

Federal Court



Cour fédérale

Date: 20100209

Docket: T-940-09

Citation: 2010 FC 132

Ottawa, Ontario, February 9, 2010

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

ROBERT NORTON ALLAIRE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] [36] While it is open to the Board to inquire into the respondent's relationships with (criminal) others who conspired with him to commit the offences of which he was convicted (and indeed to inquire into any ongoing relation with like-minded persons), it should avoid the use of terms which, if acknowledged, can give rise to an admission that a criminal offence has been committed with respect to which no conviction has been obtained, or at least be mindful of the difficulty which its choice of words can pose.

(As stated in the majority judgment in *Canada (Attorney General) v. Coscia*, 2005 FCA 132, [2006]

1 F.C.R. 430).

[2] Subsequent to a redetermination, the National Parole Board (NPB) may reach the same conclusion it did; however, it must be mindful of the questions it poses as per the majority reasons in the excerpt quoted above.

II. Introduction

[3] This is an application for judicial review of a decision of the National Parole Board Appeal Division (NPBAD) affirming the decision of the NPB which refused to direct the Applicant's release on day parole in accordance with the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (CCRA).

III. Background

[4] The Applicant pled guilty to importing a schedule 1 substance on May 3, 2007 and was sentenced to 10 years imprisonment.

[5] On November 21, 2004, the Applicant was arrested for failing to yield to U.S. Customs officers at a border crossing in Washington. During this encounter, U.S. Customs officials informed the Applicant that his vehicle would be searched. The Applicant then drove ahead, striking the officer with the door of his vehicle. The Applicant drove back into Canada where he was arrested for being in possession of 149 kilograms of cocaine with a street value of \$12 million.

[6] On January 16, 2009, the NPB conducted an Accelerated Parole Review (APR) hearing pursuant to subsection 126(4) of the CCRA and did not direct the Applicant's release on Accelerated Day Parole (ADP).

[7] During the hearing, the NPB pursued a line of questions regarding the Applicant's involvement with organized crime. Although the Applicant denied any direct involvement with organized crime, the NPB drew negative conclusions and found reasonable grounds to believe that, if released, he would commit an offence involving violence.

IV. Decision under Review

[8] The Applicant appealed the decision of the NPB to the NPBAD pursuant to subsection 147(1) of the CCRA claiming the NPB's questioning had breached procedural fairness. The NPBAD affirmed the NPB's decision to refuse ADP.

[9] The NPBAD found the NPB's questions regarding the Applicant's ties to organized crime were fair and reasonable based on the information before the NPB. The Appeal Division also held that the NPB never inferred that the Applicant was a member of a criminal organization, but focused on his links to such groups. The Appeal Division also found the NPB questioned the Applicant's credibility when he stated that he was not a member of a criminal organization, when there was evidence before it to indicate to the contrary.

V. Issue

[10] Did the Appeal Board err in not finding that the NPB breached the Applicant's right to procedural fairness by questioning the Applicant regarding his alleged involvement with a criminal organization?

VI. Relevant Legislative Provisions

[11] ADP must be directed for a first offender if the NPB is satisfied there are no reasonable grounds to believe the offender will commit a violent offence if released, pursuant to sections 125, 126 and 126.1 of the CCRA:

Application

125. (1) This section and section 126 apply to an offender sentenced, committed or transferred to penitentiary for the first time, otherwise than pursuant to an agreement entered into under paragraph 16(1)(b), other than an offender

(a) serving a sentence for one of the following offences, namely,

- (i) murder,
- (ii) an offence set out in Schedule I or a conspiracy to commit such an offence,
- (ii.1) an offence under section 83.02 (providing or collecting property for certain activities), 83.03 (providing, making available, etc. property or services for terrorist purposes), 83.04 (using or possessing property for terrorist purposes), 83.18 (participation in activity of terrorist group), 83.19 (facilitating terrorist activity), 83.2 (to carry

Application

125. (1) Le présent article et l'article 126 s'appliquent aux délinquants condamnés ou transférés pour la première fois au pénitencier — autrement qu'en vertu de l'accord visé au paragraphe 16(1) — , à l'exception de ceux :

a) qui y purgent une peine pour une des infractions suivantes :

