

Federal Court



Cour fédérale

Date: 20091123

Docket: T-649-09

Citation: 2009 FC 1201

Ottawa, Ontario, November 23, 2009

**PRESENT:** The Honourable Madam Justice Snider

**BETWEEN:**

**ESMOND JACK YU**

**Applicant**

and

**ATTORNEY GENERAL OF CANADA**

or

**CORRECTIONAL SERVICE OF CANADA**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

**I. Introduction**

[1] Mr. Esmond Jack Yu, the Applicant, is currently serving an indeterminate life sentence in Canada's penitentiary system. He was incarcerated at Matsqui Institution on January 16, 1997. After an incident on November 1, 2007, Mr. Yu was moved from his cell to a segregation unit at Matsqui and, on December 7, 2007, he was transferred to Kent Institution.

[2] Mr. Yu claims that some of his personal belongings never made it to his new home at Kent. On April 9, 2009, Mr. Yu filed an Inmate Claim for Lost or Damaged Property (Inmate Claim) for \$463.11, listing 13 allegedly missing items. His claim followed the established procedures up to a Third Level Grievance considered by a Senior Deputy Commissioner (SDC). Dissatisfied with the results of the decision of his final grievance, Mr. Yu commenced this application for judicial review. In addition to other remedies, Mr. Yu asks this Court to overturn the Third Level Grievance Decision, dated March 11, 2009, in which the Correctional Services Canada (the Service) was found liable for \$198.00.

## **II. Issues**

[3] In my view, this application raises the following issues:

1. What is the appropriate standard of review of the Third Level Grievance Decision?
2. Was the Third Level Grievance Decision made in breach of procedural fairness because copies of certain documents were not provided to Mr. Yu before the decision was made?
3. Was the Third Level Grievance Decision reasonable?
4. Are the remedies sought (*mandamus*, costs, and damages) appropriate in this instance?

[4] For the reasons that follow, I am satisfied that this application should be dismissed.

Accordingly, there is no need to address the final issue listed.

### **III. Background**

#### *A. Procedure followed*

[5] When Mr. Yu was removed from his cell on November 7, in accordance with policy, his cell was locked. His personal effects were removed from the cell about three hours later. At that time, an initial Personal Property (Cell Property Removal) form (CPR) was completed. Once it was determined that Mr. Yu would be transferred to Kent Institution, his belongings were packed by two Correctional Officers and a second or final CPR was completed. As noted, Mr. Yu filed his Inmate Claim on April 8, 2009. Two of the items (a Cord and guitar strings) “resurfaced” and are no longer claimed by Mr. Yu.

#### *B. First Decision*

[6] An official with the Service rendered the first decision (Claim Decision) on July 3, 2008.

The Decision was based on Commissioner’s Directive 566-12 (CD 566-12), which states that the Applicant has responsibility to ensure that his Personal Property Record (PPR) is kept current.

Mr. Yu had not done so and only two items that he claimed were lost had been properly documented on his PPR: a printer and a book with CD. Since the printer was not listed on the final

CPR, the claim was upheld for \$24.00, an approximation of the value of the “Speed Mechanics” book and CD.

C. *Second Level Decision*

[7] Mr. Yu submitted a second level grievance on July 24, 2008.

[8] In the Second Level Grievance Decision dated October 31, 2008, the Assistant Deputy Commissioner Institutional Operations (Assistant Deputy Commissioner) upheld the grievance in part and granted Mr. Yu \$177.06 for his claim, in respect of five items:

- two language learning CDs (\$65.40);
- a long-sleeve black shirt (\$9.99);
- two T-shirts (\$24.99);
- the “Speed Mechanics” book and CD (\$25.39); and
- pants (\$51.29)

[9] Even though the language learning CDs, the black shirt, the t-shirts and the pants were not listed on Mr. Yu's PPR, the Assistant Deputy Commissioner determined that these items were listed on the final CPR. In other words, the Assistant Deputy Commissioner had evidence beyond the PPR that these items had, at the time he was removed from his cell at Matsqui, been in the possession of Mr. Yu. Mr. Yu's claim was denied for the remaining items.

