Federal Court  Cour fédérale

Date: 20120329

Docket: T-376-99

Citation: 2012 FC 375

Ottawa, Ontario, March 29, 2012

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

DR. V.I. FABRIKANT

Applicant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR ORDER AND ORDER

[1] Dr. Valery I. Fabrikant, the applicant in this motion, is self-represented. He has been convicted on four counts of first degree murder and sentenced to life imprisonment, [1993] QJ 1443, without the possibility of parole before the expiration of twenty five years and is currently incarcerated at Archambault Institution.

[2] By order issued on November 1, 1999 by Justice McGillis, the applicant was declared a vexatious litigant within the meaning of section 40 of the *Federal Courts Act*, RSC 1985, c F-7

[Act], and is accordingly required to present a formal motion under subsection 40(3) of the Act before instituting or continuing any proceedings before this Court.

THE PRESENT MOTION

[3] On May 26, 2011, the applicant has been granted leave to file an application for judicial review, pursuant to section 18.1 of the Act, challenging the legality of a Commissioner's directive adopted by the Correctional Service of Canada [CSC] [Security Bulletin 2009-22, December 11, 2009] which prohibits inmates from communicating electronic media by mail, under section 2 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*.

[4] The applicant was accordingly given thirty days to file his application for judicial review in accordance with the *Federal Courts Rules*, SOR/98-106 [Rules]. This deadline was extended by a further order dated December 1, 2011, because of the deficiencies identified in the notice of application and other required materials submitted by the applicant. At the present date, the documents required to commence this application for judicial review have not yet been duly filed with the Court.

[5] On December 7, 2011, the applicant filed the present motion in writing seeking leave to institute a proceeding pursuant to subsection 40(3) of the Act and a declaration that the seizure of his personal computer by the CSC is illegal. The applicant also asks this Court to order the respondent to return his computer to him and to allow him to make the necessary repairs.

ISSUES

[6] The respondent contends that this motion must fail, based on the two following reasons:

- First, the applicant cannot contest the legality of a decision rendered on a grievance through a motion.
- Second, the respondent is justified in refusing the applicant access to his personal computer.

[7] Having considered the parties' submissions and material on file, the Court accepts the respondent's contentions.

PROCEDURAL DEFECT

[8] First, it is clear that the applicant should not be allowed to contest internal CSC grievance decisions by way of motion in an unrelated proceeding.

[9] The applicant has already grieved the decision of the CSC to remove his personal computer which occurred in 2007. The grievance has been denied at all levels and ended in February of 2008 (V4A00025522), based on paragraph 23 (then paragraph 24) of the CD 566-12 which clearly states that inmates are required to comply with its conditions to be permitted to retain their personal computers:

23. Inmates who have approved personal computers, peripherals and software which were authorized as personal effects prior to October 2002, will be permitted to retain this equipment, with the exception of the prohibited computer	23. Les détenus ayant des ordinateurs personnels, des périphériques et des logiciels autorisés à titre d'effets personnels avant octobre 2002 pourront conserver ce matériel (sauf s'il s'agit de périphériques ou de jeux électroniques

peripherals and electronic games, until the time of their release from institution or violation of the conditions specified in the Technical Requirements for Inmate-Owned Computers and Electronic Games (Annex C) or form CSC/SCC 2022. These inmates were required to sign form CSC/SCC 2022.	interdits) jusqu'à leur mise en liberté de l'établissement ou encore le non-respect des Exigences techniques relatives aux ordinateurs et jeux électroniques appartenant aux détenus (annexe C) ou des conditions énoncées dans le formulaire CSC/SCC 2022. Les détenus en question ont dû signer le formulaire CSC/SCC 2022.

[Emphasis added]

[10] The Commissioner, thus, determined on February 20, 2008 that the warden at Collins Bay Institution had followed policy properly in denying the applicant access to his computer. In the Court's view, the present motion is nothing more than a further attempt to relitigate a matter finally decided more than three years ago and for which the applicant has never sought judicial review and is clearly out of time unless an extension is granted pursuant to paragraph 18.1(2) of the Act.

SEIZURE OF THE APPLICANT'S COMPUTER NOT ILLEGAL

[11] Second, the present motion should be denied on the further ground that the applicant has failed to convince this Court that there is an arguable case to set aside the impugned decision, while the respondent is apparently justified in refusing the applicant access to his personal computer.

[12] Since the applicant has exhausted the internal grievance procedure, he may have been entitled to contest the legality of the final level grievance decision through an application for judicial review before this Court, provided that leave together with an extension of time would be granted in the meantime. In the circumstances, despite the procedural defect noted above, the Court has

considered the allegations made in the present motion that the Commissioner failed to adjudicate the matter properly or that the procedure was unduly delayed in his case. In the Court's opinion, while the unexplained delay is unreasonable, there is no chance that an application for judicial review would succeed or that the delay to file same would be extended by the Court.

[13] The applicant had a personal computer in his possession since he was incarcerated in 1993 until May of 2007, when the applicant's computer was seized at Collins Bay Institution following an inspector's report which revealed unauthorized use and other irregularities of his computer.

[14] On January 5, 2007, Commissioner's Directive 566-12 on Personal Property of Inmates [CD 566-12, formerly CD 09] came into effect prohibiting inmates from having personal computers in their cells, save for those who already possessed one before October 2002. In fact, the grandfather clause provided that inmates who had in their possession approved and authorized personal computers prior to October of 2002 were permitted to retain the equipment, conditional to signing an "inmate statement of consent to abide by conditions governing inmate-owned computers" [CSC 2022]. The applicant apparently signed such statement.

