



T-1945-97

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Between:

GORDON ALCORN, of William Head Institution,
DARRELL BATES, of Kent Institution,
DANNY BOLAN, of Elbow Lake Institution,
JON BROWN, of Matsqui Institution,
SHAWN BUTTLE, of Regional Health Centre,
GARY FITZGERALD, of Ferndale Institution,
ANGUS MacKENZIE, of Mountain Institution, and
FABIAN PICCO, of Mission Institution,

Applicants,

- and -

THE COMMISSIONER OF CORRECTIONS and
THE DEPUTY COMMISSIONER OF CORRECTIONS,
PACIFIC REGION, CORRECTIONAL SERVICE
OF CANADA,

Respondents.

REASONS FOR ORDER

RICHARD, J.

NATURE OF PROCEEDING

The applicants seek an interim order pursuant to Section 18.2 of the *Federal Court Act* in the nature of an interlocutory injunction enjoining the respondents, The Commissioner of Corrections and the Deputy Commissioner of Corrections, Pacific Region, Correctional Service of Canada, from implementing the Millennium Telephone System in the Pacific Region until the Court makes a decision in the application for judicial review in this matter.

The grounds relied on by the applicants, as stated in the Notice of Motion, dated the 3rd day of September, 1997, are:

1. The respondents plan to implement a new telephone system entitled the Millennium Telephone System in the Pacific Region on or about the 1st day of October, 1997. The effects of this telephone system will be that

prisoners, who can now telephone locally to friends, family, service agencies, lawyers and community support for free, will be required to make these call collect at a cost of from \$1.75 to \$2.75 per call. As most prisoners and their families are poor, the effect of this exorbitant expense on prisoners of limited means will be a denial of reasonable access to the community contrary to the *Corrections and Conditional Release Act*, as well as violations of the applicants' rights pursuant to Sections 7, 9 and 15 of the *Canadian Charter of Rights and Freedoms*;

2. By implementing the Millennium Telephone System, the respondents will act in excess of or without jurisdiction by discriminating against those of the applicants who do not have the money to pay for the additional costs of the new system because they are from a lower social economic background, contrary to Section 15 of the *Canadian Charter of Rights and Freedoms*;
3. By implementing the Millennium Telephone System the respondents will discriminate against the applicants as prisoners, contrary to Section 15 of the *Canadian Charter of Rights and Freedoms*;
4. By implementing the Millennium Telephone System the respondents will violate the applicants' rights to retain and instruct counsel without delay, contrary to Section 10(b) of the *Canadian Charter of Rights and Freedoms*;
5. By implementing the Millennium Telephone System, the respondents will act in excess of or without jurisdiction by impeding the applicants' ability to make plans for release, thereby causing them to spend a longer time in custody without due process, contrary to the common law duty to act fairly, the principles of natural justice, and Sections 7 and 9 of the *Canadian Charter of Rights and Freedoms*;
6. In failing to provide the prisoners of the Pacific Region with an opportunity to contribute to this decision to implement the Millennium Telephone System, the respondents failed to adhere to the requirements of Section 74 of the *Corrections and Conditional Release Act* and therefore erred in law;
7. By implementing the Millennium Telephone System the respondents will deny the applicants reasonable contact with family, friends and other persons from outside the penitentiary, subject only to such reasonable limits as are prescribed for protecting the security of the penitentiary or the safety of persons, contrary to Sections 71(1) and 96(z.11) of the *Corrections and Conditional Release Act*, and therefore err in law;
8. By implementing the Millennium Telephone System the respondents will not use the least restrictive measures, nor will they allow the applicants to retain the rights and privileges of all members of society, except those that are necessarily removed or restricted as a consequence of their sentence, contrary to paragraphs 4(d)(e) of the *Corrections and Conditional Release Act*, and therefore err in law;
9. By implementing the Millennium Telephone System the respondents will prevent the applicants from communicating with members of the public by telephone for reasons other than those authorised by Section 95 of the *Corrections and Conditional Release Regulations*, and therefore err in law.

