Federal Court  Cour fédérale

Date: 20091204

Docket: T-89-09

Citation: 2009 FC 1246

Ottawa, Ontario, December 4, 2009

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

MARTHA KAHNAPACE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The Applicant, Ms. Martha Kahnapace, is a first time federal offender serving a life sentence (25 years), without parole for ten years, for second degree murder. Since she began her sentence, on September 27, 2007, she has been held in a maximum-security facility. In spite of two recommendations that she be transferred to medium security, on March 4, 2008, the Regional Deputy Commissioner (RDC) of Correctional Services Canada (the Service) made a final decision to classify Ms. Kahnapace as maximum security. The Applicant unsuccessfully grieved this decision to the highest level grievance. In a decision dated November 14, 2008 (Third-level

Grievance Decision), the Acting Assistant Commissioner, Policy and Research of the Service, denied the Applicant's grievance and upheld the decision of the RDC.

[2] Ms. Kahnapace seeks judicial review of the Third-level Grievance Decision. Specifically, she requests the following relief:

- an order declaring Policy Bulletin 107 (Policy 107), which policy is described below, and its application null and void for want of jurisdiction;

- an order declaring that Policy 107 and its application violate ss. 7 and 9 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (*Charter*);

- an order quashing the Third-level Grievance Decision;

- an order of mandamus ordering the Service to place the Applicant in a medium-security environment; and

- an order for costs.

II. Issues

[3] This application raises the following issues:

1. Is the exercise of discretion by the Commissioner in modifying the Custody Rating Scale (discussed below) through Policy 107 and in establishing a procedure for its implementation justiciable?

2. Is Policy 107 unlawful on the basis that it does not accord with provisions of the Service's governing legislation?

3. Do Policy 107, which modifies the Custody Rating Scale, and its implementation violate Ms. Kahnapace's rights as protected by ss. 7 and 9 of the *Charter*?

4. Is the Third-level Grievance Decision reasonable?

[4] As set out in the Reasons that follow, I accept that Policy 107 is justiciable. However, Ms. Kahnapace's arguments on all of the other issues will fail.

III. Background

[5] This application involves a number of statutory provisions and policy documents that must be followed or applied by the Service to classify inmates within the penitentiary system. In assessing the merits of this application, it is necessary to understand how these various laws, policies and documents operate and interact.

A. *Relevant Statutory Provisions*

[6] As set out in s. 3 of the *Corrections and Conditional Release Act*, S.C., 1992, c.20 (*CCRA*):

3. The purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful and safe society by:	**3.** Le système correctionnel vise à contribuer au maintien d'une société juste, vivant en paix et en sécurité, d'une part, en assurant l'exécution des peines par des mesures de garde et de surveillance sécuritaires et humaines, et d'autre part, en aidant au moyen de programmes appropriés dans les pénitenciers ou dans la collectivité, à la réadaptation des délinquants et à leur réinsertion sociale à titre de citoyens respectueux des lois.
(a) carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and	
(b) assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community	

[7] Parliament directs the Service to achieve the purposes set out in s. 3 through the principles set out in s. 4. Of particular relevance to this application are two of those principles:

4. The principles that shall guide the Service in achieving the purpose referred to in section 3 are	**4.** Le Service est guidé, dans l'exécution de ce mandat, par les principes qui suivent :
(*a*) that the protection of society be the paramount consideration in the corrections process;	*a*) la protection de la société est le critère prépondérant lors de l'application du processus correctionnel;
. . .	. . .
(*d*) that the Service use the least restrictive measures consistent with the protection of the public, staff members and offenders;	*d*) les mesures nécessaires à la protection du public, des agents et des délinquants doivent être le moins restrictives possible;

[8] The principle of "least restrictive measure" is echoed in the compulsory language under s. 28 of the *CCRA*:

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,	*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;

(ii) the safety of that person and other persons in the penitentiary, and

(iii) the security of the penitentiary;

(*b*) accessibility to

(i) the person's home community and family,

(ii) a compatible cultural environment, and

(iii) a compatible linguistic environment; and

(*c*) the availability of appropriate programs and services and the person's willingness to participate in those programs.

b) la facilité d'accès à la collectivité à laquelle il appartient, à sa famille et à un milieu culturel et linguistique compatible;

c) l'existence de programmes et services qui lui conviennent et sa volonté d'y participer.

[9] Section 30 requires the Service to assign a security classification of maximum, medium, or minimum to each inmate in accordance with regulations.

[10] The *CCRA* contemplates broad delegation of legislative power in respect of inmate placement and the elaboration of crucial operational detail in two ways – regulations and Commissioner's Rules and Directives.

[11] Section 96 (d) of the *CCRA* provides that the Governor in Council may make regulations "respecting the placement of inmates pursuant to section 28". Pursuant to this provision, the

Corrections and Conditional Release Regulations, SOR/92-620 (the *Regulations*) were enacted. Of particular relevance to inmate placement are s. 17-18 of the *Regulations*, which provide that:

17. The Service shall take the following factors into consideration in determining the security classification to be assigned to an inmate pursuant to section 30 of the Act:	**17.** Le Service détermine la cote de sécurité à assigner à chaque détenu conformément à l'article 30 de la Loi en tenant compte des facteurs suivants :
(a) the seriousness of the offence committed by the inmate;	*a)* la gravité de l'infraction commise par le détenu;
(b) any outstanding charges against the inmate;	*b)* toute accusation en instance contre lui;
(c) the inmate's performance and behaviour while under sentence;	*c)* son rendement et sa conduite pendant qu'il purge sa peine;
(d) the inmate's social, criminal and, if available, young-offender history and any dangerous offender designation under the *Criminal Code*;	*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) any physical or mental illness or disorder suffered by the inmate;	*e)* toute maladie physique ou mentale ou tout trouble mental dont il souffre;
(f) the inmate's potential for violent behaviour; and	*f)* sa propension à la violence;
(g) the inmate's continued involvement in criminal activities.	*g)* son implication continue dans des activités criminelles.

