Date: 20080710

Docket: T-211-08

Citation: 2008 FC 862

Vancouver, British Columbia, July 10, 2008

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

HAROLD GALLUP

Applicant

and

ATTORNEY GENERAL OF CANADA and COMMISSIONER OF CORRECTIONS

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant is currently an inmate confined to a federal correctional institute. He requested that he be allowed to have sent in a computer for personal use. The Applicant's request was denied, through three levels of grievance, ultimately by the Senior Deputy Commissioner of Corrections in a decision dated December 19, 2007. Hence this judicial review. For the reasons that follow, I find that the application is allowed.

FACTS

[2] The Applicant is a federal inmate incarcerated for a lengthy period of time at Mountain Institute, British Columbia. At the time he entered that Institute in about August 2002, he did not have a computer in his possession.

[3] In January 2007, the Applicant made inquiries of the Warden of that Institution as to whether he could be provided with a computer purchased by a family member. The stated purpose for the use of the computer was that about 7000 documents related to the Applicant's forthcoming appeal to the Supreme Court of Canada were recorded on a CD-Rom and that the only practical way that he could access and use those documents was through a computer specially built for the purpose by a shop which had been identified by his sister. In his Argument filed with this Court, the Applicant also states (paragraph 8) that much of the CD-Rom information is sensitive and useful for a wrongful conviction review by the British Columbia Innocence Project.

[4] Apparently, a person about to be institutionalized for a criminal conviction is permitted, during the first thirty days upon entry, to have certain personal effects sent to them. As an alternative form of relief, therefore, the Applicant sought an extension of that thirty-day period so that a computer may be delivered to him.

[5] On March 7, 2007, the Deputy Warden of the Institution advised the Applicant in writing that his request for an extension of time was denied, drawing the Applicant's attention to a moratorium on inmate computers introduced in October 2002. The Applicant's attention was also

drawn to a new protocol that would allow him to use a common computer provided for the use of all inmates so as to access his CD-Rom through arrangements made with the relevant Office of the Institution.

[6] The moratorium in question respecting computers was set out in a Directive which stated:

> Inmates will no longer be authorized to purchase or upgrade personal computers, or have computers sent in during the 30-day admission period to incarceration.
> …
>
> Only those inmates with computers, computer peripherals and software as authorized personal effects prior to October 2002 will be allowed to keep them, in accordance with all relevant policies and requirements.

[7] The purpose of the policy was said to be:

> A risk assessment of inmate personal computers determined that the increased networking and communicating capabilities of personal computers pose a threat to the secure operation of the Correctional Service of Canada.

[8] The Applicant entered into a first level grievance of that decision. In a written response to that grievance dated April 27, 2007, the Warden of the Institution made reference to the policy set out above and denied the first level grievance at the time. The Applicant made a second level grievance which, in a written decision made by the Regional Deputy Commissioner dated June 29, 2007, was denied.

[9] The Applicant made a third level grievance. He made it clear that what he wanted was to purchase or have sent in a computer. He said that the computer would conform to the "package" that a computer was required to have as set out in Annex C of Directive CD 566-12 which is related to the configuration that a computer must have, if it is one that was in a prisoner's possession before October 2002, to meet security concerns.

[10] The Senior Deputy Commissioner of Correctional Service Canada, as authorized by the Commissioner, responded by a decision in writing to the Applicant's third level grievance dated December 10, 2007. This is the decision under review in these proceedings. This decision denied the Applicant's request to have a computer sent in and denied his request to extend the thirty-day period from entering an institution to have a computer sent in. The decision did provide that the Applicant could access his CD-Rom on reasonable notice and subject to security provisions by means of the common computer provided at the Institution for use by inmates The Senior Deputy Commissioner said, among other things:

> Furthermore, CD 090, Personal Property of Inmates, and Policy Bulletin #162 have direct relation to your issue. Bulleting #162 outlines changes to have been made to CD 090 due to the increased networking and communicating capabilities of personal computers. Personal computers pose a threat to the secure operations of the Correctional Service of Canada (CSC) and it is felt that the risk to both the public and CSC outweigh the benefits of in-cell inmate computers. The Bulletin states that inmates will no longer be authorized to purchase and upgrade personal computers, or have computers sent in during the 30-day admission period to incarceration. Only those inmates who had computers, computer peripherals and software as authorized personal effects prior to October 2002 will be allowed to keep them. Therefore, policy clearly stipulates that inmates cannot purchase or have a computer brought in to the institution.

> With regard to your request for an extension to the 30-day window, you cannot request an extension because the window began when you were first incarcerated on 2002/06/19. If you had wanted to extend your 30-day effect window, you would have had to request an extension at the time.

