Date: 20080111

Docket: T-1886-06

Citation: 2008 FC 42

Vancouver, British Columbia, January 11, 2008

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

DUFF TYRRELL

Applicant

and

ATTORNEY GENERAL OF CANADA and COMMISSIONER OF CORRECTIONAL SERVICE OF CANADA and MISSION INSTITUTION

Respondents

REASONS FOR ORDER AND ORDER

A. Introduction

[1] Mr. Duff Tyrrell, who has been an inmate in Canada's penitentiaries for many years, bought a computer in 1999. With the approval of officials with the Correctional Service of Canada (CSC), he purchased and began using the computer with a peripheral known as a TV tuner card. But for a few short periods of time and through a number of prison transfers, he used his computer with the TV tuner card from 1999 until July 18, 2005. However, in July 2005, upon a transfer back to Mission Institution, Mr. Tyrrell's computer was not issued to him because, CSC officials stated, the

installed TV tuner card was not permitted under Commissioner's Directive 090 (CD 090). The computer was placed in storage with Mr. Tyrrell's personal belongings, where it has remained.

[2] Since that time, Mr. Tyrrell has been trying to get back his computer with the TV tuner card. It is common ground that Mr. Tyrrell could have use of his computer if the TV tuner card is removed. However, according to Mr. Tyrrell, the computer is useless to him without the TV tuner card.

[3] Mr. Tyrrell feels that the decision of *Poulin v. Canada (Attorney General)*, 2005 FC 1293 (released September 20, 2005) is applicable to his situation. In that case, in *dicta*, Justice Martineau interpreted the exception clause of the June 2003 version of CD 090 to permit an inmate who had a computer with a TV tuner card installed prior to October 2002 to use his TV tuner card.

[4] In his efforts, Mr. Tyrrell has pursued all possible avenues of request and grievance. For the most part, the *Poulin* decision has been the basis of his requests. On September 19, 2006, Mr. Tyrrell's third (and final) level grievance was denied by the Assistant Commissioner of CSC. The decision (the Impugned Decision) stated that it had been the intention of the June 2003 version of CD 090 to prohibit TV tuner cards and that CD 090 had been amended in 2006 to make this policy clear.

[5] Mr. Tyrrell now seeks to have the third level grievance decision judicially reviewed.

B. Issues

[6] The following issues are raised by this application:

(i) Have Mr. Tyrrell's rights under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (Charter) been violated by the confiscation of his computer?

(ii) Did CSC commit a reviewable error in denying Mr. Tyrrell's third level grievance?

(iii) In the event that this judicial review is dismissed, should this Court order that CSC pay Mr. Tyrrell the $2200 costs of his computer?

[7] For the reasons that follow, I conclude that this application should be dismissed. Mr. Tyrrell has not persuaded me that CSC has violated his Charter rights or that the Impugned Decision should be overturned. Further, I have determined that Mr. Tyrrell is not entitled to a return of his computer costs.

C. Analysis

C.1 Background to CD-090

[8] I begin with a brief history of the relevant policy directive. Computers, as personal property, are governed by a Commissioner's Directive entitled "Personal Property of Inmates". The first version of CD 090 was issued in January 1987, but since that time the directive has gone through numerous revisions.

[9] The September 1998 version of CD 090 authorized the Director General Security to publish and distribute the technical specifications for inmate computers, peripherals and software. This was done in November 1998. The specifications listed by the Director General Security included a number of restricted computer peripherals which did not include a TV tuner card.

[10] In October 2002 a moratorium was declared by CSC prohibiting the purchase of new computers and computer peripherals. In June 2003 the moratorium was lifted and a revised version of CD 090 was issued. The June 2003 version listed a number of prohibited computer peripherals which included TV tuner cards. The June 2003 version also included an exceptions clause which stated that "[i]nmates who were previously authorized to have computers or peripherals which do not meet the preceding specifications…may continue to keep them in their cells". This version of CD 090 was the subject of the decision in *Poulin*, where Justice Martineau overturned a decision of the CSC that prohibited Mr. Poulin from keeping his computer with its TV tuner card.

[11] In response to *Poulin*, a revised version of CD 090 was issued on January 16, 2006, which removed the exceptions clause from the directive.

[12] The policy was revised once again and replaced by CD 566-12 on January 5, 2007. Under the current policy CD 566-12, it appears that Mr. Tyrrell's computer would be permitted as a computer acquired prior to October 2002, but without the TV tuner card which is prohibited under the policy. It should be noted, however, that I am not dealing with CD 566-12 and need not make a final determination of the correct interpretation of that policy. This is because the policy in effect

when the decision under review was made (the third level grievance decision made on September 19, 2006) was the January 16, 2006 version of CD 090. The question of which version of the policy should be examined is discussed below.

