SUPREME COURT OF NOVA SCOTIA
Citation: Wilson v. Canada (Attorney General), 2011 NSSC 143

Date: 20110408
Docket: Amh. No. 342924
Registry: Amherst

Between:

Karl Anthony Wilson

Applicant

-and-

Attorney General of Canada

Respondent

Decision

Judge: The Honourable Justice Robert W. Wright

Heard: April 8, 2011 at Amherst, Nova Scotia

Oral Decision: April 8, 2011

Written Decision: April 13, 2011

Counsel: Counsel for the Applicant - Robert Gregan
Counsel for the Respondent - Susan Inglis

Wright, J. (Orally)

[1] This is an application by Karl Wilson, an inmate at the Springhill Institution, for a writ of *habeas corpus* with *certiorari* in aid which was filed January 26, 2011 following the decision of the Appeal Division of the National Parole Board ("NPB") to deny his application for day parole.

[2] I will first set out the factual background to this application. In 2007, Mr. Wilson entered a guilty plea to a charge of manslaughter for which offence he was sentenced to eight years imprisonment, less twenty-one months credit for pre-trial custody. Mr. Wilson subsequently entered a plea of guilty to various drug offences, possession of stolen property and possession of a prohibited weapon for which the sentences imposed ran concurrently with the sentence for manslaughter. He was then incarcerated in the Springhill Institution where he has since remained.

[3] On October 9, 2009, Mr. Wilson applied to the NPB for day parole. That lead to a hearing which took place on March 25, 2010 before a panel of two board members with Mr. Wilson present. After considering the relevant information gathered by Correctional Service Canada ("CSC") and Mr. Wilson's comments, the panel denied his application for day parole which lacked the support of his Case Management Team. The panel found that Mr. Wilson presented an undue risk to re-offend and was therefore not a suitable candidate for day parole.

[4] On May 17, 2010, Mr. Wilson filed an appeal of that decision to the Appeal Division of the NPB under the statutory appeal provisions in the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (the "CCRA") which grants exclusive jurisdiction over parole decisions to the NPB.

[5] The main grounds of that appeal are summarized in the brief of the respondent as follows:

> That his Community Assessment Report which was considered by the Day Parole Panel was flawed because it was completed prior to receipt of his Psychological/Psychiatric Assessment Report;
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> That the Day Parole Panel ignored recommendations in his Psychological/Psychiatric Assessment Report;
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> That the Day Parole Panel exhibited an air of bias against him by "badgering" him with questions and not accepting his responses to information on his CSC file;
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> That the Day Parole Panel erred in considering that Mr. Wilson was involved in the "institutional drug trade", a proposition Mr. Wilson alleged to be false.

[6] Ultimately, on November 8, 2010 the Appeal Division of the NBP denied the appeal, affirming the decision of the initial panel denying Mr. Wilson's application for day parole. The Appeal Division found that the conclusion of the NBP Day Parole Panel was reasonable, based on the facts and information available.

[7] In between the two levels of NBP hearings, Mr. Wilson filed an internal complaint on August 3, 2010 under the CSC Complaints and Grievance Process. In that complaint, Mr. Wilson made similar allegations as those raised in his appeal to the Appeal Division of the NBP.

[8] Over the next few months, Mr. Wilson pursued his complaints by filing First, Second and Third Level grievances with CSC. The Third Level grievance, which is current, requests that various pieces of impugned information be corrected on his CSC records, including information respecting his alleged involvement in the institutional drug trade. That grievance was filed on February 23, 2011 and has not yet been responded to.

[9] Mr. Wilson has now opened another front in his challenge of the NBP decision to deny him day parole by filing (on January 26, 2011) the present application for *habeas corpus* with *certiorari* in aid. He did this on his own at the time but has since retained Mr. Gregan of Nova Scotia Legal Aid as his counsel. No amendments to this application have since been made.

