Date: 20080718

Docket: T-2243-07

Citation: 2008 FC 889

Ottawa, Ontario, July 18, 2008

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

JOHN DIXON

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Dixon, an inmate in a federal penitentiary, asks how long must he wait to have an application for day parole considered by the National Parole Board, after his previous application was rejected. He says it is six months; the Board says it is two years. For the reasons that follow, I find that he need wait no longer than six months after he makes a valid application for day parole.

BACKGROUND

[2] On November 23, 1983, Mr. Dixon was sentenced to serve a term of life imprisonment. He is currently incarcerated at Mountain Institution in Agassiz, British Columbia. The National Parole Board released Mr. Dixon on day parole on August 15, 2005; however, his day parole was revoked on December 6, 2005.

[3] On March 15, 2007, the Board denied Mr. Dixon's application for parole. Mr. Dixon submitted a further application for day parole on May 17, 2007. Both parties agree that this application was premature as subsection 122(4) of the *Corrections and Conditional Release Act*, S.C. 1992, c.20, provides that where the Board has decided not to grant day parole, as it did on March 15, 2007, no further application for day parole may be made until six months after that decision. Therefore, the earliest Mr. Dixon could reapply for day parole was September 15, 2007. Accordingly, Mr. Dixon submitted another application for day parole on September 17, 2007. His counsel then asked the Board whether it would be providing Mr. Dixon with a day parole hearing by March 17, 2008, on the basis that such a hearing was required by subsection 157(2) of the *Corrections and Conditional Release Regulations*, SOR/92-620.

[4] On November 25, 2007, the Board responded. The Board decided that it was not obliged to review Mr. Dixon's request for day parole until February 2009. That decision reads as follows:

> I am writing in response to your letter of October 30, 2007 in which you request, based on an interpretation of the legislation, that this offender's case be reviewed for day parole prior to March 17, 2008.

> This offender's case was reviewed by the National Parole Board on March 15, 2007. In accordance with s.123(5) of the *Corrections and Conditional Release Act*, the next statutory review has been scheduled for February 2009.
>
> The Board's policy allows for reviews in addition to the one required by law "when information and a recommendation are received from correctional authorities indicating that the offender, if released, will not present an undue risk to reoffend."
>
> In summary, apart from the review to be held within the mandated two-year time frame and subject to the policy, an offender can apply for day parole, which application will be considered within the regulatory timeframe provided for initial review prescribed [by] the *Corrections and Conditional Release Regulations*.
>
> I have taken the liberty of contacting Mr. Dixon's parole officer, Ms. Sharon Bath, who has advised that she is not currently supporting conditional release for the offender and that an Assessment for Decision will not be submitted to the Board at this time.

[5] Mr. Dixon is seeking judicial review of this decision of the Board denying him a day parole review prior to February 2009. He seeks an order in the nature of mandamus requiring the Board to accept his application for day parole dated September 17, 2007, and to review that application within six months of the date of application as required by section 157(2) of the Regulations. As the hearing of this application occurred after that six month period, counsel advised the Court that Mr. Dixon is now seeking an order declaring that he had a right to have his application for day parole heard within six months of the date of application, that is by March 17, 2008, and a further order directing the Board to conduct such a hearing on his application as soon as possible.

[6] The Applicant raises three issues on this application; however, it is clear from the submissions of the parties that the real issue for determination is the proper interpretation of sections

122 and 123 of the Act and section 157(2) of the Regulations in the context of Mr. Dixon's circumstances and his most recent application for day parole. Specifically, the dispute between the parties is whether Mr. Dixon's application made September 17, 2007, must be considered by the Board within six months following the date of that application, i.e. before March 17, 2008, or whether the Board is only obliged to consider that application within the two-year period following the initial denial of day parole, i.e. before March 15, 2009.