- (i) le meurtre,
- (ii) une infraction mentionnée à l'annexe I ou un complot en vue d'en commettre une,
- (ii.1) une infraction mentionnée aux articles 83.02 (fournir ou réunir des biens en vue de certains actes), 83.03 (fournir, rendre disponibles, etc. des biens ou services à des fins terroristes), 83.04 (utiliser ou avoir en sa possession des biens à des fins terroristes), 83.18 (participation à une activité d'un groupe terroriste), 83.19 (facilitation

out activity for terrorist group), 83.21 (instructing to carry out activity for terrorist group), 83.22 (instructing to carry out terrorist activity) or 83.23 (harbouring or concealing) of the *Criminal Code* or a conspiracy to commit such an offence,

(iii) an offence under section 463 of the *Criminal Code* that was prosecuted by indictment in relation to an offence set out in Schedule I, other than the offence set out in paragraph (1)(q) of that Schedule,

(iv) an offence set out in Schedule II in respect of which an order has been made under section 743.6 of the *Criminal Code*,

(v) an offence contrary to section 130 of the *National Defence Act* where the offence is murder, an offence set out in Schedule I or an offence set out in Schedule II in respect

d'une activité terroriste), 83.2 (infraction au profit d'un groupe terroriste), 83.21 (charger une personne de se livrer à une activité pour un groupe terroriste), 83.22 (charger une personne de se livrer à une activité terroriste) ou 83.23 (héberger ou cacher) du *Code criminel*, ou un complot en vue d'en commettre une,

(iii) l'infraction prévue à l'article 463 du *Code criminel* et relative à une infraction mentionnée à l'annexe I — sauf celle qui est prévue à l'alinéa (1)q) de celle-ci — et ayant fait l'objet d'une poursuite par mise en accusation,

(iv) une infraction mentionnée à l'annexe II et sanctionnée par une peine ayant fait l'objet d'une ordonnance rendue en vertu de l'article 743.6 du *Code criminel*,

(v) le meurtre, lorsqu'il constitue une infraction à l'article 130 de la *Loi sur la défense nationale*, une infraction mentionnée à l'annexe I ou une infraction mentionnée à

of which an order has been made under section 140.4 of the *National Defence Act*, or

l'annexe II pour laquelle une ordonnance a été rendue en vertu de l'article 140.4 de la *Loi sur la défense nationale*,

(vi) a criminal organization offence within the meaning of section 2 of the *Criminal Code*, including an offence under subsection 82(2);

(vi) un acte de gangstérisme, au sens de l'article 2 du *Code criminel*, y compris l'infraction visée au paragraphe 82(2);

(a.1) convicted of an offence under section 240 of the *Criminal Code*;

a.1) qui ont été déclarés coupables de l'infraction visée à l'article 240 du *Code criminel*;

(b) serving a life sentence imposed otherwise than as a minimum punishment; or

b) qui purgent une peine d'emprisonnement à perpétuité à condition que cette peine n'ait pas constitué un minimum en l'occurrence;

(c) whose day parole has been revoked.

c) dont la semi-liberté a été révoquée.

Idem

Idem

(1.1) For greater certainty, this section and section 126

(1.1) Il est entendu que le présent article et l'article 126 :

(a) apply to an offender referred to in subsection (1) who, after being sentenced, committed or transferred to penitentiary for the first time, is sentenced in respect of an offence, other than an offence referred to in paragraph (1)(a), that was

a) s'appliquent aux délinquants visés au paragraphe (1) et qui, après leur condamnation ou leur transfèrement au pénitencier pour la première fois, sont condamnés pour une infraction — autre qu'une infraction visée à l'alinéa

committed before the offender was sentenced, committed or transferred to penitentiary for the first time; and

(1)a) — commise avant cette condamnation ou ce transfert;

(b) do not apply to an offender referred to in subsection (1) who, after being sentenced, committed or transferred to penitentiary for the first time, commits an offence under an Act of Parliament for which the offender receives an additional sentence.

b) ne s'appliquent pas aux délinquants visés au paragraphe (1) et qui, après leur condamnation ou leur transfèrement au pénitencier pour la première fois, commettent une infraction à une loi fédérale pour laquelle une peine d'emprisonnement supplémentaire est infligée.

Review of cases by Service

Examen par le Service

(2) The Service shall, at the time prescribed by the regulations, review the case of an offender to whom this section applies for the purpose of referral of the case to the Board for a determination under section 126.

(2) Le Service procède, au cours de la période prévue par règlement, à l'étude des dossiers des délinquants visés par le présent article en vue de leur transmission à la Commission pour décision conformément à l'article 126.

