

Federal Court



Cour fédérale

**Date: 20120117**

**Docket: T-150-11**

**Citation: 2012 FC 54**

**Ottawa, Ontario, January 17, 2012**

**PRESENT: The Honourable Mr. Justice O'Reilly**

**BETWEEN:**

**MICHAEL AARON SPIDEL**

**Applicant**

**and**

**CANADA (ATTORNEY GENERAL)**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

I. Overview

[1] Mr. Michael Spidel challenges a policy relating to family visits at Ferndale Institution, where he used to be incarcerated (he was later transferred to the Mission Institution and then to Kwikwèxwelhp Healing Lodge). He claims he was once able to have one-on-one visits with his minor son but Ferndale changed its policy in 2010. The policy now requires that his common-law spouse be solely responsible for supervising their son at all times during visits.

[2] Mr. Spidel complained about the policy change, as well as its application to him personally. His grievances relating to the policy were dismissed at all levels. He argues that the latest decision by the Commissioner of the Correctional Service of Canada is unreasonable and incomplete. He asks me to overturn it and compel the Commissioner to consider his grievance in full.

[3] I cannot conclude that the Commissioner's decision was unreasonable or incomplete. The Commissioner reasonably concluded that Ferndale's policy on visits was justifiable and consistent with national policies and legislation. I must, therefore, dismiss this application for judicial review.

[4] There are two issues:

1. Is this proceeding moot since Mr. Spidel has been transferred?
2. Was the Commissioner's decision unreasonable?

## II. Factual Background

[5] In 2010, Mr. Spidel complained that Ferndale had changed its policy on visits to prevent inmates from supervising their children in the absence of the custodial parent. The change was expressed in an amendment to the Inmate Handbook.

[6] Prior to 2010, the Handbook stated:

Parental supervision is the responsibility of both parents. The inmate is encouraged to cultivate a personal individual relationship and supervision of their child while recognizing that they are still responsible for the child's conduct, care and safety.

[7] In 2010, the Handbook was revised to state:

At all times, visitors are strictly responsible for the safety, care and good conduct of children who accompany them for visits. Children cannot be left unattended at any time or in the care of another visitor or inmate.

[8] Mr. Spidel's complaint was rejected on the grounds that the change to the Inmate Handbook reflected existing policy, not a change in the rules. Visiting parents had always been required to sign a child safety waiver form acknowledging their responsibility for the child at all times while at Ferndale.

[9] Mr. Spidel presented a first-level grievance asking that the alleged policy change be rescinded. He proposed that inmates be given the option of signing the waiver forms themselves, or that the custodial parent give written consent permitting an inmate to supervise his child. His grievance was denied based on the fact that visiting parents had always had primary responsibility for supervising visiting children. Further, the policy did not affect the ability of inmates to supervise and interact with their children.

[10] Mr. Spidel launched a second-level grievance, which was again denied. At this point, the first grievance was combined with a second. The first contested the alleged policy change on the grounds of inmates' parental rights generally; the second related to his personal right to have private family visits alone with his son. The second-level decision-maker again concluded that the policy regarding the supervision of children had not changed, although the wording in the Inmate Handbook had been amended to clarify the existing policy. Regarding Mr. Spidel's personal situation, the decision-maker found that there was not enough information to establish that the visits

would be safe for all parties, or to determine whether the child would have any concerns about this type of visit.

[11] Mr. Spidel grieved again at the third level of the process. He argued that his two grievances should not have been combined at the second level and that the Inmate Handbook had been altered to limit the ability of inmates to supervise their children. He also argued that he had addressed all concerns about having private visits with his son, and had been improperly turned down. Mr. Spidel's grievances relating to the combining of the two complaints and the visitation policy were again denied, this time by the Commissioner. This is the decision under review. In a separate decision, his grievance relating to private visits with his son was upheld in part.

### III. The Commissioner's Decision

[12] Regarding the combination of the two grievances, the Commissioner relied on Commissioner's Directive (CD) 081 "Offender Complaints and Grievances", which provides that: "When a grievor submits two or more complaints or grievances in reference to a similar issue, the decision maker may choose to address all of the issues in one response" (para 24). (See Annex for references.)

[13] The Commissioner found that there was a common theme underlying Mr. Spidel's two grievances and that the responses at the second level were complete and clear. Accordingly, this part of his grievance was denied.

[14] Regarding the policy on visits, the Commissioner referred to the relevant passage in the Inmate Handbook:

At all times, visitors are strictly responsible for the safety, care and good conduct of children who accompany them for visits. Children cannot be left unattended at any time or in the care of another visitor or inmate.