STATUTORY PROVISIONS

[7] The relevant provisions of the Act dealing with day parole that must be considered in this application are subsections 122(1), 122(4) and 123(5), which read as follows:

122.(1) Subject to subsection 119(2), the Board shall, on application, at the time prescribed by the regulations, review, for the purpose of day parole, the case of every offender other than an offender referred to in subsection (2).	**122.(1)** Sur demande des intéressés, la Commission examine, au cours de la période prévue par règlement, les demandes de semi-liberté.
122.(4) Where the Board decides not to grant day parole, no further application for day parole may be made until six months after the decision or until such earlier time as the regulations prescribe or the Board determines.	**122.(4)** En cas de refus, le délinquant doit, pour présenter une nouvelle demande, attendre l'expiration d'un délai de six mois à compter de la date du refus ou du délai inférieur que fixent les règlements ou détermine la Commission.
123.(5) Where the Board decides not to grant parole following a review pursuant to section 122 or subsection (1) or a review is not made by	**123.(5)** En cas de refus de libération conditionnelle dans le cadre de l'examen visé à l'article 122 ou au paragraphe (1) ou encore en l'absence de

virtue of subsection (2), the Board shall conduct another review within two years after the later of

(*a*) the date on which the first review under this section took place or was scheduled to take place, and

(*b*) the date on which the first review under section 122 took place,

and thereafter within two years after the date on which each preceding review under this section or section 122 took place or was scheduled to take place, until

(*c*) the offender is released on full parole or on statutory release;

(*d*) the sentence of the offender expires; or

(*e*) less than four months remains to be served before the offender's statutory release date.

tout examen pour les raisons exposées au paragraphe (2), la Commission procède au réexamen dans les deux ans qui suivent la date de la tenue du premier examen en application du présent article ou de l'article 122, ou à celle fixée pour cet examen, selon la plus éloignée de ces dates, et ainsi de suite, dans les deux ans, jusqu'à la survenance du premier des événements suivants :

a) la libération conditionnelle totale ou d'office;

b) l'expiration de la peine;

c) le délinquant a moins de quatre mois à purger avant sa libération d'office.

The relevant provision of the Regulations dealing with day parole that is relevant to this application is subsection 157(2), which reads as follows:

157.(2) Subject to subsection (3), the Board shall review the case of an offender who applies, in accordance with subsection (1), for day parole within six months after receiving the

157.(2) Sous réserve du paragraphe (3), la Commission doit examiner le cas du délinquant qui présente une demande de mise en semi-liberté conformément au

application, but in no case is the Board required to review the case before the two months immediately preceding the offender's eligibility date for day parole.	paragraphe (1) dans les six mois suivant la réception de la demande, mais elle n'est pas tenue de le faire plus de deux mois avant la date de l'admissibilité du délinquant à la semi-liberté.

STANDARD OF REVIEW

[8] The Respondent submits that the appropriate standard of review of the Board's decision is reasonableness. The Respondent acknowledges that one could arguably characterize the issue in this application as a question of law such that correctness is the applicable standard. However, the Respondent submits that the determination of the maximum period prior to a day parole review depends not solely on the interpretation of the Act and Regulations but the interrelationship of those provisions within the context of the parole system. It is submitted that the resolution of the issue raised by Mr. Dixon depends on an analysis of the entire legislative regime and the manner in which the Board applies those provisions. Accordingly, the Respondent argues: "A resolution of the issue without a degree of deference to the Board's experience in processing and deciding these applications and indeed its expertise in employing the interrelated provisions of its enabling legislation along with its policies it has developed over time would be to, in large part, defeat one of the purposes for which it was established, the effective monitoring of the offender's rehabilitative progress".

[9] In my view, the foundation for this application and the determination of the Board in the decision under review depends solely on an interpretation of the relevant provisions of the Act and Regulations. If, as I have found, the issue before the Court is a question of law alone, then,

the Respondent submits, it was not a question that lies outside the expertise of the Board and as long as the Board's interpretation of the Act and Regulations was reasonable, it should not be disturbed on review. I do not agree.

[10] A question of statutory interpretation is a question of law. The applicable standard of review when reviewing impugned decisions relating to an interpretation of a statute is correctness. The Board has no greater or special expertise in this regard than this Court. Justice Snider in *Latham v. Canada*, 2006 FC 284, held that the proper standard of review of a decision of the Appeal Division of the National Parole Board that involves statutory interpretation is correctness. In my view, decisions of the Board that involve statutory interpretation are also subject to the standard of correctness. In this instance the Board's decision relies entirely on the proper interpretation of the relevant sections of the Act and Regulations. The interpretation given these legislative provisions by the Board must be correct.

[11] Although the parties differ in their interpretation of the relevant statutory provisions, both claim that their interpretation is supported by the plain meaning of the words of the Act and Regulations.

