Federal Court of Appeal | Cour d'appel fédérale

Date: 20110602

Docket: A-338-10

Citation: 2011 FCA 184

CORAM: **NADON J.A.**
LAYDEN-STEVENSON J.A.
MAINVILLE J.A.

BETWEEN:

WARREN MCDOUGALL

Appellant

and

CANADA (ATTORNEY GENERAL)

Respondent

Heard at Vancouver, British Columbia, on May 5, 2011.

Judgment delivered at Ottawa, Ontario, on June 2, 2011.

REASONS FOR JUDGMENT BY: MAINVILLE J.A.

CONCURRED IN BY: NADON J.A.
LAYDEN-STEVENSON J.A.

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REASONS FOR JUDGMENT

MAINVILLE J.A.

[1] This concerns an appeal from the judgment of Tremblay-Lamer J. (the "applications judge") cited as 2010 FC 747 dismissing the appellant's application pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, for judicial review of the decision of the Senior Deputy Commissioner of the Correctional Service of Canada ("CSC") which denied the appellant's inmate grievance concerning both (a) the validity of the Institutional Standing Order 770 ("ISO 770") issued by the Warden of the Ferndale Institution and (b) the cancellation of the visiting clearance of two of the appellant's visitors.

[2] For the reasons set out below, I would dismiss this appeal.

Background

[3] The use of illicit drugs in federal penitentiaries is a pressing problem for Canada's correctional authorities. The Correctional Service of Canada Review Panel (the "Review Panel") submitted to the Minister of Public Safety a Report dated October 2007 (the "Report") in which it provided an independent assessment of CSC's contributions to public safety and proposals (or suggestions as to) how the current federal correctional system can be improved. This Report raises serious concerns related to illicit drug use in federal penitentiaries by an offender population which it assessed as being more violent and disrespectful than in the past and less concerned about repercussions while incarcerated. The Report notably includes the following at pages 26-27:

> While many factors may be contributing to this climate of disrespect, the Panel believes the key underlying factor is illicit drug use and trafficking. The prevalence of drug abuse and trafficking should not be surprising given that four out of five offenders arrive at a penitentiary with serious substance abuse problems, and about half the offenders have committed crimes under the influence of drugs, alcohol or other intoxicants. The current offender population will try to find every vulnerability in CSC's security systems to introduce drugs into the penitentiary.
>
> According to a member of the Citizens' Advisory Committee at the Victoria, B.C., parole office:
>
> > *When I have inmates tell me they can get just about any drug in an institution that they can get on the street and I hear from CSC institutional staff about drug-related violence, I have to wonder whether enough is being done to keep these drugs out of institutions.*
>
> The Panel is convinced that drugs have also propagated the increase in organized gangs within penitentiaries and the ensuing violence as these gangs attempt to continue their criminal activity…
> …

> The Panel members believe that illicit drugs are unacceptable in a federal penitentiary and create a dangerous environment for staff and offenders that translates into assaults on offenders and staff, promotes transmittable diseases such as HIV/AIDS and Hepatitis, and destroys any hope of providing a safe and secure environment where offenders can focus on rehabilitation.
>
> As dismal as the situation seems, the Panel believes there are solutions requiring a sustained focus.

[4] The Review Panel heard from many interest groups that visitors are considered one of the major sources of drugs in penitentiaries (Report at p. 31) and thus made recommendations to enhance the control and supervision of visitors, including the creation of a national database of all visitors (Report at p. 62).

[5] This Report and its recommendations were acted upon by CSC which began working on a number of initiatives to enhance safety and security, including plans that were specifically linked to eliminating drugs. Among the measures undertaken was the creation of the recommended national database for visitors to federal institutions which allowed for visitors to one institution to be cross-checked against other institutions to determine which individuals are visiting multiple inmates.

[6] Within the context of this national databank, and under the authority of section 4 of Commissioner's Directive CD-770 concerning inmate visits, the Acting Director General, Security Branch, of the CSC issued Security Bulletin Number 2008-06 (the "Security Bulletin") on June 30, 2008 in order to clarify procedures for staff members involved in the clearance of visitors. The Security Bulletin requires that the screening of any new visitor include a verification of any other

offender the visitor may be visiting and that any visitor without adequate justification for such visits be refused clearance.

