

BETWEEN:

**DAVID W. SHORTREED, STEVEN FORSTER AND
DWIGHT CREELMAN, on behalf of themselves
and of all other members of the INMATE
COMMITTEE OF WARKWORTH INSTITUTION
CORRECTIONAL SERVICE OF CANADA**

Applicants

- and -

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER

CULLEN J.:

This is an application for judicial review of several decisions of officers of the Correctional Service of Canada [hereinafter, the "decisions"]. The applicants seek declaratory relief in respect of these decisions, and an Order to compel the Correctional Service of Canada to act in accordance with such.

The decisions are in respect of a voided purchase order for legal texts to be drawn out of the Inmate Welfare Fund; the rejection of a proposed issue of Outlook magazine for publication; the discontinuance of a trial period for the Outlook magazine; the elimination of the part-time editorial for that magazine; and an alleged confiscation of two legal texts from one of the applicants.

THE FACTS

The applicants are all inmates at Warkworth Institution in Campbellford, Ontario. The applicants Shortreed and Creelman are both elected members of the Warkworth Inmate Welfare Committee [hereinafter, the "Inmate Committee"].

The Inmate Committee is created and defined by Commissioner's Directive [hereinafter, the "CD"] 861, dated April 15, 1989. It is supervised by David Larcombe, coordinator of the Personal Development Programs at Warkworth. The applicants Shortreed and Creelman both work for the Personal Development Programs and are the democratic representatives of the inmates.

The Inmate Welfare Fund [hereinafter, the "Fund"] is also created and defined by the same CD 861. The monies for the Fund derive from deductions from approved earnings of the inmates, canteen profits, interest on the Fund's balance, the receipt of gifts authorized by the institution, and fundraising activities carried out by the inmates under authority of the institution.

For the purposes of this discussion, it is useful to outline some of the provisions in CD 861.

Paragraph 1 sets out the policy objective of the Fund. The policy objective relevant to this case is the maintenance of a fund that contributes to the inmate's general welfare within the institution.

Paragraph 4 of CD 861 sets out the uses the Inmate Committee may make of the Fund. Relevant authorized uses include the provision of educational and recreational activities for inmates, the provision of amenities for inmates, and helping to meet the costs of inmate publications.

Finally, paragraph 3 states that the Inmate Committee may make recommendations regarding the use of the Fund. However, the recommendations must be approved by the Warden or his/her delegate.

The specific CSC decisions that are the subjects of the requests for declaratory relief can be divided into three groups.

The first group comprises decisions which resulted in the voiding of an Inmate Committee purchase order for the purchase of various legal texts and legislation. The purchases were to be drawn from the Fund.

The circumstances surrounding the voiding of this purchase order are as follows. The library at Warkworth, available to all the inmates, has a wide variety of legal reading materials. Mr. Larcombe formerly had approved purchase orders for additional legal texts out of the Fund. Although they remain unnamed, other elected members of the Inmate Committee had advised Mr. Larcombe of their concern about some of the expenditures made by the Inmate Committee. Mr. Larcombe had come to feel that the Inmate Committee's requests for more legal texts had escalated to the point where such requests had become a financial threat to the budget of the Inmate Committee. Mr. Larcombe concluded that such purchases were no longer a reasonable use of the limited monies available in the Fund, and refused to approve further purchases.

The second group of decisions at issue involve 1) the refusal to publish Outlook magazine; 2) the discontinuance of the trial period for Outlook magazine; and 3) elimination of the part-time Editor position.

Outlook magazine is governed by Standing Order 765, which states that the "objective" of the various inmate publications at Warkworth is to "provide structured avenues of self-expression." The Publication Committee, also created by Standing Order 765, is comprised of several CSC officials, including Mr. Larcombe. The Publication Committee reviews and approves each issue of Outlook magazine before it is printed and circulated.

Outlook Magazine was discontinued by the Programmes Board at the request of the Inmate Committee about two years ago, due to lack of interest on the part of the inmates.

In the fall of 1995, the Inmate Committee asked the Programmes Board to reinstate Outlook magazine and to pay for a part-time editor. The Board agreed to this proposal on a trial basis. The applicant Shortreed was hired as editor. The applicants submit that, near the beginning of November, the Inmate Committee asked the applicant Shortreed to produce an issue that included case law relevant to the general inmate population. In response to the request from the Inmate Committee, the Editor polled 150 inmates, requesting their input into

the content of the magazine. The first issue was sent to the Publication Committee for approval in December, 1995.

