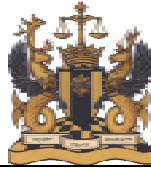


Federal Court



Cour fédérale

**Date: 20100715**

**Docket: T-1431-09**

**Citation: 2010 FC 747**

**Vancouver, British Columbia, July 15, 2010**

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

**BETWEEN:**

**WARREN MCDUGALL**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, and Rule 300(a) of the *Federal Courts Rules*, SOR/98-106, for judicial review of a decision by the Senior Deputy Commissioner of the Correctional Service of Canada (“CSC”) dismissing in part at the final level a grievance filed by Warren McDougall (“the Applicant”). The dismissed part of the grievance concerned the validity of the Institutional Standing Order (“ISO”) 770 issued by the Warden of the Ferndale Institution (“the Warden”) and the cancellation of two of his visitors’ visiting rights pursuant to the ISO 770.

## **BACKGROUND FACTS**

[2] The Applicant is an inmate at the Ferndale Institution.

[3] In the summer of 2008, the Warden issued the ISO 770, in application of a Security Bulletin issued by the Acting Director General, Security Branch, of CSC and pursuant to a directive of the Commissioner of the CSC (“the Commissioner”), Commissioner’s Directive 770 (“CD 770”). Pursuant to the Security Bulletin and the ISO 770, no person was to be granted clearance to visit inmates at more than one institution without an adequate justification.

[4] A search of CSC’s database revealed that two of the Applicant’s visitors appeared on visitors’ lists of inmates at more than one institution. Therefore, on August 27, 2008, they were sent letters requesting that they explain in writing which inmates they were visiting, why, and whether they wished to continue visiting those inmates. The letters stated that their visiting clearance would be cancelled if no response were to be received within four weeks.

[5] The Applicant’s visitors did not respond to these letters; there is no explanation in the file as to the reason for their failure to do so. On October 2, 2008, both were sent letters notifying them that their visiting clearances had been cancelled, and inviting them to contact CSC for any further questions. They have not done so.

[6] The Applicant was only informed of these cancellations on December 23, 2008, and on the same day submitted an Inmate's Request concerning them. He was advised that the cancellations were the result of the ISO 770. The Applicant filed a complaint, and attended a meeting of the Ferndale Institution's Visits Review Board (the "Board") to discuss it. The Board indicated to him that several visitors had responded to letters similar to those sent to his visitors and, their explanations having been found satisfactory, their clearances had been maintained. The Applicant's complaint was dismissed. He then filed a grievance, the final denial of which he now seeks to have judicially reviewed.

#### **DECISION UNDER REVIEW**

[7] The Senior Deputy Commissioner advised the Applicant that the ISO 770 was intended to prevent the introduction of drugs into the Ferndale Institution, and was part of a national strategy implemented by CSC. Previous studies indicated that persons who visit more than one inmate or institution represented an increased risk in that respect. The Commissioner explained that "[f]or this reason ... visitors without adequate justification (i.e. two (2) family members in different institutions) will not be granted clearance." Because of the risk, and in view of the paramount importance of security considerations, "it is not unreasonable that visitors be required to provide an adequate justification as to why they wish to visit a particular offender."

[8] The Senior Deputy Commissioner further dismissed the Applicant's argument that the ISO 770 only applied to new visitors.

## ISSUES

[9] This application raises the following issues:

1. Is the Applicant's challenge to ISO 770 justiciable?
2. If so, is the ISO 770 unlawful because
  - a) it was *ultra vires* the Warden?
  - b) it was adopted in breach of the Warden's duty of fairness?
  - c) it is ineffective, unnecessary, or unjustified?
3. Was the Senior Deputy Commissioner's decision dismissing the Applicant's grievance reasonable?

## ANALYSIS

### 1. Is the Applicant's challenge to ISO 770 justiciable?

[10] This issue is raised by the Respondent, who contends that this Court cannot review the exercise of discretion by the Commissioner, in accordance with whose directives the ISO 770 was issued. He takes the position that, pursuant to the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (CCRA), the Commissioner has a discretion "to take whatever steps are necessary to ensure the control and management of the CSC." The Court should not review the exercise of what is a "purely discretionary power of the Commissioner and the Warden to implement policies for the administration and control of the visits ... in a federal correctional facility." The Court should not make

policy or act as a regulatory agency. Parliament has conferred that role on the Commissioner, who in turn delegated powers to the Warden. The Court cannot second-guess their exercise of these powers.