[7] Following the Security Bulletin, the Warden of the Ferndale Institution issued the impugned ISO 770 in August 2008 as a visitor screening tool. The provisions of ISO 770 pertinent to this appeal are sections 5 to 7 which read in part as follows:

> 5. The Visits Board shall consist of the Manager Operations (chairperson), Correctional Manager, Security Intelligence Officers, V&C [visits and correspondence] staff and other ad hoc members.
>
> 6. The Visits Board shall review applications of all persons who wish to enter the institution to visit inmates.
>
> 7. A security screening for any new visitors shall include a verification of any other inmate the visitor may be visiting. The following procedures will be used to determine if any new applicants are on another inmate's visiting list:
> a) when an application is received by V&C, the officer shall check to ensure that the application is completed and correctly filled out … as per current routine;
> …
> d) if the visitor is listed as being on another inmate's visiting list, they will be sent a letter requesting to know why they are applying to visit this particular inmate at Ferndale Institution;
> e) the explanation received by V&C will be discussed at a Visits Board, prior to a CPIC check;
> f) if the explanation is viable, the process will continue with entering the information into OMS, CPIC check, etc.;
> g) if the explanation is not viable, the visitor will be notified via letter. This information shall also be logged into OMS as it will show as "DENIED" under the inmates contacts. This will be useful to determine if individuals are attempting to visit inmates at other Institutions repeatedly. The inmate shall also receive notice that the visitor was denied;
> h) if someone was previously listed on an other inmate's visiting list (showing as "CANCELLED") in RADAR, the application shall be processed as usual, because the visitor is no longer active on the other inmate's visiting list.

[8] When the Ferndale Institution conducted a search of visitors visiting more than one inmate in the Pacific Regional institutions, two of the appellant's visitors were identified. The two visitors were sent letters on August 27, 2008 requesting that they provide a written explanation indicating who they were visiting at which institutions and if they wished to continue visiting those inmates. The letters indicated that their visiting clearances would be cancelled if no response was received within four weeks, but that visitor status could be reinstated by resubmitting a new visiting application.

[9] The two concerned visitors refused or failed to respond to these letters. Consequently, both visitors were sent letters dated October 2, 2008 notifying them that their visiting clearance had been cancelled, but they could contact the Visits and Correspondence Department if they had any questions. Neither took this offer. Moreover, there is no indication that either of these visitors submitted a subsequent new application to visit the appellant.

[10] The appellant was informed of these visiting clearance cancellations on December 23, 2008 and immediately complained. He was then afforded an opportunity to meet with the Visits Board to discuss the matter. He eventually submitted an inmate grievance challenging the legality of ISO 770 and the decision to cancel the clearance. The thrust of the appellant's argument throughout the grievance process was set out as follows in his first level grievance (Appeal Record at p. 1152):

> The VRB [Visitor Review Board] claimed that several visitors had responded to the letters and, when the reasons for visiting they provided were discussed during VRB, the VRB had deemed the reasons satisfactory to maintain visitors' clearance. I pointed out that this process was illegal, as the law makes no requirement for visitors to justify the nature or quality of their relationship with an inmate nor to justify their reasons for visiting. Rather, the onus is on the institutional head to establish, on reasonable grounds, that there is a risk to

> safety or the security of the institution before any authority is given under law to restrict, suspend, or refuse any visit. Moreover, there is an obligation to inform the inmate and the visitor that there is a concern and also to give them an opportunity to make representations. I was never informed that this review was being conducted. I was never formally notified of the decision or the reasons therefore. Nor was the Inmate Committee consulted on this policy change.
> …
> I'm asking that the ISO 770 be rescinded for failing to conform with the law concerning visiting rights.
>
> I'm asking that my visitors' approved status be reinstated…

[11] At the third-level of the process, the grievance was denied by the Senior Deputy Commissioner on the following grounds (Appeal Record at p. 1144):

