Date: 20070907

Docket: T-1729-06

Citation: 2007 FC 893

Montréal, Quebec, the 7th day of September 2007

Before: The Honourable Mr. Justice Maurice E. Lagacé

BETWEEN:

FRANÇOIS BOUCHER
and
PIERRE-PAUL DANDURAND

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] François Boucher and Pierre-Paul Dandurand made an application to the Court for declaratory relief under paragraph 18(1)(*a*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, asking it to declare to be *ultra vires* Directive No. 259 ("the Directive") and any other policy or rule of the Commissioner of Correctional Service Canada (CSC), prohibiting smoking within cells and private family visiting facilities.

Facts

[2] Exposure to second-hand smoke has been a concern of the CSC for several years, though until recently smoking was permitted in certain areas of federal penitentiaries, including in particular inmates' cells.

[3] Following consultations with various groups concerned, the CSC announced on July 12, 2005 that it intended to eliminate exposure to second-hand smoke inside all federal penitentiaries by January 31, 2006.

[4] At the time of the application for declaratory relief at bar, the applicants were inmates in the Cowansville Institution and, like other inmates, had been informed and consulted on this objective as well as being notified of the assistance available to help them stop smoking or reduce their dependence on tobacco. On January 3, management informed them that as of January 23 smoking would be prohibited in private family visiting (PFV) units. Additionally, they were notified at the same time that as of January 31, 2006 the prohibition would extend to all areas inside buildings, including cells. However, the prohibition did not apply to areas outside the buildings which inmates might use during the day.

[5] The CSC Commissioner's Directive, published on January 31, 2006, came into effect and stated its purpose in section 1 as follows:

> To enhance health and wellness by eliminating exposure to second hand smoke indoors in all federal correctional institutions, including in motor vehicles under the control of the Service.

[6] In section 10, the Directive further provided that:

> Where inmates are found smoking indoors in institutions, they will be subject to the inmate disciplinary process.

It accordingly specified penalties for offences.

[7] The applicants, who were longtime smokers, were serving terms in the Cowansville federal penitentiary when they filed their action. Their application for declaratory relief sought the partial cancellation of the prohibition so they could continue smoking both in their cells and in areas reserved for PFVs.

[8] However, they did not dispute the Department of Health's scientific information regarding the harmful effect of second-hand smoke on their health.

[9] The applicants complained of limited daily outdoor time and limited opportunities to smoke. Further, they said at least once a month inmates were prohibited from leaving their cells for six to seven hours when management closed the penitentiary for a general search, an administrative inquiry or a power shutdown. Security incidents occurred regularly to interrupt their time outside and compel them to return to their cells sooner than scheduled. For several hours inmates thus did not have the right to go out or to smoke in their cells, which caused them anxiety attacks and anguish.

[10] The CSC felt it was advisable to offer and make available to inmates a program to help stop or reduce smoking. This assistance was accompanied by pharmaceutical products for those who wished to have them.

[11] However, the applicants wanted to continue to smoke. Like many inmates, they were the subject of disciplinary reports for smoking in their cells despite the Directive. The penalties, set out in section 44 of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (CCRA), ranged from a simple warning to fines or even punitive segregation.

Issue

[12] Is the CSC Commissioner empowered to adopt the Directive, or any other rule, prohibiting smoking in a cell and in premises used for private family visits (PFVs)?

[13] The applicants maintained that the CSC is not empowered by the *Non-Smokers' Health Act*, R.S.C. 1985 (4th Supp.), c. 15 (NSHA), to prohibit inmates from smoking in cells and PFVs.

***Corrections and Conditional Release Act* (CCRA)**

[14] The applicants challenged the CSC's right to prohibit inmates from smoking in cells and areas reserved for PFVs. Contrary to this argument, the Court considers that the CCRA empowers the CSC Commissioner to adopt the Directive.

[15] Sections 97 and 98 of the CCRA provide that:

97. Subject to this Part and the regulations, the Commissioner may make rules (*a*) for the management of the Service; (*b*) for the matters described in section 4; and (*c*) generally for carrying out the purposes and provisions of this Part and the regulations . . .	**97.** Sous réserve de la présente partie et de ses règlements, le commissaire peut établir des règles concernant: *a*) la gestion du Service; *b*) les questions énumérées à l'article 4; *c*) toute autre mesure d'application de cette partie et des règlements. **98.** (1) Les règles établies en application de l'article 97 peuvent faire l'objet de directives du commissaire . . .