The applicants filed a number of affidavits to support their allegations.

GENERAL BACKGROUND

1. a) Until the mid 1970s inmate access to telephones was permitted only for exceptional reasons and only under the control and supervision of a Correctional Service of Canada (CSC) staff member. This practice became unmanageable.
 - b) By 1994 a practice of introducing coinless, collect call pay telephones into institutions had resulted in 80% of all institutions having variations of these phones. (Coinless collect call pay phones are the only practical way to allow inmates in minimum security institutions to use phones because the possession of coins, as currency, is prohibited as contraband in institutions. See CCRA section 2, and CCRR section 42(2)(b))
 - c) In the early 1990s deregulation of the phone industry and technological developments allowed the CSC to consider more secure and equitable methods of establishing phone services in institutions.
 - d) The CSC examined various services available in the United States and decided to implement a new phone system nationally in Canada in November of 1994. The goal of this system was to enhance both the security of institutions and public safety.
2. The Commissioner of the CSC, pursuant to section 97 of the *Corrections and Conditional Release Act* (CCRA), issued Commissioner's Directive (CD) 085 in April 1996 after the new system became operational in Ontario.
 3. On November 20, 1995 various applicants in the matter of *Kenneth Hunter et al. v. The Commissioner of Corrections et al.* had served the Attorney General of Canada with an application which sought to judicially review the decision of the Commissioner of Corrections to implement the new phone system. Injunctive relief was sought as well.
 4. The application for an interlocutory injunction was heard by Denault, J. of the F.C.T.D. His decision is dated December 1, 1995. An injunction was granted because of the voice over feature of the proposed telephone system.¹
 5. A final decision was issued by Mr. Justice Lutfy on July 8, 1997. Except for the voice over feature, the legality and constitutionality of the new system was upheld.²

BACKGROUND OF THIS APPLICATION

Inmates in the Pacific Region of the CSC currently have access to three types of phone systems: administrative phones, coinless pay phones for the purpose of long distance calls, and coinless pay phones for local service. The coinless pay phones for local service, unlike in the rest of Canada, are provided to inmates at no charge for local calls. The cost of this service is borne by the

¹ See *Hunter et al. v. Commissioner of Corrections (Can.) et al.* (1995), 104 F.T.R. 77 at 80.

² See: *Kenneth Hunter et al. v. The Commissioner of Corrections et al.*, unreported decision of Lutfy J., July 8, 1997, F.C.T.D., No. T-2439-95

CSC which rents the use of these phone for a monthly charge per phone. In all other regions supervised by the CSC, inmates are required to place local calls from coinless pay phones on a collect basis, with the result those calls cost whatever is the prescribed rate for their local service provider, as set by the CRTC.

The "no cost to inmates service" for local calls will be removed by the implementations of the Millennium Phone System.³ Inmates in the CSC Pacific Region will then be required to pay for local collect calls. The rates they will pay for these call are set by the CRTC and are implemented by BC Tel, the local service provider. The removal of this "no cost to inmates service" as a result of the implementation of the Millennium Phone System is at the heart of the inmate complaints in relation to the within application.

AFFIDAVIT OF RICHARD MONTMINY

The respondent relied on the affidavit of Richard Montminy sworn the 10th day of September, 1997. In it he states:

1. I am a staff member of the Correctional Service of Canada (CSC) employed as the Project Manager of Technical and Information Management Services for National Headquarters of CSC.
2. Among other duties I have been the primary CSC staff member involved in the review of inmate telephone access for the past several years.
3. I am aware of an application by various inmates in British Columbia which seeks to block the implementation of the millennium phone system in the Pacific Region of the CSC. I have reviewed the Notice of Motion which is dated September 3, 1997.
4. A new Commissioner's Directive has been issued to reflect the July 8, 1997 ruling of Mr. Justice A. Lutfy in *Kenneth Hunter et al. v. Her Majesty the Queen et al.* Essentially, the new Commissioner's Directive reflects the Court's ruling against the implementation of a recorded voice-over message.
5. The first ground of the Notice of Motion indicates that in the Pacific Region "prisoners, who can now telephone locally to friends, family, service agencies, lawyers and community support for free, will be required to make those calls collect at a cost of from \$1.75 to \$2.75 per call". Based on my approximately five years of experience working with inmate phone systems and based on information currently available to me

