Federal Court Cour fédérale

Date: 20091023

Dockets: T-533-08
T-1017-08

Citation: 2009 FC 1071

Ottawa, Ontario, October 23, 2009

PRESENT: The Honourable Mr. Justice Martineau

Docket: T-533-08

BETWEEN:

PATRICK MERCIER

Applicant

and

CORRECTIONAL SERVICE OF CANADA
(represented by the Attorney General of Canada)
and
ATTORNEY GENERAL OF CANADA

Respondents

Docket: T-1017-08

AND BETWEEN:

STÉPHANE LINTEAU
JEAN-PIERRE DUCLOS
PIERRE THÉRIAULT
RAYMOND LANDRY
GÉRALD MATTICKS
DENIS THIBAULT
JEAN RAUZON
REGIS LABBEE
RICHARD DION
DANIEL PATRY
DANIEL LÉVESQUE
CLAUDE RANGER
JEAN DESCHÊNES
GAÉTAN ST-GERMAIN

STÉPHANE FORTIN
FRANÇOIS LANDCOP
BENOIT GUIMOND
PATRICK ROCHEFORT
DANIEL DUSSEAULT

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants, all inmates in federal correctional institutions (penitentiaries) at the time these proceedings for judicial review were instituted, are challenging the legality of Directive No. 259 – Exposure to Second-Hand Smoke, issued by the Commissioner of the Correctional Service of Canada (CSC) under the purported authority of sections 97 and 98 of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (Act) and published on May 5, 2008 (New Directive 259).

[2] New Directive 259 prohibits smoking and the possession of smoking items within the perimeter of federal penitentiaries, including Community Correctional Centres (CCCs), with the exception of tobacco and ignition sources necessary for Aboriginal religious and spiritual practices in individual cells, rooms and groups to the extent safely possible (religious exception).

[3] It should be noted that in order to address the problem of second-hand smoke in penitentiaries, a smoking ban in all CSC buildings was instituted on January 31, 2006. Smoking was not completely banned and inmates were still permitted to smoke in outdoor areas (Commissioner's Directive No. 259 – former version).

[4] Today, the applicants, who cannot avail themselves of the religious exception, are asking the Court to declare New Directive 259 void, unconstitutional or unreasonable, in whole or in part.

[5] The respondents, the Attorney General of Canada and the CSC, oppose the present application.

[6] The application is allowed for the following reasons.

[7] The means of administrative law raised by the applicants are determinative in this case.

[8] Given that this involves the exercise of broad powers of prescription delegated by Parliament to the Commissioner, significantly affecting the conditions of detention and the lives of offenders serving sentences in a penitentiary, the legality of any rule or directive covered by sections 97 and 98 of the Act is subject to the respect for fundamental principles referred to in sections 3 and 4 of the Act.

[9] In fact, whether it is a right or a privilege, even while in detention, offenders retain the rights and privileges of all members of society, except those rights and privileges that are necessarily removed or restricted as a consequence of the sentence, as set out in paragraph 4(e) of the Act.

[10] Furthermore, even though section 70 of the Act allows the CSC to take all reasonable steps to ensure that the living and working conditions of the inmates and the working conditions of staff members are safe and healthful, paragraph 4(d) of the Act stipulates that the least restrictive measures be used.

[11] In this case, no one is contesting the fact that second-hand smoke is harmful to the health of others.

[12] In addition, improving the health and well-being of inmates and officers could certainly justify removing the right or privilege of smoking inside the facilities, including cells: *Boucher v. Canada (Attorney General)*, 2007 FC 893.

[13] Nevertheless, according to the evidence in the record, smoking outdoors poses no risk to the health of others.

[14] In this case, according to the evidence in the record, there is no rational link between prohibiting inmates from smoking outside of CSC facilities and the right of non-smokers to not be exposed to second-hand smoke.

[15] In our free and democratic society, no blanket ban on smoking or possessing tobacco or smoking items has ever been enacted by Parliament in order to protect the health of non-smokers from exposure to second-hand smoke.

[16] Where the *Non-smokers' Health Act*, R.S.C. 1985, c. 15 (4th Supp.) (NSHA) applies, the smoking ban for citizens – employees, visitors, passers-by – is limited to areas inside of federal buildings or directly outside of the said buildings.

[17] Moreover, there is no safety requirement to prohibit inmates from smoking outside of buildings within the perimeter of penitentiaries. In fact, this was the situation that existed prior to New Directive 259 coming into effect.

[18] The possession of tobacco and smoking items is not prohibited by the Act.

[19] Additionally, expressly excluded from the definition of ''intoxicant'' as described in subsection 2(1) of the Act are caffeine and nicotine, which means that tobacco products do not fall under the definition of "contraband", which includes ''intoxicants'' as well as ''any

item . . . that could jeopardize the security of a penitentiary or the safety of persons, when that item is possessed without prior authorization’’.

[20] New Directive 259 simply goes too far.

[21] A total ban on smoking both inside and outside of CSC buildings is at odds with the Act, as well as being unjustifiable and unreasonable under the circumstances.

[22] For many years inmates and correctional officers were free to smoke in outdoor areas, within the security perimeters of penitentiaries. In fact, correctional staff are still permitted to smoke on penitentiary premises, that is, in areas on CSC property to which the inmates do not have access (for example, the parking lot of an institution).

[23] In light of the evidence in the record, I am not satisfied that past difficulties or anticipated future problems in enforcing the indoor smoking ban by correctional authorities allow the Commissioner to now prohibit smoking outdoors.

[24] The respondents, for their part, argued forcefully that the only way to eliminate second-hand smoke indoors was to eliminate the source itself. In the Court’s view, this is not a very convincing argument.

