Federal Court  Cour fédérale

Date: 20150730

Docket: T-1108-14

Citation: 2015 FC 934

Ottawa, Ontario, July 30, 2015

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

HARIS NARAINE

Applicant

and

THE ATTORNEY GENERAL OF CANADA
and
THE COMMISSIONER OF CORRECTIONS

Respondents

JUDGMENT AND REASONS

I. Overview

[1] Mr. Naraine and the Inmate Committee of Archambault Institution seek judicial review of a decision dated March 7, 2014, whereby the Acting Senior Deputy Commissioner [Commissioner] of Correctional Service Canada [CSC] denied Mr. Naraine's grievance over the cancelling of two television channels included in the package subscribed for by a group of

inmates. These television channels aired sexually explicit content and while the inmates previously enjoyed access to these television channels, the Commissioner concluded that under the law and new policy, the right to access the material and live entertainment was not absolute; particularly, in accordance with CSC's responsibilities, the channels were banned to maintain a safe and healthful environment. It was found that sexually explicit material undermined a person's sense of personal dignity, and in the circumstances under consideration, particularly that of female correctional officers.

[1] Mr. Naraine argues that: (i) the impugned decision does not comply with his entitlements under the *Corrections and Conditional Release Act*, SC 1992, c 20 [CCRA] and with the *Corrections and Conditional Release Regulations*, SOR/92-620 [CCRR]; (ii) there was a breach of procedural fairness, the content of which includes the inmates' right of consultation; and (iii) the decision violates the applicant's rights to freedom of expression guaranteed under section 2(*b*) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

[2] At the hearing, the respondents agreed to waive their right to costs in the event that this application be dismissed.

[3] The role of this Court is not to determine whether or not inmates in CSC's institutions should have access to sexually explicit television programs, but rather to assess the legality of the Commissioner's decision. For the reasons discussed below, the application for judicial review will be granted and the file sent back to a different Commissioner for a new determination.

Standing of the Inmate Committee

[4] At the hearing, I raised the question of the Inmate Committee's standing as the impugned decision only concerns a third-level grievance filed by Mr. Naraine.

[5] Counsel for the applicant did not convince me that the Inmate Committee had standing before the Court. It could very well be that it has (a) a direct interest in the matter by virtue of a finding that the matter at issue adversely affects the rights of its members, or (b) public interest standing (*Canwest MediaWorks Inc v Canada (Minister of Health)*, 2007 FC 752 at paras 13 and 18). However, no such evidence was adduced before me and the Inmate Committee has not asked for intervener status. Therefore, its name as an applicant will be struck out and the style of cause will be amended accordingly.

II. Facts

[6] Mr. Naraine is a 46 year-old federal inmate in a medium and minimum security detention facility for male prisoners called Archambault Institution.

[7] He claims that he and his fellow inmates at Archambault and other CSC institutions previously enjoyed access to sexually explicit programs as part of a local cable television package which they could purchase through the Inmate Committee. These programs could be accessed on closed circuit channels very late in the evening, usually after 11 PM.

[8] In his affidavit, Mr. Naraine asserts having watched sexually explicit content while at Archambault and previously at two other institutions; to his knowledge, for at least 7 years (the period of his incarceration) there had been no incidents or complaints from correctional officers resulting from inmates' access to that category of television programming.

[9] On January 29, 2013, the Standing Committee on the Status of Women held its 55th meeting at the House of Commons whereby two witnesses from the Union of Canadian Correctional Officers testified as part of a continuing study on sexual harassment in the federal workplace. One of those two witnesses claimed that the Minister of Public Safety had announced, in May 2012, that access to pornography on television in CSC institutions was an unacceptable practice which he would be "putting an end to".

[10] On March 4, 2013, a videoconference was held by the Assistant Commissioner/ Correctional Operations and Programs [ACCOP]; as a follow-up to that videoconference he sent a Memorandum to all Assistant Deputy Commissioners, Institutional Operations [ADCIOs] instructing that material depicting sexually explicit content, on the walls inside inmates' cells or elsewhere in the institution, be removed, and that each region confirm that they have introduced "appropriate blockers" to "X" rated television content. All regions had to confirm that the measures were in place no later than March 25, 2013.

[11] On March 22, 2013, the Inmates Committee was informed that the transmission of the two television channels with explicit content would no longer be broadcast as of March 25, 2013 at 4 pm.

