Date: 20071106

Docket: A-33-07

Citation: 2007 FCA 356

CORAM: **LÉTOURNEAU J.A.**
PELLETIER J.A.
TRUDEL J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

GEORGE FLYNN

Respondent

Hearing held at Montréal, Quebec on October 10, 2007.

Judgment rendered at Ottawa, Ontario on November 6, 2007.

REASONS FOR JUDGMENT BY: LÉTOURNEAU J.A.

CONCURRED IN BY: PELLETIER J.A.
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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

[1] This appeal raises the question of the scope of the procedural guarantees to which an inmate is entitled when he is temporarily deprived of the right to have contact visits with his *de facto* spouse and to participate in the private family visits program. So far as I know, this question is before the Court for the first time.

[2] The question comes here from the Federal Court, where it was decided in the respondent's favour on judicial review. Specifically, the question is whether the Court erred when it concluded that there was a breach of procedural fairness because at the time the decision was taken to suspend visits in the form and manner that the respondent had received them thus far, he was not given sufficient information to allow him to make appropriate representations regarding the suspension.

[3] The respondent has since recovered his freedom, but he has brought a court proceeding against the appellant. However, this has been stayed pending a final decision on his challenge to the decision made on the third level grievance by the Commissioner of Correctional Service Canada. The parties thus still have an interest in having the case at bar decided. In the appellant's case, this interest also involves setting the parameters of the duty of procedural fairness in the situation before the Court.

FACTS AND PROCEEDINGS

[4] The respondent was serving a term of imprisonment at La Macaza. When he arrived there in 2002, he was given the right to have visits with physical contact with his *de facto* spouse. He also participated in the private family visits program.

[5] Based on information obtained from various sources, the respondent was suspected of bringing narcotics and money into the institution. The private family visits were allegedly the means used to do this. Further, he was suspected of making loans of tobacco and engaging in financial

transactions inside the institution. His telephone conversations were then tapped in accordance with an authorization issued on January 8, 2003: see appeal case, vol. 1, page 41.

[6] The investigation was conducted by the preventive security service. It led to the following conclusion: the unlawful activities of the respondent and his spouse-accomplice posed a risk to the security of the institution. Accordingly, the visits board made a decision on February 27, 2003 to suspend contact visits and participation in the private family visits program. These were replaced by [TRANSLATION] “wicket” visits, that is visits without contact.

[7] On March 12, 2003 the warden of the institution upheld the decision to suspend contact visits and private family visits indefinitely.

[8] The respondent challenged the warden’s decision as a breach of the rules of procedural fairness. On May 6, 2003 the respondent’s grievance was dismissed at the second level of review. The Regional Deputy Commissioner who made the decision dismissing the grievance considered that the reasons for the suspension had been given to the respondent and his spouse on February 21 and 27, 2003. A month later, the third level of review upheld the warden’s decision on the same grounds as were given by the decision-making authority at the second level.

FEDERAL COURT JUDGMENT

[9] Relying on subsection 90(1) of the *Corrections and Conditional Release Regulations*, SOR/92-620 (the Regulations), the Federal Court concluded that a right to contact visits existed unless separation of the individuals was necessary to guarantee the security of the institution and no less restrictive solution was available. Section 90 reads:

