Federal Court  Cour fédérale

Date: 20220225

Dockets: T-1904-21
T-24-22

Citation: 2022 FC 273

Ottawa, Ontario, February 25, 2022

PRESENT: Mr. Justice McHaffie

BETWEEN:

DAVID ADAMS

Applicant

and

PAROLE BOARD OF CANADA –
APPEAL DIVISION

Respondent

ORDER AND REASONS

I. Overview

[1] The respondent seeks dismissal of each of these two applications for judicial review. Since the applications for judicial review have a related procedural background, I will address the two motions jointly in these reasons. The respondent argues that the application in Court File No T-1904-21 is moot, and that the application in Court File No T-24-22 improperly

seeks review of the reasons of the Appeal Division of the Parole Board of Canada and not of its order, which was in the applicant's favour.

[2] For the reasons set out in further detail below, I grant the respondent's motion to dismiss the application in Court File No T-1904-21 as moot. The conditions on the applicant's statutory release that are the subject of his first appeal to the Appeal Division and his application for judicial review to this Court are no longer in place in light of the subsequent revocation of his statutory release. A decision on this application for judicial review would have no practical effect, and this is not an appropriate case to exercise the Court's discretion to hear a moot matter. Even if the same conditions may be subsequently re-imposed by the Parole Board, as the applicant argues, they would be re-imposed based on the facts and surrounding circumstances in place at the time and not on the facts and surrounding circumstances as they existed when the conditions were first imposed. They would also be subject to a new right of appeal to the Appeal Division, as the Appeal Division itself confirmed. The matter is therefore moot and shall be dismissed.

[3] However, I will dismiss the respondent's motion to dismiss the application in Court File No T-24-22. While the Appeal Division found that the Parole Board's decision to revoke his parole was procedurally unfair and remitted the matter to the Parole Board, it did not order the applicant's statutory release as it had the jurisdiction to do. As the applicant argues, he was not fully successful on his appeal, since he remains imprisoned. I therefore disagree that the applicant's application for judicial review is simply a challenge to the Appeal Division's reasons and not its order.

II. Issues

[4] The primary issue on these motions is whether either or both of these applications for judicial review should be dismissed as a preliminary matter. In addition, the parties' submissions raise a number of additional issues that are best addressed as preliminary matters.

[5] I will therefore address these various issues in the following order, after setting out the factual and procedural background to the applications for judicial review:

A. Is it appropriate to determine these motions in writing?

B. Should the order requested by the applicant regarding computer access while incarcerated be issued?

C. Are the applicant's written cross-examination questions proper?

D. Should the application for judicial review in Court File No T-1904-21 be dismissed as moot?

E. Should the application for judicial review in Court File No T-24-22 be dismissed as seeking to challenge only the reasons of the Appeal Division and not its order?

III. Background: The Appeal Division Decisions and the Applications for Judicial Review

[6] The applicant is currently incarcerated at Bowden Institution. In January 2021, the applicant was released from imprisonment on statutory release pursuant to section 127 of the *Corrections and Conditional Release Act*, SC 1992, c 20 [*CCRA*]. His statutory release was

subject to certain conditions imposed by the Parole Board of Canada, including residency at a community-based residential facility (CBRF), which I will call the "residency requirement," and a prohibition on owning, using or possessing a computer that would allow unsupervised access to the internet, which I will call the "device prohibition."

[7] In March 2021, issues arose regarding the presence of an internet-accessible computer, namely an Xbox 360, in the applicant's room at the CBRF, and the applicant's absence from the residence. These issues, and in particular the discovery of the Xbox, led to the suspension of the applicant's statutory release and his arrest and return to incarceration.

[8] The applicant maintained that the Xbox belonged to another resident, who took responsibility for the item. On a review of the suspension, the Parole Board found this explanation plausible, although it noted other incidents of non-compliance with CBRF rules and the applicant's conditions of release. By decision dated May 31, 2021, the Parole Board issued a reprimand to the applicant, but cancelled the suspension of his statutory release, imposing the same conditions that had previously been in place.

