] Mr. Drennan is currently completing a prison sentence, having been convicted of several serious offences. His statutory release date is January 22, 2008.

[4] As a result of gunshot injuries suffered at the time of his arrest, Mr. Drennan was rendered a paraplegic, and is confined to a wheelchair.

[5] Mr. Drennan has spent a large portion of his sentence in Matsqui Institution, a medium security institution in the lower mainland of British Columbia. He does not take issue with the level of accommodation that was provided to him at that institution.

[6] Mr. Drennan had previously been classified as a medium security prisoner. However, as a result of behavioural issues, in November of 2007 he was reclassified as a maximum security prisoner. The decision was also made at this time to transfer Mr. Drennan to Kent Institution, which is a maximum security institution.

[7] Prior to his transfer, concerns were raised by Mr. Drennan's counsel as to whether his physical needs could properly be accommodated at Kent Institution. CSC was of the view that sufficient accommodation was available, and Mr. Drennan was moved to Kent Institution on December 18, 2008.

[8] While at Kent Institution, Mr. Drennan has been provided with the assistance of an inmate caregiver, who is responsible for collecting his meals and providing him with whatever other assistance he might require. While there was initially some question as to the payment of the inmate caregiver for this service, he is now being paid by CSC to assist Mr. Drennan on a full-time basis.

[9] On his arrival at Kent Institution, Mr. Drennan was initially placed in a cell that was not wheelchair accessible. Moreover, the shower to which he had access was not accessible to those in wheelchairs. Two days later, however, he was moved to a cell which had been modified so as to accommodate wheelchairs. He was also provided with access to a shower that has “grab bars” installed on the walls.

[10] Mr. Drennan’s current cell is in a range which is only accessible by stairs. There have been discussions between the parties with respect to providing Mr. Drennan with access to a chair lift. While there is a disagreement between the parties as to precisely what has transpired in this regard, it is common ground that no such lift is permanently in place, and that if Mr. Drennan wants to access the lift, it would have to be installed in the stairwell each time that he wanted to go up or down the stairs.

[11] Mr. Drennan claims that each time he has asked to use the lift, he has been refused. Moreover, he says the videotape that he and his caregiver were shown regarding the use of the lift made it clear that the lift would not work with the model of wheelchair that he uses. As a

consequence, he is forced to drag himself up and down the stairs on his buttocks, which he says is not only humiliating, but also has caused him to develop pressure sores on his buttocks.

[12] CSC says that the lift is available for Mr. Drennan's use at any time that he is permitted to move off of the range. CSC further says that a second wheelchair has been provided for Mr. Drennan for him to use when using the chair lift.

[13] Mr. Drennan also says that the shower to which he has access does not address his needs. The uncontradicted evidence in this regard is that there is no shower curtain separating the shower area from the area where he has to leave his wheelchair, with the result that his wheelchair gets wet when he showers. Having to sit on the wet surface after he leaves the shower contributes to the breakdown of the skin on his buttocks, making his pressure sores worse.

[14] There is also no dispute about the fact that the shower area does not have a bench or chair for Mr. Drennan to sit on while showering. As a result, he has to bring in a plastic chair from his cell. The chair is not designed for use in a shower, is not sturdy, and does not have slip-resistant legs. This has caused Mr. Drennan to fall in the shower while attempting to move from the plastic chair to his wheelchair, causing him injury.

[15] The plastic chair also does not have drainage slots, causing Mr. Drennan to sit in a pool of water while showering and drying himself, further exacerbating his pressure sores.

[16] Because of his dissatisfaction with the accommodation provided to him by CSC, Mr. Drennan filed a second level grievance at CSC with respect to these matters. On December 19, 2007, he also filed a complaint with the Canadian Human Rights Commission.

[17] As was noted previously, Mr. Drennan's statutory release date is January 22, 2008. As a consequence, there is no realistic possibility that his human rights issues will be addressed through the processes established under the *Canadian Human Rights Act* before then.

[18] Mr. Drennan asserts that the conditions under which he is currently being held at Kent Institution put his personal health and safety in jeopardy. As a result, he now seeks a mandatory injunction compelling the Correctional Service of Canada to transfer him to the Regional Treatment Center at the Pacific Institution, where he says that his disability can be properly accommodated.