[10] The grounds for review plead by Mr. Wilson in support of his *habeas corpus* application are as follows:

(1) NBP did not follow certain named sections of the CCRA (viz. ss. 102, 100, and 101(a)(b) and (d);

(2) NBP breached or failed to apply NBP policies;

(3) NBP failed to observe the principles of fundamental justice in its treatment and consideration of a community assessment report that was completed before a favourable psychology report was prepared;

(4) NBP based its decision on erroneous or incomplete information in respect of the psychology report, the sentencing judge's recommendations, and the applicant's involvement in the institutional drug culture (citing the obligation of CSC to ensure that all information about an offender is accurate, up to date and

complete).

[11] The remedies sought by Mr. Wilson, as outlined in his counsel's brief, are:
(1) The grant of full parole by this court to vindicate the breach of Mr. Wilson's ss. 7, 11 and 15 Charter Rights; or
(2) In the alternative, an order remitting the matter to a differently constituted panel of the NBP for re-hearing and determination of his eligibility for day parole on an expedited basis, including the setting of guidelines to the board as to what evidence it can and cannot consider in relation to the drug trade incident and the facts it may properly rely on regarding the manslaughter conviction.

[12] The foregoing sets the stage for the determination of the threshold issue of whether this court should assume or decline its jurisdiction to hear this *habeas corpus* application.

[13] The starting point is an examination of the statutory regime for the granting of parole set out in the CCRA.

[14] It bears repeating at the outset that the CCRA (under s.107) confers exclusive jurisdiction and absolute discretion on the NBP to administer any and all parole matters including specifically, under subparagraph 1(a), the granting of parole to an offender. The CCRA also sets out guiding principles for the board (s. 101) and the circumstances where the board may grant parole (s.102).

[15] Section 147 of the CCRA gives inmates a right of appeal to the Appeal

Division of the NBP and confers upon it broad appellate and remedial powers.

[16] Beyond that, the Federal Court has jurisdiction under its constituent statute, the *Federal Courts Act*, R.S.C .1985, c. F-7, to exercise judicial oversight of NBP decisions. In particular, s. 18 of that Act confers exclusive original jurisdiction on the Federal Court to deal with judicial reviews of decisions made by any federal board, commission or other tribunal, which would clearly include the NBP Appeal Division.

[17] Instead of following that route, Mr. Wilson has chosen to file a *habeas corpus* application with this court, seeking judicial intervention with the decision of the NBP Appeal Division by granting either of the remedies above referred to.

[18] In light of the statutory regime for all parole matters under the CCRA summarized above, coupled with the statutory jurisdiction of the Federal Court to exercise judicial oversight of NBP decisions, ought this court assume or decline its concurrent jurisdiction to hear Mr. Wilson's *habeas corpus* application to set aside the decision of the NBP Appeal Division denying him day parole?

[19] Both counsel have referred me to the recent decision of the Supreme Court of Canada in *May v. Ferndale Institution*, [2005] SCJ 84. That was a case in which the applicant inmates applied to the Supreme Court of British Columbia for *habeas corpus* with *certiorari* in aid directing correction officials to transfer them back to the minimum security institution they had been removed from as a result of a security classification review.

[20] The question to be resolved was framed as "whether the Supreme Court of British Columbia should have declined *habeas corpus* jurisdiction in favour of Federal Court jurisdiction on judicial review"? That question was posed in the context of a decision made by prison authorities having been reviewed by other prison authorities. The case did not involve the statutory appeal process from a denial of parole.