[25] On the one hand, inmates who are eligible for the religious exemption continue to have the right to smoke and possess certain smoking items.

[26] On the other hand, almost 75% of inmates are smokers, which creates a significant internal demand for a product that is sold legally outside of penitentiaries.

[27] Of course, the removal or restriction of the right or privilege of smoking enjoyed by all members of society is not a necessary consequence of the sentences served by inmates in penitentiaries.

[28] Practically speaking, if the administrative inconveniences are taken into account, the blanket ban on smoking or possessing smoking items simply means that extra control measures (the effectiveness of which remains doubtful and yet to be demonstrated to the Court), must now be implemented by correctional authorities to stamp out the contraband of cigarettes and tobacco products that continue to be sold legally outside of penitentiaries and which are easily available to any ordinary citizen.

[29] The fact remains that if an ordinary citizen is caught smoking inside a federal building in violation of the NSHA or its statutory regulations, that person is committing an offence and liable to pay a fine if found guilty.

[30] For offenders serving time in penitentiaries, the deliberate violation of a written regulation governing the conduct of inmates, which may include violating the indoor smoking ban, constitutes a disciplinary offence, rendering an inmate who is found guilty of such an offence liable to one or more of the following:

a) a warning or reprimand;

b) a loss of privileges;

c) an order to make restitution;

d) a fine;

e) performance of extra duties; and

f) in the case of a serious disciplinary offence, segregation from other inmates for a maximum of thirty days.

A fine or restitution may be collected in the prescribed manner (see sections 40 to 44 of the Act).

[31] It must be remembered that the disciplinary system established by sections 40 to 44 of the Act and regulations is a proven system which respects the rule of law and seeks to encourage inmates to conduct themselves in a manner that promotes the good order of the penitentiary, through a process that contributes to the inmates' rehabilitation and successful reintegration into the community (section 38 of the Act).

[32] As can be seen, the current disciplinary system allows for different levels of punishment, depending on the seriousness of the offence, in keeping with promoting the good order of the penitentiary.

[33] Measures necessary to protect non-smokers from exposure to second-hand smoke in penitentiaries should be the least restrictive possible.

[34] In this case, considering the stated purpose of the correctional system and its guiding principles set out in sections 3 and 4 of the Act, the evidence in the record does not allow the Court to conclude that the outdoor smoking ban is a preventive measure that can be justified in an objective and rational way by the Commissioner and correctional authorities, who have full authority under the Act and the *Corrections and Conditional Release Regulations*, SOR/92-620, to enforce the indoor smoking ban in federal buildings under their authority.

[35] Having weighed the evidence and arguments submitted by the parties, I find that the applicants are entitled to a declaratory judgment ruling that prohibiting inmates from smoking outdoors within the perimeter of penitentiaries, including CCCs, is null, void, and contrary to the Act. The Commissioner's New Directive 259 is declared invalid to the extent that a complete ban on smoking and possessing tobacco and smoking items is contrary to the Act and to this judgment.

[36] Given this conclusion, it is not necessary to rule on the scope and application of sections 7, 12 and 15 of the *Canadian Charter of Rights and Freedoms* subsidiarily raised in this case by the applicants.

[37] In the event that the Court should issue a declaration of invalidity, as is the case here, the representatives of the Attorney General of Canada have requested that the Court suspend the effect of any such declaration so as to allow the Commissioner to review the policy on second-hand smoke and make the appropriate changes to the invalidated directive so that it complies with the Act and the Court's judgment. A period of 90 days from the Court's final judgment seems reasonable under the circumstances.

[38] Given the result, the applicants will be entitled to costs.

JUDGMENT

IT IS DECLARED, ORDERED AND ADJUDGED THAT:

1. The application is allowed;

2. Prohibiting inmates from smoking outdoors within the perimeter of penitentiaries, including CCCs, is null, void, and contrary to the *Corrections and Conditional Release Act* (Act). Directive No. 259 – Exposure to Second-Hand Smoke, issued by the Commissioner of the Correctional Service of Canada and published on May 5, 2008, is invalid to the extent that a complete ban on smoking and possessing tobacco and smoking items is contrary to the Act and to this judgment;

3. The effect of the declaration mentioned in the preceding paragraph is suspended for a period of 90 days following the final judgment of the Court; and

4. The applicants are entitled to costs.

‘‘Luc Martineau’’

Judge

Certified true translation

Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-533-08
STYLE OF CAUSE:	**PATRICK MERCIER** **v. CORRECTIONAL SERVICE OF CANADA** (represented by the Attorney General of Canada) **and** **ATTORNEY GENERAL OF CANADA**
DOCKET:	T-1017-08
	STÉPHANE LINTEAU **JEAN-PIERRE DUCLOS** **PIERRE THÉRIAULT** **RAYMOND LANDRY** **GÉRALD MATTICKS** **DENIS THIBAULT** **JEAN RAUZON** **REGIS LABBEE** **RICHARD DION** **DANIEL PATRY** **DANIEL LÉVESQUE** **CLAUDE RANGER** **JEAN DESCHÊNES** **GAÉTAN ST-GERMAIN** **STÉPHANE FORTIN** **FRANÇOIS LANDCOP** **BENOIT GUIMOND** **PATRICK ROCHEFORT** **DANIEL DUSSEAULT** **v.** **ATTORNEY GENERAL OF CANADA**
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	October 14, 2009
REASONS FOR JUDGMENT AND JUDGMENT:	MARTINEAU J.

DATED: October 23, 2009

APPEARANCES:

Julius H. Grey Isabelle Turgeon	FOR THE APPLICANTS
Marc Ribeiro Eric Lafrenière	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Grey Casgrain Montréal, Quebec	FOR THE APPLICANTS
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENTS