Federal Court  Cour fédérale

Date: 20100611

Docket: T-683-09

Citation: 2010 FC 632

Ottawa, Ontario, June 11, 2010

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

MICHAEL DANIEL MYMRYK

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision rendered by the Appeal Division of the National Parole Board (the Appeal Division) on February 24, 2009, wherein, pursuant to paragraph 147(4)(a) of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (the Act), the Appeal Division affirmed the decision of the National Parole Board (the Board) rendered on September 4, 2008, to deny the applicant day parole and full parole.

I - Background

[2] The applicant has been in prison since 1977. He is serving a life sentence for first-degree murder.

[3] Prior to his most recent application, the applicant applied for, and was granted, parole in 1992 and again in 2003. He made an application for parole and 2006, but this was denied.

[4] In 1996, the applicant had his full parole revoked after being convicted for carrying a concealed weapon (that was inoperative) and sentenced to two months of incarceration. Then in 2004, the applicant's day parole was revoked after he failed a regular urine test by testing positive for cocaine.

[5] The applicant vehemently challenges the allegation that his urine tested positive for cocaine and soon after he was re-incarcerated, he sought a re-test. For a variety of reasons that are not pertinent to the case at bar, the retest failed to be completed before the sample was destroyed. The applicant filed a number of grievances with the Correctional Service of Canada (CSC), the last of which was the subject of a judicial review that was allowed in part (see *Mymryk v. Canada (Attorney General)*, 2007 FC 32 (*Mymryk*)).

[6] In October 2007, the applicant was involuntarily transferred from Montée Saint-François, a minimum security institution, to Archambault, a medium security institution, as a result of allegations that he was involved in the smuggling, trafficking and use of drugs inside the prison. The

applicant contests this allegation and is presently going through the grievance process. As far as the evidence demonstrates, neither disciplinary nor criminal charges have ever been filed against the applicant. Furthermore, there is nothing on the record to demonstrate that the applicant was the source of any other difficulties at any of the institutions that housed him during his approximately thirty years in incarceration.

[7] On September 4, 2008, the applicant appeared before the Board for a hearing regarding his most recent request for release for either day or full parole. Prior to the hearing, and in conformity with section 141 of the Act, the applicant had shared with him most of the information to be used by the Board. Pursuant to subsection 141(4) however, the Board withheld from the applicant three security intelligence reports dated from December 2005, October 2007 and November 2007**.** It is not contested that these reports concern the applicant's alleged involvement in drug-related activities at the Montée Saint-François.

[8] No distinct summary of these reports were ever provided to the applicant. In fact, the only insight into the contents of these reports can be found within other disclosed documents, and namely, the applicant's Correctional Plan Progress Report No. 22 (CPPR #22), the Memorandum to File No. 34 (Memo # 34) and the Memorandum to File No. 36 (Memo #36). Having reviewed these documents however, there are only a few sentences embedded deep within the larger document, which touch on the allegations of drug related misconduct against the applicant; nowhere do these documents summarize the contents of these reports.

II - The Decisions

[9] At the end of the hearing the Board denied both of the applicant's requests for either day or full parole on the following grounds:

1. Two previous attempts at conditional release were revoked as a result of the applicant's conduct in 1996 and 2004;
2. Previous attempt at parole in 2006 was denied partially because of the applicant's negative attitude towards his Case Management Team (CMT). At the date of hearing there was little progress made between the applicant and his CMT;
3. The applicant's involvement in criminal activities, namely the drug trafficking in the minimum security institution, which resulted in a transfer to a higher security institution, shows that his criminal values are still active;
4. His CMT currently rated the applicant's reintegration potential as low;
5. A psychological report from June 2008 considers that it would be premature to release the applicant on parole; and
6. His CMT is of the opinion that the applicant's proposed release plan is not very structured and does not take into account the factors that contributed to his criminality. The applicant needs to contribute to the development of a realistic correctional plan with clear goals based on his needs.