[21] In any event, the Supreme Court of Canada took the opportunity to set out some general principles in cases involving the overlap and potential conflict of jurisdiction between provincial superior courts and the Federal Court. After reviewing the relevant jurisprudence, the judgment of the majority of the court summed up as follows:

> 44. To sum up therefore, the jurisprudence of this Court establishes that prisoners may choose to challenge the legality of a decision affecting their residual liberty either in a provincial superior court by way of *habeas corpus* or in the Federal Court by way of judicial review. As a matter of principle, a provincial superior court should exercise its jurisdiction when it is requested to do so. *Habeas corpus* jurisdiction should not be declined merely because another alternative remedy exists and would appear as or more convenient in the eyes of the court. The option belongs to the applicant. Only in limited circumstances will it be appropriate for a provincial superior court to decline to exercise its *habeas corpus* jurisdiction. For instance, in criminal law, where a statute confers jurisdiction on a court of appeal to correct the errors of a lower court and release the applicant if need be, *habeas corpus* will not be available (i.e. *Gamble*). Jurisdiction should also be declined where there is in place a complete, comprehensive and expert procedure for review of an administrative decision (i.e. *Pringle and Peiroo*)

[22] The majority opinion goes on to say (at para. 50):

> 50. Given the historical importance of *habeas corpus* in the protection of various liberty interests, jurisprudential developments limiting *habeas corpus* jurisdiction should be carefully evaluated and should not be allowed to expand unchecked. The exceptions to *habeas corpus* jurisdiction and the circumstances under which a superior court may decline jurisdiction should be well defined and limited. **...** In principle, the governing rule is that provincial superior courts should exercise their jurisdiction. However, in accordance with this Court's decisions, provincial superior courts should decline *habeas corpus* jurisdiction only where (1) a statute such as the Criminal Code, R.S.C. 1985, c. C-46, confers jurisdiction on a court of appeal to correct the errors of a lower court and release the applicant if need be or (2) the legislator has put in place complete, comprehensive and expert procedure for review of an administrative decision.

[23] The Supreme Court ultimately found that neither of these two recognized exceptions applied in that case, thereby upholding the decision of the trial court to exercise its *habeas corpus* jurisdiction.

[24] The Supreme Court of Canada in *May* also made reference to its earlier decision in *Steele v. Mountain Institution*, [1990] 2 S.C.R. 1385. In that case, the applicant, a dangerous offender, had repeatedly been denied parole by the NPB. He therefore applied to the Supreme Court of British Columbia for a writ of *habeas corpus* and *certiorari* in aid for his release in which he was successful, both at the trial and appellate court levels.

[25] On further appeal to the Supreme Court of Canada, the court dealt with the jurisdictional issue and concluded (at para. 83):

> Since any error that may be committed occurs on the parole review process itself, an application challenging the decision should be made by means of judicial review from the NPB decision, not by means of an application for *habeas corpus*.

[26] Nonetheless, the court ruled that in view of the offender’s age and the length of his detention, it would be unfair to require him to commence a new judicial

review proceeding and he was released on the basis of the *habeas corpus* application.

[27] The Supreme Court of Canada clarified in *May* that the *Steele* case should not be taken as creating a fresh and independent exception to the availability of *habeas corpus*, i.e., whenever an alternative remedy is available. The Supreme Court of Canada stood by the result in *Steele*, but emphasized that it was the product of a convergent set of unusual facts.

[28] Beyond that , neither counsel has been able to find any case precedent on identical facts as exist here, namely, where an application for *habeas corpus* was made to a provincial superior court from a decision of the NPB Appeal Division denying parole, rather than a judicial review application to the Federal Court. The closest is *Lena v. Donnacona Prison* [2011] Q.J. No. 437 which I will refer to later.

[29] Counsel for the respondent has indeed referred me to numerous appellate court decisions in this country where the general principles set out by the Supreme Court of Canada in *May* have been applied, albeit in different fact situations. For the sake of brevity, I will refer to only four of the most recent ones.

[30] In *L.R.F. v. Canada (National Parole Board)*, [2008] N.S.J. No. 252 the offender applied for and was denied both full parole and day parole. He then decided to make application to this court for *habeas corpus* rather than appeal to the NBP Appeal Division. Justice Fichaud, writing for the court, stated (at paras.