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 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

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 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) minimum security where the inmate is assessed by the Service as	*c)* la cote de sécurité minimale, si l'évaluation du Service montre que le détenu :
(i) presenting a low probability of escape and a low risk to the safety of the public in the event of escape, and	(i) soit présente un faible risque d'évasion et, en cas d'évasion, constituerait une faible menace pour la sécurité du public,
(ii) requiring a low degree of supervision and control within the penitentiary	(ii) soit exige un faible degré de surveillance et de contrôle à l'intérieur du pénitencier.

[12] The second broad delegation consists of Commissioner's Rules and Directives. Pursuant to s. 6(1) of the *CCRA*, the Governor in Council may appoint a Commissioner who, under the direction of the Minister of Public Safety and Emergency Preparedness, "has the control and management of the Service and all matters connected with the Service". The Commissioner may make rules, under s. 97 of *CCRA*, for: (a) the management of the Service; (b) for matters described in s. 4; and (c) generally for carrying out the purposes and provisions of the *CCRA* and the *Regulations*. Under s. 98 of *CCRA*, the Commissioner has the power to designate any rules, made pursuant to s. 97, as "Commissioner's Directives". In this application, the key Commissioner's Directive is CD 705-7, entitled "Security Classification and Penitentiary Placement".

B. *Initial Security Classification and Placement (CD705-7)*

[13] Upon admission into federal custody, Service staff members assess each offender to determine an initial security placement for the offender. This initial placement is carried out under the guidance of Commissioner's Directive CD 705-7 – "Security Classification and Penitentiary Placement" and CD 705 – "Intake Assessment Process".

[14] One of the first steps in the intake assessment process is the completion of the Custody Rating Scale (referred to as the "Scale" or "CRS") by the inmate's Parole Officer or Primary Worker (CD 705-7, paragraphs 16-17). Paragraphs 35-41 of CD 705-7 describe the role of the Scale in assessments and Appendix A of the Directive provides extensive details of its use.

[15] The Scale is a research-based instrument, which generates numerical scores intended to measure both the inmate's potential for institutional adjustment and his security risk. It was designed to make the classification of inmates more objective and transparent. Under the Institutional Adjustment component of the Scale, scores are assigned to five factors. Under the Security Risk component, scores are assigned to seven factors, including two of specific relevance to this application – sentence length and severity of the current offence. There is little, if any, discretion in those administering the Scale. This ensures that the total score generated is consistent across all inmates in the penitentiary system.

[16] As scores escalate, the offender receives a higher security level designation. Pre-determined cut-off values are set for minimum, medium and maximum-security placement (CD 705-7, at paragraph 37). The security level cut-off score for maximum security is 95 or greater on the Institutional Adjustment dimension, or 134 or greater on the Security Risk dimension.

[17] Once generated, the total actuarial score is used as a tool in establishing the final placement of an offender. As set out in paragraph 40 of CD 705-7:

> The final assessment must address both the actuarial score and clinical factors. In the overall assessment of risk, clinical judgment will normally be anchored by the results of the Scale. Where variations occur (i.e. the actuarial measure is inconsistent with the clinical appraisal), it is important that the assessment specify why this is the case. The final assessment will conform with section 17 of the CCRR by setting out the analysis under the three headings of institutional adjustment, escape risk and risk to public safety. [Emphasis added.]

[18] In other words, the Scale result is the starting point for classification. Once it is completed, the clinical judgment of experienced and specialized staff and psychological assessments become important to determine whether the result of the actuarial assessment under the Scale should be maintained.

[19] Under paragraph 34, the following factors must be considered to determine the least restrictive environment for the offender:

a) the safety of the public, the offender and other persons in the penitentiary;

b) the offender's individual security classification;

c) the security classification of the institution;

d) accessibility to the offender's home community and family;

e) the cultural and linguistic environment best suited to the offender;

f) the availability of appropriate programs and services to meet the offender's needs; and

g) the offender's willingness to participate in programs.

[20] Furthermore, in determining the classification of Aboriginal offenders, staff will be sensitive to the spirit and intent of *R. v. Gladue*, [1999] 1 S.C.R. 688 and consider the following factors:

a) history of dislocation such as residential school experience or family history of residential school experience;

b) unemployment due to a lack of opportunity or options;

c) lack or irrelevance of education;

d) history of substance abuse;

e) history of systemic and direct discrimination;

f) history of previous experience involving restorative/community based sanctions;

g) history of participation in Aboriginal traditional teachings, ceremonies and activities; and

h) history of living on or off reserves.

C. *Policy 107*

[21] The specific document of concern to Ms. Kahnapace is Policy Bulletin 107 (Policy 107), issued by the Commissioner on February 23, 2001. The policy was applicable only to the security classification of offenders serving a minimum life sentence for first or second degree murder. According to Policy 107:

> Since first and second degree murder are the most serious crimes that can be committed in Canada, and are subject to the most severe penalty in the Criminal Code, CSC's policies and procedures must more clearly reinforce this aspect of our criminal justice system. Consequently, offenders serving a minimum life sentence for first or second degree murder will be classified as maximum security for at least the first two years of federal incarceration, which is congruent with the reasons for sentencing.

