Date: 20100621

Docket: A-442-09

Citation: 2010 FCA 167

CORAM: **NADON J.A.**
PELLETIER J.A.
TRUDEL J.A.

BETWEEN:

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

and

ATTORNEY GENERAL OF CANADA

Appellants

AND:

PATRICK MERCIER

Respondent

AND BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

AND:

STÉPHANE LINTEAU
JEAN-PIERRE DUCLOS
PIERRE THÉRIAULT
RAYMOND LANDRY
GÉRALD MATTICKS
DENIS THIBAULT
JEAN RAUZON

RÉGIS LABBÉE
RICHARD DION
DANIEL PATRY
DANIEL LÉVESQUE
CLAUDE RANGER
JEAN DESCHÊNES
GAÉTAN ST-GERMAIN
STÉPHANE FORTIN
FRANÇOIS LANDCOP
BENOIT GUIMOND
PATRICK ROCHEFORT
DANIEL DUSSEAULT

Respondents

Heard at Ottawa, Ontario, on March 16, 2010.

Judgment delivered at Ottawa, Ontario, on June 21, 2010.

REASONS FOR JUDGMENT BY: NADON J.A.

CONCURRED IN BY: PELLETIER J.A.
TRUDEL, J.A.

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REASONS FOR JUDGMENT

NADON J.A.

[1] This is an appeal from a Judgment rendered by Martineau J. (the "Judge") of the Federal Court, 2009 FC 1071, dated October 23, 2009, who allowed the respondents' judicial review application challenging the legality of the Commissioner of the Correctional Service of Canada's (the "Commissioner") Directive No. 259, banning smoking indoors and outdoors within the perimeter of federal correctional facilities, including community correctional centres ("CCCs"). The Judgement reads, in part, as follows

> 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.
>
> [Emphasis added]

[2] More particularly, the Judge declared Directive No. 259 (the "Directive") to be invalid insofar as it purports to prevent inmates from smoking outdoors within the perimeter of federal correctional facilities.

[3] The main issue raised by this appeal is whether it was within the Commissioner's power to enact the Directive so as to implement a total smoking ban at all federal correctional facilities. If the answer to that question is in the affirmative, the issue which arises is whether the Directive falls within the scope of the powers given to the Commissioner. Finally, the respondents raise a number of Charter issues.

[4] I now turn to the facts which are relevant to the determination of this appeal.

THE FACTS

[5] Under the authority of sections 70, 97 and 98 of the Act, the Commissioner issued the Directive on May 5, 2008. In brief, the Directive bans smoking and possession of smoking items, indoors and outdoors, within the perimeter of federal correctional facilities, but makes an exception for aboriginal religious and spiritual practices.

[6] The main provisions of the Directive are as follows:

> POLICY OBJECTIVE
> 1. To enhance health and wellness by eliminating exposure to second-hand smoke at all federal correctional facilities. To achieve this objective, smoking will not be permitted

indoors or outdoors within the perimeter of federal correctional facilities, including Community Correctional Centres (CCCs).

[…]

DEFINITIONS

4. Unauthorized smoking items: smoking items including, but not limited to, cigarettes, cigars, tobacco, chewing tobacco, cigarette making machines, matches and lighters are unauthorized items within the meaning of section 2 of the Corrections and Conditional Release Regulations, except tobacco and ignition sources used for the accommodation of Aboriginal spirituality or other religious practices.

5. Perimeter of a correctional facility: the fence, wall or designated out-of-bounds area surrounding a facility.

PRINCIPLE

6. The Service is committed to maintaining a healthy environment for those living, working and visiting correctional facilities while accommodating religious and spiritual practices without discrimination.

SMOKING RESTRICTIONS

7. Offenders, staff members, contractors, volunteers and visitors are not permitted to smoke inside correctional facilities (including private family visiting units) or outdoors within the perimeter of a correctional facility.

8. Smoking is only permitted outside the perimeter of a correctional facility in an area designated by the Institutional Head or District Director.

9. Smoking is not permitted inside CSC vehicles.

POSSESSION RESTRICTIONS

10. Staff members, contractors, volunteers and visitors must not possess unauthorized smoking items within the perimeter of a correctional facility.

RESPONSIBILITIES

11. The Regional Deputy Commissioner in consultation with the Director General, Aboriginal Initiatives will approve all site specific implementation plans to ensure the appropriate accommodation of Aboriginal spiritual practices.

12. The Institutional Head or District Director (CCCs) will:

[…]

> d. ensure implementation plans include accommodations for religious and spiritual practices in individual cells, rooms and in groups to the extent safely possible (accommodations will be made in consultation with religious leaders, Elders or Aboriginal advisory bodies as appropriate);
>
> REPORTING
> 13. Staff members will report any incident of smoking in violation of this policy to management.
>
> DISCIPLINE
> Employees
> 14. Employees who are in violation of this policy are subject to the employee disciplinary process.
>
> Offenders
> 15. Inmates who are in violation of this policy are subject to the inmate disciplinary process.
>
> 16. Offenders who are in violation of this policy are subject to administrative sanctions as deemed appropriate by the District Director.
>
> Other
> 17. CSC contractors, volunteers and visitors who are in violation of this policy will be requested to cease smoking or dispose of any unauthorized smoking items and if they persist will be directed to leave the institution or CCC.
>
> [Emphasis added]

[7] As appears from article 15 of the Directive, inmates who are in breach of the Directive are subject to the disciplinary system which is set out at sections 40 to 44 of the Act. As the Judge found at paragraph 30 of his Reasons:

> 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).

[8] An earlier version of the Directive (the "First Directive"), issued on January 31, 2006, had banned all indoor smoking, thus allowing inmates to continue smoking outdoors. It should be noted that approximately 75% of inmates in federal correctional facilities smoke and that the total ban on smoking is accompanied by the availability of anti-smoking aids such as nicotine patches and medication for inmates.

[9] The stated policy objective of the Directive is "[T]o enhance health and wellness by eliminating exposure to second-hand smoke at all federal correctional facilities" (article 1). The Directive then states that in order to meet that objective, smoking indoors and outdoors will be prohibited within the perimeter of federal correctional facilities. Before us, counsel for the respondents indicated that his clients did not take issue with the Commissioner's position that indoor smoking could be harmful to non-smoking persons. In that regard, the Judge made the following remarks at paragraphs 11 to 13 of his Reasons:

> [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.

[10] The reasons why the Commissioner decided that a ban on indoor smoking only was not sufficient to achieve the stated purpose of enhancing health and wellness by eliminating exposure to second-hand smoke in all federal correctional facilities appear in a Memorandum from the Assistant Commissioner, Correctional Operations and Programs, to the Commissioner, dated June 21, 2007, wherein the Assistant Commissioner recommends that a total ban on smoking be implemented by April 30, 2008.

