Federal Court Cour fédérale

Date: 20200604

Docket: T-358-20

Citation: 2020 FC 670

Ottawa, Ontario, June 4, 2020

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

BRYAN RALSTON LATHAM

Applicant

And

HER MAJESTY THE QUEEN and ATTORNEY GENERAL OF CANADA

Respondents

ORDER AND REASONS

I. Nature of the Matter

[1] At 72 years of age, Mr. Latham is presently an inmate at the Bowden Institution [Bowden], a federal medium security prison in Innisfail, Alberta. He has filed an urgent motion seeking immediate release from prison, with conditions to be determined by the Court.

[2] Mr. Latham claims that his advanced age and pre-existing medical conditions place him at an elevated risk of succumbing to the novel coronavirus [COVID-19], although at the time of the hearing, there are no confirmed cases of the virus within Bowden.

[3] The underlying proceeding in this matter is Mr. Latham's application for judicial review of a decision dated January 27, 2020, of the Appeal Division of the Parole Board of Canada [Appeal Division] which affirmed a decision dated September 11, 2019, of the Parole Board of Canada [Parole Board]), denying Mr. Latham both full and day parole. The decision which is the subject of judicial review does not relate to any risks associated with COVID-19.

[4] In the present motion, Mr. Latham argues that having to remain in prison constitutes a violation of sections 7, 9 and 12 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter], given his increased vulnerability of contracting COVID-19 and the elevated risk to his life and security while being detained in prison; he brings this motion seeking relief in the form of a temporary release from Bowden under subsection 24(1) of the Charter.

[5] According to Mr. Latham, Bowden is ill suited to protect someone of his advanced age and medical profile from COVID-19. In addition, and quite apart from any issue relating to the global pandemic, Mr. Latham expresses frustration with his lack of access to administrative and legal support in relation to his efforts to alter the term of his sentence, or at least to better accommodate his circumstances.

[6] For the reasons that follow, I must dismiss Mr. Latham's motion.

II. Context

[7] On January 22, 2021, the Applicant, Mr. Bryan Ralston Latham, will have been in jail for 50 years.

[8] He was convicted in 1971 for a series of violent sexual offences. In 1985, he was charged with the sexual assault of a 15 year old girl while on parole; he was subsequently found guilty. Upon application by the Crown, on May 20, 1987, the Manitoba Court of Queen's Bench found Mr. Latham to be a dangerous offender and, after setting out Mr. Latham's history of sexual offences, imposed on him a sentence for an indeterminate period so as to "better protect the public and Mr. Latham" (*R v Latham*, [1987] MJ No 263, 47 Man R (2d) 81, 1987 CanLII 7165 (MB QB) at para 114).

[9] Since 2013, Mr. Latham has been released on day parole by way of an unescorted temporary absence [UTA] on at least three occasions. Rightly or wrongly (depending upon whether one is to believe Mr. Latham), day parole was either suspended or revoked on each of these occasions on account of violations of his parole conditions.

[10] In the past few years, Mr. Latham repeatedly sought to obtain his release from incarceration, with all efforts having failed. In fact, his tenacity reached the point where he was eventually declared a "vexatious litigant" by the Court of Queen's Bench of Alberta in 2018

(*Latham (Re)*, 2018 ABQB 955; see also *Latham (Re)*, 2018 ABQB 522; *Latham (Re)*, 2019 ABQB 223).

[11] On September 11, 2019, the Parole Board issued a decision denying Mr. Latham both full and day parole. Upon consideration of the information on file and Mr. Latham's submissions, the Parole Board found that he remained a risk to reoffend if released; such risk was "deemed by the Board to be unmanageable in the community".

[12] The Appeal Division affirmed the Parole Board's decision on January 27, 2020. Mr. Latham's application for judicial review of that decision was filed with this Court on March 10, 2020.

[13] In the meantime, in response to the unprecedented circumstances created by the global COVID-19 pandemic, this Court issued a *Practice Direction and Order* on March 17, 2020, by which it cancelled all scheduled hearings and suspended the running of timelines under, *inter alia*, the *Federal Courts Rules*, SOR/98-106 [Federal Courts Rules], for a specifically determined Suspension Period. The *Practice Direction and Order* was superseded on April 4, 2020, by the *Updated Practice Direction and Order (COVID-19)*, which has since been further updated on April 29, 2020, by the *Practice Direction and Order (COVID-19): Update #2*, and on May 29, 2020, by the *Practice Direction and Order (COVID-19): Update #3*, in each case extending the Suspension Period including the running of time under the Federal Courts Rules.

[14] Concerned with the effect that the suspension of procedural timelines would have on his ability to access parole while Bowden grappled with the reality of the global pandemic, on April 21, 2020, this Court received a letter from Mr. Latham seeking an immediate video hearing so as to request that this Court grant him an interim release from prison pending the determination of his application for judicial review.