The proposed issue of Outlook was not accepted for the following reasons: 1) it did not conform to the Standing Order 765 requirement that the publication "provide [a] structured avenue for self-expression," because it was a mere compilation of photocopied articles from various legal texts, journals, and newspapers already available to the inmates through the library; and 2) concerns over copyright infringement.

The applicants did not revise the proposed issue. The applicants did not grieve the decision of the Programme Board rejecting the proposed issue.

Shortly afterwards, the Programmes Board met and decided that, because the proposed trial issue had not conformed to Standing Order 765, Outlook magazine would be discontinued and the position of part-time editor eliminated. This decision was not grieved through any of the available internal grievance routes.

During the summer of 1996, the Inmate Committee again approached the Programmes Board and requested that Outlook magazine be reinstated on a volunteer basis. The request was approved. An issue composed of articles written by the inmates and of general interest to the inmates was approved, printed, and distributed to the inmates.

The third group of impugned decisions involves an alleged confiscation of two law books on the basis that the Editor did not have a mandate to do or publish legal research. The events leading up to the confiscation are as follows.

On the basis of some information received from Xerox Canada, Mr. Larcombe perceived that someone was abusing subsidized photocopying privileges. In December of 1995, Mr. Larcombe found the applicant Shortreed using the photocopier in the Personal Development Programs building. The applicant Shortreed was copying pages from a legal text on behalf of the Inmate Committee. Mr. Larcombe advised that he considered this legal research to be personal business and therefore unauthorized legal research. Personal photocopying had to be done through the library. The applicant Shortreed disagreed that the

photocopying was for personal reasons. Mr. Larcombe then took the two law books to his supervisor, for an opinion as to whether the photocopying was for personal business or not. At no time did the applicant Shortreed object to this action. After a few days, the supervisor agreed that the texts were for personal business, and that the applicant, therefore, was not entitled to photocopy the articles at no cost to himself on the Personal Development Programs machine. There was also a concern over copyright infringement.

Mr. Larcombe informed the applicant Shortreed of his decision, and returned the books to him.

DISCUSSION

Issue 1: The voiding of the purchase order for legal texts:

The applicants submit that their rights were infringed on the basis of the voiding of a purchase order for legal reading materials.

The respondent submits that this was a decision well within the discretionary power of the CSC. The Commissioner of the CSC may make rules concerning the management of the penitentiary service. These rules may take the form of Commissioner's Directives. CD 861, paragraph 4, uses mandatory language to enumerate the uses to which the Fund may be put. The strength of the respondent's argument lies in the submissions that: 1) since the purchase of legal texts is not one of the specified uses for the Fund, it may not be used for this purpose; and 2) paragraph 3 requires CSC approval of any uses of the Fund.

Analysis: At first glance, the respondent's argument about the wording of paragraph 4 of CD 861 seems determinative. The language is mandatory: the Inmate Committee "shall use the fund [in order] to..."

However, a recent decision by this Court indicates otherwise. I believe that the reasoning used by Lutfy, J. in *Timmins Bissonnette et al. v. The Commissioner of Corrections et al.*, T-2085-95, October 24, 1996 [hereinafter, *Timmins Bissonnette*] helps to resolve this issue.

In *Timmins Bissonnette*, Lutfy, J. ruled that the respondent's restrictive interpretation of paragraph 4 of CD 861 did not give sufficient importance to the policy objective of contributing to the general inmate welfare enunciated in paragraph 1. Therefore, the mandatory language in paragraph 4 did not necessarily prohibit the funding, in that case, of legal actions. Lutfy, J. found that this interpretation was supported by the relevant legislation and regulations. Particularly relevant is subsection 97(3) of the *Corrections and Conditional Release Regulations*, SOR/92-620 [hereinafter, the "Regulations"], which reads:

- (3) The Service shall ensure that every inmate has reasonable access to
 - (a) legal counsel and legal reading materials;

Further, CD 861 had been created before the above Regulations had come into force. That is, CD 861 had been created when CSC had no legislated mandate "to ensure that every inmate has reasonable access to .. legal reading materials."

Applying the principles set out in *Timmins Bissonnette* to the case at Bar, the only question to answer is whether the decision to void the purchase order was in keeping with subsection 97(3) of the Regulations. Was the CSC decision as to the uses of the Fund in keeping with the requirement to provide reasonable access to legal reading materials?

