Federal Court  Cour fédérale

Date: 20110627

Docket: T-1001-10

Citation: 2011 FC 786

Toronto, Ontario, June 27, 2011

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

MJ

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

and

ATTORNEY GENERAL OF ONTARIO

Intervener

REASONS FOR ORDER AND ORDER

[1] The central issue in the present Application is whether procedural fairness must be accorded by the Respondent Minister, prior to a decision being made to disclose a pardoned criminal record pursuant to s. 6 (3) of the *Criminal Records Act* (R.S.C., 1985, c. C-47) (*CRA*). The Minister's

present policy is to make such a decision without notice to the person to whom the record pertains. This policy was put into practice with respect to the Applicant's pardoned record, resulting in the present judicial review Application. The Applicant's argument is that the decision rendered by the Minister is made in error of law because he was not given notice that an application had been made by a police authority for disclosure of the record for use in a criminal prosecution against him, and he was not given an opportunity to be heard prior to the decision being made.

I. The Legislative Scheme of the *CRA*

[2] The following précis of key *CRA* provisions provides the legislative context of the decision under review.

[3] The National Parole Board "has exclusive jurisdiction to grant or refuse to grant or to revoke a pardon" (s. 2.1). When a person is granted a pardon it "is evidence of the fact that the [National Parole Board], after making inquiries, was satisfied that the applicant for the pardon was of good conduct, and the conviction in respect of which the pardon is granted or issued should no longer reflect adversely on the applicant's character" (subpar. 5 (a)(i) and (ii)). With respect to record keeping, "any record of a conviction in respect of which a pardon has been granted that is in the custody of the Commissioner [of the R.C.M.P.] or of any department or agency of the Government of Canada shall be kept separate and apart from other criminal records, and no such record shall be disclosed […] without the prior approval of the Minister" (s. 6 (2)). Most relevant to the present Application is the requirement that, before granting approval for disclosure of a record, the Minister shall "satisfy himself that the disclosure is desirable in the interests of the administration of justice" (s. 6 (3)) [Emphasis added].

[4] In making a decision to disclose or not to disclose, s. 4 of the *Criminal Records Regulations* (SOR/2000-303) (*CRR*) requires that the Minister give consideration to: the offences for which the applicant has been convicted, including those for which pardons have been granted or issued, and the relevancy of the offences to the purpose for which disclosure is being considered; the nature of the offences, including whether the offences involve violence, children or vulnerable persons, or breach of trust; the length of time since the applicant committed offences for which pardons have been granted or issued; the age of the applicant at the time the applicant committed offences for which pardons have been granted or issued; and the sentences imposed for offences committed by the applicant, including those offences for which pardons have been granted or issued.

[5] An important feature of the *CRA* is that, with respect to the proposed revocation of a pardon by the National Parole Board, the Board "shall notify the person to whom the pardon was granted of its proposal in writing and advise that person that he or she is entitled to make, or have made on his or her behalf, any representations to the Board that he or she believes relevant either in writing or, if the Board so authorizes, orally at a hearing held for that purpose" (s. 7.1). No similar procedural fairness provision exists in the *CRA* with respect to a proposed decision to disclose a record by the Minister.

II. The Minister's Policy Respecting Disclosure Decisions

[6] The affidavit evidence of Ms. Mary Elizabeth Campbell, the Director General of the Corrections and Criminal Justice Directorate of the Department of Public Safety and Emergency

Preparedness, who is responsible for the processing of requests for disclosure of pardoned records, provides the Minister's policy, and the rationale upon which it is based:

> The formulation of any recommendation for disclosure is done in consideration of these statutory requirements, the purpose of the pardon and in the circumstances in which the disclosure is authorized under the CRA.
>
> The CRA does not require nor anticipate the subject of the pardon will be provided a hearing either in person, in writing, electronically or otherwise, before the Minister's [sic] considers a disclosure request.
>
> When it is formulating a recommendation to the Minister on disclosure for a limited and particular purpose, consideration is given to the public interest factors that the Minister is required to consider, i.e. if the disclosure is in the interest of the administration of justice, or for any purpose related to the safety or security of Canada or any state allied or associated with Canada. The Minister also considers certain aspects relating to the person as presecribed by law such as paragraphs 4 (c) and (d) of the Regulations. Submissions by the pardoned individual are not required in order to determine those factors.
>
> In order to make this recommendation, the Legislator has not found it necessary nor relevant for the pardoned individual to have an opportunity to make representations since the pardoned individual would not likely be in a position to consider what would be in the interest of the administration of justice when deciding if a record should be disclosed or not.
>
> This emanates from the reality that notification of a pardon records [sic] disclosure could jeopardize the very reason for which disclosure is sought. For example, notification to a pardoned offender that a request for a pardoned criminal record has been made could greatly impact criminal investigations, criminal prosecutions or other law enforcement activities.
>
> Notification to a pardoned offender that a pardoned criminal record will be disclosed could also greatly impact criminal investigations, criminal prosecutions or other law enforcement activities.
>
> [Emphasis added]