³ It would appear that inmates have been allowed money for use in pay phones at Ferndale and Elbow Lake Institutions.

regarding practices in the Pacific Region, I am able to state the following in response:

- a) Inmates in CSC, Pacific Region Institutions, depending on where they are located have three types of phone access:
 - (i) "administrative phones" are provided by the CSC for the use of case management, correctional staff, and inmates in relation to matters such as ensuring the right to counsel and various forms of community contact. These calls are made at no cost to inmates. They are supervised by CSC employees. For example, inmates have a right to counsel and pursuant to that right, they may ask designated staff members to make arrangements for them to contact counsel with administrative phones;
 - (ii) "coinless pay phones for purposes of long distance calls" are provided at various institutions so that inmates may make long distance calls at a collect call rate;
 - (iii) "coinless pay phones for local service (with the option of a switch over to long distance collect service)" are provided at various institutions. These phone are not "free" since the CSC pays approximately \$51.50 to operate each phone per month. This cost to the CSC has not been absorbed in other regions across Canada. Inmates in the Pacific Region are the only inmates in Canada who have this unique type of phone access. Currently that access allows for:
 - local calls that are not charged to inmates
 - blocked access to 1-800, 1-900, 411 and 911 numbers
 - a switch-over mechanism that allows for collect long distance calls to be made.
- b) Based on my experience I have concluded that the current use of coinless pay phones for local service, as described above, creates the following difficulties:
 - (i) Their use does not provide any means for addressing serious safety, security and administrative concerns. The millennium phone system addresses these safety, security and administrative concerns.
 - (ii) Their use does not allow for automated supervision of phone calls, and, as such, their continued use results in a drain of CSC resources in those institutions where staff must supervise inmate calls to allow for an orderly and equitable use of telephones. The millennium phone system requires less staff to supervise inmate calls.
 - (iii) Their continued use blocks the ability of the CSC to increase the number of phones for inmate use in Pacific Region institutions since any increase in the number of existing coinless pay phones cannot be matched by the resources which are required to ensure security. As less resources are required for its implementation, the millennium phone system will allow for a greater number of pay phones to be provided for the use of inmates in CSC's Pacific Region.

- (iv) Their continued use blocks the ability of the CSC to accurately and easily judge where there is the greatest demand and need for phones, and, as such, the CSC cannot allocate phone resources in an efficient and equitable manner. The millennium phone system will allow for a relatively automatic analysis of the number of users and the extent of use of phone resources. This will allow the CSC to work towards having a greater ratio of phones to users.
 - (v) Their continued use blocks the ability of the CSC to provide a safe and secure environment for inmates. The provision of a safe environment is a security related goal as well as one that relates to rehabilitation. For example, the millennium system can prevent inmates from calling the family members of other inmates in order to extort favours (since numbers can be blocked on the offending inmates' call lists). As such, inmates will feel more secure and more able to engage in successful rehabilitation.
 - (vi) Their continued use prevents the CSC from implementing a nationwide phone strategy that is equitable in reference to the distribution of phone and financial resources.
6. I note the reference to a cost of \$1.75 to \$2.75 per local collect call. These charges are, unfortunately, beyond the control of the CSC since they are predetermined by B.C. Tel, the local provider of phone services, in accordance with rates set by the CRTC. There is no decision of any CSC official that sets these CRTC approved rates.
 7. There has been no CSC intent to discriminate against applicants or inmates who do not have the money to pay rates set by the CRTC.
 8. In reference to interference with the right to counsel and the ability to make plans for release, the implementation of the millennium phone system will not detract from the use of administrative phone which are provided for these purposes.
 9. It has always been the position of the CSC that consultation was not required in order to implement the millennium phone system since the decision to implement that system related to security matters. This is in compliance with section 74 of the *Corrections and Conditional Release Act* (CCRA).