[10] The applicant appealed the decision of the Board on the grounds that the Board's decision violated procedural fairness and was concluded on the basis of incomplete and erroneous information. Specifically, the applicant alleged that the Board failed to consider the applicant's

accomplishments, such as completing all mandated programs and counselling requirements; the Board failed to consider the evidence concerning the unreliability of the negative urine test conducted in 2004; and the Board failed to provide the applicant with any detailed information concerning the applicant's participation in any illegal conduct within the minimum security institution.

[11] On February 24, 2009 the Appeal Division affirmed the decision of the Board and noted:

> … we find the Board's conclusion to be reasonable given the facts of your case, and the said decisions to be based on sufficient reliable and persuasive information...[W]e remind you that the Board is entitled to take into consideration all of the available relevant information, and it has discretion to determine the appropriate manner for verifying the reliability of information supplied to it… In that regard, the Board gave you and your legal assistant ample opportunity to respond to the Board's concerns and present your version of the events that led to your involuntary transfer to the medium security institution. We note that given the file information in that regard and your behaviour to date, it was not unreasonable for the Board to conclude that the file information is reliable and persuasive.
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> … [H]aving reviewed all the information available to the Board, in your file and at the hearing, the Appeal Division finds that the Board had sufficient relevant, reliable and persuasive information upon which to base its decision. The Board's decisions to deny day and full parole are reasonable and consistent with the pre-release criteria set out in law and Board policy.

[12] The applicant now attacks the validity of the impugned decision made by the Appeal Division on the grounds that:

1. The Board failed to observe a principle of natural justice or procedural fairness in failing to communicate to the applicant sufficient information to properly defend himself with respect to the allegations of drug trafficking; and
2. The decision of the Board to deny any form of release and the decision of the Appeal Division to uphold such release are otherwise unreasonable and not supported by the law and the facts of this case and are not the least restrictive measure as required by the legislation.

III - Analysis

[13] The jurisprudence is clear that when the applicant is judicially reviewing the decision of the Appeal Division to affirm the Board's decision, the Court is essentially required to ensure that the Board's decision is lawful (*Cartier v. Canada (Attorney General)*, [2003] 2 F.C. 317 at paragraph 10 (F.C.A.)).

[14] I believe that the issue of procedural fairness raised in this application is determinative. It is common ground that issues of procedural fairness are reviewed on a correctness standard, either the duty of procedural fairness was complied with, or it was not (*Sketchley v. Canada (Attorney General)*, 2005 FCA 404 at paragraph 53). For the following reasons, I do not believe that the duty of procedural fairness was met by the Board, therefore the application for judicial review is granted.

[15] The only documents that were not shared with the applicant were the three security intelligence reports noted above. It is clear that the Board relied on these reports, which contain the

allegations against the applicant concerning his drug-related activities in the minimum security institution, in coming to their decision to refuse his applications for parole. As is detailed below, however, I do not find that the Board communicated sufficient detail regarding these allegations to enable the applicant to intelligently respond to them.

[16] Central to the duty of procedural fairness is the right to know the case to be met. Section 141 of the Act sets out the disclosure of information requirements prior to a review hearing conducted by the Board:

141. (1) At least fifteen days before the day set for the review of the case of an offender, the Board shall provide or cause to be provided to the offender, in writing, in whichever of the two official languages of Canada is requested by the offender, the information that is to be considered in the review of the case or a summary of that information.	**141.**(1) Au moins quinze jours avant la date fixée pour l'examen de son cas, la Commission fait parvenir au délinquant, dans la langue officielle de son choix, les documents contenant l'information pertinente, ou un résumé de celle-ci.
(2) Where information referred to in subsection (1) comes into the possession of the Board after the time prescribed in that subsection, that information or a summary of it shall be provided to the offender as soon as is practicable thereafter.	(2) La Commission fait parvenir le plus rapidement possible au délinquant l'information visée au paragraphe (1) qu'elle obtient dans les quinze jours qui précèdent l'examen, ou un résumé de celle-ci.
(3) An offender may waive the right to be provided with the information or summary referred to in subsection (1) or	(3) Le délinquant peut renoncer à son droit à l'information ou à un résumé de celle-ci ou renoncer au délai

to have it provided within the period referred to, but where an offender has waived that period and any information is received by the offender, or by the Board, so late that the offender or the Board is unable to sufficiently prepare for the review, the offender is entitled to, or the Board may order, a postponement of the review for such reasonable period as the Board determines.