[11] It will therefore be useful to highlight some of the relevant portions of the Assistant Commissioner's Memorandum. First, at page 1, the Assistant Commissioner sets out the background to his recommendation:

> **Background**
>
> The current CSC Smoking Policy, *Commissioner's Directive 259, Exposure to Second Hand Smoke*, came into effect on January 31, 2006. It prohibits smoking inside federal correctional facilities including private family visiting units and CSC vehicles. Smoking is permitted outdoors in designated areas.
>
> This policy was developed in response to the expanding body of scientific evidence demonstrating the potential harmful effects of second hand smoke and the increasing concern about continued exposure by employees, offenders and other individuals inside federal penitentiaries. Under previous CSC policies, institutions were provided with the flexibility to establish their own individual smoking rules which resulted in significant variations across the country. Although some had prohibited smoking indoors, many had not. In implementing the current smoking policy, CSC sought to adopt a national approach that would more effectively and consistently protect individuals from exposure to second hand smoke.
>
> At the time the current policy was being developed, staff and other groups expressed concern that an indoor smoking ban could not be properly enforced and that the only effective way to address second hand smoke in the penitentiary context would be to ban

> tobacco products altogether from CSC facilities. A move directly to a total ban was considered, but CSC opted to implement an indoor ban in an effort to accommodate the needs of both non-smokers and smokers. Also, CSC committed to monitor the implementation of the indoor ban and to evaluate its effectiveness after one year to determine whether a further change in policy was necessary. This evaluation has been completed and results indicate that there have been challenges and difficulties with the implementation and enforcement of the indoor ban in many institutions. As a result, a decision must now be made as to whether it would be appropriate to adopt a different policy framework.
>
> [Emphasis added]

[12] At page 2, the Assistant Commissioner discusses the legislative and policy framework which led to the First Directive. He states, in part, as follows:

> **Legislative and Policy Framework**
>
> […]
>
> CSC's obligation to provide a healthful environment is echoed in the CCRA. In particular, section 70 states that CSC must take all reasonable steps to ensure that the penitentiaries, the penitentiary environment, the living and working conditions of inmates and the working conditions of staff are safe, healthful and free of practices that undermine a person's sense of personal dignity. At the same time, CSC decision-making is guided by the principle in subsection 4(e) of the CCRA which states that offenders retain the same rights and privileges as all members of society except those that are necessarily removed or restricted as a consequence of sentence. The decision to implement a partial smoking ban was an attempt to balance these provisions and find an effective compromise that would achieve the health and safety objective while at the same time allowing offenders the opportunity to smoke. Lastly, both the CCRA and associated regulations contain provisions that underscore CSC's obligation to respect and accommodate Aboriginal spirituality and religious practices.
>
> [Emphasis added]

[13] Then the Assistant Commissioner turns to Correctional Service of Canada's ("CSC") record of smoking-related disciplinary charges. In particular, he sets out, at page 4, the number of charges per week from January 31, 2006 to April 18, 2007:

January 31, 2006 to December 27, 2006	159 per week
December 28, 2006 to February 7, 2007	152 per week
February 8, 2007 to February 21, 2007	70 per week
February 22, 2007 to March 8, 2007	58 per week
March 9, 2007 to March 22, 2007	30 per week
March 23, 2007 to April 4, 2007	35 per week
April 5, 2007 to April 18, 2007	89 per week

[14] These figures lead the Assistant Commissioner to make the following remarks at page 5:

> Enforcement of the indoor ban has proved challenging in part because tobacco remains an authorized item that inmates can purchase through institutional canteens and store in their cells. In an effort to address this concern, a number of institutions introduced measures aimed at restricting the ability of offenders to smoke in their cells and living units. In some instances, lock boxes were purchased for tobacco storage and installed in common areas and inmates were no longer permitted to have tobacco and related items in their cells. Several institutions used lock boxes for the general population while others limited their use to offenders in segregation or other sub-populations. Although some institutions noted reduced levels of second hand smoke in segregation or within other restricted areas, there is a clear consensus among almost all institutions that lock boxes are not a viable solution for the general population. They noted that intensive monitoring is required to ensure that inmates do not smuggle or steal cigarettes when they access their lock boxes and that effective monitoring is almost impossible when dealing with a large, open population. Inmates regularly smuggle cigarettes back into the institution despite being searched, use the boxes to distribute contraband, vandalize and destroy the boxes and, in some instances, disassemble them to manufacture weapons.
>
> As an alternative to restricting access to tobacco, the Prairie Region attempted to prevent offenders from smoking inside by removing matches and lighters from their possession and initiating lighting devices in outdoor smoking areas. This initiative was largely unsuccessful as offenders tampered with electric outlets, used homemade wicks and manufactured ignition systems to light cigarettes indoors. As a result of the safety risks associated with these practices, a decision was made in late 2006 to reintroduce matches and lighters to the

> offender population. The Prairie Region reports that over 1200 damaged electrical outlets had to be repaired at a cost of approximately $80,000.
>
> [Emphasis added]

[15] The Assistant Commissioner then turns to the matter of complaints made by CSC employees under the *Canada Labour Code* (the "CLC") that exposure to second hand smoking in their workplace constitutes a danger under Part II of the CLC. At page 6, the Assistant Commissioner explains this problem in the following terms:

> **Canada Labour Code Complaints**
> Prior to the implementation of the current indoor smoking ban, CSC was subject to a number of challenges by employees who claimed that exposure to second hand smoke at the workplace constituted a danger under Part II of the *Canada Labour Code*. The individual complaints were investigated by health and safety officers from Human Resources and Social Development Canada (HRSDC) and upheld in two instances. The successful cases both involved employees with medical conditions or certificates. One of the dismissed complaints was appealed unsuccessfully by the Union of Canadian Correctional Officers (UCCO) and has progressed to the Federal Court on judicial review. A hearing date has yet to be scheduled.
>
> Despite the implementation of the indoor smoking ban, CSC employees have continued to seek redress under the *Canada Labour Code* for exposure to second hand smoke. Four work refusals have been invoked by correctional officers since January 2006, all of which resulted in a finding of danger by HRSDC officers. Two work refusals were made at Dorchester Penitentiary in June 2006 and another at Millhaven Institution in September 2006. They are currently under appeal. In the latter case, the Institution was ordered to develop an action plan to address the presence of second hand smoke. In December 2008, UCCO sent a request to the Minister of Labour seeking consent to commence prosecution proceedings against the Service for failure to comply with the HRSDC direction at Millhaven.
>
> A fourth work refusal took place at Warkworth Institution in early March 2007. In concluding that the definition of danger has been met, the HRSDC officer noted that even in areas of the institution where the indoor smoking policy is consistently applied, offenders continue to smoke. CSC has developed an action plan in response to the HRSDC direction and has decided not to file an appeal.

> In addition to formal work refusals, a number of employees have lodged internal complaints under section 127.1 of the CLC for issues relating to second hand smoke. For the most part, these have been resolved informally at the institutional level (often through the accommodation of the employee in another area of the workplace). Institutional managers report that considerable time has been spent addressing these complaints with the individual employees as well as with local occupational health and safety committees.

[16] The Assistant Commissioner then points out that CSC has engaged in an extensive consultation process with a view to determining whether it would be appropriate to edict a total ban. The Assistant Commissioner explains that inmates at each federal institution and CCC were consulted through inmate committees, wardens and district directors. Also consulted were CSC management, union groups, citizen advisory committees, health organizations and other stakeholders. In addition, the aboriginal elders working group was consulted. At pages 8 and 9, the Assistant Commissioner relates the comments received from the consulted parties;

> **Consultations**
>
> […]
>
> The majority of inmate committees responded that they were not in support of a total smoking ban despite being aware of the dangers associated with smoking and exposure to second hand smoke. The most common response was that smoking is not illegal and that inmates should be permitted to smoke in their cells in the same way that other members of society are permitted to smoke in their homes. If inmates are not allowed to smoke in their cells, then they should at least be able to smoke outdoors. They also advocate for additional outdoor smoking breaks and increased disciplinary consequences for those caught smoking. A number of inmate committees noted that air quality had improved since the implementation of the current policy.
>
> Most inmate committees agreed that cessation aid programs are beneficial, but felt that the period of free cessation aids should have been longer as it is cost prohibitive for inmates to purchase them from their own funds. Respondents were of the view that a total ban on smoking would lead to an underground market for tobacco sales resulting in muscling, violence and debts. It would also lead to increased tensions between staff and inmates and disruptive behaviour by inmates. A few noted that a complete smoking ban would cause

hardship on those serving long periods of incarceration. There was a consensus, however, that any ban on smoking should include appropriate accommodations for Aboriginal spirituality.