ISSUES

[11] The Applicant has raised essentially two issues:

1. Does the decision conform to the provisions of section 4(e) of the *Corrections and Conditional Release Act*,
2. Does the decision violate the Applicant's rights under section 15(1) of the *Charter of Rights and Freedoms*?

PRELIMINARY ISSUE

[12] The Applicant filed his own affidavit as part of his record in this application. The Respondent objected to having that affidavit admitted into evidence on this application on the basis that it went beyond merely providing what was before the decision-maker at the time that the decision under review was made. In particular, the Respondent's counsel took objection to paragraphs 15 and 22 of the Applicant's affidavit. Paragraph 15 is directed to discussions that other inmates of the Institution had with an official of the Institution as to the meaning of the relevant directive. Paragraph 22 is directed to a different grievance respecting a different inmate at another institution. After discussion with the Court and the parties during the hearing of the matter held by teleconference, it was agreed that paragraphs 15 and 22 would not be considered to be in evidence on this application and thus, they have not been considered in arriving at the decision in this proceeding.

Issue #1: Conformity with Section 4(e) of the *Corrections and Conditional Release Act*

[13] The *Correctional and Conditional Release Act*, S.C. 1992, c. 20, sets out its purpose in section 3:

> **3.** The purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful and safe society by
>
> > (*a*) carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and
> >
> > (*b*) assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community.

[14] Section 4(a) stipulates that the protection of society shall be the paramount consideration in the correction process:

> **4.** The principles that shall guide the Service in achieving the purpose referred to in section 3 are
>
> > *(a)* that the protection of society be the paramount consideration in the corrections process;

[15] Section 4(e) provides that offenders retain all the rights and privileges of members of society except those as are necessarily removed or restricted as a consequence of the sentence:

> (*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;

[16] The Commissioner issued a Directive respecting computers, the relevant parts of which have already been recited in these reasons. A further Directive, replacing earlier ones such as 090, number 566-12, was issued, dated 2007-01-05, stating as its objectives in section 1 and 2:

> 1. To allow inmates to have sufficient personal property to ensure requirements of daily life are met while ensuring the safety of staff, inmates and the public by establishing appropriate controls for the management of inmate personal property and purchasing practices.
>
> 2. To provide reasonable protection from damage, theft or loss of personal property of inmates or offenders at Community-Based Residential Facilities (CBRF).

[17] Section 21 of Directive 566-12 provides a listing of categories of personal property items that inmates shall normally be allowed to retain in their cells. Among the categories of listed items are:

> 21. Inmates shall normally be allowed to retain personal property items in their cells which fall within the following categories, in accordance with the National Lists of Personal Property:
>
> …
>
> c. articles for personal use such as notebooks, and writing materials;
>
> …
>
> g. calculators, typewriters, batteries and battery chargers;
> h. television and radio sets, compact disc players and discs record players and records, tape players and tapes;
> i. electronic games (in accordance with the Technical Requirements of Inmate-Owned Computers and Electronic Games);
> j. books and magazines (in accordance with CD 764 – Access to Material and Live Entertainment and CD – 345 Fire Safety);
>
> …

> l. a maximum of twenty (20) computer floppy diskettes (1.4 MB 0 3.5 in/90mm) for inmates accessing institutional supplied computers. All floppy diskettes must enter the institution through purchase orders effective the date of implementation of this policy.

[18] Section 24 provides for computers authorized as personal effects prior to October 2002:

> 24. Inmates who have approved personal computers, peripherals and software which were authorized as personal effects prior to October 2002, shall be permitted to retain this equipment, with the exception of the prohibited computer 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) or form CSC/SCC 2022. These inmates were required to sign form CSC/SCC 2022.

[19] The question as to whether the adoption of a policy such as the foregoing conforms with the provisions of the *Corrections and Conditional Release Ac, supra*, has previously been considered by this Court in *Poulin v. Canada (Attorney General)*, 2005 FC 1293. Justice Martineau at paragraph 26 of that decision said:

> **26** In order to dispose of the application for judicial review at bar, therefore, only the following additional comments are needed. First, the adoption of a coherent and predictable policy on staff safety, and even on the safety of the prison population, is of cardinal importance in the penitentiary system. Directive 090, dealing with the possession of computers with certain peripheral equipment in cells, is thus very important. Any means of communication between inmates, or even between inmates and persons from outside the penitentiary, is clearly unacceptable. That is why the bringing in of new computers and peripheral equipment must be scrupulously controlled by the Service. The Commissioner's general concerns are thus legitimate, in view of the breathtaking speed at which the data processing field is evolving. The basis for the current limitations is not known to the Court, but I imagine it has to do with a data processing concern such as the power of computers after that date. I can only speculate