[22] Policy 107 was, in effect, an announcement or notice of changes to the Custody Rating Scale so that it would:

> . . . take into account the seriousness of the sentence. This will result in a maximum security rating for offenders serving a minimum life sentence for first or second degree murder**.**

[23] How did Policy 107 effect change to the actuarial score? As of the date of Policy 107, February 23, 2001, item #4 of the security risk component of the Scale – Sentence Length – was amended. An additional category – "life as a minimum – first or second degree murder," – was added with a pre-determined score of 98 points. When the 36 points already in place on the Scale for "severity of the current offence" were added to the sentence length score, the offender would necessarily meet the maximum-security cut-off of 134 points.

[24] The Scale was once again modified on September 18, 2007. At that time, item #4 of the security risk subscale was changed by removing the category "life as a minimum – first or second degree murder" thereby resulting in a score of 65 points for a sentence of more than 24 years. The second change was to item #3, Severity of Current Offence, where an additional category of "extreme", applicable for first and second degree murder, was added and assigned a value of 69 points. The combination of items #3 and #4 resulted in a total score under the Security Risk subscale of 134 points for anyone convicted of first or second degree murder. Once again, any such offender would, without exception, meet the maximum-security threshold.

[25] Of note, Policy 107 did <u>not</u> eliminate the initial intake assessment, with its clinical assessment that could result in a different final security placement of the individual offender. Nor did it eliminate classification reviews. Policy 107 contemplated overrides to the maximum-security

rating that would necessarily be generated from application of the Scale to offenders convicted of first or second degree murder and sentenced to 24 years or more. Policy 107 states as follows:

> The initial security classification decision on offenders serving a minimum life sentence for first or second degree murder shall be determined by the Custody Rating Scale result. Proposed overrides of the Custody Rating Scale for this group shall be exceptional and must be approved by the Assistant Commissioner, Correctional Operations and Programs. [Emphasis added]
>
> In the case of offenders serving a minimum life sentence for first or second degree murder, security classification review, or application of the Security Reclassification Scale, will occur every two years over the duration of the period of incarceration.

[26] On December 10, 2007, the Assistant Commissioner Correctional Operations and Programs (ACCOP) released a memorandum regarding CD705-7 and Policy 107. In the memorandum, the ACCOP expressed concern about "significant regional variances and quality issues" related to the individual assessments and the use of the override described in Policy 107. The memorandum set out the following:

> [I]n keeping with further development of an overall strategy for managing offenders serving a minimum life sentence for first or second degree murder . . . the decision making authority for "exceptions" or initial placement to medium-security for these offenders is being returned to the ACCOP**.**
>
> Henceforth, the "exceptions" decision-making process is as follows:
>
> 1) Institutional Parole Officer prepares an Assessment for Decision;
>
> 2) Intake Warden reviews as to whether an exception is warranted, then forwards recommendation to their respective RDC;

3) RDC assures quality control and compliance with all aspects of policy, and forwards their recommendation for an "exception" and relevant documentation to ACCOP for review and decision; and

4) ACCOP notifies RDC of decision results.

D. *Application to Ms. Kahnapace*

[27] I turn to how the various policies applied to Ms. Kahnapace. Upon her admission to federal custody, the Offender Intake Assessment process was initiated for the purposes of classifying and placing Ms. Kahnapace in the appropriate institution. Application of the Scale resulted in a score of 139 points under "Security Risk". With a score of over 134 on this component of the Scale, Ms. Kahnapace was assigned an initial placement of maximum security. This result "anchored" her individual assessment.

[28] She then underwent a clinical assessment and process as described in the December 10 memorandum. On January 14, 2008, her Institutional Parole Officer and her Case Management Team (CMT) both recommended that she be placed in medium security. The Warden also recommended that Ms. Kahnapace be placed under medium security. Upon review, however, the RDC determined that Ms. Kahnapace was to be assigned to a maximum-security facility for two years. At that point, there was no need for approval by the ACCOP due to the fact that the RDC had not determined that an exemption was warranted.

[29] A more detailed review of the steps and decisions involved in the placement of Ms. Kahnapace is set out later in these Reasons.

[30] As I understand Ms. Kahnapace's key arguments, she objects to the application of Policy 107 in her case because:

1. the automatic assignment of 134 points on the Security Risk component of the Scale is arbitrary and does not comply with the provisions of the *CCRA* or the *Regulations*;

2. Policy 107 is contrary to ss. 7 and 9 of the *Charter*; and

3. The RDC fettered her discretion or ignored evidence by not accepting the recommendations of the Applicant's psychologist, CMT and Warden that Ms. Kahnapace be placed in medium-security facilities.

[31] Ms. Kahnapace also appears to dispute the fact that she is ineligible for review of her classification for two years, whereas offenders who have not been convicted of first or second degree murder may have more frequent review. However, this argument was not seriously argued by Ms. Kahnapace, either in her written materials or in oral submissions.

[32] With this background, I turn to an analysis of the issues before me.

IV. Standard of Review

[33] There does not appear to be disagreement on the standard of review in this case.