15-16):

> 15. The statutory appeal process to the NPB Appeal Division under s. 147 of the CCRA is a complete, comprehensive and expert procedure to challenge the decision of the NPB. The grounds of appeal stated in s. 147(1) include the type of argument made by Mr. L.R.F. on his *habeas corpus* application under appeal. Judicial review of a decision of the NPB Appeal Division is governed by the Federal Courts Act, R.S.C. 1985, c. F-7. There may be exceptional circumstances where a statutory appeal procedure, comprehensive on its face, is so ineffective as to warrant the exercise of judicial discretion by *habeas corpus*. Nothing of that sort exists here.
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> 16. The Supreme Court judge had concurrent jurisdiction, but he should have declined to exercise it. In my view, the Supreme Court judge erred in law by deciding this matter that was within the complete, comprehensive and expert statutory appeal jurisdiction of the NPB Appeal Division.

[31] At the risk of reading too much into this passage, I observe that Justice Fichaud made no mention of the *habeas corpus* application simply being premature because an appeal to the NBP Appeal Division had not been first exhausted. Rather, he stated only that judicial review of a decision of the NBP Appeal Division is governed by the *Federal Courts Act*.

[32] I also observe the passage quoted by Justice Fichaud in his decision taken from the Supreme Court of Canada decision in *Dumas v. Director of LeClerc Institution of Leval*, [1986] 2 S.C.R. 459. Justice Lamer there stated (at p. 464):

> The continuation of an initially valid deprivation of liberty can be challenged by way of *habeas corpus* only if it becomes unlawful. In the context of parole, the continued detention of an inmate will only become unlawful if he has acquired the status of a parolee. ... If, for some reason, the restriction to his liberty continues, he may then have access to *habeas corpus*. ... Finally, if parole is refused, it is obvious that the inmate has not become a parolee and he cannot have recourse to *habeas corpus* to challenge the

decision.

[33] The next case I will refer to is *R. v. Latham*, 2009 SKCA 26. There, the offender made an application for *habeas corpus* from a NBP decision to cancel his privileges for Unescorted Temporary Absences. He also filed an appeal of that decision to the NBP Appeal Division. Both were unsuccessful. In respect of the *habeas corpus* application, the judge declined to exercise jurisdiction.

[34] After reviewing the statutory regime set out in the CCRA, the Court of Appeal had this to say (at para. 25):

> 25. Finally, and similar to the Immigration Appeal Division, a detailed procedure is set out in the *Federal Courts Act* for the manner in which applications and appeals are to be brought before the Federal Court. The Federal Court provides effective oversight over the NPB by way of judicial review and is fully capable of providing a remedy where appropriate.[8] Therefore in my opinion the NPB and the Appeal Division constitute a complete, expert and comprehensive review procedure, such that provincial superior courts should decline to exercise their *habeas corpus* jurisdiction as the Chambers judge did in this case. Other courts have come to the same conclusion.

[35] Most recent is the decision of the Ontario Court of Appeal in *R. v. Graham*, 2011 ONCA 138. In that case, the offender made a *habeas corpus* application to the Superior Court of Justice after his day parole privileges were suspended by his parole officer's supervisor. The trial court declined jurisdiction.

[36] Subsequently, the NBP revoked his parole and his appeal therefrom to the NBP Appeal Division was denied. Nonetheless, he pursued an appeal to the Ontario Court of Appeal seeking to overturn the decision of the trial court and to have the Appeal Court quash the decision of his parole officer's supervisor

suspending his parole.

[37] Justice Blair, writing for the court, framed the question to be decided as whether the CCRA provides a complete, comprehensive and expert procedure for administering the parole review process. That, of course, was the second circumstance articulated in *May* where it is appropriate for a provincial superior court to decline jurisdiction on a *habeas corpus* application.