> as to the specific reasons the Commissioner may have had in prohibiting the purchase of new computers after October 2002 and limiting the use of peripheral equipment previously authorized. The respondents chose not to file any affidavit from the persons responsible for adopting and implementing Directive 090. At the same time, Directive 090 also recognizes that certain individuals suffering from visual or physical handicaps need in certain circumstances to use peripheral equipment and software developed for their requirements. That is the applicant's situation. Thus, I do not have to decide here whether the loss of the disputed peripheral equipment in the case at bar is an infringement of the equality right claimed by the applicant on account of his visual disability. In any case, the current policy authorizes the possession of non-compliant computers and peripheral equipment in the case of inmates who obtained leave before October 2002 to keep them. That is the applicant's situation. The Commissioner undoubtedly may choose in future to cancel any acquired right of the applicant and other inmates, by again amending Directive 090, but I do not have to decide at this time whether such a decision would be legal. Suffice it to say that Directive 090 currently recognizes the applicant's acquired rights.

[20] It is clear from the statement made respecting the policy as adopted in 2003 and the reasoning of Justice Martineau that the objection with respect to inmates having personal possession of computers is that the ability to network and communicate with others by use of the computer gives rise to legitimate concerns. Thus, to the extent that section 21 or any other provision of Directive 566-12 does not specifically authorize post-October 2002 computers to be personally possessed by inmates it cannot be faulted.

[21] However, there is a concern in the present circumstances that all parties have been proceeding on a mutually shared misunderstanding. The Applicant asked for a computer and undertook to have such a computer conform to acceptable pre-October 2002 standards.

The Respondent says that since the Applicant never previously had a computer he cannot have one now, whether built to pre-October 2002 standards or otherwise. The problem seems to be in the use of the word “computer”.

[22] The Applicant finds himself in this situation. He has been convicted of murder and wishes to pursue his legal recourses including an appeal to the Supreme Court of Canada. Apparently there are some seven thousand pages of documents that may be relevant to such an appeal which the Applicant is undertaking himself. Those documents have been copied by others to a CD-Rom and this is the only form to which the Applicant has access. To print them out would be prohibitively expensive. The Applicant needs a convenient means to read those documents. The Respondent has offered the Applicant access to a computer located in the Institute. The Applicant says that access would be extremely limited and subject to severe restrictions. If the seven thousand pages were printed out and several thousand dollars paid for that purpose, the Applicant, subject to fire and safety restrictions, could have them in his cell and refer to them at a time of his choosing.

[23] The Applicant can, according to section 21 of Directive 566-12, have electronic devices such as a calculator, typewriter, television, radio and electronic games in his cell. What the Applicant wants is a device so that he can read what is on his CD Rom, that is, some type of CD reader. It is unfortunate that all parties have referred such a device as a computer.

[24] While the parties should not be faulted for using the word “computer” in their discussions, at some point consideration should have been given to what the real needs of the Applicant were

namely, to read the CD-Rom at a time of his choosing, and to the concerns of the Respondent namely, that inmates should not have at their disposal means for networking and communicating with others without adequate supervision and control. What the Applicant wants is not a computer but a CD-Rom reader with a screen and control panel. Any concerns as to whether the Applicant would share or use material other than the CD-Rom in question are no greater than those with respect to electronic games that are allowed and could easily be met by appropriate supervision.

[25] This is a situation where the parties should reconsider the whole matter given a proper perspective. The decision at the third level grievance will be set aside and the matter returned for reconsideration in light of these reasons.

ISSUE #2 – *Charter* Considerations

[26] In view of the foregoing it is not necessary to consider the Charter issue. I point out, however, that such issue was recently considered by Justice Gauthier of this Court in *Poulin v. Canada (Attorney General)* 2008 FC 811 at paragraphs 45 and following. I come to the same conclusion in the circumstances of the present case; the Applicant's rights under section 15(1) of the *Charter* have not been violated.

CONCLUSION

[27] As a result therefore, I will set aside the decision at issue and require reconsideration in light of these reasons. There will be no Order as to costs.

JUDGMENT

For the reasons herein:

THIS COURT ORDERS AND ADJUDGES that:

1. The decision of the Senior Deputy Commissioner of Corrections dated December 19, 2007 is set aside;
2. The matter is referred back for reconsideration having regard to these reasons;
3. No Order as to costs.

"Roger T. Hughes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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