Federal Court Cour fédérale

Date: 20240726

Docket: T-1366-23

Citation: 2024 FC 1186

Ottawa, Ontario, July 26, 2024

PRESENT: Associate Chief Justice Gagné

BETWEEN:

JEFFREY GEORGE EWERT

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Parole Board of Canada [Board] and its Appeal Division denied day and full parole to Mr. Jeffrey George Ewert, an indigenous offender. Mr. Ewert now asks the Court to quash the Appeal Division's decision, stating it is globally unreasonable and that both instances failed to properly consider and apply what is known in criminal law as the *Gladue* principles.

[2] Decision makers must pay particular attention to the circumstances of Indigenous offenders and consider the systemic and background factors which may play a part in bringing the person into interaction with the justice system (see *R v Gladue*, 1999 CanLII 679 (SCC), *R v Ipeelee*, 2012 SCC 13 and *Twins v Canada (Attorney General)*, 2016 FC 537).

II. Facts

[3] The Applicant is a 61-year old Indigenous federal offender serving two concurrent life sentences. The life sentence for second-degree murder carries a 15-year minimum before parole eligibility and the life sentence for attempted murder carries a 7-year minimum before parole eligibility.

[4] Mr. Ewert started his sentences on August 10, 1984 and has now been incarcerated for 40 years.

[5] The crimes of extreme violence were committed while Mr. Ewert was highly intoxicated, provoked by a sudden rage and anger.

[6] Mr. Ewert suffered a traumatic childhood. He was adopted into a dysfunctional and non-indigenous family that abused him physically, psychologically, and sexually.

[7] Mr. Ewert has followed several treatment programs and is engaged in a healing process helping him come to terms with his childhood trauma. He has recognized the seriousness of his offences and demonstrated a high level of accountability for his actions.

[8] Mr. Ewert has held a minimum-security classification since July 2019. He is currently incarcerated at the Federal Training Center in Laval, Quebec. He has obtained several Escorted Temporary Absences.

[9] Mr. Ewert's correctional file indicates a moderate social reintegration potential. His risk of violence is assessed as moderate to high in the short term. He exhibits the need to dominate and control women, emotional management issues, an explosive temperament, and distrust towards others.

III. Decision Under Review

[10] Mr. Ewert applied for day parole in accordance with section 119 of the *Corrections and Conditional Release Act*, SC 1992 c 20 [the Act] on October 18, 2022. The Applicant asked for day parole at the Salvation Army halfway house in Saskatoon, Saskatchewan.

[11] The Board held a parole hearing on November 30, 2022 and denied day and full parole on December 12, 2022.

[12] The Board considered positive elements in Mr. Ewert's case such as the absence of recent signs of physical violence, Mr. Ewert's progress in managing his emotions, his increased self-esteem, and the fact that he has not felt the need to use substances for decades.

[13] However, the gravity of Mr. Ewert's offences, his inability to identify his triggers, his dismissive attitude and lack of accountability towards an incident involving a female parole

officer, and his distrust of his case management team led the Board to conclude that Mr. Ewert poses an undue risk to society.

[14] The Board preferred a gradual return to the community, starting with Escorted Temporary Absences and Unescorted Temporary Absences in order to build Mr. Ewert's credibility and demonstrate his capacity to work with his case management team.

[15] On June 1, 2023, the Appeal Division confirmed the Board's decision to deny day and full parole. The Appeal Division found the Board reasonably analyzed Mr. Ewert's background factors in accordance with the *Gladue* principles.

[16] Mr. Ewert now seeks judicial review of the Appeal Division's decision.

IV. Issues and Standard of Review

[17] The only issue is whether the Board and Appeal Division erred in denying the Applicant's parole application. Four elements of the Board's reasons are determinative of the Board's risk assessment:

- The Applicant's motive behind the crimes;
- The Applicant's relationship with, and attitude towards women;
- The Applicant's trust issues; and
- The Applicant's release plan.

[18] The parties agree the standard of review is reasonableness (*Canada (Citizenship and Immigration v Vavilov*, 2019 SCC 65). The Court must consider both the Board decision and the Appeal Division decision and determine whether the Appeal Division's affirmation of the Board decision was reasonable, taking into account whether it demonstrated the required recognition and application of the jurisprudence in *Gladue*, *Ipeelee*, and any other related authorities (*Twins* at para 30).

V. Analysis

A. *The Legislative Framework*

[19] The Board assesses an offender's suitability for conditional release pursuant to the Act. The Board must determine whether the offender presents an undue risk to society of reoffending prior to the expiration of the offender's sentence and whether the offender's release will contribute to the protection of society by facilitating their reintegration as a law-abiding citizen (section 102 of the Act).