D. *Third Level Grievance*

[10] Mr. Yu submitted a third level grievance on November 10, 2008.

[11] In a decision dated March 11, 2009 (the decision under review in this application), the SDC reviewed each item on the list and, with the exception of one item, denied the claims. The only exception was the claim for the printer. The SDC noted that the printer had been in Mr. Yu's cell when he was moved to segregation:

Although the [printer] does not appear on the CPR form, a thorough analysis into the whereabouts of your printer has revealed that it was in your cell, as a cellular telephone was found hidden it. However, there was no record as to where the printer was stored following the seizure. As it can be determined that the Service was responsible for the safekeeping of your printer and that it cannot be demonstrated that it took all reasonable steps to protect your property, this part of your grievance is upheld.

[12] Mr. Yu's claim for the printer was allowed at \$198, that being the amount that had been listed on Mr. Yu's PPR.

[13] The SDC's reasons for rejecting the other claims fall into three categories:

- (a) For the claim to "clothing-pant", the SDC found that Mr. Yu had not clearly identified the pants and that "it cannot be clearly ascertained which pair of pants you are claiming";
- (b) For the claim to the "Book with Compact Disc – "Speed Mechanics"", the SDC noted that this item was now listed on Mr. Yu's current PPR at Kent. As such, it appears that the Book and the CD were not missing;
- (c) For all of the other items, the SDC rejected the claims on the basis that they were not listed on his PPR from before he was transferred from Matsqui.

#### **IV. Statutory Framework for the Issues**

[14] Mr. Yu claims that his personal effects have been lost by the Service and he has not received adequate compensation. He has gone through the grievance system established and mandated under the *Corrections and Conditional Release Act*, S.C. 1992, c.20 (*CCRA*). Mr. Yu highlights s. 4(g) of *CCRA* where correctional decisions are to "be made in a forthright and fair manner, with access by the offender to an effective grievance procedure".

[15] The *CCRA* stipulates, at ss. 90-91, that a fair and expeditious procedure must exist to resolve offenders' grievances on matters within the jurisdiction of the Commissioner. Every offender must have complete access to the grievance procedure without negative consequences.

[16] The grievance procedure that Mr. Yu went through, from the original claim, to the Second Level Grievance and finally the Third Level Grievance, all correspond with ss. 74-80 of the *Corrections and Conditional Release Regulations, SOR/92-620 (CCRR)*. At each level of grievance, Mr. Yu's claims are assessed *de novo*. In this case, that means that the SDC was not in any way constrained by the determinations at the Second Level Grievance.

[17] Mr. Yu argues that, under s. 84 of *CCRR*, the institutional head must take all reasonable steps to ensure that his property within the penitentiary is protected from loss or damage.

[18] Mr. Yu also raises the Service's liability under *Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50 (CLPA)*. Under s. 3(b), the Crown is liable for damages in any Canadian province for a tort committed by a servant of the Crown, or for a breach of duty attaching to the ownership, occupation, possession or control of property.

[19] An issue raised by Mr. Yu is that essential documents were not provided to him prior to the decision on March 11, 2009. Under s. 27(1) of *CCRA*, the offender, Mr. Yu, is entitled to make representations, and the administrative body is mandated to give him all information to be considered in the decision-making process. This is to be done within a reasonable period before the

decision is to be made. The parties agree that Mr. Yu was not given a copy of the CPR until after the Third Level Grievance Decision was made.

V. **Analysis**

A. *Standard of Review*

[20] The first task of the Court is to establish an appropriate standard of review of for the Third Level Grievance Decision. Justice Mosley in *Johnson v. Canada (AG)*, 2008 FC 1357, 337 F.T.R. 306 at paragraphs. 35-39 examined the standard of review on decisions made at hearings conducted under *CCRA*. Correctness is applied to issues of procedural fairness (*Johnson*, at para. 36). The standard of reasonableness is applied on decisions of whether the Service properly compensated the Applicant for the destruction or loss of items (*Johnson*, at paras. 38-39).