[15] The Respondent objected to such a request being made by informal letter, and following a series of exchanges involving the parties, and no less than three directives from the Court, by May 6, 2020, Mr. Latham had succeeded in filing a complete motion record containing his notice of motion seeking relief under subsection 24(1) of the Charter, an unsworn affidavit, and his written representations.

[16] I directed the Respondent to file its responding motion record by May 14, 2020, and on May 15, 2020, I proceeded to hear Mr. Latham's motion by way of conference call.

III. Preliminary Issues

A. *Style of Cause*

[17] The Respondent requests that the style of cause be amended so as to only identify the Attorney General of Canada as the Respondent. And so it will be ordered, as I agree that this amendment is proper (Rule 303(3) of the Federal Courts Rules; *Forest Ethics Advocacy Association v Canada (National Energy Board)*, 2013 FCA 236 at paras 18-21).

B. *Applicant's Affidavit*

[18] The Respondent also asks that this Court give no weight to the Applicant's affidavit because it is speculative, contains unfounded allegations, is unsworn, and generally does not comply with Rule 81 of the Federal Courts Rules.

[19] As Mr. Latham states, he was not able to swear his affidavit as he had no access to a commissioner for oaths, and he asks this Court to take his oath or to notarize his affidavit for him.

[20] Mr. Latham is a self-represented litigant. He finds himself in an environment that may not afford the same amenities as one may be accustomed to outside of prison. He has clearly gone to great efforts to put his story before the Court, and this Court has often given self-represented litigants a wide berth as regards the more technical aspects of our procedural rules of engagement (*Bird v Canada (National Revenue)*, 2014 FC 843 at paras 36-42 [*Bird*]; *Smith v Canada (Attorney General)*, 2018 FC 993 at para 40; *Gerrard v Canada (Attorney General)*, 2010 FC 1152 at paras 22-23; see also *Thom v Canada*, 2007 FCA 249 at para 14).

[21] Having considered the matter, I exercise my discretion and accept the contents of Mr. Latham's unsworn affidavit as evidence of the matters asserted to therein (section 55 of the Federal Courts Rules; *Bird*). I am afraid, however, that such evidence alone will not yield the outcome which Mr. Latham is seeking.

IV. Analysis

[22] Mr. Latham argues that because of his age and medical condition there is a "good chance" that he will not survive if he contracts COVID-19. He claims to suffer from chronic obstructive pulmonary disease [COPD], a heart condition for which he has a heart stent, an irregular heart rhythm (atrial fibrillation, also called "AFib" or "AF"), a left kidney that has a stent that needs to be removed, and diabetes, which affects his ability to use his legs and feet.

[23] Mr. Latham believes that he cannot control his environment or follow social distancing guidelines while in Bowden. He argues that living in the prison places him at an even higher risk of COVID-19 exposure because of the size of his institutional unit (of over 100 inmates), the air intake within Bowden, and the lack of control over the safety of the food supply at the institution.

[24] I also understand that Mr. Latham is due to undergo a surgical operation on one of his kidneys in the coming days.

[25] As regards the development of some type of release plan, Mr. Latham claims that his son offered him a place to stay during his COVID-19 self-isolation—either a basement room in his home or a small trailer on his property. Mr. Latham also suggested he be sent to a Métis community in northern Saskatchewan. According to Mr. Latham, this arrangement would allow him to practice safe social distancing, thereby reducing his risk of contracting the virus.

[26] Quite apart from the immediate need to self-isolate, Mr. Latham also says that he wants to be transferred to a federal correctional institution in British Columbia, thus facilitating his transfer to one of the community-based residential facilities operated by the Correctional Service of Canada [CSC] in Abbotsford, which is geared to high-risk offenders. To do so, Mr. Latham requires the support of CSC, in particular the chain of command at Bowden; although his efforts continue, Mr. Latham says that that support is simply not on the cards.

[27] The Respondent submits that Mr. Latham has failed to show that he is entitled to immediate temporary release and argues that the motion is premature, as Mr. Latham has failed to exhaust the mechanisms for release provided for under the *Corrections and Conditional Release Act*, SC 1992, c 20 [CCRA], such as early parole review and a UTA.

[28] As to Mr. Latham's Charter arguments, the Respondent submits that Mr. Latham has not demonstrated in which way the denial of a parole application or the conditions under which he remains imprisoned at Bowden violate his Charter rights.

[29] I think it safe to assert that the changes to our lives brought on by the global COVID-19 pandemic have been nothing short of transformational; as regards the reality of congregate living facilities such as prisons, what may well be required is a novel approach to relating to individuals at risk while protecting the public interest in a safe and healthy environment.

[30] It has been readily acknowledged that COVID-19 poses a particular problem for correctional institutions (*R v TK*, 2020 ONSC 1935 at para 71 [*TK*]; *R v CJ*, 2020 ONSC 1933 at

para 9). As congregate living facilities, correctional institutions are prime areas for the transmission of the virus as they place inmates in confined and communal spaces, with limited or no ability to practice social or physical distancing and other protective measures. Indeed, inmates spend much of their day in cramped quarters, often in shared sleeping and dining facilities, and may lack access to basic hygiene products (*R v Hearns*, 2020 ONSC 2365 at para 11).

