

CANADA / JUDGMENT

Pengelly v. Canada (Attorney General)

2005 FC 693

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T-1235-04 Citation: 2005 FC 693 BETWEEN: EDWARD PENGELLY Applicant and THE ATTORNEY
GENERAL OF CANADA Respondent REASONS FOR ORDER HARRINGTON J.

- [1] The question for decision in this case is whether the use of personal computers by inmates of Federal penitentiaries constitutes a security matter. It comes about this way.
- [2] Until fairly recently, inmates were authorized to have approved personal computers. There were restrictions on the computers, their peripherals and software. For instance, they were stand-alone and were not supposed to have access to the internet or electronic mail.
- [3] The Commissioner of Corrections changed that policy. Personal computers are no longer permitted, subject to some grandfathering.
- [4] Edward Pengelly was, and is, an inmate at Kingston Penitentiary. Neither he, nor any other inmate, was given the opportunity to contribute to this decision.
- [5] Section 74 of the Corrections and Conditional Release Act, S.C. 1992, c. 20, as amended, provides: The Service shall provide inmates with the opportunity to contribute to decisions of the Service affecting the inmate population as a whole, or affecting a group within the inmate population, except decisions relating to security matters. Le Service doit permettre aux détenus de participer à ses décisions concernant tout ou partie de la population carcérale, sauf pour les questions de sécurité.
- [6] Mr. Pengelly says, and he is right, that the decision to ban computers affected him, as a computer user, and other computer users within the inmate population.
- [7] He argues that the decision is not one which relates to security matters. The Attorney General disagrees.
- [8] This is a judicial review of the Commissioner's Directive 090 and Annex A thereto, dated 30 June 2003, insofar as they relate to inmate-owned computers and electronic games as personal property of inmates.

- [9] As the issue comes to this Court by way of judicial review, the question is not whether the use of personal computers constitutes a security matter; rather, the question is whether the Commissioner's decision that the use of such computers related to a security matter was unreasonable.
- [10] The Commissioner of Corrections heads Correctional Service Canada ("CSC"). The Commissioner is charged with an awesome responsibility. The purpose of the Federal correction system is to contribute to the maintenance of a just, peaceful and safe society. Sentences imposed by courts are to be carried out through safe and humane custody and supervision; offenders are to be assisted in their rehabilitation and integration, and the Service should use the least restrictive measures consistent with the protection of the public, staff members and offenders. Nevertheless, the protection of society is the paramount consideration of the Corrections process (Act, sections 3 and 4).
- [11] Before deciding to change the CSC policy with respect to personal computers, the Commissioner considered an external report it commissioned entitled "Inmates and Computers - Threat and Risk Assessments". The report noted the significant development in information technology. On the one hand, there were clear benefits to offender rehabilitation through education and retraining using Information Technology. On the other hand, many inmates were not rehabilitated, were likely to re-offend given the opportunity, and there was grave risk that inmates could use computers to assist in criminal activity. It was recommended to CSC that it should not only ban future in-cell personal computer ownership by inmates, but the computers already in institutions should not be grandfathered. They should be removed. It was also recommended that CSC implement tightly controlled and managed computing facilities which would allow inmates to receive classroom training, perform personal educational or legal research or rehabilitative assignments thereon. The same held true for video games, and other electronic entertainment. The Commissioner did not follow the recommendations in their entirety. He did ban new computers, and programs are being developed, with inmate consultation, for the use of computers owned by and controlled by CSC. Inmates who already owned computers were, however, allowed to keep them during their current incarceration, but would apparently lose the right to use the computer if transferred to another institution.
- [12] The Court has benefited from the affidavit and cross-examination of Jason Cormier, a Special Project Officer with CSC. He has worked extensively on the policy with respect to inmate access to personal computers. He explained that the change in policy came about following a Threat Risk Assessment to study CSC's ability to safely administer its policy relative to inmate-owned computers. That report showed technologies - which might appear to be innocuous - could be exploited, modified or used in conjunction with illicit hardware or software, thus posing a serious risk to the institution. He related incident upon incident, and the risk relating therefrom. Smuggled equipment led to multiple pornography files, internet use, illegal commerce in copyrighted software, illegal gambling, templates for fraudulent RCMP, and CSC identification cards, and lawyer's letterheads, network conduits

which could lead to illegal and unauthorized access to CSC's corporate protected information, and various blank bank credit card formats, to name but a few.