[…]

The following internal and external health stakeholders were also consulted: CSC's Chief of Health Services, CSC Health Care Advisory Committee, Canadian Cancer Society, Canadian Medical Association and provincial medical officers of health. Participants noted that both indoor and outdoor smoking bans exert external motivation on inmates to quit smoking. As treatment of an addiction is much more successful if a person is motivated internally, CSC should consider additional methods to increase inmates' internal motivation to quit smoking. The most common recommendation from CSC participants was the creation of a permanent position for a health promotion nurse and additional education. Both CSC and external respondents added that an indoor smoking ban is too difficult to enforce and that problems will persist if inmates continue to have access to tobacco in their cells. The majority of participants recommended that free cessation aids be provided to inmates prior to the implementation of a total smoking ban and that a phased approach of cessation aids be introduced thereafter (starting with free programs, then partially subsidized and finally through inmate purchase). They also agreed that additional support should be provided to inmates in the form of counselling, education and other support services if possible.

Correctional stakeholders were also canvassed for their views. Seven of the nine Citizen's Advisory Committees (CACs) were not in favour of a total smoking ban on the correctional reserve. CACs feel that smoking is a very hard habit to break and that one year of the indoor ban is a relatively short timeframe in which to make a decision on a total smoking ban. The John Howard Society is not yet prepared to support a total ban while the Canadian Criminal Justice Association (CJA) representative is in favour. The John Howard Society indicated that they do not think that the inconvenience of enforcing the indoor ban justifies imposing a ban outside and that making a change after only one year is too short a timeframe. The CCJA representative responded that inmates coming into the federal system have already spend significant time without tobacco in provincial facilities and this should continue in the federal system.

A separate consultation process with the National Elders Working Group was undertaken by CSC's Aboriginal Initiatives Branch. They recommend that the protocols for traditional and spiritual practices that were put in place at the time the indoor ban was implemented should continue. They also noted that traditional tobacco is one of four sacred medicines and cannot be substituted. As a result, appropriate accommodations will have to be made to allow for possession and use of traditional tobacco if tobacco is deemed an unauthorized item within federal correctional facilities. Appropriate controls will also have to be put in place to ensure

> that individuals using tobacco for traditional purposes are not subject to intimidation. CSC will continue to work with Elders to ensure that these and other important issues are addressed.

[17] The Assistant Commissioner then examines the situation prevailing in provincial, territorial and international correctional organizations, particularly in the United States. He notes that the majority of provinces and territories have implemented a total smoking ban inside and outside of their detention and correctional facilities, noting that Quebec is the only province that still permits smoking indoors, but that it expected to introduce a total smoking ban in 2007-2008 (not yet in force – the parties indicated to us that Quebec still allows inmates to smoke outdoors). Then, at page 10, the Assistant Commissioner says:

> The jurisdictions with total smoking bans indicate that despite some initial challenges, the implementation of their bans have been largely successful. Among the challenges reported include the fact that tobacco has become the most popular form of contraband, that inmates have tampered with electrical outlets in order to light homemade cigarettes and have combined nicotine patches with other dried substances for smoking. In response to the last difficulty, the province of Alberta recently discontinued the safe nicotine patches and gum to offenders. Most jurisdictions canvassed indicate that inmates who are caught in violation of the smoking ban are subject to a progressive discipline system and that accommodations are made for Aboriginal spiritual ceremonies.

[18] The Assistant Commissioner then points out that 80% of state correctional departments in the U.S. have instituted a complete or partial smoking ban within their facilities and that the Federal Bureau of Prisons implemented a partial smoking ban in 2004 and a total smoking ban in April 2005. He also notes that accommodations were made in the U.S. for Native American spirituality and for the use of tobacco in religious ceremonies.

[19] Lastly, the Assistant Commissioner sets out the advantages and disadvantages of maintaining the status quo or of implementing a total smoking ban at all federal correctional facilities. At page 13, the Assistant Commissioner sets out the pros and cons of the status quo in the following terms:

> **1. Status Quo**
>
> CSC would continue with its current policy which prohibits smoking indoors. Inmates should be permitted to purchase tobacco through institutional canteens, store tobacco and related products in their cells and smoke outdoors in designated areas.
>
> Staff members would continue to be responsible for enforcing the indoor ban and applying disciplinary measures for contravention of the policy.
>
> **Advantages**
> - This is the preferred option of most offenders.
> - Reduces levels of second hand smoke indoors when compared with previous smoking policies.
> - Accommodation for Aboriginal spiritual practices effectively in place.
> - No additional resources required.
>
> **Disadvantages**
> - Exposure to second hand smoke within institutions would not be eliminated.
> - Likely to result in further complaints and work refusals by staff members under Part II of the *Canada Labour Code*.
> - Does not address the enforcement and monitoring concerns raised by regional managers, many staff and union groups.
> - Not in keeping with the long-term trend in provincial/territorial correctional facilities and the evolving societal consensus on the dangers of second hand smoke.

[20] At page 16, he goes through the same exercise with regard to a total smoking ban:

> **4. Total Smoking Ban at all Federal Correctional Facilities**
>
> A total ban on smoking would apply to all federal correctional facilities and tobacco products would no longer be permitted inside institutions (appropriate accommodations would be made for traditional tobacco used in Aboriginal ceremonies).

If CSC chooses this option, a new policy would likely come into force in April 2008. National, regional and local working groups would be formed in advance to develop the policy framework in further detail and provide recommendations as to how best to effect implementation. In addition, local implementation teams would be responsible for developing appropriate parameters with respect to staff smoking off-site.

A number of elements will need to be built into the implementation of the policy including a comprehensive cessation aid and education package. CSC will also engge in further consultations to ensure that appropriate mechanisms are put in place to accommodate Aboriginal and religious ceremonies. Strategies should be develop to address and minimize any security risks association with the implementation of a total smoking ban. A comprehensive communications plan should also be developed. Furthermore, outstanding tobacco procurement issues will need to be addressed and a number of CSC policies will need to be modified.

Advantages:

- Eliminates exposure to second hand smoke within all CSC facilities.
- Generally the preferred option of many staff, institutions and union groups.
- Minimizes the risk of legal challenges by staff as a result of exposure to second hand smoke.
- Is in keeping with the long term trend in provincial/territorial correctional facilities and the evolving societal consensus on the dangers of second hand smoke.

Disadvantages:

- Resources would be required to implement this option. Depending on the length of time and the number of offenders who accept smoking cessation aids, cost estimates are approximately $1.6M.
- Aboriginal Elders, NGOs, most offenders and some staff oppose this option.
- A strategy would have to be developed to allow for Aboriginal ceremonial practices. This may require additional resources.
- Tobacco products would become a major item on the “black market” and potentially increase safety and security issues.
- Nicotine withdrawal of 72% of the offender population could increase irritability/tension and lead to an increase of assaultive behaviour among inmates and towards staff.
- Canteen – 85% inmate-owned – will require planning in regard to inventories, payment of outstanding loans and minimizing the impact of the loss of significant revenue.
- Approximately 15 Commissioner’s Directives will need to be modified prior to modification.

[21] At page 17, the Assistant Commissioner recommends that CSC implement a total smoking ban at all of its correctional facilities by April 30, 2008. In his view, such a ban constitutes "the most equitable and appropriate manner in which to achieve the objective of creating a healthy and smoke-free environment for offenders, staff, volunteers, contractors and visitors".

[22] On June 21, 2000, the Commissioner endorsed the Assistant Commissioner's recommendation.

[23] I have set out in some detail the Assistant Commissioner's Memorandum to the Commissioner in order to provide a complete background to the enactment of the Directive. In light of that background, I can now turn to the Judgment which the appellants seek to set aside and to the issues raised by the appeal.

DECISION OF THE FEDERAL COURT

[24] First, the Judge held that the Commissioner had gone too far in enacting a total ban on smoking because the Directive did not, in his view, respect the fundamental principles found at section 4 of the Act which provides, *inter alia*, at paragraphs 4*(d)* and 4*(e)* thereof, that CSC is to "use the least restrictive measures consistent with the protection of the public, staff members and offenders" and that inmates "retain all of the rights and privileges of all members of society, except those rights and privileges that are necessarily removed as a consequence of their sentence".