[31] The confined and communal nature of correctional institutions makes social and physical distancing a challenge for inmates and institutional staff. Yet, there is a vital public health need to respect social distancing in order to protect inmates as well as the community at large. This situation poses a public health problem; a COVID-19 outbreak within a given correctional institution may turn into a larger societal problem, as the virus may spread through institutional staff and service personnel who leave the institution.

[32] As a result, there is public interest in managing the prison population so as to reduce the spread of infection and preserve valuable healthcare services (*R v Kazman*, 2020 ONCA 251 at para 18 [*Kazman*]; *R v JR*, 2020 ONSC 1938 at para 50).

[33] It has also been recognized that certain demographics are especially vulnerable to COVID-19. In particular, older members of society are more likely to experience the more serious effects of COVID-19 (*R v Nelson*, 2020 ONSC 1728 at para 35; *R v Wilson*, 2020 ONCJ 176 at para 23 [*Wilson*]). Moreover, individuals with heart and lung disease, or other medical conditions, also tend to be at a higher risk in the event of an infection (*R v Cahill*, 2020 ONSC 2171 at para 20; *R v Yzerman*, 2020 ONCJ 224 at para 12). In the matter before me, Mr. Latham

is a member of both high-risk demographics: he is of an advanced age and has health issues related to his heart and lungs.

[34] That said, the risk alone that the virus may reach Bowden, or that Mr. Latham may become infected, cannot give him a "get out of jail free" card (*TK* at para 73; see also *R v Hassan*, 2020 ONSC 2265 at paras 74-75; *R v Mantes*, 2020 ONSC 2259 at paras 32, 40-41); there is a process that must be followed, for if not, the confidence that we all have in the administration of justice may well be significantly eroded if the courts were simply to begin releasing into the general population inmates who continue to present a serious risk of committing crimes or otherwise endangering the public.

A. *Remedies under the CCRA*

[35] The CCRA makes it clear that the jurisdiction to grant parole lies with the Parole Board. Subsection 107(1) of the CCRA states the following:

Jurisdiction of Board	**Compétence**
107(1) Subject to this Act, the *Prisons and Reformatories Act*, the *International Transfer of Offenders Act*, the *National Defence Act*, the *Crimes Against Humanity and War Crimes Act* and the *Criminal Code*, the Board has exclusive jurisdiction and absolute discretion	107(1) Sous réserve de la présente loi, de la *Loi sur les prisons et les maisons de correction*, de la *Loi sur le transfèrement international des délinquants*, de la *Loi sur la défense nationale*, de la *Loi sur les crimes contre l'humanité et les crimes de guerre* et du *Code criminel*, la Commission a toute compétence et latitude pour :
(a) to grant parole to an offender;	a) accorder une libération conditionnelle;

(b) to terminate or to revoke the parole or statutory release of an offender, whether or not the offender is in custody under a warrant of apprehension issued as a result of the suspension of the parole or statutory release;	b) mettre fin à la libération conditionnelle ou d'office, ou la révoquer que le délinquant soit ou non sous garde en exécution d'un mandat d'arrêt délivré à la suite de la suspension de sa libération conditionnelle ou d'office;
(c) to cancel a decision to grant parole to an offender, or to cancel the suspension, termination or revocation of the parole or statutory release of an offender;	c) annuler l'octroi de la libération conditionnelle ou la suspension, la cessation ou la révocation de la libération conditionnelle ou d'office;
(d) to review and to decide the case of an offender referred to it pursuant to section 129; and	d) examiner les cas qui lui sont déférés en application de l'article 129 et rendre une décision à leur égard;
(e) to authorize or to cancel a decision to authorize the unescorted temporary absence of an offender who is serving, in a penitentiary,	e) accorder une permission de sortir sans escorte, ou annuler la décision de l'accorder dans le cas du délinquant qui purge, dans un pénitencier, une peine d'emprisonnement, selon le cas :
(i) a life sentence imposed as a minimum punishment or commuted from a sentence of death,	(i) à perpétuité comme peine minimale ou à la suite de commutation de la peine de mort,
(ii) a sentence for an indeterminate period, or	(ii) d'une durée indéterminée,
(iii) a sentence for an offence set out in Schedule I or II.	(iii) pour une infraction mentionnée à l'annexe I ou II.
[Emphasis added.]	[Je souligne.]

[36] Mr. Latham is someone described in subparagraph 107(1)(e)(ii) of the CCRA.