Evidence to be considered

Critères de l'examen

(3) A review made pursuant to subsection (2) shall be based on all reasonably available information that is relevant, including

(3) L'étude du dossier se fonde sur tous les renseignements pertinents qui sont normalement disponibles, notamment :

(a) the social and criminal history of the offender obtained pursuant to section 23;

a) les antécédents sociaux et criminels du délinquant obtenus en vertu de l'article 23;

(b) information relating to the performance and behaviour of the offender while under sentence; and

b) l'information portant sur sa conduite pendant la détention;

(c) any information that discloses a potential for violent behaviour by the offender.

c) tout autre renseignement révélant une propension à la violence de sa part.

Referral to Board

Transmission à la Commission

(4) On completion of a review pursuant to subsection (2), the Service shall, within such period as is prescribed by the regulations preceding the offender's eligibility date for full parole, refer the case to the Board together with all information that, in its opinion, is relevant to the case.

(4) Au terme de l'étude, le Service transmet à la Commission, dans les délais réglementaires impartis mais avant la date d'admissibilité du délinquant à la libération conditionnelle totale, les renseignements qu'il juge utiles.

Delegation to provincial authorities

Délégation

(5) The Service may delegate to the correctional authorities of a province its powers under this section in relation to offenders who are serving their sentences in provincial correctional facilities in that province. 1992, c. 20, s. 125; 1995, c. 42, s. 39; 1997, c. 17, s. 24; 1998, c. 35, s. 116; 1999, c. 5, ss. 50, 53; 2001, c. 41, s. 90.

(5) Le Service peut déléguer aux autorités correctionnelles d'une province les pouvoirs que lui confère le présent article en ce qui concerne les délinquants qui purgent leur peine dans un établissement correctionnel de la province. 1992, ch. 20, art. 125; 1995, ch. 42, art. 39; 1997, ch. 17, art. 24; 1998, ch. 35, art. 116; 1999, ch. 5, art. 50 et 53; 2001, ch. 41, art. 90.

Review by Board

Examen par la Commission

126. (1) The Board shall review without a hearing, at or before the time prescribed by the regulations, the case of an offender referred to it pursuant to section 125.

126. (1) La Commission procède sans audience, au cours de la période prévue par règlement ou antérieurement, à l'examen des dossiers transmis par le Service ou les autorités correctionnelles d'une province.

Release on full parole

(2) Notwithstanding section 102, if the Board is satisfied that there are no reasonable grounds to believe that the offender, if released, is likely to commit an offence involving violence before the expiration of the offender's sentence according to law, it shall direct that the offender be released on full parole.

Report to offender

(3) If the Board does not direct, pursuant to subsection (2), that the offender be released on full parole, it shall report its refusal to so direct, and its reasons, to the offender.

Reference to panel

(4) The Board shall refer any refusal and reasons reported to the offender pursuant to subsection (3) to a panel of members other than those who reviewed the case under subsection (1), and the panel shall review the case at the time prescribed by the regulations.

Release on full parole

(5) Notwithstanding section 102, if the panel reviewing a case pursuant to subsection (4) is satisfied as described in subsection (2), the panel shall direct that the

Libération conditionnelle totale

(2) Par dérogation à l'article 102, quand elle est convaincue qu'il n'existe aucun motif raisonnable de croire que le délinquant commettra une infraction accompagnée de violence s'il est remis en liberté avant l'expiration légale de sa peine, la Commission ordonne sa libération conditionnelle totale.

Rapport au délinquant

(3) Si elle est convaincue du contraire, la Commission communique au délinquant ses conclusions et motifs.

Réexamen

(4) La Commission transmet ses conclusions et motifs à un comité constitué de commissaires n'ayant pas déjà examiné le cas et chargé, au cours de la période prévue par règlement, du réexamen du dossier.

Libération conditionnelle

(5) Si le réexamen lui apporte la conviction précisée au paragraphe (2), le comité ordonne la libération conditionnelle totale du délinquant.

offender be released on full parole.

Refusal of parole

(6) An offender who is not released on full parole pursuant to subsection (5) is entitled to subsequent reviews in accordance with subsection 123(5).

Definition of “offence involving violence”

(7) In this section, “offence involving violence” means murder or any offence set out in Schedule I, but, in determining whether there are reasonable grounds to believe that an offender is likely to commit an offence involving violence, it is not necessary to determine whether the offender is likely to commit any particular offence.