[12] On January 27, 2014, Mr. Naraine's Third-Level Presentation grievance, signed and dated January 6, 2014, was received by CSC. In his grievance, he asked CSC to lift the recent ban on television channels that otherwise aired sexually explicit content. He argued that the CSC had no right to censor television channels which the inmates legally paid for. He cited *Mercier v Canada (Attorney General)*, 2009 FC 1071 for the proposition that offenders retain the rights of all citizens, except those limited as a necessary consequence of their sentence. By limiting their access to publicly available television channels, the CSC violated their section 2 Charter rights; the impact of the recent ban is also disproportionate to the stated intent of the restriction.

[13] Mr. Naraine further requested reimbursement for the "channel packages" they had continue to pay for.

[14] His grievance was denied.

III. Impugned Decision

[15] The Commissioner examined the applicant's submission, the relevant legislation and policy as well at his Offender Management System file. She also consulted with National Headquarters in addition to staff at Archambault Institution. The Commissioner concluded that "both law and policy prescribe that access to material is not absolute" and that, in this case, there were serious concerns expressed by female correctional officers relating to their security and personal dignity concerning the sexually explicit material. The reasoning adopted by the Commissioner is based on the following provisions:

- Section 4(d) of the CCRA does indeed confirm that offenders "retain the rights of all members of society except those that are, as a consequence of the sentence, lawfully and necessarily removed or restricted";

- Subject to certain conditions, the Commissioner's Directive 764 [CD 764] *Access to Material and Live Entertainment* says that inmates "shall have" access to material and live entertainment; under paragraph 4, such material must be: a) legally available on the open market; b) adhere to the *Copyright Act* and c) not jeopardize the security of the institution or the safety of persons;

- Notwithstanding these conditions, under the same directive, paragraph 7 says that the material can be prohibited if the institutional head or his or her immediate delegate believes on reasonable grounds that it is likely to be viewed by other persons and that it would undermine the personal dignity by demeaning, causing humiliation or embarrassment to a person on the basis of sex, race, national or ethnic origin, colour or religion; subsection 96(2) of the CCRR is to the same effect;

- Finally, section 70 of the CCRA states that CSC has an obligation to take reasonable steps to insure 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";

[16] Applying the factual circumstances to these provisions, the Commissioner reasoned that the CSC had been informed of serious concerns relating to female correctional officers who expressed a degraded sense of personal dignity and their safety being undermined from their exposure to sexually explicit material on a regular basis in the workplace.

[17] The Commissioner then turned to the evidence relating to these concerns, which subsequently led to a follow-up videoconference between ADCIOs and the ACCOP. She then decided to introduce a change in policy pursuant to paragraph 7 of the CD 764 (as emphasized above), by issuing a Memorandum entitled "Inmate Access to Sexually Explicit Material",

banning sexually explicit content from the walls and blocking sexually explicit television channels.

[18] In her discussion of the evidence, the Commissioner cited the testimonies of the two correctional officers before the House of Commons Standing Committee on the Status of Women, which expressed emotional harm and insecurity resulting from "unwanted attention, unwelcome comments and intentional displays of sexual gratification" including deliberate exposure masturbating in front of the officers. These incidents were said to be common in their workplace.

[19] The Commissioner explained that it was impossible to limit access to the television channels on a case-by-case review of Correctional Plan objectives and offences because there were limitations in technology, significant costs involved and management issues resulting from double-occupancy of cells. Failure to ensure that a certain class of inmates were not watching prohibited broadcasts would have a detrimental effect on their reintegration:

> . . . the population at AI includes inmates who have committed sexual offences. In accordance with the objectives of their Correctional Plans, many of these inmates are prohibited from accessing sexually explicit material. The availability of sexually explicit content on television channels within the Institution may expose these inmates to material that they are not permitted to access, impeding the maintenance of an environment that is conducive to actively encouraging and assisting offenders to become law-abiding citizens.

[20] It was finally found that there would also be no ability to restrict access to the content on an individual basis without breaching an inmate's right to privacy.

IV. Issues and Standard of Review

[21] The issues raised by this application for judicial review are as follows:

(1) Was there a breach of procedural fairness?

(2) Did the Commissioner commit a reviewable error in his interpretation and application of the CCRA and policy?

(3) Does the impugned decision violate the applicant's right of freedom of expression guaranteed by section 2(*b*) of the Charter?

[22] The third issue is a question of mixed fact and law and attracts a reasonableness standard while questions of procedural fairness attract a correctness standard (*McDougall v Canada (Attorney General)*, 2011 FCA 184 at para 24).

[23] On the issue of Charter violation, the parties disagree on the applicable standard of review. The respondent argues that the applicant is wrong to suggest a standard of correctness based on *Multani v Commission Scolaire Marguerite-Bourgeoys* [2006] 1 SCR 256 at para 17 and asserts *Doré v Barreau du Québec*, [2012] 1 SCR 395 at paras 33-34, 52-58 [*Doré*] is authoritative.