[37] The criteria for granting parole are set out in section 102 of the CCRA:

Criteria for granting parole	**Critères**
102 The Board or a provincial parole board may grant parole to an offender if, in its opinion,	102 La Commission et les commissions provinciales peuvent autoriser la libération conditionnelle si elles sont d'avis qu'une récidive du délinquant avant l'expiration légale de la peine qu'il purge ne présentera pas un risque inacceptable pour la société et que cette libération contribuera à la protection de celle-ci en favorisant sa réinsertion sociale en tant que citoyen respectueux des lois.
(a) the offender will not, by reoffending, present an undue risk to society before the expiration according to law of the sentence the offender is serving; and	
(b) the release of the offender will contribute to the protection of society by facilitating the reintegration of the offender into society as a law-abiding citizen.	
[Emphasis added.]	[Je souligne.]

[38] Normally, day and full parole cannot be applied for until at least one year following the date of any previous refusal, subject to the discretion of the Parole Board (subsections 122(4) and 123(6) of the CCRA). Consequently, the Respondent argues that early parole review, supported by evidence of health concerns related to COVID-19, may be available to Mr. Latham at the Parole Board's discretion, even though the Parole Board refused him day and full parole less than a year ago.

[39] Similarly, according to the Respondent, a UTA for medical reasons may be available. The CCRA sets out the authorization requirements for the issuance of UTAs. Section 116 of the CCRA states, in part:

Conditions for authorization	**Motifs de l'octroi**

116(1) The Board may authorize the unescorted temporary absence of an offender referred to in paragraph 107(1)(e) where, in the opinion of the Board,	116(1) La Commission peut autoriser le délinquant visé à l'alinéa 107(1)e) à sortir sans escorte lorsque, à son avis, les conditions suivantes sont remplies :
(a) the offender will not, by reoffending, present an undue risk to society during the absence;	a) une récidive du délinquant pendant la sortie ne présentera pas un risque inacceptable pour la société;
(b) it is desirable for the offender to be absent from the penitentiary for medical, administrative, community service, family contact, including parental responsibilities, personal development for rehabilitative purposes or compassionate reasons;	b) elle l'estime souhaitable pour des raisons médicales, administratives, de compassion ou en vue d'un service à la collectivité, ou du perfectionnement personnel lié à la réadaptation du délinquant, ou pour lui permettre d'établir ou d'entretenir des rapports familiaux notamment en ce qui touche ses responsabilités parentales;
(c) the offender's behaviour while under sentence does not preclude authorizing the absence; and	c) sa conduite pendant la détention ne justifie pas un refus;
(d) a structured plan for the absence has been prepared.	d) un projet de sortie structuré a été établi.
Idem	**Idem**
(2) The Commissioner or the institutional head may authorize the unescorted temporary absence of an offender, other than an offender referred to in paragraph 107(1)(e), where, in the opinion of the Commissioner or the institutional head, as the case	(2) Le commissaire ou le directeur du pénitencier peut accorder une permission de sortir sans escorte à tout délinquant, autre qu'un délinquant visé à l'alinéa 107(1)e), lorsque, à son avis, ces mêmes conditions sont remplies.

may be, the criteria set out in paragraphs (1)(a) to (d) are met.	
Medical reasons	**Raisons médicales**
(3) An unescorted temporary absence for medical reasons may be authorized for an unlimited period.	(3) Les permissions de sortir sans escorte pour raisons médicales peuvent être accordées pour une période illimitée.
[Emphasis added.]	[Je souligne.]

[40] Consequently, authorization for UTAs rests with the institutional head at Bowden, except that Mr. Latham is an inmate serving a sentence for an indeterminate period, in which case the power to authorize a UTA remains with the Parole Board (subparagraph 107(1)(e)(ii) and subsection 116(2) of the CCRA).

[41] I enquired with Mr. Latham as to whether he had availed himself of either early parole review given the pandemic or a UTA for medical reasons.

[42] Mr. Latham stated that he has not specifically applied for either form of release citing COVID-19 concerns, however, he added that he did make a request to his parole officer that he be considered for release for day or full parole because of "what is going on", which I take it was a reference to the efforts being undertaken by Bowden to grapple with the reality of the virus.

[43] Mr. Latham was advised that he did not meet the requirements for such relief because of his profile, i.e., his designation as a dangerous offender and because he is serving an indeterminate sentence.

[44] Mr. Latham has not sought judicial review of that decision.

[45] He added that although he may be considered by the Parole Board for early parole, this would require support from CSC, in particular the chain of command at Bowden, including Mr. Latham's case management team, which includes, amongst others, his parole officer and his manager, assessment and intervention. Mr. Latham felt that his request for release would not be supported by his case management team. I take it such lack of support would make the possibility of the Parole Board's exercise of discretion rather remote.

[46] As for a medical UTA, it may be that Mr. Latham would need the support of Bowden's medical staff and consent for the release of his medical records. However, no specific application by Mr. Latham for a medical UTA has been made.

[47] At the end of the hearing, I requested that counsel for the Respondent make enquiries regarding the nature and status of any request for temporary release that may have been made by, or may be pending in relation to, Mr. Latham.