90. (1) Every inmate shall have a reasonable opportunity to meet with a visitor without a physical barrier to personal contact unless	**90.** (1) Tout détenu doit, dans des limites raisonnables, avoir la possibilité de recevoir des visiteurs dans un endroit exempt de séparation qui empêche les contacts physiques, à moins que :
(*a*) the institutional head or a staff member designated by the institutional head believes on reasonable grounds that the barrier is necessary for the security of the penitentiary or the safety of any person; and	*a*) le directeur du pénitencier ou l'agent désigné par lui n'ait des motifs raisonnables de croire que la séparation est nécessaire pour la sécurité du pénitencier ou de quiconque;
(*b*) no less restrictive measure is available.	*b*) il n'existe aucune solution moins restrictive.
(2) The institutional head or a staff member designated by the institutional head may, for the purpose of protecting the security of the penitentiary or the safety of any person, authorize the visual supervision of a visiting area by a staff member or a mechanical device, and the supervision shall be carried out in the least obtrusive manner necessary in the circumstances.	(2) Afin d'assurer la sécurité du pénitencier ou de quiconque, le directeur du pénitencier ou l'agent désigné par lui peut autoriser une surveillance du secteur des visites, par un agent ou avec des moyens techniques, et cette surveillance doit se faire de la façon la moins gênante possible dans les circonstances.
(3) The Service shall ensure that every inmate can meet with the inmate's legal counsel in private interview facilities.	(3) Le Service doit veiller à ce que chaque détenu puisse s'entretenir avec son avocat dans un local assurant à l'entrevue un caractère confidentiel.

[10] It further held that the authorities had failed in their duty of disclosure set out in section 27 of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (the Act). That provision reads as follows:

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.	**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.
Idem	Idem
(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.	(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.
Exceptions	Exception
(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	(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

(*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*).	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.

[Emphasis added.]

[11] In the Court's view, taking into account the interests involved and the importance of the undisclosed information, failure to provide sufficient information to allow the respondent [TRANSLATION] "a reasonable opportunity to defend himself" before the decision was made by the warden of the institution on March 12, 2003 was a breach of procedural fairness: see paragraphs 18, 31 and 32 of the Court's reasons for order.

ANALYSIS OF JUDGMENT

Access to and participation in contact visit and private family visits programs

[12] Section 71 of the Act, which need not be reproduced, gives every inmate the right, within reasonable limits set by regulation to ensure the safety of all persons or the penitentiary, to maintain relations with his or her family, especially by visits. However, subsection 90(1) of the Regulations

does not give the inmate an absolute right or a strict right to contact visits. At most, if we are to speak of a right, we can say there is a relative and qualified right to a reasonable opportunity for contact visits: see the wording of subsection 90(1). Seen from the penitentiary administration's standpoint, section 90 imposes on it a corresponding duty to provide an opportunity for contact visits.

[13] This right is also subject to suspension or prohibition of visits under section 91 of the Regulations, where the institutional head or staff member believes on reasonable grounds that during the course of the visit the inmate or visitor would jeopardize the security of the penitentiary or the safety of any person, or the inmate or visitor is likely to plan or commit a criminal offence. Section 91 provides:

91. (1) Subject to section 93, the institutional head or a staff member designated by the institutional head may authorize the refusal or suspension of a visit to an inmate where the institutional head or staff member believes on reasonable grounds	**91.** (1) Sous réserve de l'article 93, le directeur du pénitencier ou l'agent désigné par lui peut autoriser l'interdiction ou la suspension d'une visite au détenu lorsqu'il a des motifs raisonnables de croire :
(*a*) that, during the course of the visit, the inmate or visitor would (i) jeopardize the security of the penitentiary or the safety of any person, or (ii) plan or commit a criminal offence; and	*a*) d'une part, que le détenu ou le visiteur risque, au cours de la visite : (i) soit de compromettre la sécurité du pénitencier ou de quiconque, (ii) soit de préparer ou de commettre un acte criminel;
(*b*) that restrictions on the manner in which the visit takes place would not be adequate to control the risk.	*b*) d'autre part, que l'imposition de restrictions à la visite ne permettrait pas d'enrayer le risque.

(2) Where a refusal or suspension is authorized under subsection (1),	(2) Lorsque l'interdiction ou la suspension a été autorisée en vertu du paragraphe (1) :
(*a*) the refusal or suspension may continue for as long as the risk referred to in that subsection continues; and	*a*) elle reste en vigueur tant que subsiste le risque visé à ce paragraphe;
(*b*) the institutional head or staff member shall promptly inform the inmate and the visitor of the reasons for the refusal or suspension and shall give the inmate and the visitor an opportunity to make representations with respect thereto.	*b*) le directeur du pénitencier ou l'agent doit informer promptement le détenu et le visiteur des motifs de cette mesure et leur fournir la possibilité de présenter leurs observations à ce sujet.