[24] The *Doré* new standard of review for administrative tribunals' assessment of Charter issues was also applied in the Supreme Court of Canada's most recent decision in *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12, to a Minister's discretionary decision.

[25] In *Doré*, the Disciplinary Council of the Barreau du Québec rejected the appellant's argument that article 2.03 of the *Code of ethics of advocates* violated section 2(*b*) of the Charter, finding that the limitation on freedom of expression was reasonable in the circumstances. Justice Abella found that the role of a Court reviewing a discretionary administrative decision was to ensure that the administrative decision interferes with the relevant Charter guarantee no more than necessary given the statutory objectives. If the decision has a disproportionate impact on the guaranteed right, it is unreasonable. However, if the administrative decision reflects a proper balance of these objectives with Charter protection, it is a reasonable one. The Court must determine if the decision-maker has proportionately balanced the relevant Charter values with statutory objectives, in which case if he or she does do so, the decision will be found to be reasonable.

[26] The Charter issue raised in the present application for judicial review will therefore be reviewed under the reasonableness standard.

[27] Finally, I also reject the applicant's assertion that in light of the power imbalance in the structure of CSC, as between the institution and its inmates, the question at issue is of fundamental importance to the legal system as a whole and outside the expertise of the Commissioner. In *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 [*Alberta Teachers*], Binnie J stated that an issue of general legal importance is one "whose resolution has significance outside the operation of the statutory scheme under consideration." Since *Alberta Teachers*, the Supreme Court of Canada has reiterated its strict limitations to the use of the exceptions to the reasonableness standard (see for

example, *McLean v British Columbia (Securities Commission)*, 2013 SCC 67). In my view, the interpretation of the CCRA provisions by the Commissioner does not fall outside his or her expertise and does not involve a question of central importance to the legal system as a whole; it does not have significance outside the Canadian correctional service system, nor does it involve any other special circumstance that would require review on a correctness standard.

V. Analysis

Procedural Fairness

[28] The applicant submits that he was denied "administrative fairness" because the inmates were not informed nor consulted prior to the ACCOP issuing its memorandum banning the sexually explicit material. In accordance with sections 27 and 74 of the CCRA, and the caselaw (*Baker v Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817; *Nicholson v Haldimand Norfolk Regional Police Commissioners*, [1979] 1 SCR 311), the applicant argues that he had a right to information on which the CSC would base its decision and a right to make representations. He submits that a duty of consultation was owed to him since the issues involved dealt only "secondarily" with security; relying on *William Head Institution Inmate Committee v Canada (Corrections Service)*, [1993] FCJ No 821, he argues the decision should be quashed.

[29] The respondents submit that the applicant is barred from raising the issue of procedural fairness as it was raised for the first time on judicial review and not at the earliest practical opportunity. In short, the applicant has waived his rights to challenge procedural violations (*Maritime Broadcasting System Limited v Canadian Media Guild*, 2014 FCA 59 at paras 67-68;

Restrepo Benitez v Canada (Minister of Citizenship and Immigration), 2006 FC 461 at para 220, aff'd 2007 FCA 199).

[30] In the alternative, the respondents submit that there was no duty to consult under the CCRA because section 74 explicitly excludes decisions relating to security matters. The ban on sexually explicit television channels relates to the security of staff and inmates. The distinction raised between primary and secondary "security matters" has been previously rejected by this Court (*McDougall v Canada (Attorney General)*, 2010 FC 747 at para 23).

[31] At the hearing, counsel for the applicant added that the inmate population is vulnerable, they sometimes suffer from mental issues, and some have little education; as a consequence, he says they could not have been expected to raise the issue of procedural fairness which is otherwise a sophisticated matter. However, the respondents pointed out that these vulnerabilities did not preclude the applicant from adequately understanding his Charter rights as raised in his grievance.

[32] In my view, there is no need to delve into the content of procedural fairness as the applicant has waived his right to raise violations of procedural fairness; such allegations do not appear in his submissions before the Commissioner at the final level grievance stage. The issue could have been grieved in the Offender Grievance Presentation which was the earliest practical opportunity. The applicant was fully aware of the television ban on March 22, 2013, upon receiving notice. This was prior to the date of submitting his application which was signed and dated January 6, 2014. I therefore agree with the respondents on this issue.

Reasonableness of the Decision

[33] The applicant submits that the impugned decision does not comply with the CCRA because it makes reference to only impressions and unproven assumptions, not conclusive evidence and as such, is based on speculation. As an example, the applicant discusses how the Certified Tribunal Record [CTR] does not contain evidence showing a causal connection between access to sexually explicit content and security risk or adverse effects on inmates' progress.