> Based on information that suggests that visitors who visit more than one (1) offender may present a risk to the Institution, it is not unreasonable that visitors be required to provide an adequate justification as to why they wish to visit a particular offender.
>
> With regard to your contention that the policy regarding visitors who visit more than one (1) offender only applies to new visitors, the Reintegration Programs Division at National Headquarters was consulted and it has been found that the policy applies to all visitors. The Security Bulletin was developed as a result of the Correctional Service of Canada (CSC) Review Panel Recommendation regarding the creation of a national database for visitors to Federal institutions. The intent of policy is to mitigate the potential for security risks associated with visitors who desire visiting privileges with more than one (1) inmate. For this reason, the policy does not simply apply to new visitors but applies to all visitors attending CSC institutions.
>
> With regard to the specific case of your visitors, personal information regarding individuals held by the CSC is protected under the *Privacy Act*. While CSC cannot provide any more information regarding the visiting status of your visitors, your visitors can communicate with the Institution to discuss the concerns that have arisen.
>
> As security is the paramount consideration in all decisions made in CSC institutions and there is no indication that any law or policy is being violated by requesting visitors who visit more than one (1) inmate to provide an explanation as to why they wish to visit an offender, this part of your grievance is denied.

The Reasons of the applications judge

[12] The applications judge found that ISO 770 was lawfully enacted and was consistent with paragraph 71(1) of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (the "Act") which provides that inmates are entitled to have reasonable outside contacts, including visits, "subject to such reasonable limits as are prescribed for protecting the security of the penitentiary or the safety of persons". The applications judge found that ISO 770 was such a reasonable limit.

[13] Turning her attention to the specific case of the appellant's two visitors whose clearance had been cancelled, the applications judge found that though such a cancellation must be assessed on a case by case basis in accordance with the duty to act fairly, ISO 770 was consistent with this rule since it did not authorise a blanket restriction on visits, but rather provided visitors whose clearance was in doubt an opportunity to make representations explaining the reasons for their visits and setting up a process for assessing these reasons.

[14] The applications judge also rejected the appellant's argument that ISO 770 had been adopted in violation of the inmates' right to be consulted since, under section 74 of the Act, inmates have no entitlement to consultation on decisions relating to security matters.

[15] The applications judge rejected the appellant's arguments that ISO 770 was ineffective on the basis that it was not up to the courts to determine the wisdom of delegated legislation or to assess its validity on the basis of the court's policy preferences.

[16] Finally, the applications judge found the cancellation of the clearance of two of the appellant's visitors reasonable since the concerned visitors had failed to respond to the questions asked of them under ISO 770.

The positions of the parties

[17] The appellant submitted a series of grounds for appeal which challenged just about every aspect of the reasons given by the applications judge. However, in his notice of appeal and in his oral arguments before this Court the appellant emphasized issues which he had raised in his grievance and which were not directly dealt with by the applications judge in her reasons.

[18] The appellant notably referred to subsection 91(1) of the *Corrections and Conditional Release Regulations*, SOR/92-620 (the "Regulations") which provides that a visit to an inmate cannot be refused except (a) if a staff member believes on reasonable grounds that the visit would jeopardize the security of the penitentiary or the safety of an individual or involve the commission of a criminal offence, and (b) that restrictions on the manner in which the visit takes place would not be adequate to control the risk. The appellant asserts that these provisions are incompatible with ISO 770 and the resulting cancellation of the visiting clearance.

[19] The appellant also emphasizes that he had not been afforded an appropriate opportunity to make representations concerning the cancellation of the visiting clearance and that this also constituted a violation of his right to procedural fairness.

[20] The respondent, for its part, essentially supports the applications judge's reasons in every respect.

The issues in appeal

[21] I would identify the issues in this appeal as follows:

a. Did the applications judge err in finding that the Warden of the Ferndale Institution had the authority to adopt ISO 770?

b. Insofar as ISO 770 was validly adopted, was the cancellation of the visiting clearance made in contravention of subsection 91(1) of the Regulations in that (i) no reasonable grounds existed for such a cancellation, or (ii) less restrictive measures could have been implemented in order to control the risks of illicit drug trafficking during these visitors' visits?

c. Did the CSC violate the appellant's rights by not providing him with an opportunity to make representations concerning the cancellation of the visiting clearance?