[25] In support of that view, the Judge made a number of findings, namely:

- second-hand smoke is harmful to the health of non-smokers
- smoking outdoors does not pose any risk to non-smokers
- there is no rational connection between the outdoor smoking prohibition and non-smokers' rights not to be exposed to second-hand smoke
- Parliament has not enacted legislation either banning smoking or the possession of tobacco outdoors
- smoking outside within the perimeter of a correctional facility does not pose or raise any safety issues
- the Act does not prohibit the possession of tobacco or of smoking items
- nicotine is excluded from the definition of "intoxicant" found in subsection 2(1) of the Act and, thus, tobacco products do not fall within the definition of "contraband", the possession of which is prohibited under the Act.

[26] The Judge also remarked that CSC employees were allowed to smoke outdoors in areas of a correctional facility to which inmates did not have access. He also noted that in the past, both inmates and correctional officers could smoke in outdoor areas. This led him to the view, which he expressed at paragraph 23 of his Reasons, that "past difficulties or anticipated future problems in enforcing the indoor smoking ban by correctional authorities" did not justify the Commissioner's decision to prohibit smoking outdoors. He further held, at paragraphs 33 and 34 of his Reasons:

> [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.

[27] In dismissing the appellants' argument that the purpose of the outdoor ban on smoking was to, in effect, eliminate second-hand smoke inside correctional facilities, the Judge pointed to the fact that the Directive created an exemption for religious and spiritual practices in individual cells and in rooms within correctional facilities, that a great demand for a product that was legally sold, i.e. tobacco and cigarettes, resulted from the fact that 75% of inmates were smokers and that the removal of the right or privilege or smoking was not "a necessary consequence of the sentence served by inmates in penitentiaries" (paragraph 27 of the Judge's Reasons). The Judge then indicated that the smoking ban implemented by the Directive would likely result in additional administrative measures 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" (paragraph 28 of the Judge's Reasons).

[28] As a result, the Judge concluded that the respondents were entitled to a declaratory judgment that the Directive, to the extent that it prohibited inmates from smoking outdoors within the perimeters of a correctional facility, was null, void and contrary to the Act.

[29] Finally, by reason of the above conclusion, the Judge was of the view that he was not required to make a determination with respect to the respondents' argument that their rights under

sections 7, 12 and 15 of the *Canadian Charter of Rights and Freedoms* (the "Charter") had been breached.

THE SUBMISSIONS OF THE PARTIES

(a) The Appellants' Submissions

[30] The appellants first submit that the Judge erred in finding that the Commissioner did not have the legislative authority to adopt the Directive. In their view, there could be no doubt that the Commissioner was authorized under the Act to adopt the Directive, adding that this question had already been determined by the Federal Court in *Boucher v. Canada (Attorney General)*, [2007] F.C.J. No. 1163 (Q.L.). Specifically, the appellants rely on sections 3, 70, 97 and 98 of the Act which, they say, confer legislative authority for the adoption of the Directive.

[31] The appellants then say that the Judge erred in substituting his judgment for that of the Commissioner in regard to the prevailing circumstances in federal correctional facilities. In other words, it was not open to the Judge to substitute his view as to the advisability of a total smoking ban in correctional facilities for that of the Commissioner, whose responsibility it is to determine what measures are necessary to enhance health and wellness in federal correctional facilities. The appellants say that to the extent that the Directive falls within the scope of the powers given to the Commissioner and that the measures taken by him find support in the Act and the *Corrections and Conditional Release Regulations*, SOR/92-620 (the "Regulations"), the Judge should not have intervened.

[32] The appellants further submit that there can be no doubt that the Commissioner was clearly authorized to enact the Directive and that its provisions do not offend the guiding principles found at section 4 of the Act.

[33] More particularly, the appellants say that the Directive was enacted to address the problem of second-hand smoke in federal correctional facilities and that the respondents do not contest the fact that second-hand smoke may cause harm to non-smokers. Thus, in attempting to prevent the harm caused by second-hand smoke, the Directive clearly finds support in sections 3 and 70 of the Act. The appellants also say that the Directive is in accord with subsection 3(1) of the *Non-Smokers' Health Act*, 1985, c. 15 (4th Suppl.), which provides that:

3. (1) Every employer, and any person acting on behalf of an employer, shall ensure that persons refrain from smoking in any work space under the control of the employer.	**3.** (1) L'employeur — ou son délégué — veille à ce que personne ne fume dans un lieu de travail placé sous son autorité.

[34] The appellants further say that in enacting the Directive, the Commissioner attempted to reconcile the principle stated at section 70 of the Act that CSC must ensure that the living and working conditions of inmates are, *inter alia*, healthful, with the principle found at subsection 4*(e)* of the Act that inmates are to retain all of those rights and privileges which members of society possess, other than those that must necessarily either be removed or restricted by reason of their detention. In support of this submission, the appellants refer to the Assistant Commissioner's recommendation to the Commissioner.

[35] The appellants conclude that there can be no doubt that the Commissioner attempted to balance the interests of all persons living and working in federal correctional facilities. In other words, he considered the interests of both smokers and non-smokers. As evidence of the Commissioner's approach, the appellants point to the First Directive, pursuant to which the Commissioner had put forward a solution of compromise whereby only smoking indoors was prohibited. This approach was abandoned only when it became clear to CSC that a partial ban on smoking would not lead to the intended purpose of preventing inmates from smoking indoors. At paragraphs 50 and 51 of their Memorandum of Fact and Law, the appellants write as follows:

> [TRANSLATION]
> 50. As explained above, the Commissioner attempted to implement a less "restrictive" measure in 2006 by banning indoor smoking only within correctional facilities. This attempted compromise did not work. The policy was violated on numerous occasions despite the prohibition, and the prisoners and employees continued to be exposed to second-hand smoke. As explained above, additional measures were introduced by the Correctional Service of Canada to make the partial prohibition more effective (for example, lighting devices only available outdoors, lock boxes adjacent to the outdoor common area), but these measures were largely unsuccessful, and even created security problems within the facilities.
>
> 51. Therefore, given the continuing problems with second-hand smoke, the Commissioner decided that a ban on the possession of tobacco in correctional facilities had become necessary. Directive No. 259 was adopted to address this. It is clear that the measure objectively falls within the Commissioner's statutory grant of authority and that it is reasonable.

[36] The foregoing leads the appellants to state that the Directive is clearly *intra vires*, adding that the burden of demonstrating the *ultra vires* nature of the Directive was that of the respondents. In the appellants' submission, the Judge erred in imposing that burden upon the appellants.

[37] The appellants also make a number of submissions regarding: (i) the distinction which they submit must be made between “intoxicants” which constitute “contraband” and “unauthorized items”; (ii) the case of CSC employees who are allowed to smoke outdoors in areas to which inmates do not have access and; (iii) the aboriginal religious exception.

[38] With respect to “intoxicants” which fall within the definition of “contraband”, the appellants say that the Commissioner need not take any action whatsoever in regard thereto, since section 2 of the Act prohibits their possession and, as a result, inmates found in possession thereof are subject to disciplinary sanctions under paragraphs 40*(i)* and 45*(a)* of the Act.

[39] The appellants then say that with regard to “unauthorized items” which section 2 of the Regulations defines as “means an item that is not authorized by Commissioner’s Directives or by a written order of the institutional head and that an inmate possesses without prior authorization”, the situation is different. The Act gives the Commissioner the responsibility of determining which substances will be considered “unauthorized” and those found in breach of a Commissioner’s Directive are subject to disciplinary sanctions under paragraphs 40*(j)* and *(r)* of the Act. As a result, an inmate must obtain the Commissioner’s consent to possess a substance which he has declared, by way of a Directive, to be an “unauthorized item”. In the present instance, article 4 of the Directive declares as follows:

> 4. Unauthorized smoking items: smoking items including, but not limited to, cigarettes, cigars, tobacco, chewing tobacco, cigarette making machines, matches and lighters are unauthorized items within the meaning of section 2 of the *Corrections and Conditional Release Regulations*, except tobacco and ignition sources used for the accommodation of Aboriginal spirituality or other religious practices.