[9] The applicant's statutory release was again suspended on August 13, 2021. This occurred after an incident involving the applicant and another resident of the CBRF, which the Parole Board described as a "physical altercation." The applicant disputes this characterization, asserting that the event involved him being assaulted by the other resident. However, the characterization of this event is not material to the issues before this Court on these motions.

[10] On August 27, 2021, the applicant filed an appeal of the Parole Board's May 31, 2021 decision with the Appeal Division. His appeal challenged (1) the imposition of conditions on his statutory release, in particular the device prohibition and the residency requirement; and (2) a statement in the Parole Board's decision to the effect that the applicant had "refused treatment programming" while in custody.

[11] On September 28, 2021, the Appeal Division advised the applicant that it would "take no further action on [his] appeal" in light of the fact that his statutory release had been suspended. The Appeal Division confirmed that once the Parole Board rendered a decision on the August 2021 suspension, it would be prepared to consider a new appeal based on that decision. The applicant asked the Appeal Division to reopen the appeal, alleging it could not "take no action" on the appeal based on the suspension of the statutory release. The Appeal Division declined this request on November 15, 2021 on the basis that its September 28, 2021 decision rejecting the appeal was final.

[12] The applicant's application in Court File No T-1904-21 seeks judicial review of the September 28, 2021 decision of the Appeal Division, as confirmed on November 15, 2021.

[13] In the interim, on October 25, 2021, the Parole Board issued its decision arising from the August 2021 suspension of the applicant's statutory release. It concluded the applicant remained a high risk for re-offending, had made no gains while in the community on statutory release, and would present an undue risk to society if released on statutory release. It therefore decided the statutory release would be revoked "for the safety of the community."

[14] The applicant appealed the October 25, 2021 Parole Board decision to the Appeal Division, arguing that the Parole Board had based its decision on erroneous or incomplete information, had failed to apply its own policies, and had failed to observe a principle of fundamental justice by relying on information that was not shared with him.

[15] On December 6, 2021, the Appeal Division overturned the Parole Board's revocation decision on the procedural fairness/fundamental justice ground. It concluded the Parole Board had failed to ensure all relevant documents were disclosed before the hearing, and that the statutory disclosure obligations under the *CCRA* had not been met, resulting in a procedurally unfair determination. The Appeal Division sent the matter back for a new review, while ordering the continuance of the October 25, 2021 decision until the conclusion of that review. As of the date of the evidence filed by the parties, that review was scheduled to take place on February 7, 2022. The Court has no information regarding the conduct of that review or its outcome.

[16] The applicant's application in Court File No T-24-22 seeks judicial review of the December 6, 2021 decision of the Appeal Division.

IV. Analysis

A. *The motions are appropriate to be determined in writing*

[17] The applicant submits in response to each motion that if it is not dismissed, the Court should hear the motion orally to give the applicant an opportunity to respond given his situation and lack of legal education.

[18] Rule 369(2) of the *Federal Courts Rules*, SOR/98-106 provides that a responding party to a written motion may indicate in its written representations the reasons why the motion should not be disposed of in writing. Rule 369(4) provides that the Court may dispose of the motion in writing or fix a time and a place for an oral hearing. These provisions give the Court the discretion to assess whether, in light of the respondent's request, it is appropriate to deal with the matter in writing or whether oral argument is required.

[19] Relevant in the exercise of this discretion are factors such as the nature of the motion; the complexity of the issues; the nature of the evidence and the parties' arguments; the potential that conducting an oral hearing will simply increase costs and delay the disposition of the matter; and whether a hearing is necessary for the disposal of the motion: *Oberlander v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 86 at para 10; *SNC-Lavalin Group Inc v Canada (Public Prosecution Service)*, 2019 FCA 108 at para 13 and Schedule "A"; *Federal Courts Rules*, Rule 3(*b*). Ultimately, the question is whether the determination of the motion in writing is in the interests of justice and consistent with the just, most expeditious and least expensive outcome of the proceeding: *Federal Courts Rules*, Rule 3(*a*).