[34] The actual decision under review is the Third-level Grievance Decision. The decision, in turn, reviewed the decision of the RDC. These two decisions related to the determination of whether an exception to Policy 107 should be applied to Ms. Kahnapace. This is primarily a factual determination that attracts a standard of review of reasonableness. According to the Supreme Court in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraph 47, the Court should not intervene if the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[35] This application raises issues that extend beyond the factual or discretionary conclusions reached by the RDC and in the Third-level Grievance Decision. The Supreme Court in *Dunsmuir* also stated that constitutional questions and questions of true jurisdiction (relating to the authority granted by Parliament) are reviewed on a standard of correctness (above, at paras. 58-59). As such, the issues about the lawfulness and implementation of modifications to the Scale as reflected in Policy 107 and the *Charter* attract the standard of correctness.

V. Justiciability of Policy 107

[36] The Respondent, as a threshold issue, submits that Policy 107 is not justiciable. For purposes of this judicial review, I am prepared to accept that the review of Policy 107 is justiciable.

VI. Lawfulness of Policy 107

[37] Ms. Kahnapace argues that Policy 107's modifications to the Scale are null and void because they are in direct conflict with ss. 3, 4, 28, and 30 of the *CCRA* and ss. 17 and 18 of the *Regulations*. She submits that the application of Policy 107 is inconsistent with the legislated requirement for offender classifications and incarcerations to be based on the "least restrictive environment" and in taking into account the factors set out in s. 17 of the *Regulations*. Thus, by using the Scale, as modified by Policy 107, Ms. Kahnapace asserts that she faces incarceration circumstances that are more restrictive than necessary, as evidenced by the recommendations of her CMT, the Warden and the psychologist.

[38] There are two reasons why Ms. Kahnapace's arguments will fail. The first is that the evidence before me shows a rational connection between the subscales of severity of the offence, length of sentence, and the broad concept of public safety. The second, contrary to the assertions of Ms. Kahnapace, Policy 107 does not eliminate the need of an individual assessment of the circumstances of each offender. In other words, Policy 107 does not lead to arbitrary placement of persons convicted of first and second degree murder in maximum-security facilities.

[39] Placement of offenders requires a consideration of many factors. Many of those factors relate directly to the offender. However, balanced with those considerations must be the factors that relate to the paramount consideration of the protection of society (*CCRA*, s. 4(a)). Thus, it is more than reasonable that the Service examine such matters as the risk of escape and the ability of the offender to integrate into the prison environment. Section 17 of the *Regulations* mandates the

Service to take into account, *inter alia*, the seriousness of the offence committed by the offender and the inmate's behaviour while under sentence. Pursuant to s. 18 of the *Regulations*, an inmate will be classified as maximum security where the individual requires a high degree of supervision and control within the penitentiary.

[40] It is within this framework that s. 28 of the *CCRA* must be read. As noted above, s. 28 requires that the Service take all reasonable steps to ensure that the offender is assigned to an institution that provides the "least restrictive environment for that person". In making this determination, the Service must have regard to many factors, including factors that extend to the safety of the public, the safety of the individual and other persons in the penitentiary, and the security of the penitentiary.

[41] I first observe that we have no evidence or submissions that Policy 107 was implemented in bad faith. The question then becomes whether there is any defensible rationale for assigning higher scores for long-term sentences and violent crimes in the Scale.

[42] To address the issues involved in inmate placement and the operation of the Scale and Policy 107, the Respondent provided the affidavit evidence of Dr. Larry Motiuk, Director General, Offender Programs and Reintegration for the Service. As an employee of the Service for the past 20 years, Dr. Motiuk has been extensively involved with corrections research. In his opinion, the Scale was developed to bring consistency and predictability to the placement of offenders. In his

affidavit, he described the Scale as "an actuarial risk assessment tool". Of particular relevance to this application, Dr. Motiuk expressed the opinion that:

> Classification research has demonstrated that the length of sentence imposed by the courts, history of violent behaviour, degree of violence, harm caused, use of a weapon and an inmate's role in the incident(s) is indicative of increased risk to institutional and public safety. Further, increasing the opportunity to observe an individual's behaviour over time increases the observer's ability to predict that individual's future behaviour and performance and address the individual's needs.

[43] Although Ms. Kahnapace was severely critical of Dr. Motiuk's evidence, the Scale and its modification by Policy 107, she did not bring any experts before this Court to support her criticisms. She refers to articles and reports where the Scale and Policy 107 are criticized. However, the fact that a policy is criticized or unpopular is not determinative of its lawfulness. What would have assisted Ms. Kahnapace's position would have been expert affidavit evidence that provided a sound basis for rejecting the evidence proffered by the Respondent.

[44] During extensive cross-examination, Dr. Motiuk's opinions were not undermined in any material way.

[45] Based on the evidence of Dr. Motiuk, I am of the view that the use of the Scale, as amended by Policy 107, is rationally linked to the requirements of the *CCRA* and the *Regulations*.

[46] The next problem that I have with Ms. Kahnapace's position is that it appears to misapprehend the Policy and its application. Contrary to her assertions, the application of Policy 107 is not arbitrary. In other words, there was no arbitrary assignment of Ms. Kahnapace to

maximum-security facilities. The possibility of an override – as reflected in Policy 107 – was available to her.

[47] Moreover, the evidence before me demonstrates that exceptions have been made, obviously on the basis of the offender's individual assessment. Between 2001 and 2008, approximately 30% of female offenders convicted of first or second degree murder have been assigned to medium-security facilities. Ms. Kahnapace is critical of the statistics presented by Dr. Motiuk but provides no compelling evidence that they are in any way incorrect.

[48] In conclusion on this issue, I am not persuaded that either Policy 107, which amended the Scale, or the further directive on its implementation is contrary to the provisions of the *CCRA* or the *Regulations*.