(Affidavit of Mary Elizabeth Campbell, Respondent's Record, pp. 3 - 4)

III. The Minister's Decision in the Present Case

A. *Compliance with the CRA and the CRR*

[7] In her affidavit, Ms. Campbell describes the uncontested circumstances in the present case as follows:

> In or about April 2010, Peel Regional Police made a request in writing to the Minister for pardoned criminal record disclosure relating to the Applicant herein [to be used in his upcoming trial]. […]
>
> I assigned the initial review of the request to a senior analyst of the Directorate, Bill Wilson. He undertook to analyze the request in light of the scheme created by the CRA and the CRR, and relevant policies. I concurred fully with his analysis, which we presented to the Deputy Minister, the essence of which is follows [sic].
>
> The letter from Peel Regional Police included the following salient information: that the Applicant was charged with sexual assault and sexual interference; the charges were in respect of two children, ages ten and eleven years old; the charges related to incidences from June 2003; the Peel Regional Police had an old police report giving rise to their belief that the Applicant was previously convicted with several criminal offences including a sexual offence; and the trial of the Applicant with respect to the recent charges was to be held on June 14, 2010.
>
> The individual facts of this case, which were given regard in the formulation of the Directorate's recommendation to the Deputy Minister, and thereafter put before the Minister, included the following: the age of the Applicant at the time of earlier convictions: in 1985 at the age of 23; in 1987, and in 1988 when sentenced to 15 months and probation for 12 months upon conviction; the nature of the 1988 convictions, namely for sexual interference with a female under 14 years of age and assault causing bodily harm; the nature of the new charges against the Applicant for sexual assault and interference involving two children under 14 years of age; that the police investigators were

> already aware of the existence of a pardon; the purpose for which disclosure was sought by the Peel Regional Police, namely for use in the prosecution of the new charges; and that if the request for disclosure of the Applicant's pardoned records was not allowed, the provincial Crown's ability to assess whether or not the new charges should proceed to trial would be undermined, or alternatively, evidence which the court might deem to be relevant would be pre-empted.
>
> On the basis of the above considerations, I supported a recommendation to the Deputy Minister that disclosure was appropriate for the administration of justice as permitted under section 6 (3) of the CRA.
>
> The Deputy Minister concurred, and on or about April 26, 2010, he presented the above analysis and recommendation to the Minister for review and approval. […]
>
> On or about April 27, 2010, the Minister, presented with and on the basis of the above analysis [sic], exercised his authority to allow disclosure in the interest of the administration of justice.
>
> (Affidavit of Mary Elizabeth Campbell, Respondent's Record, pp. 4 - 6)

[8] It is agreed that the recommendations made by Ms. Campbell and the Deputy Minister constitute part of the reasons for the decision rendered by the Minister. In particular, the Deputy Minister's statement that "no further charges had been registered since 1988; however, the subject has been charged with historical sex offences involving children [and] the investigator, Crown attorney, and the court should be made aware of the previous convictions is a clear reason for disclosure" (Affidavit of Mary Elizabeth Campbell, Respondent's Record, p. 10). As part of his recommendation to the Minister, the Deputy Minister presented a draft order for the Minister's signature which, with the Minister's signed approval, the following passage constitutes the balance of the reasons: "it is apparent that [MJ] has resumed his 'criminal activities' and therefore his record should be available for court purposes" (Intervener's Record, p. 60).

[9] However, Counsel for the Applicant argues that the Minister's decision should be set aside on the basis of a failure to properly consider the factors required by the *CRR* as quoted above in paragraph 5 of these reasons. This argument is based on the fact that, prior to the making of the request to the Minister for disclosure the National Parole Board was asked to revoke the Applicant's pardon, and on January 22, 2011 this request was refused without reasons being provided (see: Applicant's Motion Record, Tab 4E, p. 2). According to the argument, the Minister cannot claim the expertise of the National Parole Board in parole matters, and in reaching a decision on the disclosure of the record, the Minister was required to inform himself of the reasons for the National Parole Board's decision, or allow a representative of the National Parole Board to participate in the Minister's decision-making process.

[10] I dismiss this argument on the basis that there is no legislative or regulatory support for the argument. The mandate and authority of the National Parole Board and the Minister under the *CRA* are mutually exclusive. In my opinion, on evidentiary matters, the Minister's decision is in full compliance with the requirements of the *CRA* and the *CRR*.

IV. Use of the Pardoned Record Disclosed

[11] During the course of oral argument, Counsel for the Attorney General of Ontario confirmed that the disclosed record is being put to use in the current criminal proceedings against the Applicant in the Ontario Superior Court of Justice on a motion that it be admitted as evidence on the trial as similar fact evidence (see: Intervener's Record, p. 28 – 43). Counsel for the Attorney General of Ontario also confirmed that admission depends on the outcome of a *voir dire* in which the Applicant

has full criminal due process rights. Indeed, during the passage of time from the date of the disclosure of the record to the date of the hearing of the present Application, the Superior Court has acted in recognition of this requirement. A *voir dire* with respect to the record has already been conducted, in which the Applicant exercised his criminal due process rights, a decision is expected on its admission on June 30, 2011, and the trial is to begin on August 2, 2011. It is agreed that if the Minister's decision is set aside as a result of the present Application, the pardoned record can not be used in the trial.