[48] On May 19, 2020, I received a response from counsel for the Respondent confirming that Mr. Latham had not made a request for a medical UTA based on COVID-19 concerns, although

he had sought full and day parole at some point, which I assume is a reference to the "request" made by Mr. Latham that is mentioned above in paragraphs 42 and 43, and in relation to which Mr. Latham was found not to meet the "profile" for having his situation reviewed on account of COVID-19 concerns. As stated, no application for judicial review of that decision was filed by Mr. Latham.

[49] Although I have sympathy for Mr. Latham, the fact remains that he has not made any formal application to avail himself of the administrative avenues available to him under the CCRA in light of the risks associated with COVID-19, including an application for early parole review or a UTA for medical reasons citing his concerns over contracting the virus.

[50] Section 107 of the CCRA makes it clear that the Parole Board has exclusive jurisdiction to grant parole. As an expert tribunal, the Parole Board is the proper entity to supervise the release and continued detention of long-term inmates (*Steele v Mountain Institution*, [1990] 2 SCR 1385, 1990 CanLII 50 (SCC) at 1418-1419). Until Mr. Latham proceeds with applying for release as contemplated under the CCRA, it is generally premature to seek relief from the courts.

[51] The normal rule is that a party can seek relief before this Court only after all adequate remedial recourses in the administrative process have been exhausted (*Harelkin v University of Regina*, [1979] 2 SCR 561, 1979 CanLII 18 (SCC); *Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61 at paras 30-33). Although Mr. Latham suggests that such efforts would likely prove futile given the lack of support he has been receiving from the chain of

command at Bowden, I am not convinced from the evidence before me that there is reason in this case to depart from such a general rule of Canadian administrative law.

[52] An application for release based upon medical reasons linked to the virus would open the door for Mr. Latham to possibly seek to have a negative decision reviewed by the Court on judicial review; if there are undue delays in the rendering of a decision in respect of such an application, Mr. Latham may have recourse to *mandamus* seeking to compel the rendering of a decision.

[53] Putting aside any Charter issues for now, Mr. Latham must understand that there are processes for him to seek release of which he has not yet availed himself, and that the difficulty for the Court is that it cannot, as Mr. Latham is requesting it does, simply substitute itself for the Parole Board so as to release him from incarceration.

[54] As matters stand right now, Mr. Latham is putting the proverbial cart before the horse.

B. *Breach of Charter Rights*

[55] The Applicant seeks relief under subsection 24(1) of the Charter, which allows for remedies against unconstitutional government actions once a Charter violation has been established (*R v 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 SCR 575 at para 14 [*Dunedin*]), and which confers a broad discretion on the Court to tailor an appropriate remedy that vindicates one's Charter rights in a responsive and effective manner (*Mills v The Queen*, [1986] 1 SCR 863, 1986 CanLII 17 (SCC) at 965; *Dunedin* at para 20; *Canada (Attorney General) v PHS*

Community Services Society, 2011 SCC 44, [2011] 3 SCR 134 at paras 142, 145 [*PHS Community Services*]; *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 SCR 3 at para 25 [*Doucet-Boudreau*]).

[56] In *Doucet-Boudreau*, the Supreme Court outlined general principles for the remedies under subsection 24(1) of the Charter:

> 54. While it would be unwise at this point to attempt to define, in detail, the words "appropriate and just" or to draw a rigid distinction between the two terms, there are some broad considerations that judges should bear in mind when evaluating the appropriateness and justice of a potential remedy. These general principles may be informed by jurisprudence relating to remedies outside the *Charter* context, such as cases discussing the doctrine of *functus* and overly vague remedies, although, as we have said, that jurisprudence does not apply strictly to orders made under s. 24(1).
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> 55. First, an appropriate and just remedy in the circumstances of a *Charter* claim is one that meaningfully vindicates the rights and freedoms of the claimants. Naturally, this will take account of the nature of the right that has been violated and the situation of the claimant. A meaningful remedy must be relevant to the experience of the claimant and must address the circumstances in which the right was infringed or denied. An ineffective remedy, or one which was "smothered in procedural delays and difficulties", is not a meaningful vindication of the right and therefore not appropriate and just (see *Dunedin*, *supra*, at para. 20, McLachlin C.J. citing *Mills*, *supra*, at p. 882, *per* Lamer J. (as he then was)).
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> 56. Second, an appropriate and just remedy must employ means that are legitimate within the framework of our constitutional democracy. As discussed above, a court ordering a *Charter* remedy must strive to respect the relationships with and separation of functions among the legislature, the executive and the judiciary. This is not to say that there is a bright line separating these functions in all cases. A remedy may be appropriate and just notwithstanding that it might touch on functions that are principally assigned to the executive. The essential point is that the courts must not, in making orders under s. 24(1), depart unduly or unnecessarily from their role of adjudicating disputes and granting remedies that address the matter of those disputes.

