

Urinalysis: The Legal Viewpoint

On May 2, 1985, the Correctional Service of Canada amended the *Penitentiary Service Regulations* (the Regulations) in an effort to check the scourge of drug use in penitentiaries. Section 39 of the Regulations was expanded to include an additional disciplinary offence: 39. Every inmate is guilty of a disciplinary offence who...

(i.1) consumes, absorbs, swallows, smokes, inhales, injects or otherwise uses an intoxicant.

The term "intoxicant" was defined to include "alcohol, a drug, a narcotic or any other substance that causes an hallucination, but not any authorized medication used in accordance with directions given by a member or a health care professional."

At the same time, the *Regulations* were amended to allow a member of the Correctional Service of Canada to require an inmate to provide a urine sample, which, if found to contain an intoxicant, could imply that the inmate had contravened subsection 39(i. 1). Thus, paragraph 41.1(1) reads: 41.1(1) Where a member considers the requirement of a urine sample necessary to detect the presence of an intoxicant in the body of an inmate, he may require that inmate to provide, as soon as possible, such a sample as is necessary to enable a technician to make a proper analysis of the inmate's urine using an approved instrument. These amendments were designed to achieve three main objectives:

- to make the use of intoxicants a disciplinary offence;
- to enable members of the Correctional Service of Canada to require inmates to provide urine samples in order to detect the presence of intoxicants; and
- to establish that, in the absence of proof to the contrary or a reasonable explanation, the presence of an intoxicant in a urine sample analysed in the approved manner is evidence that the inmate has used the intoxicant.

It was not long before the legality of the new sections was challenged. In October 1985, the inmate committee of the Cowansville institution filed a declaratory action in the Quebec Superior Court, contesting the legality of subsection 39(i.1) and section 41.1 of the *Regulations*. Thus began the case of *Jean-Pierre Dion v. The Attorney General of Canada et al.*(1) The Dion Case On August 14, 1986, Mr. Justice Galipeau of the Quebec Superior Court declared subsection 39(i. 1) and section 41.1 to be null and of no force or effect.

With regard to subsection 39(i.1), Mr. Justice Galipeau declared that it contravened the right to life, liberty and security guaranteed by section 7 of the *Canadian Charter of Rights and Freedoms*(2)

On this subject, Mr. Justice Galipeau stated: There is no doubt in the mind of the court that the wide and general meaning attributed by these courts to the word "liberty" encompasses the right of a citizen to consume, if only on occasion, certain intoxicants and the right not to be subject to an obligation to provide a urine sample to whomever it is that wants to detect the presence of the intoxicant in his body. (p.2201) He went on to say that: To forbid someone, even a prisoner, from consuming an intoxicant, such as alcohol or a drug, and to require him to provide a urine sample in order to test the degree of his

compliance with this order places the individual in the position of seeing the security of his person threatened. (pp.2201 and 2202) Finally, Mr. Justice Galipeau concluded that subsection 39(i. 1) of the *Regulations* was not in accordance with the principles of fundamental justice and had no place in a free and democratic society (section 1 of the *Charter*)(3) because it had no limits, was arbitrary and open to unreasonableness.

Mr. Justice Galipeau drew similar conclusions about section 41.1 of the *Regulations*. He determined that this section did not protect the inmate from unreasonableness, as it enabled a member of the Correctional Service of Canada to require a urine sample from a prisoner when the member judged it *necessary*. Mr. Justice Galipeau wondered when, for what reason and according to which criteria a member of the Correctional Service of Canada might find such a step necessary. What one individual believes necessary may not be necessary for another. Section 41.1 does not provide adequate protection against arbitrariness. Mr. Justice Galipeau made it clear, moreover, that his finding might have been different if the section had specified, as did the *Criminal Code* on the taking of breath samples (former sections 234 and 235), that a member of the Correctional Service of Canada must have *reasonable and probable* grounds to believe that the inmate has ingested an intoxicant.