[16] Additionally, the CCRA allows correctional authorities to impose disciplinary penalties for failure to comply with a directive:

40. An inmate commits a disciplinary offence who . . . . . (*r*) wilfully disobeys a written rule governing the conduct of inmates . . .	**40.** Est coupable d'une infraction disciplinaire le détenu qui : . . . . . *r*) contrevient délibérément à une règle écrite régissant la conduite des détenus . . .

[17] Accordingly, the CSC Commissioner is empowered to adopt standards in the form of directives dealing with CSC management, matters falling under section 4 and any other measure giving effect to Part I of the CCRA (ss. 2 to 98).

[18] To protect health in the penitentiary environment, the CCRA provides that:

> **70.** The Service shall take all reasonable steps to ensure that penitentiaries, the penitentiary environment, the living and working conditions of inmates and the working conditions of staff members are safe, healthful and free of practices that undermine a person's sense of personal dignity.
>
> **70.** Le Service prend toutes mesures utiles pour que le milieu de vie et de travail des détenus et les conditions de travail des agents soient sains, sécuritaires et exempts de pratiques portant atteinte à la dignité humaine.

[19] Although this provision does not specifically mention the second-hand effect of tobacco smoke, it nevertheless requires the CSC to take the necessary steps to ensure that penitentiaries, the penitentiary environment, the living and working conditions of inmates and the working conditions of staff members are safe and healthful. Seen in conjunction with sections 97 and 98 of the Act, *supra*, this provision is a sufficient basis for the Commissioner's authority to adopt the Directive at issue here.

[20] Other provisions of the CCRA exist to reinforce the CSC's mandate, indicating its purpose as follows . . .

[21] Thus, section 4 of the Act describes the operating principles of the Correctional Service as follows:

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 :
. . . . .	. . . . .
(e) that offenders retain the rights and privileges of all members of society, except those rights and privileges that are necessarily removed or restricted as a consequence of the sentence . . .	*e*) le délinquant continue à jouir des droits et privilèges reconnus à tout citoyen, sauf de ceux dont la suppression ou restriction est une conséquence nécessaire de la peine qui lui est infligée . . .

[22] The comparison made by the applicants of inmates' rights and privileges with those of ordinary individuals is based on section 4 of the CCRA, but appears to overlook the fact that while ordinary individuals are entitled to smoke inside their residences, they also have the now recognized right not to be exposed to second-hand tobacco smoke in their residences. In the same way, the Court cannot ignore the interests of non-smoking inmates or non-smoking officers working in institutions, who are entitled to have "penitentiaries, the penitentiary environment, the living and working conditions . . . [be] safe [and] healthful".

[23] Accordingly, the CSC Commissioner cannot be blamed for considering the harmful effect of second-hand smoke in drafting the Directive at issue, especially as interested groups were consulted, the measure was announced in advance and steps were taken to assist inmates in dealing with the

situation well before it came into effect. No one could therefore complain of being taken by surprise.

[24] The Court notes, and counsel for the applicants cannot be unaware of this, that several decisions dealing with smoking prohibitions in penitentiaries, even more restrictive than the measures in the action at bar, have been declared valid, in particular under the Charter (see *Regina Correctional Centre v. Saskatchewan* (*Department of Justice*), [1995] S.J. No. 350 (Sask. Q.B.) (QL), affirmed on appeal at (2000), 193 Sask. R. 248 (Sask. C.A.); *McNeill v. Ontario (Ministry of the Solicitor General & Correctional Services)*, [1998] O.J. No. 2288 (Ont. G.D.) (QL); *Saskatoon Correctional Centre v. Government of Saskatchewan*, [2000] S.J. No. 307 (Sask. Q.B.) (QL); *Vaughan v. Ontario*, [2003] O.J. No. 5304 (Ont. S.C.J.) (QL); *William Head Institution Inmate Welfare Committee v. William Head Institution*, [2003] F.C.J. No. 411 (F.C.) (QL)).

[25] For these reasons, the Court must conclude that the CSC Commissioner was empowered to adopt the Directive or any other rule prohibiting smoking in a cell and within premises used for PFVs, as this is *intra vires* the Act.

[26] The judgment could stop here. However, since the applicants based their arguments on the *Non-Smokers' Health Act*, R.S.C. 1985 (4th Supp.), c. 15, let us consider the validity of their argument.