[Emphasis added.]

Parameters of duty of procedural fairness under section 90 of Regulations

[14] It is well known that the content and parameters of the duty of procedural fairness vary depending on the nature and importance of the decisions in question. In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paragraph 21, the Supreme Court of Canada stated this rule as follows:

> The existence of a duty of fairness, however, does not determine what requirements will be applicable in a given set of circumstances. As I wrote in *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case". All of the circumstances must be considered in order to determine the content of the duty of procedural fairness: *Knight*, at pp. 682-83; *Cardinal*, *supra*, at p. 654; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, *per* Sopinka J.

[15] In the field of custodial law the decisions taken by administrative authorities are varied. They are not all of the same importance. They also give rise to consequences of varying duration and seriousness. Sometimes they affect a privilege, sometimes a right, sometimes living conditions, sometimes the inmate's residual freedom, to mention only a few of the interests affected by such decisions. More often than not they are prompted by the security requirements of the institution or of a group of individuals. It will be understood that the duty to disclose information to an inmate may as a result be subject to limits and exceptions. Indeed, this is expressly recognized by subsection 27(3) of the Act, which authorizes the non-disclosure of certain information.

[16] In *Gallant v. Canada (Deputy Commissioner, Correctional Service Canada)*, [1989] 3 F.C. 329, and *Cartier v. Canada (Attorney General)*, [1998] F.C.J. No. 1211, cited by the Federal Court in the case at bar, this Court stated as follows the need to have some difference of treatment for administrative decisions so as to set the limits of the duty of procedural fairness. At pp. 342 and 342 of *Gallant*, adopted in the reasons of Nadon J. in *Cartier*, in those of Pelletier J.A. in *Blass v. Canada (Attorney General)*, 2002 FCA 220, and by the undersigned in *The Attorney General of Canada v. Boucher*, 2005 FCA 77, at paragraph 29, Marceau J.A. wrote:

> It seems to me that, to appreciate the practical requirements of the *audi alteram partem* principle, it is wrong to put on the same level all administrative decisions involving inmates in penitentiaries, be they decisions of the National Parole Board respecting the revocation of parole, or decisions of disciplinary boards dealing with disciplinary offences for which various types of punishments, up to administrative segregation, can be imposed, or decisions, such as the one here involved, of prison authorities approving the transfer of inmates from one institution to another for administrative and good order reasons. Not only do these various decisions differ as to the individual's rights, privileges or interests they may affect, which may lead to different standards of procedural safeguards; they also differ, and even more significantly, as to their purposes and justifications, something which cannot but

> influence the content of the information that the individual needs to be provided with, in order to render his participation, in the making of the decision, wholly meaningful. In the case of a decision aimed at imposing a sanction or a punishment for the commission of an offence, fairness dictates that the person charged be given all the 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. In the situation we are dealing with here, guilt was not what had to be confirmed, it was whether the information received from six different sources was sufficient to raise a valid concern and warrant the transfer.

[17] Counsel for the appellant submitted that in the case at bar the Federal Court, after concluding that section 90 of the Regulations gave the inmate a right, mistakenly gave this right an undue legal status and importance. This led to an error of law involving the imposition by the Court of a duty of procedural fairness which was neither required nor justified by section 90. As counsel for the appellant submitted, the Federal Court imposed a duty to disclose information that was greater than that imposed by the Act and the courts on transfer proceedings, though a transfer was a procedure which carried with it far greater consequences than a mere suspension of contact visits. I feel that the appellant is right on this point.