Standard of Review

[22] On appeal of a judgment concerning a judicial review application, the role of this Court is to determine whether the applications judge identified and applied the correct standard of review, and in the event she has not, to assess the impugned decision in light of the correct standard of review; the applications judge's selection of the appropriate standard of review is a question of law subject to review on appeal on the standard of correctness: *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226 at paragraph 43; *Mugesera v. Canada*

(Minister of Citizenship and Immigration), 2005 SCC 40, [2005] 2 S.C.R. 100 at paragraph 35; *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)*, 2006 FCA 31, [2006] 3 F.C.R. 610 at paragraphs 13-14; *Yu v. Canada (Attorney General)*, 2011 FCA 42 at paragraph 19.

[23] In her reasons, the applications judge did not discuss nor assess the applicable standard of review, but it appears from her reasons that she applied a standard of correctness in determining whether ISO 770 was lawful and whether it was adopted in violation of a duty of fairness, while she applied a standard of reasonableness to the third-level grievance decision upholding the cancellation of the clearance of the appellant's two visitors.

[24] In assessing the standard of review of inmate grievance decisions, a standard of correctness applies to issues of law, including the interpretation of the Act and Regulations and of the Commissioner's Directives, as well as to issues of procedural fairness. A standard of reasonableness applies to issues of fact and to issues of mixed law and fact, unless an extricable issue of law can be identified, in which case a standard of correctness may apply to that extricable issue: *Sweet v. Canada (Attorney General)*, 2005 FCA 51, 332 N.R. 87 at paragraphs 15-16; *Yu v. Canada (Attorney General)*, above at paragraph 21.

[25] The first issue in this appeal raises the question of the legal authority of the Warden to adopt ISO 770, which is a question of law. The second issue raises the question of the compatibility of the decision to cancel the visiting clearance with subsection 91(1) of the Regulations, which itself raises questions of mixed law and fact, notably whether reasonable grounds existed for this cancellation

and whether less restrictive measures could have been implemented. Finally, the third issue in this appeal raises a question of procedural fairness.

[26] Consequently, a standard of correctness applies to the first and third issues, while a standard of reasonableness applies to the second issue unless an extricable issue of law can be identified.

Did the applications judge err in finding that the Warden of the Ferndale Institution had the authority to adopt ISO 770?

[27] As noted above, ISO 770 provides that the security screening of visitors must include a verification of any other inmate the visitor may be visiting and, if multiple inmate visits are found to exist, the concerned visitor is required to explain the reasons why multiple inmate visits are being pursued. This explanation is then reviewed at the institution's Visits Board to determine if it is viable. In the event that the explanation is not found to be viable, the visitor's clearance is denied with notice of this decision being provided to both the concerned visitor and the inmate.

[28] The first issue is whether ISO 770 can be adopted and implemented by the Warden of the Ferndale Institution under existing statutory or regulatory authority. The applications judge found that it could be so adopted. Though I agree with the applications judge's conclusion on this issue, I do so for different reasons.

[29] The proper approach to this question was reiterated by this Court in *Friends of the Canadian Wheat Board v. Canada (Attorney General)*, 2011 FCA 101, [2011] F.C.J. No. 297 at paragraph 35,

citing with approval the following passage in *Canadian Wheat Board v. Canada (Attorney General)*, 2009 FCA 214, [2010] 3 F.C.R. 374 at paragraph 46:

> The first step in a *vires* analysis is to identify the scope and purpose of the statutory authority pursuant to which the impugned order was made. This requires that subsection 18(1) be considered in the context of the Act read as a whole. The second step is to ask whether the grant of statutory authority permits this particular delegated legislation (*Jafari v. Canada (Minister of Employment and Immigration)*, [1995] 2 F.C. 595, para. 14).