APPLICANT'S INTERPRETATION

[12] Mr. Dixon submits that subsection 122(1) governs all applications for day parole and sets out the general rule that the Board is required to review the case of every offender who applies for day parole at the time prescribed by the Regulations, subject to certain exceptions. There are

two exceptions to the general rule set out in subsection 122(1). It is common ground that neither applies to Mr. Dixon. Accordingly, it is submitted, the general rule applies to him.

[13] Mr. Dixon submits that there is nothing in the Act that limits an offender's right to continue making applications for day parole until he or she is successful. The only restriction on his right to apply for day parole is subsection 122(4) of the Act which provides that an application cannot be made earlier than six months following a decision of the Board denying him day parole. He points out that this subsection is the only provision in the Act that actually speaks to the making of an application for day parole. Therefore, he submits all day parole applications are made pursuant to subsection 122(1).

[14] In short, it is his position that while an offender must wait at least six months after a day parole application is denied before he or she can reapply, the offender is entitled to reapply under subsection 122(1) of the Act. He submits that he filed a proper application for day parole on September 17, 2007 pursuant to subsection 122(1) of the Act, and pursuant to subsection 157(2) of the Regulations, the Board was required to consider it within six months after receiving it. On this view, the Board was required to review with his application on or before March 17, 2008.

RESPONDENT'S INTERPRETATION

[15] The Respondent submits that different statutory provisions apply depending on whether the offender is making an initial application for day parole or a subsequent application for day parole. The parties are agreed, at least as far as concerns what the Respondent describes as the

initial application, that the application is made pursuant to subsection 122(1) of the Act and, in accordance with subsection 157(2) of the Regulations, it must be considered by the Board within six months of the application.

[16] The fundamental difference between the parties' interpretations of subsequent applications for day parole arises from the Respondent's position that subsection 122(1) of the Act and therefore subsection 157(2) of the Regulations does not apply to subsequent applications for day parole.

[17] The Respondent submits that subsequent day parole applications are made pursuant to subsection 122(4) of the Act. Subsection 122(4) precludes an offender from making a subsequent application until six months have elapsed after the Board's refusal to grant day parole. Thus, it is argued, subsequent applications are made pursuant to this provision and then, it is submitted, subsection 123(5) applies to that subsequent application requiring that it be heard within two years of the decision denying the initial application. It is submitted by the Respondent that the requirement in subsection 157(2) of the Regulations that a hearing occur within six months only applies to a subsection 122(1) or initial application, and to no other.

[18] In short, the Respondent submits that Mr. Dixon's subsequent day parole application dated September 17, 2007, need only be considered by the Board within two years after the last rejected application; that is before March 15, 2009.

ANALYSIS

[19] The Supreme Court of Canada in *Re Rizzo & Rizzo Shoes*, [1998] 1 S.C.R. 27, accepted and endorsed the view of Elmer Drieger in Construction of Statutes (2nd ed. 1983) that statutory interpretation cannot be founded on the wording of the legislation alone. He writes:

> Today there is only one principle or approach, namely, the words of the Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[20] In the analysis that follows I will look first at the words in their grammatical and ordinary sense in the scheme of the Act to see whether either party's interpretation is more strongly supported. I will then turn to consider the object of the Act and the intention of Parliament to see whether those considerations support or challenge the previous analysis.

Grammatical and Ordinary Sense of the Words

[21] In my view, the Applicant's interpretation more closely accords with the grammatical and ordinary sense of the words of the relevant statutory provisions in the context of the Act. The Respondent's interpretation requires a reading in of the concepts of an "initial application" and "subsequent applications" for day parole. There is nothing in the ordinary sense of the words used in subsection 122(1) that would limit its application only to an offender's initial application for day parole.

[22] The Respondent's interpretation also requires that subsection 122(4) be read as the statutory provision under which subsequent day parole applications are made. However, the ordinary sense

of the words in that subsection is that it sets out a restriction on the timing of an application for day parole made after a previous application was denied. Unlike subsection 122(1), subsection 122(4) does not contain any obligation that the Board shall review these subsequent applications. The Respondent argues that the requirement that the Board review these subsequent applications is found in subsection 123(5). In my view, this cannot be a proper interpretation because that interpretation results in subsection 122(4) being unnecessary in the scheme of the Act.