[15] However, upon routine inspection in May 2007, a technician at Collins Bay Institution reported that most security seals placed on the applicant's computer were cracked and two of the security screws were replaced by regular screws. The technician's report noted that an opening on the front of the applicant's computer was simply covered with removable plastic filters in a way that it could allow the user to insert additional CD, DVD or disk player in the computer. It could also allow easy access to the computer's internal wiring and power supply, although according to the

report the internal inspection of the computer did not reveal any wire tampering or other nonconformities with CD 566-12.

[16] The technician's software inspection revealed other breaches of CD 566-12, annex C, paragraphs 12b, 14a, c, f, g and i. More specifically, the applicant had an unauthorized version of Office 1.1.5 on burnt CD-ROM containing prohibited software capable of altering or manipulating SQL database. Several other unauthorized software found in the applicant's computer, as detailed in the report, consisted of either burnt CDs, programs having database utilities, unlicensed programs or programs able to create encrypted or executable files.

[17] Furthermore, the technician's report noted that certain material on the applicant's computer, such as the mouse and the printer, were damaged and had to be repaired.

[18] Following this report on June 11, 2007, the warden of Collins Bay Institution ordered that the applicant's computer be stored until such time as arrangements could be made to have it shipped out of the institution at the applicant's own expense.

[19] On July 5, 2007, the applicant was transferred to Archambault Institution. At Archambault, the decision made at Collins Bay Institution was maintained: on August 10, 2007, the applicant was provided with an additional delay of thirty days to make necessary arrangements to have his computer shipped out of the institution. On September 19, 2007, he was given another thirty days to do so, in order for him to be able to download his documentation from the hard disk for later use on CSC computers.

[20] Since October 2007, the applicant has in his possession a CSC-owned computer on which he has transferred his files and documentations from his own computer.

[21] The applicant alleges that upon finding unauthorized software in the applicant's computer, the respondent should have attempted to charge him with a disciplinary offence rather than denying him access to his computer. This contention is unfounded. Nothing in the *Corrections and Conditional Release Act*, SC 1992, c 20, or in the CD566-12, requires the respondent to take disciplinary action against an inmate who breaches the conditions of a Commissioner's directive instead of following the policies established by the directive itself. The applicant did not use his computer in accordance with the conditions specified in the Technical Requirements for Inmate-Owned Computers and Electronic Games (annex C of the CD566-12) and the CSC 2022 statement, and this alone justified the seizure of his computer by the CSC.

[22] Moreover, the applicant seems to have a long record of non-compliance with the CSC policy with respect to computer equipment and software put at the disposal of inmates.

[23] The unauthorized programs reported by the technician in May 2007 included the Superkey program, for which the applicant's computer had been previously seized in 2005 in Archambault Institution. The applicant grieved the seizure and in December of 2006, while at Fenbrook Institution, his computer was finally returned back to him after he accepted to remove the unauthorized software from his computer. However, in Fenbrook Institution, the applicant was

found to have installed the Superkey software on a CSC-owned computer (affidavit of Louise Mallette, Deputy Warden, Federal Training Center, CSC).

[24] The applicant contends that since the respondent's written representations contain excerpts of Ms. Mallette's affidavit, the Court may infer that the respondent has breached rule 82 of the Rules which prohibits against counsel both giving evidence through affidavit and arguing the case on the basis of that evidence. The applicant also contends that Ms. Mallette has no personal knowledge of the facts relating to his non-compliance with institutional rules and guidelines concerning the use of computers and software, and her affidavit should therefore be struck out from the record.

[25] The Court notes however that, for the most part, Ms. Mallette's affidavit refers to different inspection reports and institutional decisions provided in exhibits, except for paragraphs 13-16 of the affidavit where the affiant states facts unrelated to the applicant's motions. Those facts are rather related to the applicant's previous motion against Security Bulletin 2009-22 and the Court does not consider them in these reasons.

[26] Also, at paragraphs 22 and followings, the affiant refers to two observation reports of an IT analyst at Archambault Institution, dated August 20, 2007, which have been completed since the date the applicant's computer was seized. These reports noted that despite a security device that is used to prevent installation of unauthorized programs, the applicant had saved files and installed programs on a CSC-owned computer which was put at the disposal of all inmates in the institution. The IT analyst also reported that other computer equipment prohibited by CD 566-12 were found in

the possession of the applicant, notably, a CD-ROM containing documents copied from the internet, a rewritable CD-ROM containing uncontrolled multimedia files, and an unauthorized number of disks, one of which contained a hidden file which made it possible for the user to open an MS-DOS Command Prompt and make commands other than the existing standard system commands.

[27] The applicant also submits that the respondent is breaching the CSC 2022 inmate statement which stipulates that any decision to remove an inmate-owned computer for reasons related to risk "may be appealed and is subject to periodic review". Again, the applicant is not addressing this issue in the right forum. The applicant can grieve CSC's non compliance with the terms of the statement if CSC refuses to conduct periodic review on its decision to remove the applicant's computer, but he cannot address such issues through a further motion before this Court.

[28] In the circumstances, the Court is unable to conclude that the applicant's computer was illegally seized or that any impugned decision the applicant wishes to contest is illegal or unreasonable in the circumstances.

[29] For all these reasons, this motion is dismissed.

ORDER

THIS COURT ORDERS that the present motion is dismissed.

"Luc Martineau"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-376-99
STYLE OF CAUSE:	DR. V.I. FABRIKANT v HER MAJESTY THE QUEEN

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369

REASONS FOR ORDER AND ORDER:	MARTINEAU J.
DATED:	March 29, 2012

APPEARANCES:

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