de transmission; toutefois, le délinquant qui a renoncé au délai a le droit de demander le report de l'examen à une date ultérieure, que fixe la Commission, s'il reçoit des renseignements à un moment tellement proche de la date de l'examen qu'il lui serait impossible de s'y préparer; la Commission peut aussi décider de reporter l'examen lorsque des renseignements lui sont communiqués en pareil cas.

(4) Where the Board has reasonable grounds to believe

(*a*) that any information should not be disclosed on the grounds of public interest, or

(*b*) that its disclosure would jeopardize

(i) the safety of any person,

(ii) the security of a correctional institution, or

(iii) the conduct of any lawful investigation,

the Board may withhold from the offender as much information as is strictly necessary in order to protect the interest identified in paragraph (*a*) or (*b*).

(4) La Commission peut, dans la mesure jugée strictement nécessaire toutefois, refuser la communication de renseignements au délinquant si elle a des motifs raisonnables de croire que cette communication irait à l'encontre de l'intérêt public, mettrait en danger la sécurité d'une personne ou du pénitencier ou compromettrait la tenue d'une enquête licite.

[17] While the Board is entitled to withhold from the offender information which falls under subsection 141(4), they must only withhold “as much information as is strictly necessary” (emphasis added). Fundamental justice requires the Board to provide the offender with details of the relevant information upon which it will base its decision (*Strachan v. Canada (Attorney General)*, 2006 FC 155 at paragraph 22).

[18] While dealing with the issue of an involuntary transfer to a higher security institution, the decision of the Federal Court of Appeal in *Demaria v. Regional Classification Board*, [1987] 1 F.C.74 at pages 77 and 78 (F.C.A.) (*Demaria*), is helpful in articulating the disclosure obligations imposed on the Board:

> The burden is always on the authorities to demonstrate that they have withheld only such information as is strictly necessary for that purpose. A blanket claim, such as is made here, that "all preventive security information" is "confidential and (cannot) be released", quite apart from its inherent improbability, is simply too broad to be accepted by a court charged with the duty of protecting the subject's right to fair treatment. In the final analysis, the test must be not whether there exist good grounds for withholding information but rather whether enough information has been revealed to allow the person concerned to answer the case against him…
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> [Footnotes omitted; my emphasis.]

[19] In that case, the only notice provided to the applicant before he was transferred to a higher security institution was that there were “reasonable and probable grounds to believe that [he was] responsible for bringing contraband into [the] institution, ie, the poisonous substance cyanide” (see page 75). No disciplinary or criminal actions were ever taken against him. In concluding that the test

outlined above was not met, the Court found that the applicant was given no hint as to what the reasonable grounds were and at page 77 the Court notes that:

> In the absence of anything more than the bald allegation that there were grounds to believe that he had brought in cyanide, the appellant was reduced to a simple denial, by itself almost always less convincing than a positive affirmation, and futile speculation as to what the case against him really was.

[20] It is important to note that section 27 of the Act, which governs the disclosure obligations incumbent on CSC when making a decision that concerns an offender (such as involuntary transfers as contemplated by the Court of Appeal in *Demaria*, above), greatly resembles section 141 of the Act. Specifically, both provisions provide for an exception to the general rule that any information used in making a decision must be disclosed to the offender where there are reasonable grounds to believe that disclosure of the information would jeopardize the safety of an individual, the security of the correctional institution or the conduct of any lawful investigation (see subsections 27(3) and 141(4)). Further, and as highlighted by the respondent in the case at bar, both provisions enable the offender to be supplied with a summary of the information that is going to be relied on; he or she does not necessarily have to have all of the information disclosed in full (subsection 27(1), subsection 141(1) and *Hudon v. Canada (Attorney General)*, 2001 FCT 1313 at paragraph 44). While discussing section 27 of the Act, I think it is significant that the Supreme Court of Canada in *May v. Ferndale Institution*, 2005 SCC 82 at paragraph 95 noted that the Act "imposes an onerous disclosure obligation on CSC." It is with these observations in mind that I find that the Board did not fulfill its disclosure obligations under section 141 of the Act.

