Date: 20090514

Docket: A-163-08

Citation: 2009 FCA 156

CORAM: **RICHARD C.J.**
LÉTOURNEAU J.A.
BLAIS J.A.

BETWEEN:

NICHOLAS BONAMY

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard by Videoconference between Ottawa, Ontario and Saskatoon, Saskatchewan,
on May 12, 2009.

Judgment delivered at Ottawa, Ontario, on May 14, 2009.

REASONS FOR JUDGMENT BY: LÉTOURNEAU J.A.

CONCURRED IN BY: RICHARD C.J.
BLAIS J.A.

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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

[1] The self-represented appellant is appealing against a decision of Beaudry J. of the Federal Court (judge) in which he upheld two decisions of prothonotary Lafrenière (prothonotary).

[2] The first of these two decisions dismissed the appellant's application for judicial review of a decision of the National Parole Board (Board) denying full parole to the appellant. The second dismissed the appellant's motion to reconsider and vary the earlier dismissal decision.

[3] The appellant is a layman. He raises a number of issues which are beyond the scope of the decisions rendered by the judge and the prothonotary and consequently of this appeal. I shall therefore limit my assessment of the appellant's arguments to the two issues ruled upon by the judge.

Whether the judge erred in upholding the decision of the prothonotary dismissing the appellant's application for judicial review

[4] By way of judicial review, the appellant sought to set aside the decision of the Board. The prothonotary dismissed it on the basis that the application was premature in light of the statutory appeal available to the appellant pursuant to subsection 147(1) of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (Act).

[5] At the time of rendering his decision, the prothonotary had not received the appellant's material in response to the motion to dismiss. The appellant complains of a lack of procedural fairness.

[6] On the motion to reconsider and vary his decision, the prothonotary ruled that his decision would not have been different even if he had possession of the appellant's argument at the time of the initial decision.

[7] There is a debate as to who is responsible for the late delivery of the appellant's material in violation of the time-frame set up by the *Federal Courts Rules* (Rules). However, whether it is the

appellant who did not file it on time or the Correctional Services which failed to act diligently in forwarding it is irrelevant. This is because the judge who reviewed the prothonotary's decision proceeded *de novo* and the appellant's submissions and arguments were duly considered at that time. Any breach of procedural fairness which may have occurred at the earlier stage was then remedied.

[8] In *Fehr v. Canada National Parole Board)* (1995), 93 F.T.R. 161, at paragraphs 29-30, McKeown J. emphasized the importance of exhausting the statutory appeal route prior to bringing an application for judicial review. He wrote:

> **29** The purpose of having an appeal route is to avoid a multiplicity of proceedings before the Court. As such, where an appeal route exists, it should, in general, be pursued to the extent that it may be, before seeking judicial review. I wish to make clear, however, that a decision may only be appealed to the extent provided for in the legislation. Judicial review may still be available for issues which may not be properly appealed.
>
> **30** Counsel for the applicant argued before me that the applicant should not be required to go to the Appeal Division of the Board prior to bringing an application for judicial review, on the grounds that she is unable to raise her Charter arguments at the Appeal Division. As such, she should not have to wait for the results of the internal appeal process before being able to come to this Court; she should be able to argue all of her case at once. As mentioned earlier, all appeal routes should be pursued to the extent possible prior to bringing an application to this Court. There is no prejudice to the applicant in requiring this, as, while it is clear that no deference will be awarded to the decisions of an administrative body regarding the Charter, the applicant is not precluded from raising Charter arguments before the Appeal Division. It should be noted, however, that I am not foreclosing the availability of judicial review should the Appeal Division refuse to hear Charter arguments. [my emphasis. *See also* to the same effect *Diamond v. Canada (National Parole Board)*, [1995] F.C.J. No. 424 at para. 14]

[9] The Alberta Court of Appeal came to the same conclusion in a decision for which leave to appeal to the Supreme Court of Canada was denied: *Armaly v. Canada (Parole Service)*, 2001

ABCA 280, [2002] S.C.C.A. No. 134. The decision stresses the importance of resorting to a comprehensive and expert statutory scheme of review where it exists. The Court held:

> …It is clear that an alternate remedy exists in this case, the appeal procedures set forth in s. 147 of the *Corrections and Conditional Release Act*.
>
> …
>
> We are satisfied that Parliament did not intend a breach of procedural fairness, as has occurred here, to result in a non-remediable loss of jurisdiction. The *CCRA* provides a comprehensive statutory scheme for administering the parole review process. Sound policy reasons exist for not setting the threshold for *habeas corpus* so low that it effectively creates a parallel system for challenging revocation or termination of parole. This very point was made by Cory, J. in *Steele, supra,* at p. 1418 where he stated the following:
>
> > Since any error that may be committed occurs in the parole review process itself, an application challenging the decision should be made by means of judicial review from the National Parole Board decision, not by means of an application for *habeas corpus*. It would be wrong to sanction the establishment of a costly and unwieldy parallel system for challenging a Parole Board decision. <u>As well, it is important that the release of a long-term inmate should be supervised by those who are experts in this field</u>.
>
> [Emphasis added]

[10] I see no error in the decisions of the prothonotary and the judge to dismiss the application for judicial review as premature in the circumstances.

[11] Relying upon Rule 64 of the *Federal Courts Rules*, the appellant submits that he also sought a declaration that the procedures and policies established by the Board to review applications for parole violate the principles of fundamental justice guaranteed by section 7 of the *Charter of Rights and Freedoms*. As a result, his application for judicial review should not have been dismissed. There are two short answers to this submission.

[12] The first comes from the decision of the Federal Court in *Pieters v. Canada (Attorney General)*, 2004 F.C. 27 where, at paragraph 17, it wrote:

> **17** … the Rule cannot operate in the absence of an underlying application. Rule 64 speaks to relief and not to the proceedings. In other words, there must be some basis on which the application is brought and not merely some abstract desire to obtain clarification or a hammer with which to negotiate further.
>
> [Emphasis added]

[13] More recently in *Democracy Watch v. Canada (Conflict of Interest and Ethics Commissioner)*, 2009 FCA 15, our Court reasserted the same view. At paragraph 15, Chief Justice Richard stated:

> **15** With respect to the applicant's request for a declaration that subsections 44(1) to 44(6) [of the *Conflict of Interest Act*, S.C. 2006, c. 9] violate their section 2(*b*) and 2(*d*) Charter rights, we find that while this Court can properly hear constitutional challenges within applications for judicial review, the applicant cannot simply tack a constitutional challenge onto an application for judicial review which was inappropriately brought.
>
> [Emphasis added]

[14] Since the appellant's application for judicial review was improperly brought, there was no proceeding on which "to tack a constitutional challenge".

[15] In any event, there was another valid reason to dismiss the appellant's application for judicial review.

[16] The appellant had also appealed the Board's decision to the Appeal Division pursuant to section 147. The appeal was successful. A new hearing before two members who did not participate in the impugned decision was held to remedy the alleged breaches of procedural fairness. By the time the matter was decided *de novo* by the judge, the appellant's application for judicial review had become moot and could also have been dismissed on that basis.

Whether the judge erred in upholding the prothonotary's decision to dismiss the appellant's application to reconsider and vary the earlier dismissal decision

[17] For the reasons given with respect to the first issue, I see no error in the judge's decision on this second ground of complaint. I should add that I agree with the prothonotary that Rules 397(1)(*b*) and 399 found no application in this case.

[18] For these reasons, I would dismiss the appeal with costs.

"Gilles Létourneau"
J.A.

"I agree
J. Richard C.J."

"I agree
Pierre Blais J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

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