Federal Court  Cour fédérale

Date: 20110429

Docket: T-1300-10

Citation: 2011 FC 502

Ottawa, Ontario, April 29, 2011

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

MICHAEL AARON SPIDEL

Applicant

and

CANADA (ATTORNEY GENERAL)

Respondent

REASONS FOR ORDER AND ORDER

[1] Mike Spidel is a "lifer". He is acutely aware of his rights, or what he considers his rights, and is quick to assert them. He is the applicant or plaintiff in 11 matters filed in this Court within the last three years. Some times he is right, sometimes he is not. In this particular case, although his application is being dismissed, he is partly right and partly wrong.

[2] This dispute began in May 2009 when Mr. Spidel was serving as secretary of the Inmate Committee at the Ferndale Institution. The inmates, or certainly a number of them, were unhappy

with the administration of a contract the Inmate Committee had entered into with Correctional Service of Canada in 2005 with respect to the canteen.

[3] Both the president of the committee, Warren McDougall, and Mr. Spidel, drafted Bulletins which required approval before distribution. Mr. McDougall's was approved, and is not to be found in the tribunal record. Mr. Spidel's was not.

[4] The draft Bulletin, which is only one page in length, states that "in 2005 the Ferndale inmates "bought" the Canteen." The problem, according to Mr. Spidel, was that they were unduly restricted in what they could purchase: "we still can't get protein powder or simple food stuffs or meats".

[5] He added:

> So you see we bought their product, relieved them of all their costs, a bunch of their time and most of their responsibilities and got **nothing** in return. Zilch!!!

[6] Two solutions were suggested, one was hiring a lawyer, and another was to throw up the contract.

[7] After the first refusal, the draft then went to the warden who returned it with the following comments: ""Bought" the Canteen" was circled and the comment "bought the stock" was added. He concluded: "inaccurate", "inciteful", "not approved". In reality, it is the warden's decision which is being reviewed.

[8] Mr. Spidel pursued the matter, unsuccessfully, through the second and third grievance levels and now here by way of judicial review. This grievance, which is on behalf of the Inmates Committee, spun other grievances which will be dealt with later on in these reasons. In essence, the grievance is that Mr. Spidel has been denied the right to express himself freely, a right recognized and guaranteed in our Constitution.

[9] Article 2(b) of the *Canadian Charter of Rights and Freedoms* provides:

2. Everyone has the following fundamental freedoms:	2. Chacun a les libertés fondamentales suivantes :
[…]	…
(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;	*b)* liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication;
[…]	…

[10] This freedom is contextual. No one has the right to yell “fire” in a crowded theatre or, for example, in civil law, to make fraudulent or negligent misstatements or to defame someone, without repercussions.

[11] In addition, Charter rights are restricted by article 1 which provides:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits	1. La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de

prescribed by law as can be demonstrably justified in a free and democratic society.	droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

[12] The whole premise of the respondent's position is set out in the *Offender Grievance Response at the Second Level*. It reads:

> The Inmate Committee Bulletin prepared by you provided information regarding the Inmate Canteen. Unfortunately, the Bulletin did not accurately describe the circumstances surrounding the canteen and the information was not suitable for sharing with others. The Warden asked that changes be made. You were not denied the opportunity to present a Bulletin, rather you were asked to word your submission in an appropriate and accurate manner.
>
> As there is no information to support that the rights of the Ferndale Institution Inmate Committee were violated, your grievance is denied.

[13] There is no evidence that the warden asked Mr. Spidel to re-draft the Bulletin. The fact of the matter is, however, as clearly stated by Mr. Spidel throughout the grievance process, he did resubmit the Bulletin. He deleted the comment ""bought" the Canteen" and said the inmates "got nothing worthwhile in return". He also deleted "Zilch!!!"

[14] Although this revised draft Bulletin is in the tribunal record, the respondent is at a loss to explain why no response thereto was ever given to Mr. Spidel. Therefore, Mr. Spidel took the position, not unsurprisingly, that freedom of expression was denied him either because there is no policy that a draft bulletin may be revised, or that his rights were denied because he was ignored. This led me to surmise during the hearing that the dispute before me may actually be moot.

Nevertheless, since whatever policy there may be with respect to revising drafts in order to obtain approval is not written, I consider it appropriate to deal with the matter.

ISSUES

[15] The first issue is whether the refusal to approve Mr. Spidel's first bulletin infringed his right of freedom of expression. If so, we must select an appropriate remedy.

[16] The second issue is what is to be done with Mr. Spidel's revised bulletin. Should the authorities be ordered to make a decision?