### **Jurisdiction**

[19] CSC does not squarely challenge the jurisdiction of this Court to grant an injunction in a case such as this, but, at the same time, counsel questions whether such jurisdiction exists. In this regard, counsel points out that there has yet to be a case where interim injunctive relief has been granted by this Court in relation to a human rights complaint that had not yet been referred to the Canadian Human Rights Tribunal for determination by the Canadian Human Rights Commission.

[20] According to CSC, if the Court was to assume jurisdiction, it would usurp the Commission's screening function, and would effectively result in the determination of the merits of Mr. Drennan's human rights complaint. No authority was cited by the CSC for this proposition.

[21] This matter was brought on an urgent basis, and neither party was in a position to make fulsome submissions on the jurisdictional issue. Moreover, for this process to have any meaning for Mr. Drennan, a quick decision on the part of the Court was required. As a consequence, I intend to deal with the jurisdictional issue summarily, and this aspect of these reasons should be read with this in mind.

[22] In *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, the Supreme Court of Canada found that this Court has the jurisdiction to grant "free standing" interim injunctive relief in relation to complaints made under the *Canadian Human Rights Act*.

[23] A review of the Supreme Court's analysis at paragraphs 23-37 of that decision does not disclose any obvious impediment to this Court assuming jurisdiction in this case. Virtually all of the Supreme Court's comments with respect to the supervisory relationship of the Federal Court to the Canadian Human Rights Tribunal apply with equal force to the nature of the relationship between the Federal Court and the Canadian Human Rights Commission.

[24] Moreover, I do not accept CSC's submission that the assumption of jurisdiction by the Court would usurp the screening function of the Commission, or that it would effectively result in the

determination of the merits of Mr. Drennan's complaint. All that the Court is being called upon to decide is whether Mr. Drennan has satisfied the tripartite injunctive test. This requires, amongst other things, the determination of whether he has raised a serious issue, not whether his human rights complaint should ultimately succeed.

[25] As a consequence, to the extent that CSC is in fact raising a jurisdictional objection, that objection is dismissed.

[26] In order to be entitled to injunctive relief, Mr. Drennan must demonstrate that there is a serious issue to be tried, that he will suffer irreparable harm if the injunction is not granted, and that the balance of convenience favours the granting of an injunction: see *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

### **Serious Issue**

[27] Generally speaking, the threshold for establishing the existence of a serious issue is a low one, and a moving party must simply demonstrate that the application is neither vexatious nor frivolous, and a prolonged examination of the merits is generally neither necessary nor is it desirable: see *RJR-MacDonald* at pp. 337-338.

[28] However, in this case, CSC submits that the Court should take a hard look at the merits of Mr. Drennan's human rights complaint. Given that Mr. Drennan will shortly be released from

custody, CSC says that the practical result of any relief granted by the Court would be to effectively determine the merits of his complaint.

[29] I am not persuaded that the granting of the relief sought by Mr. Drennan will finally determine all of the issues in his human rights complaint, as there are clearly issues relating to systemic and remedial matters that would be left unresolved. That said, nothing turns on this conclusion, as I am satisfied that a close examination of the merits of the matter demonstrates the existence of a serious issue as to whether CSC has satisfied the duty imposed on it by the *Canadian Human Rights Act* to accommodate Mr. Drennan's disability to the point of undue hardship.

[30] In this regard, I would simply note that whatever dispute there may be in the evidence with respect to the availability of access to the chair lift, it is uncontroverted that Mr. Drennan has advised CSC of the accommodative measures that he needs in order to be able to use the shower safely. There is no suggestion that Mr. Drennan's demands in this regard are not legitimate. Nor is there any question about the fact that CSC has not provided Mr. Drennan with either a proper shower chair or shower curtain. Finally, no explanation has been provided by CSC as to why these simple accommodative measures have not been implemented, nor has there been any attempt to justify its failure to do so.

[31] As a consequence, Mr. Drennan has satisfied the serious issue component of the injunctive test.