[40] Thus, the appellants say that the Judge erred in failing to make the proper distinction between “contraband” and “unauthorized items”.

[41] With respect to the situation of CSC employees who are allowed to smoke outside in those areas where inmates do not normally have access, for example the parking lot of a correctional facility, the appellants say that this is of no relevance to the determination of whether the Directive is valid. In their view, there is no link between that situation and the risk of indoor smoking which the Directive seeks to prevent.

[42] With regard to the religious exemption for Aboriginals, the appellants submit that the respondents made no allegation nor any submission before the Judge. As a result, they state that they were never in a position to file evidence on this point and that it would therefore be unfair, at this stage of the proceedings, to allow the respondents to make such arguments. In any event, the appellants submit that section 83 of the Act, in conjunction with paragraph 2(a) of the Charter, clearly support the religious exemption found in the Directive.

[43] With regard to the Charter issue raised by the respondents, the appellants submit that because the respondents failed to serve a Notice of Constitutional Question, as required by section 57 of the *Federal Courts Acts*, S.C. 1985, c. F-7, they are barred from raising a constitutional challenge. In any event, the appellants submit that the Directive does not violate any of the rights

guaranteed by sections 7, 12 and 15 of the Charter, adding that if there was a breach, it was justified under section 1 thereof.

(b) The Respondents' Submissions

[44] The respondents argue that the Directive was *ultra vires* of the Commissioner's powers. They say that Directives can only address relatively minor administrative issues. In their view, major rights or major changes in policy can only be modified by regulation or statute, arguing that the Directive creates an unintended legislative absurdity, since the Directive violates the principles set out in sections 3 and 4 of the Act in that it does not use the least restrictive measure as required by paragraph 4(2)*(d)* thereof.

[45] The respondents also take issue with the fact that the Directive creates distinctions between inmates, employees and visitors. They argue that: "[o]nce it is accepted that no medical argument exists showing that third parties are adversely affected by second-hand *[sic]*, there is no serious, rational defense of the total ban" (paragraph 58 of respondents' Memorandum).

[46] Regarding the Charter issues, the respondents submit that the Directive's effect on the liberty and security of the person is such that it triggers the application of section 7. They argue that while there is no constitutional right to smoke, the "taking away of such a right will constitute a Charter violation". For this proposition, the respondents refer to the Supreme Court of Canada's decision in *Chaouilli v. Quebec*, [2005] 1 S.C.R. 791.

[47] Finally, the respondents argue that section 1 of the Charter cannot justify the breach of their rights, adding that the example of the province of Quebec demonstrates that a total ban on smoking is not necessary and that the appellants have based the total ban solely on administrative inconvenience.

RELEVANT LEGISLATION

[48] The relevant provisions of the Act, the Regulations and the *Federal Courts Act* read as follows:

Corrections and Conditional Release Act	***Loi sur la système correctionnel et la mise en liberté sous condition***
2.	**2.**
"contraband" means (a) an intoxicant,	« objets interdits » a) Substances intoxicantes;
[…]	…
"intoxicant" means a substance that, if taken into the body, has the potential to impair or alter judgment, behaviour or the capacity to recognize reality or meet the ordinary demands of life, but does not include caffeine, nicotine or any authorized medication used in accordance with directions given by a staff member or a registered health care professional;	« substance intoxicante » Toute substance qui, une fois introduite dans le corps humain, peut altérer le comportement, le jugement, le sens de la réalité ou l'aptitude à faire face aux exigences normales de la vie. Sont exclus la caféine et la nicotine, ainsi que tous médicaments dont la consommation est autorisée conformément aux instructions d'un agent ou d'un professionnel de la santé agréé.
[…]	…
3. The purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful and safe society by (a) carrying out sentences imposed by	**3.** Le système correctionnel vise à contribuer au maintien d'une société juste, vivant en paix et en sécurité, d'une part, en assurant l'exécution des peines par des

courts through the safe and humane custody and supervision of offenders; and
(b) assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community.

4. The principles that shall guide the Service in achieving the purpose referred to in section 3 are
(a) that the protection of society be the paramount consideration in the corrections process;
(b) that the sentence be carried out having regard to all relevant available information, including the stated reasons and recommendations of the sentencing judge, other information from the trial or sentencing process, the release policies of, and any comments from, the National Parole Board, and information obtained from victims and offenders;
(c) that the Service enhance its effectiveness and openness through the timely exchange of relevant information with other components of the criminal justice system, and through communication about its correctional policies and programs to offenders, victims and the public;
(d) that the Service use the least restrictive measures consistent with the protection of the public, staff members and offenders;
(e) that 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;
(f) that the Service facilitate the involvement of members of the public in matters relating to the operations of the Service;

mesures de garde et de surveillance sécuritaires et humaines, et d'autre part, en aidant au moyen de programmes appropriés dans les pénitenciers ou dans la collectivité, à la réadaptation des délinquants et à leur réinsertion sociale à titre de citoyens respectueux des lois.

4. Le Service est guidé, dans l'exécution de ce mandat, par les principes qui suivent :
a) la protection de la société est le critère prépondérant lors de l'application du processus correctionnel;
b) l'exécution de la peine tient compte de toute information pertinente dont le Service dispose, notamment des motifs et recommandations donnés par le juge qui l'a prononcée, des renseignements obtenus au cours du procès ou dans la détermination de la peine ou fournis par les victimes et les délinquants, ainsi que des directives ou observations de la Commission nationale des libérations conditionnelles en ce qui touche la libération;
c) il accroît son efficacité et sa transparence par l'échange, au moment opportun, de renseignements utiles avec les autres éléments du système de justice pénale ainsi que par la communication de ses directives d'orientation générale et programmes correctionnels tant aux délinquants et aux victimes qu'au grand public;
d) les mesures nécessaires à la protection du public, des agents et des délinquants doivent être le moins restrictives possible;
e) le délinquant continue à jouir des droits et privilèges reconnus à tout citoyen, sauf de ceux dont la suppression ou restriction est une conséquence nécessaire de la peine qui lui est infligée;
f) il facilite la participation du public aux questions relatives à ses activités;

(g) that correctional decisions be made in a forthright and fair manner, with access by the offender to an effective grievance procedure;
(h) that correctional policies, programs and practices respect gender, ethnic, cultural and linguistic differences and be responsive to the special needs of women and aboriginal peoples, as well as to the needs of other groups of offenders with special requirements;
(i) that offenders are expected to obey penitentiary rules and conditions governing temporary absence, work release, parole and statutory release, and to actively participate in programs designed to promote their rehabilitation and reintegration; and
(j) that staff members be properly selected and trained, and be given
(i) appropriate career development opportunities,
(ii) good working conditions, including a workplace environment that is free of practices that undermine a person's sense of personal dignity, and
(ii) opportunities to participate in the development of correctional policies and programs.

[…]

40. An inmate commits a disciplinary offence who
(a) disobeys a justifiable order of a staff member;
[…]
(i) is in possession of, or deals in, contraband;
(j) without prior authorization, is in possession of, or deals in, an item that is not authorized by a Commissioner's

g) ses décisions doivent être claires et équitables, les délinquants ayant accès à des mécanismes efficaces de règlement de griefs;
h) ses directives d'orientation générale, programmes et méthodes respectent les différences ethniques, culturelles et linguistiques, ainsi qu'entre les sexes, et tiennent compte des besoins propres aux femmes, aux autochtones et à d'autres groupes particuliers;
i) il est attendu que les délinquants observent les règlements pénitentiaires et les conditions d'octroi des permissions de sortir, des placements à l'extérieur et des libérations conditionnelles ou d'office et qu'ils participent aux programmes favorisant leur réadaptation et leur réinsertion sociale;
j) il veille au bon recrutement et à la bonne formation de ses agents, leur offre de bonnes conditions de travail dans un milieu exempt de pratiques portant atteinte à la dignité humaine, un plan de carrière avec la possibilité de se perfectionner ainsi que l'occasion de participer à l'élaboration des directives d'orientation générale et programmes correctionnels.