[20] In the present case, the issues are not particularly complex, as the respondent's motions are based on a single issue in each case. I am satisfied that the positions of the parties are well elaborated in their respective submissions. This includes the applicant's submissions, which set out salient arguments despite his lack of legal education. Having considered the factors above, I conclude it is in the interests of a just and expeditious determination of the matter to hear the motions in writing.

B. *The Court will not grant the applicant's request for an order requiring computer access*

[21] The applicant states in his February 2, 2022 affidavit that he is "in over 23 hour per day lockdown." He refers to difficulties in preparing materials in response to the respondent's motions and asks for an order directing Correctional Services Canada and/or the Attorney General to permit him access to a computer every day he is in lockdown.

[22] Section 18.2 of the *Federal Courts Act*, RSC 1985, c F-7 provides that the Court may make any interlocutory orders on an application for judicial review that it considers appropriate pending the final disposition of the application. This Court recently relied on this provision to make an order granting computer access to allow an offender to represent themselves adequately in an application for judicial review, in the context of a long-term supervision order: *Watts v Canada (Attorney General)*, 2020 FC 209 at paras 17–19.

[23] Unlike in *Watts*, however, the applicant has not brought a motion seeking such an order in a manner that would allow the respondent to respond to the request. In the context of the respondent's motions to dismiss, the Court is not in a position to assess the applicant's request or

to purport to dictate terms of the applicant's incarceration. As noted above, the applicant has been able to respond substantively to the respondent's motions in writing. He has apparently been able to do so without the need for an extension of time, which is another means by which concerns about ability to respond may be addressed should the need arise. I am therefore not prepared to make an order regarding computer access at this time.

C. *The applicant's written examination of the respondent's affiant*

[24] In his responding motion record on each motion, the applicant included written cross-examination questions directed to the respondent's affiant, Raylean Ballard. Ms. Ballard is a manager with the Parole Board and provided an affidavit in support of the respondent's motions in each matter, setting out facts found in the Parole Board's files relevant to the process leading to the decisions under review. Her affidavits each attach documents such as the decisions of the Parole Board and the Appeal Division.

[25] A party to a motion may cross-examine the deponent of an affidavit served by an adverse party: *Federal Courts Rules*, Rule 83. That examination may be conducted orally or in writing: *Federal Courts Rules*, Rules 87(*c*) and 88(1). While the applicant's written questions, which are appropriately in Form 99A, refer to examination for discovery, it is clear that they are intended to be written cross-examination of the respondent's affiant in accordance with the abovementioned Rules.

[26] The respondent has not filed a response to the written cross-examination questions, which generally must be done by affidavit: *Federal Courts Rules*, Rules 99(3). Rather, the respondent

wrote to the Court noting that the questions were not served on the respondent prior to the filing of the applicant's motion records, objecting to the nature of the questions, and arguing that the questions are unnecessary as the applicant has already provided his arguments. The respondent therefore states that it does not intend to provide answers unless otherwise directed by the Court.

[27] Some of the respondent's objections are misplaced. The *Federal Courts Rules* provide for the delivery of motion records containing affidavits and written representations within a certain time period: *Federal Courts Rules*, Rules 365(1), 369(2). The delivery of such affidavits must occur prior to cross-examination: *Federal Courts Rules*, Rule 84(1). While parties may agree to, or the Court may impose, a timetable on a motion that sees the delivery of affidavits and the conduct of cross-examinations before the filing of records, the *Federal Courts Rules* themselves contemplate the conduct of cross-examinations after the filing of records. Indeed, Rule 364(2), which the respondent cites, specifically says that the inclusion of transcripts in a motion record is "subject to rule 368." Rule 368 provides that transcripts of cross-examinations on affidavits are to be filed before the hearing of the motion. The fact that the applicant's written examinations were delivered concurrently with his motion records, which include his affidavits and written representations, does not mean that the respondent can simply refuse to answer them as unnecessary.