[11] While it is of course not the role of the Court to make policy in the Commissioner's place, the Applicant's challenge to the ISO 770 concerns not only its wisdom, but also its lawfulness. In a case such as this, the Court has a duty to verify that the impugned administrative action is compatible with its enabling legislation and with the Constitution. As the Supreme Court explained in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, "[b]y virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution."

[12] Thus, while courts will review exercises of a discretionary or policy-making authority deferentially (*Dunsmuir*, *ibid.*, at par. 53), they will nevertheless apply the strict standard of correctness when reviewing decisions pertaining to constitutionality and jurisdiction (*ibid.*, at par. 58-59). In addition, all administrative decision-making must comply with the applicable duty of fairness and, as Justice Binnie, for the majority of the Supreme Court, emphatically explained in *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539, "[i]t is for the courts, not the [executive], to provide the legal answer to procedural fairness questions. It is only the ultimate exercise of the

[executive's] discretionary ... power" which commands the applicable degree of deference.

## **2. Is the ISO 770 unlawful?**

### *a) Is the ISO 770 ultra vires the Warden?*

[13] The Applicant submits that the Warden had no jurisdiction to implement the ISO 770 because, on the one hand, of his failure to consult inmates and, on the other hand, because of he had no "legal authority to afford greater or lesser access to visits based on the visitor's family status with the prisoner." He notes that the *CCRA* does not distinguish family members from other classes of visitors. Inmates are entitled to visits by any visitors who would see them, subject only to restrictions on reasonable security-related grounds.

[14] The Respondent, for his part, submits that the Commissioner's authority to issue Directives is provided by sections 97 and 98 of the *CCRA*. CD 770 is justified by these provisions. The fact that it does not mention them is irrelevant. Furthermore, CD 770 does not authorise the Warden to impose blanket restrictions on visits; on the contrary, it mandates a case-by-case examination of every proposed visit.

[15] In turn, by section 3 of the CD 770, the Commissioner required the Warden to "specify the procedures to be followed and the conditions to be met with respect to

visiting.” Provisions of the *CCRA* and the *CCRR* provide a framework within which the Warden’s discretion is exercised. The ISO 770 complies with this framework. It furthers the statutory and regulatory objectives of assisting the inmates’ rehabilitation through visits while ensuring the security of correctional facilities by allowing the Ferndale Institution to assess the risk which a potential visitor poses to its security. In addition, it requires that both the inmate and the visitor be informed of a decision affecting the visitor’s clearance and allow both to make representations. Finally, the ISO 770 does not require every visitor to justify visits, but only those visiting multiple inmates or institutions; therefore, it is the least restrictive means available to achieve its objectives.

[16] I will address separately, under the heading of procedural fairness, the argument with respect to the alleged duty to consult inmates before implementing the ISO 770. I focus now on the Applicant’s submission that the ISO 770 is contrary to the *CCRA* and the *CCRR* (the relevant provisions of which are reproduced in full in the Appendix) because it imposes a blanket prohibition on certain visits. I reject this argument for the following reasons.

[17] Paragraph 97(b) of the *CCRA* authorises the Commissioner to “make rules ... for the matters described in section 4” of that act. Among those matters are the protection of society (paragraph 4(a)) and the rehabilitation of inmates (paragraph 4(i)). Both these objectives justify the Commissioner’s efforts to keep penitentiaries drug-free. The CD 770 is part of these efforts. It is also consistent with the rule, set out in paragraph 71(1) of the *CCRA*, that “an inmate is entitled to have reasonable contact, including visits ..., with

family, friends and other persons from outside the penitentiary, *subject to such reasonable limits as are prescribed for protecting the security of the penitentiary or the safety of persons*” (my emphasis).

[18] As the Respondent points out, section 19 of the CD 770 specifically provides that “[e]ach visit shall be assessed on a case-by-case basis. The refusal or suspension of a visit from a specific individual to a particular inmate shall occur in accordance with the Duty to Act Fairly.” It does not authorise any blanket restrictions on visits. The ISO 770 is consistent with this rule. It provides that visitors whose clearance may be in doubt may make representations, explaining why they wish to visit an inmate; if the explanation is adequate, clearance will be granted or maintained, as the case may be. Thus, the ISO 770 is consistent with the statutory and regulatory framework, and the Applicant’s attack on it must fail.

[19] In his written submissions, the Applicant further challenged the validity of the ISO 770 alleging that it violated his rights protected by the *Canadian Charter of Rights and Freedoms*. However, not having served the notice of constitutional question required by section 57 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, the necessity of which to challenge rules made under the *CCRA* the Federal Court of Appeal recently confirmed in *Mercier v. Canada (Attorney General)*, 2010 FCA 167, he rightly abandoned this issue at the hearing.



b) *Was the ISO 770 adopted in violation of the Warden's duty of fairness?*

[20] The Applicant argues that the ISO 770 was issued in violation of the CSC's duty to consult prisoners. While inmates are not entitled to be consulted on decisions relating to security, the implementation of the ISO 770 "was an attempt to mitigate the potential for security risks; it was not a security decision *per se*."