VII. Section 7 and 9 Breach

[49] Ms. Kahnapace submits that her continued confinement in a maximum-security environment pursuant to Policy 107 amounts to a violation of her rights under ss. 7 and 9 of the *Charter*.

[50] The relevant provisions of the *Charter* are as follows:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.	7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.
9. Everyone has the right not to be arbitrarily detained or imprisoned.	9. Chacun a droit à la protection contre la détention ou l'emprisonnement arbitraires.

[51] I will begin with a consideration of the application of s. 7 of the *Charter*. Having reviewed the relevant jurisprudence, it appears that a series of questions must be addressed to respond to the issue.

1. Has there been a deprivation of Ms. Kahnapace's right to liberty?

2. If so, is the deprivation sufficiently serious to warrant *Charter* protection?

3. If so, was the deprivation done in accordance with the principles of fundamental justice?

[52] The first question is whether the initial classification of an offender to a maximum-security level is a deprivation of the right to liberty, as contemplated by s. 7 of the *Charter*.

[53] The case of *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809 presents similarities to the case at bar. In *May*, several offenders were transferred to more restrictive detention. The transfers resulted from a Commissioner's Directive to review the security classifications of all inmates serving life sentences in minimum-security institutions who had not completed their violent offender programming. The Service used the Scale to assist the classification review process. The appellants attacked the decision-making process leading to their transfers. They submitted that a change in general policy, embodied in a direction to review the security classification of offenders serving a life sentence at Ferndale Institution using certain classification tools, was the sole factor prompting their transfers. They said that the transfers were arbitrary, made without any "fresh" misconduct on their parts, and made without considering the merits of each case. While the Court in *May* was primarily concerned with whether the inmates could pursue the remedy of *habeas corpus* in provincial superior courts, the Supreme Court provided useful guidance on the application of s. 7 of the *Charter*.

[54] In *May*, above, the majority of the Supreme Court observed that the decision to transfer an inmate to a more restrictive institutional setting constitutes a deprivation of his or her "residual liberty" (see paragraph 76) and that inmates' liberty interest cannot be impinged upon except in accordance with the principles of fundamental justice, as required by s. 7 of the *Charter* (paragraph 77).

[55] An offender is initially deprived of his or her "liberty" by the conviction and sentence. However, the jurisprudence teaches that, even after conviction, s. 7 may apply to actions that affect the inmate's "residual liberty". As described by the Supreme Court in *Dumas v. Leclerc Institute*, [1986] 2 S.C.R. 459 at paragraph 11:

> In the context of correctional law, there are three different deprivations of liberty: the initial deprivation of liberty, a substantial change in conditions amounting to a further deprivation of liberty, and a continuation of the deprivation of liberty.

[56] Ms. Kahnapace faces a situation similar – albeit not identical – to that of the appellants in *May*. The RDC determination placing Ms. Kahnapace into maximum security and the Third-level Grievance Decision affected her "residual liberty". Thus, for the purposes of this application, I am satisfied that Ms. Kahnapace has discharged her burden of making out a deprivation of liberty. Thus, s. 7 of the *Charter* is engaged.

[57] This conclusion is not the end of the analysis. The next question is whether the deprivation is sufficiently serious to warrant *Charter* protection. "The *Charter* does not protect against insignificant or 'trivial' limitations of rights" (see *Cunningham v. Canada*, [1993] 2 S.C.R. 143 at para. 15). Once again, I am prepared to accept, without deciding, that the decision to place Ms. Kahnapace into maximum-security facilities rather than medium is sufficiently serious to attract s. 7 protection.

[58] Finally, I turn to the question of whether the deprivation of Ms. Kahnapace's residual liberty was done in accordance with the principles of fundamental justice.

[59] From a review of the jurisprudence in cases with a similar context, it appears that there are two components to this question. As observed by Justice McLachlin (as she then was) in *Cunningham*, above, at paragraph 17:

> The principles of fundamental justice are concerned not only with the interest of the person who claims his liberty has been limited, but with the protection of society. Fundamental justice requires that a fair balance be struck between these interests, both substantively and procedurally.

[60] Thus, for purposes of this examination, I need to address two questions:

(a) From a substantive point of view, does Policy 107 strike the right balance between the offender's interests and the interests of society?

(b) Are there "safeguards" in place to prevent arbitrary and capricious confinement of offenders to maximum-security facilities?

[61] With respect to the first question, *May* is particularly helpful. In *May*, above, at paragraph 84, the majority of the Court commented as follows:

> In our view, the new policy strikes the proper balance between these two interests. Its purpose is to protect society. Public safety is an important factor CSC must consider in the course of inmate placement and transfer decisions: s. 28 of the *CCRA*. It is also worthy of note that the policy requires that inmates be transferred to higher security institutions only after an individual assessment of their file has been conducted.

[62] I should note that the appeal in *May* was allowed, on the basis that there had not been full disclosure of the applicable scoring matrix. This is not an issue before me as Ms. Kahnapace was – albeit late in the process – provided with the Scale.

[63] As discussed above at paragraphs 42 to 45, the Respondent has provided a rationale for the increase in scores on the Scale for first and second degree murder convictions. The affidavit evidence of Dr. Motiuk addresses the rationale.

[64] Ms. Kahnapace argues that there is no evidence to support a conclusion that Policy 107 – either the initial assignment of an offender to maximum security or a review of the initial classification only after two years – serves the interests of society. The problem with these assertions is that Ms. Kahnapace relies on a number of sources that cannot be tested. No expert was put forward by Ms. Kahnapace to contradict the opinions of Dr. Motiuk. In the absence of reliable evidence which would demonstrate that there is no link between violent crime and difficulty settling into the prison environment, I am left with the uncontradicted opinion of Dr. Motiuk that there is such a link.

