

Federal Court



Cour fédérale

Date: 20100827

Docket: T-388-10

Citation: 2010 FC 856

Vancouver, British Columbia, August 27, 2010

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

KEN MACKAY

Applicant

and

**ATTORNEY GENERAL
OF CANADA**

Respondent

REASONS FOR ORDER AND ORDER

[1] “Don’t make a federal case out of it!” means “don’t make a mountain out of a molehill” or don’t make a “big deal” of a small matter.

[2] At issue in this Federal Court case is whether a \$20 thesaurus is a book subject to the \$1,500 limit on personal property penitentiary inmates may retain in their cells, or an educational text book or supply. If the latter, it is exempt from that limitation.

[3] Mr. Mackay, who is serving a life sentence at the Mountain Institution, submitted a purchase order for an Oxford paperback thesaurus at a total cost of \$23.14. The form gave him a choice of characterizing the purchase as either “personal” or “hobby”. He checked the “personal” box.

[4] His request was denied in stages. The point first taken was that the purchase would bring him over the \$1,500 personal limit. However, after it was confirmed that he was enrolled in a program, the National Sex Offender Maintenance Program, his request was still denied because “as per letter from Programs Department, this item is not ‘required’ for your program as the institution has copies which can be lent out.”

[5] He then went through the first, second, and finally the third level of grievance as contemplated by the *Corrections and Conditional Release Act* and *Regulations*, all to no avail. This is a judicial review of the Offender Grievance Response, third level.

[6] In his affidavit filed in support of his application for judicial review, Mr. Mackay, who was not cross-examined, stated he needed the thesaurus “to assist me in my quest to further my English and be able [to] write notes in it and mark as I need it as a personal text.” He also stated he was engaged in the National Sex Offender Maintenance Program and the thesaurus would aid him in writing his logs and maintenance writings. Although thesauruses were available in the library, there were time limits on loans as well as prohibitions on marking the text.

I. The Decisions

[7] At the first level grievance, Mr. Mackay was informed that if he removed some of his effects to bring him under the \$1500 limit his request for the purchase of a thesaurus would have been approved.

[8] At the second level, Mr. Mackay emphasized that the thesaurus was educational and therefore exempt from the \$1500 limit. His request was denied as an item cannot be characterized as educational material “unless it is specifically required for a program in which you are enrolled.” Although it was stated that improving Mr. Mackay’s education was a commendable goal, it was reiterated that copies were available to borrow or that he could purchase a thesaurus and have it in his cell if he reduced the value of his other personal effects.

[9] The third level grievance response is to the same effect. It was again noted that he was registered in the National Sex Offender Maintenance Program. By referring to earlier correspondence, the decision maker, a senior deputy commissioner, stated that if Mr. Mackay thought he needed a thesaurus he could sign one out. A thesaurus was not required for the course itself. He went on to say:

A book [is] not considered a part of the fifteen hundred dollar (\$1500.00) limit, if it is deemed to be an “educational textbook” under paragraph 25 of CD 566-12, which states:

Health care items (including medical bracelets) as well as religious, spiritual or cultural articles, educational textbooks or supplies, and arts and crafts raw materials should be allowed...

It has been found that a Thesaurus is included under paragraph 20(j) of CD 566-12 which states:

Inmates will normally be allowed to retain personal property items in their cells which fall within the following categories, in accordance with the National Lists of Personal Property:

j. books and magazines (in accordance with CD 764 – Access to Material and Live Entertainment and CD – 345 Fire Safety);

Therefore, a Thesaurus is not considered to be an educational text and, as such, it will not be exempt from the limit imposed by paragraph 26 of CD 566-12.

II. Standard of Review

[10] As established by the Supreme Court in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, there are two standards against which decisions of federal boards or tribunals are to be assessed: correctness and reasonableness. Questions of fact, or mixed questions of fact and law, are assessed on a reasonableness standard. Although questions of law are usually assessed on a correctness standard, we are called upon here to interpret a Commissioner's Directive. *Dunsmuir*, and some other cases which preceded it, state that some discretion should be given to a decision-maker interpreting his or her home statute. However, as I find the decision unreasonable, I need not delve into this issue further.

[11] The Attorney General submits that the decision was discretionary, was fair, and was made in good faith. Certainly Mr. Mackay was given a fair opportunity to make his case, there is no suggestion of bad faith, and there is some discretion as personal purchases of exempt items must

nevertheless be approved by the Deputy Warden or a delegate not below the Assistant Warden level. In this case, there is no suggestion that a thesaurus is inappropriate, a fire hazard, or would put the safety of staff, inmates and the public at risk in any way.

