Federal Court  Cour fédérale

**Date: 20190710**

**Docket: T-417-19**

**Citation: 2019 FC 909**

**Ottawa, Ontario, July 10, 2019**

**PRESENT: The Honourable Mr. Justice Manson**

**BETWEEN:**

**DLE**

**Applicant**

**and**

**AGC AND THE PAROLE BOARD OF CANADA (APPEAL DIVISION)**

**Respondents**

# JUDGMENT AND REASONS

## I. Introduction

[1] This is an application for judicial review of the decision by the Appeal Division of the Parole Board of Canada [Appeal Division] dated February 4, 2019, dismissing the Applicant's appeal and upholding the decision by the Parole Board of Canada [Board] to revoke the Applicant's full parole.

## II. Background

[2] The Applicant and his ex-wife were married in 1991. They had two children together, a son and a daughter.

[3] In or around 2005 the couple separated, and the Applicant's ex-wife obtained a protection order against the Applicant. In 2006, the Applicant was convicted of breaching the protection order.

[4] In 2007, the Applicant and his ex-wife were formally divorced. In 2008, the Applicant was again convicted for breaching the protection order and breaching his probation order.

[5] In the early morning hours of July 27, 2008, the Applicant broke into his ex-wife's home and committed a violent sexual assault against his ex-wife, who was undergoing treatment for terminal cancer at the time and was in a weakened physical state.

[6] The Applicant pled guilty. Pursuant to the sentencing judgment of Chief Justice Monin of the Court of Queen's Bench of Manitoba issued August 21, 2009 (*R v DLE*, 2009 MBQB 218), the Applicant began serving a 12 year and 10 month sentence for break and enter and aggravated sexual assault, unlawful confinement, and wearing a disguise with intent to commit an indictable offence.

[7] The Applicant was released on day parole on August 13, 2015, granted full parole on October 6, 2016, and released on full parole on October 11, 2016.

[8] In May 2018, the Applicant was granted permission to travel out of province to visit his elderly mother in Manitoba.

[9] On May 31, 2018, one of the Applicant's daughters, working in a nearby town in Manitoba, reported to police that the Applicant had been standing across the street from her workplace at 5:00 pm, in violation of a no-contact parole condition.

[10] A warrant was issued. The Applicant was arrested that evening at his mother's home. The police informed Correctional Services Canada [CSC], and the Applicant's parole was suspended.

[11] The Applicant's Correctional Management Team [CMT] prepared two reports for the Board – a Correctional Plan Report dated June 15, 2018, and an Assessment for Decision dated June 13, 2018.

[12] In the Correctional Plan Report, the Applicant's parole officer detailed her investigation into the events of May 31, 2018, including that:

(i) when police interviewed the Applicant's mother, she stated that the Applicant had not left the property the entire day. However, the police observed the Applicant driving back to the property at 8:00 pm;

(ii) when the parole officer spoke with the Applicant's mother, his mother said the Applicant left her property at two times that day – once in the morning for about an hour to pick up gardening supplies, and the second time at about 8:00 pm for about 20 minutes. His mother stated that she thought she had communicated this information to police; and

(iii)when the parole officer spoke with the Applicant's brother, his brother initially said that he and the Applicant had not left their mother's property that day. When questioned about a morning trip for gardening supplies, his brother stated that they had left the property for about three hours, but had not gone to the Applicant's daughter's workplace.

[13] The parole officer raised concerns that, due to the inconsistencies above, the Applicant's mother and brother were colluding with the Applicant. The parole officer was also concerned that throughout his parole, the Applicant had repeatedly requested contact with his youngest son and daughter, despite the no-contact conditions imposed on him.

[14] In the Assessment For Decision, the Applicant's CMT recommended revoking his parole, noting in particular that:

(i) the Applicant had been "consistently deceptive" with the CMT about a current intimate relationship;

(ii) the applicant made repeated requests while on parole regarding contact with his two younger children; and

(iii)it appeared that "collateral contacts" were colluding with the Applicant regarding his whereabouts on May 31, 2018.

## III. Decision Under Review

### A. *The Board's decision*

[15] On September 6, 2018, the Applicant attended a post-suspension hearing in front of the Board. On that same day, the Board issued a decision revoking the Applicant's parole [the Board's decision].

[16] The Board reviewed conflicting information regarding the Applicant's whereabouts on May 31, 2018.

[17] The Applicant submitted that he did not attend his daughter's workplace on the day in question. He testified that he left the property with his brother to pick up supplies, and to take his mother to a medical appointment, before working all afternoon and evening in the garden of his mother's home, save for a brief trip to pick up groceries at about 9:20 pm. The Applicant also stated that in her oral statement, his daughter described him as having red hair, when he has had grey hair for several years. This version of events was supported by at least one letter from a neighbour, who wrote of speaking with the Applicant at his mother's property between 5:30 pm and 6:00 pm, as well as letters by the Applicant's mother and brother.