[18] Section 28 of the Act, in relative language comparable to that of section 90 of the Regulations, gives an inmate the right to be confined in the least restrictive environment possible.

Both section 28 of the Act and section 90 of the Regulations impose a duty to the inmate on the penal administration. I set out section 28:

28. Where a person is, or is to be, confined in a penitentiary, the Service shall take all reasonable steps to ensure that the penitentiary in which the person is confined is one that provides the least restrictive environment for that person, taking into account	**28.** Le Service doit s'assurer, dans la mesure du possible, que le pénitencier dans lequel est incarcéré le détenu constitue le milieu le moins restrictif possible, compte tenu des éléments suivants :
(*a*) the degree and kind of custody and control necessary for (i) the safety of the public, (ii) the safety of that person and other persons in the penitentiary, and (iii) the security of the penitentiary;	*a*) le degré de garde et de surveillance nécessaire à la sécurité du public, à celle du pénitencier, des personnes qui s'y trouvent et du détenu;
(*b*) accessibility to (i) the person's home community and family, (ii) a compatible cultural environment, and (iii) a compatible linguistic environment; and	*b*) la facilité d'accès à la collectivité à laquelle il appartient, à sa famille et à un milieu culturel et linguistique compatible;
(*c*) the availability of appropriate programs and services and the person's willingness to participate in those programs.	*c*) l'existence de programmes et services qui lui conviennent et sa volonté d'y participer.

[19] There is no question that a decision on the placement of an inmate on his or her arrival in a penitentiary is somewhat more fraught with consequences for the inmate and his or her rehabilitation than a decision on contact visits. Similarly, a subsequent decision on the transfer of an

inmate following an upward revision of the latter's security rating is again, in terms of its consequences, not comparable to a decision to temporarily suspend contact visits.

[20] In fact, the decision to transfer an inmate from a medium to a maximum security institution affects his or her living conditions within the prison and participation in correctional programs. It may delay the inmate's parole. When as in *Boucher, supra*, the transfer is from Montréal to the maximum security institution in Port-Cartier, even the opportunity of having visits, let alone contact visits, is seriously compromised by the distance between the two places. In the respondent's case, he did continue to have visits, but without contact.

[21] I feel that the Federal Court also erred in law on the scope of the duty of procedural fairness when it considered the question of the suspension of contact visits as if the respondent was facing disciplinary charges. It referred twice to the fact that the respondent "had no fair opportunity to defend himself against the allegations" and that the disclosure made did not give him "a reasonable opportunity to defend himself": see paragraphs 31 and 32 of the reasons for judgment.

[22] In cases of transfers resulting, for example, from allegations of the perpetration of disciplinary offences, assessing the inmate's guilt is not at issue. The penitentiary administration has to decide on the advisability of making the transfer. The Court's function is determining whether sufficient information was given to the inmate "for him to be able to participate meaningfully in the process of determining whether he should be transferred and to oppose it": see *Attorney General of Canada v. Boucher, supra,* at paragraph 28.

[23] The question, and the approach to the question, are the same for the decision to temporarily suspend contact visits. The issue in the case at bar is not whether the inmate was guilty of trafficking in money, lending tobacco and trafficking in narcotics inside the institution, but whether he had sufficient information to object to the process of deciding on whether to suspend his participation in contact visits and private family visits. This leads me to consider more closely, first, the point at which for the purposes of procedural fairness there should be a determination of the sufficiency of the information needed by the inmate to effectively exercise his right of objection. Secondly, it is also necessary to consider, from the standpoint mentioned earlier, the information that was given to the inmate and his spouse before the initial decision was made. I will also then consider the information disclosed, as it casts some light on the sufficiency of what was provided before the decision to suspend was made. I will proceed by chronological order up to the date of June 6, 2003, when the decision was made on the third level grievance, as it is that decision which is the subject of the judicial review; however, I will also consider certain information given to the respondent after June 6, 2003 because the Federal Court considered that the provision of this information was belated and was a breach of procedural fairness.