[28] However, the respondent also objects to the content of the written examination, on the basis that the questions are "largely irrelevant or improper, raise hypothetical scenarios, and are more in the nature of discovery rather than an examination on an affidavit." On my review of the applicant's written questions, these objections are well founded. The applicant has served 99

written questions, which are the same in the two matters. The list of questions include questions of the following nature, which I provide with the Court's assessment:

- Questions regarding whether Ms. Ballard has had decisions regarding review of an offender's case overturned, how often successful appeals are returned to her office, and how often they result in a new determination. These questions are neither relevant to these motions nor arise from the contents of Ms. Ballard's affidavits.

- Questions about Ms. Ballard's reference to the applicant being suspended "following a physical altercation with another offender," including the source of her information, details of the event, and information regarding the other offender. It is clear that Ms. Ballard's reference to a physical altercation is drawn from the Parole Board's revocation decision of October 25, 2021, which refers to "a physical altercation with another offender." It is also clear that the applicant disagrees with this characterization. However, Ms. Ballard's procedural affidavit referring to the decisions in the context of an application for judicial review does not create new evidence regarding the event and does not make cross-examination on her knowledge of it relevant. Nor are details regarding the other offender in any way relevant to these motions.

- Questions asking Ms. Ballard for legal and policy conclusions such as her views on procedural fairness, reasonableness, effective Parole Board practice, or interpretation of Parole Board principles. These questions are improper.

- Questions about the prior profession of Ms. Ballard and other Parole Board members and asking for "any knowledge or examples of bias or prejudice of Parole Board members."

These questions are improper, irrelevant, and are an inappropriate fishing expedition as no foundation for an allegation of bias has been established.

- Questions about Ms. Ballard's personal beliefs about scenarios presumably intended to describe the applicant's experiences in incarceration. These questions are again improper and irrelevant to the issues on both the applications for judicial review and the motions.

- Questions about the contents of the Parole Board's decisions and the evidence before the Parole Board. A procedural affidavit that attaches a decision does not make the decision that of the affiant nor does it entitle a party to ask effectively legal questions about the contents of that decision.

[29] I appreciate that the applicant is unrepresented by counsel. However, it is important for the applicant to understand that an application for judicial review is an assessment of the fairness and reasonableness of a tribunal's decision based on the information that was before the tribunal. With rare and narrow exceptions, it is therefore conducted on the basis of the record before the tribunal whose decision is being reviewed: *Canadian National Railway Company v Canada (Transportation Agency)*, 2019 FCA 257 at para 12; *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 14–20. Neither the applications for judicial review nor the current motions are the place to seek to introduce new evidence regarding the events underlying the decisions. Nor can an affiant, even one from the Parole Board, be asked for legal conclusions or opinions about the decisions or the relevant statutory regime.

[30] Having reviewed the entirety of the applicant's written questions, I conclude that they are not proper questions. I therefore make no adverse inference as a result of the respondent's refusal to respond to them.

D. *The application for judicial review in Court File No T-1904-21 should be dismissed*

(1) Analytical framework

[31] Preliminary motions to dismiss an application for judicial review are rare. Since applications for judicial review are themselves expedited proceedings, the appropriate way in which to contest an application for judicial review is generally by responding to the application on the merits: *David Bull Laboratories (Canada) Inc v Pharmacia Inc*, [1995] 1 FC 588 (CA) at pp 596–597. However, the Court has an inherent power to strike or dismiss an application for judicial review on a preliminary motion where it is "so clearly improper as to be bereft of any possibility of success" or "doomed to fail": *David Bull* at p 600; *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 at paras 47–48; *Wenham v Canada (Attorney General)*, 2018 FCA 199 at para 33.

[32] An application for judicial review may be doomed to fail, and may be struck or dismissed at a preliminary stage, because it is moot: *Wenham* at para 36(1); *Kardava v Canada (Citizenship and Immigration)*, 2016 FC 159 at para 12, citing *Rahman v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 137 at paras 8–11.