[21] The argument that the SDC did not provide Mr. Yu with relevant documents prior to the decision is a question of procedural fairness. This should be reviewed on a standard of correctness.

[22] The issue of whether the compensation was adequate is reviewable on a standard of reasonableness. According to the Supreme Court in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraph 47, the Court should not intervene unless decisions are outside the realm of reasonable outcomes, and they are not intelligible, not supported by evidence, or not defensible in law and on the facts.



B. *Breach of Procedural Fairness*

[23] It is acknowledged by the Respondent that Mr. Yu was not provided with a copy of the CPR prior to the Third Level Grievance Decision.

[24] Mr. Yu argues that the Service breached the duty of fair procedure by not disclosing relevant and essential documents used in the decision-making process. Mr. Yu relies on *Lee v. Canada (Deputy Commissioner, Correctional Service, Pacific Region)*, [1994] F.C. 15, [1993] F.C.J. No. 759 at paragraph 21 and *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809 at paragraphs 92-94. These cases stand for the proposition that failure to disclose relevant information relied upon by the decision-maker is a reviewable error.

[25] According to Mr. Yu, because the documents were revealed after the decision was made, he was denied the opportunity to fully challenge the legality, validity and accuracy of the documents. Having now seen the document in question, Mr. Yu argues that the drafting of the CPR violated the Service's Policy CD 566-12 (para. 74), which stipulates that CPR forms are to be filled out by two correctional officers. Mr. Yu also raises inaccuracies in the CPR forms. In Mr. Yu's submission, the disclosure of these documents would have allowed him to challenge their accuracy and validity, thus resulting in a different decision by the SDC.

[26] The Respondent submits that the late disclosure of any documents does not amount to a breach of procedural fairness.

[27] The Respondent relies on *Sweet v. Canada (AG)*, 2005 FCA 51, 332 N.R. 87 at paragraphs 31-40 to argue that the level of procedural fairness is low in the context of an inmate's claim at a Third Level Grievance decision. I agree that the prison context calls for a lower degree of procedural fairness as set out by the Federal Court of Appeal in *Sweet* (at para. 34). It may also be true that the rules of disclosure in an administrative context within the prison system are not as high as they are in criminal proceedings (*May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809, at para. 91). However, the Supreme Court in *May*, at paragraph 92, was clear in stating that there is a legal duty to provide relevant documents in the prison context.

[28] I am satisfied that there was a breach of procedural fairness by the failure to provide timely disclosure of the CPR to Mr. Yu. However, where a Court is satisfied that there is no prejudice from the non-disclosure of a document or that the breach was inconsequential, the Court need not intervene (see *Uniboard Surfaces Inc. v. Kronotex Fussboden GmbH and Co.*, 2006 FCA 398, [2007] 4 F.C.R. 101, at paras. 17-24 and *Yang v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 158, 324 F.T.R. 22, at para. 29 aff'd by *Yang v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 281, 380 N.R. 387, at paras. 14-15). As stated by Justice Décary in *Uniboard*, at paragraph 22:

. . .where the breach of the duty of procedural fairness consists of a failure to disclose some evidence, as a general rule the court, in the exercise of its discretion, will intervene if the court is in no position to determine whether the breach might have worked to the disadvantage of the complainant. Conversely, as a general rule, where the court has before it the evidence which was not disclosed at the hearing before the tribunal, and where the court is satisfied that it is in a position to conclude that there was no prejudice and no possibility or likelihood of prejudice, the court will not intervene.

[29] In my view, the facts of this case fall squarely within the exception described by Justice Décary.

