IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Finck v. Canada (National Parole Board), 2007 NSSC 11

Date: 20070110
Docket: S.Am.267595
Registry: Amherst

Between:

Lawrence Ross Finck and
Carline Antonia Vanden Elsen

Applicants

v.

National Parole Board of Canada and
Correctional Service of Canada

Respondents

Judge:	The Honourable Justice Charles E. Haliburton
Heard:	December 18, 2006, in Truro, Nova Scotia
Written Decision:	January 10, 2007
Counsel:	Applicants self represented Dean Smith, for the Respondents

By the Court:

[1] This is the continuation of the *habeas corpus* application of Mr. Finck and Ms. Vanden Elsen. On November 10th matters relating to Mr. Finck's interest in the application were determined at Amherst. At the end of the day, no evidence had been adduced with respect to Ms. Vanden Elsen and accordingly the hearing in so far as it related to her interests was adjourned without day.

[2] At the opening of this application regarding Ms. Vanden Elsen I announced to the parties my belief that I was bound by the decisions I had reached on Mr. Finck's application. In brief, the application for *habeas corpus* seeks the immediate release from custody of Ms. Vanden Elsen, her application for parole having been refused when that application was heard May 24, 2006. Her right or opportunity for parole is governed by the ***Corrections and Conditional Release Act***, Statutes of Canada 1992 c.20.

[3] The following precepts have governed my approach to this application and define the context of my thinking. They can be enumerated as follows:

1. The right of *habeas corpus* (now legislated as the ***Liberty of the Subjects Act***, R.S.N.S. c. 253) is a fundamental Canadian right trumping all

other rights and procedures and apply to all persons detained by Canadian Authorities.

2. The sentence imposed on Carline Vanden Elsen is not subject to review by this court. It was imposed after a full trial in this court and must be assumed to be both lawful and appropriate. No successful appeal has been taken from that conviction and sentence.

3. The ***Corrections and Conditional Release Act***, [1992] c.20 provides certain statutory rights applicable to all inmates of Canada's prisons and under its rules the Parole Board may authorize early release.

4. One right of all inmates is the "right" to apply for parole including the right to have their application heard and the right to be informed of (to share) all information to be considered by the Parole Board on that hearing (the relevant information).

5. The Parole Board has unique expertise in adjudicating such applications and is by the statute clothed with the exclusive authority to order parole and thereby to grant the inmate the opportunity to serve a portion of their sentence under approved conditions outside the prison institution. Where the inmate believes the Board has erred in the proper

performance of its function the statute provides an appeal process within the system.

6. Notwithstanding any alternative statutory or common law right available to the prisoner every person who is detained in a Canadian jail or institution has the inalienable right to have the propriety of their detention tested by means of a *habeas corpus* application (***Liberty of the Subjects Act***) to a court of competent jurisdiction.

[4] Returning specifically to the application of Ms. Vanden Elsen; parole has been refused and no appeal has been taken to the Appeal Division pursuant to section 146 of the ***Act***.

[5] In determining this application in so far as it related to Mr. Finck I relied upon the provisions of sections 101 and 141 of the ***CCRA*** and the precedents cited in the brief presented on behalf of the crown.

[6] Section 101 provides:

> "The principles that shall guide the board and the Provincial Parole Boards in achieving the purpose of conditional release are:
>
> a) . . .
>
> 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) . . .
>
> d) that parole boards make the least restrictive determination consistent with the protection of society;
>
> e) . . .
>
> 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." (emphasis added)

[7] Section 102 endows the Parole Board panel with discretion, in the following terms:

> S. 102. The Board or a provincial parole board **may grant parole** to an offender if, in it's opinion . . .

[8] Section 147 dealing with appeals to the Appeal Division of the Board incorporates a statutory obligation upon the panel hearing the parole to observe the principles of fundamental justice. This accords with the Charter of Rights and Freedoms. In this context, Section 101(f) is of paramount importance in terms of "due process". The offender is to be in possession of the "relevant information". It was implicit, if not explicit, in my earlier comments with respect to Mr. Finck that; not only is the offender entitled to be in possession of the relevant information in advance of the hearing so that

she may be appropriately prepared, but also the panel of the Parole Board dealing with the matter must be in possession of that relevant information, and only that information, in order to accord with the principles of natural justice.

[9] The information upon which the Parole Board is going to make a determination must be "shared" information.

[10] Section 141(1) is precise with respect to this obligation to share information. It provides:

> "At least fifteen days before the day set for the review of the case of an offender, the Board shall provide . . . in writing . . . **the information that is to be considered in the review of the case** or a summary of that information.

[11] Section 141(4) provides for certain exceptions which permit non disclosure. Those exceptions are "strictly" limited in order to protect the public interest or personal safety. I am of the view that where such information is deemed to be relevant to the decision to be made by the panel, then a summary of such restricted evidence disclosing a general sense of what it is and why it is protected, must be provided to the offender. If the information is not relevant then there is no reason why it should be in the possession of the panel, or considered by the panel.