[20] Pursuant to section 101 of the Act, the Board must take into account all relevant available information when assessing the existence of an undue risk to society, including:

- The reasons and recommendations of the sentencing judge;
- The nature and gravity of the offence;
- The degree of responsibility of the offender;
- The information from the trial, the sentencing process and the victims;
- The assessments provided by correctional authorities.

[21] The Act states the protection of society is the "paramount consideration" in the determination of all cases (section 100.1 of the Act).

[22] The statutory requirements must be read in conjunction with the principles from the Supreme Court of Canada's decision in *Gladue* and this Court's decision in *Twins*, the latter of which specifically addressed the application of the *Gladue* principles in the context of parole.

[23] In *Twins*, this Court found the obligation arising from *Gladue* "to be a duty to approach decision making in a manner which is attentive to the systemic disadvantages and discrimination which may have contributed to an Aboriginal offender's engagement with the criminal justice system and to make decisions that are responsive to the unique circumstances of Aboriginal offenders" (para 64).

[24] As Justice Southcott wrote in *Twins*,

> [67] […] In my view, the obligation is not to consider just the offender's background as a member of a First Nations community, but rather to consider the systemic and background factors which may have played a part in bringing the particular Aboriginal offender before the courts or more generally into interaction with the criminal justice system. It is these factors that the Board must take into account as one of the considerations underlying its assessment under subsection 135(5) of the Act of whether an offender will, by reoffending before sentence expiration, present an undue risk to society.

B. *Motive behind the crimes*

[25] The Board found that the Applicant's inability to articulate the specific motives behind his crimes increases his risk of reoffending because it suggests that the Applicant remains unable to identify, avoid, and manage high-risk situations.

[26] The Applicant contests the Board's finding that his inability to specify his motives increases his risk of reoffending. The Applicant was heavily intoxicated during the commission of both crimes and has little to no recollection of these crimes. The Board's finding of an undue risk of reoffending based on the Applicant's inability to specify his motives behind crimes he cannot recall is, in my view, irrational and unreasonable.

[27] The Applicant argues the Board failed to adopt the holistic approach required by *Gladue* that considers the healing done to address the Applicant's background factors and traumas and to consider how that healing could mitigate his reactions to triggers in high-risk situations. *Gladue* calls for "consideration of the deleterious effects of historic discrimination and the salutary benefits of exposure to indigenous practices and traditions" (*R v Abram*, 2019 ONSC 3383 at para 29).

[28] The Applicant states that the trigger could have been a feeling of rejection.

[29] The Applicant's healing helped him realise the anger he carried before his offences, as well as the correlation between triggering emotions or situations and both heavy substance abuse

and extreme violence. The Applicant has healed from the root cause of his past substance abuse problems and no longer reverts to poor coping mechanisms. Here is how the Board addresses the issue at page 10 of its reasons:

> You are considered engaged in your correctional plan. You are also highly invested in your healing journey. It has helped you progress in terms of understanding your crime cycle and your triggers. At the hearing, the Board observed that you also have a good understanding of your risk factors, namely substance use and the poor management of your emotions.

[30] The Applicant argues the *Gladue* methodology requires the Board to holistically assess the Applicant's past trauma-induced triggers and subsequent healing. The Applicant's healing and practice of traditional teachings are strongly connected to his risk management strategies. The past triggers and subsequent healing therefore must be taken into consideration by the Board when assessing the Applicant's ability to identify and manage future triggering or high-risk situations.

[31] The Applicant identified trauma from his childhood. His adopted father was negligent and alcoholic and his adopted mother had recurring psychiatric problems. In addition, the Applicant reported that she physically, emotionally and sexually abused him, from the age of 6 or 7 until he was about 12, when he became physically strong enough to resist. He began abusing substances between the ages of 12 and 15 until a few years after he was incarcerated.

[32] According to the Applicant's Case Management Team (CMT), the violence and abuse he suffered are not unlike what was experienced in residential schools. As such, his CMT considers

that the Applicant is dealing with the after-effects and social stigma that are well known to Indigenous peoples.

[33] Yet, the fact that the Applicant's crimes have a link to his childhood trauma and his significant progress to overcome this did not alleviate concerns surrounding his inability to identify the motive behind his crimes.

[34] The case law is clear that the Board must consider the salutary benefits of the Applicant's participation in Indigenous healing practices and traditions (*R v Abram* at para 29). The parties dispute whether the Board properly considered the Applicant's background and healing before coming to the conclusion that his healing progress does not alleviate concerns surrounding his inability to identify the motive behind his crimes. This requires the Board to consider the systemic disadvantages and discrimination the Applicant has faced and their link to his circumstances.