- [13] Mr. Pengelly argues, and it was not really disputed, that even the most innocuous object can become a security matter within the confines of a penitentiary. A toothbrush can be honed and turned into a shiv. Juice can be fermented, and so on. CSC has not responded by declaring dental hygiene a security matter, or by denying inmates the right to drink liquids which contain sugar which could be converted into alcohol. If the security matter can be properly managed, then it is not a security matter. The fact that inmates who had computers were allowed to keep them is an admission that the risk is manageable.
- [14] In reply, the evidence as shown by Mr. Cormier is that with attrition the number of personal computers has decreased from 1,119 inmate-owned computers in October 2002 to 670 as of September 2004. CSC's resources are limited, and they are better able to deal with this reduced number. In due time, there will be no personally-owned computers left.
- [15] The new policy is not without its critics. The Executive Director of the John Howard Society complained to the Solicitor General. He submitted that common room computers would be of limited use and value. If there were to be a demand for their use, only those with power will get to use them. Access times will be restricted, and computers remaining with prisoners who have been grandfathered will become major commodities and may become an aspect of the black market in prison. That may be so.
- [16] There are few cases which deal with the meaning of section 74 of the Corrections and Conditional Release Act. In *William Head Institution v. Canada (Corrections Services)*, [1993] F.C.J. No. 821 (QL), Rothstein J., as he then was, quashed a decision to terminate a university program. Decisions affecting educational programs for inmates fell within section 74 and the decision was quashed as the required consultation did not take place.
- [17] The relevant sections of the Act survived the Charter in *Alcorn v. Canada (Commissioner of Corrections)*, [1999] F.C.J. No. 330 (QL). The Commissioner had decided to change the telephone system available to inmates. There was evidence that unfettered inmate access to telephones, as they had under the old system, led to inappropriate communications, such as to arrange violent assaults and break-outs, importation of drugs into the institutions, to "settle accounts", to name but a few. Richard, A.C.J., as he then was, noted that the Directive did not prevent inmates from making telephone calls and dismissed the application. He said:
103. The applicants raised a decision made by Rothstein, J. in *Williams Head Institution Inmate Committee v. Canada (Corrections Service)* (1993) [note omitted] where a penitentiary decided to terminate the University program without consultation. Unlike to the matter raised before me, that was an educational issue. Here we are dealing with security matters, as Mr. Montminy has explained in his affidavit.

- [18] He was upheld in appeal, 2002 FCA 154, [2002] F.C.J. No. 620 (QL). More recently, Martineau J., after citing both these cases, and the relevant portions of the Act, upheld a directive with respect to body counts, notwithstanding that the inmates had not been consulted in advance.
- [19] It does not matter whether I would have reached the same decision as the Commissioner, or that others would have come to a different decision. Given certain facts, the Commissioner decided, or inferred, if you will, that there was a security risk. At the very minimum, this was a mixed question of fact and law and his decision should not be disturbed unless it was unreasonable. In my opinion, the decision related to security matters and was not unreasonable. This is not to say that it would have been unreasonable for him to come to another decision. For instance, he could have followed the Threat Assessment Recommendation and not grandfathered existing personal computers.
- [20] Mr. Pengelly submitted that the decision was made in bad faith, that it had nothing to do with security, and everything to do with politics. Randy White, a Member of Parliament and a member of the then-Reform Party, publicly criticized CSC as regards the availability of child pornography on personal computers in the Kingston Penitentiary. The evidence shows, however, that the Threat Assessment had already been issued, and a moratorium on new computers was in place before Mr. White expressed his concerns. Furthermore, if there is a security risk, it should be acted upon no matter how it comes to the Commissioner's attention.
- [21] Mr. Pengelly's status as applicant was questioned, since his right to own his own personal computer has been grandfathered. However, he cannot upgrade it and the evidence is somewhat murky about whether he could bring the computer with him if transferred to another institution. At one point, he wished to be transferred and then declined because it appeared he could not bring his computer.
- [22] He also contested the seizure of his computer, which contained programs and paraphernalia contrary to the Commissioner's Directive. His complaint went as far as the third grievance level where it was held to be moot as by then his computer had been returned to him. Nevertheless, one of the grounds of his application is that he was not treated fairly when his computer was seized, and that an inclusion in his inmate record would be in violation of section 24 of the Act. He has not made out a case.
- [23] For all these reasons, the application shall be dismissed. "Sean Harrington" Judge Ottawa, Ontario May 13, 2005 FEDERAL COURT NAMES OF COUNSEL AND SOLICITORS OF RECORD DOCKET: T-1235-04 STYLE OF CAUSE: EDWARD PENGELLY AND THE ATTORNEY GENERAL OF CANADA PLACE OF HEARING: TORONTO, ONTARIO DATE OF HEARING: MAY 11, 2005 REASONS FOR ORDER : HARRINGTON J. DATED: MAY 13, 2005 APPEARANCES: John L. Hill FOR APPLICANT Matthew Sullivan FOR RESPONDENT SOLICITORS OF RECORD: John L. Hill FOR APPLICANT Toronto, Ontario John H. Sims, Q.C. FOR RESPONDENT Deputy Attorney General of Canada

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