> 57. Third, an appropriate and just remedy is a judicial one which vindicates the right while invoking the function and powers of a court. It will not be appropriate for a court to leap into the kinds of decisions and functions for which its design and expertise are manifestly unsuited. The capacities and competence of courts can be inferred, in part, from the tasks with which they are normally charged and for which they have developed procedures and precedent.
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> 58. Fourth, an appropriate and just remedy is one that, after ensuring that the right of the claimant is fully vindicated, is also fair to the party against whom the order is made. The remedy should not impose substantial hardships that are unrelated to securing the right.
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> 59. Finally, it must be remembered that s. 24 is part of a constitutional scheme for the vindication of fundamental rights and freedoms enshrined in the *Charter*. As such, s. 24, because of its broad language and the myriad of roles it may play in cases, should be allowed to evolve to meet the challenges and circumstances of those cases. That evolution may require novel and creative features when compared to traditional and historical remedial practice because tradition and history cannot be barriers to what reasoned and compelling notions of appropriate and just remedies demand. In short, the judicial approach to remedies must remain flexible and responsive to the needs of a given case.

[57] In accordance with these principles, various forms of relief have been found to be available under subsection 24(1), including declaratory relief (*Canada (Prime Minister) v Khadr*, 2010 SCC 3, [2010] 1 SCR 44 at paras 46-47; *Association des parents de l'école Rose‑des‑vents v British Columbia (Education)*, 2015 SCC 21, [2015] 2 SCR 139 at paras 61-68); *mandamus* (*PHS Community Services* at para 150), injunctive relief (*Doucet-Boudreau* at para 70; *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311, 1994 CanLII 117 (SCC)), structural injunctions (*Doucet-Boudreau* at paras 72-74); stay of proceedings (*R v O'Connor*, [1995] 4 SCR 411, 1995 CanLII 51 (SCC) at paras 68, 82), *habeas corpus* (*R v*

Gamble, [1988] 2 SCR 595, 1988 CanLII 15 (SCC) at 646), and modified sentencing (*R v Nasogaluak*, 2010 SCC 6, [2010] 1 SCR 206 at paras 48-49, 63-65).

[58] Within the context of the COVID-19 pandemic, I would think that the flexibility inherent in subsection 24(1) allows courts to tailor remedies that account for the particularities and risks posed by an unprecedented global pandemic with wide-ranging consequences.

[59] In the abstract, I accept that the failure to provide adequate health care or the failure to protect the health and safety of inmates may under certain circumstances constitute a breach of one's section 7 rights (*PHS Community Services* at para 93; *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 SCR 791 at para 43; *New Brunswick (Minister of Health and Community Services) v G (J)*, [1999] 3 SCR 46, 1999 CanLII 653 (SCC); *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 SCR 307).

[60] Such a failure would also constitute a breach of an institution's statutory duty to provide a safe and healthful environment for prisoners (sections 70, 86, 87 of the CCRA; *Pawliw v Canada (Attorney General)*, 2007 FC 614 at para 26; *Reddock v Canada (Attorney General)*, 2019 ONSC 5053 at paras 72-73).

[61] In addition, I accept that decision-makers must exercise their discretion in light of the COVID-19 situation in a manner that conforms to the Charter (*Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3; *PHS Community Services* at paras 117, 128).

[62] However, while recognizing the important Charter implications at play in this case, I am not convinced that Mr. Latham has satisfied the burden upon him of establishing a breach under sections 7, 9 or 12 of the Charter due to any decision by CSC or anyone else at Bowden.

[63] The mere fact that the Applicant is being held within a correctional facility during the COVID-19 pandemic and may be vulnerable to COVID-19 exposure is insufficient, in itself, to constitute a Charter breach; more evidence is required (*Mackay v Manitoba*, [1989] 2 SCR 357, 1989 CanLII 26 (SCC) [*Mackay*]).

[64] In this case, Mr. Latham has provided insufficient evidence as to Bowden's health and safety measures (distancing protocols, cleaning protocols, contact tracing efforts, isolation protocols, hand sanitizers, personal protective equipment, cleaning supplies), Bowden's administrative initiatives, his living arrangements at Bowden (cell size, bunk beds, shared eating quarters, etc.), his medical records and behavioural history, and additional logistical details regarding his structured plan for absence.

[65] Evidence relating to these factors would, I believe, be necessary if I am to determine that there has been a breach of Mr. Latham's Charter rights, and whether such a breach may be justified as a reasonable limitation under section 1 of the Charter. Charter claims cannot be determined in a factual vacuum (*Mackay* at 361), and I am afraid the small amount of information in Mr. Latham's affidavit is exactly that.

[66] In addition to the assertions in his affidavit, what evidence that does exist as to his medical condition is limited to a completed inmate's request form attached to Mr. Latham's affidavit.