[30] The Act sets out in subsection 71(1) the general principle that inmates are entitled to have reasonable contact, including visits and correspondence, with family, friends and other persons, but that this entitlement is subject to reasonable limits which may be prescribed for protecting the security of the penitentiary or the safety of persons:

71. (1) In order to promote relationships between inmates and the community, an inmate is entitled to have reasonable contact, including visits and correspondence, with family, friends and other persons from outside the penitentiary, subject to such reasonable limits as are prescribed for protecting the security of the penitentiary or the safety of persons. [Emphasis added]	**71.** (1) Dans les limites raisonnables fixées par règlement pour assurer la sécurité de quiconque ou du pénitencier, le Service reconnaît à chaque détenu le droit, afin de favoriser ses rapports avec la collectivité, d'entretenir, dans la mesure du possible, des relations, notamment par des visites ou de la correspondance, avec sa famille, ses amis ou d'autres personnes de l'extérieur du pénitencier. [Je souligne]

[31] These reasonable limits may be prescribed in regulations of the Governor-in-Council as well as in Commissioner's Directives made under sections 97 and 98 of the Act. This flows from the definition of "regulations" in subsection 2(1) of the *Interpretation Act*, R.S.C. 1985, c. I-21 which

includes Commissioner's Directives, since these directives are orders or rules issued, made or established in the execution of a power conferred by or under the authority of the Act: *Canada (Attorney General) v. Mercier*, 2010 FCA 167, 320 D.L.R. (4th) 429 at paragraph 58.

[32] Under section 4 of the Regulations, an institutional head (which means the person who is normally in charge of the penitentiary: subsection 2(1) of the Act) is responsible, under the direction of the Commissioner, for the care, custody and control of all inmates in the penitentiary, as well as for the management, organization and security of the penitentiary. The security of the penitentiary certainly includes the control of illicit drugs, as notably provided in Commissioner's Directive 585 concerning a National Drug Strategy ("CD 585"), which further empowers the institutional head to develop and implement various measures and procedures for this purpose. The provisions of sections 1, 4, 5 and 12 of CD 585 read as follows:

1. The Correctional Service of Canada, in achieving its Mission, will not tolerate drug or alcohol use or the trafficking of drugs in federal institutions. A safe, drug-free institutional environment is a fundamental condition for the success of the reintegration of inmates into society as law-abiding citizens.	1. Dans l'accomplissement de sa Mission, le Service correctionnel du Canada ne tolérera ni la consommation d'alcool ou de drogues ni le trafic de drogues dans les établissements fédéraux. Un milieu pénitentiaire sûr, libre de toute drogue, est une condition fondamentale pour que les détenus puissent réintégrer la société à titre de citoyens respectueux des lois.
4. The Institutional Head is responsible for ensuring that the institution applies the Drug Strategy in accordance with the *Corrections and Conditional Release Act* and related regulations, the Correctional Service of Canada policies, standards and guidelines.	4. Le directeur de l'établissement doit veiller à ce que la stratégie antidrogue soit mise en application en conformité avec la *Loi sur le système correctionnel et la mise en liberté sous condition* et le règlement connexe, ainsi qu'avec les politiques, les normes et les lignes directrices du Service correctionnel du

Canada.

5. Each institution shall develop and implement drug strategies to balance detection, deterrence and treatment that are reflective of the nature of the institution.	5. Tous les établissements doivent élaborer et mettre en application des stratégies antidrogues adaptées à leur nature, de façon à établir un équilibre entre la détection, la dissuasion et le traitement.
12. Depending on the circumstances relating to the particular inmate and on the organization of the institution, every institution shall establish a procedure for assessing risk related to drug use and trafficking, as well as procedures for reviewing the imposition of administrative measures. This responsibility may rest with the Unit Board, the Visitors Screening Board or the Program Board. [Emphasis added]	12. Selon les circonstances propres à chaque détenu et l'organisation des établissements, ceux-ci doivent tous établir des procédures pour évaluer le risque de consommation et de trafic de drogues et pour examiner la possibilité d'imposer des mesures administratives. Cette tâche peut être confiée au Comité de l'unité, au Comité de sélection des visiteurs ou au Comité des programmes. [Non souligné dans le texte original]

