Federal Court Cour fédérale

Date: 20240522

Docket: T-1911-23

Citation: 2024 FC 776

Toronto, Ontario, May 22, 2024

PRESENT: Madam Justice Go

BETWEEN:

RON MAYERS

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. Ron Mayers [Applicant] is an inmate serving an indeterminate sentence. The Applicant had a parole hearing scheduled for July 6, 2022. Prior to the hearing, the Applicant indicated that he wanted to request a postponement. Due to circumstances that are under dispute, the Applicant did not sign a postponement form, and did not attend the hearing. The Applicant retained counsel to act as his assistant, who was on standby on the day of the hearing.

[2] The Parole Board of Canada [Parole Board] proceeded with the hearing in the Applicant's absence by way of a paper review. The Parole Board denied granting the Applicant day or full parole.

[3] The Applicant appealed the Parole Board's decision to the Parole Board of Canada Appeal Division [Appeal Division], arguing that the Parole Board failed to give him an opportunity to attend his hearing, engaged in abuse of power and violated his rights. Upon its review of the evidence, the Appeal Division dismissed the Applicant's appeal on January 8, 2023, finding it was reasonable for the Parole Board to proceed by way of paper review in the Applicant's absence. The Appeal Division also concluded that the Parole Board conducted a fair risk assessment and there was no basis to interfere with the Parole Board's decision.

[4] The Applicant seeks judicial review of the Appeal Division's decision pursuant to subsection 18.1(2) of the *Federal Courts Act* (R.S.C., 1985, c. F-7). For reasons set out below, I dismiss the application.

II. Issues and Standard of Review

[5] The jurisprudence establishes that when the decision under review is that of the Appeal Division confirming the Parole Board's decision, the Court should examine the lawfulness of the underlying Parole Board decision. The leading case for this is *Cartier v Canada (Attorney General)*, 2002 FCA 384 [*Cartier*] at para 10. This Court has followed *Cartier* most recently in *Allen v Canada (Attorney General)*, 2024 FC 412 at para 38; *Rowe v Canada (Attorney*

General), 2023 FC 1282 [*Rowe*] at para 24; *Chaif v Canada (Attorney General)*, 2022 FC 182 at para 15; and *Sedore v Canada (Attorney General)*, 2022 FC 60 at para 13.

[6] In the case before me, both parties focus their submissions on the issue of procedural fairness as it pertains to the Parole Board hearing, but provide differing issues.

[7] In his written submissions, the Applicant raises the following three issues:

a. Did the Parole Board breach the rules of procedural fairness?

b. Was it reasonable for the Parole Board to proceed by way of paper review in the absence of the Applicant's lawyer, whom they were aware was on standby to attend the hearing?

c. Did the Parole Board breach procedural fairness in spite knowing of the Applicant's learning disability?

[8] The Applicant does not pursue the last issue at the hearing, nor will I address it given the Applicant did not raise this issue in his submissions to the Appeal Division or in his Notice of Application to this Court.

[9] As the Applicant bases his procedural fairness argument on the Parole Board's refusal to grant him his postponement request and to engage with his assistant, I reframe the issues as follows:

a. Did the Parole Board breach procedural fairness by not postponing the parole hearing, and in that context,

    i. Did the Parole Board ignore the Applicant's non-written request for postponement; and

    ii. Did the Board fail to engage with the Applicant's assistant?

b. Did the Parole Board breach procedural fairness by proceeding with a paper review?

[10] For issues of procedural fairness, the Court must consider whether the process followed was fair and just, paying attention to the nature of the rights at stake and consequences for the affected individuals. No deference is owed to the decision-maker. This is functionally the same as applying a correctness standard: *Canadian Pacific Railway Ltd. v Canada (Attorney General)*, 2018 FCA 69 at paras 54, 56; *Ewonde v Canada (Attorney General)*, 2020 FC 829 [*Ewonde*] at para 23.

III. Analysis

[11] Before addressing the Applicant's arguments, it is worth noting the importance of ensuring fairness in all parole hearings. The decisions of the Parole Board and the Appeal Division result in the Applicant's incarnation until he is next eligible to apply for parole. As the Court confirms in *Ewonde*, the process followed in arriving at those decisions necessarily attracts a high degree of procedural fairness: *Ewonde* at para 24.