[30] The SDC's decision, with respect to all of the claimed items, was based completely on the PPR. Although reference is made to the CPR, this document was not relied on in the final determinations for each claimed item. Accordingly, I am satisfied that there was no prejudice and no possibility or likelihood of prejudice caused by the failure to disclose the CPR. In other words, there is no way in which the decision would be any different because of the disclosure of the CPR. Any alleged irregularities in the execution of the CPR are simply not relevant.

[31] Accordingly, in spite of the breach of duty of procedural fairness, I will not overturn the decision on this basis.

C. *Reasonableness of Decision*

[32] Mr. Yu submits that the Third Level Grievance Decision was wrong for a number of reasons. In general terms, Mr. Yu objects to the refusal by the SDC of most of his claims simply because they were not included on his PPR. In Mr. Yu's opinion, the SDC was obliged to consider his other evidence – such as receipts and other explanations offered by him – in assessing his claim. He also asserts that the duty of completing and keeping the PPR current rests with the Service. Finally, he claims that the \$198 for the printer should have included an amount for sales tax.

[33] There is no question that there was a duty on the Service's staff to take proper care of an inmate's effects when he is transferred, either internally or from one institution to another. This is seen in s. 84 of *CCRR*, in the Commissioner's Directives pointed out by Mr. Yu and the Respondent. However, this duty can only assist where there has been an accurate listing of the inmate's property before any such transfer. This is where the PPR becomes critical. If an item is not described in the PPR, how can it be ascertained that a claimed item or an item removed from the cell was actually the property of the inmate? As noted by the SDC, "The Service could not be responsible to protect your property when it was not aware the said property was in your effects."

[34] In this case, the SDC was not unreasonable in finding that Mr. Yu had a responsibility to make sure that his PPR was updated. Mr. Yu had not done so. Thus, it was not unreasonable for the SDC to find that it cannot be verified whether the items were in Mr. Yu's cell or not at the time he was segregated. Mr. Yu's responsibility is clearly set out in two Commissioner's Directives – CD090 (para. 9) and CD566-12 (para. 16).

[35] Moreover, the receipts presented by Mr. Yu are not entirely helpful. While the receipts show that Mr. Yu purchased items during his time in prison, they do not prove whether these items remained in his possession. The SDC considered the receipts and found that some were "unclear and confusing".

[36] Finally, Mr. Yu argues that the printer should have received a valuation of \$225.72, to include applicable sales taxes. The printer was listed on Mr. Yu's PPR for an amount of \$198. Having determined that the printer claim was to be allowed, the SDC applied Commissioner's

Directive 234, paragraph 39. Pursuant to this Directive Mr. Yu was to be compensated on the lesser of the amount claimed (in this case, \$225.72) and the value assigned to the item on his PPR (in this case \$198). I see no error in the SDC's application of the Directive, CD 234, in determining that Mr. Yu should be compensated in the amount of \$198 for the printer.

[37] In sum, I am satisfied that the Third Level Grievance Decision was reasonable

## **VI. Conclusion**

[38] For the reasons above, I will dismiss the application for judicial review. The Respondent seeks costs in this matter. As noted above, there was a breach of procedural fairness by the Respondent in the processing of Mr. Yu's claim, albeit not a breach that warrants this Court's intervention. In the circumstances, I believe it fair and just to award no costs to either party.

**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES that**

1. The application for judicial review is dismissed.
2. No costs are awarded.

“Judith A. Snider”

---

Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-649-09

**STYLE OF CAUSE:** Esmond Jack Yu  
v. The Attorney General of Canada et al

**PLACE OF HEARING:** Vancouver, British Columbia  
(held by way of conference call)

**DATE OF HEARING:** November 4, 2009

**REASONS FOR JUDGMENT  
AND JUDGMENT:** SNIDER J.

**DATED:** November 23, 2009

**APPEARANCES:**

Esmond Jack Yu  
(on his own behalf)

FOR THE APPLICANT

Mr. François Paradis

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

n/a

APPLICANT SELF-REPRESENTED

John H. Sims, Q.C.  
Deputy Attorney General of Canada  
Vancouver, B.C.

FOR THE RESPONDENT