[33] In addition, pursuant to Commissioner’s Directive 770 concerning visiting, the institutional head must specify the procedures to be followed and the conditions to be met with respect to visiting, and pursuant to section 4 thereof, must also decide whether or not visitor clearance will be given:

4. All inmates' visitors shall complete an application and information form for the purpose of security screening. A verification of the Canadian Police Information Centre files shall then be conducted and subsequently updated at least every two (2) years for all active visitors. On the basis of this security	4. Toute personne désirant rendre visite à un détenu doit remplir une formule de demande d'admission et de renseignements aux fins du contrôle de sécurité. Une vérification des fichiers du Centre d’information de la police canadienne doit être menée et, par la suite, une mise à jour doit être effectuée

check and following a review of possible restrictions, the Institutional Head shall decide whether or not visitor clearance will be granted. Under special circumstances, at the discretion of the Institutional Head, the security screening may be waived. [Emphasis added]	au moins tous les deux (2) ans pour les visiteurs actifs. Compte tenu de cette vérification et à la suite d'un examen des restrictions possibles, le directeur de l'établissement doit déterminer si l'autorisation de visite sera accordée. Dans des circonstances particulières, le directeur peut décider de dispenser le visiteur du contrôle de sécurité. [Non souligné dans le texte original]

[34] It is thus abundantly clear that the Warden of the Ferndale Institution, as its institutional head, could adopt and implement ISO 770 as a visitor screening tool pursuant to the above mentioned statutory and regulatory authorities.

[35] Nor is ISO 770 in conflict with subsection 91(1) of the Regulations further discussed below, since this Institutional Standing Order simply seeks to inquire as to the purpose of multiple inmate visits and sets up a process to ascertain if the explanations given are viable. Consequently, any incompatibility with subsection 91(1) of the Regulations would flow from the application of ISO 770, and not from the adoption or the terms of that Institutional Standing Order.

[36] Moreover, as found by the applications judge, the adoption of ISO 770 was a decision relating to security matters in which the inmates contribution was neither necessary nor required under section 74 of the Act, which exempts such decisions from inmate participation.

Was the cancellation of the visiting clearance made in contravention of subsection 91(1) of the Regulations?

[37] Having determined that the Warden had the authority to adopt and implement ISO 770, it must now be asked if the application of this institutional standing order to the appellant's visitors violated subsection 91(1) of the Regulations which provides as follows:

91. (1) Subject to section 93, the institutional head or a staff member designated by the institutional head may authorize the refusal or suspension of a visit to an inmate where the institutional head or staff member believes on reasonable grounds	**91.** (1) Sous réserve de l'article 93, le directeur du pénitencier ou l'agent désigné par lui peut autoriser l'interdiction ou la suspension d'une visite au détenu lorsqu'il a des motifs raisonnables de croire :
(*a*) that, during the course of the visit, the inmate or visitor would	*a*) d'une part, que le détenu ou le visiteur risque, au cours de la visite :
(i) jeopardize the security of the penitentiary or the safety of any person, or	(i) soit de compromettre la sécurité du pénitencier ou de quiconque,
(ii) plan or commit a criminal offence; and	(ii) soit de préparer ou de commettre un acte criminel;
(*b*) that restrictions on the manner in which the visit takes place would not be adequate to control the risk.	*b*) d'autre part, que l'imposition de restrictions à la visite ne permettrait pas d'enrayer le risque.

[38] In the appellant's view, paragraph 91(1)(*a*) of the Regulations places a heavy onus on the institutional head to establish that there is either a risk to security or safety, or a risk of a criminal offence before suspending or refusing a visit. Consequently, in this view, even if a visitor could be asked to justify the nature or quality of his relationship with an inmate or to justify the reasons for

visiting, the refusal to answer such enquiries could not, under paragraph 91(1)(*a*), form on its own the basis for a belief on reasonable grounds that there exists a risk to security or safety. The appellant would restrict the CSC to making the inquiry by asking questions, but would leave the CSC powerless to restrict visitors from visiting the institution in the event they refuse to answer. I find this reasoning unpersuasive.