III. Discussion

[12] Why was the thesaurus not considered an educational textbook? Without doubt it is educational. Nor was the refusal based on a narrow interpretation of “textbook” as opposed to “reference book”. Although in common parlance one might consider a thesaurus, like a dictionary, to be a reference book, and not a textbook in the sense of, say, A.V. Dicey’s *Introduction to the Law of the Constitution*, the French version of the exemption speaks of “les manuels ou fournitures scolaires”. “Manuel” is defined in *Le Petit Robert de la langue française*, CD-ROM, (Paris: Dictionnaires Le Robert/VEUF, 2001), as: “Ouvrage didactique présentant, sous un format maniable, les notions essentielles d’une science, d’une technique, *et spécialement* les connaissances exigées par les programmes scolaires.” In accordance with the intent of the regulation, which also exempts “hobby” material from the \$1,500 limitation, the purpose of a thesaurus is to instruct Mr. Mackay on and help him improve his written communication skills in English, and as such it certainly is a “manuel”.

[13] Nowhere is it stated in the Commissioner’s Directive that an educational textbook or supply is one required for a course offered at the penitentiary or a continuing education course by correspondence approved by the penitentiary.

[14] Unfortunately, “educational textbooks or supplies” are in no way defined. Nowhere is it stated that Mr. Mackay is not allowed to educate himself, that an educational textbook is one required in a course, or if otherwise an educational textbook, it loses that status because copies are available in the library.

[15] According to *Roget’s International Thesaurus*, 6th ed., Mr. Roget’s first edition in 1852 was titled *Thesaurus of English words and phrases, classified and arranged so as to facilitate the expression of ideas and assist in literary composition*. A thesaurus groups words according to their ideas, rather than a dictionary which lists them alphabetically. A thesaurus must be treated the same way as a dictionary. Either they are both educational textbooks or supplies, or they are not.

[16] As for Mr. Mackay wishing to have his own copy, this is what Justice Scalia of the United States Supreme Court and Bryan Garner, Editor in Chief of *Black’s Law Dictionary*, say in their book *Making Your Case: The Art of Persuading Judges*, (St. Paul: Thomson/West, 2008) at page 64:

Sometimes good writers find themselves struggling for a word that says what they want to express more precisely, or that has a more desirable tone or connotation – what we would call (but you should not call in your brief, because it is too pretentious) le *mot juste*. For this purpose, an indispensable reference book is a thesaurus, which gives synonyms for everything. The oldest and most commonly used is *Roget’s Thesaurus* (available in many editions and many formats). It should be on your shelf and should soon be dog-eared.

[My emphasis.]

[17] I have no doubt but that a thesaurus is an educational textbook or supply.

[18] The Attorney General submits that the decision was discretionary, made in good faith and was within the range of reasonable outcomes contemplated in *Dunsmuir*.

[19] I am not questioning the good faith of Corrections Canada. If there is some discretion, it is limited by the language of the directive itself. Corrections Canada is simply reading into the text things that aren't there. Words have an objective meaning. Perhaps, given a prison must be tightly regulated, and inmates study intensely each word and each line of a directive, the Commissioner should have defined "educational textbooks and supplies". However, he did not.

[20] According to Lewis Carroll, "[w]hen *I* use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean -- neither more nor less.' 'The question is,' said Alice, 'whether you *can* make words mean so many different things.' 'The question is,' said Humpty Dumpty, 'which is to be master -- that's all.' In this Court, Humpty Dumpty falls. In my opinion, the decision was unreasonable. A thesaurus does not lose its educational textbook or supply status and become a mere book because it is not required reading in a course offered by or approved by the institution, or because a copy is available in the library.

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that:

1. The application for judicial review is granted.
2. The matter is referred to a new decision-maker at the third level of grievance to be dealt with accordingly.
3. Mr. Mackay is awarded costs of \$200.

“Sean Harrington”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-388-10

STYLE OF CAUSE: MACKAY v. AGC

PLACE OF HEARING: Vancouver, BC
(By way of videoconference)

DATE OF HEARING: August 24, 2010

**REASONS FOR ORDER
AND ORDER:** HARRINGTON, J.

DATED: August 27, 2010

APPEARANCES:

Ken Mackay FOR THE APPLICANT
(self-represented)

Edward Burnet FOR THE RESPONDENT
Karen Choy

SOLICITORS OF RECORD:

n/a FOR THE APPLICANT
(self-represented)

Myles J. Kirvan FOR THE RESPONDENT
Deputy Attorney General of Canada
Vancouver, BC