

The legal context of accessibility issues

In 1989, the federal government issued a Treasury Board policy on "real property accessibility." The objective was to ensure that persons with disabilities could gain access to and use property owned or leased by the federal government.

The policy clearly states that the provisions of the Canadian Charter of Rights and Freedoms⁽²⁾ and the Canadian Human Rights Act⁽³⁾ make it a discriminatory practice for federal organizations to deny persons with disabilities access to property owned or leased by the federal government.

This policy, along with relevant human rights legislation and the Corrections and Conditional Release Act, set out the internal and legal accessibility requirements that the Correctional Service of Canada must meet in managing its special needs offenders. Application of the Treasury Board policy Government departments may exercise some discretion in conforming to the minimum accessibility requirements of the Treasury Board policy on "real property accessibility" but they must not violate the general intent of the policy - making federal government property accessible to all people. The term "accessible" refers to easy physical access for persons with disabilities affecting mobility particularly individuals who use wheelchairs. The term also covers access requirements for people with visual or hearing disabilities.

To that end, the Correctional Service of Canada developed a set of accessibility guidelines for correctional facilities.⁽⁴⁾ March 1995 is the target date for full implementation of the policy.

In general, the Correctional Service of Canada attempts to provide equality of access so that inmates with disabilities are adequately housed at their correct security level, in the region and, as much as possible, in an institution that provides access to the programs and services deemed necessary to their rehabilitation and wellbeing.

The guidelines stipulate that all minimum- and medium-security institutions and all special-purpose facilities (such as protective custody and psychiatric centres) must eventually have several accessible beds and cells, as well as program areas to accommodate inmates with disabilities. Legal standards Each region is further required to designate at least one institution at each security level as an institution accessible to inmates with disabilities. However, the designation of only specific institutions as fully accessible may not protect the Service from being sued by an inmate alleging discrimination under section 15 of the *Canadian Charter of Rights and Freedoms*. Section 15 guarantees "equality before and under the law... without discrimination." An inmate with a disability could argue that discrimination occurred if he or she was denied a place at an institution with more appropriate programming (for his or her needs) or at an institution closer to his or her home community because that institution was not fully accessible.

Further, section 28 of the *Corrections and Conditional Release Act* requires the Service to take all reasonable steps to place an inmate in an institution that provides the least restrictive environment for that offender, taking into account security requirements; accessibility to the inmate's home community; a compatible cultural and linguistic environment; and the availability of appropriate programs and services.

An inability to appropriately place (according to these various guidelines) an inmate with a disability may put the Correctional Service of Canada in breach of the Treasury Board policy, Correctional Service of Canada guidelines, the *Canadian Charter of Rights and Freedoms* and the *Corrections and Conditional Release Act*, unless the Service can demonstrate that it took all reasonable steps to accommodate the inmate. Inmate challenges Very few inmates with disabilities have launched legal action thus far. The courts have, therefore, not yet addressed the responsibilities of the Correctional Service of Canada with respect to inmates with disabilities. The following will illustrate the types of situations that led some inmates with disabilities to take or consider taking action through the legal system.

In *Baird v. The Queen*,⁽⁵⁾ an inmate at Collins Bay Institution filed a sentence appeal, relying on his disability and the Correctional Service of Canada's alleged inability to accommodate him as grounds for a reduction in his sentence. Baird (who is confined to a wheelchair) was convicted of second-degree murder in 1988 and sentenced to life imprisonment with no eligibility for parole for 14 years.

However, the Service submitted evidence demonstrating that Baird had been provided access to the same services and programs offered to the other inmates at the institution, and the appeal was dismissed with no comment by the court on the Service's responsibilities.

In *Harris v. The Queen*,⁽⁶⁾ an inmate at Warkworth Institution filed an action seeking damages for alleged discrimination contrary to section 15 of the Canadian Charter of Rights and Freedoms, as well as damages for cruel and unusual punishment under section 12 of the Charter.⁽⁷⁾ Harris is a double amputee and claims that the facilities and services at the institution are inadequate for persons with disabilities. The matter has not yet proceeded past the early stages of litigation.

In *Ratte v. The Warden of Kingston Penitentiary*,⁽⁸⁾ the Ontario Court of Justice (General Division) determined that the continued detention in isolation of an HW-positive inmate who was volatile, uncooperative and dangerous to staff did not constitute discrimination based on physical disability contrary to section 15 of the *Charter*.

The court held that Ratte had been isolated because he was a potential threat to the discipline and good order of the institution - he had threatened to bite and stab staff members - and not because he was HIV positive.

Finally, the Correctional Service of Canada's Legal Services section recently received correspondence from the lawyer of an inmate suffering from a condition known as multi-chemical sensitivity. The lawyer alleged that his client was being discriminated against, even though the Service had made attempts to accommodate the inmate's disability within the institution, including a commitment to construct a specially vented cell. It remains to be seen whether the inmate will pursue legal action.

However, the issue of multi-chemical sensitivity was recently analyzed in *McCleary v. The Ministry of Health*.⁽⁹⁾ McCleary lost her appeal to have the Ontario Ministry of Health pay medical costs she incurred in the United States without prior approval of the ministry. More importantly, the court ruled

that treatment for multi-chemical sensitivity is not a recognized medical service in Ontario. This distinction could potentially impact on any legal action taken by an offender with this condition.

Responsibilities The responsibilities of the Correctional Service of Canada to inmates with disabilities have been clearly articulated in the Treasury Board policy, the Service guidelines and the relevant federal legislation. The goal of the Service is, therefore, to provide inmates with disabilities, to the extent possible, the same access to institutions and programs available to inmates without disabilities.

The Correctional Service of Canada seems to be meeting those responsibilities, if the limited litigation in the area is an accurate reflection of the level of dissatisfaction among federal inmates with disabilities.

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(2)Section 15⁽¹⁾ of the *Canadian Charter of Rights and Freedoms* states that "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

(3)Section 3⁽¹⁾ of the *Canadian Human Rights Act* states that "For all purposes of this Act, race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability and conviction for which a pardon has been granted are prohibited grounds of discrimination."

(4)*Guidelines for Implementing Treasury Board's Policy on Accessibility in Correctional Service of Canada Owned and Leased Correctional Facilities* (unpublished).

(5)Alberta Court of Appeal, No.900 3 0807 A.

(6)Federal Court, No. J-1273-92.

(7)Section 12 of the *Canadian Charter of Rights and Freedoms* states that "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment."

(8)Ontario Court of Justice (General Division), court file No.6729.

(9)Ontario Divisional Court, No.455/92.