C.2 Issue #1: Have Mr. Tyrrell's Charter rights been violated?

[13] Mr. Tyrrell submits that the decision to refuse him his TV tuner card deprived his right to work with a "legal item" in violation of s. 7 of the Charter.

[14] He also submits that CSC is subjecting him to unusual treatment in violation of his s. 12 Charter rights by acknowledging it is aware of the Court's decision in *Poulin*, above, but nevertheless refusing to issue an allowable item.

[15] Finally, Mr. Tyrrell submits that, by not issuing his computer with his TV tuner card installed without any evidence that his use of the TV tuner card is a risk, CSC has confiscated his property in violation of his s. 8 Charter rights.

[16] I will consider each of the alleged breaches.

C.2.1 Section 7

[17] In order to establish a violation of s. 7 of the Charter, a claimant must demonstrate a violation of life, liberty or security of the person. If no such interest is implicated, it is unnecessary

to continue with the s. 7 analysis (*Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 at para. 47).

[18] In the case before me, Mr. Tyrrell has not identified which s. 7 interest (life, liberty or security of the person) has been violated by the actions of the Respondent. It is obvious that deprivation of his TV tuner card does not put Mr. Tyrrell's life at risk. Accordingly, I will only consider whether Mr. Tyrrell's rights to liberty and security of the person have been violated.

[19] The liberty interest protected by s. 7 has been reviewed in a number of cases. In *Blencoe*, above, at para. 49, Justice Bastarache observed that "'liberty' is engaged where state compulsions or prohibitions affect important and fundamental life choices". In *R. v. Clay*, [2003] 3 S.C.R. 735, Justices Gonthier and Binnie reviewed the jurisprudence with respect to the s. 7 liberty interest and held:

> What stands out from these references, we think, is that the liberty right within s. 7 is thought to touch the core of what it means to be an autonomous human being blessed with dignity and independence in "matters that can properly be characterized as fundamentally or inherently personal" (*Clay*, above at para. 31).

[20] In the case at bar, Mr. Tyrrell has provided a sworn affidavit stating that he has been deprived of the following benefits as a result of not having his computer with the TV tuner card installed:

(i) Accessing file records of his rehab relapse prevention logs.

(ii) Denied day parole because he could not provide a print out of his logs to prove that he was doing them.

(iii) Accessing and making recordings of education and vocational type TV programs geared towards his reintegration into society.

(iv) Educational and recreational amusements such as gaming, writing, word-processing, learning computers, typing skills, etc.

(v) Legal pursuits geared towards his parole hearing.

[21] In addition, Mr. Tyrrell swears that he has struggled with his crime cycle and suffered anxiety, stress, depression, restless sleep, and resentment since losing his TV tuner card.

[22] Even accepting Mr. Tyrrell's affidavit to be true, I find that he has failed to demonstrate that owning and operating a TV tuner card is of an "inherently personal" nature warranting s. 7 protection. Indeed, Mr. Tyrrell has not submitted any evidence or case law suggesting that being deprived of his TV tuner card affected his dignity or independence in a manner envisioned by *Clay*, above. Moreover, many of the deprivations Mr. Tyrrell has suffered appear to be of a nuisance nature. As noted in *Blencoe*, above at para. 97, the s. 7 liberty interest does not provide protection from all anxieties, stresses and stigmas suffered.

[23] Turning to Mr. Tyrrell's s. 7 security interest, in *Blencoe*, above, the Supreme Court noted that state interference with bodily integrity and serious state-imposed psychological stress could constitute a breach of an individual's security of the person (*Blencoe*, above at para. 55). However,

in *Blencoe*, the Supreme Court refused to find that the stress, anxiety and stigma associated with a 30 month delay in processing a human rights complaint of sexual harassment reached the level of stress necessary to implicate s. 7.

[24] In this case, there is no evidence Mr. Tyrrell's bodily integrity has been interfered with. Furthermore, as in *Blencoe*, above, I do not find that the stress and other deprivations suffered by Mr. Tyrrell have reached the level required to amount to serious state-imposed psychological stress. As noted by Justice Lamer in (*New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 at para. 59):

> It is clear that the right to security of the person does not protect the individual from the ordinary stresses and anxieties that a person of reasonable sensibility would suffer as a result of government action. If the right were interpreted with such broad sweep, countless government initiatives could be challenged…

C.2.2 Section 8

[25] For purposes of s. 8 of the Charter, a seizure is "the taking hold by a public authority of a thing belonging to a person against that person's will" (*Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425 at 493, 505). However, when determining whether a seizure is unreasonable, it should be remembered that the purpose of s. 8 is the protection of an individual's reasonable expectation of privacy (*Thomson*, above at 506).