[12] Indeed, several provisions in the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 [*CCRA*] set out the Parole Board's requirement to act in accordance with procedural fairness. For instance, paragraph 4(f) requires correctional decisions to be "made in a forthright and fair manner, with access by the offender to an effective grievance procedure." Paragraph 101(e) sets out the guiding principle that the Parole Board should "ensure a fair and understandable conditional release process." The duty of the Parole Board to act fairly is further affirmed in the

jurisprudence, such as in *Mooring v Canada (National Parole Board)*, 1996 CanLII 254 (SCC), [1996] 1 SCR 75 at para 35.

A. *Did the Parole Board Breach its duty of procedural fairness by not postponing the parole hearing?*

[13] In its decision denying the Applicant parole, the Parole Board began by addressing the issue of postponement as follows:

> The Parole Board of Canada (the Board) conducted an in-office paper review of your case to make a decision regarding your day parole and full parole. The Board originally scheduled a hearing for this review. The day before the hearing, your assistant notified the Board that you wanted to postpone your hearing for two months. A Parole Officer therefore attempted to provide you with a Request for Postponement form for you to complete as the Board cannot postpone your hearing without it, but you refused to accept it. Other staff also attempted to provide you with the form, but you continued to refuse. The Board therefore proceeded to conduct your hearing at the originally scheduled time, but you refused to attend, and the board has therefore conducted a paper review.

[14] The Applicant raises two points to argue that the Parole Board committed a procedural fairness breach by not postponing the parole hearing. First, the Applicant submits that the Parole Board was "fully aware" the Applicant wished to postpone the hearing for two months, which makes the postponement form irrelevant. Second, the Applicant submits the Parole Board ignored his counsel at the hearing and that "there is no reason a retained solicitor licensed by the Law Society of Ontario could not simply sign a postponement form on [*sic*] applicant's behalf."

[15] I will address these two arguments separately.

i. Did the Parole Board ignore the Applicant's non-written request for postponement?

[16] At the hearing before me, the Applicant elaborated further on this argument, reiterating as he stated in his affidavit and in his appeal to the Appeal Division, that he did not sign the postponement form provided to him because the form was prepared for a six-month postponement when he wanted a two-month postponement. The Applicant also referenced the email correspondence from his assistant, J.G., on July 6 stating she was "pretty sure" the Applicant wished to postpone for two months and was concerned that the postponement would instead be for six months, adding there were "trust issues." Further, the Applicant pointed to an affidavit from a parole officer of Correctional Service Canada [CSC], Y.L., stating that to the best of their recollection, the postponement form they brought to the Applicant on June 29, 2022 was blank, meaning the parole officer failed to confirm the form did not come with a six-month postponement request. The Applicant submitted that "no one was surprised," and "everyone knew" that he wanted a postponement. As such, the Applicant submitted the Parole Board should have granted him a postponement instead of proceeding with the hearing in his absence.

[17] The Applicant also noted that a member of the Parole Board, S. Kim, inquired on July 5, 2022 on whether a parole officer could facilitate a call with the Applicant's assistant so that the Applicant could have the form in front of him while talking with his assistant and possibly sign it. The Applicant submitted that if the Applicant had been given the form, that would have resolved the issue.

[18] I reject all of the Applicant's arguments for the following reasons.

[19] First, I find the Applicant's submissions contradictory in that, by stating the issue would have been resolved had the Applicant been given the form as suggested by Member Kim, the Applicant is acknowledging that the Parole Board required the written form in order to deal with his postponement request.

[20] Second, I agree with the Respondent that the policy governing the Parole Board does not allow the Parole Board to postpone the hearing without the Applicant's consent in writing.

[21] Under subsections 157(3) and 158(3) of the *Corrections and Conditional Release Regulations*, SOR/92-620 [*CCRR*], the Parole Board may postpone a day parole review, or a full parole review, as the case maybe, with the consent of the offender. Pursuant to the version of the "Decision-Making Policy Manual for Board Members" [Policy Manual] in effect at the time the Parole Board made its decision, a postponement request must be made in writing.

[22] Specifically, Policy 11.7 of the Policy Manual defined "postponement" as "a written request from an offender to delay a review."