CD 084 speaks to the kinds of legal reading materials that are to be available at Warkworth. This directive lists, at paragraph 10, the legal texts that an institutional library must contain. The list includes eight statutes and a number of other publications dealing with the administration of CSC. These texts are available at Warkworth.

Paragraph 11 provides that, where circumstances warrant, the institution shall make reasonable efforts to arrange for inmates' access to other relevant legal and regulation documents within its control.

The situation at Warkworth is such that there are a number of legal texts available to the applicants through the library. In addition, there is the possibility of access to further texts held at other institutions, where circumstances warrant.

There is no obligation for CSC to obtain the requested texts, at no charge to the inmates, pursuant to CD 084. Rather than using a CD 084 request,¹ the applicants chose to try to obtain the books through the use of their Fund. The ultimate approval of purchases through the inmates' Fund lies with CSC. The issue, really, is whether the denial of the request was made unreasonably and, therefore, in contravention of paragraph 97(3)(a) of the Regulations.

The respondent submits that there was sufficient justification to deny the request, as the applicants' "interest in legal research had escalated to the point where it became a financial

¹ It is unclear whether CD 084 actually could be used to obtain the requested texts, as the respondent has given no indication that the requested texts were available through other institutions.

threat to the budget of the Committee ... responsible for providing many services to the inmate population." There is no evidence as to what the Inmate Committee's budget was, or how this request was a threat to that budget. Indeed, the evidence that the respondent relies on in this submission, that being the cross-examination of Mr. Larcombe, indicates that the decision-maker may simply not have liked the fact that the applicants had become interested in legal matters. At page 65 of the transcript of Mr. Larcombe's cross-examination, he states:

In the past, the committees began doing a little bit of research and they became ... and then it started to get bigger and grow and grow, and it got to the point in this committee where we had a room full of "wanna-be lawyers" I call them, slang term, but, I mean, they were heavy duty into it.

... it got to the point where it was interfering with the good order of the building and what our mandate was, you know. It wasn't ... they're not dabbling into legal work anymore.

I mean, it comes to a point in time when you're not dabbling and all of a sudden it is ... it is a main priority. And that's when ... that's when this controversial .. when I challenged it. I said, "Whoa, you're out of line."

On the following page, Mr. Larcombe states that he viewed the legal research that the Inmate Committee was conducting as a personal mandate that was a threat to the financial operation of the building.

Were the decisions "reasonable," or made capriciously and without jurisdiction? The above passages seem to indicate capriciousness.

How to decide? On the one hand, there is evidence of numerous purchase orders for legal texts that were approved in the past, and a deposition that the Fund was threatened by additional purchase orders. On the other hand, there is no evidence as to the value of, and hence threat to, the Fund itself. The purchase orders are not placed in any sort of context, and there is evidence from the cross-examination of Mr. Larcombe that could seem to be capricious.

However, given the access to books already available and the evidence of the respondent's concern (albeit with no figures advanced) I feel in balance the applicant has not made its case.

Issue 2: the "cancellation" of Outlook magazine and the Editor's position

The applicants submit that the CSC's decisions had the effect of denying the applicants access to general legal knowledge that might have the collateral effect of imparting on inmates a deeper appreciation of Canadian law, therefore assisting in their rehabilitation and reintegration into society as "law-abiding citizens." The applicants submit that this is contrary to subsection 3(b) of the *Corrections and Conditional Release Act*, R.S.C. 1992, c. C-20 [hereinafter, the *Act*].

The respondent answers that the objective of Outlook magazine, as defined in Standing Order 765, is to "provide structured avenues of self-expression." "Self-expression" requires at least some original work, and does not include mere photocopying of previously published articles.

The applicants submit that they were not provided with an adequate opportunity to contribute in a meaningful way to the decision to cancel the Outlook magazine and Editor's position. The applicants submit that these decisions were thus taken outside of the section 74 "General - Living Conditions" jurisdiction.

The respondent answers that neither the applicant Shortreed, as editor of the magazine, nor anyone else, revised the proposed edition in any way or ever suggested doing so. Nor did any of the applicants grieve the decisions not to approve the proposed issue through the internal grievance system created by the *Act* and Regulations. The respondent further submits that section 74 requires the CSC to provide inmates with an opportunity to contribute only to CSC decisions which relate to the purpose and guiding principles of the correctional system as set out in sections 3 and 4 of the *Act*.