[12] With respect to the standard of proof to be applied both parties rely on *May v. Ferndale Institution*, [2005] S.C.J. No. 84 (S.C.C.)(QL source).

Paragraphs 74 and 77 have been recited in the crown's brief as follows:

> "A successful application for *habeas corpus* requires two elements; (1) deprivation of liberty and (2) that the deprivation be unlawful. The onus of making out a deprivation of liberty rests on the application. The onus of establishing the lawfulness of that deprivation rests on the detaining authority."

[13] With respect to the lawfulness of a deprivation of liberty:

> "a deprivation of liberty will only be lawful where it is within the jurisdiction of the decision-maker. Absent express provision to the contrary, **administrative decisions must be made in accordance with the Charter. Administrative decisions that violate the Charter are null and void for lack of jurisdiction**: *Slaight Communications Inc. V. Davidson*, [1989] 1 S.C.R. 1038, at p. 1078. Section 7 of the Charter provides that an individual's liberty cannot be impugned (sic) upon except in accordance with the fundamental (sic) principles of fundamental justice. **Administrative decisions must also be made in accordance with the common law duty of procedural fairness and requisite statutory duties.**

[14] In this context I consider the only issues to be that with respect to whether the parties have met their respective onus of proof. Ms. Vanden Elsen is incarcerated as a result of a sentence imposed after a lengthy trial. The sentence was lawful and accordingly there is no issue with respect to her present status, subject to her right to seek release under the provisions of the (***Parole Act***).

[15] The real issue is whether Ms. Vanden Elsen's continued imprisonment is unlawful on the basis that she did not receive a "fair" hearing on her application for parole because the panel hearing her application was in possession of evidence which was not shared with her. If such a circumstance is proven then the board was in breach of the provisions of Section 101 and 141 of the ***Act*** and Ms. Vanden Elsen would have been deprived of her rights both statutory and charter.

[16] In this context what is the evidence before me? On Ms. Vanden Elsen's application specifically there was evidence from herself and evidence from Rodney MacDonald, her parole officer at the Nova Institution. I found Ms. Vanden Elsen to be an honest and straightforward witness. I perceived no effort on her part to colour her testimony with respect to what information had been made available to her before the hearing of the Parole Board. She testified that she had received essentially all the information except for an estimated twenty to twenty five pages which related to "health care. etc." and she testified she had not been provided with the "Ipso file" consisting of some sixty pages.

[17] She was not informed of any reason for the non-disclosure of these items. She acknowledged that she had previously received from and shared with

her parole officer the information which had been received by the Institution and which was produced for her parole board hearing, although she did not recognize some eighteen pages of material produced at the court as Exhibit 1, a book containing in all 267 pages. These particular pages encompass an incident report prepared by the Halifax Regional Police Service in relation to the matters which resulted in the trial and conviction of Ms. Vanden Elsen.

[18] Rodney MacDonald testified that he is Ms. Vanden Elsen's parole officer within the Institution and that he meets with her regularly and in particular he met with her in preparation for her parole application. It is his responsibility to share all information he receives with her and to advise her of the date and place of her parole hearing. A check list of the information shared appears at page 131ff of Exhibit 1. He attended her parole board hearing on May 24th and confirmed that the Board had denied her full parole.

[19] Under cross examination Mr. MacDonald was questioned about the "ONS" system. This is apparently an intranet computer system established and operated by Correctional Services. Mr. MacDonald testified that any document generated with respect to an inmate is reported on the system and that "lots of people" have access to it. I understood him to say that it was possible for him to examine the file of any inmate in the country by

accessing this system although he said “I am not supposed to”. He described it as a “many fingered site” which I understood to mean that while some locations on the site may be accessed by everyone having access to it, there are other aspects, other locations restricted specific user groups. My understanding is that each user group has access to all aspects of the system which inform their particular work. When asked specifically if he was aware of any information withheld from Ms. Vanden Elsen before her hearing his response was “We provided every bit of information we had . . . people send materials directly to the Parole Board which they share with us”.

[20] No question of credibility arose with Mr. MacDonald who like Ms. Vanden Elsen simply described his understanding of the facts surrounding the provision of information relative to her application for parole. As Exhibit 1 makes clear that information included some reference to her life’s history, specific evidence or reports with respect to the incident which resulted in her being incarcerated, reports on her conduct and counselling within the Institution and her own plans for release. These latter were followed by the negative response or assessment of those plans authored by parole officers within the institution in May of 2006.

CONCLUSION:

[21] The onus is upon the applicant to demonstrate that access to liberty has been unlawfully denied by the failure of the authorities to abide by the principles of fundamental justice in sharing information. I am not satisfied that Ms. Vanden Elsen has established, either beyond a reasonable doubt or on a balance of probability that in denying her parole in June of 2006 the Parole Board had access to or relied upon information not shared with her. Accordingly her application is dismissed.

Haliburton J.