[65] Ms. Kahnapace also objects to the initial placement for two years for offenders who have been convicted of first or second degree murder. Such offenders will be in the prison system for at least ten years. Common sense and logic tell me that it is important for the Service to take the time necessary to assess the behaviour of the inmate within the prison setting. Through observation and careful planning of programs for the inmate, the Service can ensure that the needs of both the offender and the rest of the prison population can be met over the course of the offender's lengthy

sentence. Does this require two years? I have no evidence to indicate that some lesser time would suffice. Such evidence may exist; but it is not before this Court. In the absence of such evidence, I do not believe that the Court is in a better position than the Service to assess the needs of the penitentiary system. In other words, it is not the role of the Court to micro-manage the Service.

[66] I am satisfied, on the record before me, that Policy 107 provides a fair balance between the two interests of public safety and the individual interests of offenders potentially affected by Policy 107.

[67] Finally, I am satisfied that there are "safeguards" in place to prevent arbitrary and capricious confinement of offenders to maximum-security facilities. In short, the procedure that has resulted in a maximum-security classification provides procedural fairness to Ms. Kahnapace. The change to the Scale was implemented pursuant to a Commissioner's Directive as authorized by ss. 97 and 98 of the *CCRA*. Policy 107 does not eliminate the need for an individual assessment or the possibility of exemptions to the operation of the Scale. Ms. Kahnapace was permitted throughout to make representations and to be represented by counsel. The final decision of the RDC was subject to the grievance procedure. Both judicial review and *habeas corpus* are available to Ms. Kahnapace (see *May*, above). These requirements provide safeguards against arbitrary and capricious orders and ensure that curtailment of the "residual liberty" only occurs after the interests of Ms. Kahnapace have been considered.

[68] Ms. Kahnapace raises the concern that the grievance procedure is ineffective. She refers to the statement of Justice Doherty in the Ontario Court of Appeal decision in *Spindler v. Millhaven*

Institution (1993), 175 OAC 251, [2003] O.J. No. 3449, at paragraph 9 that "The grievance procedures are of little practical value given that the initial classification is made pursuant to a specific policy put in place by the Commissioner". Justices Lebel and Fish, speaking for the Supreme Court in *May*, above, at paragraph 63, described similar shortcomings of the grievance procedure, where they stated that:

> [T]he internal grievance process set out in the *CCRA* prescribes the review of decisions made by prison authorities by other prison authorities. Thus, in a case where the legality of a Commissioner's policy is contested, it cannot be reasonably expected that the decision-maker, who is subordinate to the Commissioner, could fairly and impartially decide the issue. It is also noteworthy that there are no remedies set out in the *CCRA* and its regulations and no articulated grounds upon which grievances may be reviewed. Lastly, the decisions with respect to grievances are not legally enforceable.

[69] I acknowledge that the use of the grievance procedure in this case may not be an effective or practical way of addressing all of the issues raised by Ms. Kahnapace with respect to the decision of the RDC. It is unlikely that the grievance decision-maker could fairly address the lawfulness of the RDC's decision or the *Charter* arguments. That, however, does not leave Ms. Kahnapace without recourse. As she has done here, she can apply for judicial review where these issues can be considered. In addition, as taught by the Supreme Court in *May*, Ms. Kahnapace has access to *habeas corpus* in provincial superior courts.

[70] Moreover, I am not persuaded that the grievance procedure, which Ms. Kahnapace accessed, is completely without practical effect. Had Ms. Kahnapace demonstrated that the RDC's decision was made without regard to some of the evidence, or if she presented evidence at the grievance that seriously questioned the application of the policy to her situation, or if she showed that her rights to procedural fairness were breached, those matters would have to be dealt with at the Third-level

Grievance. While it might not have been open to the decision-maker to move Ms. Kahnapace to medium-security facilities, the decision-maker could have returned the decision to the RDC for re-consideration.

[71] Ms. Kahnapace also submits that the override procedure is unfair because the RDC is in no position to make a personal assessment of the circumstances of an offender. In her submission, only the psychiatrists and psychologists and Service field workers are in a position to provide an individualized assessment. I do not agree. It is evident that the RDC cannot ignore the recommendations made by an offender's intake team and warden. However, the RDC has been assigned responsibility for ensuring a balance between individual offenders' rights and the needs of the overall protection of society. Consistency in decision making is important. The Service has determined that only the RDC (and in some instances the ACCOP) can ensure that the consistent balance is achieved. Thus, it is clear that the RDC must take all of the information concerning the individual into account.

[72] Ms Kahnapace asserts that the RDC or ACCOP is not "trained to analyze risk more accurately" than field staff. However, when the question was posed to Dr. Motiuk about the RDC's qualifications, he responded as follows:

> I do know that Regional Deputy Commissioner in this case has considerable training as a former Probation Officer; Institutional Case Management Officer; Coordinator of Case Management, Community Case Preparation Section Supervisor; Institutional Unit Manager; Deputy Warden; Director, Institutional Operations; Director General, Offender Programs and Reintegration; A/Assistant Commissioner Correctional Operations and Programs; and Deputy Commissioner, Women.

[73] The experience of the RDC is, in my view, directly relevant to the decisions that she is making. Further, the RDC's decision in this case reflects a broad understanding of the record before her. Should the RDC fail to consider all of the evidence before her, or rely solely on the score generated by the Scale, I believe that she would be acting beyond her mandate. That is not the case in the application before me.