TEST FOR INJUNCTIVE RELIEF

Section 18.2 of the *Federal Court Act* reads as follows:

On an application for judicial review, the Trial Division may make such interim orders as it considers appropriate pending the final disposition of the application.

The Supreme Court of Canada, in *Manitoba (A.G.) v. Metropolitan Stores Ltd.*,⁴ considered the proper tests to be applied by the Court governing the stay of administrative proceedings pending the trial of the issue of the validity of legislation. These tests set out in *Metropolitan* were reaffirmed by the Supreme Court of Canada in *RJR - MacDonald v. Canada (Attorney General)*.⁵

The first test is a preliminary assessment of the merits of the case. Rather than the Court deeming whether the applicant has a *prima facie* case, it is sufficient to satisfy the Court that there is a serious question to be tried. The threshold to satisfy this test is a low one.

The issues raised by the applicants relate to the withdrawal of a no cost to inmates phone service with the result that inmates will be required to pay CRTC approved local rates for collect calls. The applicants claim that this infringes their Charter Rights. Because of the constitutional challenge, I am prepared to accept, for the purpose of this motion, that there is a serious question to be tried.

The second test consists of deciding whether the applicants who seek the interlocutory injunction would suffer irreparable harm if the relief is not granted. Clear and definite evidence of harm is required; it must not be speculative.

The applicants in this case have not established that they will suffer irreparable harm as a result of the proposed implementation, in the Pacific Region, of the Millennium Phone System by requiring inmates to place local phone calls from coinless pay phones on a collect basis, at a rate set by the CRTC. The right to communicate with counsel is unchanged and the inmates will have access to coinless pay phones for local calls on a collect basis. The harm that is alleged is speculative.

⁴ *Manitoba (A.G.) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110

⁵ *RJR - MacDonald v. Canada (Attorney General)*, [1994] 1 S.C.R. 311

The third test considers the balance of convenience. This test comes into play if the applicants have established a serious question to be tried and that they will suffer irreparable harm if the relief is not granted. The respondents may, at this stage, allege that they will suffer irreparable harm if the Court grants the order sought.

In constitutional cases, the public interest is a factor to be taken into consideration in assessing where the balance of convenience lies. Here there is a public interest in the implementation of a system that addresses safety, security and administrative concerns.

CONCLUSION

Accordingly, the applicants' motion for an interim order pursuant to s. 18.2 of the *Federal Court Act* is dismissed.

(Sgd.) "John D. Richard"

Judge

September 23, 1997
Vancouver, British Columbia

NAMES OF COUNSEL AND SOLICITORS OF RECORD

STYLE OF CAUSE: **GORDON ALCORN, of William Head Institutions, DARRELL BATES, of Kent Institution, DANNY BOLAN, of Elbow Lake Institution, JON BROWN, of Matsqui Institutions, SHAWN BUTTLE, of Regional Health Centre, GARY FITZGERALD, of Ferndale Institution, ANGUS MacKENZIE, of Mountain Institution, and FABIAN PICCO, of Mission Institution**

- and -

THE COMMISSIONER OF CORRECTIONS and THE DEPUTY COMMISSIONER OF CORRECTIONS, PACIFIC REGION, CORRECTIONAL SERVICE OF CANADA

COURT NO.: **T-1945-97**

PLACE OF HEARING: **Vancouver, BC**

DATE OF HEARING: **September 15, 1997**

**REASONS FOR ORDER OF RICHARD, J.
dated September 23, 1997**

APPEARANCES:

Ms. Sasha Pawliuk **for Applicants**

Mr. Steven Albin **for Respondents**

SOLICITORS OF RECORD:

Legal Services Society of B.C. **for Applicants**

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Deputy Attorney General
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