[39] First, this reasoning ignores the first guiding principle set out in paragraph 4(*a*) of the Act which provides "that the protection of society be the paramount consideration in the corrections process." The protection of society includes the control of the entry of illicit drugs in penitentiaries.

[40] Second, and equally important in my view, this reasoning also improperly imports into the administration of federal penitentiaries and into the administrative decision making process concerning inmate visits the notion of "reasonable belief" applicable in a search, seizure and detention context. The same level of procedural protections applicable in the context of search, seizure and detention does not necessarily extend to an administrative law context. Rather, the context and purpose of the decision to refuse visitor clearance must be taken into account in determining the standard to which the decision maker is to be held in making that decision.

[41] In this case, after an extensive analysis, the Review Panel has noted that illicit drug trafficking within penitentiaries is one of the major challenges facing federal correctional authorities and that a substantial part of this trafficking appears to be tied to inmate visits. One of the methods suggested to properly address this problem is the development of a national visitor database

allowing cross-referencing of multiple inmate visits, since such visits raise *prima facie* suspicions that the security of the institution could be jeopardized. As I have already noted above, there is ample legislative and regulatory authority for the CSC to require visitors to explain the reasons which underlie their multiple inmate visits. In the absence of any response from the concerned visitors, and in the context of determining the appropriate administrative measures (as opposed to disciplinary measures) which need to be implemented for managing inmate visits, it is reasonable for the CSC to hold a belief on reasonable grounds that the *prima facie* suspicions are founded in the case of a visitor who refuses to explain the nature of the relationship and the purposes of the visits with multiple inmates.

[42] Consequently, the absence of an explanation from a visitor is an objectively verifiable indication that can sustain a CSC belief on reasonable grounds, under the meaning of paragraph 90(1)(*a*) of the Regulations, that such a visitor would jeopardize the security of the penitentiary during a visit. This is so since the subject of the inquiry, as well as the decision making process, concern an administrative action relating to the secure access to a penitentiary, and not, as the appellant would have us believe, a matter relating to search, seizure or detention, or otherwise affecting a constitutional right.

[43] It is consequently inappropriate to confuse the administrative law concept of reasonableness, which is reflected in subsection 91(1) of the Regulations, with the wholly unrelated notion of "reasonable belief" applicable in a search, seizure and detention context. Administrative law is

infused with the concept of reasonableness and the administrative decisions of the correctional authorities relating to visitors to federal institutions must be assessed in the light of that concept.

[44] For similar reasons, I am not persuaded by the appellant's arguments based on paragraph 90(1)(*b*) of the Regulations. In the appellant's view, the visits cannot be cancelled insofar as other restrictions could be implemented during the visits which would address the drug trafficking concerns of the CSC, such as searches of visitors and inmates through technical devices or drug detector dogs, or frisk searches and strip searches. In the appellant's view, since his visitors have refused to explain their visits, he and his visitors could be subjected to more intensive searches upon visits, thus answering the CSC's concerns pertaining to drug trafficking while allowing the visits to continue.

[45] The appellant's position is inconsistent with the guiding principle set out in paragraph 4(*d*) of the Act, which states that the CSC use the least restrictive measures consistent with the protection of the public, staff members and offenders. The physical search of an individual is normally strictly regulated by the law in light of its intrusive nature. Asking a visitor to explain the nature and purpose of the visits is much less intrusive and, in my considered opinion, is a reasonable, simple, non-intrusive and appropriate method of visitor control and screening. I agree with the applications judge that the approach taken by the CSC is reasonable taking into account all the circumstances and is consistent with the applicable legislative and regulatory provisions.

[46] The appellant fundamentally seeks to have this Court establish its own preferred method of visitor control in federal penitentiaries. As the applications judge aptly noted at paragraph 26 of her reasons, this is simply not a ground of judicial review.

Did the CSC violate the appellant's rights by not providing him with an opportunity to make representations concerning the cancellation of the visiting clearance?