…

40. Est coupable d'une infraction disciplinaire le détenu qui :
a) désobéit à l'ordre légitime d'un agent;
…
i) est en possession d'un objet interdit ou en fait le trafic;
j) sans autorisation préalable, a en sa possession un objet en violation des directives du commissaire ou de l'ordre écrit du directeur du pénitencier ou en

Directive or by a written order of the institutional head;
[…]
(r) wilfully disobeys a written rule governing the conduct of inmates;

fait le trafic;
…
r) contrevient délibérément à une règle écrite régissant la conduite des détenus;

[…]

…

45. Every person commits a summary conviction offence who
(a) is in possession of contraband beyond the visitor control point in a penitentiary;

45. Commet une infraction punissable par procédure sommaire quiconque :
a) est en possession d'un objet interdit au-delà du poste de vérification d'un pénitencier;

[…]

…

70. The Service shall take all reasonable steps to ensure that penitentiaries, the penitentiary environment, the living and working conditions of inmates and the working conditions of staff members are safe, healthful and free of practices that undermine a person's sense of personal dignity.

70. Le Service prend toutes mesures utiles pour que le milieu de vie et de travail des détenus et les conditions de travail des agents soient sains, sécuritaires et exempts de pratiques portant atteinte à la dignité humaine.

[…]

…

83. (1) For greater certainty, aboriginal spirituality and aboriginal spiritual leaders and elders have the same status as other religions and other religious leaders.

83. (1) Il est entendu que la spiritualité autochtone et les chefs spirituels ou aînés autochtones sont respectivement traités à égalité de statut avec toute autre religion et chef religieux.

(2) The Service shall take all reasonable steps to make available to aboriginal inmates the services of an aboriginal spiritual leader or elder after consultation with
(a) the National Aboriginal Advisory Committee mentioned in section 82; and
(b) the appropriate regional and local aboriginal advisory committees, if such

(2) Le Service prend toutes mesures utiles pour offrir aux détenus les services d'un chef spirituel ou d'un aîné après consultation du Comité consultatif autochtone national et des comités régionaux et locaux concernés.

committees have been established pursuant to that section.

[…]

…

96. The Governor in Council may make regulations
[…]
(e) providing for the matters referred to in section 70;
[…]

96. Le gouverneur en conseil peut prendre des règlements :
…
e) régissant les questions visées à l'article 70;

…

97. Subject to this Part and the regulations, the Commissioner may make rules
(a) for the management of the Service;
(b) for the matters described in section 4; and
(c) generally for carrying out the purposes and provisions of this Part and the regulations.

97. Sous réserve de la présente partie et de ses règlements, le commissaire peut établir des règles concernant :
a) la gestion du Service;
b) les questions énumérées à l'article 4;
c) toute autre mesure d'application de cette partie et des règlements.

98. (1) The Commissioner may designate as Commissioner's Directives any or all rules made under section 97.
Accessibility

(2) The Commissioner's Directives shall be accessible to offenders, staff members and the public.

98. (1) Les règles établies en application de l'article 97 peuvent faire l'objet de directives du commissaire.
Publicité

(2) Les directives doivent être accessibles et peuvent être consultées par les délinquants, les agents et le public.

****

Corrections and Conditional Release Regulations

****

Règlement sur le système correctionnel et la mise en liberté sous condition

2.
"unauthorized item" means an item that is not authorized by a Commissioner's Directives or by a written order of the institutional head and that an inmate possesses without prior authorization;

2.
« objet non autorisé » Tout objet que le détenu a en sa possession sans autorisation préalable et en violation des Directives du commissaire ou d'un ordre écrit du directeur du pénitencier.

Federal Courts Act	***Loi sur les cours fédérales***
57. (1) If the constitutional validity, applicability or operability of an Act of Parliament or of the legislature of a province, or of regulations made under such an Act, is in question before the Federal Court of Appeal or the Federal Court or a federal board, commission or other tribunal, other than a service tribunal within the meaning of the *National Defence Act*, the Act or regulation shall not be judged to be invalid, inapplicable or inoperable unless notice has been served on the Attorney General of Canada and the attorney general of each province in accordance with subsection (2).	**57.** (1) Les lois fédérales ou provinciales ou leurs textes d'application, dont la validité, l'applicabilité ou l'effet, sur le plan constitutionnel, est en cause devant la Cour d'appel fédérale ou la Cour fédérale ou un office fédéral, sauf s'il s'agit d'un tribunal militaire au sens de la Loi sur la défense nationale, ne peuvent être déclarés invalides, inapplicables ou sans effet, à moins que le procureur général du Canada et ceux des provinces n'aient été avisés conformément au paragraphe (2).

ISSUES

[49] The main issues before us are the following:

1. Did the Commissioner have the legislative authority to enact, by way of the Directive, a total ban on smoking in federal correctional facilities? If the answer to that question is in the affirmative, then does the Directive fall within the scope of the powers given to the Commissioner and do the measures found therein find support in the Act and in the Regulations?

2. Are the respondents barred from raising Charter issues in this appeal because of their failure to provide to the attorneys general of the provinces a notice pursuant to subsection 57(1) of the *Federal Courts Act*. If the answer to that question is in the negative, then does the Directive infringe the respondents' Charter rights?

[50] I now turn to these issues.

ANALYSIS

The Charter Issues

[51] I will first address the question of whether subsection 57(1) of the *Federal Courts Act* prevents the respondents from raising Charter issues in this appeal, by reason of their failure to give notice to the attorney general of each province that they intended to raise the constitutionality of the Directive.

[52] In *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241, the Supreme Court of Canada dealt with the purpose of notice provisions and the consequences of non-compliance as they pertained to section 109 of the *Courts of Justice Act*, R.S.O. 1990, c. C-43, a provision similar to subsection 57(1) of the *Federal Courts Act*. At paragraphs 48, 53 and 54 of his Reasons, Sopinka J., writing for the Court, stated:

> 48 The purpose of s. 109 is obvious. In our constitutional democracy, it is the elected representatives of the people who enact legislation. While the courts have been given the power to declare invalid laws that contravene the Charter and are not saved under s. 1, this is a power not to be exercised except after the fullest opportunity has been accorded to the government to support its validity. To strike down by default a law passed by and pursuant to the act of Parliament or the legislature would work a serious injustice not only to the elected representatives who enacted it but to the people. Moreover, in this Court, which has the ultimate responsibility of determining whether an impugned law is constitutionally infirm, it is important that in making that decision, we have the benefit of a record that is the result of thorough examination of the constitutional issues in the courts or tribunal from which the appeals arise.
>
> […]

> 53. In view of the purpose of s. 109 of the *Courts of Justice Act*, I am inclined to agree with the opinion of the New Brunswick Court of Appeal in *D.N. v. New Brunswick (Minister of Health & Community Services), supra*, and Arbour J.A. dissenting in *Mandelbaum, supra*, that the provision is mandatory and failure to give the notice invalidates a decision made in its absence without a showing of prejudice. It seems to me that the absence of notice is in itself prejudicial to the public interest. I am not reassured that the Attorney General will invariably be in a position to explain after the fact what steps might have been taken if timely notice had been given. As a result, there is a risk that in some cases a statutory provision may fall by default.
>
> 54 There is, of course, room for interpretation of s. 109 and there may be cases in which the failure to serve a written notice is not fatal either because the Attorney General consents to the issue's being dealt with or there has been a de facto notice which is the equivalent of a written notice. It is not, however, necessary to express a final opinion on these questions in that I am satisfied that under either strand of authority the decision of the Court of Appeal is invalid. No notice or any equivalent was given in this case and in fact the Attorney General and the courts had no reason to believe that the Act was under attack. Clearly, s. 109 was not complied with and the Attorney General was seriously prejudiced by the absence of notice.
>
> [Emphasis added]