[21] Furthermore, the Applicant claims that he was not informed about this decision or told the reasons justifying it. He adds that "[t]he threshold for 'justification' (i.e. more than one family member in different institutions) was never disclosed to [him];" nor was the information upon which the Security Bulletin, which the ISO 770 implemented, was based.

[22] The Respondent argues that the Warden had no duty to consult the inmates before implementing the ISO 770, because it relates to security matters – namely, the smuggling of drugs into the penitentiary – on which inmates need not be consulted. He acknowledges that there was a delay before the Applicant was informed of the cancellation of his visitors' clearances following the implementation of the ISO 770. However, he argues that it did not in any way prejudice the Applicant, since he was able to complain and file a grievance to challenge this decision. Furthermore, the Applicant's visitors were notified when their visiting clearances were cancelled and invited to contact the Ferndale Institution.

[23] I agree with the Respondent. I do not understand the distinction the Applicant tries to make between decisions taken in order “to mitigate the potential for security risks” and “security decision[s] *per se*.” A decision mitigating a security risk is still a security decision. Section 74 of the *CCRA* provides that CSC “shall provide inmates with the opportunity to contribute to [its] decisions ... affecting the inmate population as a whole, or affecting a group within the inmate population, *except decisions relating to security matters*” (my emphasis). Therefore neither Warden nor CSC had any duty to consult inmates about the ISO 770.

[24] Furthermore, since the inmates had no right to be consulted about the ISO 770, they had no right to prior notice of its implementation. While it is unfortunate that a policy affecting an important aspect of the inmates’ lives was not communicated to them until months after it was adopted, this does not impact on its validity.

c) *Is the ISO 770 unreasonable because it is ineffective, unnecessary, or unjustified?*

[25] The Applicant further attacks the ISO 770 on a variety of other grounds. He argues that it may well prove ineffective; that the Warden has other means of controlling drug smuggling in particular cases where it appears to be a danger at his disposal, so that there is no justification for imposing a generalized preventive screening; and that there is in fact no information on the basis of which the CSC could believe that persons visiting more than one inmate represent a security risk.

[26] In my opinion, none of the arguments advanced by the Applicant would justify this Court's interference with what, as I explain above, is the Warden's legal exercise of validly delegated rule-making authority. Potential ineffectiveness of administrative action or the possibility that policies other than those pursued by the administration would prove as good or even better to attain its objectives are simply not among the grounds of review on which this Court may intervene in the decision-making process of a federal board or tribunal.

[27] This is consistent with the principle that "it is not for a court to determine the wisdom of delegated legislation or to assess its validity on the basis of the court's policy preferences. The essential question for the court always is: does the statutory grant of authority permit this particular delegated legislation?" (*Jafari v. Canada (Minister of Employment and Immigration)*), [1995] 2 F.C. 595 at 602). The Court would err if it were "to determine *de novo* whether the [impugned rule] was justified in the circumstances." (*Mercier*, above, at par. 80).

### **3. Was the Senior Deputy Commissioner's decision dismissing the Applicant's grievance reasonable?**

[28] Having correctly concluded that the issuance of the ISO 770 was within the Warden's powers, the Senior Deputy Commissioner reasonably concluded that the cancellation of the Applicant's visitors' clearances was valid. The Applicants' visitors did

not explain why they wanted to visit him, as they were required to do pursuant to the ISO 770.

[29] That said, I am concerned by the Senior Deputy Commissioner's reference, in his decision rejection the Applicant grievance against the ISO 770, to "family members in different institutions" as being *the* adequate justification for a visitor wishing to visit several inmates or institutions. The ISO 770 does not specify or limit what justifications may be adequate. This is consistent with the *CCRA*, which, as the Applicant rightly points out, entitles inmates to visits from family members *and* "friends and other persons from outside the penitentiary." To the extent that the Warden or the visiting committee would refuse to recognise reasons other than a family relationship as being adequate, they would be fettering their discretion in a manner inconsistent with the *CCRA* and the CD 770.

[30] Nevertheless, the record does not indicate that this happened in the present case. The Applicant's visitors failed to provide *any* justification for wishing to visit him. They were not denied clearance to visit him because they were not the Applicant's family members, but because they did not give any reason whatsoever.

