Federal Court  Cour fédérale

Date: 20140916

Docket: T-2120-13

Citation: 2014 FC 886

Ottawa, Ontario, September 16, 2014

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

ROBERT LATIMER

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This is an application for review of a Parole Board of Canada Appeal Division [the Appeal Board] decision denying the Applicant's request to remove the international travel restriction imposed by paragraph 161(1)(b) of the *Corrections and Conditional Release Regulations*, SOR /92-620 [CCRR]. The Parole Board of Canada [the Board] decided not to exercise the discretion granted them under paragraph 133(6)(a) of the *Corrections and Conditional Release Act*, SC 1992, c 20 [CCRA] to remove, temporarily or permanently, the international travel restriction on the Applicant's parole. The Board decided the restriction was

still a necessary requirement of his parole. The Appeal Board upheld the Board's decision on November 14, 2013, affirming the reasons given by the Board in denying Mr. Latimer's application.

I. Issues

[2] The issues are as follows:

A. Did the Board and the Appeal Board fetter the discretion provided by paragraph 133(6)(a) of the CCRA?

B. Were the Board's and the Appeal Board's decisions unreasonable, in denying the Applicant's request to permanently relieve him of the international travel restrictions prescribed by paragraph 161(1)(b) of the CCRA?

II. Background

[3] The Applicant was convicted for second-degree murder of his seriously disabled daughter by means of carbon-monoxide poisoning in 1997, upheld by the Supreme Court of Canada on January 18, 2001.

[4] All levels of Courts considering the case of the Applicant have held that he is not a danger to society, and does not require rehabilitation (*R v Latimer*, 1997 CanLII 11316 (SK QB) at para 21; *R v Latimer*, 1994 128 Sask R 63 at para 17; *Latimer v Canada (Attorney General)*, 2010 FC 806 at paras 59-60, *R v Latimer*, 2001 SCC 1 at para 86).

[5] The Supreme Court of Canada in *R v Latimer*, 2001 SCC 1 stated at para 86 of the decision:

> **86** Finally, this sentence is consistent with a number of valid penological goals and sentencing principles. Although we would agree that in this case the sentencing principles of rehabilitation, specific deterrence and protection are not triggered for consideration, we are mindful of the important role that the mandatory minimum sentence plays in denouncing murder. Denunciation of unlawful conduct is one of the objectives of sentencing recognized in s. 718 of the Criminal Code.

[6] The Applicant remained on day parole until December 8, 2010, when the Board released him on full parole with special conditions.

[7] On April 2 and 3, 2013, the Applicant applied for permanent relief from the international travel restriction prescribed in paragraph 161(1)(b) of the CCRA, pursuant to the Board's authority under paragraph 133(6)(a) of the CCRA.

[8] On April 2, 2013, the Applicant's parole supervisors released a Progress Review stating "the CMT [Case Management Team] has no concerns with respect to Mr. Latimer at this time".

[9] The Applicant's psychologist recommended that his requirement for continuing contact with a psychologist be removed from his parole requirements in a report dated April 30, 2013.

[10] The Applicant's application was further supported by a letter dated May 2, 2013, from Ms. Mary Campbell, who was one of the writers of the CCRA and its Regulations, and was

Director General, Corrections and Criminal Justice, Public Safety Canada from 2003-2013, who strongly recommended that any international travel restrictions be removed.

[11] The application prompted an Assessment for Decision [the Assessment] dated June 4, 2013, by the Correctional Service of Canada, which supported the Applicant's request to have his paragraph 161(1)(b) travel restriction removed.

[12] The Applicant's Parole Officer and Parole Officer Supervisor both recommended that the application of paragraph 161(1)(b) of the CCRR be removed, due to his (i) demonstrated positive behaviour in the community; (ii) very limited risk factors to re-offend violently as established by consistent psychological reports; (iii) his record of never abusing any of his freedoms and continual compliance with all restrictions put upon him during parole; (iv) his successful reintegration into society and being a pro-social member of society; and (v) his continued obligations under paragraphs 161(1)(a) and 161(1)(g)(iv) of the CCRA to report to his parole supervisor as instructed and provide his address and any changes that would affect his ability to comply with his conditions of parole, including any travel plans.

