Federal Court of Appeal | Cour d'appel fédérale

Date: 20110204

Docket: A-508-09

Citation: 2011 FCA 42

CORAM: **NADON J.A.**
PELLETIER J.A.
MAINVILLE J.A.

BETWEEN:

ESMOND JACK YU

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Vancouver, British Columbia, on January 26, 2011.

Judgment delivered at Ottawa, Ontario, on February 4, 2011.

REASONS FOR JUDGMENT BY: MAINVILLE J.A.

CONCURRED IN BY: NADON J.A.
PELLETIER J.A.

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REASONS FOR JUDGMENT

MAINVILLE J.A.

[1] The appellant seeks compensation for the loss of his property following his involuntary transfer from the Matsqui penitentiary to the Kent penitentiary. At the time of his transfer, the belongings in his cell at Matsqui were gathered by the Correctional Service of Canada (CSC) and eventually shipped to Kent. However, many of the items gathered never reached Kent. Consequently, the appellant made claims for lost property. These claims were for the most part denied by the correctional authorities, principally on the basis that many of the items claimed were not listed on the appellant's personal property record (PPR). On judicial review, Snider J. of the Federal Court upheld the denial of compensation. The appellant now appeals to this Court.

Background and context

[2] The type and quantity of personal property which inmates in penitentiaries may keep with them within a facility are strictly regulated through controls on the management of inmate property and purchasing practices. These restrictions are intended to ensure the safety of staff, of the inmates and of the public. However, once the personal property of an inmate has been lawfully allowed into the institution, the institutional head must take all reasonable steps to ensure that this property is protected from loss or damage.

[3] Commissioner's Directive 090 (CD-090) regulated the personal property of inmates until its replacement by a more detailed Commissioner's Directive 566-12 (CD-566-12). Both CD-090 and CD-566-12 were adopted pursuant to sections 97 and 98 of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20.

[4] Under the inmate personal property system established under these directives, all authorized personal property of an inmate is registered on a PPR upon the inmate's admission to an institution, with an agreed upon value being assigned to each item. After the inmate's admission, he may acquire other personal property, notably through purchase. All items received after the inmate's admission are also registered on a PPR. As rightfully conceded by counsel for the respondent during the hearing of this appeal, it is CSC staff who control both the initial PPR and the updates to the PPR, and who also control the admission of items purchased by inmates.

[5] When it is necessary to remove and transfer the personal property of an inmate from his cell, the inmate himself, whenever possible, is responsible for packing the items and a system for recording and verifying the packed items exists for purposes of control. However, when an inmate does not pack his personal property himself, the directives provide for a system under which the employees of the CSC conduct the packing in a controlled environment. Of particular interest for the purposes of this appeal is the requirement that an "Inmate Personal Property (Cell Property Removal)" (CPR) form be completed in such circumstances by two staff members, which allows for a list of the items packed to be prepared and attested to by the staff.

[6] On November 1, 2007, a cellular phone was found in the appellant's cell at Matsqui hidden in his printer. The possession of a cellular phone is considered to be a serious breach of security, and the appellant was placed in segregation and eventually transferred to Kent. His cell was padlocked, and his personal effects were subsequently packed by CSC personnel. A CPR of the items packed was consequently prepared by the staff.

[7] The appellant's personal effects were eventually forwarded to Kent. However, many items were missing. The appellant's printer was missing and was not even listed on the CPR, though it was obviously in his cell when he was segregated since the cell phone had been found hidden in it. Many other items listed on the CPR were also missing, notably two language learning CDs, a black long sleeve shirt, two T-shirts, a special mechanics book with CD, and a pair of pants.

[8] The appellant claimed compensation for these missing items as well as for various small items which were not listed on the CPR or on his PPR, but which he asserted were nevertheless in his cell at Matsqui when he was segregated.

The claims decisions

[9] Claims payment requests for damage to, or loss of, property belonging to inmates are the subject of Commissioner's Directive 234 entitled *Claims against the Crown and the Offender Accident Program* (CD-234). This directive provides for an internal claims process and investigation, and sets out guidelines to accept or reject inmate claims for loss of property and to determine an appropriate amount of compensation where claims are found to be warranted.

[10] The initial investigation report prepared in response to the appellant's claims noted that the appellant had submitted receipts that showed that many of the items claimed and listed on the CPR had been purchased while he was at Matsqui. Nevertheless, the initial investigation concluded that there was "no choice" but to reject most of the appellant's claims since the missing items listed on the CPR were not also listed on the appellant's PPR.