[33] In assessing whether a matter is moot, the Court applies the two-part analysis set out by the Supreme Court of Canada in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342. The first question is whether there is a "live controversy" that affects or may affect the rights of the parties. If there is not, the second question asks whether the Court should nonetheless exercise its discretion to hear and decide the matter: *Borowski* at pp 353–363; *Democracy Watch v Canada (Attorney General)*, 2018 FCA 195 at para 10. In considering whether to exercise its discretion to hear a moot matter, the Court considers the extent to which the three basic rationales for the mootness doctrine are present by assessing (1) the presence or absence of an adversarial context; (2) the appropriateness of using scarce judicial resources; and (3) the Court's sensitivity to its role relative to that of the legislative branch of government: *Borowski* at pp 358–363; *Democracy Watch* at para 13.

(2) The application for judicial review is moot

[34] The applicant's application for judicial review challenges the Appeal Division's September 28, 2021 decision declining to take further action in the applicant's appeal of the Parole Board's May 31, 2021 decision regarding his statutory release. The applicant's appeal to the Appeal Division had challenged both the Parole Board's imposition of conditions and its assertion that he had refused treatment programming when in custody. The applicant appears to have anticipated the mootness concerns, making submissions to the Appeal Division in his appeal as to why the matter was not moot, namely "because these conditions will be imposed again if you don't order otherwise, and the error will continue to be relied on."

[35] While the Appeal Division did not use the language of mootness in its decision letter, it effectively decided that the appeal before it was moot because the Parole Board decision that was being challenged had been overtaken by subsequent events, namely the subsequent revocation of the applicant's statutory release.

[36] In this Court, the applicant argues that the Appeal Division went beyond its jurisdiction by rejecting the appeal based on his subsequent suspension. He points to subsection 147(2) of the *CCRA*, which sets out the basis on which the Vice-Chairperson of the Appeal Division may refuse to hear an appeal without causing a full review of the case to be undertaken. The subsection sets out four circumstances, none of which pertain to the appellant having subsequently had their statutory release suspended. The applicant seeks an order declaring that the Appeal Division unlawfully rejected the appeal, and ordering the Appeal Division to allow the appeal.

[37] I conclude that the respondent is correct to assert that the application for judicial review is moot.

[38] Even if the Court were to conclude that the Appeal Division did not have the power to reject the applicant's appeal on the basis of mootness, there would be no point in referring the matter back to the Appeal Division for redetermination, because the matters at issue before the Appeal Division are themselves no longer live issues.

[39] With respect to the imposition of conditions on the applicant's statutory release, the conditions at issue in the first appeal before the Appeal Division, namely those imposed by the Parole Board on May 31, 2021, are no longer in force given the subsequent suspension of the applicant's statutory release. Referring the matter back to the Appeal Division could therefore have no impact on those particular conditions.

[40] In this regard, I am not persuaded by the applicant's argument, made in this Court as it was before the Appeal Division, that the matter is not moot because the same conditions could be imposed again by the Parole Board. The Parole Board has the authority to impose any conditions on statutory release it considers reasonable and necessary "to protect society and to facilitate the offender's successful reintegration into society": *CCRA*, s 133(3). The Parole Board may also include a requirement to reside in a CBRF if the Parole Board is "satisfied that, in the absence of such a condition, the offender will present an undue risk to society by committing" certain offences before the expiration of their sentence: *CCRA*, s 133(4.1).

[41] In either case, the assessment of whether the criteria for the imposition of conditions—in particular the device prohibition and the residency requirement challenged by the applicant—is necessarily undertaken at the time the conditions are imposed, based on the most recent and relevant information. This has two impacts. First, it means that the fact that conditions have been imposed once does not mean that those conditions will necessarily be imposed again in the new circumstances. Second, it means that a decision regarding whether the conditions were unreasonably or improperly imposed the first time does not mean that it will be unreasonable or improper to impose those conditions in the new circumstances.