[13] Considering all of the above:

> …his CMT are of the opinion that his risk to the public is non-existent and due to the purely situational nature of this offence, the likelihood of him being in a situation such as this again is close to nil. It is the CMT's opinion that Mr. Latimer can clearly be managed with the removal of CCRA 161(1)(b)…

[14] The CMT also recommended removal of the other two conditions concerning the Applicant, namely to remove the need for follow-up psychological counselling and the

requirement that he not have responsibility for, or make decision for, any individuals who have significant disability.

[15] The Board denied the Applicant's request to vary or permanently relieve him of the international travel restriction under paragraph 161(1)(b) of the CCRR on June 13, 2013.

[16] The Applicant appealed this decision on November 14, 2013. The Appeal Board affirmed the Board's decision to deny relief, and determined that the Board reasonably exercised its discretion in determining that the international travel restriction was still a necessary condition on the Applicant's parole, despite the existence of positive evidence suggesting the contrary.

III. Relevant Legislation

[17] All excerpts of relevant legislation are attached as Annex A.

IV. Standard of Review

[18] The standard of review is reasonableness, given the Board's and Appeal Board's highly specialized field of expertise, and given the issue to be decided involves an interpretation of their home statute (*Christie v Canada (Attorney General)*, 2013 FC 38 at para 31; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47; *Sychuk v Canada (Attorney General)*, 2009 FC 105 at paras 37-40, aff'd 2010 FCA 7 [*Sychuk*]; *Fernandez v Canada (Attorney General)*, 2011 FC 275 at para 20).

V. Analysis

[19] While the application for judicial review refers to the decision of the Appeal Board, the Court must ultimately determine whether the underlying Board's decision is lawful (*Christie v Canada (Attorney General)*, 2013 FC 38 at para 31).

A. *Did the Board and the Appeal Board Fetter the Discretion Afforded by paragraph 133(6)(a) of the CCRA?*

[20] The Applicant submits that the Board fettered its discretion by referring to the application of the Parole Board of Canada's Policy Manual [Policy Manual] (specifically, Chapter 1.2, s. 3 and Chapter 7.1, s.6), as well as employing an unwritten "Board position", which prevents the Board from permanently removing the travel restriction.

[21] Further, the Applicant argues that given the lack of any temporal limits on the Board's discretion to relieve offenders of parole conditions in the CCRA, Parliament clearly indicated an intention for broad discretion to be available for such relief. As well, when compared with other sections in the CCRA, where temporal limits are placed, one can more clearly interpret Parliament's intention not to do so here. This is arguably consistent with the Supreme Court's recent decision in *R v Summers*, 2014 SCC 26 at paras 36-39.

[22] The Applicant also argues that the Board and Appeal Board incorrectly relied on *Sychuk*, in their above decision, distinguishing the Applicant's circumstances and willingness to facilitate

ongoing contact with his parole officer while travelling. Further, it is argued, *Sychuk* incorrectly limits the broad discretion afforded by Parliament pursuant to paragraph 133(6)(a) of the CCRA.

[23] I do not agree with the Applicant's submission that the Board fettered its discretion by incorrectly applying the Policy Manual, as well as allegedly adhering to an unwritten rule. This position is unsupported by the wording in the Board's decision. The decision reflects an exercise of the discretion on the Board's part not to grant permanent relief, rather than a failure to consider the possibility of permanent relief.

[24] The Appeal Board summarizes the Board's considerations in its November 14, 2013, decision as follows:

> The Board did not err in its consideration of your request for permanent relief… in its determination that certain details of each application for travel outside the country, including destination and purpose, are needed to assess your risk…
>
> The Board clearly considered all available information, including the positive factors such as assessments related to your low risk for general or violent recidivism, reports indicating compliance with your special conditions while in the community, and the fact that you are considered a pro-social individual who does not condone criminal attitudes and behaviour…

[25] While it is possible for a rule or guideline that points out factors to be considered in exercising discretion to be "elevated to the status of a general rule that results in the pursuit of consistency at the expense of the merits of individual cases" (J.M. Evans, "*de Smith's Judicial Review of Administrative Action*", 4th ed., 1980 Stevens & Sons, London, at 312), which may result in a fettering of discretion, that is not the case here. The Board considered the possibility

of permanent relief and decided, on the evidence before it, that the Applicant's case did not merit such relief.