Termination or revocation

(8) Where the parole of an offender released pursuant to this section is terminated or revoked, the offender is not entitled to another review pursuant to this section. 1992, c. 20, s. 126; 1995, c. 42, s. 40.

Release on day parole

126.1 Sections 125 and 126 apply, with such modifications as the circumstances require, to

Refus

(6) Dans le cas contraire, la libération conditionnelle totale est refusée, le délinquant continuant toutefois d’avoir droit au réexamen de son dossier selon les modalités prévues au paragraphe 123(5).

Infractions accompagnées de violence

(7) Pour l’application du présent article, une infraction accompagnée de violence s’entend du meurtre ou de toute infraction mentionnée à l’annexe I; toutefois, il n’est pas nécessaire, en déterminant s’il existe des motifs raisonnables de croire que le délinquant en commettra une, de préciser laquelle.

Conséquences de la révocation

(8) En cas de révocation ou de cessation de la libération conditionnelle, le délinquant perd le bénéfice de la procédure expéditive. 1992, ch. 20, art. 126; 1995, ch. 42, art. 40.

Application

126.1 Les articles 125 et 126 s’appliquent, avec les adaptations nécessaires, à la

a review to determine if an offender referred to in subsection 119.1 should be released on day parole. 1997, c. 17, s. 25.

procédure d'examen expéditif visant à déterminer si la semi-liberté sera accordée au délinquant visé à l'article 119.1. 1997, ch. 17, art. 25.

(Emphasis added).

[12] Paragraph 101(b) reads as follows:

Principles guiding parole boards

101. The principles that shall guide the Board and the provincial parole boards in achieving the purpose of conditional release are

(a) that the protection of society be the paramount consideration in the determination of any case;

(b) that parole boards take into consideration all available information that is relevant to a case, including the stated reasons and recommendations of the sentencing judge, any other information from the trial or the sentencing hearing, information and assessments provided by correctional authorities, and information obtained from victims and the offender;

(c) that parole boards enhance their effectiveness and openness through the timely exchange of relevant information with other components of the criminal

Principes

101. La Commission et les commissions provinciales sont guidées dans l'exécution de leur mandat par les principes qui suivent :

a) la protection de la société est le critère déterminant dans tous les cas;

b) elles doivent tenir compte de toute l'information pertinente disponible, notamment les motifs et les recommandations du juge qui a infligé la peine, les renseignements disponibles lors du procès ou de la détermination de la peine, ceux qui ont été obtenus des victimes et des délinquants, ainsi que les renseignements et évaluations fournis par les autorités correctionnelles;

c) elles accroissent leur efficacité et leur transparence par l'échange de renseignements utiles au moment opportun avec les autres éléments du système

justice system and through communication of their policies and programs to offenders, victims and the general public;

de justice pénale d'une part, et par la communication de leurs directives d'orientation générale et programmes tant aux délinquants et aux victimes qu'au public, d'autre part;

(d) that parole boards make the least restrictive determination consistent with the protection of society;

d) le règlement des cas doit, compte tenu de la protection de la société, être le moins restrictif possible;

(e) that parole boards adopt and be guided by appropriate policies and that their members be provided with the training necessary to implement those policies; and

e) 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;

(f) that offenders be 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.

f) 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 possibilité de les faire réviser.

(Emphasis added).

VII. Applicant's Position

[13] The Applicant cites the case of *Coscia*, above, where a party was questioned by the NPB regarding his involvement with organized crime. The NPB relied on the party's evasive answers with respect to his involvement as a reason to refuse his accelerated release.

[14] The Federal Court of Appeal held the NPB had committed a breach of procedural fairness by asking questions that had a double meaning, as answering questions regarding involvement with organized crime places the offender in jeopardy of a *Criminal Code*, R.S.C., c. C-34, s. 1, conviction. The Applicant submits the NPB can inquire into an offender's association with criminals, but should not use terms which, if acknowledged, can give rise to a criminal conviction.

VIII. Respondent's Position

[15] The Respondent submits the NPB did not make a finding about whether the Applicant was a member of organized crime. Instead, the NPB questioned the Applicant in relation to the offence committed, which is usually associated with organized crime.