[17] Finally, there are a number of points which are essentially procedural. Nevertheless, I realize they are important to a person in Mr. Spidel's situation. After his first draft bulletin was rejected, he filed a separate grievance with respect to the use of the word "inciteful" by the warden. The first grievance was on behalf of the Inmate Committee, the second was personal. He wants any reference to "inciteful" struck from his record, as it may jeopardize his chances to one day be granted day parole. He characterized both grievances as relating to charter rights. The authorities reclassified them and joined them as one. They were then separated and classified as suggested by Mr. Spidel at the second grievance level, but then again treated as one at the third level.

THE FIRST BULLETIN

[18] It is common ground that following the decision of the Supreme Court in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, the standard of review on findings of fact and discretionary decisions is that of reasonableness.

[19] It is certainly reasonably arguable that the warden was correct in considering the bulletin to be inaccurate. Mr. Spidel takes the position that inaccuracy should be considered separately from incitefulness and that he has the right to state something which may be inaccurate. Although for the purpose of analysis the two terms have to be considered separately, it is their overall effect which counts. Something might be inaccurate, but not inciteful, or accurate but inciteful.

[20] The warden's decision that the bulletin was inaccurate is a reasonable one. He may have been a little picky in objecting to ""bought" the Canteen" rather than "bought the stock". The contract certainly makes it clear that it was the management and property of canteens which was transferred. Nevertheless, the heading of the memorandum of understanding states "Inmate owned and operated canteen…"

[21] The memorandum of understanding goes on to provide, among other things, that there would be no changes to the then current Material Management purchasing policies and regulations. Thus the complaint that the inmates could not purchase protein powder or other food stuffs does not appear to be attributable to a breach of contract on the part of the Correctional Service.

[22] I suggested to Mr. Spidel that rather than frame this issue as one of freedom of expression, if the Inmate Committee was of the view that Correctional Service was in breach of contract, then they should either grieve or sue, as was done in *Frontenac Institution Inmate Committee v. Canada (Corrections Services)*, 2004 FC 580, [2004] FCJ No 703 (QL).

[23] Mr. Spidel informed me that the chair of the Committee, Warren McDougall, did just that and was unsuccessful through to the third level grievance. He did not seek judicial review.

[24] As to the Bulletin being inciteful, Mr. Spidel considers that he was accused of calling the inmates to arms. I suggested that "inciteful" is not necessarily a call for physical violence. The *Canadian Oxford Dictionary* defines "insight" as "to urge or stir up" coming from the French "inciter" which in turn comes from the Latin "citare" meaning to arose. Perhaps a better word could have been selected. However, in any event, I cannot read the warden's comment as meaning that Mr. Spidel was personally inciteful. I read his comment as meaning that the Bulletin was inciteful.

[25] In my opinion, the warden's determination that the draft bulletin was "inciteful" was not unreasonable. Prison life is, and must be, tightly controlled. In one sense, the warden, as the head of Ferndale Institution, may be considered the publisher, and need not publish what he does not approve. In Robert J. Sharpe and K. Roach, *The Charter of Rights and Freedoms,* 4th edition (Toronto: Irwin Law, 2009), at page 177, dealing with the location of the expression, the authors say:

> For those who lack the resources to place their message in newspapers or broadcast media, expressing oneself in a public place may be essential if the message is to find an audience.

In this case, Mr. Spidel lacked the resources.

[26] In my opinion, the warden's decision not to permit publication of the Bulletin did not limit Mr. Spidel's freedom of expression. Surely there is a distinction between freedom to express one's

thoughts and the freedom to publish. In this particular case, Mr. Spidel lacked the wherewithal to publish. Mr. Spidel had no constitutional right to require the institution to publish his thoughts.

[27] However, if I am wrong in my analysis, and the decision not to distribute the Bulletin did limit Mr. Spidel's freedom of expression, I find that the decision was justifiable under section 1 of the Charter. The test for deciding whether a limit is justified was set up by the Supreme Court in *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200. The burden falls upon the government to establish that the action addressed a pressing and substantial objective and that the limitation was proportional having regard to rational connection, minimal impairment, and the balancing of effects. The leading case dealing with the freedom of expression is *Irwin Toy Ltd v Québec (Attorney General)*, [1989] 1 SCR 927, 58 DLR (4th) 577.

[28] It was the warden's obligation to maintain security at the institution. It was not unreasonable for him to assume that the publication of the bulletin could well stir up bad feelings on the part of the inmates. Pursuant to sections 3 and 4 of the *Corrections and Conditional Release Act*, the correctional system is to contribute to the maintenance of a just, peaceful and safe society. The service is to use the least restrictive measures consistent with the protection of the public, staff members and offenders. Section 4 of the said Act requires the warden to be responsible for the care, custody and control of all inmates and the security of the penitentiary. The Regulations go on to provide at section 96 that the institutional head, or staff member designated by him, may prohibit the circulation of any publication, believed on reasonable grounds, that would jeopardize the security of the penitentiary.