[23] That result arises for the following reasons. First, there is nothing in subsection 123(5) that indicates that the further reviews it states that the Board is to conduct are to be conducted only if there is a subsequent application. In its grammatical and ordinary meaning subsection 123(5) requires the Board to conduct further day parole reviews whether or not the offender ever files another application for parole. The only condition precedent to the requirement under subsection 123(5) that the Board conduct a further day parole review is that it had previously denied an application for day parole made under subsection 122(1). Once the Board has denied such an application, then subsection 123(5) requires that it conduct another review of that offender's eligibility for day parole within the two-year time frame set out in that provision.

[24] If the Respondent's interpretation is correct that subsequent applications are governed by subsection 122(4) and those subsequent applications must be considered by the Board within the two-year period prescribed by 123(5), then subsection 122(4) becomes redundant as there will be an automatic review of an offender's right to day parole within the period prescribed in subsection 123(5) whether or not the offender makes a further application. The interpretation to be preferred is

that which does not make statutory provisions redundant or unnecessary. In this case, that is the Applicant's interpretation.

[25] Accordingly, in my view, the position advanced by the Applicant more closely accords with the grammatical and ordinary sense of the words in the context of the Act.

[26] Is this interpretation supported or countered by examining the objective of the Act and Parliament's intention?

The Object of the Act

[27] Section 3 of the Act sets out the purpose of the correctional system as a whole:

3. The purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful and safe society by (*a*) carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and (*b*) assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community.	**3.** Le système correctionnel vise à contribuer au maintien d'une société juste, vivant en paix et en sécurité, d'une part, en assurant l'exécution des peines par des mesures de garde et de surveillance sécuritaires et humaines, et d'autre part, en aidant au moyen de programmes appropriés dans les pénitenciers ou dans la collectivité, à la réadaptation des délinquants et à leur réinsertion sociale à titre de citoyens respectueux des lois.

[28] The object of reintegrating offenders into the community as law abiding citizens seems to capture the purpose of day parole. The Respondent submitted that its interpretation that reviews are required only every two years accords with this purpose as this extended period increases the likelihood that offenders who seek release have experienced a reduction in their risk and are better prepared for release when their applications are considered by the Board. It was noted that while two-years is the general rule, the Board may consider a review at an earlier time if it is of the view that it is warranted in the particular circumstances of the offender.

[29] On the other hand, in addition to the purpose in section 3, the Applicant points to section 4 of the Act which provides that in achieving the purposes of the Act, the Correctional Service is to "use the least restrictive measures consistent with the protection of the public, staff members and offenders" and that "offenders retain the rights and privileges of all members of society" except as are necessarily removed or restricted as a result of the sentence. If the Applicant's interpretation is accepted, the offender has some control as to the timing of reviews in advance of the two-year automatic review. An offender who feels that he has been rehabilitated and is ready to rejoin society has the right to apply and be considered for day parole within a one-year period. This provides both the least restrictive measure on the offender and accords with his or her rights as a citizen.

[30] In my view, the objects of the Act are arguably consistent with both interpretations and accordingly this consideration offers little to support one over the other.

The Intention of Parliament

[31] Although the Respondent made submissions as to the intention of Parliament in support of the interpretation it advanced, I have not found the evidence presented to be demonstrative of any particular Parliamentary intention. Specifically, the Court was provided with some of the provisions of the Board's Policy Manual, the Board's 1994 Strategic Action Plan, and passages from the Board's Trainer Manual. These documents indicate how the Board interprets the statutory provisions in issue, but the Board's own interpretation is no assistance in determining Parliamentary intent. Further, it was precisely the Board's interpretation that resulted in this application.

[32] It was submitted that the 1994 Strategic Action Plan does offer evidence of Parliamentary intent as it was provided to the government prior to the introduction of Bill C-45 in 1995. That Bill amended the statutory provisions under consideration and, in particular, amended subsection 123(5) to make the two-year review periods applicable to day parole. It is submitted that this document, which shows the Board recommending a change from a one-year review to a two-year review, supports the Respondent's position that Parliament intended that reviews are only to be done every two years. It may be that the Board advised the government that it could save money and create efficiencies in the parole system if it were required to consider parole applications only every two years; however, this fails to address the question of whether in passing Bill C-45 this was Parliament's intention. No parliamentary debates or Ministerial comments were provided to the Court and accordingly, there is no foundation provided to support the Respondent's submission regarding the intention of Parliament. Further, the Court notes that the Summary included with Bill

C-45 makes no reference at all to the question under consideration here or the extension to two years relied on by the Respondent.