[26] The case of *Weatherall v. Canada (Attorney General)*, [1993] 2 S.C.R. 872 considered the scope of s. 8 within a prison setting. Although the case involved a search, rather than a seizure, I find the following comments by Justice La Forest to nevertheless be applicable:

> Imprisonment necessarily entails surveillance, searching and scrutiny. A prison cell is expected to be exposed and to require observation. The frisk search, the count and the wind are all practices necessary in a penitentiary for the security of the institution, the public and indeed the prisoners themselves. A substantially reduced level of privacy is present in this setting and a prisoner thus cannot hold a reasonable expectation of privacy with respect to these practices. This conclusion is unaffected by the fact that the practices at times may be conducted by female guards. There being no reasonable expectation of privacy, s. 8 of the Charter is not called into play; nor is s. 7 implicated (*Weatherall*, above at 877, see also *R. v. Guimond*, [1999] M.J. No. 213 (Q.B.)). [Emphasis added.]

[27] Mr. Tyrrell has argued that CSC has procedures in place whereby inmate computers are subject to regular inspection. Mr. Tyrrell does not dispute the validity of these procedures. Given the low to non-existent reasonable expectation of privacy in a prison setting (*Weatherall*, above), and Mr. Tyrrell's acceptance of CSC procedure to search and seize computer peripherals in general, I do not find that the seizure of the computer with TV tuner card installed infringes on any reasonable expectation of privacy of Mr. Tyrrell. Accordingly, s. 8 of the Charter is "not called into play" in the case at bar.

[28] In any event, I am satisfied, on the basis of the affidavit evidence before me, that the seizure of the TV tuner card by CSC was not unreasonable as it was necessary for the security of CSC's Mission Institution (*Guimond*, above at para. 36).

C.2.3 Section 12

[29] Justice Lamer, in *R. v. Smith*, [1987] 1 S.C.R. 1045, defined “cruel and unusual treatment or punishment” as:

> The criterion which must be applied in order to determine whether a punishment is cruel and unusual within the meaning of s. 12 of the Charter is, to use the words of Laskin C.J. in *Miller* and *Cockriell*, supra, at p. 688, "whether the punishment prescribed *is so excessive as to outrage standards of decency*". In other words, though the state may impose punishment, the effect of that punishment must not be grossly disproportionate to what would have been appropriate (*Smith*, above at 1072). [Emphasis added.]

[30] This definition has been applied in a number of cases where it was alleged that prison conditions violated s. 12 of the Charter (see, for example, *R. v. Olson* (1987), 62 O.R. (2d) 321 (C.A.), aff’d [1989] 1 S.C.R. 296; see also *Carlson v. Canada*, [1998] F.C.J. No. 733 at para. 30 (T.D.) (QL)).

[31] In the case at bar, the Respondents have submitted affidavit evidence as to the necessity of limiting access to TV tuner cards in order to minimize security risks in CSC institutions. I also note the Impugned Decision includes an attempt by CSC to explain to Mr. Tyrrell why his situation differs from that in *Poulin*, above. Furthermore, Mr. Tyrrell has admitted that CSC is willing to issue his computer if he consents to having the TV tuner card removed. Having regard to all the evidence, I find that CSC has taken steps to minimize the effect of the denial of the TV tuner card while at the same time minimizing the risk to its institutions. In my view, such actions do not constitute cruel and unusual treatment or punishment so excessive as to outrage the standards of decency.

C.3 Issue #2: Did CSC commit a reviewable error in denying Mr. Tyrrell's third level grievance?

[32] I turn now to consider whether there was any reviewable error in the third level grievance decision. Mr. Tyrrell raises a number of alleged problems with the decision:

(i) CSC should have followed the decision in *Poulin* and grandfathered his computer and TV tuner card.

(ii) There is no evidence that his first generation TV tuner card is capable of the mischief to which CD-090 is directed.

(iii) Other inmates are using computers with TV tuner cards installed.

(iv) CSC acted unfairly in changing the policy after *Poulin*.

[33] I first note that Mr. Tyrrell has not provided me with sufficient evidence that CSC acted maliciously or perversely when it made changes to CD 090. Secondly, as it is undisputed that CSC has the jurisdiction to draft procedures to ensure safety in the penitentiary environment, I find that it is irrelevant whether CSC has shown that Mr. Tyrrell is personally a security risk (*Poulin*, above at para. 26). I further observe that Mr. Tyrrell's allegation of unequal enforcement of the policy is not supported by the evidence. In any event, even if true, this fact is not relevant to the determination of this application.

