NOVA SCOTIA COURT OF APPEAL
Citation: ***(Canada) National Parole Board v. Finck***, 2006 NSCA 132

Date: 20061207
Docket: CAC 274815
Registry: Halifax

Between:

National Parole Board and
Correctional Service of Canada

Appellants
(Respondents)

v.

Lawrence Ross Finck
Carline Antonia Vandenelsen

Respondent
(Applicants)

Judge:	The Honourable Justice Thomas Cromwell
Application Heard:	December 7, 2006, in Halifax, Nova Scotia, in Chambers
Held:	Application dismissed.
Counsel:	Dean Smith, for the appellant Respondent not appearing

Reasons for judgment:

[1] In response to an application for *habeas corpus*, Haliburton, J. ordered the National Parole Board to conduct a new parole hearing for Lawrence Ross Finck within 30 days of November 23, 2006, the date of the judge's order. The Board has set the hearing for next Monday, December 11. The appellants have appealed and now apply in chambers for a stay of the order pending appeal and for an order abridging the time for filing their application.

[2] The application was filed on December 5, 2006 and, therefore, short of the three clear days required by the **Rules**. More significantly, the respondent Finck is incarcerated in the Federal Penitentiary at Renous, New Brunswick and, although notice was apparently given to him, no arrangements for him to be present have been made. Counsel advised that Mr. Finck was available by telephone. The application for all practical purposes is, therefore, made *ex parte*. The urgency of the matter arises from the fact that the new parole hearing, as mentioned, is scheduled for next Monday.

[3] I have heard counsel for the appellants fully and reviewed all of the material filed on their behalf. My view is that the application for a stay should be dismissed. Accordingly, no purpose would be served by attempting to secure the respondent's participation on the application.

[4] The appellants submit that they have established the three elements required for a stay pending appeal set out in **RJR-MacDonald Inc. v. Canada (Attorney General)**, [1994] 1 S.C.R. 311, namely, that there is a serious question raised by the appeal, that they will suffer irreparable harm if the stay is denied and that the balance of convenience favours the granting of a stay. In my view, the appellants have satisfied the first, but not the second or the third of these requirements.

[5] With respect to the serious question requirement, my review of the merits at this stage is only to be "preliminary" and conducted according to a "low threshold": **RJR** at 337. I do not have the reasons of the judge at first instance. From reading his order, it appears that he directed a new parole hearing be held because the Board had material available to it in making its decision which the respondent did not. On appeal, the appellants intend to argue that the judge did not have jurisdiction to intervene by way of *habeas corpus* because this matter

falls within the second exception set out by the Supreme Court of Canada in **May v. Ferndale Institution**, [2005] 3 S.C.R. 809 at para. 50 and, alternatively, that the judge was wrong on the merits. I am persuaded that there are at least arguable grounds that the judge may have erred in making the order he did.

[6] Turning to irreparable harm, the appellants say that if the stay is denied, the respondent will obtain a new parole hearing to which he may ultimately be shown not to have been entitled and that the appeal itself may become moot.

[7] In my respectful view, the holding of a new parole hearing that may ultimately be found to have been unnecessary does not constitute irreparable harm to the appellants. Aside from requiring the Board to consider the matter again, there is no suggestion that the judge's order otherwise interferes with the Board's exercise of its "exclusive jurisdiction and absolute discretion ... to grant parole to an offender..." as provided for under s. 107 of the **Corrections and Conditional Release Act**, S.C. 1990, c. 20. I reject the appellants' contention that refusal of the stay opens up the possibility that the respondent will be wrongly released by the Board. There is no suggestion that the holding of another hearing as ordered by the judge in any way requires the Board to do anything other than to exercise its statutory powers according to its legislative mandate. As for any expense to the Board which ultimately proves to have been unnecessary should the appeal succeed, that may be compensated by money and is therefore not irreparable. There is no evidence before me that the Board will incur additional expense or even be inconvenienced by holding the hearing.

[8] In my view, the record before me does not show that the holding of a new parole hearing inflicts on the Board the risk of harm which cannot be undone or cured.

[9] The appellants also submit that, if the stay is not granted, the appeal will become moot once the new parole hearing is held. This submission, however, overlooks two important considerations. The first is that the question of whether a moot appeal should be dismissed or, in the discretion of the court, be heard and determined are matters normally reserved to a panel of the Court, not to a single judge in chambers. I am hesitant to, in effect, exercise that discretion by granting a stay when the substance of the matter should generally be decided by a panel. The second is that, even if the appeal is moot, the appellants' right of appeal is not

necessarily rendered nugatory. As argued before me, the appellants' main concern is a systemic one. The concern is not so much that the effects of a new hearing cannot be undone. Rather, the concern is that the decision under appeal sets what the appellants assert to be a wrong precedent. They say that it is important that the appeal proceed because the decision under appeal creates legal uncertainty that will "...challenge the capacity of the entire parole system." This submission, in my view, overlooks the fact that the Court has a discretion to hear moot appeals. The appellants' submissions about the importance of the appeal going forward seem to me to be better considered in the context of whether a panel of the Court will hear a moot appeal rather than in the context of whether a chambers judge should prevent the appeal from becoming moot by issuing a stay. This is not, in my opinion, a case in which the appellants' right of appeal will necessarily be rendered nugatory even if the appeal becomes moot.

[10] Having found that the appellants have not established irreparable harm should the stay be denied, it is not necessary for me to consider the balance of convenience. However, I shall do so in case my finding about irreparable harm is wrong.

[11] Assuming that the appellants will suffer irreparable harm if the stay is denied, where does the balance of convenience lie? The court must balance the risk of harm to both parties. In my view, the balance of convenience clearly favours denying the stay.

[12] The harm to the appellants, if the stay is denied, is the holding of a parole hearing which, if the appeal succeeds, will have been unnecessary. However, if the stay is granted and the appeal ultimately fails, there is a risk to the respondent Finck of potentially much greater harm: he may have been incarcerated needlessly in the sense that he was deprived of an opportunity to persuade the Board to grant him parole. The risk of some months of further incarceration seems to me to be a much greater harm than will be caused by having another parole hearing on the date it has been scheduled by the Board. Moreover, the respondent's release date, I am advised, is in March, 2007. There is no realistic possibility that the appeal could be heard before then. Thus, if the stay is granted and the appeal is ultimately dismissed, the respondent will have irrevocably lost the opportunity to persuade the Board to release him before his statutory release date.

[13] The application for a stay is dismissed.

Cromwell, J.A.