[67] During the hearing, Mr. Latham indicated that he had requested the health services at Bowden to prepare a report on his medical condition. On April 28, 2020, Mr. Latham, not having received such a report, submitted an inmate's request to the attending physician at Bowden asking that he advise Mr. Latham's case management team, and in particular his parole officer, that he, Mr. Latham, is at a high risk of dying if he acquires the COVID-19 virus, and accordingly asking that the doctor recommend that he be released as part of the efforts already underway at Bowden to evaluate the prison population so as to identify those at higher risk.

[68] A registered nurse responded on April 28, 2020, to the effect that Mr. Latham's parole officer had been made aware of the "multiple medical conditions" that would place Mr. Latham "at higher risk of severe complications" if he was to contract the virus. The response included a statement that there were no active COVID-19 cases presently at Bowden, and that "Health Services makes no recommendations on security matters".

[69] On the issue of a proper release plan, I am afraid that simply asserting that there is a place ready for Mr. Latham at his son's home is not sufficient to address the concerns that arise as regards the risk of danger Mr. Latham's release may pose to the community. Nor does Mr. Latham address how that environment would lessen the risk to him than would be the case if he were to remain in prison under the new protocols that are being adopted by Bowden.

[70] Mr. Latham suggests that he could remain under house arrest and either have the Royal Canadian Mounted Police [RCMP] act as enforcers of any such order or impose on someone from Bowden, his parole officer or Mr. Latham's son or his partner the obligation to supervise or continually be with Mr. Latham if he were to leave the house.

[71] I am not convinced that imposing upon the RCMP the obligation of supervising Mr. Latham's self-imposed house arrest is the right answer. In any event, I doubt whether I am even in a position to come up with a plan that would be satisfactory. The bottom line is that it is not for the courts to undertake the obligation of assessing and planning for the release of inmates. The CCRA provides for mechanisms to undertake such efforts.

[72] Clearly Mr. Latham has medical issues which would place him at a higher risk in the event that he was exposed to COVID-19. However, even taken at face value, I cannot find that the evidence put forward by Mr. Latham in his affidavit meets the threshold for demonstrating that he is either being deprived of his liberty and security contrary to the principles of fundamental justice, or is being subjected to any cruel and unusual treatment or punishment, or that he is being arbitrarily detained or imprisoned.

[73] It must be remembered that I am not sitting in review of the Appeal Division decision of January 27, 2020. That decision is the subject of the underlying application for judicial review.

[74] I also cannot change the fact that Mr. Latham has been declared a dangerous offender and that he has been ordered to serve an indeterminate sentence, with the statutory restrictions and

limitations this brings with it. Under the present circumstances, he may not obtain parole unless the Parole Board determines that he no longer poses a risk to society, or more particularly that any risk is somehow safely manageable within the community.

[75] During the hearing, I enquired with counsel for the Respondent as to whether any of the options under the CCRA that he was proposing would be reasonably available to Mr. Latham given his status as a dangerous offender, his indeterminate prison term, and the fact that the Parole Board and Appeal Division recently found that his risk to the community would be "undue" and that it could not be reasonably managed outside of prison.

[76] Counsel conceded that the situation for Mr. Latham in particular was difficult as any request for release would have to proceed through the Parole Board and that the Parole Board would have to be convinced that any release plan in place would safeguard the public.

[77] I accept that the element of danger to the public is always a primary concern for the Parole Board. Consequently, it seems clear to me that if the Parole Board felt that Mr. Latham continued to pose a danger to the public and that the risk associated with his release could not be mitigated or managed in any reasonable way, the options that the Respondent is proposing to be available to Mr. Latham under the CCRA are mere fantasy.

[78] So what is someone in Mr. Latham's situation to do? Mr. Latham suggests that he is being left in a cauldron. He is clearly at a higher risk if in fact he contracts the virus but is also serving an indeterminate sentence further to his dangerous offender designation and is presently

fighting a decision of the Parole Board which found that the risk to the community in the event that he is released is unmanageable.

[79] I think short of more significant evidence to support a finding that Mr. Latham's Charter rights have been breached, it must be for the Parole Board and CSC to develop the mechanisms necessary to protect individuals like Mr. Latham in the face of the extreme challenges and dangers brought on by COVID-19.

[80] The ongoing pandemic requires our correctional institutions and the courts that supervise their decisions to employ new ways to account for the specific risks posed by the virus. The appropriateness of each avenue depends on the nature of the claim, the status of the applicant, and the facts of the case.

[81] We have seen new risk-based approaches in the context of bail and sentencing decisions that address the reality of COVID-19 under the *Criminal Code*, RSC 1985, c C-46 [Criminal Code].

[82] For example, within the context of bail, Canadian courts have treated COVID-19 as a relevant factor for the assessment of the "public perception of the administration of justice" ground under paragraph 515(10)(c) of the Criminal Code because of risks posed to inmates and the delays in the court system that will result from the pandemic (e.g., *R v JS*, 2020 ONSC 1710 at para 18; *R v TL*, 2020 ONSC 1885 at para 36; *R v Forbes*, 2020 ONSC 1798 at para 33).