### **Irreparable Harm**

[32] It is clear from the jurisprudence that proof of irreparable harm must be clear and not speculative. It is also well understood that irreparable harm refers to the nature of the harm suffered rather than its magnitude.

[33] With this in mind, while Mr. Drennan has satisfied me that he will suffer irreparable harm if certain accommodative measures are not implemented on an interim basis, he has not persuaded me that he will suffer irreparable harm if he is not transferred to the Regional Treatment Center at the Pacific Institution.

[34] Insofar as access to the chair lift is concerned, there is a serious conflict in the evidence as to what has gone on in this regard. Even if I accept Mr. Drennan's version of events, it appears that Mr. Drennan's meals can be brought to him by his inmate caregiver, who is being paid by CSC to provide such services. While Mr. Drennan quite understandably does not like having to depend on others for assistance, his need to do so for the next three weeks does not, in my view amount to irreparable harm.

[35] Mr. Drennan evidently needs to use the stairs at Kent Institution if he wants to visit the library or the exercise yard, or to go outside for smoke breaks. Mr. Drennan would also need to go down the stairs if it became necessary to attend the health centre.

[36] Once again, it must be kept in mind that what we are dealing with here is a three-week period between now and Mr. Drennan's release from prison on January 22, 2008. Any inability on his part to go to the library, the exercise yard, or to go outside to smoke during this period does not in my view amount to irreparable harm such as to entitle him to interim injunctive relief.

[37] At this point, it also is speculative to think that Mr. Drennan may need health care during this time. In any event, no reason has been offered as to why medical personnel could not visit him in his cell, if need be.

[38] In her reply submissions, counsel for Mr. Drennan raised, for the first time, the question of Mr. Drennan's safety in the case of a fire in the institution. Given that CSC did not know that this was an issue, it had no opportunity to marshal any evidence in this regard. As a result, I advised counsel that I would not be considering this submission, and I decline to do so.

[39] This leaves the issue of Mr. Drennan's lack of access to proper shower facilities. Mr. Drennan has satisfied me that he cannot safely use the shower facilities as they are currently set up, as is evidenced by the fact that he has already suffered one serious fall in the shower.

[40] In this regard, it must be recalled that irreparable harm refers to the nature of the harm suffered rather than its magnitude. With this in mind, while Mr. Drennan might not suffer any long-term physical effects if he were unable to shower for the next three weeks, I am satisfied that the

injury to his personal dignity that would result from his inability to safely attend to his most basic personal hygiene needs for the next three weeks amounts to irreparable harm.

### **Balance of Convenience**

[41] CSC submits that Mr. Drennan does not come to this Court with clean hands, as his transfer to Kent Institution came about as a result of his own misconduct. Be that as it may, this does not in any way relieve CSC from its obligation to respect Mr. Drennan's quasi-constitutional human rights, and to provide him with safe living arrangements that properly accommodate his disability. This duty is all the more important in the case of a prisoner, who has no choice as to his living arrangements, and as such is in a uniquely vulnerable position.

[42] Moreover, as was noted earlier, CSC has offered absolutely no explanation as to why Mr. Drennan cannot be provided with a medically-approved shower chair or shower curtain. Indeed, CSC has stated that it has no objection to doing so, if so ordered by the Court. As a result, the balance of convenience clearly favours Mr. Drennan in this regard.

### **Conclusion**

[43] For these reasons, the motion is granted, in part.

**ORDER**

**THIS COURT ORDERS that** within 48 hours of this decision, CSC will install a shower curtain in the wheelchair accessible shower stall in “A” Block at Kent Institution, and will provide a medically-approved shower chair to Mr. Drennan for his use while he is in the institution.

“Anne Mactavish”

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Judge

**FEDERAL COURT**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** T-2241-07

**STYLE OF CAUSE:** ISAAC DRENNAN v.  
THE ATTORNEY GENERAL OF CANADA

**PLACE OF HEARING:** Ottawa, Ontario by teleconference

**DATE OF HEARING:** January 3, 2008

**REASONS FOR ORDER  
AND ORDER:** Mactavish, J.

**DATED:** January 4, 2008

**APPEARANCES:**

Ms. Jennifer Metcalfe FOR THE APPLICANT

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