Point at which, for purposes of procedural fairness, there should be determination of sufficiency of information provided to inmate so he can exercise his right of objection

[24] Subsection 27(1) of the Act states as a general rule that an inmate, who is entitled to make representations, is to be given all the information to be considered in the taking of the decision within a reasonable period before the decision is taken. In emergency situations, such as terminating

an ongoing illicit activity, this information may and must be provided after the decision is taken. This is dealt with in subsection 27(2) of the Act.

[25] In the case at bar, however, paragraph 91(2)(*b*) of the Regulations contains a specific rule: when a suspension has been authorized, the inmate and the visitor must be informed promptly of the reasons for the suspension. They should also be given an opportunity to make representations regarding it.

[26] The penitentiary authorities complied with this provision of the Regulations. The information on the decision to suspend contact visits was given to the respondent and his spouse on February 21 and 26, 2003, before the visits board took its decision on February 27, 2003. This point is not in dispute. Accordingly, it is at that date, or subsequent to the date on which the warden of the institution approved the visits board's decision, that the sufficiency of the information given to the respondent must be assessed. This approval was given by the warden on March 12, 2003. The judge placed the making of the decision at that date: see the reasons for his judgment, paragraphs 18, 31 and 32.

[27] I see no error in this conclusion, especially as the period of time between the decision by the committee and that of the warden was short and nothing new or significant was communicated during the interval.

[28] I felt I should make some clarification of the time at which the sufficiency of information for procedural fairness purposes must be determined, in view of the grievances at the second and third levels of review of the initial decision and the fact that additional information may be provided at these stages of the process. It should be noted that these stages are only a review of the validity of the initial decision. If additional information provided at these later stages can support the merits of the decision under review, it cannot compensate for a breach of procedural fairness surrounding the taking of the initial decision.

[29] Having made that clarification, I now turn to the crux of the matter, the sufficiency of the information.

Sufficiency of information given to respondent and his spouse

(a) Information disclosed before decision by warden of institution

[30] Subsection 27(1) of the Act authorizes the body responsible for making a decision to give the inmate, before the decision is made, a summary of the information to be considered in taking the decision, rather than the information itself. This is the option that was used in the case at bar. The initial decision to suspend contact visits was made by the visits board of the institution on February 27, 2003: see appeal case, volume 1, page 78, paragraphs 16 and 17 of the affidavit of Julie Bergevin.

[31] Before the decision was made, specifically on February 21 and 26, 2003, the respondent and his spouse were each informed of the facts and reasons which subsequently led to suspension of the contact visits, namely that:

(a) the respondent had been the subject of a preventive security and electronic surveillance investigation;

(b) the electronic surveillance was authorized because the prison authorities reasonably believed that the respondent had brought in narcotics through private family visits and was preparing to do so again;

(c) he was suspected of participating in unlawful acts with the assistance of his spouse, specifically bringing pills, money and narcotics into the institution;

(d) he was also suspected of loans of tobacco and money transactions in the institution;

(e) this information came from several sources;

(f) the respondent's cell had been searched;

(g) customer collection lists were found there, as one information source had indicated, and those lists were seized;

(h) the results of the preventive security investigation and the wiretapping confirmed the respondent's involvement in illicit activities in the institution;

(i) a conduct contract was given to the respondent, who refused to sign it;

(j) the conduct contract asked that he undertake to cease [TRANSLATION] "being associated with trafficking in pills (medication) and drugs, trafficking in money with fellow inmates" and "not to have a convenience store";

(k) the suspension of visits was temporary and would be reassessed when the smuggling risk had decreased;

(l) the contact visits were replaced by wicket visits, which appeared to the prison authorities to be the least restrictive measure in the circumstances; and

(m) the respondent and his spouse could make representations to challenge the decision.