[23] Policy 11.7 also set out the process for postponing a parole hearing, which is reproduced, in part, below:

> 4. An offender may request a postponement for reasons that may include but are not limited to:
>
> > a. a procedural safeguard cannot be met before the review;
> >
> > b. the offender wishes to complete an assessment, treatment or program before the review; or

> c. the offender's assistant is not available for the scheduled hearing date.
>
> 5. A postponement may be requested at any time prior to the review or during the hearing.
>
> 6. If a postponement will result in a legislative or regulatory timeframe not being met, Board members will ensure that:
>
> a. a written request for postponement has been received from the offender; and
>
> b. the offender understands that the postponement will result in the timeframe not being met and that no release will occur prior to the Board making a final decision, where applicable.
>
> 7. If the Board has reasonable grounds to believe that the offender is abusing the postponement process (e.g., to avoid having a hearing in the presence of an observer), the Board may deny the request and proceed with the review.
>
> 8. When the Board agrees to postpone a review it should take place or resume as soon as practicable, but normally no longer than four months from the original scheduled month.
>
> [Emphasis added]

[24] While the Policy Manual does not have the force of the law, it serves to guide the Parole Board in its decision-making process: *Mahoney v Canada*, 2023 FC 507 at para 21; *Gagnon v Canada (Attorney General)*, 2017 FC 258 at para 19; *Latimer v Canada (Attorney General)*, 2010 FC 806 at para 29; and *Farrier v Canada (Attorney General)*, 2018 FC 1190 at para 31. Moreover, as the Respondent notes, paragraph 101(d) of the *CCRA* sets out that "parole boards adopt and are guided by appropriate policies ..."

[25] The Respondent submits, and I agree, that requiring the Parole Board to have non-equivocal confirmation of an offender's request for postponement is a necessary procedural

safeguard, as the Parole Board's postponement decisions can have important consequences on offenders.

[26] A decision to postpone a hearing has the effect of denying the Applicant's right to review his parole past the legislatively mandated review date and delaying Applicant's entitlement to parole. Viewed in that light, the Parole Board's decision to proceed with the hearing, in the absence of the Applicant's written consent for a postponement, was consistent with the requirement of the Policy Manual and reflective of the legislative safeguard for offenders' right to parole reviews.

[27] Third, putting aside the conflicting evidence before me as to the circumstances of this case, including the differing account about the content of the postponement form, the undisputed fact is that the Applicant did not make a written request for postponement. While the Applicant signalled an intent for postponement, at the end of the day, he never provided his consent, without which the Parole Board could not consider the postponement request.

[28] Given the evidence indicating the Applicant refused to sign the postponement form on multiple occasions, a fact the Parole Board observed in its reasons, I find the Parole Board did not err by deciding not to postpone the hearing.

ii. Did the Board fail to engage with the Applicant's assistant?

[29] I reject the Applicant's argument that the Parole Board ignored his assistant and refused to hear from his "retained counsel of record."

[30] While an offender is entitled to be aided by an assistant during the parole hearing: *CCRA* at subsection 140(7), an offender's assistant is limited in their role in a Parole Board hearing, which the Courts have characterized as an inquisitorial rather than an adversarial proceeding: *MacInnis v Canada (Attorney General)* (C.A.), 1996 CanLII 4088 (FCA), [1997] 1 FC 115; *Ewonde* at para 45; and *Fraser v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 821 at para 85-86.

[31] More importantly, paragraph 140(8)(a) of the *CCRA* specifically prescribes that an assistant is entitled to be present at the parole board hearing at all times "when the offender is present." Paragraph 140(8)(c) further describes the role of an assistant is to address, on behalf of the offender, "the members of the Board conducting the hearing at times they adjudge to be conducive to the effective conduct of the hearing."

[32] In other words, Parliament explicitly restricts the role of an assistant by allowing them to be present at a parole hearing ***only*** when the offender is present.

[33] In this particular case, as the Parole Board decided to proceed by way of paper review in the absence of the Applicant, the legislation precluded any further involvement of the assistant. Here, I pause to note that the Applicant's assistant did not raise any concern when the Parole Board advised her of the Applicant's refusal to attend and when the Parole Board opted to conduct a paper review, nor did she ask for further participation in the review process.

[34] Further, the evidence before me suggests the Parole Board did not ignore the Applicant's assistant. The record contains email exchanges indicating the Applicant's assistant was informed of the developments leading up to the hearing. The Respondent submits that neither the Parole Board nor CSC staff impeded the Applicant's ability to consult his counsel. Additionally, the Applicant was reminded that he could discuss his matter with his lawyer. I agree.

[35] The Applicant also argued at the hearing that if the Applicant was not going to attend the hearing, the assistant could have told the Parole Board he needed a postponement. This argument has no merit. As the Applicant himself repeatedly asserts, the Board was aware of his intent to seek adjournment from multiple sources, including the assistant. Having the assistant at the hearing would not have addressed the Parole Board's concern about the Applicant's refusal to provide a written consent for postponement.

