Federal Court  Cour fédérale

**Date: 20100401**

**Docket: T-721-09**

**Citation: 2010 FC 355**

**Ottawa, Ontario, April 1, 2010**

**PRESENT: The Honourable Madam Justice Tremblay-Lamer**

**BETWEEN:**

**MARC-ANTOINE GAGNÉ**

**Applicant**

**and**

**CORRECTIONAL SERVICE OF CANADA (CANADA (CSC))**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review by Marc-Antoine Gagné (the applicant) under subsection 18.1(4) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, of a decision by the Acting Warden of the La Macaza Institution (the warden), dated January 8, 2009, refusing the applicant an escorted temporary absence (ETA) in order for him to attend a family dinner.

**FACTS**

[2] The applicant is serving a two-year sentence after having been convicted for a series of sexual offences involving minors, committed via the Internet. On November 19, 2008, he applied for an ETA in order to be able to attend a family dinner during the Christmas holidays.

[3] The warden refused this application on January 8, 2009. It should be noted that the applicant has since been placed in a halfway house. He is therefore subject to a different legislative and regulatory regime than the one applicable to penitentiaries. As he acknowledged at the hearing, a decision of this Court in his favour would not have any practical effect. He nonetheless insists on having the case heard on its merits.

[4] In her reasons, the warden initially thought the applicant's proposed ETA plan was unrealistic and unacceptable at this stage of his institutional progress. She noted that the applicant had not worked on his criminogenic factors, and that he still posed a relatively high risk while having low reintegration potential. In his case no discharge was recommended until he had undergone treatment to help him in his rehabilitation. The granting of an ETA would have been premature, since an ETA is one stage in a ''gradual reintegration process'' which the applicant had not reached.

[5] She explained her decision as follows: [TRANSLATION]

> In short,

> Despite the fact that your conduct in the institution does not preclude authorizing an absence,
>
> Considering that the risk of reoffending that you pose during your absence is an undue risk to society,
>
> The Escorted Temporary Absence is not granted pursuant to section 17 of the [*Corrections and Conditional Release Act*, S.C. 1992, c. 20 (the Act)].

[6] Moreover, according to the warden, even if the applicant's risk of reoffending could have been managed by taking appropriate measures, including the presence of an armed escort, [TRANSLATION] ''the very purposes of the ETA would have been thwarted by this kind of escort. In fact, it would have been difficult to have any meaningful contact with the members of [the] family in circumstances where [the applicant would be] in handcuffs and shackles and under the surveillance of an armed escort.''

**ANALYSIS**

[7] Subsection 17(1) of the Act states that a warden of a penitentiary ''may'' authorize an ETA,

> Where, in the opinion of the institutional head,
>
> > (a) an inmate will not, by reoffending, present an undue risk to society during an absence authorized under this section,
> >
> > (b) it is desirable for the inmate to be absent from the penitentiary, escorted by a staff member or other person authorized by the institutional head, for medical, administrative, community service, family contact, personal development for rehabilitative purposes, or compassionate reasons, including parental responsibilities,
> >
> > (c) the inmate's behaviour while under sentence does not preclude authorizing the absence, and
> >
> > (d) a structured plan for the absence has been prepared.

[8] The use of the verb ‘‘may’’ in this section indicates that Parliament intended the power to authorize an ETA to be discretionary (see section 11 of the *Interpretation Act*, R.S.C. 1985, c. I-21), even though it adopted criteria which must guide the exercise of this power.

[9] Section 9 of the *Corrections and Conditional Release Regulations*, SOR/92-620 (the *Regulations*) provides additional explanations with regard to the intended purposes of an ETA. Paragraph (*d)* of this section states that an ETA may be authorized ‘‘for family contact purposes to assist the inmate in maintaining and strengthening family ties as a support to the inmate while in custody and as a potential community resource on the inmate’s release’’. This purpose is also recognized by the respondent’s Commissioner’s Directives (the Directives).

[10] The applicant argues that the warden erred in refusing his application and that he met all of the admissibility criteria for an ETA. He insists that the Act, the Regulations and the Directives all recognize maintaining and strengthening family ties as being a valid objective of an ETA. Furthermore, the warden allegedly failed to consider the fact that the offences for which he was convicted were committed via the Internet. According to the applicant, committing such an offence takes time, and the officer escorting him would surely notice the slightest sign of any attempt to reoffend and put a stop to it. As such, the warden allegedly erred in determining that he would pose a risk of reoffending during an absence.

[11] I agree with the applicant's arguments with regard to the warden's assessment of the risk he would pose during his absence. Whatever medium or long-term risks the applicant might pose to society, it is true that committing the kind of offence for which he was convicted does require time and planning. There were in fact preventive measures that could have been taken in the context of a brief escorted absence which would have prevented the applicant from planning and committing such an offence. The warden herself acknowledged this fact. The finding that [TRANSLATION] ''the risk of reoffending [that would be posed by the applicant] during [an] absence is an undue risk to society'' cannot be inferred from the applicant's record. The warden's reasoning is ''deeply flawed''. It does not fall ''within a range of possible, acceptable outcomes which are defensible in respect of the facts and law'', *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 47.

[12] In spite of all the deference owed to a discretionary decision by a penitentiary warden, given the fact that this finding is the very basis of the warden's decision and not merely some incidental matter to which the Court should pay only scant attention, the decision is unreasonable and should be set aside. However, given the change in the applicant's circumstances, it would be futile to refer the matter back for a new decision.

**JUDGMENT**

**THE COURT ORDERS that** the application for judicial review be allowed. The warden's decision is set aside. Costs are awarded to the applicant.

"Danièle Tremblay-Lamer"
Judge

Certified true translation

Sebastian Desbarats, Translator

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-721-09 |
| **STYLE OF CAUSE:** | **MARC-ANTOINE GAGNÉ and CORRECTIONAL SERVICE OF CANADA** |
| **PLACE OF HEARING:** | MONTRÉAL, QUEBEC |
| **DATE OF HEARING:** | March 25, 2010 |
| **REASONS FOR JUDGMENT:** | TREMBLAY-LAMER J. |
| **DATED:** | April 1, 2010 |

**APPEARANCES:**

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|---|---|
| Marc Antoine Gagné | FOR THE APPLICANT |
| Éric Lafrenière | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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| Marc Antoine Gagné | FOR THE APPLICANT |
| John H. Sims, Q.C.<br>**By Éric Lafrenière** | FOR THE RESPONDENT |