## **CONCLUSION**

[31] The ISO 770 is not invalid. It was not adopted in violation of any rules of procedural fairness; it is not *ultra vires* the Warden; and its wisdom or lack thereof is not

a matter for this Court's consideration. The Senior Deputy Commissioner's dismissal of the Applicant's grievance was reasonable. For these reasons, the application for judicial review of the decision is dismissed, without costs.

**JUDGMENT**

**THIS COURT ORDERS that** the application for judicial review of the decision be dismissed, without costs.

“Danièle Tremblay-Lamer”  
Judge

## APPENDIX

### Relevant legislative provisions

*Corrections and Conditional Release Act, S.C. 1992, c. 20*

<p><b>4.</b> The principles that shall guide the Service in achieving the purpose referred to in section 3 are</p> <p>(a) that the protection of society be the paramount consideration in the corrections process;</p> <p>...</p> <p>(i) that offenders are expected to obey penitentiary rules and conditions governing temporary absence, work release, parole and statutory release, and to actively participate in programs designed to promote their rehabilitation and reintegration;</p> <p>...</p>	<p><b>4.</b> Le Service est guidé, dans l'exécution de ce mandat, par les principes qui suivent :</p> <p>a) la protection de la société est le critère prépondérant lors de l'application du processus correctionnel;</p> <p>...</p> <p>i) il est attendu que les délinquants observent les règlements pénitentiaires et les conditions d'octroi des permissions de sortir, des placements à l'extérieur et des libérations conditionnelles ou d'office et qu'ils participent aux programmes favorisant leur réadaptation et leur réinsertion sociale;</p> <p>...</p>
<p><b>71.</b> (1) In order to promote relationships between inmates and the community, an inmate is entitled to have reasonable contact, including visits and correspondence, with family, friends and other persons from outside the penitentiary, subject to such reasonable limits as are prescribed for protecting the security of the penitentiary or the safety of persons.</p> <p>...</p>	<p><b>71.</b> (1) Dans les limites raisonnables fixées par règlement pour assurer la sécurité de quiconque ou du pénitencier, le Service reconnaît à chaque détenu le droit, afin de favoriser ses rapports avec la collectivité, d'entretenir, dans la mesure du possible, des relations, notamment par des visites ou de la correspondance, avec sa famille, ses amis ou d'autres personnes de l'extérieur du pénitencier.</p> <p>...</p>
<p><b>74.</b> The Service shall provide inmates with the opportunity to contribute to decisions of the Service affecting the inmate population as a whole, or affecting a group</p>	<p><b>74.</b> Le Service doit permettre aux détenus de participer à ses décisions concernant tout ou partie de la population carcérale, sauf pour les questions de sécurité.</p>

within the inmate population, except decisions relating to security matters.	
<p><b>97.</b> Subject to this Part and the regulations, the Commissioner may make rules</p> <p>...</p> <p>(b) for the matters described in section 4; and</p> <p>(c) generally for carrying out the purposes and provisions of this Part and the regulations.</p>	<p><b>97.</b> Sous réserve de la présente partie et de ses règlements, le commissaire peut établir des règles concernant :</p> <p>...</p> <p>b) les questions énumérées à l'article 4;</p> <p>c) toute autre mesure d'application de cette partie et des règlements.</p>
<p><b>98.</b> (1) The Commissioner may designate as Commissioner's Directives any or all rules made under section 97.</p> <p>...</p>	<p><b>98.</b> (1) Les règles établies en application de l'article 97 peuvent faire l'objet de directives du commissaire.</p> <p>...</p>

*Corrections and Conditional Release Regulations, SOR/92-620*

<p><b>91.</b> (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</p> <p>(a) that, during the course of the visit, the inmate or visitor would</p> <p>(i) jeopardize the security of the penitentiary or the safety of any person, or</p> <p>(ii) plan or commit a criminal offence; and</p> <p>(b) that restrictions on the manner in which the visit takes place would not be adequate to control the risk.</p>	<p><b>91.</b> (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 :</p> <p>a) d'une part, que le détenu ou le visiteur risque, au cours de la visite :</p> <p>(i) soit de compromettre la sécurité du pénitencier ou de quiconque,</p> <p>(ii) soit de préparer ou de commettre un acte criminel;</p> <p>b) d'autre part, que l'imposition de restrictions à la visite ne permettrait pas d'enrayer le risque.</p>
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<p>(2) Where a refusal or suspension is authorized under subsection (1),</p> <p>(a) the refusal or suspension may continue for as long as the risk referred to in that subsection continues; and</p> <p>(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.</p>	<p>(2) Lorsque l'interdiction ou la suspension a été autorisée en vertu du paragraphe (1) :</p> <p>a) elle reste en vigueur tant que subsiste le risque visé à ce paragraphe;</p> <p>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.</p>
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Commissioner's Directive 770 "Visiting"