[16] The Respondent submits the Appeal Division was correct in finding the NPB's questions did not cross the line established in *Coscia*, above. The Respondent argues the questioning in this case does not take the inquisitorial tone nor the repetitive nature of the questioning in *Coscia*. Instead, the Respondent submits the NPB made inquiries that were open to it on the basis of the evidence tendered at the hearing, including police documentation and the Applicant's statements that he owed money to a "criminal organization" and has connections with "criminally oriented individuals". The Respondent submits the NPB's questioning was appropriate and fair, as it used the term "organized crime" only three times during the entirety of the questioning and with each time it acknowledged the Applicant's answer and moved on.

[17] The Respondent cites the transcript of the hearing and submits the NPB was more concerned with whether there were reasonable grounds to believe the Applicant was likely to commit an

offence involving violence before the expiration of his sentence. The Respondent submits the NPB's concerns regarding the Applicant's potential for violence were warranted given the Applicant's refusal to admit the potential violent effects of his behaviour and the poor judgment he showed prior to his arrest.

[18] The Respondent cites the case of *Mooring v. Canada (National Parole Board)*, [1996] 1 S.C.R. 75 and paragraph 101(b) of the CCRA for the proposition that the NPB is obligated to assess all available relevant information in order to determine whether the test under section 126 of the CCRA has been met. The Respondent concludes the NPB's questioning of the Applicant was fair and relevant in the circumstances.

IX. Standard of Review

[19] The parties agree that the standard of review for a potential breach of procedural fairness is correctness.

[20] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the Supreme Court of Canada held that a court reviewing a decision on the standard of correctness will not show deference to a decision-maker's reasoning process, but will instead undertake its own analysis of the question (*Dunsmuir* at para. 50).

X. Analysis

[21] Central to this review is the issue of whether the NPB's questioning runs afoul of the majority judgment in *Coscia*, above, by which this Court is bound. The majority in *Coscia* described the boundaries of the NPB's procedure in the following terms:

[36] While it is open to the Board to inquire into the respondent's relationships with (criminal) others who conspired with him to commit the offences of which he was convicted (and indeed to inquire into any ongoing relation with like-minded persons), it should avoid the use of terms which, if acknowledged, can give rise to an admission that a criminal offence has been committed with respect to which no conviction has been obtained, or at least be mindful of the difficulty which its choice of words can pose.

[37] Counsel for the appellant, during the course of her very able presentation, acknowledged that the Board could inquire into the respondent's relationships with his co-conspirators and others without using terms such as "organized crime." Indeed, nothing prevented the Board from exploring all aspects of the respondent's prior convictions and ongoing relations without using ambiguous terms.

[22] The argument that the NPB did not make a finding that the Applicant was a member of a criminal organization is dealt with in *Coscia* where the majority stated:

[34] ... it is no justification for the Board to say that it was not concerned with the respondent being a member of organized crime in the legal sense. Accepting that the Board had no such concerns, it remains that if one admits to being a member of or participating in a criminal organization, one is exposed both to a *Criminal Code* conviction and to being found to be a member of a criminal organization pursuant to the Directive. The Board had no power to grant immunity in this regard and did not purport to do so.

[23] The Respondent's submission that the NPB did not draw conclusions from the Applicant's denial of association with organized crime is dealt with in *Coscia* where the majority held:

[38] ... the Board's insistence on using such terms without seeming to have any appreciation for the difficulty which they created for the respondent is fundamentally unfair and shows that the respondent was not heard by the Board in so far as his response to this particular line of questioning was concerned. This breach was compounded by the Board when it went on to draw a negative inference from the

respondent's denial of his involvement with the "mafia" and criminal others ...
(Emphasis added).

[24] It is clear from the passages above that asking the questions as posed constitute a breach of procedural fairness.

[25] The excerpts of the two pages of the transcript below are self evident. They demonstrate, in and of themselves, that which occurred:

JEAN CUSSWORTH: Okay. Because the file information clearly indicates that was a belief that you were quite involved in organized crime and bringing drugs across the border.

ROBERT ALLAIRE: I'm sorry, I wasn't. **Transcripts, p. 8, ll.19-22.**

...

CONNIE SNOW: Did you admit that you were associated to an organized crime group?

ROBERT ALLAIRE: No, I'm not associated to an organized crime group. Or not knowledgeable. The only person I dealt with was Al Turnbull.

CONNIE SNOW: But did you admit to being associated but you didn't want to provide details?