[53] This Court has cited *Eaton, supra*, with approval and has held that the same general principles apply to subsection 57(1) of the *Federal Courts Act*: *Bekker v. Canada*, 2004 FCA 186*; Halifax Longshoremen's Association, Local 269 v. Offshore Logistics Inc.* (2000), 257 N.R. 338 (F.C.A.), at paragraphs 56-57; *Gitxsam Treaty Society v. Hospital Employees' Union*, [2000] 1 F.C. 135 (C.A.)*; Canada (Minister of Canadian Heritage) v. Mikiswe Cree First Nation*, 2004 FCA 66, at paragraphs 73-81 (per Sharlow J.A. dissenting, but not on this point, which the majority did not address); *Jacobs v. Sports Interaction*, 2006 FCA 116, at paragraph 5. While Rothstein J.A. (as he then was) in *Halifax Longshoremen's Association, supra*, at paragraph 58, left open the question of whether section 57 is mandatory, this Court has stated on several occasions that it is without jurisdiction to hear a constitutional issue where the party raising it has not fully complied with the

notice requirement: *Bekker, supra*, at paragraph 8; *Giagnocavo v. Canada* (1995), 95 D.T.C. 5618 (F.C.A.); *Jacobs, ibid.*

[54] It is clear from the text of subsection 57(1) that notice is required only in those cases where the constitutional validity, applicability or operability of an "Act of Parliament" or of "regulations" is challenged. A Commissioner's Directive is not an Act of Parliament; the question, however, is whether such a Directive can be deemed a "regulation" for the purpose of subsection 57(1).

[55] The respondents point out that in *Martineau v. Matsqui Institution*, [1978] 1 S.C.R. 118, the Supreme Court held that Directives issued by Commissioners of CSC were not "laws" within the meaning of what was then section 28 of the *Federal Court Act*. At page 129 of its Reasons, the Court held that although Directives were authorized by statute, they were "clearly of an administrative, not a legislative, nature". The issue before the Supreme Court was whether the Federal Court of Appeal had erred in concluding that a disciplinary order made against the appellant by the Matsqui Institution inmate disciplinary board did not fall within the scope of section 28. More particularly, the Federal Court of Appeal had concluded that the board's decision was an order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis.

[56] In my view, the issue raised in *Matsqui, supra*, and the conclusion which the Supreme Court arrived at are of no relevance to the present matter. First, on the wording of the present section 28 of the *Federal Courts Act*, to which sections 18 to 18.5 thereof apply *mutatis mutandis*, except subsection 18.4(2), the decision of the Supreme Court in *Matsqui* would clearly have been different. Second, the Court's determination in *Matsqui* is of no help to the issue now before us, i.e. whether

the Commissioner's Directive is a regulation within the meaning of subsection 57(1) of the *Federal Courts Act*.

[57] Section 2 of the *Interpretation Act*, R.S. 1985, c. I-21, defines "regulation" as follows:

"regulation" includes an order, regulation, rule, rule of court, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established (a) in the execution of a power conferred by or under the authority of an Act, or (b) by or under the authority of the Governor in Council; [Emphasis added]	« règlement » Règlement proprement dit, décret, ordonnance, proclamation, arrêté, règle judiciaire ou autre, règlement administratif, formulaire, tarif de droits, de frais ou d'honoraires, lettres patentes, commission, mandat, résolution ou autre acte pris : a) soit dans l'exercice d'un pouvoir conféré sous le régime d'une loi fédérale; b) soit par le gouverneur en conseil ou sous son autorité. [Non souligné dans l'original]

[58] Section 97 of the Act confers upon the Commissioner the power to make rules and subsection 98(1) confers upon him the power to designate "any or all rules made under section 97" as a "Commissioner's Directive". Consequently, it is my view that a "Commissioner's Directive" is a "rule … or other instrument issued, made or established *(a)* in the execution of a power conferred by or under the authority of an Act" within the meaning of section 2 of the *Interpretation Act*. Thus, the Directive constitutes, for the purposes of subsection 57(1) of the *Federal Courts Act*, a "regulation" and, as a result, a notice of constitutional question is necessary to challenge its constitutionality.

[59] It is not disputed that the Attorney General of Canada has received notice of a constitutional question. However, no such notice was given to the attorneys general of the provinces and, consequently, the respondents' failure to provide the notice prevents us from entertaining the respondents' constitutional challenge.

Did the Commissioner have the legislative authority to enact, by way of the Directive, a total ban on smoking in federal correctional facilities?

[60] In enacting the Directive, the Commissioner relied on sections 70, 97 and 98 of the Act. More particularly, the appellants say that the Commissioner was entitled to adopt a Directive for "carrying out the purposes and provisions of this Part and the regulations", i.e. to ensure, as provided in section 70 of the Act, that the living and working conditions of inmates and of employees are safe and healthful. On the other hand, the respondents argue that the Commissioner could not proceed as he did because paragraph 96*(e)* of the Act grants the Governor in Council the power to enact regulations in regard to "the matters referred to in section 70".

[61] For ease of reference, I again reproduce sections 70, 96*(e)*, 97 and subsection 98(1) of the Act, which provide as follows:

70. Le Service prend toutes mesures utiles pour que le milieu de vie et de travail des détenus et les conditions de travail des agents soient sains, sécuritaires et exempts de pratiques portant atteinte à la dignité humaine.	**70.** Le Service prend toutes mesures utiles pour que le milieu de vie et de travail des détenus et les conditions de travail des agents soient sains, sécuritaires et exempts de pratiques portant atteinte à la dignité humaine.
…	…

[…]

96. The Governor in Council may make regulations […] (e) providing for the matters referred to in section 70; […]	**96.** Le gouverneur en conseil peut prendre des règlements : … e) régissant les questions visées à l'article 70; …
97. Subject to this Part and the regulations, the Commissioner may make rules (a) for the management of the Service; (b) for the matters described in section 4; and (c) generally for carrying out the purposes and provisions of this Part and the regulations.	**97.** Sous réserve de la présente partie et de ses règlements, le commissaire peut établir des règles concernant : a) la gestion du Service; b) les questions énumérées à l'article 4; c) toute autre mesure d'application de cette partie et des règlements.
98. (1) The Commissioner may designate as Commissioner's Directives any or all rules made under section 97.	**98**. (1) Les règles établies en application de l'article 97 peuvent faire l'objet de directives du commissaire.

[62] I should also make reference to subsection 83(1) of the Regulations, which reads:

83. (1) The Service shall, to ensure a safe and healthful penitentiary environment, ensure that all applicable federal health, safety, sanitation and fire laws are complied with in each penitentiary and that every penitentiary is inspected regularly by the persons responsible for enforcing those laws.	**83.** (1) Pour assurer un milieu pénitentiaire sain et sécuritaire, le Service doit veiller à ce que chaque pénitencier soit conforme aux exigences des lois fédérales applicables en matière de santé, de sécurité, d'hygiène et de prévention des incendies et qu'il soit inspecté régulièrement par les responsables de l'application de ces lois.

[63] I am satisfied that the Commissioner is not prohibited from issuing Directives regarding matters found in section 70 simply because the Act authorizes the Governor in Council to make regulations in regard to those matters.

[64] First, section 70 of the Act makes it clear that it is CSC's duty to "take all reasonable steps to ensure that … the living and working conditions of inmates and the working conditions of staff members are safe, healthful …". This duty is reinforced by the wording of section 83 of the Regulations.

[65] Second, limiting the Commissioner's ability to issue Directives because of the Governor in Council's power to enact regulations is, in my view, inconsistent with the opening words of section 97, which make it clear that the Commissioner's power to make rules is "[S]ubject to this Part and the regulations". In other words, while the Commissioner may make rules, the Governor in Council may make regulations-in relation to the same subject matter and if it does, the regulations prevail over the rules. Given the nature of the Commissioner's duties and the broad discretion that he has been given in order to carry them out, Parliament surely did not intend to prevent the Commissioner from issuing Directives by reason of section 96.