As a result, Mr. Justice Galipeau declared subsection 39(i. 1) and section 41.1 of the *Regulations* to be null and of no force or effect. It is interesting to note that his decision was based only on section 7 of the *Charter*, although the plaintiff had cited the contravention of other sections of the *Charter* (section 8 on unreasonable search and seizure, section 11 on protection against self-incrimination, etc.).

The Correctional Service of Canada appealed the decision of Mr. Justice Galipeau in the Quebec Court of Appeal, which rendered its decision on May 31,1990.

As might be expected, the Quebec Court of Appeal overturned the part of the decision by the Quebec Superior Court pertaining to section 39(i. 1) of the *Regulations*. We may thus consider valid the section that makes the ingestion of intoxicants an offence. Accordingly, institutions can clearly cite it for cases in which such a disciplinary offence is proven. However, the Correctional Service of Canada did not contest the Quebec Superior Court's decision on section 41.1 of the *Regulations*, in view of the decision in the *Jackson* case, rendered in the interim by the Federal Court of Canada. The Jackson Case The facts in the case of *Jackson v. Disciplinary Tribunal, Joyceville Penitentiary et al.*(4) were as follows: Inmate Jackson, at the time a prisoner in the Joyceville Penitentiary, had refused to provide a urine sample as ordered by a member of the Correctional Service of Canada. As a result of this refusal, the disciplinary tribunal charged Jackson with refusing to obey a lawful order (section 39(a) of the *Regulations*). Appearing before the disciplinary tribunal, the inmate argued that the order given was not lawful because section 41.1 of the *Regulations*, authorizing a member to order an inmate to provide a urine sample, was unconstitutional. The independent chairperson presiding at the disciplinary tribunal considered that it was not within his jurisdiction to rule on the constitutionality of section 41.1 of the *Regulations* and found the inmate guilty of refusing a lawful order. However, the independent chairperson withheld sentencing pending the disposition of proceedings on the constitutional question.

In the fall of 1987, inmate Jackson applied to the Federal Court of Canada for the following relief:

- a declaration that the presiding judge at the disciplinary tribunal had
- unlawfully declined to rule on the constitutionality of section 41.1 of the *Regulations*; and
- a declaration that section 41.1 of the *Regulations* contravened sections 7, 8 and 15 of the Charter.

On February 16, 1990, the Federal Court of Canada rendered its decision on the case. The Court concluded that:

- it was not necessary to rule on whether the independent chairperson could have rendered a decision on the constitutionality of section 41.1 of the *Regulations*, in view of the Court's other conclusions;
- section 41.1 of the *Regulations* is contrary to sections 7 and 8 of the Charter and does not provide a reasonable limit that is justifiable in a free and democratic society, pursuant to section 1 of the *Charter*;
- section 41.1 of the *Regulations* is not discriminatory and is not contrary to section 15 of the *Charter* (equality rights).

I will review in detail the grounds upon which the Court based its conclusions, except for the first conclusion, which is self-explanatory. Section 8 of the Charter(5) The Court found that section 41.1 of the *Regulations* allows unreasonable searches, contrary to section 8 of the *Charter*, as it specifies no standards, circumstances or criteria relating to its application, for the guidance of staff or inmates. Moreover, the Court rejected the argument by the Attorney General of Canada that a search was not involved as, pursuant to the *Regulations*, the inmate could refuse to provide a urine sample and thus avoid a search. The Court declared that an inmate who refused to provide a urine sample could be charged with a disciplinary offence and be subject to a punishment similar to that for a positive urine test. The Court thus concluded that the consequences for refusing to provide a urine sample were similar to those for ingesting an intoxicant and that a search would follow even a refusal to provide a urine sample. However, the Court recognized that the Service's technical procedure for testing would not constitute an unreasonable search if the *Regulations* were not otherwise unreasonable. The testing in question was the E.M.I.T.-S.T. (enzyme multiple immunoassay technique-single test) detection test, and the G.C./M.S. (gas chromatography/mass spectrometer) confirmation test.