[83] The COVID-19 pandemic may also constitute a material change in circumstances warranting a bail review under section 520 of the Criminal Code (e.g., *R v Cain*, 2020 ONSC 2018 at para 8; *R v Rajan*, 2020 ONSC 2118 at para 18; *R v Brown*, 2020 ONSC 2626 at paras 34-45), or a factor that undermines the necessity of detention "for the protection or safety of the public" under paragraph 515(10)(b) of the Criminal Code (e.g., *TK* at para 60).

[84] In the context of sentencing, courts have shown signs of leniency by adapting the length and conditions of the sentence to account for the COVID-19 pandemic (e.g., *Wilson* at para 37; *R v Reynolds*, 2020 BCSC 732 at para 48; *R v McConnell*, 2020 ONCJ 177 at paras 35-37).

[85] Appellate courts have accepted the COVID-19 pandemic as a factor militating in favour of release pending the disposition of an appeal under section 679 of the Criminal Code (e.g., *R v Shingoose*, 2020 SKCA 45 at para 52; *Kazman* at paras 17-19; *R v Stojanovski*, 2020 ONCA 285; *Egorho c Minister of Justice Canada*, 2020 QCCA 568).

[86] These exceptional circumstances may well require the health services at Bowden to support Mr. Latham's application for a medical UTA and not simply conclude that it "makes no recommendations on security matters".

[87] Mr. Latham argues that his history of fighting for his rights, his often combative approach to things, and the challenges posed by his sentence and offender status are causing him to be placed at the bottom of the pile in the efforts presently underway at Bowden to manage the prison population under these extreme circumstances.

[88] Whether that is true or not, the fact remains that the evidence presented to me by Mr. Latham is insufficient to allow me to come to that conclusion.

[89] Finally, the Respondent challenges the jurisdiction of this Court to order the release of Mr. Latham. I will keep my powder dry on that issue; given my findings in relation to the evidence, I need not address it.

V. Conclusion

[90] Although I have tremendous sympathy for Mr. Latham's situation, I must dismiss his motion seeking release from his present confinement.

[91] That said, I do recognize that there is some urgency in Mr. Latham's situation. Consequently, I am ordering that timelines under the Federal Courts Rules for the filing of documents and the taking of other procedural steps will continue to run as regards Mr. Latham's application for judicial review notwithstanding the Suspension Period currently imposed under the *Updated Practice Direction and Order (COVID-19)* dated April 4, 2020, as updated on April 29, 2020, and May 29, 2020.

[92] My decision is meant solely to deal with the running of procedural timelines going forward, and is to have no impact on the timeliness of Mr. Latham's initial filing of his application for judicial review on March 10, 2020, or on the validity of the notice of appearance already filed by the Respondent.

[93] In the event that Mr. Latham requires additional time to submit further affidavits than is provided for in Rule 306 of the Federal Courts Rules, he remains at liberty to apply to this Court for an extension.

[94] I should note that the outcome of this matter in no way addresses or impacts the legality of Mr. Latham’s incarceration or the underlying application for judicial review.

ORDER in T-358-20

THIS COURT ORDERS that:

1. The style of cause is amended to name only the Attorney General of Canada as the proper Respondent.
2. The underlying application for judicial review is to be considered an urgent matter under the *Updated Practice Direction and Order (COVID-19)* dated April 4, 2020, as updated on April 29, 2020, and May 29, 2020.
3. The suspension of timelines for the filing of documents and the taking of other procedural steps as provided for in the *Federal Courts Rules*, SOR/98-106 [Federal Courts Rules], including the additional 14 day buffer period, set out in the *Updated Practice Direction and Order (COVID-19)* dated April 4, 2020, as updated on April 29, 2020, and May 29, 2020 no longer applies to the present proceedings.
4. Such timelines in relation to Mr. Latham's underlying application for judicial review shall run as if the notice of application for judicial review was served upon the Respondent pursuant to Rule 304 of the Federal Courts Rules on the date of this Order.
5. All documents necessary for the adjudication of the underlying application for judicial review are to be filed electronically with this Court. The parties are referred to the Service and Filing of Documents section of the *Updated Practice Direction and Order (COVID-19)* dated April 4, 2020.
6. The requirement to file documents electronically does not apply to the Applicant, unless he wishes to avail himself of such process.

7. Otherwise, the present motion is dismissed, on a without costs basis.

"Peter G. Pamel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-358-20
STYLE OF CAUSE:	BRYAN RALSTON LATHAM v HER MAJESTY THE QUEEN AND THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	MATTER HEARD BY TELEPHONE CONFERENCE IN MONTRÉAL, QUEBEC
DATE OF HEARING:	MAY 15, 2020
ORDER AND REASONS:	PAMEL J.
DATED:	JUNE 4, 2020

APPEARANCES:

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Keelan Sinnott	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Attorney General of Canada Calgary, Alberta	FOR THE RESPONDENTS