Federal Court of Appeal  Cour d'appel fédérale

Date: 20160607

Docket: A-371-14

Citation: 2016 FCA 170

[ENGLISH TRANSLATION]

CORAM: **GAUTHIER J.A.**
SCOTT J.A.
DE MONTIGNY J.A.

BETWEEN:

M. Y.

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Québec, Quebec, on June 1, 2016.

Judgement delivered at Québec, Quebec, on June 7, 2016.

REASONS FOR JUDGMENT: GAUTHIER J.A.

CONCURRED IN BY: SCOTT J.A.
DE MONTIGNY J.A.

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REASONS FOR JUDGMENT

GAUTHIER J.A.

[1] M. Y., is appealing from the decision rendered by a Federal Court judge (the judge) (2014 FC 599) dismissing the appellant's application for judicial review of a decision rendered in 2013 by the Parole Board of Canada. In its decision, the Board revoked the suspension of M. Y.'s criminal record (known as a pardon, at the time) because he was no longer of good conduct within the meaning of paragraph 7(*b*) of the *Criminal Records Act* R.S.C. 1985, c. C-47 (the Act).

[2] In a judicial review case, when an appeal is brought before this Court, it must decide whether the Federal Court identified the appropriate standard of review, and whether it applied the said standard properly (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para. 47, [2013] 2 S.C.R. 599 [*Agraira*]). To determine whether the judge properly applied the standard(s) of review, this Court steps into the shoes of the judge, and examines the administrative decision under judicial review (*Agraira* at para. 46).

[3] With respect to the first issue raised by the appellant, that is, that the Board violated its duty of procedural fairness, the appellant is not challenging the standard of review chosen by the judge. He is simply arguing that the standard was not properly applied. However, it will not be necessary to examine this issue in order to address the appeal before us.

[4] The appellant also argues that the judge erred in choosing to apply the reasonableness standard of review to what he considers a jurisdictional issue. According to the appellant, the Board did not exercise its discretion; rather, it applied the Act as though the revocation should be automatic, given his conviction. Hence, the judge should have applied the standard of correctness.

[5] I cannot accept that argument. According to the doctrine of the Supreme Court of Canada, what falls within the category of true question of jurisdiction must be interpreted narrowly (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 59, [2008] 1 S.C.R. 190; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at paras. 33-50, [2011] 3 S.C.R. 654 [*Alberta Teachers*]). Here, the appellant is challenging the

Board's interpretation and application of the Act to the facts of the case, which constitutes a question of mixed fact and law. Even given that the issue before this Court, the interpretation of paragraph 7(*b*) (particularly the meaning intended by the words "of good conduct") is a pure question of law, I am of the view that the reasonableness standard still applies. The Board interprets legislation that is closely connected to its function, and I can in no way refute the presumption that the reasonableness standard applies in this case (*Alberta Teachers* at paragraphs 30 and 34).

[6] That being said, and despite the deference required in the application of the standard of reasonableness, the appellant has convinced me that the Board's decision should have been quashed.

[7] At this stage, it is appropriate to recall that M. Y.'s criminal record was suspended on February 4, 2011. The offence for which he received a summary conviction in 2007 dates back to a period between 2000 and 2003; at the time, he was convicted of conspiring to export a controlled substance without a permit to export required under the *Export and Import Permits Act*, R.S.C. 1985, c. E-19.

[8] It was therefore over nine years after committing the offence (August 2012) that M. Y. pleaded guilty in a summary proceeding to the hybrid offence set out in section 255 of the *Criminal Code*, R.S.C., 1985, c. C-46 (impaired driving). The offence was committed on March 2, 2012. The court imposed the minimum punishment set out in the *Criminal Code*, that is, a $1,000 fine and a one-year suspension of his driver's licence.

[9] When it learned of the conviction, the Board wrote to M. Y. on July 15, 2013, to notify him that it intended to revoke his pardon because it suspected that he no longer met the good conduct criterion set out in the Act, and to enable him to make submissions in that regard. In his comments, M. Y. attributes his behaviour to an error in judgment—the only one of record in over nine years. The evaluation report he submitted from the Société de l'assurance automobile du Québec concludes that the risk of recidivism is low. That conclusion is based on the fact that M. Y. did not seem to have problems with alcohol and had not committed any other driving offences. Lastly, M. Y. describes the serious consequences that a revocation of the suspension of his criminal record would have on his work, family (his son) and business (that requires him to travel regularly to the United-States).