[42] If the Parole Board does impose the same conditions again, the applicant may again appeal that decision to the Appeal Division. The Appeal Division confirmed this to be the case in its decision, stating “once the PBC renders a new decision on your suspension, the Appeal Division would be prepared to consider a new appeal based on the new PBC decision.” As it happens, this is what has occurred. The Parole Board issued a new decision; the applicant appealed that decision to the Appeal Division; and the Appeal Division decided that appeal in the decision that is the subject of Court File No T-24-22.

[43] As a result, and contrary to the applicant’s submissions, an order of this Court stating that the Appeal Division was not entitled to dismiss the appeal on grounds of mootness would not have any practical effect. Nor would a decision of the Appeal Division finding that the Parole Board unreasonably or unfairly imposed the device prohibition or the residency requirement in May 2021 matter since those conditions on the applicant’s statutory release ceased to apply when that statutory release was suspended. In other words, contrary to the applicant’s submissions, the previously imposed conditions do not “continue to apply in every future decision.” Rather, future decisions regarding the conditions to be imposed will be determined on the basis of the Parole Board’s assessment of whether the criteria for imposing such conditions are met at the time the conditions are imposed.

[44] The same is true with respect to the applicant’s concern regarding the Parole Board’s statement that he had refused treatment programming. At a future review pertaining to his statutory release, the applicant will be entitled to present arguments and evidence that he did not refuse treatment programming. The Parole Board will not be bound by the prior statement in its

May 31, 2021 decision on this question, particularly in the context of a decision that was appealed but for which the appeal was dismissed as moot.

[45] The applicant further argues that if the Appeal Division conducts a full appeal of the May 31, 2021 decision as a result of an order from the Court requiring it to do so, this could result in better outcomes for the applicant, including his immediate release from imprisonment. I cannot accept this argument. It is to be recalled that the appeal in question is an appeal of the imposition of conditions of statutory release that presupposes that the applicant has already been released from prison. The Appeal Division, in rendering a decision on the Parole Board's May 31, 2021 decision regarding the imposition of conditions on statutory release would not be addressing the reasons for which that statutory release was subsequently suspended. Regardless of the outcome of the appeal of this order, it would have no impact on the subsequent suspension of the applicant's statutory release and could not result in the applicant's immediate release from imprisonment as he contends.

[46] As the orders requested from the Court on this application for judicial review would not impact the parties' legal rights, I conclude that the application is moot.

(3) The Court will not exercise its discretion to hear a moot application

[47] The applicant asks the Court to decide his application for judicial review even if it is moot. He argues that the Court needs to clarify the legislative criteria for the Appeal Division to refuse to hear an appeal, as well as the "proper notification of a final decision." I am not persuaded that this an appropriate case to exercise the discretion to hear a moot application. As

set out above, in exercising this discretion, the Court considers (1) the presence or absence of an adversarial context; (2) the appropriateness of using scarce judicial resources; and (3) the Court's sensitivity to its role relative to that of the legislative branch of government.

[48] The respondent argues there is no longer an adversarial context between the parties since the conditions of statutory release are no longer in effect. In my view, this confuses the question of mootness with that of adversarial context. In *Borowski*, the Court accepted that there was an adversarial relationship despite the fact that the matter was moot because the appeal was "fully argued with as much zeal and dedication on both sides as if the matter were not moot": *Borowski* at p 363. In the present case, I am satisfied that the applicant's ongoing desire to fully argue the moot issues means that there remains an adversarial context.

[49] However, in my view, neither the interests of judicial economy nor the Court's role in respect of other branches of government supports the hearing of the matter. I note that the application for judicial review remains at a preliminary stage. If the matter were to proceed, numerous steps in the application for judicial review would have to be undertaken, including a full hearing on the merits, all for the purpose of making a decision that would not impact the parties' legal rights. This speaks against the Court hearing the matter.

[50] Nor can I agree with the applicant that the Court needs to pronounce on the power of the Vice-Chairperson of the Appeal Division to dismiss an appeal for mootness in this case. Should this issue arise again, it is better determined in the context of a case in which the outcome would

affect the legal rights of the parties. It is not simply because a decision may have an impact on future cases that the Court will hear a moot application.