[34] Therefore, with respect to Mr. Tyrrell's complaints, the case turns on the question of statutory interpretation. Does CD 090 provide an exception for grandfathered TV tuner cards? If it does, the Impugned Decision should be set aside. If it does not, the Impugned Decision should stand.

[35] Thus, the central issue is whether CSC erred in its interpretation of CD 090. I will assume that this is a question of law that should be reviewed on a standard of correctness (*Laliberté v. Canada (Correctional Service)*, [2000] F.C.J. No. 548 at para. 22 (T.D.) (QL); *Macdonald v. Canada (Attorney General)*, 2005 FC 1326 at para. 42).

[36] A preliminary issue that is crucial to the case at bar is determining which version of CD 090 the Assistant Commissioner was entitled to examine when making the Impugned Decision. In particular, I note that the June 2003 version of CD 090 was in effect at the time the original decision was made to deny Mr. Tyrrell access to his TV tuner card, while the January 16, 2006 version of CD 090 was in effect at the time of the disposition of Mr. Tyrrell's second and third level grievances.

[37] Grievance procedures under the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 are governed by the Corrections and Conditional Release Regulations, S.O.R./92-620, ss. 74-82). The procedure was described by Justice Rothstein in the case of *Giesbrecht v. Canada*, [1998] F.C.J. No. 621 at para. 10 (T.D.) (QL):

> Grievances are to be handled expeditiously and time limits are provided in the Commissioner's Directives…Through the grievance procedure an inmate may appeal a decision on the merits and an appeal tribunal may substitute its decision for that of the tribunal appealed from (see also *Wild v. Canada*, 2006 FC 777 at para. 9).

[38] In other words, at each higher level of the grievance procedure, the decision maker may substitute its decision for that rendered by the decision maker below. Therefore, although technically an "appeal", the nature of the grievance process allows each subsequent decision maker

to approach a grievance as a *de novo* review and to hear new evidence (see, for example, *Besse v. Canada (Minister of National Revenue - M.N.R.)*, [1999] F.C.J. No. 1790 at para. 5 (C.A.) (QL)). Thus, I conclude that the Assistant Commissioner was entitled to rely on the January 2006 version of CD 090 in deciding the merits of Mr. Tyrrell's request notwithstanding the fact that the original decision to deny him his TV tuner card was rendered pursuant to the June 2003 version of CD 090.

[39] Having identified that the Assistant Commissioner was correct to rely on the January 16, 2006 version of CD 090, I must next determine whether the Assistant Commissioner was correct in his interpretation of that directive.

[40] Mr. Tyrrell places great reliance on the case of *Poulin*, above. In *Poulin*, Justice Martineau held that the June 2003 version of CD 090 allows individuals suffering from visual or physical handicaps, in certain circumstances, to use peripheral equipment and software developed for their requirements. Justice Martineau also noted that:

> 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 (*Poulin*, above at para. 26).

[41] As noted above, the version of CD 090 ultimately relied on to reject Mr. Tyrrell's third level grievance was the January 16, 2006 version. Unlike the June 2003 version relied on in *Poulin*, the 2006 version of CD 090 did not contain any exceptions for "computers or peripherals which do not meet [CSC]…specifications". In other words, there was no "grandfather" exception. Given that Mr. Tyrrell's TV tuner card was an explicitly prohibited item at the time of the Impugned Decision, the

Assistant Commissioner was correct to dismiss his third level grievance. Since the decision in *Poulin* depended on the interpretation of an earlier version of CD 090, *Poulin* is not applicable to Mr. Tyrrell's situation.

[42] In sum, the interpretation of the applicable directive CD 090, as of the date of the Impugned Decision, is correct.

C.4 Issue #3: Should CSC reimburse the cost of Mr. Tyrrell's computer?

[43] Finally, Mr. Tyrrell submits that the Court should order CSC to reimburse him for the cost of his computer with TV tuner card installed. Not only do I question whether such an order would be within the Court's jurisdiction, I do not think that such an order is warranted. Mr. Tyrrell can have the use of his computer at any time provided that he agrees to the removal of the TV tuner card. Although he submits that the computer, by itself, is useless to him, I am not persuaded that this would be the case. Further, as an inmate, Mr. Tyrrell must have been aware, when he purchased his computer, that policies on this personal item could change. Accordingly, I will not order that CSC reimburse Mr. Tyrrell for the cost of his computer.

D. Conclusion

[44] For these reasons, this application for judicial review will be dismissed.

[45] The Respondents seek costs. As the successful party, the Respondents are entitled to their costs. In my discretion, I will award costs in the lump sum amount of $300.

ORDER

THIS COURT ORDERS that:

1. the application for judicial review is dismissed; and

2. costs fixed at $300 are awarded to the Respondents.

"Judith A. Snider"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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