Federal Court of Appeal

Cour d'appel fédérale

Date: 20120124

Docket: A-239-11

Citation: 2012 FCA 26

CORAM: **NOËL J.A.**
DAWSON J.A.
TRUDEL J.A.

BETWEEN:

Michael Aaron SPIDEL

Appellant

and

CANADA (ATTORNEY GENERAL)

Respondent

Heard at Vancouver, British Columbia, on January 18, 2012.

Judgment delivered at Ottawa, Ontario, on January 24, 2012.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: NOËL J.A.
TRUDEL J.A.

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] This is an appeal from a decision of the Federal Court (2011 FC 601, [2011] F.C.J. No. 804) wherein a Judge dismissed the appellant Mr. Spidel's application for judicial review in respect of the denial of a third-level grievance filed against the Ferndale Institution (Institution).

[2] The relevant facts are set out by the Judge in his reasons and are not in dispute. The appellant indicated during the course of the hearing of this appeal that his first-level grievance, which was directed at an issue which has since been resolved, "changed trajectory" at the second-

level. In the second-level grievance, the appellant alleged that amendments to the Institution's policy with respect to the permitted use of cameras, implemented while his first-level grievance was pending, violated the principle of the "least restrictive measures", as set out in subsection 4(*d*) of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20. The appellant explained that this is "what the grievance is about".

[3] Given this, the issues which remain on appeal are:

1. Did the Judge err by finding the onus to be on the appellant to show amendments to the Institution's permitted use of cameras (contained in Standing Order 764.1 and the inmate photographer job description) were not the least restrictive measures possible?
2. Did the Judge err by striking out portions of the appellant's affidavit and attached exhibits?
3. Did the Judge err by refusing to allow the appellant to rely on a ground of review not pleaded in his notice of application?
4. Did the Judge err by not applying Rules 75 and 312 of the *Federal Courts Rules*, SOR/98-106 in the appellant's favour so as to allow him to amend his notice of application or supplement his record?
5. Did the Judge err in his consideration of the adequacy of the procedural fairness shown to the appellant at the first-level of the grievance process?

[4] Addressing the first issue, no error has been shown to have been committed as to who bore the burden of proof. The appellant acknowledges that the amendments were within the Warden's jurisdiction. Determining whether the measures implemented were the least restrictive measures possible is a question of law or mixed fact and law. It was incumbent upon the appellant to demonstrate a *prima facie* case that less restrictive measures were available, and he did not submit evidence to show this.

[5] The appellant also argues that the respondent should justify the amendments to the Institution's policy in an Oakes style Charter analysis. However, even if this type of analysis was required in this instance, a litigant must still prove a violation of the Charter before the government is required to justify the limitation on the litigant's Charter rights. The appellant has not demonstrated a violation of his rights.

[6] Turning to the second issue, on judicial review the Federal Court only considers documentary evidence that was before the decision-maker. New evidence may only be added in exceptional circumstances. This is different from the grievance process where the griever is entitled to a hearing *de novo* at each level. In my view, the appellant has not shown any error in the Judge's exercise of discretion to strike portions of the appellant's affidavit and attached exhibits.

[7] Moreover, the appellant elected to argue this appeal solely on the basis of the certified tribunal record. Thus, nothing would seem to turn on the material struck from the record by the Judge.

[8] The third and fourth issues may conveniently be addressed together because even if the Judge had allowed the appellant to amend his notice of application and argue the issue of least restrictive measures, there was no evidence that the measures adopted were not the least restrictive. Nor did the appellant suggest that any such evidence could have been forthcoming had the Judge allowed him to supplement his record. In the absence of evidence that less restrictive measures were available the appellant's argument could not succeed.

[9] Turning to the final issue, nothing turns on the breach of natural justice alleged to have taken place during the course of the first-level grievance because even if one assumes that the process leading to that decision was unfair, the appellant obtained through that process the return of certain photographs. This was the very remedy the appellant sought. Furthermore, as the appellant made clear during the hearing, the issue surrounding the return of the photographs transformed into a different one aimed at the allegedly "illegal" policy which was adopted in the interim.

[10] For completeness, I note that the appellant continued to take issue with the outcome of the first grievance to the extent that after the photographs in question were returned to him, the grievance was categorized as "no further action required". In the appellant's view his grievance was upheld.

[11] However, as the appellant was advised in the response to his second-level grievance, guidelines in force at the Institution prohibited photographs from being taken that could undermine the security of the Institution or the safety of any person. Photographs of things such as "office

equipment / filing cabinets" were prohibited. In his third-level grievance presentation, the appellant did not challenge the existence of these guidelines.

[12] The Offender Complaint and Grievance Procedures Manual in force at the time provided that a grievance should be categorized as upheld where the grievance was justified on grounds that the treatment of the offender, or the application of a procedure was unfair, arbitrary or contrary to policy. Given that the pictures in issue were of files and filing cabinets (and thus *prima facie* prohibited) and that they were released to the appellant after the conduct of a security risk assessment, it was not unreasonable for the grievance to have been closed on the basis that no further action was required.

[13] For these reasons, I would dismiss the appeal with costs.

"Eleanor R. Dawson"
J.A.

"I agree.
Marc Noël J.A."

"I agree.
Johanne Trudel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-239-11
STYLE OF CAUSE:	Michael Aaron SPIDEL v. CANADA (ATTORNEY GENERAL)
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	January 18, 2012
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CONCURRED IN BY:	Noël J.A. Trudel J.A.
DATED:	January 24, 2012

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Liliane Bantowakis	FOR THE RESPONDENT

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