V. Disclosure and the Principle of Procedural Fairness

[12] Counsel for the Applicant's principal line of argument is that the Minister's policy as above stated was applied in the present case in error of law because its application offends the principle that "public decision makers are required to act fairly in coming to decisions that affect the rights, privileges or interests of an individual" (*Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, paragraph 79). Counsel for the Applicant argues that the disclosure of the record affects an interest the Applicant holds, and, as a result, the Applicant was entitled to notice of the pending disclosure application and the opportunity to make representations to the Minister on the issue of disclosure.

[13] The interest that the Applicant holds is described as being placed in jeopardy of criminal sanction if his record is disclosed and, since his rights as an individual are part of the administration of justice, he should have been accorded procedural fairness to advance this interest prior to disclosure.

[14] Counsel for the Minister and Counsel for the Attorney General of Ontario argue that no duty of fairness was owed to the Applicant. Two grounds are advanced in support of this argument: as described above, unlike the situation of a revocation of a pardon, there is no requirement in the *CRA* that notice be given to the person named in a record before a decision is made on disclosure; and, since the Minister's decision is not dispositive, no procedural fairness need be accorded.

[15] In making the latter argument, the central point of analysis is paragraph 22 of Justice L'Heureux-Dubé's decision in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817:

> Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances. I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.
>
> [Emphasis added]

[16] Thus, according to the argument, until the Applicant is "affected" by the proposed use of the record disclosed, no procedural fairness must be accorded. In my opinion, the general principles stated by Justice L'Heureux-Dubé support this argument when considered in the context of the *CRA* and the use to be made of the disclosed record. I find that the Applicant's rights to procedural fairness are not affected until the record is put to use on a motion for its admission as similar fact evidence in the trial of the charges pending against him, and it is only at that point that the Applicant

must be accorded criminal due process. As stated above, in fact, this accord has already been provided.

VI. Ancillary Arguments

[17] Counsel for the Applicant argues that since the pardoned record was known to the Peel Regional Police from their own files; and since pardoned records are to be kept separate and apart from other criminal records by the Commissioner of the R.C.M.P pursuant to s. 6 (2) of the *CRA*; and since public confidence in the police must be maintained; the apparent record keeping failure in the present case should be "deemed unacceptable" by setting the Minister's decision aside. I dismiss this argument because I find that no record keeping failure occurred. At the time the Applicant received his pardon, he was warned by the National Parole Board that "a pardon does not ensure that either municipal or provincial agencies or private citizens will not disclose a criminal record, because the *CRA* applies only to records kept at the federal level" (Applicant's Motion Record, Tab 4B, p. 2).

[18] Counsel for the Applicant also argues that because the National Parole Board did not revoke his pardon even though he had been charged with new offences, the Applicant had an expectation that the pardoned record would remain separate and apart and would not be adversely used against him. I dismiss this argument because there is no connection in law between the National Parole Board's exercise of discretion regarding revocation of a pardon, and the Minister's exercise of discretion regarding disclosure of a pardoned record.

[19] Counsel for the Applicant further argues that, because, as a matter of policy, disclosure requests are handled *ex parte* because of a potential risk to police investigations and prosecutions, in the present case, notice should have been given because no risk was in play; the Applicant was already charged with new criminal offences when the disclosure request was made.

[20] In my opinion, the risk to law enforcement by giving notice of an application for disclosure, as addressed in the Minister's policy, is realistic. The fact that the risk might not come into play in each and every case does not detract from the validity of the policy, and it also does not affect the lawfulness of a Minister's decision to disclose where notice is not provided in a case where such risk does not exist. This is so because, as found above, disclosure itself of a pardoned record does not affect an interest held by the person to whom the record pertains.

[21] Counsel for the Applicant finally argues that the Minister's decision should be set aside for a reasonable apprehension of bias. The argument is that: since the present Minister has proposed amendments to the *CRA* that will make it impossible for a person with three prior convictions to obtain a pardon; and since the Applicant has three prior convictions; and since the Minister decided to disclose the record, the Minister's decision is suspect for bias. I dismiss this argument because, in my opinion, the mere coincidence of the factors advanced does not constitute a credible foundation for a bias argument considered against the clear and compelling reasons provided by the Minister for reaching the decision under review.

VII. Conclusion

[22] As a result, I find there is no error in law in the application of the Minister's policy in the decision presently under review.

ORDER

THIS COURT ORDERS that

By consent, the style of cause is amended to name the Applicant as “MJ”.

For the reasons provided, the present Application is dismissed.

I make no award as to costs.

“Douglas R. Campbell”
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	MJ v. THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS v. ATTORNEY GENERAL OF ONTARIO
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