[74] I conclude that Ms. Kahnapace has not established that Policy 107 deprived her of her liberty contrary to the principles of fundamental justice. Since no violation of s. 7 has been made out, it is unnecessary to consider the arguments under s. 1 of the *Charter*.

[75] Although Ms. Kahnapace also raises s. 9 of the *Charter*, she made no arguments directly related to a s. 9 *Charter* breach. However, I observe that the analysis of s. 7 contains consideration of the possible arbitrariness of Policy 101. Thus, on the facts of this case, an analysis of s. 9 of the *Charter* would almost certainly lead to the same result. Accordingly, I will also dismiss the argument that s. 9 is contrary to the *Charter*.

VIII. The Third-level Grievance Decision

[76] Having concluded that Policy 107 is not unlawful and that there is no breach of Ms. Kahnapace's *Charter* rights, I turn to the specific decision that precipitated this judicial review – the Third-level Grievance Decision. This decision cannot be reviewed without consideration of the RDC decision.

[77] While primarily concerned with the lawfulness of Policy 107, Ms. Kahnapace also submits that the RDC decision and the Third-level Grievance Decision, which affirmed the RDC decision, were unreasonable. The score assessed for Ms. Kahnapace on the Institutional Adjustment component of the Scale was 22; this score falls in the level of minimum security. Ms. Kahnapace also argues that the RDC's decision to deny the exception from maximum security was not based on enumerated factors and recommendations provided by Service field staff. The RDC and the Acting Assistant Commissioner, Policy and Research of the Service (ACC) ignored relevant facts, such as the psychologist's finding that Ms. Kahnapace was a model inmate and should be considered for medium level of security.

[78] To understand the decision under review in this application, it is necessary to describe the recommendations and decisions that led to the Third-level Grievance Decision.

[79] Ms. Kahnapace commenced her sentence on September 27, 2007. In accordance with the applicable Commissioner's Directives (discussed above), Service staff began an Offender Intake Assessment.

[80] As discussed above, the application of the Scale resulted in an initial placement of maximum security.

A. *Psychologist's Report*

[81] On December 11, 2007, a Service psychologist completed a Psychological Intake Assessment of the Applicant. The psychologist observed many positive factors. For example, the psychologist noted that Ms. Kahnapace was a model inmate since her arrival at Fraser Valley Institute on October 9, 2007, and had not shown signs of institutional violence. However, the psychologist also noted a number of negative factors: Ms. Kahnapace's history of substance abuse; her history of violence – both as victim and perpetrator; her poor performance on bail; and her failure to accept responsibility for her offence. It is unclear from reading the report how or even if these negative factors were weighed by the psychologist. However, we do know that the psychologist concluded that:

> Ms. Kahnapace has not presented as a concern for institutional violence while in remand and FVI. She is currently residing in the Secure Unit and is considered a model inmate since her arrival at FVI. Given her ability to manage her behavior in an incarcerated setting, Ms. Kahnapace could be considered a candidate for reduced security from maximum to medium level security

B. *CMT Report*

[82] The psychologist's report was considered by her CMT. In a report dated January 14, 2008, the CMT referred to the psychologist's conclusion cited above and to certain of the factors – both positive and negative – in that report. The CMT also took into consideration the fact that she was an Aboriginal woman. The CMT concluded that Ms. Kahnapace's "overall assessment" was "Medium".

C. *Warden's Recommendation*

[83] We can see from a note to Ms. Kahnapace's file, dated March 6, 2008 (two days after the RDC decision) that her Warden agreed with the conclusion of the CMT.

D. *RDC Decision*

[84] Pursuant to the Memorandum of December 10, 2007, neither the CMT nor the Warden was able to make the final decision on Ms. Kahnapace's placement. Her file was referred to the RDC. In a decision dated March 4, 2008, the RDC concluded that Ms. Kahnapace should be classified as maximum security, in spite of the positive recommendations on her file.

[85] The RDC considered the reports of both the psychologist and the CMT. No evidence was ignored. From her reasons, we can see that the RDC put more weight on a number of the negative factors in Ms. Kahnapace's situation than had the psychologist or the CMT. For example, the RDC noted that Ms Kahnapace was convicted of an extremely violent offence, has a history of intimate partner violence, of substance abuse, has admitted to escaping from a youth detention centre in the past and is currently unwilling to discuss her offence. Furthermore, the RDC noted that Ms. Kahnapace requires a number of high intensity programs to address contributing factors that led to her offence. The RDC considered the fact that the Applicant's CMT and her Institutional Warden recommended that she be placed under medium security; however, the RDC did not concur. The RDC concluded that, given the negative factors, it was not unreasonable to place Ms. Kahnapace in a maximum security setting for her first two years.

E. *The Third-level Grievance*

[86] On July 9, 2008, Ms. Kahnapace filed a First-level Grievance to start the internal offender grievance process under the *CCRA* and the *Regulations*. On July 17, 2008, Ms. Kahnapace pursued her grievance directly to the Third-level Grievance.