[18] The second version of events was that the Applicant attended his daughter's workplace on the day in question. This version was supported by the Applicant's daughter's statement to police.

[19] The Board reviewed the Applicant's testimony, the CMT's Assessment for Decision and various other pieces of documentary evidence. The Board concluded that the Applicant did attend his daughter's workplace on the day in question, relying on his daughter's police statement as well as his repeated requests while on parole to have contact with his children. The Board also discounted the evidence of the Applicant's family due to the inconsistencies identified in the Correctional Plan Report.

B. *The Appeal Division decision*

[20] The Applicant's counsel, who is also counsel before this Court, appealed the Board's decision to the Appeal Division on October 30, 2018. On February 4, 2019, the Appeal Division affirmed the Board's decision [the Appeal Division decision].

[21] First, the Applicant argued that if the Appeal Division took more than one to two months to render a decision, it violated section 7 of the Charter. The Appeal Division found that these arguments were not within its jurisdiction to consider.

[22] Second, the Applicant argued that the Board erred by, among other things, unreasonably assessing the evidence, and by failing to obtain a copy of the police report. The Appeal Division found that the Board was faced with two competing versions of events, and reasonably assessed the evidence to arrive at a conclusion. Further, the Appeal Division found that there was no police report in the file, and that the Board was under no duty to adjourn the hearing in order to get a copy of the police report.

IV. Issue and Standard of Review

[23] The issues are:

(i) Were the decisions of the Board and the Appeal Division reasonable?

(ii) Was the Applicant denied procedural fairness?

[24] When the Board is alleged to have breached the Applicant's rights to procedural fairness, the applicable standard of review is correctness (*Abraham v Canada (Attorney General)*, 2016 FC 390 at para 12).

[25] Pursuant to Rule 302 of the *Federal Courts Rules*, SOR/98-106, an application for judicial review is generally limited to a single order in respect of which relief is sought. However, when the Appeal Division's decision affirms a decision of the Board, the Court is required to also ensure that the Board's decision was lawful (*Chartrand v Canada (AG)*, 2018 FC 1183 at para 38 [*Chartrand*]; *Cartier v Canada (Attorney General)*, 2002 FCA 384 at para 10).

[26] Therefore the Court will review whether both decisions were justified, transparent and intelligible, and whether they fell within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Chartrand*, above at para 39).

## V. Relevant Provisions

[27] Pursuant to section 100 of the *Corrections and Conditional Release Act*, SC 1992, c 20 [CCRA], "the purpose of conditional release is to contribute to the maintenance of a just, peaceful and safe society by means of decisions on the timing and conditions of release that will best facilitate the rehabilitation of offenders and their reintegration into the community as law-abiding citizens."

[28] The protection of society is the paramount consideration for the Board and the provincial parole boards in the determination of all cases (section 100.1, CCRA).

[29] Section 101 of the CCRA outlines the principles for the Board and the provincial parole boards to consider:

> 101 The principles that guide the Board and the provincial parole boards in achieving the purpose of conditional release are as follows:
>
> (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;
>
> (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;
>
> (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;
>
> (d) parole boards adopt and are guided by appropriate policies and their members are provided with the training necessary to implement those policies; and
>
> (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 process.
>
> [Emphasis added.]

[30] Subsection 135(5) of the CCRA governs the Board's review of offenders serving a sentence of two years or more:

> (5) The Board shall, on the referral to it of the case of an offender who is serving a sentence of two years or more, review the case and — within the period prescribed by the regulations unless, at the offender's request, the review is adjourned by the Board or is postponed by a member of the Board or by a person designated by the Chairperson by name or position —
>
> > (a) if the Board is satisfied that the offender will, by reoffending before the expiration of their sentence according to law, present an undue risk to society,
> >
> > > (i) terminate the parole or statutory release if the undue risk is due to circumstances beyond the offender's control, and
> > >
> > > (ii) revoke it in any other case;
> >
> > (b) if the Board is not satisfied as in paragraph (a), cancel the suspension; and
> >
> > (c) if the offender is no longer eligible for parole or entitled to be released on statutory release, cancel the suspension or terminate or revoke the parole or statutory release.

[31] Section 147 of the CCRA allows an offender to appeal a decision of the Board to the Appeal Division.