[38] The heart of this decision is found in paragraphs 15 and 16 which read as follows:

> 15. The Board's review decision is, in turn, subject to an appeal to the Appeal Division of the NPB, pursuant to s. 147. The statutory grounds for such an appeal are wide-ranging and include jurisdictional error, error in law, and the failure to observe the principles of fundamental justice. Finally, the decision of the Appeal Division is subject to judicial review in the Federal Court.
>
> 16. This, in my view, is the very type of statutory regime envisioned in the *habeas corpus* exception articulated in *May v. Ferndale Institution*. The CCRA establishes a complete and comprehensive procedural regime for the review and appeal of a parole officer supervisor's decision to suspend parole. In addition, the process is carried out at its various stages by experts in the parole field.

[39] The court then stated its conclusion that the decision whether to decline *habeas corpus* jurisdiction is a discretionary one and that the application judge was correct in declining to exercise that jurisdiction.

[40] Another very recent case is the decision of the Quebec Court of Appeal in *Lena* above mentioned. This case presents the closest fact situation to the case at bar. The offender there filed a motion for *habeas corpus* in the Quebec Superior

Court on two grounds:

(1) That he had been illegally detained past his statutory release date, at which time he should have been released to the America authority; and

(2) That he was illegally placed in segregation following a fight with another inmate that was a set-up.

[41] In respect of the first ground, the trial judge decided that the statutory regime under which the NBP operates was a complete, comprehensive and expert procedure for review of an administrative detention (tracking the language in *May*). He went on to conclude that the Quebec Superior Court had no jurisdiction over the NBP Appeal Division who had decided twice to detain the offender. In the result, the *habeas corpus* petition was dismissed.

[42] The offender appealed on the ground that the trial judge had jurisdiction to hear his motion for *habeas corpus* and was wrong in declining such jurisdiction. The Quebec Court of Appeal ruled as follows (at paras. 7-9):

> 7. The appeal relating to the first of those two grounds must fail, because the trial judge was right in deciding that he could not overrule a decision made by the National Parole Board Appeal Division acting within the limits of its power.
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> 8. That part of the judgment rendered by Justice Grenier was in compliance with paragraph 44 of the judgment of the Supreme Court of Canada, May v. Ferndale Institution, [2005] 3 S.C.R. 809:
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> > [Earlier recited in this decision at para. 21]
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> 9. According to the jurisprudence[1], the statutory appeal process to the National Parole Board Appeal Division is a complete, comprehensive and expert procedure and consequently provincial superior courts should decline to exercise their habeas corpus jurisdiction in this regard as Justice Grenier did.

[43] I recognize that the “complete, comprehensive and expert procedure for review of an administrative decision” exception as set out in *May* pertains to the statutory parole review regime set out in the CCRA. However, crowned with that is the right of judicial review to the Federal Court which has the jurisdiction to exercise judicial oversight of NBP decisions pursuant to the *Federal Courts Act*. Together, they form a complete and comprehensive statutory framework ideally suited to adjudicate on parole matters from start to finish.

[44] Moreover, although labelled a *habeas corpus* application, this matter has, in substance, many hallmarks of a judicial review application where the applicant seeks to set aside the decision of an independent federal tribunal. Indeed, counsel for Mr. Wilson has submitted in his brief that this application entails a review of the NBP Appeal Division’s decision on the standards of reasonableness or correctness, depending upon the issue involved, as prescribed in *Dunsmuir v. New Brunswick*, 2008 S.C.C. 9.

[45] As earlier stated, the clear legislative intent in the *Federal Courts Act* was to confer exclusive jurisdiction on the Federal Court when it comes to judicial review applications from such federal bodies. It therefore comes as no surprise that there are seemingly no reported cases to be found in a situation where a provincial superior court has assumed jurisdiction on a *habeas corpus* application from a decision of the NBP Appeal Division denying parole. Having regard to the language of the judgments above referred to, I am not persuaded that the present application ought to be the first such case.

[46] I therefore decline to exercise this court's *habeas corpus* jurisdiction and Mr. Wilson's application is accordingly dismissed.

J.