[11] The appellant appealed this decision under Commissioner's Directive 081 concerning *Offender Complaints and Grievances* (CD-081). Assistant Deputy Commissioner Bergen granted the appeal for all missing items which had been listed on the CPR even though they may not have been listed on the appellant's PPR. She explained her decision as follows (Appeal Book at pages 56-57) :

> While the institutional review focused on the inmate's responsibility with respect to his/her personal property, it is also important for the institution to take some responsibility in this case with respect to the recording of personal property. Inmates should not be permitted to take property to their cells for personal use until that property has been provided a value and has been listed on Personal Property Records.
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> […]
>
> Although it appears that property was sent out for Mr. Yu, Kent Institution records indicate that some of Mr. Yu's personal items were never received. Although these items are not listed on Mr. Yu's Personal Property Records, Mr. Yu provided copies of receipts validating his claim and institutional staff at Matsqui Institution allowed him to have these items for cell use without recording them as per policy requirements, therefore I recommend that this claim be upheld in part … .

[12] The appellant again appealed this decision to a "third level" under the grievance procedure set out in CD-081. In his third level grievance decision, senior Deputy Commissioner Hyppolite overturned the previous decision of Assistant Deputy Commissioner Bergen. He rejected the claims for all items which were not listed on the appellant's PPR even though they had been found in his cell by the staff and had been listed on the CPR. His decision was principally based on his reading of section 9 of CD-090 and of section 15 of CD-566-12 which both provide that every inmate must ensure that his personal property records are kept up-to-date by bringing any changes to the attention of relevant staff.

[13] However, a missing printer had been listed on the appellant's PPR, and since a printer was clearly in the appellant's cell when the cellular phone had been found hidden in it, the Senior Deputy Commissioner accepted this claim even though the printer was not listed on the CPR.

Federal Court Judgment

[14] The appellant sought judicial review of this third level grievance decision before the Federal Court. The applications judge defined three issues, namely what was the appropriate standard of review, whether the third level grievance decision was made in breach of procedural fairness, and whether this decision was reasonable.

[15] The applications judge found that the appropriate standard of review was correctness on issues of procedural fairness, and reasonableness on whether the decision properly compensated for the destruction or loss of items.

[16] The applications judge determined that there had been a breach of procedural fairness by the failure to provide timely disclosure of the CPR to the appellant. However, the judge also found that there was no prejudice resulting from this non-disclosure and that the breach was inconsequential. She consequently declined to overturn the third level grievance decision on this sole basis.

[17] The applications judge further determined that it was not unreasonable for the third level grievance decision-maker to find that the appellant had the responsibility to update his PPR. The applications judge also determined that in light of the fact the PPR had not been updated, it was also not unreasonable for the third level grievance decision-maker to find that the CSC could not verify whether the items were in the appellant's cell at the time he was segregated. Moreover, the fact that the appellant had receipts for these items was found by the applications judge not to be helpful, since they did not prove that the items purchased had remained in the appellant's possession.

[18] In conclusion, the applications judge was satisfied that the third level grievance decision was reasonable, and consequently dismissed the judicial review application without costs.

Analysis

Standard of Review

[19] In appeal of a judgment concerning a judicial review application, the role of this Court is to determine whether the applications judge identified and applied the correct standard of review, and in the event she has not, to assess the impugned decision in light of the correct standard of review; the applications judge's selection of the appropriate standard of review is a question of law subject to review on appeal on the standard of correctness:: *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226 at paragraph 43; *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100 at paragraph 35; *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)*, 2006 FCA 31, [2006] 3 F.C.R. 610 at paragraphs 13-14.

[20] In assessing the standard of review, the applications judge adopted the analysis in *Johnson v. Canada*, 2008 FC 1357 at paragraphs 35 to 39, in which Mosley J. concluded that for inmate grievance decisions, a standard of correctness applied to questions of law, including procedural fairness, and a standard of reasonableness applied to findings of fact and of mixed law and fact. The applications judge thus applied a standard of correctness to the issue of procedural fairness she had identified, and a standard of reasonableness to whether the third level grievance decision properly

compensated for the destruction or loss of items, presumably on the assumption that only questions of fact or of mixed law and fact were involved.

[21] However, as further discussed below, this judicial review also raises issues of law, notably the interpretation of section 84 of the *Corrections and Conditional Release Regulations*, SOR/92-620, of section 3 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, and of various Commissioner's Directives, which are subject to review on a standard of correctness: *Sweet v. Canada (Attorney General)*, 2005 FCA 51, 332 N.R. 87 at paragraph 15. Though that case concerned the interpretation of certain provisions of the *Corrections and Conditional Release Act* and of its regulations, a similar standard of correctness applies to the proper interpretation of the Commissioner's Directives which are adopted pursuant to sections 97 and 98 of that act and which are therefore "regulations" under the meaning of subsection 2(1) of the *Interpretation Act*, R.S.C. 1985, c. I-21: *Canada (Attorney General) v. Mercier*, 2010 FCA 167, 320 D.L.R. (4th) 429 at paragraph 58.