[21] The respondent submits that in the case at bar, the gist of the reports withheld by the Board was shared with the applicant through other documents: the CPPR # 22, the Memo #34 and the Memo #36. Therefore, there is no violation of the duty of procedural fairness and similarly, there is no violation of the disclosure obligations as provided by section 141 of the Act. In support of their argument, the respondent specifically relies on *Cartier v. Canada (Attorney General)* (1998), 165 F.T.R. 209, [1998] F.C.J. No. 1211 (F.C.T.D.) (QL) (*Cartier*).

[22] The decision in *Cartier*, above, dealt with section 27 of the Act, and similar to *Demaria*, above, concerns a decision by CSC to involuntarily transfer an inmate from a maximum security institution to a special handling unit. In that case, there was information received that the applicant was involved in the serious assault of another inmate, in addition to allegations that he was involved in influence peddling and drug trafficking within the institution. The inmate was given summaries of the information compiled against him, and the Court, most importantly, found the summaries met the duty of procedural fairness. In so finding, the Court focused on the nature of the decision being made, and particularly the fact that a decision to transfer an inmate to a higher security institution (just like a decision concerning the parole of an offender) does not assess the innocence or guilt of the individual. As such, the duty of procedural fairness is lower than what would be required in the criminal context, which is full disclosure.

[23] I cannot agree with the reasoning and propositions advanced by the respondent. The latter fails to appreciate the particularities and the significant differences existing between the present case and the facts in *Cartier* where the summaries provided to the inmate where found to be sufficient so

the Court did not deem it necessary to look at whether the authorities adequately demonstrated the necessity of the non-disclosure.

[24] First, while the allegations against the applicant in *Cartier* included an allegation of drug trafficking, the primary allegation against him was a violent crime, namely his involvement in a serious assault against a fellow inmate. Second, in the summaries provided to the applicant in *Cartier*, he was informed of a number of significant details including: that he was alleged to be part of a criminal network known as the Rock Machine which intimidates other inmates and traffics drugs; that he was seen at a particular meeting held on a particular day where it was decided that an inmate needed to be killed; that the targeted inmate was later seriously assaulted; and that the applicant was named by an informant as one of the assailants.

[25] In the case at bar, there is no explanation put forward as to why further information contained in the security intelligence reports could not be disclosed. No explanation can be found in the materials that were before the Board, and respondent did not file an affidavit with the Court to explain why the information cannot be disclosed.

[26] Further, as in *Demaria*, above, the information provided to the applicant in the CPPR # 22 and Memo # 34, provide little more than a bald allegation that the applicant was involved in institutional drug smuggling and trafficking in addition to being a user himself. CPPR # 22 only adds to the allegation that this activity is suspected to have been going on for some time and that the applicant "is considered to be a major supplier in the institution… [h]e thus held a key position in a

structured network." Memo # 34 simply specifies that the allegations are with regard to activities alleged to have been undertaken as early as 2005. Finally, Memo #36, and the most detailed summary provided to the applicant, specifies that he was "identified as a source of drugs" by "[s]ources believed to be reliable" and that money was "transferred … to the [applicant] and to his workplace". While Memo #36 seems more detailed than the previous two documents, it must be pointed out that an allegation of trafficking necessarily implies that drug users transferred money to the applicant in exchange for drugs; this additional statement therefore offers little to the applicant.