<p>3. The Institutional Head shall:</p> <p>a. ensure that general visiting is available to all inmates;</p> <p>b. specify the procedures to be followed and the conditions to be met with respect to visiting;</p> <p>c. ensure that procedures and conditions pertaining to visiting are communicated to all inmates, visitors and staff;</p> <p>d. ensure that visits are normally scheduled at least twenty-four (24) hours in advance.</p>	<p>3. Le directeur de l'établissement doit :</p> <p>a. veiller à ce que tous les détenus aient la possibilité de recevoir des visites ordinaires;</p> <p>b. préciser les procédures à suivre relativement aux visites ainsi que les conditions à remplir;</p> <p>c. s'assurer que les détenus, les visiteurs et les employés sont tous informés des procédures et des conditions ayant trait aux visites;</p> <p>d. s'assurer que les visites sont normalement prévues au moins vingt-quatre (24) heures à l'avance.</p>
<p>4. All inmates' visitors shall complete an application and information form for the purpose of security screening. A verification of the Canadian Police Information Centre files shall then be conducted and subsequently updated at least every two (2) years for all active visitors. On the basis of this security check</p>	<p>4. Toute personne désirant rendre visite à un détenu doit remplir une formule de demande d'admission et de renseignements aux fins du contrôle de sécurité. Une vérification des fichiers du Centre d'information de la police canadienne doit être menée et, par la suite, une mise à jour doit être effectuée au moins tous les deux</p>

<p>and following a review of possible restrictions, the Institutional Head shall decide whether or not visitor clearance will be granted. Under special circumstances, at the discretion of the Institutional Head, the security screening may be waived.</p>	<p>(2) ans pour les visiteurs actifs. Compte tenu de cette vérification et à la suite d'un examen des restrictions possibles, le directeur de l'établissement doit déterminer si l'autorisation de visite sera accordée. Dans des circonstances particulières, le directeur peut décider de dispenser le visiteur du contrôle de sécurité.</p>
<p>19. Each visit shall be assessed on a case-by-case basis. The refusal or suspension of a visit from a specific individual to a particular inmate shall occur in accordance with the Duty to Act Fairly. The refusal or suspension of a visit from a specific individual shall continue only for as long as the risk which justified the refusal or suspension of the visit continues. The reassessment of the risk shall be done not less than once every six (6) months and the result and the decision shall be forwarded in writing to the inmate within fourteen (14) days.</p>	<p>19. Chaque visite doit faire l'objet d'une évaluation distincte. L'interdiction ou la suspension des droits de visite d'un individu en particulier à un détenu ne peut se faire que dans le respect du devoir d'agir équitablement et ne reste en vigueur que tant que subsiste le risque ayant justifié l'interdiction ou la suspension de ce droit. Une réévaluation du risque devra être effectuée au moins tous les six (6) mois. Le résultat ainsi que la décision devront être communiqués au détenu par écrit dans les quatorze (14) jours.</p>

Ferndale Institution Standing Order 770 “Inmate Visits”

6. The Visits Board shall review applications of all persons who wish to enter the institution to visit inmates.

7. A security screening for any new visitors shall include a verification of any other inmate the visitor may be visiting. The following procedures will be used to determine if any new applicants are on another inmate’s visiting list:

...

d) if the visitor is listed as being on another inmate’s visiting list, they will be sent a letter requesting to know why they are applying to visit this particular inmate at Ferndale Institution;

e) the explanation received by V&C will be discussed at a Visits Board ...

f) if the explanation is viable, the process will continue ...

g) if the explanation is not viable, the visitor will be notified via letter ... The inmate shall also receive notice that the visitor was denied ...

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-1431-09

**STYLE OF CAUSE:** WARREN MCDUGALL V. THE ATTORNEY  
GENERAL OF CANADA

**PLACE OF HEARING:** Vancouver, BC

**DATE OF HEARING:** July 13, 2010

**REASONS FOR ORDER  
AND ORDER:** TREMBLAY-LAMER, J.

**DATED:** July 15, 2010

**APPEARANCES:**

Mr. Warren McDougall FOR THE APPLICANT  
(self-represented)

Ms. Charmaine de los Reyes FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

n/a FOR THE APPLICANT  
(self-represented)

Myles J. Kirvan FOR THE RESPONDENT  
Deputy Attorney General of Canada  
Vancouver, BC