[26] Paragraph 133(6)(a) uses the permissive term "may" and grants the Board wide discretion to either grant or deny a request made for relief from a variance of a mandatory condition.

[27] In declining the Applicant's request for permanent relief, the Board did not conclude that it was bound by policy, but made the following two statements, which are references to factors set out in Chapter 7.1 of the Policy Manual:

> Normally if an offender is out of the country, the offender cannot benefit from the usual monitoring and support offered through the parole supervision process.
>
> In addition, it is important for the Board to be aware of the purpose for the trip as it may relate to your risk of reoffending.

[28] These are the only references to the policy made by the Board in its decision. The use of the word "normally" in a policy guideline does not fetter discretion. The Applicant contends that because paragraph 21 of Chapter 7.1 of the Policy Manual states that an offender "may request that the Board authorize a temporary exemption" , this implies that only a temporary exemption will be considered and that no such restriction is found in paragraph 133(6)(a) of the CCRA. However, paragraph 19 of Chapter 7.1 makes clear that "the Board may vary the application of or relieve the offender from any condition prescribed by the CCRR".

[29] I do not find that the Board fettered its discretion.

B. *Were the Board and the Appeal Board's Decisions Unreasonable?*

[30] As stated by Justice Anne L. Mactavish in *Latimer v Canada (Attorney General)*, 2010 FC 806 at paras 22, 28 and 31 [*Latimer*]:

> **22** The *Corrections and Conditional Release Act* and Regulations constitute the framework under which the National Parole Board makes its decisions. Section 3 of the CCRA identifies the purpose of the federal correctional system as being "to contribute to the maintenance of a just, peaceful and safe society by carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders" and to assist in "the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community".
>
> **28** Section 101 of the CCRA articulates the statutory principles guiding parole boards "in achieving the purpose of conditional release". It provides that the paramount consideration in the determination of any case is the protection of society: subsection 101(a). Another statutory principle guiding parole boards is that they are to make "the least restrictive determination consistent with the protection of society": subsection 101(d). Amongst other things, parole boards are directed to take all available information, including the reasons and recommendations of the sentencing judge, into account in considering whether conditional release is appropriate in a given case: subsection 101(b).
>
> **31** A Policy Manual has been adopted by the National Parole Board under the authority of section 151 of the *CCRA*. Chapter 7.2 of the Manual deals with "Residency and Day Parole Leave Privileges" and observes that the Board is responsible "for establishing the parameter of leave privileges to be associated with an approved day parole, or parole or statutory release that is subject to a residency condition". The Policy Manual goes on to note that the Board "entrusts to those who are responsible for the day-to-day supervision and care of these offenders, the manner in which the leave privileges will be implemented".

[31] It is important to note that if a discretionary decision by the Parole Board is inconsistent with achieving the purpose of providing the least restrictive determination, consistent with the

protection of society, then that decision runs the risk of being unreasonable, regardless of the ambit of discretion and deference owed to the Parole Board, or the Appeal Board.

[32] As again stated by Justice Mactavish in *Latimer*, above, at para 63:

> It is clear from the CCRA that in making the least restrictive determination, the Board has to carefully tailor the conditions of an offender's release having regard to all of the particular circumstances of the individual offender. How the leave privileges granted to Mr. Latimer compare to those granted to other offenders is irrelevant. Moreover, as was noted in the Assessment for Decision, the circumstances of Mr. Latimer's index offence are indeed "unique".

[33] There is no dispute that a decision made by the Board and by the Appeal Board under subsection 133(6) of the CCRA is a discretionary one, as evidenced by use of the words "may remove or vary such condition" and that permission to travel outside of Canada is an exception to the general rule applicable to offenders on conditional release: that they remain in Canada at all times, at locations specified by the offender's Parole Officer (*Sychuk* at para 44).