***Non-Smokers' Health Act* (NSHA)**

[27] Although the NSHA is not the chief source of the Commissioner's authority to adopt the Directive, the Court cannot, contrary to the arguments made by the applicants, ignore the fact that the Directive complies in all respects with the Act.

[28] The NSHA in fact requires an employer and any person acting on the employer's behalf to ensure that "persons refrain from smoking in any work space under the control of the employer" and states that the employer may "designate for smoking . . . enclosed rooms under the control of the employer other than rooms normally occupied by non-smokers" (subsections 3(1) and 3(2)).

[29] The *Non-Smokers' Health Regulations* (NSHR), SOR/90-21, provide that the employer may designate rooms or areas for smokers:

4. . . . an employer may designate the following rooms or areas in a work space under the control of the employer as designated smoking rooms or designated smoking areas: (*a*) any living accommodation . . . [Emphasis added.]	**4.** . . . l'employeur peut, dans le lieu de travail placé sous son autorité, désigner comme fumoir ou zone fumeurs les pièces ou aires suivantes: *a*) un local d'habitation . . . [Non souligné dans l'original.]

[30] The applicants argued that the Directive is not consistent with the NSHA, as inmates' cells and PFV units are not work spaces within the meaning of subsection 3(1), but rather places of residence. They accordingly concluded that a smoking prohibition is not possible in these areas.

[31] However, while it is true that the areas may be described as living accommodation, this does not prevent them being also part of a work space and these living quarters remain under CSC control, not the control of inmates.

[32] Further, the use of the word “may” in section 3 of the NSHA and section 4 of the NSHR clearly indicates that the employer is not required to designate areas as smoking rooms. It is one of several options available to the employer.

[33] Further, the applicants’ position is contrary to the NSHR, which states in paragraph 4(*a*) that the employer, here the CSC, may designate any living accommodation as designated smoking rooms or designated smoking areas. Additionally, cells and PFV areas are work spaces for CSC employees, who must regularly supervise these two areas as well as the entire prison.

Standard of review

[34] The parties admitted that the validity of the CSC Directive essentially is a question of law. The applicable standard of review is accordingly that of correctness. To succeed, therefore, the applicants must show that the CSC Commissioner did not have the necessary legal authority to adopt it. Unfortunately for them, the applicants did not discharge this burden.

[35] Although the applicants retain the rights and privileges of all members of society , and although the Court is very conscious of the psychological or even physical difficulties which this

new policy imposes on them, the fact remains that sections 97 and 98 of the CCRA give the Commissioner the authority to adopt standards in the form of directives for management of the CSC. That discretionary power did not appear out of nowhere. It was preceded by consultations and reasonable notice accompanied by an offer of assistance to help smokers adjust to the new Directive and cope with it when the time came.

[36] For all these reasons, the Court must dismiss their action against a measure which proves to be legal, justified and reasonable.

[37] Under Rule 302 of the *Federal Court Rules*, SOR/98-106, only one decision should be challenged in an application for judicial review, even though the action at bar is in the form of declaratory relief. As the action is focused primarily on the CSC Commissioner's Directive, the Court will not rule on any other policy or rule of the Commissioner prohibiting smoking inside cells and PFV facilities and will thus confine itself to the Directive.

[38] The applicants asked that their application be allowed with costs on the ground that they are inmates with limited means and the question is an important one for them and for other inmates in the same situation. They also sought costs in the event the Court allowed their application. In the contrary case, the respondent did not see why the applicants should not have to pay costs.

[39] As the applicants brought the action at bar in accordance with their rights as individuals, they must also bear the obligation of any individual who loses a case, that of paying costs, unless there is some good reason to exempt them from doing so.

[40] The decision may be important to the applicants, but what they were seeking has already been decided in similar cases. The Court does not see why being inmates exercising their rights as individuals should give them an exemption from paying costs which any individual who is not an inmate would have to pay. For these reasons, the applicants must pay the costs.

JUDGMENT

THE COURT ORDERS AND DIRECTS that

1. The application for declaratory relief at bar is dismissed with costs;
2. Directive No. 259 of the CSC Commissioner is *intra vires* the Correctional Service of Canada Commissioner and also consistent with the *Non-Smokers' Health Act* and the *Non-Smokers' Health Regulations*.

"Maurice E. Lagacé"
Deputy Judge

Certified true translation

Brian McCordick, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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