## VI. Analysis

[32] The Applicant submits that the Board erred by accepting his daughter's version of events, because:

(i) the Board failed to request the police report be added to the Applicant's file, and instead relied on "double hearsay evidence" – the CMT's Assessment for Decision which described the police report;

(ii) the Board erred by failing to explore whether the Applicant's daughter had been made aware that the Applicant was visiting Manitoba; and

(iii) the Applicant's daughter described him as having red hair, when he has had grey hair for several years.

[33] The Applicant also suggests that the Board erred by rejecting the neighbour's letter. While there were some concerns with the veracity of the evidence of the Applicant's brother and mother, the Board did not identify concerns with the neighbour's evidence. The Applicant submits the Board had no justification to prefer his daughter's version of events over the evidence put forward by the Applicant, his family, and his mother's neighbour.

[34] The Applicant also alleges that the Board's acceptance of the daughter's evidence resulted in a denial of procedural fairness.

[35] As outlined by Chief Justice Crampton in *Miller v Canada (Attorney General)*, 2010 FC 317 at para 54, the Board was obligated to take into account all information received from the CSC, and further to ensure that any such information relied upon was reliable and persuasive:

> I do not agree with Mr. Miller's contention that paragraph 101(b) imposed an obligation on the Board to actively seek to obtain information that had not been placed before it and that might or might not contain information that was relevant to his case. In my view, the words "all available information that is relevant to a case" and "information and assessments *provided by* correction authorities" do not contemplate that the Board has an open-ended duty to actively seek potentially relevant information from the CSC. Rather, insofar as the CSC is concerned, those words simply require the Board to take into consideration all information *received from* the CSC that is relevant to a case. Paragraph 101(f) of the CCRA and the common law duty of fairness then require the Board to ensure that any such information upon which it may act is reliable and persuasive. As stated in *Zarzour*, above, the Board then has some

> latitude with respect to the manner in which it satisfies this latter obligation. (See also *Strachan*, above, at paragraph 28.)
>
> [Emphasis added.]

[36] While the language of the CCRA has been slightly altered since it was considered by Chief Justice Crampton, and paragraph 101(f) has become paragraph 101(e), the principles expressed remain the same.

[37] Therefore, while the Board was not explicitly obligated to review the police report, it was obligated to (1) take into account all relevant information received and (2) ensure that the information relied upon was reliable and persuasive. The Board failed to satisfy these obligations.

[38] First, the Applicant raised concerns before the Board that his daughter's police statement described him as having red hair when he has had grey hair for many years. This was not addressed in the Assessment for Decision or the Correctional Plan Report, and should have raised reliability concerns regarding the daughter's version of events.

[39] Second, the neighbour's letter gave uncontradicted evidence that the Applicant was at his mother's home at 6:00 pm, which would also preclude him from having attended his daughter's workplace. While the Board reasonably discounted evidence from the Applicant's mother and brother due to concerns of collusion, no concerns were identified regarding the neighbour's letter.

[40] I find that by failing to directly review the police report, the Board failed to ensure that the information relied upon was reliable, thereby resulting in a denial of procedural fairness to the Applicant. The police report, particularly the daughter's statement to police, was the crucial piece of evidence upon which the Board relied. The Applicant raised significant concerns regarding the reliability of his daughter's police statement, and also put forward uncontradicted evidence in the form of the neighbour's letter, as well as his own testimony, which called into question the reliability of his daughter's police statement. In these circumstances, the Board erred by failing to directly review the police report.

[41] Moreover, I find that by failing to address the neighbour's letter, the Board erred by failing to take into account all relevant information received. The Board's decision was therefore unreasonable, as was the Appeal Division's decision which upheld it.

[42] This application is allowed, and the matter returned to a different member of the Parole Board of Canada for reconsideration in accordance with these reasons. Costs to the Applicant to be assessed in accordance with Column III of Tariff B.

**JUDGMENT in T-417-19**

**THIS COURT'S JUDGMENT is that**

1. The application is allowed.

2. The decision of the Parole Board of Canada, dated September 6, 2018, and the decision of the Appeal Division, dated February 4, 2019, which upheld the original decision, are both quashed.

3. The matter is referred back to a different member of the Parole Board of Canada for reconsideration in accordance with these reasons.

4. Costs are awarded to the Applicant to be assessed in accordance with Column III of Tariff B.

"Michael D. Manson"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-417-19 |
| **STYLE OF CAUSE:** | DLE v AGC AND THE PAROLE BOARD OF CANADA (APPEAL DIVISION) |
| **PLACE OF HEARING:** | VANCOUVER, BRITISH COLUMBIA |
| **DATE OF HEARING:** | JULY 4, 2019 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | MANSON J. |
| **DATED:** | JULY 10, 2019 |

**APPEARANCES:**

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|---|---|
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| Lucy Bell | FOR THE RESPONDENTS |

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