[35] In my view, the Applicant has identified a logical fallacy in the Board's reasons that calls the reasonableness of the decision into question (*Vavilov* at para 104). The Board drew a negative inference from the Applicant's inability to identify the specific elements that led to the murder and the attempted murder of two young women. This is illogical given the Applicant's inability to remember his crimes and given his best effort to connect his anger to his childhood trauma. The Board finds the Applicant needs to explore his motivations further before day parole can be granted. This is a problematic conclusion given that the Applicant may never fully

remember his crimes or what exactly triggered an episode of extreme violence in his life 40 years ago, especially given the time that has gone by.

[36] The evidence demonstrates that the Applicant has gained extensive awareness about how his background and childhood trauma led to his heavy substance abuse, anger triggers, and his relationships with women.

[37] Looking at all of the circumstances through a holistic approach, it is unreasonable for the Board to conclude that the Applicant is unable to identify the motives behind his actions during a period of trauma-induced heavy substance abuse because he cannot articulate the specific motive behind two crimes he cannot recall in a way the Board deems acceptable.

C. *The Applicant's relationship with and attitude towards women*

[38] The Board's decision also relied on findings pertaining to the Applicant's relationship with and attitude towards women, his need to dominate and control women, and his problematic reactions to feelings of rejection, dismissal, and criticism.

[39] The Applicant argues there is no evidence that supports the Board's finding that the Applicant continues to have unresolved issues with his attitude towards women.

[40] The Applicant contends that the Board failed to assess and weigh contrasting evidence, which is central to a proper *Gladue* analysis. Specifically, the evidence shows the Applicant maintained a healthy and restorative relationship with an Indigenous woman from 1994 to 2007.

The healing component of this relationship is absent from the Board's decision. The Board did not refer to evidence that demonstrates this long-term romantic relationship never raised security concerns during the countless visits over the course of 13 years nor when the Applicant's partner abruptly ended the relationship, despite the Applicant's legitimate feelings of rejection and dismissal.

[41] The Board hearing transcript demonstrates the Applicant had the opportunity to present his progress with respect to his relationships with women in detail.

[42] The Board gives several reasons explaining why it concludes the Applicant's attitude towards women indicates that an undue risk to the community continues to exist. The Board points to the incident with the female officer at the Archambault Minimum Security Institution. The Appeal Division in its reasons points to a Psychological Risk Assessment and a Community Assessment from 2022.

[43] With respect to the incident at the Archambault Minimum Security Institution, the Applicant stated he was attracted to the officer, making her feel uncomfortable. While this is unfortunate and inappropriate in such a situation, there is no indication that the officer was at an undue risk of violence during this interaction.

[44] The Psychological Risk Assessment and Community Assessment assess the risk of violence in the context of day parole as moderate in the short term. Longer-term risk of violence would need to be reassessed after 6 months in the community. As for the risk of sexual

recidivism, it is of “9% within five years after release, and 15.8% within 10 years after release”. The report ultimately recommends against day parole.

[45] These reports do not sufficiently address the Applicant’s Indigenous Social History, nor do they sufficiently assess the healing process the Applicant has engaged in. The Board was required to weigh these reports and evidence against mitigating factors, in accordance with the *Gladue* principles.

[46] In my view and considering the impact of the Applicant’s attitude towards women at the outcome of both decisions, it was incumbent upon the Board and Appeal Division to consider the long term relationship the Applicant entertained during his incarceration and his reaction, or lack thereof, when his partner put an end to it.

VI. Conclusion

[47] In my view, the two errors identified above warrant the intervention of the Court, even more so, considering all the positive *Gladue* factors identified by the Board and Appeal Division.

[48] The file will therefore be sent back to the Appeal Division for a new determination in accordance with these reasons.

[49] On a final note, I also find troubling the fact that the Board and Appeal Division assessed the Applicant’s right to both day parole and full parole. In my view, these do not present the same risk to society and require different assessments. The Applicant never asked for a full

parole; he even specifically stated he was not ready for full parole. The Appeal Division is therefore required to only assess the Applicant's right to day parole.

[50] The Applicant does not seek costs and none will be granted.

JUDGMENT in T-1366-23

THIS COURT'S JUDGMENT is that:

1. The Application for Judicial Review is granted;
2. The file is sent back to the Appeal Division of the Parole Board of Canada for a new determination in accordance with these reasons;
3. No costs are granted.

"Jocelyne Gagné"
Associate Chief Justice

FEDERAL COURT

SOLICITORS OF RECORD

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