[32] This information was distributed throughout the two volumes of the appeal case, but it is possible to consult it at pages 41, 54 and 55, 77 to 79, 92, 132 and 133 and 147 of volume 1 and at page 291 of volume 2.

[33] The respondent admitted having engaged in loans of tobacco, but said he did this to help other inmates. In connection with the existence of three boxes at his spouse's place of residence, the

presence of which at that location was revealed by the wiretap on his telephone conversations, the respondent admitted buying ten cases of contraband cigarettes. Finally, he admitted having lost nearly $10,000 with fellow inmates in the 11 months he had been in La Macaza, which corroborated the information received from inmates regarding loans of money and explained the customer collection lists: see appeal case, volume 1, at pages 72 to 74.

(b) Information disclosed before decision at second grievance level on May 6, 2003

[34] On March 21, 2003 the respondent filed a grievance against the decision by the warden of the institution: see the respondent's affidavit in the appeal case, volume 1, pages 37 and 38, paragraph 10. The decision was rendered on May 6, 2003: *ibid.*, at page 63.

[35] On April 1, 2003, by a letter to counsel for the respondent, the latter was invited to get in touch with security information officers or his parole officer if he wished to obtain further explanations on the suspension of contact visits. The respondent did not make use of this invitation: see appeal case, volume 1, at page 107.

[36] Nevertheless, on April 15, 2003 the respondent was given by the prison authorities an evaluation report setting out further details as to [TRANSLATION] "his involvement in certain schemes", to use the phrase employed in the report: see appeal case, volume 2, at pages 292 to 295.

[37] This report referred to protected information reports of November 5, 2002, January 7, 2003 and January 29, 2003 and to a security information report of March 17, 2003. Once again, these reports related illicit activities allegedly conducted by the respondent. They contained nothing new, except that they indicated the reliability rating of the information sources, which varied from an anonymous or unknown source to a source of complete reliability, and included a high reliability level. This was the only new material not known to the respondent.

[38] With this additional information brought to the respondent's notice before his grievance was decided at the second level he could, if it appeared necessary and he felt that the information he had received on the suspension was insufficient, have asked security information officers or his parole officer for further details, as the letter of April 1, 2003 invited him to do. Nothing was done in this regard.

(c) Information disclosed before decision on June 6, 2003

[39] The respondent's grievance at the third decision level was filed on May 13, 2003, and the decision rendered on June 6, 2003. The submissions by counsel for the respondent contained in letters of February 28 and March 10 and 21, 2003 were drawn to the attention of the adjudicator: see appeal case, volume 1, at pages 43, 50 and 59. Their content indicates that before the initial decision was made the respondent was sufficiently aware of the allegations in favour of a suspension of contact visits, and the circumstances leading thereto, for him to make an objection.

(d) Information disclosed after decision on June 6, 2003

[40] On August 8, 2003, pursuant to application for judicial review T-997-03 filed by the respondent in the Federal Court, the appellant entered in the Court record a censored copy of the security information report dated March 17, 2003 with the reliability rating alongside each information source. This piece of information appeared in the report of January 3, 2003 given to the respondent on April 15, 2003. In any case, the report is subsequent to the making of the initial decision approved by the institution warden on March 12, 2003.

[41] The Federal Court indicated its concern that a protected information report of January 8, 2003 was not given to the respondent (in fact, it was dated January 7 but not signed by the second co-signer until January 8). At paragraph 31 of the reasons for judgment, the Court wrote:

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

[42] With respect, the defendant was aware that he was suspected of trafficking in narcotics and using private family visits to bring illicit merchandise into the institution: see above, the summary of information disclosed to the respondent and the references to the appeal cases. He also knew before the first suspension decision on February 27, 2003, made by the institution's visits board, that wiretapping of his telephone conversations had indicated that he was preparing to do this again: see in particular in the appeal case, volume 1, at page 41, the notification of interception of communications given to the respondent.