ROBERT ALLAIRE: Now, and after the fact that I got muscled into the situation where I agreed to go down, and I knew that there was something more to it, and I had to assume that it was organized crime, but I wasn't -- I wasn't knowingly associated with them, I'll put it that way.

JEAN CUSWORTH: So you basically came to that conclusion after you were threatened?

ROBERT ALLAIRE: Yes. I never met any of them until I couldn't pay that second part of the -- the third time I borrowed money from them.

JEAN CUSWORTH: Mr. Allaire, that's an awful lot of cocaine worth \$12 million, for them to entrust someone who didn't really know what they were doing.

ROBERT ALLAIRE: They were following me, so that they didn't just entrust it to me. And I didn't see it, they just told me what to do and I did it.

JEAN CUSWORTH: Okay. File information indicates that you pled guilty.

ROBERT ALLAIRE: Yes, I did.

JEAN CUSWORTH: Are you guilty?

ROBERT ALLAIRE: No, I -- well, I am, yes. In hindsight, yes, I am guilty. I did bring cocaine across the border. Am I sorry it happened? Absolutely.

Would I do it differently? Absolutely. **Transcripts, p. 10, 11. 15-47 and p. 11, 1.1.**

...

...

JEAN CUSWORTH: Mr. Allaire, based on a comprehensive file review and our discussions with you today, we find some of your explanations very questionable. Given the fact that you pled guilty to involvement in criminal activity that you yourself acknowledge is linked to organized crime, drug trafficking, and violence. You pled guilty to that. We have to take into consideration that you've been convicted for something like that. **Transcripts, p. 23, ll. 15-23**

...

JEAN CUSWORTH: Okay. Okay. But you've put yourself in an extremely unusual situation by pleading guilty to a crime that is clearly linked to organized crime, drug trafficking and violence. So we are satisfied that there is reasonable grounds to believe that there is the potential for violence to occur before warrant expiry.

ROBERT ALLAIRE: May I please? I was given what I considered was the choice of either doing ten years in Canada or dying the United States. I had no choice -- well, I chose to plead guilty in Canada. I don't plead guilty to being involved with organized crime in any way, shape or form. I was not. I --

JEAN CUSWORTH: But we have to base our decision on the fact that you did plead guilty. We're aware that if you went to the States you were under the impression that you were certainly going to be putting a lot longer period of time in jail.

Transcripts, p. 23, l. 47 and p. 24, ll. 1-18.

(Applicant's Record at pp. 172-173).

XI. Conclusion

[26] The Court recognizes that the decision in *Coscia*, above, may place members of the NPB in a difficult position. On the one hand, they may be informed by evidence that it is likely that a person has ties to criminal organizations: "Now and after the fact that I got muscled into the situation where I agreed to go down, and I knew that there was something more to it, and I had to assume that it was organized crime, but I wasn't -- I wasn't knowingly associated with them, I'll put it that way" (AR at p. 172).

[27] Therefore, it may be open to them to draw conclusions that the person is likely to commit violent acts on the basis of that evidence; however, the *Coscia* decision dictates that the NPB may not directly question the person about his or her ties to organized crime or those questions may breach procedural fairness. One can recognize the quandary the NPB is in, since the NPB ought to put before the potential parolee any concerns it might have regarding the person's potential for violence. It follows that a decision made on the basis of concerns that were not put before the prisoner might be quashed as being in violation of procedural fairness.

[28] The Court concludes that in order to fairly put concerns regarding a person's connections with criminal others before a potential parolee the NPB should take instruction from paragraph 36 of *Coscia* and avoid the use of terms which, if acknowledged, would place the person at risk of criminal prosecution.

[29] The Court's concern in making this order is not with the substantive decision of the NPB, which was open to it to make, but instead with the procedure that was used in the hearing.

[30] The matter is, therefore, remitted to the NPB for redetermination on the basis of that which is specified above.

JUDGMENT

THIS COURT ORDERS that

- 1) the application for judicial review be granted;
- 2) the decision of the NPB be set aside and the matter be referred to the NPB for redetermination of whether day parole should be directed;
- 3) no order be made as to costs as this is a matter of specific importance in the interest of the public in addition to the parties concerned.

“Michel M.J. Shore”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-940-09

STYLE OF CAUSE: ROBERT NORTON ALLAIRE
v. ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: January 26, 2010

**REASONS FOR JUDGMENT
AND JUDGMENT:** SHORE J.

DATED: February 9, 2010

APPEARANCES:

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