[34] For their part, the respondents maintain that the decision is reasonable and reiterate that the testimonies of the two female correctional officers, which are found in the CTR, served as uncontradicted evidence before the Commissioner justifying her conclusions.

[35] It is clear from the record before me that there are some significant gaps in the CTR which make it difficult to support the analysis of the impugned decision, most particularly the proportionality part, which to some extent subsumes into the Charter analytical framework. There is no specific evidence relating to the conditions or circumstances of Mr. Naraine's own institution, nothing about the management issues discussed in the impugned decision.

[36] The only evidence before me is the transcript of the January 29, 2013 session held by the Standing Committee on the Status of Women, containing the two testimonies of the female correctional officers. The purpose of the meeting related more so to failures in the redress process and the fact female staff workers, more generally in all federal agencies, were unsatisfied

with redress mechanisms (CTR, pages 41-66) and were deterred by reason of their gender from coming forward with sexual harassment complaints in the workplace.

[37] As to the situation in CSC institutions, two witnesses, both female correctional officers part of the Union of Canadian Correctional Officers, testified. The first witness had 12 years of experience and worked at the time at Kingston Penitentiary, a maximum security institution for men. The second witness had 26 years of experience as a correctional officer and at the time of her testimony, worked at Cowansville federal penitentiary, a medium security institution. Security issues and emotional harm resulting from inmates' access to sexually explicit material was not the focus of the two testimonies. The focus was rather on the lack of awareness, support and responsive action on the employer's part to prevent female officers from being sexually harassed by inmates.

[38] As indicated above, the first witness began her testimony by citing the Minister of Public Safety, stating that he had been made aware that federal inmates had access to pornography on television, that it was unacceptable and that he would put an end to the practice. She added that to date, it had not happened. She generally makes a link between inmates being "permitted to keep sexually suggestive and explicit magazines and personal photographs that continue to subject female officers to unwanted attention, unwelcome comments, and intentional displays of sexual gratification" (CTR, page 44).

[39] Although she states that similar incidents are common, she provides only one example of a situation where a female colleague reported an inmate deliberately and repeatedly masturbating

in front of her during her routine range walk on a midnight shift. Responsive action by management was not immediate and she ultimately used 200 hours of sick leave as a result of the employer's inaction, before the inmate was finally reassessed and found to be a sexual deviant. The testimony does not specify in which institution this incident took place and more importantly, neither does it specify if this inmate had access to sexually explicit television programs. During the rest of her testimony, the officer criticizes the fact that those events seem to be without consequence and that "intentionally masturbating in front of an officer is not clearly defined [in CSC policies] and this needs to change. Officers must be given a viable avenue in which corrective measures can be consistently applied."

[40] As to the second witness, she does not make any reference to the availability of sexually explicit television programs nor to any other similar material. Her testimony focuses on the fact that female officers, as opposed to their male colleagues, are subject to sexual harassment by inmates. She notes that the employer has zero tolerance for harassment when it happens between colleagues but when it is inmates who are responsible for sexual harassment, resources are more limited. For several reasons she reports, a victim will not easily confide in her work colleagues and superiors. In addition to the emotional repercussions of sexual harassment, the victims' careers may become undermined and they are "doubly penalized" (CTR, page 46).

[41] Despite the fact that the Commissioner states in her decision having also examined, as part of her analysis, the applicant's Offender Management System file and having contacted staff at Archambault Institution, she only refers to the testimonies before the Standing Committee on the Status of Women to justify her conclusions. I have to infer from her silence that no similar

incident occurred at Archambault and more importantly, no similar incident involved the applicant.

[42] On the other hand, the applicant filed an affidavit whereby he states that he had been in three different federal penitentiary institutions for the last 7 years, where he had access to adult pornography movies. These movies were available after evening lock down (11 pm) when only night watch persons could look into the inmates' cells. He adds that it is unlikely that the officer would be exposed to the sight of the movies as his television, as most televisions, points toward the back of his cell, in order for his head to face the door, which he says is institutional policy. In addition, the officer doing rounds at night would turn on a blue light in the cell to announce him or herself. He would then make sure he was not doing anything that would be offensive. He never had any incident or complaint from a correctional officer, nor had he heard of any incident of an inmate being reprimanded for doing anything related to, or while watching pornography.