[15] The Commissioner noted that s 71(1) of the *Corrections and Conditional Release Act*, SC 1992, c 20 states that inmates are entitled to have reasonable visits with family members, subject to reasonable limits based on security or safety concerns. The institutional head is responsible for safety and security (*Correctional and Conditional Release Regulations*, SOR/92-620, s 4).

[16] At Ferndale, staff regard minor children as dependents who should be accompanied by the visiting parent at all times. If an inmate is alone with a child, the visitor cannot be considered to be supervising that child. The Commissioner referred to the waiver the visiting parent is required to sign, which acknowledged the visitor's responsibility for the child at all times while at Ferndale. This has always been the policy at Ferndale. The wording of the Inmate Handbook had merely been revised to reflect that policy. The institutional head had the authority to make that change according to Commissioner's Directive 770 (para 3(b)).

[17] In his grievances, Mr. Spidel had proposed alternative practices that could be implemented regarding child supervision. Specifically, he had requested that inmates be permitted to complete waiver forms or that visiting custodial parents be permitted to consent to sole supervision of a child by an inmate.

[18] The Commissioner declined to comment on the merits of these proposals, noting that the purpose of the internal grievance process was to ensure that policy and legislation had been adhered to; its purpose was not to debate the merits of the policy.

[19] In a separate set of reasons, the Commissioner addressed Mr. Spidel's personal grievance. He found that the additional information Mr. Spidel had provided through counsel (*i.e.*, an affidavit from his spouse consenting to his sole supervision of their son, a copy of their custody agreement, and a court order giving the parents joint custody) had not been previously considered. However, in upholding this part of Mr. Spidel's grievance, the Commissioner noted that, since he was now residing elsewhere, he would have to make a fresh request for visits without supervision to the institutional head there.

IV. Issue One - Is this proceeding moot since Mr. Spidel has been transferred?

[20] The respondent submits that this proceeding is moot as it relates to a policy at Ferndale, where Mr. Spidel no longer resides. In the circumstances, I do not agree.

[21] First, this argument was made at a late hour, giving Mr. Spidel little opportunity to respond to it.

[22] Second, the issue raised by Mr. Spidel is not unique to Ferndale. Indeed, the Commissioner noted that Ferndale's policy was consistent with national standards. Therefore, Mr. Spidel's transfer does not settle the controversy before the Court.

V. Issue Two - Was the Commissioner's Decision Unreasonable?

[23] Mr. Spidel argues that the Commissioner should not have concluded that his two grievances could be addressed together. They dealt with distinct issues and should have been kept entirely separate. I disagree.

[24] Both grievances obviously arose from the same policy. They dealt with related issues and, therefore, could be combined according to CD 081, above. I note that the Commissioner actually answered the two grievances separately, but this does not, in itself, suggest that any error had been made in combining them.

[25] Mr. Spidel adamantly disputes the Commissioner's assertion that the Inmate Handbook was amended to reflect existing policy. Further, he argues that the policy conflicts with the general proposition that inmates retain all rights and privileges enjoyed by Canadians as a whole, except those that are specifically limited as a consequence of incarceration. Inmates who are parents, therefore, enjoy all their parental rights except those that must necessarily be curtailed as a result of their imprisonment. Speaking of his personal situation, Mr. Spidel submits that the fact of his incarceration, in itself, does not require that his time alone with his son be extinguished. His spouse favours continuation of his private visits with his son and is willing to sign a waiver to that effect. Staff at Ferndale regarded him as an ideal candidate for these kinds of visits.

[26] There is much force to Mr. Spidel's submissions. From the record, it appears that he and other inmates were allowed to have private visits with their children up until 2010 even though the

official policy, as reflected in the waiver signed by visiting parents, was to the contrary. So, while there may not have been a change in policy, there was a change in practice that adversely affected inmate parents. Exceptions to the strict policy seem to have been foreclosed at a certain point.

[27] Further, at the level of principle, Mr. Spidel's submissions are compelling. Correctly, he points out that prisoners relinquish only those rights and privileges that are necessarily incidental to their incarceration. Obviously, as Mr. Spidel accepts, some parental rights shrink as a consequence of imprisonment. He has no expectation that he should have all the access to his son that he would have outside prison. But why deny him precious time alone with his son that will nourish the father-son bond, especially when his spouse and the institutional staff support it?

[28] In that vein, Mr. Spidel asserts that the Commissioner should have considered his alternative proposals. Further, the Commissioner should have decided the merits of the policy, not simply whether the institutional head had the authority to put it in place. The purpose of a grievance is not simply to determine whether a decision was lawful, but to ensure that there has been a true resolution of the inmate's concern.

[29] Mr. Spidel's alternative suggestions certainly merited some consideration. However, looking at the overall context, specifically, the two separate grievances, I am satisfied that Mr. Spidel's suggestions would be fully considered in respect of his personal circumstances. Those suggestions would not necessarily be appropriate for all inmates at Ferndale. It was not unreasonable, therefore, for the Commissioner to deal with the validity of the policy itself, leaving



the question whether there were appropriate alternatives in individual cases such as Mr. Spidel's to a separate inquiry.