[47] Paragraph 91(2)(*b*) of the CRR Regulations and paragraph 18(b) of CD 770 provide that in the event of the refusal or suspension of a visit to an inmate, the inmate and the visitor are to be promptly informed of the reasons and given an opportunity to make representations with respect thereto. Paragraph 91(2)(*b*) of the Regulations reads as follows:

91. (2) Where a refusal or suspension is authorized under subsection (1),	**91.** (2) Lorsque l'interdiction ou la suspension a été autorisée en vertu du paragraphe (1) :
(b) the institutional head or staff member shall promptly inform the inmate and the visitor of the reasons for the refusal or suspension and shall give the inmate and the visitor an opportunity to make representations with respect thereto.	*b)* le directeur du pénitencier ou l'agent doit informer promptement le détenu et le visiteur des motifs de cette mesure et leur fournir la possibilité de présenter leurs observations à ce sujet.

[48] Moreover, sections 8 and 9 of ISO 770 provide that, when making a decision, the Visits Board shall permit the concerned inmate to make representations, and that its decisions are to be communicated to the affected parties within fourteen days of being taken.

[49] In this case, the appellant was informed on December 23, 2008 that the visiting clearance of his two visitors had been cancelled on October 2, 2008. Though the notice was not as prompt as

may have been desirable under paragraph 91(2)(*b*) above, and though it was certainly not provided within the 14 days contemplated by ISO 770, the appellant was nevertheless informed of the reasons for the decision on January 6, 2009, and was given an opportunity to discuss the matter on February 20, 2009 with the Visits Board of the institution. In addition, the appellant availed himself of the inmate grievance process in order to challenge both the legality of ISO 770 and the cancellation of the clearance, and he provided to the CSC substantial representations and arguments supporting his contentions within that process.

[50] As noted in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraphs 21 and following, and reiterated many times since, the concept of procedural fairness is eminently variable and its content is to be decided in the specific statutory, institutional and social context of each case. In this case, the appellant has been informed of the decision and of the reasons for which it was made, and has had an ample and full opportunity to challenge this decision before the Visits Board and within the inmate grievance process. In these circumstances, I cannot conclude that the appellant's right to make representations was affected to such an extent as to vitiate the cancellation of the visiting clearance or to invalidate the third level grievance decision upholding this cancellation.

[51] As concerns the late notice to the appellant informing him of the visits cancellation, the Court has the discretion under subsections 18.1(5) and 28(2) of the *Federal Courts Act* to dismiss an application for judicial review notwithstanding technical irregularities in the process under review if no substantial wrong or miscarriage of justice has occurred: *Community Panel of the Adams Lake*

Indian Band v. Dennis, 2011 FCA 37; [2011] F.C.J. No. 150 (QL) at para. 26-37; *Yassine v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 949 (QL), 172 N.R. 308 at paras. 9-10 (F.C.A.). That said, my comments in this respect should not be interpreted as condoning the tardiness of the notice to the appellant. The mandated timelines, absent special circumstances, should be respected by the CSC.

[52] Finally I note that thought the appellant did make representations to the CSC concerning the fact that his visitors had previously obtained clearance, the appellant did not submit any cogent evidence as to the reasons for which these visitors were visiting more than one inmate. I note that no letter or affidavit from the concerned visitors concerning this matter was submitted by the appellant at his meeting with the Visits Board or during the entire inmate grievance process. Since the October 2, 2008 decision of the CSC cancelling the visits related to the issue of multiple inmate visits, it was incumbent on the concerned parties to submit a cogent explanation addressing this issue. In this context, I cannot find that the applications judge erred in finding that the third level grievance decision upholding the cancellation of the visiting clearance was reasonable.

Conclusion

[53] I would dismiss this appeal. The applications judge did not deem it appropriate to award costs, and I would do the same for the purposes of this appeal.

"Robert M. Mainville"
J.A.

“I agree
M. Nadon J.A.”

“I agree
Carolyne Layden-Stevenson J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-338-10
STYLE OF CAUSE:	WARREN MCDOUGALL v. CANADA (ATTORNEY GENERAL)
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	May 5, 2011
REASONS FOR JUDGMENT BY:	MAINVILLE J.A.
CONCURRED IN BY:	NADON J.A. LAYDEN-STEVENSON J.A.
DATED:	June 2, 2011

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