[43] I agree with the two correctional officers who testified before the Standing Committee on the Status of Women that there must be a zero tolerance policy toward inmates sexually harassing correctional officers and that there must be "a viable avenue in which corrective measures can be consistently applied" (CTR, page 44). I also agree with the respondents: should causality be established between the applicant or any other inmate at Archambault Institution, with respect to accessing sexually explicit content on television and sexual harassment of correctional officers or similar misconduct on the inmates' part, it would justify the imposition of a ban. However, there was no such evidence before the Commissioner and her decision does not

fall within a range of possible, acceptable outcomes which is defensible in respect of the facts and law.

Charter Right

[44] Again, I agree with the respondents that the Court should follow the new analytical approach established by the Supreme Court of Canada in *Doré*; courts must first consider whether a Charter value is involved and if so, "the question becomes whether, in assessing the impact of the relevant Charter protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the Charter protections at play" (at para 57).

[45] However I do not agree with the respondents that the decision proportionately balanced the statutory objectives of the CCRA, more specifically the obligation of CSC to provide a working environment that is safe, healthful and free of practices that undermine a person's sense of personal dignity and the intimates' right to have access to sexually explicit material on television.

[46] At the hearing, the respondents conceded that freedom of expression is engaged and limited by the decision to ban access to sexually explicit material. Freedom of expression is in fact notoriously wide in scope and will capture the transmission and reception of sexually explicit content. Therefore, the decision of the Commissioner upholding the ban on access to

sexually explicit material to inmates constitutes a *prima facie* infringement of section 2(*b*) of the Charter (*R v Sharpe*, 2001 SCC 2).

[47] However, the respondents are of the view that to the extent the decision limits the applicant's freedom of expression, it is nevertheless reasonable as it strikes a proportionate balance between the statutory objectives and the relevant Charter value.

[48] The impugned decision states that one of the main objectives of the CCRA is to provide a safe and healthful working environment for correctional officers, free of practices that undermine a person's sense of personal dignity and that serious concerns were expressed about the undermining of the personal dignity and security of female correctional officers presumably at Archambault institution. However, the Commissioner does not consider the specific context of the objectives at issue and there is no evidence that the safety and healthful working environment of female correctional officers at Archambault is jeopardized.

[49] Moreover, the Commissioner's exercise of balancing interests and rights is found in a single paragraph of the decision:

> Consideration has been given to limiting access to sexually explicit content on television channels based on a case-by-case review of Correctional Plan objectives and offence cycle; however, the limitations in technology and significant costs involved are prohibitive. Furthermore, population management issues sometimes result in double-occupancy of cells. In these cases, there would be no ability to ensure that inmates are not watching broadcasts which would have a detrimental effect on their reintegration. There would also be no ability to restrict access to the content on an individual basis without breaching an inmate's right to privacy.

[50] First, the CTR is silent on the alleged limitations in technology and significant costs that would be involved in limiting access on a case-by-case basis. The record contains a certain number of emails from the Analyst, Offender Redress who was called upon to investigate the applicant's grievance, whereby she asks the Assistant Warden Operations, to no avail, for information and documentation pertaining to the reason why the ban was implemented in March 2013 (CTR, pages 67-71). The only substantive information contained in the record is the transcript of the testimonies before the Standing Committee on the Status of Women discussed above.

[51] Second, in my view, it is impossible for this Court to assess whether or not the decision has a disproportionate impact on the guaranteed right or Charter value as no real balancing exercise was conducted by the Commissioner; the purported effort to balance the objectives of the CCRA with the restriction on the guaranteed right or Charter value is unsupported by the evidence available in the CTR.

VI. Conclusion

[52] For all of these reasons, the application for judicial review will be granted and the file sent back to a different Commissioner for a new determination, including a proper assessment of the proportionality of the restriction imposed on the applicant's Charter right. Costs will be granted to the applicant.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The applicant's application for judicial review is granted;
2. The decision by the Acting Senior Deputy Commissioner of the Correctional Service Canada, dated March 7, 2014, is set aside;
3. The file is sent back to a different Senior Deputy Commissioner of Correctional Service Canada for a new determination;
4. The Inmate Committee of Archambault Institution is to be struck out from the style of cause;
5. Costs are granted in favour of the applicant.

"Jocelyne Gagné"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1108-14
STYLE OF CAUSE:	HARIS NARAINE v THE ATTORNEY GENERAL OF CANADA AND THE COMMISSIONER OF CORRECTIONS
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	MAY 4, 2015
JUDGMENT AND REASONS:	GAGNÉ J.
DATED:	JULY 30, 2015

APPEARANCES:

Todd Sloan	FOR THE APPLICANT
Marie-Josée Bertrand	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

J. Todd Sloan Barrister and Solicitor Kanata, Ontario	FOR THE APPLICANT
William F. Pentney Deputy attorney general of Canada Ottawa, Ontario	FOR THE RESPONDENTS