[30] Further, while Mr. Spidel correctly points out that the Commissioner had a duty to carry out a *de novo* review of his grievance, I do not accept that the Commissioner was obliged to decide whether the institutional head at Ferndale was correct in imposing the visitation policy. The institutional head is responsible for safety and security, and has the authority to make rules regarding visits. The Commissioner's role in reviewing a grievance relating to a decision of an institutional head is to ensure that the latter was acting within his or her authority and that the decision does not conflict with the principles and policies laid down in legislation, regulations or other enactments. That is what the Commissioner did here.

[31] Therefore, I cannot see anything unreasonable about the Commissioner's conclusion that the rule relating to sole supervision of children by inmates (whether it was new or newly-enforced) was validly established in the interests of safety and security.

[32] This is particularly so given that the Commissioner seems to have accepted that there could be exceptions to the policy where safety and security concerns could be otherwise met. Mr. Spidel has been given an opportunity to make the case for private visits with his son.

[33] Accordingly, I cannot see anything unreasonable in the Commissioner's decision. It was justified, transparent and intelligible, and fell within the range of defensible outcomes based on the facts and the law.

VI. Conclusion and Disposition

[34] I cannot conclude that the Commissioner's decision was unreasonable. I must, therefore, dismiss this application. I note that Mr. Spidel's application raised an issue of general concern to inmates at Ferndale and, no doubt, elsewhere. Given the public interest aspect of the application, I decline to make an order as to costs.

**JUDGMENT**

**THIS COURT’S JUDGMENT is that:**

1. The application for judicial review is dismissed.
2. There is no order as to costs.

“James W. O’Reilly”

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Judge

## Annex

*Corrections and Conditional Release Act, SC 1992, c 20*

*Loi sur le système correctionnel et la mise en liberté sous condition, LC 1992, ch 20*

Principles that guide the Service

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;
- (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

Principes de fonctionnement

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;

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

(iii) opportunities to participate in the development of correctional policies and programs.

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.

### Contacts and visits

**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.

### Rapports avec l'extérieur

**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.

Correctional Service Canada -- Commissioner's Directive (CD) 081 "Offender Complaints and Grievances", 2011, Nov. 29

Service Correctionnel Canada – Directive du Commissaire (DC) 081 « Plaintes et griefs des délinquants », 29 nov. 2011

#### Combining Complaints or Grievances

Plaintes ou griefs sur des questions de même nature

**24.** When a grievor submits two or more complaints or grievances in reference to a similar issue, the decision maker may choose to address all of the issues in one response. When this is done, it is necessary to identify each of the complaints and grievances being addressed in the response.

**24.** Si un plaignant présente deux ou plusieurs plaintes ou griefs portant sur des questions de nature similaire, le décideur peut choisir de traiter toutes les questions dans une seule réponse. Le cas échéant, il doit indiquer chacune des plaintes et chacun des griefs sur lesquels porte sa réponse.

Correctional Service Canada -- Commissioner's Directive (CD) 770 "Visiting", 2008, Aug. 14

Service Correctionnel Canada – Directive du Commissaire (DC) 770 « Visites », 14 août 2008

#### General Visiting

Visites ordinaires

**3.** The Institutional Head shall:

**3.** Le directeur de l'établissement doit :

[...]

...

(b) specify the procedures to be followed and the conditions to be met with respect to visiting;

b) préciser les procédures à suivre relativement aux visites ainsi que les conditions à remplir;

*Correctional and Conditional Release Regulations, SOR/92-620*

*Règlement sur le système correctionnel et la mise en liberté sous condition, DORS/92-620*

#### Duties

Fonctions

**4.** An institutional head is responsible, under the direction of the Commissioner, for

**4.** Sous l'autorité du commissaire, le directeur du pénitencier, est responsable de :

(a) the care, custody and control of all inmates in the penitentiary;

a) la prise en charge, la garde et la surveillance de tous les détenus du pénitencier;

(b) the management, organization and security of the penitentiary; and

b) la gestion, l'organisation et la sécurité du pénitencier;

(c) the direction and work environment of staff members. 4

c) la direction des agents et leur milieu de travail.

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-150-11

**STYLE OF CAUSE:** MICHAEL AARON SPIDEL v  
CANADA (ATTORNEY GENERAL)

**PLACE OF HEARING:** Vancouver, British Columbia

**DATE OF HEARING:** July 20, 2011

**REASONS FOR JUDGMENT  
AND JUDGMENT:** O'REILLY J.

**DATED:** January 17, 2012

**APPEARANCES:**

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