[51] In terms of the third factor, I consider it relevant that the legislature has created an administrative regime for determining issues related to conditions of statutory release that includes an administrative appeal to the Appeal Division. This legislative choice suggests that relevant administrative processes should be pursued for the determination of issues pertaining to statutory release and that the Court should take a restrained approach to deciding issues pertaining to the powers and jurisdiction of the Appeal Division, particularly in circumstances where the determination of those issues will not affect the legal rights of a party.

[52] The respondent also raises the timeliness of the application for judicial review, and in particular the fact that it was filed more than 30 days after the Appeal Division's original decision of September 28, 2021. In the circumstances, including the applicant's incarceration and his understanding that the Appeal Division's decision was not final, I do not consider this a material issue in the assessment of whether to exercise the discretion.

[53] Nonetheless, for the other reasons provided above, I conclude that this is not an appropriate case for the Court to exercise its discretion to hear a moot application for judicial review.

[54] As a result, I will grant the respondent's motion and dismiss the application. The respondent does not seek costs of this motion.

E. *The application for judicial review in Court File No T-24-22 should not be dismissed*

[55] The applicant's second application for judicial review challenges the Appeal Division's December 6, 2021 decision sending the revocation of the applicant's statutory release back to the Parole Board for redetermination. The applicant seeks an order setting aside the Appeal Division's decision and substituting the Court's decision cancelling the suspension of his statutory release. Alternatively, he seeks an order setting aside the Appeal Division's decision and remitting the matter to the Appeal Division for a full review of his case. The applicant contends that the Appeal Division erred in failing to address his grounds of appeal relating to the merits of the Parole Board's decision and deciding his matter only on the procedural fairness ground.

[56] The respondent argues that the applicant's application for judicial review should be dismissed because it improperly challenges a decision of the Appeal Division in which the applicant was successful. It is well established that an application for judicial review is taken from the order of an administrative tribunal and not from the reasons. As a result, an application for judicial review cannot be had from the reasons for decision independently of the final decision itself: *Rogerville v Canada (Attorney General)*, 2001 FCA 142 at para 28; *Fournier v Canada (Attorney General)*, 2019 FCA 265 at para 28.

[57] The respondent argues this principle applies in this case since the Appeal Division, in its decision of December 6, 2021, ordered a new review of the Parole Board's October 25, 2021 decision revoking the applicant's statutory release. The respondent argues the applicant was

effectively successful on his appeal and that he cannot seek judicial review of the reasons that were given for that successful result. The respondent also argues the Court has no jurisdiction to grant the applicant's request for an order that he be immediately released from prison and that it is therefore plain and obvious that this aspect of the application for judicial review cannot succeed.

[58] The applicant argues he was, if anything, only partially successful before the Appeal Division, since he remains incarcerated. He argues he is seeking a different result from that ordered by the Appeal Division, namely the cancellation of the suspension of his statutory release and his release from prison.

[59] Having reviewed the applicant's application for judicial review and the decision of the Appeal Division, I conclude the application is not so clearly doomed to fail that it should be struck at this stage.

[60] While the Appeal Division remitted the matter to the Parole Board, it did not allow the applicant's appeal to the extent of substituting its own decision for that of the Parole Board. This is a disposition open to the Appeal Division by virtue of paragraph 147(4)(*d*) of the *CCRA*, which permits the Appeal Division to "reverse, cancel or vary the decision" of the Parole Board. In its reasons for decision, the Appeal Division stated it "has jurisdiction to re-assess the issue of risk to reoffend and to substitute its discretion for that of the original decision makers, but only where it finds that the decision was unfounded and unsupported by the information available at the time the decision was made." This language, also found in subsection 12.1(9) of the

Decision-Making Policy Manual for Board Members published by the Parole Board, appears common to Appeal Division decisions and has been referenced with approval by this Court: see, *e.g.*, *Reid v Canada (National Parole Board)*, 2002 FCT 741 at para 22; *Bonamy v Canada (National Parole Board)*, 2001 FCT 121 at para 15.