Applicable Legal Principles

[22] The general principle concerning the loss of inmate effects is set out in section 84 of the *Corrections and Conditional Release Regulations*:

84. The institutional head shall take all reasonable steps to ensure that the effects of an inmate that are permitted to be taken into and kept in the penitentiary are protected from loss or damage.	**84.** Le directeur du pénitencier doit prendre toutes les mesures utiles pour garantir que les effets personnels que le détenu est autorisé à apporter et à garder dans le pénitencier soient protégés contre la perte et les dommages.

[23] Section 38 of CD-234 concerning claims against the Crown provides that an inmate should not be compensated for the loss of property which is not listed on his property record. However, this section adds that compensation may nevertheless be provided, even for property that is not listed on a property record, if the inmate can demonstrate that efforts were made to record the property:

38. An offender should not be compensated for property that is not listed on his or her property record, unless:	38. Un délinquant ne devrait pas recevoir de dédommagement pour des effets personnels qui ne figurent pas dans son relevé des effets personnels, sauf :
a. the property was not required to be recorded on a property record in accordance with CD 090, "Personal Property of Inmates"; or	a. s'il n'était pas tenu de les consigner dans le relevé des effets personnels selon la DC 090, « Effets personnels des détenus »;
b. the offender can demonstrate that efforts were made to have the item recorded. (Emphasis added)	b. si le délinquant peut démontrer qu'il s'est efforcé d'y faire consigner les articles. (Je souligne)

[24] Items purchased by an inmate after his admission into an institution must first transit through CSC staff, who are responsible for assigning a value to each item so purchased and to register the value of each item on a PPR pursuant to sections 28 and 30 of CD-090 and sections 40 and 44 of the more recent CD-566-12 concerning the personal property of inmates. The "efforts" required under section 38 of CD-234, reproduced above, can thus be deemed to have been demonstrated by the inmate who follows the purchasing policies of the CDC in order to acquire an item.

[25] Moreover, the *Claims Administration Instructions – Guidelines 234-1* issued under the authority of the Assistant Commissioner, Corporate Services of the CSC specifically provides in section 26, that a claim is normally accepted when the circumstances that gave rise to the claim indicate that the requirements of section 84 of the *Corrections and Conditional Release Regulations* have not been met, or where the CSC is liable for the loss by reason of section 3 of the *Crown Liability and Proceedings Act*. The directions concerning the conduct of investigations on claims and which are set out in section 8 of Annex B of these Guidelines 234-1 allow for an inmate to substantiate a claim not only by means of his PPR, but also by means of a CPR, by means of purchase vouchers, and by means of CSC reports. This approach would be meaningless if the sole accepted evidence for allowing a claim was the PPR.

Application to the circumstances of the appellant

[26] It is not disputed that certain items listed on the CPR prepared after the appellant's segregation at Matsqui never reached Kent. It is also not disputed that these items lawfully entered the Matsqui Institution through purchases by the appellant, and consequently CSC does not assert that any of these items are contraband.

[27] It is nevertheless argued by CSC that even if these items were lawfully purchased and lawfully entered the institution, and even if they were in fact found in the appellant's cell and subsequently lost while under the care and control of CSC, no compensation should be paid because the appellant was remiss in not updating his PPR. This approach cannot be right and should not be endorsed.

[28] As already noted, section 38 of CD-234 concerning claims against the Crown states that compensation may be provided even for property that is not listed on a PPR if the inmate can demonstrate that efforts were made to have the property recorded. Moreover, both CD-090 and CD-566-12 provide for an inmate purchase system which requires CSC to approve all items entering the institution which are purchased by an inmate and to register such items on a PPR.

[29] In this matter, I subscribe to the reasons of Assistant Deputy Commissioner Bergen, reproduced above, which granted compensation for all missing items which had been listed on the CPR even though they may not have been listed on the appellant's PPR. As Assistant Deputy Commissioner Bergen noted, while the institutional review focused on the appellant's responsibility with respect to his PPR, it was also important for the institution to take some responsibility in this case with respect to the recording of personal property. Although some of the items listed on the CPR are not listed on the PPR, the appellant provided copies of receipts of purchase, and institutional staff at Matsqui allowed him to have items for cell use without recording these items on a PPR as required under Commissioner's Directives.

[30] Pursuant to section 84 of the *Corrections and Conditional Release Regulations*, the institutional head must take reasonable steps to ensure that the effects of an inmate that are permitted to be taken into and kept in a penitentiary are protected from loss. A claim for loss items should therefore be accepted where it appears that the requirements of section 84 of the regulations have not been met or where the CSC is liable for the loss under section 3 of the *Crown Liability and*

Proceedings Act. Here, the items claimed were listed on the CPR and the appellant could prove ownership by means of the receipts in his possession. Since the items were last seen in the possession and under the control of the CSC, the failure to deliver the items to the appellant at Kent was a breach of section 84 of the regulations and would create liability under section 3 of the *Crown Liability and Proceedings Act* since the CSC acted as a bailee of the appellant's property. To the extent the Commissioner's directives are inconsistent with the regulations or the *Crown Liability and Proceedings Act*, the third-level grievance decision-maker erred in law in preferring form (the PPR requirement) over substance.