[43] The Federal Court referred to this information obtained from the inmate Lama. It added that the summary previously given to the respondent did not contain "particulars that would allow [the respondent] to challenge the reliability of the evidence and defend himself".

[44] I referred earlier to the fact that we are not concerned here with a disciplinary offence, and consequently a decision involving a conviction at the end of a hearing in which an inmate may "defend himself" and present a full and complete defence. In *Gaudet v. Marchand*, [1994] A.Q. No. 375, which raised a question of a transfer, Rothman J.A. of the Quebec Court of Appeal set out the limits to procedural fairness as follows, at paragraph 39:

> In my respectful opinion, the authorities had no duty to provide appellant with copies of the statements given by informers, nor to afford appellant an opportunity to cross-examine these witnesses or the penitentiary authorities themselves. In a prison context, such a hearing would go considerably beyond procedural fairness into the realm of an unreasonable intrusion into the administration and security of the penitentiary.
>
> [Emphasis added.]

[45] The Federal Court also emphasized the suspect reliability of the evidence provided by the inmate Lama. It does not seem to have been drawn to the Court's attention that the word "Lama", accompanied by a number and associated with the word "inmate", referred to an inmate's code name. Similarly, the reasons for judgment do not indicate that the Court was aware that there were several "Lamas" in this matter, each corresponding to a source of information on the ongoing illicit activities. Thus, Lama 0389, referred to by the Court, Lama 0121, Lama 0312, Lama 0238, Lama 0212 and Lama 0435 are inmates who were involved in the loans of money or tobacco or who contracted debts of money or tobacco: see observation or information reports in appeal case, volume 2, at pages 296, 317, 318, 379, 380 and 391. With most of the aforementioned information sources, the information received by the prison authorities was checked and validated. If we add the respondent's admissions regarding loans of tobacco and the customer collection lists that were seized in his cell, I do not think that the making of the decision to suspend contact visits was based on information from a single inmate whose reliability might be considered suspect.

(e) Conclusion on sufficiency of information given to respondent

[46] In short, the decision to suspend an inmate's contact visits requires the prison authorities to give the inmate sufficient information to allow him to object to the process for deciding on the advisability of suspending his participation in contact or private family visits. To paraphrase Marceau J.A. in *Gallant, supra*, what is at issue here is [TRANSLATION] "merely the

reasonableness and the seriousness of the reasons on which the decision is based, and the participation of the person involved has to be rendered meaningful for that, but nothing more".

[47] For purposes of procedural fairness the sufficiency of the information given to the respondent had to be assessed at the date on which he was required to make, or could have made, his representations to the visits board of the institution or the warden of the institution, on February 27 and March 12, 2003 respectively. The latest date was that on which the visits board's decision was approved by the warden of the institution, namely March 12, 2003.

[48] The Federal Court referred to the criterion by which it was bound, put forward by Marceau J.A. in *Gallant*, but I am not sure that it did not unconsciously disregard this in saying that the respondent had no fair opportunity to defend himself against the allegations or a reasonable opportunity to defend himself. If it had applied the correct test, or had correctly applied the test to which it referred in *Gallant*, without misconceiving the status of contact visits, it would undoubtedly have concluded that these were sufficient and that the duty of procedural fairness had been met in the circumstances. It would have dismissed the application for judicial review.

CONCLUSION

[49] For these reasons, I would allow the appeal with costs and I would set aside the Federal Court's decision on January 8, 2007 in case T-997-03. Rendering the judgment which should have been rendered, I would dismiss the application for judicial review.

"Gilles Létourneau"
J.A.

I concur.
J.D. Denis Pelletier J.A.

I concur.
Johanne Trudel J.A.

Certified true translation

Brian McCordick, Translator

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

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APPEARANCES:

Dominique Guimond	FOR THE APPELLANT
Diane Condo	FOR THE RESPONDENT

SOLICITORS OF RECORD:

John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE APPELLANT
Condo Law Office Ottawa, Ontario	FOR THE RESPONDENT