[87] In the Third-level Grievance Decision, dated November 14, 2008, the ACC denied the grievance. In her decision, the ACC indicated that all of the relevant documentation and Ms. Kahnapace's file were reviewed along with the submissions of her counsel. In denying the grievance, the ACC provided the following reasons:

> The [RDC] clearly justified why she rated you as High, Moderate, and Moderate for Institutional Adjustment, Escape Risk, and Public Safety, in accordance with the [*Regulations*].
>
> . . .
>
> File information notes that you have demonstrated a lengthy and pervasive history of violence but you will not admit that you have a problem with violence. Information included in [your] Referral Decision sheet indicates that you have recently been convicted of an extremely violent offence, Second Degree Murder. Your Correctional Plan requires that you take a number of high intensity programs but you continue to minimize your violent history and you are unwilling to discuss your index offence. It is also noted that you are unwilling to address certain factors that have contributed to your index offence. For the reasons noted above, the RDC rated you as High on Institutional Adjustment.
>
> . . .
>
> Based on the [Scale] as well as considering clinical factors, the RDC determined that it would be reasonable for you to spend up to two (2) years in a maximum security setting where staff can assess and assist you through the adaptation stage of your Life sentence. During this time, you will be able to participate in correctional programs and

> work with the Institutional Elder. The RDC does not believe that you can currently be managed in a medium security setting.
>
> In accordance with the [*Regulations*], section 17 and 18, the RDC took into consideration all relevant factors when determining your security classification. The RDC has clearly explained the decision to classify you as a maximum-security offender. The decision was made in accordance with legislation and policy. For these reasons, your grievance is denied.

F. *Analysis*

[88] I begin with an analysis of the Third-level Grievance Decision by reviewing the submissions made by Ms. Kahnapace and her counsel. This is important because the ACC would err by failing to address the new evidence or arguments presented by Ms. Kahnapace.

[89] In addition to a brief hand-written note, Ms. Kahnapace provided the submissions of her counsel, by letter dated September 17, 2008. Briefly stated, Ms. Kahnapace, through her counsel, provided two reasons for overturning the RDC decision. They were as follows:

1. the decision to maintain Ms. Kahnapace in maximum-security facilities is "unsupported by any information found in the assessments done by [the Service]";

2. the decision is "contrary to the legislation governing [the Service]"

[90] In connection with the grievance, Ms. Kahnapace's counsel requested an extension of time for filing submissions until she had received the CRS results for Ms. Kahnapace. Subsequently, in a letter dated October 10, 2008, counsel advised that her request for information should not hold up the decision making process and that she understood "that you will now go ahead and make a decision, and look forward to a timely response". From this communication, it is reasonable to assume that Ms. Kahnapace was prepared to proceed without the further information on her Scale results.

[91] Beyond the arguments that the process used to classify Ms. Kahnapace was unlawful, no new evidence or submissions were made.

[92] With respect to the merits of the RDC decision, Ms. Kahnapace essentially argued that the decision of the RDC was not based on the evidence before her. In her submission, the RDC should have adopted the recommendations of the psychologist, the CMT and the Warden. In this application, Ms. Kahnapace makes the same argument with respect to the Third-level Grievance Decision.

[93] As noted above, this part of the decision of the ACC is reviewable on a standard of reasonableness. And, in my view, Ms. Kahnapace has not persuaded me that the decision of either the ACC or the RDC is unreasonable. The ACC correctly noted that there was evidence before the RDC that supported her conclusion. While there were some factors that could have favoured Ms. Kahnapace's assignment to a medium-security facility, there were others that indicated problems that could have led to difficulties with a less-restrictive placement. In coming to her decision, the

RDC referred extensively to findings of the psychologist and the CMT. Contrary to the submission of Ms. Kahnapace, both the RDC and ACC considered the psychologist's opinion that Ms. Kahnapace was a model inmate and should be considered for medium level of security. Quite simply, the RDC weighed the evidence concerning Ms. Kahnapace differently than had the psychologist, CMT or Warden.

[94] I am also not persuaded that either the RDC or the ACC fettered their discretion by limiting their decision to an application of Policy 107. A review of the decisions shows that both the RDC and the ACC were well aware that an exception could be made to the application of the revised Scale.

[95] Ms. Kahnapace, in effect, argues that the RDC was bound by the recommendations of the psychologist, CMT and Warden. This is an erroneous understanding of the decision-making procedure. The RDC was mandated to make the final decision; the psychologist, Warden and CMT were not.

[96] On the basis of this record, and given that no new evidence was presented, I do not see how the ACC could have intervened in the decision of the RDC, on its merits. While I might not have agreed with the RDC in how she weighed the evidence before her, I conclude that her decision was not unreasonable. It follows that the decision of the ACC in the Third-level Grievance was similarly reasonable.

[97] The Third-level Grievance Decision is deficient in that the ACC did not adequately (or at all) address the arguments of Ms. Kahnapace that the RDC decision was not made in accordance with the principles of the *CCRA* or the *Regulations*. While this might constitute a reviewable error, this precise question has been considered earlier in this decision where I concluded that neither Policy 107 nor the process of implementation of the revised Scale is unlawful or contrary to the *Charter*. Thus, any error of the ACC in failing to consider these submissions is immaterial.

IX. Conclusion

[98] On the record before me and for the reasons stated, I conclude that the application for judicial review will be dismissed on the basis that:

- Policy 107 is not unlawful;
- Neither Ms. Kahnapace's s. 7 nor her s. 9 *Charter* rights have been breached by Policy 107 or its implementation; and
- The Third-level Grievance Decision is not unreasonable.

[99] In many ways, I am not happy with this result. A number of parties who understand correctional services have been very critical of Policy 107 and its implementation. The current practice appears to be harsh – particularly for women – and might benefit from further research. A more complete applicant's record with, in particular, expert evidence that questions the validity and

reliability of the Custody Rating Scale would, perhaps, have provided Ms. Kahnapace with stronger arguments.

[100] In my discretion, no costs will be awarded.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. the application for judicial review is dismissed; and

2. no costs are awarded.

"Judith A. Snider"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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