[10] The Board revoked the suspension of the appellant's criminal record on September 20, 2013. The Board's reasons are brief. After describing the offence, including the appellant's high blood alcohol level and the sentence imposed, the Board wrote:

> [TRANSLATION] The Board examined all of the documentation provided to determine if you still meet the criteria set out in the Act. The Board carefully reviewed the information submitted by your assistant, as well as the results of the Société de l'assurance automobile du Québec's evaluation program. After completing its examination, the Board finds that the offence of which you are accused again shows that your behaviour is likely to put the lives of others in danger. Your actions once again required the intervention of the police and the court.

[11] Under subparagraph 7.2(*a*)(i) of the Act, a record suspension automatically ceases to have effect if the concerned person is convicted of a hybrid offence—an offence that is punishable either on a conviction on indictment or on summary conviction—listed in paragraph

4(1)(*a*) of the Act. This last provision relates to offences that were prosecuted by indictment, which is not the case here.

[12] A suspension also automatically ceases to have effect when the offence is one listed under subparagraph 7.2(*a*)(ii), which reads as follows:

Cessation of effect of record suspension	**Nullité de la suspension du casier**
7.2 A record suspension ceases to have effect if	7.2 Les faits ci-après entraînent la nullité de la suspension du casier :
(*a*) the person to whom it relates is subsequently convicted of	*a*) la personne dont le casier a été suspendu est condamnée :
…	[…]
(ii) any other offence under the *Criminal Code*, except subsection 255(1), or under the *Controlled Drugs and Substances Act*, the *Firearms Act*, Part III or IV of the *Food and Drugs Act* or the *Narcotic Control Act*, chapter N-1 of the Revised Statutes of Canada, 1985, that is punishable either on conviction on indictment or on summary conviction; or	(ii) soit pour toute autre infraction — punissable par voie de mise en accusation ou par procédure sommaire — au *Code criminel*, à l'exception de l'infraction prévue au paragraphe 255(1) de cette loi, à la *Loi réglementant certaines drogues et autres substances*, à la *Loi sur les armes à feu*, aux parties III ou IV de la *Loi sur les aliments et drogues* ou à la Loi sur les stupéfiants, chapitre N-1 des Lois révisées du Canada (1985);
…	[…]

[13] Therefore, when impaired driving is prosecuted on summary conviction, it is the only hybrid offence set out in the *Criminal Code* that is exempt from an automatic revocation. Given that the offence is not listed under subparagraphs 7.2(*a*)(i) or 7.2(*a*)(ii), it is appropriate to review

paragraphs 7(*a*) and (*b*) of the Act to determine whether they allow for discretionary revocation of the appellant's record suspension.

[14] Paragraph 7(*a*) allows for the revocation of a record suspension if a person is subsequently convicted of an offence referred to in paragraph 4(1)(*b*), other than an offence referred to in subparagraph 7.2(*a*)(ii). It is not disputed that it is indeed paragraph 4(1)(*b*) that applies to the offence for which M. Y. was convicted, given that it was prosecuted on summary conviction (see also *R. v. Dudley*, 2009 SCC 58 at para. 49, [2009] 3 S.C.R. 570). Paragraph 7(*b*) of the Act provides that a record suspension may be revoked by the Board "on evidence establishing to the satisfaction of the Board that the person to whom it relates is no longer of good conduct". The Board therefore could have exercised its discretion under paragraph 7(*a*) or paragraph 7(*b*)—it chose to do so under paragraph 7(*b*).

[15] Having made that choice, the Board had to put the emphasis on the good conduct criterion rather than simply on the commission of the offence. The goal of paragraph 7(*b*) of the Act is clearly to enable the Board to take into account circumstances other than a conviction under paragraph 7(*a*).

[16] The concept of good conduct in sections 4 and 7 of the Act is not defined in the Act. It should nevertheless be noted that Parliament distinguishes good conduct for having been convicted of an offence at both section 7 and paragraph 4.1(1)(*a*) of the Act. For the purposes of this appeal, it is not necessary to expand on the possible interaction between good conduct and a

new conviction. In this case, our conclusion is essentially grounded in the very specific facts of the case.

[17] Although the Decision-Making Policy Manual for Board Members is not legally binding, I agree with the appellant that the manual gives an indication of what one can normally and legitimately expect the Board to consider in making its decision and what one can expect to find in its reasons. That is clearly not the case here.