[27] Aside from simple allegations, the only details provided to the applicant include the fact that he is alleged to have participated in these activities between 2005 and October 2007 and that money was transferred to his workplace. As noted in *Demaria*, above, at paragraph 8, important details are missing. For example, a three year period is a significant amount of time to account for. No particular dates or a more precise idea of when these transactions occurred are provided. Furthermore, the nature of the substance alleged to have been trafficked, smuggled and used is not identified; neither is the method by which the applicant is alleged to have procured these substances nor the location where he is alleged to have kept them.

[28] In the case at bar, the lack of detail provided to the applicant is also evident upon review of the recording of the hearing where the applicant is only able to deny any involvement in drug-related activities, something the Federal Court of Appeal aptly noted is "by itself almost always less convincing than a positive affirmation" (*Demaria*, above, at paragraph 9).

[29] None of this is an attempt to elevate the duty of procedural fairness incumbent on the Board. It is widely acknowledged that in disclosing relevant information to individuals, the Board must balance a number of interests, most important of which is the protection of society (see subsection 101(a) of the Act). As far as the disclosure of sensitive information, there is also the safety of other inmates and staff that must be considered. That said, the Act is clear that the only information to be withheld is that which is strictly necessary. In the case at bar, the respondent has not demonstrated why the information needed to be withheld, which, considered in conjunction with the minimal information provided to the applicant, is an error which warrants this Court's intervention.

[30] The necessity of the applicant having sufficient detail concerning these allegations is made all the more clear when one considers that the Board did not simply use these allegations as evidence that the applicant's criminal values remain active. Upon review of the evidence, it is clear that the psychological report in addition to the opinion of the CMT, which are relied upon by the Board in denying the applicant's applications, partially base their conclusions on information concerning these allegations of drug-related activity.

[31] Given the importance of these allegations to the decision of the Board, the lack of sufficient justification by the Board (or by necessary extension CSC) for its non-disclosure, and the lack of information to enable the applicant to know the case to be met, it cannot be said that he had a real opportunity to defend himself.

[32] In view of the conclusion reached with respect to the issue of procedural fairness, which is decided in favour of the applicant, it is not necessary that I determine, the reasonableness of the decision of the Board to deny any form of release and the decision of the Appeal Division to uphold said denial, or whether these are supported by the law and the facts of this case, or are not the least restrictive measure as required by the legislation.

[33] The parties have already jointly submitted that should this Court decide to grant the application for judicial review, which is now the case, the proper remedy would be to quash the decision of the Appeal Division and order that a newly constituted Board conduct a new hearing with the direction that it cannot rely or give any weight to the allegations that the applicant was involved in the traffic of contraband while incarcerated in a minimum security institution, unless supplementary information is shared with the applicant, prior to a new hearing taking place, which contains sufficient detail to allow the applicant to properly respond to the allegations made against him.

[34] Thus, in allowing the present application and returning the matter to the Board, the Court will make these directions pursuant to its power under paragraph 18.1(3)(b) of the *Federal Courts Act* (see *Côté v. Canada (Attorney General)*, [1999] F.C.J. No. 1079 (QL)).

[35] Costs shall be in favour of the applicant. That being said, this is not a case for an award of costs on an increased scale or on a solicitor-and-client basis.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES:

1. The application for judicial review is allowed;
2. The decision of the Appeal Division is quashed and a new hearing shall take place before a newly constituted Board. The Board cannot rely or give any weight to the allegations that the applicant was involved in the traffic of contraband while incarcerated in a minimum security institution, unless supplementary information is shared with the applicant, prior to a new hearing taking place, which contains sufficient detail to allow the applicant to properly respond to the allegations made against him; and
3. Costs are in favour of the applicant.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-683-09
STYLE OF CAUSE:	**MICHAEL DANIEL MYMRYK and THE ATTORNEY GENERAL OF CANADA**
PLACE OF HEARING:	Montréal
DATE OF HEARING:	May 12, 2010
REASONS FOR JUDGMENT:	MARTINEAU J.
DATED:	June 10, 2010

APPEARANCES:

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