Finally, the Court reiterated the principle established in *Martineau V. Disciplinary Tribunal, Matsqui Institution*(6) and in *Weatherall V. Solicitor General of Canada*(7) that the Commissioner's Directives and the standing orders do not have the force of law and cannot be used to support the terms of the *Regulations* or to prescribe a reasonable limit pursuant to section 1 of the *Charter*. Section 7 of the Charter First of all, the Court expressed its disagreement with Mr. Justice Galipeau's statement, in the *Dion* case, that any citizen, even a prisoner, has the right to become moderately intoxicated and that to deny this right by requiring a urine sample limits the right to liberty and security of the person.

The Court explained that while this statement may apply outside penal institutions, the regime within these institutions is very different. Inside, surveillance and denial of ordinary liberties are the order of the day. Inmates may possess and consume only what is authorized or provided, and anything else is considered contraband, subject to forfeiture.

While rejecting Mr. Justice Galipeau's reasoning on the violation of section 7 of the *Charter*, the Court still concluded that section 41.1 of the *Regulations* was contrary to section 7 of the Charter. The Court ruled that an obligation to provide a urine sample deprives the inmate of a certain security. Moreover, as refusal to comply with this obligation may entail disciplinary measures, it constitutes a breach of liberty. Finally, as section 41.1 of the Regulations specifies no standards, criteria or circumstances governing the obligation to provide a urine sample, the obligation is contrary to the principles of fundamental justice. Section 1 of the Charter Mr. Justice MacKay of the Federal Court of Canada accepted that intoxicants are the source of serious problems in penitentiaries, that society's concerns about these problems are valid and that the goal of section 41.1 of the *Regulations* was to address these concerns, to ensure order and to improve security in the institutions. However, as this regulation did not provide any standards or criteria for taking an inmate's urine sample, it did not constitute a reasonable limit justifiable in a free and democratic society. Section 15 of the Charter(8) The Court briefly ruled that detention as an inmate is not one of the grounds for discrimination specified in section 15 of the *Charter*. The Court thus rejected this argument.

It is interesting to note that the Court was careful to specify on several occasions that its decision related only to the facts before it and not to a broader urinalysis program that would involve, for example, random testing or the testing of well-defined target groups. Some of the Court's statements suggest that it has not closed the door on such a program, provided of course that the *Regulations* define the parameters. It is, however, interesting to note that the Court did not specify which criteria, standards or circumstances might meet the requirements of the *Charter*, thus leaving the question open.

The Correctional Service of Canada decided not to appeal the decision by the Federal Court of Canada in *Jackson*, but rather to work on a new section of the *Regulations*, which would take into account the comments of Mr. Justice MacKay.

Jackson and Dion are the only two Canadian cases on the subject of urinalysis; therefore, the issue is far from being settled. Urinalysis in the Community There are no decisions by Canadian courts on the legality of urinalysis in the community. However, the National Parole Board has developed guidelines for mandatory urinalysis as a condition of release. Such a condition would normally be imposed only where necessary to reduce or manage the risk that the offender would otherwise represent, where it is the least restrictive measure available and where there is reason to believe that the offender's history of substance abuse, which has been linked to previous offences, may continue without this condition. The Privacy Commissioner and Urinalysis In a report entitled *Drug Testing and Privacy*, which was released last spring, the Privacy Commissioner examined various federal government programs on drug testing and their compliance with the *Privacy Act*. The report said that the Correctional Service of Canada's random mandatory urinalysis on inmates would not violate the *Privacy Act* if it was possible to prove the existence of a real threat to the security of others, if it was otherwise impossible to properly supervise the behaviour of inmates, if there were reasonable grounds to believe that the testing could significantly reduce threats to the security of others, and if there were no more subtle practical methods or combination of methods to significantly reduce the threat to the security of others. Conclusion Mandatory urinalysis on a random basis or on the basis of specific grounds raises many questions of compliance with the *Charter*. Steps will be taken to ensure that government urinalysis programs comply,

but only time will tell whether the Correctional Service of Canada will be successful.