[29] The initial decision, upheld by the warden, and through the grievance process, falls well within the range of reasonableness enunciated by the Supreme Court in *Dunsmuir*, above.

[30] Mr. Spidel also submitted that the decision should be struck down for vagueness. It is important to know the rationale of a decision in order to determine whether or not it should be grieved further. Although the language is terse, the warden's decision is perfectly clear and capable of understanding. A decision which is clear is not to be struck down simply on the grounds that it is short. A recent example is the decision of the Federal Court of Appeal in *Attorney General of Canada and National Parole Board v Franchi*, 2011 FCA 136.

[31] All of this is on the assumption that, as held at the second grievance level, Mr. Spidel had the right to resubmit the bulletin, a right which he in fact exercised, but in this case to no avail. If there is no such policy, then his right to freedom of expression was infringed. In such case the impairment was more than minimal, and was not justified. It has not been suggested that the inmate committee did not have the right to inform the inmates at large that they had a difference of opinion with the institution as to the interpretation and application of the Canteen contract, and were assessing the options open to them to resolve the issue.

THE SECOND BULLETIN

[32] Although a decision should have been rendered on the revised bulletin, it is not for this Court to opine at this stage as to whether or not it is suitable for publication. In any event, the matter may be moot as Mr. McDougall is said to have been unsuccessful in grieving the alleged breach of contract. Furthermore, Mr. Spidel is no longer at the Ferndale Institution.

PROCEDURAL ISSUES

[33] Mr. Spidel, who is self-represented, has left no stone unturned. He has pointed out a number of errors in the process, and brings to mind the following passage from Mr. Justice Joyal's decision in *Miranda v Canada (Minister of Employment and Immigration)* (1993), 63 FTR 81 (TD), [993] FCJ No 437 (QL).

> It is true that artful pleaders can find any number of errors when dealing with decisions of administrative tribunals. Yet we must always remind ourselves of what the Supreme Court of Canada said on a criminal appeal where the grounds for appeal were some 12 errors in the judge's charge to the jury. In rendering judgment, the Court stated that it had found 18 errors in the judge's charge, but that in the absence of any miscarriage of justice, the appeal could not succeed.

[34] I do not consider it necessary to deal with all of his issues, or to give him recourse. I am disturbed that it was agreed at the second level that he was correct in filing separate grievances, one on behalf of the inmates, and one on a personal basis, only to find that they were in effect joined again. The reason given is that the other grievance was not before the Commissioner. If not, it should have been, because it formed part of Mr. Spidel's submissions. The issue is not what was before the decision maker, but rather what ought to have been before him (*Tremblay v Canada (Attorney General)*, 2005 FC 339, [2005] FCJ No 421 (QL).

[35] Mr. Spidel coded the grievances as relating to charter rights which meant they should have been dealt with on a priority basis. They were re-characterized as routine, but at the second level again it was held that Mr. Spidel was right. Nevertheless, his grievances were in fact dealt with on a

routine basis. The delay does not serve to invalidate the decision, but what is the point of saying one thing and doing another?

[36] Mr. Spidel requests that his file be corrected. I was informed during the hearing that no entry has been made in his file concerning this incident and no charge was laid against him. Thus there is nothing to correct which would jeopardize his chances for a day parole. However, I am directing that my order and the reasons therefore be placed in his file.

[37] Mr. Spidel has overreached in the conclusions he seeks. I see no reason why a remedy in the nature of mandamus or prohibition should issue, or that I should make a declaration which would serve as a prisoners' manifesto. I see no need to grant a remedy (*MiningWatch Canada v Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 SCR 6).

COSTS

[38] The Minister seeks costs in the amount of $2,000 plus disbursements. Mr. Spidel also seeks costs. Considering that he is self-represented, those costs would be limited to disbursements. The rule of thumb in cases such as these is that disbursements other than filing fees be set at $250. The filing fees in this case are $100. Although Mr. Spidel was unsuccessful, he was forced into this judicial review because no decision was ever made with respect to the revised bulletin. I have wide discretion under rule 400 and following of the *Federal Courts Rules* and, in the circumstances, I consider it appropriate to award Mr. Spidel costs of $350.

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that

1. The application for judicial review is dismissed.

2. Mr. Spidel shall be entitled to costs in the amount of $350, all inclusive.

3. Copy of this order and reasons shall be placed in Mr. Spidel's file.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1300-10
STYLE OF CAUSE:	SPIDEL v CANADA (ATTORNEY GENERAL)

MATTER HELD BY WAY OF VIDEOCONFERENCE

PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
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DATED:	APRIL 29, 2011

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