[31] Consequently, the third level grievance decision was in error in overturning Assistant Deputy Commissioner Bergen's findings that compensation was owed to the appellant for those items which were recorded on the CPR but which never reached Kent.

[32] The third level grievance decision also rejected the claim for one of the items ("Book with Compact Disk-Speed Mechanics") even though it was listed both on the appellant's PPR and on the CPR. This decision was based on the finding that the item was also listed on the appellant's new, more recent PPR, leading to the conclusion that the item had consequently been found. As the appellant rightly argues, this conclusion was reached without allowing the appellant an opportunity to explain why the new PPR listed the item. The appellant contends that he purchased a new copy of this item after the initial item was loss in the transfer to Kent, and had he been given an opportunity to address the issue, he would have submitted the voucher proving his purchase of a new copy of the claimed item.

[33] Section 44 of CD-234 concerning claims against the Crown specifically provides that decision-makers in the claims process "must ensure that the information upon which they act is reliable and persuasive" and must "decide whether or not it would be fair to allow the information to affect his or her decision." In this case, neither the initial investigation nor the second level grievance decision by Assistant Deputy Commissioner Bergen raised the issue of the new PPR. In fact Assistant Deputy Commissioner Bergen had allowed the claim for the item at issue ("Book with Compact Disk-Speed Mechanics"). In light of this, it was incumbent on the third level grievance decision-maker, pursuant to section 44 of CD-234, to investigate the new PPR listing prior to reaching the finding that the item had resurfaced.

[34] The third level grievance decision however reasonably concluded that the appellant was entitled to compensation for the loss of his printer even if that item was not recorded on the CPR. Since the printer was found to be in the appellant's cell when he was segregated, it was reasonable to find that the printer had been lost even if it was not listed on the CPR. The compensation for that printer was correctly determined to be the value of the printer as indicated in the appellant's PPR. The appellant's claim that the value of this printer was incorrectly stated on his PPR cannot be accepted since the appellant confirmed this value by signing his PPR.

[35] The other items claimed by the appellant were not listed on his PPR and were not listed on the CPR. For many of these items, no receipts were submitted in support of their purchase. In such circumstances, as found by the applications judge, the decision to deny compensation for these items was reasonable.

[36] The net result is that the appellant should have been granted compensation for the claims which were upheld by Assistant Deputy Commissioner Bergen and for the amounts she determined, in addition to the compensation for the appellant's printer in the amount recognized by the third level grievance decision. The only exception concerns the item "Book with Compact Disk-Speed Mechanics" which will be compensated only insofar as the appellant can demonstrate to CSC that the item listed in his new PPR was purchased after the similar item was listed on the CPR, thus establishing that the items are not the same.

Costs

[37] The appellant is seeking costs. The rule against awarding costs to self-represented litigants has been somewhat alleviated in recent years: *Sherman v. Canada (Minister of National Revenue)*, 2003 FCA 202, [2003] 4 F.C. 865 at paragraphs 46 to 52; *Thibodeau v. Air Canada*, 2007 FCA 115, 375 N.R. 195 at paragraph 24. This new approach to costs for self-represented litigants seeks to provide a moderate allowance for the time and effort devoted to preparing and presenting a case insofar as the successful self-represented litigant incurred an opportunity cost by foregoing remunerative activity.

[38] In light of the circumstances of the appellant, who has been incarcerated in a penitentiary throughout these proceedings, I cannot conclude that he has incurred any opportunity cost by foregoing remunerative activity in order to prepare and present his case. Consequently, I would not exercise the discretion of this Court to award costs for fees. However, the appellant should be reimbursed by the respondent for his disbursements in this Court and in the Federal Court.

Disposition

[39] I would consequently grant this appeal, set aside the applications judge's decision, allow the application for judicial review, set aside the third level grievance decision, and return the matter to the Commissioner for Corrections for re-determination with instructions to compensate the appellant in accordance with these reasons. I would also order that the respondent reimburse the appellant his disbursements in this Court and in the Federal Court.

"Robert M. Mainville"
J.A.

"I agree
M.Nadon J.A."

"I agree
J.D. Denis Pelletier"

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-508-09
STYLE OF CAUSE:	**Esmond Jack Yu v. Attorney General of Canada**
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	January 26, 2011
REASONS FOR JUDGMENT BY:	MAINVILLE J.A.
CONCURRED IN BY:	NADON J.A. PELLETIER J.A.
DATED:	February 4, 2011

APPEARANCES:

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