B. *Did the Parole Board breach procedural fairness by proceeding with a paper review?*

[36] Section 140(1) of the *CCRA* empowers the Parole Board to opt out of a hearing when the offender "waives the right to a hearing in writing or refuses to attend the hearing."

[37] Before addressing the parties' arguments, I will first review the basis for the Parole Board's decision to conduct a paper review and the parties' conflicting evidence in this regard.

[38] As noted above at para 13, the Parole Board decided to conduct a paper review after determining that the Applicant refused to attend the hearing at the originally scheduled time.

[39] The Applicant stated in his appeal to the Appeal Division that he did not refuse to attend the hearing and that CSC staff lied when they told the Parole Board that he did.

[40] The Respondent submits evidence to this Court, through the affidavit of Y.L., that on July 5, 2022, at approximately 11:20 a.m., Y.L. visited the Applicant at his cell. Y.L. informed the Applicant that his hearing was about to begin and asked whether he was going to attend. The Applicant did not answer. Y.L. informed him that a Correctional Officer would come shortly to escort him to his hearing. Y.L. then attended the in-person hearing at the Parole Board. At the start of the hearing, Y.L. witnessed C.S., the Correctional Officer tasked with escorting the Applicant, arriving at the hearing without the Applicant and informing the Parole Board that the Applicant refused to attend the hearing. The Parole Board then said it would proceed with a paper decision given the Applicant's refusal. Y.L. attached her casework record entry regarding these events with her affidavit.

[41] Before this court, the Applicant emphasizes that he never waived his right to a hearing and disputes the parole officer's claim that he refused to attend the hearing. Specifically, the Applicant states in his affidavit before the Court as follows:

> It is true that I did not attend my hearing because I was not asked to attend and was locked in a cell. I thought it was postponed. That is because I was requesting a postponement and I had a lawyer at that hearing assisting me.

[42] At the hearing, the Applicant further argued there was no evidence that he was ever advised the hearing would go forward in his absence.

[43] As Justice Elliott noted in *Nielsen v Canada (Attorney General)*, 2021 FC 1217 at para 97:

> In a case where parole is involved, the Board's "decision must not be interfered with by this Court failing clear and unequivocal evidence that the decision is quite unfair and works a serious injustice on the inmate. …" *Korn v Canada (Attorney General)*, 2014 FC 590 (*Korn*) at para 14

[44] I find the Applicant in this case has not provided clear and unequivocal evidence that he did not attend because he was not told about the hearing, or that CSC staff lied to the Parole Board about his refusal to attend.

[45] I note that in his own affidavit, the Applicant appears to have offered two different reasons for not attending the hearing. First, the Applicant claims he was not asked to attend and was locked in a cell. Second, the Applicant explains he thought it was postponed and had a lawyer at that hearing assisting him. The two explanations in my view, are incongruous.

[46] I also note that the Applicant did not cross-examine Y.L. on her affidavit. The Applicant also never directly addressed the Respondent's evidence about the circumstances of his absence at the hearing either in his written submission or in his oral arguments at the hearing.

[47] Under these circumstances, I agree with the Respondent that the Applicant fails to discharge his burden of proof to establish the facts he alleges.

[48] I also find the case law that the Applicant cites does not support his position that the Parole Board erred by proceeding in his absence. The Applicant cites *Goffe v Canada (Attorney*

General), 2021 FC 270 [*Goffe*] and *Joly v Canada (Attorney General)*, 2014 FC 1253 [*Joly*] in support of his submissions.

[49] As the Respondent points out, these two cases are distinguishable on the facts and context. *Goffe* was a judicial review of a decision by an Independent Chairperson finding the applicant guilty of a disciplinary offence, a different proceeding altogether. *Joly* dealt with the right to an oral hearing when the Parole Board invoked an applicant's statutory release, in view of the language of the transitional provisions in place at the time, with the former legislative scheme entitling a parolee to an oral hearing and the new provisions granting the Parole Board discretion to conduct an oral hearing.

[50] Given that section 140(1) allows the Parole Board to conduct a paper review in the absence of the offender, the Parole Board's decision to do so in this case, based on the evidence before them, did not amount to a breach of procedural fairness.

IV. Conclusion

[51] The application for judicial review is dismissed.

[52] There is no order as to costs.

JUDGMENT in T-1911-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no order as to costs.

"Avvy Yao-Yao Go"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	RON MAYERS v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HELD VIA VIDEOCONFERENCE
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