Weatherall *v.* Canada, [1993] 2 S.C.R. 872

Argued: March 25, 1993 Decided: August 12, 1993.

Present: La Forest, L'Heureux-Dubé, Sopinka, Gonthier, McLachlin, Iacobucci and Major JJ.

On appeal from the Federal Court of Appeal

The judgment of the Court was delivered by

LA FOREST J. -- In this appeal from the Federal Court of Appeal, the appellant challenges the constitutionality of frisk searching and patrolling of cell ranges conducted in male penitentiaries by female guards pursuant to ss. 7, 8 and 15 of the *Charter*.

The frisk search consists of a hand search of a clothed inmate, from head to foot, down the front and rear of the body, around the legs and inside clothing folds, pockets and footwear and includes searching by use of hand-held scanning devices. Although touching of the genital area is not specifically precluded in this type of search, it is avoided; the appellant testified that he had never been touched in the genital area during a frisk. The frisk search ordinarily lasts five seconds, although on occasion, might take up to fifteen. The patrolling practices challenged by the appellant are twofold: the "count" and the "wind". Counts are performed regularly at four scheduled times daily. An officer first announces the count at the top of the particular range to be counted, to let the inmates know that the count is starting, and then walks down the range looking into each cell for two or three seconds in order to ensure that the inmate is accounted for and is alive and well. Winds are conducted once an hour but, in contrast, are conducted at random times and are unannounced. This surveillance technique is performed in this way to preserve an element of surprise in order to verify that the inmates are not engaged in any activities detrimental to the good order and security of the institution. In practice, the first inmate on the range to see the officer alerts the other inmates to the wind.

The appellant objected to the cross-gender touching that occurs during the frisk search and to the female guards' possible viewing of inmates while undressed or while using the bathroom facilities in their cells during counts and winds. During oral argument, counsel for the appellant abandoned its objection to the counts, recognizing that the inmates are sufficiently warned of the upcoming surveillance to avoid these results.

The possible inappropriate effects of the practices are minimized by the provision of special training to ensure they are professionally executed with due regard for the dignity of the inmate. Few complaints are received from inmates regarding invasions of privacy by virtue of having been searched by a female officer. Regarding the winds, the occasions when an inmate might be seen unclothed or tending to personal functions are rare and fleeting: one or two times a year, according to the appellant, for the two or three seconds it takes a guard to view the cell. Modesty barriers, which are placed in front of the cell toilets so that officers can only view the inmates from the waist up while using the facilities, are present in certain cell blocks. . . .

It is . . . doubtful that s. 15(1) is violated. In arguing that the impugned practices result in discriminatory treatment of male inmates, the appellant points to the fact that female penitentiary inmates are not similarly subject to cross-gender frisk searches and surveillance. The jurisprudence of this Court is clear: equality does not necessarily connote identical treatment and, in fact, different treatment may be called for in certain cases to promote equality. Given the historical, biological and sociological differences between men and women, equality does not demand that practices which are forbidden where male officers guard female inmates must also be banned where female officers guard male inmates. The reality of the relationship between the sexes is such that the historical trend of violence perpetrated by men against women is not matched by a comparable trend pursuant to which men are the victims and women the aggressors. Biologically, a frisk search or surveillance of a man's chest area conducted by a female guard does not implicate the same concerns as the same practice by a male guard in relation to a female inmate. Moreover, women generally occupy a disadvantaged position in society in relation to men. Viewed in this light, it becomes clear that the effect of cross-gender searching is different and more threatening for women than for men. The different treatment to which the appellant objects thus may not be discrimination at all.

In any event, even if one were to look at this different treatment as amounting to a breach of s. 15(1), the practices are saved by s. 1 of the *Charter*. The assignment of women to the surveillance of male inmates, with all of the resultant searching and patrolling duties, is a rather recent phenomenon. The important government objectives of inmate rehabilitation and security of the institution are promoted as a result of the humanizing effect of having women in these positions. Moreover, Parliament's ideal of achieving employment equity is given a material application by way of this initiative. The proportionality of the means used to the importance of these ends would thus justify its breach of s. 15(1), if any.