[34] It is also settled law that policy manuals, like guidelines, are not law and are not binding on the decision-maker, but nonetheless are useful indicators and if a decision is reached contrary to the guidelines, it is "of great help in assessing whether the decision was an unreasonable exercise of the power" (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 72).

[35] The Respondent argues that the Board's decision not to permanently relieve the Applicant of the international travel condition is within the range of acceptable outcomes available to the Board in light of the relevant information of the Applicant's case.

[36] Further, it is argued that the Board is open to disagree with the opinion of the Assessment presented to them that the restrictions could be lifted without disturbing their primary principle of societal protection, and that despite the existence of "positive considerations" the Board is free to exercise its discretion to disagree, and deny the application for relief.

[37] The Respondent continues that "while protection of society is to be the paramount consideration, the Board was also statutorily required to consider all relevant information, including the nature and gravity of the offence, and to be guided by Board policies". In fulfilling its mandate, the Board was reasonable to use its wide discretion to deny the request in light of all the evidence available to it and its broad spectrum of considerations, positive factors do not necessarily outweigh the seriousness, nature and gravity of the Applicant's offence.

[38] Moreover, it is argued, the Applicant did not request a variance on conditions being imposed, but requests a blanket removal of all international travel conditions. While I agree with the Respondent that the Board and Appeal Board have a broad discretion in considering the applicability of paragraphs 133(b)(a) and 161(1)(b) of the CRRA, that exercise of discretion must have a sound basis in fact to be applied reasonably.

[39] This case is distinguishable from the facts before Justice Lemieux in *Sychuk*, where the Court found that given both the brutal nature of his crime and lack of being able to monitor Mr. Sychuk overseas, supervision would be non-existent and therefore the Board's decision was reasonable.

[40] It is quite clear on the facts of this case, as it was at all levels of Court before me, that in considering Mr. Latimer's unique case, the principles of rehabilitation, specific deterrence and societal protection against risk from him do not apply. I cannot discern any basis for the Appeal Board to find that Mr. Latimer poses any risk to any persons inside or outside of Canada, or that an elimination of reporting requirements for international travel would present any real risk to public safety or adversely affect the protection of society under subsection 101(a) of the CCRA.

[41] That finding, coupled with the overarching purpose of the CCRA and CCRR, to make the least restrictive determination consistent with the protection of society under subsection 101(b), and after considering all relevant information, leads me to conclude that the Board and Appeal Board did not exercise their broad discretion in a reasonable, transparent or intelligible manner.

[42] The Board and Appeal Board cannot exercise discretion based on an arbitrary or punitive basis, inconsistent with this overarching purpose.

[43] This becomes even more pronounced when one has regard for the Policy Manual, which states that the Board is to entrust those who are responsible for the day-to-day supervision and care of offenders with the manner in which leave privileges are to be implemented. Here, both

the Applicant's Parole Officer and Parole Officer Supervisor made unqualified recommendations to remove the application of subparagraph 161(1)(b) of the CCRR.

[44] Mr. Latimer will continue to be under supervision of his Parole Officer, whenever and wherever he travels. Communication is not an issue and is subject to his continuing obligation to report to his Parole Officer. With these facts and principles in mind, and bearing in mind all the factors set out in paragraph 12 of my reasons above, I find that the Appeal Board's decision is unreasonable.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is allowed and the matter is remitted back to a differently constituted Appeal Board for redetermination, in accordance with these reasons.

"Michael D. Manson"
Judge

ANNEX "A"