[61] It may well be rare that the Appeal Division exercises its discretion to overturn a Parole Board decision and cancels its suspension of statutory release rather than remitting the matter to the Parole Board for redetermination. However, one potential outcome of this application for judicial review is that the Court concludes the Appeal Division erred in failing to consider whether it should substitute its decision for that of the Parole Board. I therefore agree with the applicant that what is being challenged on this application for judicial review is not just the reasons for the Appeal Division's order but the nature of the order itself.

[62] I have some hesitation in reaching this conclusion since it is not clear that the applicant sought the remedy of a substituted decision from the Appeal Division. In his written appeal of the Parole Board's October 25, 2021 decision, the applicant did not ask the Appeal Division to exercise its discretion to reverse or cancel the Parole Board's decision. To the extent the applicant referred to remedy, he suggested there should be a new revocation hearing before the Parole Board. However, in addition to the fact that the applicant was not represented by counsel on his appeal, I note the applicant's reference to subsection 12.1(8) of the Parole Board's Decision-Making Policy Manual in his written submissions before this Court. This subsection provides that the Appeal Division "is not restricted to a consideration of the grounds raised in the written notice of appeal, but will also consider any ground, in accordance with subsection 147(1)

of the CCRA, to determine whether the Board has erred in a way that resulted in prejudice or unfairness to the offender." Given this language, the general rule that an applicant cannot raise arguments, or seek outcomes, on judicial review that were not requested from the administrative tribunal whose decision is being reviewed may potentially be attenuated.

[63] With respect to the applicant's request that the Court order his release, I need not consider this as a separate matter, as the respondent does not seek partial striking of certain paragraphs of the notice of application. In any event, it is worth noting that although rarely exercised, this Court has a remedial discretion to grant a remedy of indirect substitution, effectively directing an administrative tribunal under its superintending jurisdiction to reach a particular outcome: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 142; *Canada (Citizenship and Immigration) v Tennant*, 2019 FCA 206 at paras 74–82. I therefore cannot agree with the respondent that it is plain and obvious that the Court has no jurisdiction to grant such a remedy in respect of the Appeal Division or that, as the respondent argues, this would amount to a collateral attack on the applicant's criminal conviction and sentence.

[64] I therefore conclude that the applicant's application for judicial review is not limited to the reasons given by the Appeal Division, and that the high "doomed to fail" standard for dismissal of a judicial review on preliminary motion is not met. I will therefore dismiss the respondent's motion to dismiss the second application for judicial review.

[65] Although the respondent did not seek costs of the motion, the applicant did. In light of my disposition of this motion, I conclude the applicant is entitled to his costs, which I will fix in the amount of $250, payable to the applicant in any event of the cause. For clarity, this means that the applicant will be entitled to $250 in costs at the conclusion of the application for judicial review, regardless of the outcome of the judicial review, which amounts may be set off against other costs awards that may ultimately be payable.

[66] The other relief sought by the applicant, such as a declaration that the respondent not file further motions to dismiss, will not be granted.

ORDER IN T-1904-21 AND T-24-22

THIS COURT ORDERS that

1. The application for judicial review in Court File No T-1904-21 is dismissed as moot, without costs.
2. The respondent's motion to dismiss the application for judicial review in Court File No T-24-22 is dismissed, with costs payable to the applicant in the amount of $250.00, in any event of the cause.

"Nicholas McHaffie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1904-21
STYLE OF CAUSE:	DAVID ADAMS V PAROLE BOARD OF CANADA – APPEAL DIVISION
AND DOCKET:	T-24-22
STYLE OF CAUSE:	DAVID ADAMS V PAROLE BOARD OF CANADA – APPEAL DIVISION

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

ORDERS AND REASONS:	MCHAFFIE J.
DATED:	FEBRUARY 25, 2022

WRITTEN REPRESENTATIONS BY:

David Adams	ON HIS OWN BEHALF
Keelan Sinnott	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Edmonton, Alberta	FOR THE RESPONDENT