Analysis: The proposed issue of Outlook magazine had no original submissions in it. The photocopying of previously published articles raises copyright concerns. Although the applicants had a laudable objective in assembling the articles for the proposed issue, this objective did not fit in with SO 765 and possibly copyright law. The copyright concerns, alone, would be enough to reject the proposed issue. Had the proposed issue been composed of inmates' review of those articles, rather than the previously published articles themselves, I believe that the CSC's decision would have been different.

The applicants have failed to show that the decisions concerning Outlook magazine and the part-time editorial position were unreasonable in any way. I do not believe that the applicants were denied access to general legal knowledge through the rejection of the proposed issue of Outlook magazine.

On the basis of the above, I believe that the decision not to approve the publication of the proposed issue of Outlook magazine was correct. Neither any Standing Orders nor the requirements of procedural fairness have been violated. There are internal grievance mechanisms to deal with the applicants' concerns, and the applicants availed themselves of none.

In any event, the issue of the cancellation of Outlook magazine and the editorial position is now moot. Publication of Outlook magazine has now resumed, albeit with a new editor.

Issue 3: Alleged confiscation of law books

The applicants submit that the CSC officers had no jurisdiction to search for the books pursuant to subsection 49(1) of the *Act* because there were no reasonable grounds to suspect that the two legal books constituted evidence relating to a disciplinary or criminal offence.

The applicants submit that CSC officers decided that the law books were "contraband," and, on this basis, confiscated them. On the basis of the definition of "contraband" in the *Act*, the applicants submit that the CSC officers made an erroneous finding of fact.

The applicants submit that, furthermore, CSC officers exercised their discretionary power with an ulterior purpose as a result of the stated objection to the conduct of legal research on behalf of the inmate population. In addition, CSC officers failed to issue a subsection 57(a) receipt for the seized items; failed to submit a subparagraph 58(1)(e) and subsection 58(5) post-search reports. Therefore, the CSC officers refused to exercise their jurisdiction.

The respondent answers that there is no evidence that the applicant Shortreed indicated to Mr. Larcombe in any way that he objected to Mr. Larcombe's taking the books to his

supervisor for examination. On this basis, the respondent submits that there was no confiscation, seizure, or interception of the legal texts from the applicant Shortreed.

Analysis: There is no evidence that the applicant Shortreed objected to the officer's actions. In fact, since Mr. Larcombe took the books to get a second opinion, it was actually in the applicant's interest to give the books to Mr. Larcombe. There is no evidence that CSC officers decided that the law books were "contraband," and seized them on that basis. The evidence is that there was a concern over the abuse of photocopying privileges for unauthorized personal use, and the books were examined to see if they were for personal use or for authorized use.

There is no error of fact or jurisdictional error. I see no unreasonableness in Mr. Larcombe's actions. In any event, the issue is now moot, as the books were returned to the applicant within a few days.

CONCLUSION

In applying the principles enunciated in *Timmins Bissonnette*, the first issue is whether the CSC's decision to deny the request for the purchase of legal texts from the Fund was made in accordance with paragraph 97(3)(a) of the Regulations. This provision requires that the CSC shall ensure that every inmate has reasonable access to legal reading materials. So, although the decision is a discretionary one, there must be sufficient justification for it, so that it can be characterized as "reasonable." On the basis of the written evidence and counsel's submissions, I conclude that the decision was reasonable.

Of concern is that the decision may have been made in reaction to growing tension between the Inmate Committee and the CSC over the Inmate Committee's increasing interest in legal matters -- an interest that CSC officers deemed inappropriate, but that's pure speculation on my part. Careful attention must be paid to the evidence of Mr. Larcombe (especially the text of his cross-examination, pages 65-67) to determine the reasonableness of the decision. The decision appears to be reasonable.

The applicants' *Charter* rights, likewise, have not been engaged through the cancellation

of the trial period and proposed issue of Outlook magazine, nor through the cancellation of the position of part-time Editor. These were discretionary decisions well within the purview of CSC officers, who did not act in any reviewable way in making these decisions. It is noteworthy that this magazine is once again being published and distributed, but under different conditions. I therefore, deny the applicants' requests regarding Outlook magazine and the editorial position.

The applicants' *Charter* rights were not engaged by the alleged confiscation of legal reading materials. Nothing was actually "confiscated."

Accordingly, this application regarding the applicants' requests concerning Outlook magazine and its editorial position, as well as the alleged confiscation of the legal texts, are dismissed. Regarding the applicants' requests for declaratory relief from the decision to void the purchase order for legal texts, this application is also dismissed.

OTTAWA, ONTARIO

B. Cullen

July 3, 1997.

J.F.C.C.