Corrections and Conditional Release Act, SC 1992, c 20

Paramount consideration 100.1 The protection of society is the paramount consideration for the Board and the provincial parole boards in the determination of all cases.	**Critère prépondérant** 100.1 Dans tous les cas, la protection de la société est le critère prépondérant appliqué par la Commission et les commissions provinciales.
Principles guiding parole boards 101. The principles that guide the Board and the provincial parole boards in achieving the purpose of conditional release are as follows:	**Principes** 101. La Commission et les commissions provinciales sont guidées dans l'exécution de leur mandat par les principes suivants :
(a) parole boards take into consideration all relevant available information, including the stated reasons and recommendations of the sentencing judge, the nature and gravity of the offence, the degree of responsibility of the offender, information from the trial or sentencing process and information obtained from victims, offenders and other components of the criminal justice system, including assessments provided by correctional authorities;	a) elles doivent tenir compte de toute l'information pertinente dont elles disposent, notamment les motifs et les recommandations du juge qui a infligé la peine, la nature et la gravité de l'infraction, le degré de responsabilité du délinquant, les renseignements obtenus au cours du procès ou de la détermination de la peine et ceux qui ont été obtenus des victimes, des délinquants ou d'autres éléments du système de justice pénale, y compris les évaluations fournies par les autorités correctionnelles;
(b) parole boards enhance their effectiveness and openness through the timely exchange of relevant information with victims, offenders and other components of the criminal justice system and through communication about their policies and programs to victims, offenders and the general public;	b) elles accroissent leur efficacité et leur transparence par l'échange, au moment opportun, de renseignements utiles avec les victimes, les délinquants et les autres éléments du système de justice pénale et par la communication de leurs directives d'orientation générale et programmes tant aux victimes et aux délinquants qu'au grand public;
(c) parole boards make decisions that are consistent with the protection of society and that are limited to only what is necessary and proportionate to the purpose of conditional release;	c) elles prennent les décisions qui, compte tenu de la protection de la société, ne vont pas au-delà de ce qui est nécessaire et proportionnel aux objectifs de la mise en liberté sous condition;
(d) parole boards adopt and are guided by appropriate policies and their members are provided with the training necessary to implement those policies; and	d) elles s'inspirent des directives d'orientation générale qui leur sont remises et leurs membres doivent recevoir la formation nécessaire à la mise en oeuvre de ces directives;
(e) offenders are provided with relevant information, reasons for decisions and access to the review of decisions in order to ensure a fair and understandable conditional release	e) de manière à assurer l'équité et la clarté du processus, les autorités doivent donner aux délinquants les motifs des décisions, ainsi que tous autres renseignements pertinents, et la

process.	possibilité de les faire réviser.
Conditions of release 133. (2) Subject to subsection (6), every offender released on parole, statutory release or unescorted temporary absence is subject to the conditions prescribed by the regulations.	**Conditions automatiques** 133. (2) Sous réserve du paragraphe (6), les conditions prévues par règlement sont réputées avoir été imposées dans tous les cas de libération conditionnelle ou d'office ou de permission de sortir sans escorte.
Relief from conditions (6) The releasing authority may, in accordance with the regulations, before or after the release of an offender, (a) in respect of conditions referred to in subsection (2), relieve the offender from compliance with any such condition or vary the application to the offender of any such condition;	**Dispense ou modification des conditions** (6) L'autorité compétente peut, conformément aux règlements, soustraire le délinquant, avant ou après sa mise en liberté, à l'application de l'une ou l'autre des conditions du présent article, modifier ou annuler l'une de celles-ci.

Corrections and Conditional Release Regulations, (SOR/92-620)

Conditions of Release 161. (1) For the purposes of subsection 133(2) of the Act, every offender who is released on parole or statutory release is subject to the following conditions, namely, that the offender	**Conditions de mise en liberté** 161. (1) Pour l'application du paragraphe 133(2) de la Loi, les conditions de mise en liberté qui sont réputées avoir été imposées au délinquant dans tous les cas de libération conditionnelle ou d'office sont les suivantes :
(b) remain at all times in Canada within the territorial boundaries fixed by the parole supervisor;	b) il doit rester à tout moment au Canada, dans les limites territoriales spécifiées par son surveillant;

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Mr. Jason Gratl	FOR THE APPLICANT, ROBERT LATIMER
Mr. Chris Bernier	FOR THE RESPONDENT, ATTORNEY GENERAL OF CANADA

SOLICITORS OF RECORD:

Gratl and Company Barristers and Solicitors Vancouver, British Columbia	FOR THE APPLICANT, ROBERT LATIMER
William F. Pentney Deputy Attorney General of Canada Saskatoon, Saskatchewan	FOR THE RESPONDENT, ATTORNEY GENERAL OF CANADA