[18] In section 12 of the manual, the Board explains how it interprets good conduct. It states that good conduct is considered behaviour that is consistent with and demonstrates a law-abiding lifestyle. Although this definition is included in the section that addresses the granting of a record suspension, it seems to apply to the Act in its entirety. It should also be noted that in section 24 of the manual, which deals more specifically with the revocation of such a suspension, the Board indicates that even when considering a new conviction under paragraph 7(*a*), it considers information that suggests a significant disregard for public safety and order and/or laws and regulations, on the basis of the offender's criminal history.

[19] In this case, I do not see how the Board could reasonably conclude that there was convincing evidence that M. Y. was no longer of good conduct because his behaviour required the intervention of the police and of the court for the offence listed in section 255 of the *Criminal Code*. This occurs as a matter of course; however, Parliament made an exception of that offence under subparagraph 7.2(*a*)(ii). The Board's conclusion is all the more surprising considering that there was no indication on file of any particular circumstance related to police involvement in

this case, and that M. Y. pleaded guilty and therefore did not abuse judicial resources. I also note once again that the court only imposed the minimum punishment on M. Y.

[20] The Board did not conduct any investigation or seek to obtain any details from police regarding the circumstances surrounding the commission of the offence to determine if M. Y.'s conduct could truly have placed the lives of others in danger (see section 16 of the Decision-Marking Policy Manual for Board Members which pertains to the conduct of independent inquiries to evaluate good conduct).

[21] The Attorney General of Canada stated that, rather than conducting an inquiry, the Board could simply leave it to M. Y. to submit all the information relevant to the evaluation of his good conduct, including the circumstances surrounding the commission of the offence.

[22] In my opinion, if the Board chooses to obtain the information that it must consider in this manner, its letter to the person whose suspension might be revoked must indicate clearly and in detail the type of information it would find useful. The Board has the necessary expertise in this matter and cannot leave M. Y. or anyone else in his situation without clear instructions.

[23] I also note that the requirement to obtain representations from M .Y. under the Act does not imply that it is M. Y. who has the burden of establishing his good conduct; rather, it reflects the Board's duty of procedural fairness (see also subsections 4.2(2) and (3) of the Act).

[24] In any event, I find that the letter of July 15 asking M. Y. to make his representations was not specific enough for him to know that he could and/or should be providing information on the circumstances surrounding the commission of the offence, as well as on his good conduct over the past nine years. He clearly did his best in this case. However, as he argued at the hearing, he did not understand that he was required to provide details to the Board on the very nature of his offence and the circumstances surrounding it. In the absence of such information on record, the Board could not conclude that there was convincing evidence that M. Y.'s behaviour could be associated with a significant disregard for public safety or that he had been a danger to the public.

[25] A high blood alcohol level is clearly a relevant factor in an individualized assessment; however, Parliament could have established a general rule whereby only those offences listed in section 255 of the *Criminal Code* involving a low blood alcohol level could be exempt. It did not do so. This factor must therefore be examined in context.

[26] The Board should have examined the specific circumstances surrounding the appellant's commission of the offence, as well as all other information related to his lifestyle. In my opinion, the Board did not distinguish the notion of good conduct with the fact that the appellant was convicted of impaired driving, despite choosing to proceed in accordance with the terms of paragraph 7(*b*), rather than paragraph 7(*a*) of the Act.

[27] I conclude that under the circumstances, the judge did not properly apply the reasonableness standard. I nevertheless find that this Court should not substitute its opinions for those of the Board, as the appellant wishes. I therefore propose that the appeal be granted without costs, as agreed by the parties. The judge's decision must be quashed, the application for judicial review granted and the case returned to the Board to be re-examined, in the light of the present reasons and the additional evidence that will be presented to the new decision-maker.

[28] M. Y. asked the court to confirm that only the redacted case under appeal should be accessible to the public, and that the non-redacted court file be kept confidential and only be accessible to the parties and their counsel. I agree with Madam Justice Danielle Tremblay-Lamer in the Federal Court Orders dated March 20 and June 2, 2014, and find that such a request should be granted in accordance with Rule 151 of the *Federal Courts Rules*, S.O.R./98-106.

"Johanne Gauthier"
J.A.

"I agree.
A.F. Scott J.A."

"I agree.
Yves de Montigny, J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A FEDERAL COURT JUDGMENT DATED JUNE 23, 2014, DOCKET NO. T-1832-13 (2014 FC 599)

DOCKET:	A-371-14
STYLE OF CAUSE:	M. Y. v. THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	QUÉBEC, QUEBEC
DATE OF HEARING:	JUNE 1, 2016
REASONS FOR JUDGMENT BY:	GAUTHIER J.A.
CONCURRED IN BY:	SCOTT J.A. DE MONTIGNY J.A.
DATED:	JUNE 7, 2016

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