[33] While not argued by either party, I have considered the history of sections 122 and 123 of the Act in considering Parliamentary intention. In my view this analysis is quite telling and strongly supports the interpretation urged by the Applicant.

[34] Bill C-45 did not amend section 122 in any manner material to the issue at hand. Subsection 123(5), however, was materially amended. Prior to the amendment, subsection 123(5) read as follows:

123.(5) Where the Board decides not to grant full parole following a review pursuant to subsection (1) or a review is not made by virtue of subsection (2), the Board shall conduct another review within one year after the later of (*a*) the date on which the first review under this section took place or was scheduled to take place, and (*b*) the date on which the first review under section 122 took place, and thereafter within one year after the date on which each preceding review under this section or section 122 took place or was scheduled to take	**123. (5)** En cas de refus de libération conditionnelle totale dans le cadre de l'examen visé au paragraphe (1) ou encore en l'absence de tout examen pour les raisons exposées au paragraphe (2), la Commission procède au réexamen de cas dans l'année qui suit la date de la tenue du primer examen on application du présent article ou de l'article 122, ou à celle fixée pour cet examen, selon la plus éloignée de ces dates, et ainsi de suite, chaque année, jusqu'à la survenance du premier des événements suivants : *a*) la libération conditionnelle totale ou d'office; *b*) l'expiration de la peine;

place, until (*c*) the offender is released on full parole or on statutory release; (*d*) the sentence of the offender expires; or (*e*) less than four months remains to be served before the offender's statutory release date.	*c*) le délinquant a moins de quatre mois à purger avant sa libération d'office.

[35] It will be noted that Bill C-45 amended subsection 123(5) in two material respects. Firstly, prior to the amendment, subsection 123(5) like the rest of section 123, applied only to full parole and not to day parole. By deleting the word 'full' in subsection 123(5) and adding a reference to a review pursuant to section 122, that provision then had application to day parole as well as to full parole. Secondly, the maximum period prior to a further review was extended from one year to two years.

[36] Under the former Act day parole was only available if the offender applied pursuant to section 122; there was no automatic further review of day parole applications as there was for full parole applications under section 123. Accordingly, an offender wishing day parole would always have to make an application. The first such application would made under section 122 would be heard by the Board within six months as required by subsection 157(2) of the Regulations. Assuming it was denied, the offender could reapply for day parole after six months. On the Respondent's theory of the proper interpretation of section 122, which was not materially amended by Bill C-45, that subsequent application would be made pursuant to subsection 122(4) and not

subsection 122(1). The question then arises as to when the Board would be required to consider that subsequent application.

[37] Subsection 157(2) of the Regulations, which obliges the Board to conduct its review within six months, has not changed since the former Act. That subsection only applies to day parole applications made pursuant to subsection 122(1) or (2) of the Act. Accordingly, on the Respondent's interpretation, the requirement to consider a day parole application within six months would not apply to a subsequent application made pursuant to subsection 122(4) of the Act. The result would be that under the former Act the Board could consider the subsequent application at any time it might choose, subject possibly to a requirement of reasonableness. That, in my view, is an absurd result.

[38] It is absurd that the Board would be required to consider an initial day parole application within six months but could take however long it wished to consider a subsequent application.

[39] The Applicant's interpretation of the relevant statutory provisions is to be preferred because it is in keeping with the ordinary language of the Act and Regulations and its application does not create any contradictions or absurdities. Specifically, I hold that Mr. Dixon was entitled to make a new application for day parole at any time on or after September 15, 2008, and the Board was required under subsection 157(2) of the Regulations to consider that application within six months.

[40] Accordingly this application for judicial review is allowed with costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is allowed with costs.
2. The Applicant was entitled to have his application for day parole, which he submitted September 17, 2007, reviewed by the National Parole Board before March 17, 2008, pursuant to subsection 157(2) of the *Corrections and Conditional Release Regulations*, SOR/92-620; and
3. The National Parole Board is hereby directed to review the Applicant's application for day parole dated September 17, 2007, as soon as possible.

"Russel W. Zinn"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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