The following summaries and extracts from opinions, reports and other documents are provided for the information and convenience of the reader. However, as the extracts are not complete, the reader should refer to the actual opinion or document or consult with Legal Services at National Headquarters concerning the specific interpretation or applicability of any opinion or decision cited. If you have any questions about these or any other related matters, please contact Theodore Tax, Senior Counsel, Department of Justice, Legal Services, Correctional Service of Canada, National Headquarters, 4A-340 Laurier Avenue West, Ottawa, Ontario K1A 0P9.

RECENT DECISIONS

In a recent decision, the Federal Court of Appeal overruled the Trial Court decision in *R. V. Conway* and held that the presence of female guards at all times in the living areas of male inmates for professional reasons was not unreasonable. The Trial Court had ruled that, except in emergency situations, it was unlawful for female guards to view male inmates in their cells without their express or implied consent if such viewing was neither previously scheduled nor previously announced to them by reasonable means. However, the Federal Court of Appeal decision countered that the inmate's reasonable expectation of privacy in prison must be balanced against the public interest. This public interest encompasses three objectives: providing adequate security in prisons; allowing women equal access to employment in federal prisons; and rehabilitating inmates. In this situation, these goals override the inmate's privacy interests, and female guards may perform the same range of penitentiary duties as male guards, including frisk searches and surprise counts. The Court noted that the presence of women has a significant positive impact on the inmates and the institutions.

In *The Queen V. Daniels*, the Court of Queen's Bench of Saskatchewan ordered, pursuant to subsection 24(1) of the *Charter*, that the inmate is not to serve any portion of her sentence in the Kingston Penitentiary for Women. The Court further declared that section 15 of the *Penitentiary Act* and all regulations and directives made thereunder contravene rights guaranteed by the *Charter*: section 7 (right to life, liberty and security of the person); section 12 (right not to be subjected to any cruel and unusual treatment or punishment); section 15 (right to equality); and section 28 (rights guaranteed equally to both sexes). Thus, the Saskatchewan Court of Queen's Bench ruled that section 15 of the *Penitentiary Act* and section 731 of the Criminal Code are of no force or effect to the extent that they may cause Carol Daniels or other native women from Western Canada to be sent to Kingston. This decision is under appeal.

In *Hebert V. R.*, the Supreme Court of Canada overturned its own 1981 ruling on the admissibility of statements made to undercover police officers by accused persons while in a prison cell. The Court held that the detained person has the right to make a meaningful choice whether to speak to the authorities or to remain silent. The scope of this right to silence must extend to exclude "tricks" that effectively deprive the accused of this choice, such as the use of undercover agents to actively elicit information in violation of the detainee's choice to remain silent. However, this right to silence is qualified by considerations of the state interest and the repute of the judicial system. Thus, police conduct designed to obtain confessions may be covert and yet legitimate if it does not actively interfere with the detainee's choice to remain silent. If a violation of the detainee's right is established, the evidence may still be admissible

unless, pursuant to subsection 24(2) of the *Charter*, it meets the test for rejection, as it did in this case.

In *Duarte v. The Queen*, the Supreme Court of Canada ruled that although paragraph 178.11(2)(a) of the *Criminal Code* is not, in itself, unconstitutional - as it merely creates an exception to a criminal prohibition against the interception of private communications when used by an instrument of the state such as the police - it does constitute an unreasonable search under section 8 of the *Charter*. With respect to private communications, individuals have a reasonable expectation of privacy, which may only be violated by the recording of such communications without the knowledge of the individual when the state has obtained prior approval from a detached judicial officer. This decision probably will have little, if any, impact on a situation in which there is a low reasonable expectation of privacy, such as in a penitentiary.

(1) [1986] R.J.Q. 2196

(2) *Section 7 of the Charter declares that "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."*

(3) *Section 1 of the Charter declares that "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."*

(4) (1990) 55 C.C.C. (3d) 50

(5) *Section 8 of the Charter provides that "Everyone has the right to be secure against unreasonable search or seizure."*

(6) [1978] 1 S.C.R. 118

(7) [1988] 1 F.C. 369 and [1989] F.C. 18

(8) *Section 15 of the Charter provides that, "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability"*