[66] Third, the scheme of the Act is inconsistent with an interpretation that would limit the Commissioner's ability to issue Directives. Section 96 enumerates the matters in regard to which the Governor in Council may make Regulations, while the Commissioner's authority to issue Directives under sections 97 and 98 is very broad. Moreover, section 96 provides the Governor in Council with

the authority to enact Regulations on numerous matters (subsections *(a)* to *(z)*). Thus, obliging the Commissioner to determine whether a proposed Directive overlaps in some way with the Governor in Council's regulation-making power would make it very difficult for him to issue Directives. For example, given the obvious overlap between "safety" and "security" in a penitentiary, the reference to the safety of inmates in section 70 could potentially prevent the Commissioner from issuing Directives on certain matters central to the operation of correctional facilities.

[67] Lastly, I believe that it is likely that Parliament intended significant overlap between the Commissioner's power to issue Directives and the Governor in Council's authority to enact regulations. The prevailing approach to resolving conflicts between legislation and subordinate legislation, which is somewhat analogous to the doctrine of federal paramountcy, in no way precludes overlap.

[68] In many administrative schemes, such overlap will be highly desirable, as instruments of administrative decision-making like Directives, rules and guidelines, are typically more flexible and easier to institute, revoke or change as the circumstances require: *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198, at paragraphs 90-109, particularly 106-109; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at paragraphs 41-42; see also R. Sullivan, *Sullivan on the Construction of Statutes*, 5th ed., (Markham: LexisNexis Canada, 2008), at 623-24. Flexibility is likely an important part of the rationale for overlapping authority in the scheme established by the Act; different aspects of the same matter may be better addressed by Regulation or by Directive.

[69] I therefore conclude that the Commissioner had the legislative authority to adopt the Directive and, more particularly, to enact a Directive so as to ensure that the living and working conditions of inmates and employees were safe and healthful.

[70] I now turn to the question of whether the Directive falls within the scope of the powers given to the Commissioner and whether the measures found therein find support in the Act and in the Regulations.

[71] To begin with, it is important to recall the policy objective of the Directive which is set out at article 1 thereof:

1. To enhance health and wellness by eliminating exposure to second-hand smoke at all federal correctional facilities. To achieve this objective, smoking will not be permitted indoors or outdoors within the perimeter of federal correctional facilities, including Community Correctional Centres (CCCs).	1. Améliorer la santé et le bien-être en éliminant l'exposition à la fumée secondaire dans tous les établissements correctionnels fédéraux. Pour atteindre cet objectif, il sera interdit de fumer à l'intérieur ainsi qu'à l'extérieur des bâtiments au sein du périmètre des établissements correctionnels fédéraux, y compris les centres correctionnels communautaires (CCC).

[72] Second, there is no dispute before us with regard to the danger that indoor smoking may pose to non-smokers. In fact, the respondents concede that indoor smoking may cause harm to non-smokers.

[73] Third, there can be no doubt that in enacting the first Directive, the Commissioner was attempting to prevent both inmates and employees from smoking indoors within federal correctional facilities so as to protect non-smokers. There can also be no doubt that the purpose of the Directive and, more particularly, the prohibition in respect of outdoor smoking, is an attempt by the Commissioner to prevent indoor smoking and, thus, to protect the health of non-smokers within the confines of federal correctional facilities. The stated purpose of the Directive clearly finds support in the Assistant Commissioner's recommendation of June 21, 2007, which explains why the first Directive was enacted, i.e.: "[T]his policy was developed in response to the expanding body of scientific evidence demonstrating the potential harmful effects of second-hand smoke and the increasing concern about exposure by employees, offenders and other individuals inside federal penitentiaries." (Appeal Book, Vol. 2, p. 328). The Assistant Commissioner's recommendation also explains why the first Directive was not successful in meeting its objective. More particularly, the recommendation sets out the number of reported infractions to the indoor smoking ban, outlining the ways and means taken by inmates to smuggle cigarettes into the correctional facilities and the fabrication of smoking devices to replace matches and lighters which CSC had either removed or confiscated.

[74] In making the case to the Commissioner for the adoption of a total smoking ban, the Assistant Commissioner speaks to the advantages of such a policy and points out that exposure to second-hand smoke would be eliminated within all federal correctional facilities (Appeal Book, Vol. 2, p. 343).

[75] I am therefore satisfied that the Commissioner's Directive clearly falls within the ambit of paragraph 97*(c)* of the Act in that it purports to take steps to ensure that the living and working conditions of inmates and employees of CSC are safe and healthful. Thus, the Directive falls within the scope of the powers given to the Commissioner under the Act and the Regulations.

[76] This conclusion, in my view, is sufficient to dispose of the question of the *vires* of the Directive. As Strayer J.A. stated in *Jafari v. Canada (Minister of Employment and Immigration,* [1995] 2 F.C. 595 at page 602:

> It goes without saying that it is not for a court to determine the wisdom of delegated legislation or to assess its validity on the basis of the court's policy preferences. The essential question for the court always is: does the statutory grant of authority permit this particular delegated legislation?

[77] The answer to the question posed by Strayer J.A. in the present appeal is clearly an affirmative one.

[78] Echoing the point of view expressed by Strayer J.A. in *Jafari, supra*, which he quoted with approval, Noël J.A., in *Canadian Council for Refugees v. Canada*, 2008 FCA 229, [2009] 3 FC 136, made the following remarks at paragraph 57:

> [57] Understanding precisely what is in issue in a judicial review application is important when it comes time to determine the standard of review as well as the scope of the review that can be conducted by the Court. An attack aimed at the *vires* of a regulation involves the narrow question of whether the conditions precedent set out by Parliament for the exercise of the delegated authority are present at the time of the promulgation, an issue that invariably calls for a standard of correctness. As was stated by this Court in *Sunshine Village Corp. v. Canada (Parks)*, 2004 FCA 166, [2004] 3 F.C.R. 600 (at para. 10):

> … Reviewing whether subordinate legislation is authorized by its enabling statute does not require application of the pragmatic and functional approach. Rather, the *vires* of subordinate legislation is always to be reviewed on a correctness standard. See, for analogous circumstances in respect of municipal by-laws: *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, at paragraph 5.
>
> [Emphasis added]

[79] As is made clear by Noël J.A. in the above passage, the question pertaining to the *vires* of delegated legislation must be reviewed on a standard of correctness. Consequently, I am of the view that the Judge erred in declaring the Directive invalid.

[80] The Judge's role was to determine whether the statutory grant of authority given to the Commissioner allowed him to adopt the Directive. However, the Judge did not see his role as so limited and proceeded to determine *de novo* whether the outdoor smoking ban was justified in the circumstances. In this regard, I refer particularly to his Reasons at paragraphs 27, 28, 33 and 34, where, in effect, the Judge appears to have substituted his view to that of the Commissioner as to whether a total ban on smoking should be implemented in federal correctional facilities. For example, at paragraph 28 of his Reasons, the Judge indicates that in his opinion, the total ban on smoking will result in the adoption of additional "control measures" and that he has doubts as to the effectiveness of these measures. As Strayer J.A. made clear in *Jafari, supra*, at page 602, it is not open to "a court to determine the wisdom of delegated legislation or to assess its validity on the basis of the court's policy preferences".

[81] In the end, it was the Commissioner's duty to determine what steps were necessary to ensure the health and safety of those living and working in federal correctional facilities. After a careful

review of the situation, the Commissioner determined that a total ban on smoking was the appropriate measure to "enhance health and wellness by eliminating second-hand smoke at all federal correctional facilities". Consequently, the Judge ought not to have intervened.

Disposition

[82] For these reasons, I would therefore allow the appeal with costs, I would set aside the Judgment of the Federal Court and, rendering the decision it ought to have rendered, I would dismiss the application for judicial review with costs.

"M. Nadon"
J.A.

"I agree.
J.D. Denis Pelletier J.A."

"I agree.
Johanne Trudel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CONCURRED IN BY:	PELLETIER J.A. TRUDEL J.A.
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