Federal Court of Appeal Cour d'appel fédérale

Date: 20100218

Docket: A-483-10

Citation: 2011 FCA 63

Present: SEXTON J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA
and NATIONAL PAROLE BOARD

Appellants

and

JOHN ANTHONY FRANCHI

Respondent

Heard at Toronto, Ontario, on February 17, 2011.

Order delivered at Toronto, Ontario, on February 18, 2011.

REASONS FOR ORDER BY: SEXTON J.A.

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<u>REASONS FOR ORDER</u>

<u>SEXTON J.A.</u>

[1] The Appellants move for a stay pending appeal of a judgment of Justice Harrington of the Federal Court (the “Applications Judge”) allowing Mr. Franchi’s application for judicial review of a decision of the National Parole Board’s Appeal Division.

[2] Mr. Franchi was convicted of fraud-related charges for the second time in October 2007, and is currently serving a six-year prison sentence. He was released on day parole in April 2009.

[3] Mr. Franchi's day parole was subject to the conditions imposed on every parolee pursuant to section 161 of the *Corrections and Conditional Release Regulations*, SOR/92-620 (the "Regulations"). Among these conditions, subparagraph 161(1)(*g*)(iii) requires that a parolee immediately report "any change in the…financial situation of the offender" to his or her parole supervisor (the "standard condition"). Subsection 133(3) of the *Corrections and Conditional Release Act*, S.C. 1992 c. 20, also allows the National Parole Board (the "Board") to impose release conditions on individual offender above and beyond the standard conditions imposed by the Regulations. In Mr. Franchi's case, the Board required that he "provide full financial disclosure, including assets, debts, income and expenditures, immediately to your parole supervisor upon request" (the "special condition").

[4] Over the course of August 2009, Mr. Franchi borrowed about $104,000. He claims that his intention was to invest that money at a high rate of interest and use the proceeds to pay down his debts. When this came to the attention of the authorities and they raised the issue with Mr. Franchi, he provided information about these activities. However, he had not reported the activity on his own initiative prior to his being required to respond to the request for full financial disclosure, despite the fact that he had the opportunity to do so during at least two meetings with his parole officer.

[5] The Board found that Mr. Franchi was in breach of the standard condition because he had failed to inform his parole officer immediately of the loans and his investment activity. It also found that he was in breach of the special condition because his disclosure on request was

incomplete. On this basis, it revoked his day parole. That decision was affirmed by the Appeal Division of the National Parole Board.

[6] The Applications Judge allowed Mr. Franchi's application for judicial review of the Appeal Division's decision. He recognized that "[w]ere it not for the special condition, it could fairly be said that he was in breach because he failed to immediately report any change in his financial situation. Borrowing more than $100,000 is certainly a change in one's financial situation" (emphasis in original). According to the Applications Judge, however, the standard condition and the special condition were contradictory. The only way to read the conditions together was that the special condition modified the standard condition, and that Mr. Franchi was therefore only required to provide disclosure upon request. He held that it was unreasonable for the National Parole Board and Appeal Division to hold otherwise. The Applications Judge also held that the Board and Appeal Division gave inadequate reasons for its conclusion that Mr. Franchi had breached the special condition through inadequate disclosure, and that this constituted a breach of procedural fairness.

[7] The Attorney General and the National Parole Board have appealed the Applications Judge's decision to this court, and they now move for a stay of that decision pending appeal. The test for granting such a stay was set out by the Supreme Court of Canada in *RJR-MacDonald v. Canada (A.G.)*, [1994] 1 S.C.R. 311 at paragraph 43 [*RJR-MacDonald*]. In order for a stay to be granted, three conditions must be met. First, there must be "a serious question to be tried" on appeal. Second, the applicant must prove that it would suffer irreparable harm if the stay is not granted. Finally, the applicant must satisfy the court that the balance of convenience favours granting the stay.

[8] As the Supreme Court recognized, the threshold for a serious question to be tried is low (*RJR-MacDonald* at paragraph 49). Such an issue exists in this case. The Applications Judge's conclusion that Mr. Franchi had not breached the standard condition turned on his holding that the standard condition and the special condition were contradictory, and that the special condition effectively modified the standard condition. It is certainly arguable that the two conditions serve different and complementary roles in preventing recidivism: while the standard condition assures that authorities are informed automatically when a parolee's circumstances change, the special condition gives authorities access to more complete information when necessary. Without expressing an opinion on the correctness of Applications Judge's decision, it is clear to me that this appeal is "neither frivolous nor vexatious". There is therefore a "serious issue" to be decided on appeal (see *RJR-MacDonald* at paragraph 49).

[9] Turning to the second and third factors, it is important to recognize that courts will accord particular consideration to the public interest. As Justices Sopinka and Cory wrote in *RJR-MacDonald*:

> In our view, the concept of inconvenience should be widely construed in *Charter* cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action (at paragraph 71).

[10] I am satisfied that failure to grant a stay would cause irreparable harm to the public interest. The Appellants have presented evidence that the Applications Judge's decision could have extremely broad effects. Between April 1 and November 14, 2010, the Board imposed special

conditions on 627 offenders requiring financial disclosure upon request. The Applications Judge's decision implies that these offenders may not be required to proactively notify authorities of changes to their financial situations. This legal uncertainty would limit the Board's ability to fulfill its mandate of supervising offenders in order to prevent recidivism.

[11] Mr. Franchi submitted that this would not be a problem, because authorities could simply request disclosure under the special condition whenever necessary. I cannot agree. Not only would this likely place an onerous burden on parole officials, but it misses the point of the standard condition, which is to ensure that authorities are notified immediately of financial activity that could indicate recidivism. Even if parole officers adopted a policy of monthly requests for full disclosure, this could obviously not catch a problem created by an offender's actions closely following such disclosure.

[12] I am also satisfied that the balance of convenience favours granting the stay. As I have already stated, the absence of a stay the decision of the Applications Judge will create uncertainty as to the responsibilities of hundreds of offenders, and it will limit the Board's ability to carry out its mandate. Against this must be weighed the infringement on Mr. Franchi's liberty interests caused by his loss of day parole. On balance, I must conclude that the Board's ability to fulfil its mandate and protect society should be accorded paramount importance, and that the balance of convenience therefore favours granting a stay in these circumstances (*Condo v. Canada (A.G.)*, 2010 FC 1286 at paragraph 6; *Kuipers v. Canada* (1994), 74 F.T.R. 306 at paragraph 28 (T.D.)).

[13] The motion is therefore allowed without costs, and the decision of the Applications Judge will be stayed pending appeal. I consulted with the parties, who consented to having an expedited

hearing, and to the following terms. The hearing is fixed for 9:30 a.m. on April 11, 2011 in Toronto, for three hours. The Appellants' materials, including appeal book and memorandum of fact and law, are to be filed by March 14, 2011. The Respondent's materials, including appeal book and memorandum of fact and law, are to be filed by March 28, 2011.

"J. Edgar Sexton"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-483-10

(APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE HARRINGTON DATED NOVEMBER 24, 2010, IN FEDERAL COURT FILE NO. T-662-10)

STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA and NATIONAL PAROLE BOARD v. JOHN ANTHONY FRANCHI
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	February 17, 2011
REASONS FOR ORDER BY:	SEXTON J.A.
DATED:	February 18, 2011

APPEARANCES:

Michael J. Sims	FOR THE APPELLANTS
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