Federal Court  Cour fédérale

Date: 201301030

Docket: T-950-12

Citation: 2013 FC 1108

Ottawa, Ontario, October 30, 2013

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

PAUL FISHER

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application under subsection 18(1) of the *Federal Courts Act*, RSC 1985, c F-7, and subsection 24(1) of the *Canadian Charter of Rights and Freedoms* (Charter) for judicial review of a resolution of the Parole Board of Canada (Parole Board) dated 19 February 1996 that altered the parole conditions of offenders placed on "parole reduced status" (Amendment). The Applicant

seeks a declaration that his rights under section 7 of the Charter have been, and continue to be, infringed by the Amendment.

BACKGROUND

[2] The Applicant is a jazz musician who resides in Surrey, British Columbia. He is serving a life sentence that was imposed in 1972, when he was 15 years of age. He has been on full parole since 1983.

[3] After more than eight years of demonstrated stability in the community, the Applicant was granted parole-reduced status (PRS) on 24 September 1991. The attainment of PRS status was important to the Applicant, as it was the greatest level of freedom he could reasonably expect to ever obtain, and it allowed him to travel as a musician and promote his music. His parole officer at that time noted that the Applicant's progress had been continuous, and that he "has demonstrated that he has adjusted beyond all expectations." The only conditions placed on him were to:

a) Report once per year to the Vancouver Central Parole Office; and

b) Report any change in address to his parole supervisor.

[4] On 19 February 1996, the Amendment was passed, requiring offenders on PRS to comply with paragraph 161(1)(*a*) of the *Corrections and Conditional Release Regulations*, SOR/92-060 (Regulations), from which they had been previously exempt by virtue of subsection 133(6) of the *Corrections and Conditional Release Act*, SC 1992, c 20 (Act). The purpose of the Amendment was

to increase the monitoring of offenders, as there had been concerns about the safety of the community and parolees engaging in further criminal activity (Applicant's Affidavit, Exhibit L).

[5] The Applicant alleges that the practical effect of the Amendment was that it granted his parole officers the discretion to change his terms of parole. It also meant that the Applicant had to report in person every three months, which was the lowest level of intervention. The Applicant was not informed in writing of this Amendment until 24 January 2011, and no hearing ever took place. The Applicant found out about it when he was contacted by his parole officer, Dave Tocheri, in the fall of 1996, but was never given anything in writing to this effect at that time.

[6] During the intervening 15 years, the Applicant says he has been subject to greater restrictions than simply reporting to his parole officer. In fact, Mr. Toheri expressly regarded the Applicant as being back on regular parole, and recommended parole conditions prohibiting the Applicant from drinking (Applicant's Affidavit, pages 130, 155). Other restrictions placed on the Applicant included monthly police reporting and the requirement of travel permits. At one point the Applicant says his movement was restricted to a 12-square-block area around his home. On another occasion, a parole officer "marched" the Applicant into the hallway of his apartment in order to get an updated photograph for one of her files, and forced him to be photographed in front of his neighbours.

[7] The Applicant says that the Amendment has had serious negative consequences on his quality of life. Most importantly, the restrictions placed upon him have effectively destroyed his career in music, which the Applicant says "saved his life." The Applicant's various parole officers

also told him that he was unable to leave Canada, and it was not until 2011 that his parole officer confirmed that, because the Applicant had PRS status, he could get a passport and travel outside of Canada.

[8] Since the Applicant was convicted in 1972, he has maintained an exemplary record of:

a) Compliance with the law;

b) Adherence to correctional institute regulations and parole conditions;

c) Involvement in his community; and

d) General social progression and responsibility.

[9] The Applicant says that he has contacted many different people and institutions seeking advice on what he could do about the impact of the Amendment on his freedom and life. These included Mr. Stockwell Day, the Association in the Defence of the Wrongly Convicted, Pivot Legal Society, and many different lawyers. The Applicant's counsel wrote to the Parole Board in November, 2010 on the Applicant's behalf. The Parole Board responded by way of letter dated 24 January 2011, informing him about the Amendment.

[10] The Applicant also wrote to the Parole Board attempting to appeal his parole conditions (Applicant's Affidavit, Exhibit BB). This letter is undated but was received on 8 December 2011. By letter dated 14 December 2011, the Vice-Chairperson of the Parole Board of Canada Appeals Division confirmed that no "decision" had been rendered in the Applicant's case. The letter said that as the notification the Applicant received on 24 January 2011 informing him of the Amendment was not a decision, the Appeal Division is "unable to take any action."

DECISION UNDER REVIEW

[11] The Amendment under review in this application ultimately decided that all offenders on parole, including the Applicant, would be governed by the standard reporting requirements set out in subsection 161(1) of the Regulations. The Parole Board said that it was making this change because:

> …Difficulties have been encountered in maintaining contact with some offenders, and other offenders have become involved in further criminal activity.
>
> In view of the foregoing, the Board is of the view that it is not possible to monitor adequately the on-going risk presented by offenders in the community who are on "parole reduced status," given the requirement only to report (in person or in writing) once per year.

[12] The Parole Board concluded that it considered it necessary for offenders to "report to the parole supervisor as instructed by the parole supervisor."

ISSUES

[13] The Applicant submits the following issue in this application:

a. Whether the Parole Board, in passing the Amendment and implementing it through the Correctional Service of Canada, acted contrary to section 7 of the Charter.

STATUTORY PROVISIONS

[14] The following provisions of the Act are applicable to this proceeding:

Relief from conditions	**Dispense ou modification des conditions**
133. (6) The releasing authority may, in accordance with the regulations, before or after the release of an offender, (a) in respect of conditions referred to in subsection (2), relieve the offender from compliance with any such condition or vary the application to the offender of any such condition; or (b) in respect of conditions imposed under subsection (3), (4) or (4.1), remove or vary any such condition.	**133.** (6) L'autorité compétente peut, conformément aux règlements, soustraire le délinquant, avant ou après sa mise en liberté, à l'application de l'une ou l'autre des conditions du présent article, modifier ou annuler l'une de celles-ci.

[15] The following provisions of the Regulations are applicable to this proceeding:

161. (1) For the purposes of subsection 133(2) of the Act, every offender who is released on parole or statutory release is subject to the following conditions, namely, that the offender	**161.** (1) Pour l'application du paragraphe 133(2) de la Loi, les conditions de mise en liberté qui sont réputées avoir été imposées au délinquant dans tous les cas de libération conditionnelle ou d'office sont les suivantes :
(a) on release, travel directly to the offender's place of residence, as set out in the release certificate respecting the offender, and report to the offender's parole supervisor immediately and thereafter as	a) dès sa mise en liberté, le délinquant doit se rendre directement à sa résidence, dont l'adresse est indiquée sur son certificat de mise en liberté, se présenter immédiatement à son surveillant de liberté

instructed by the parole supervisor;

conditionnelle et se présenter ensuite à lui selon les directives de celui-ci;

(b) remain at all times in Canada within the territorial boundaries fixed by the parole supervisor;

b) il doit rester à tout moment au Canada, dans les limites territoriales spécifiées par son surveillant;

(c) obey the law and keep the peace;

c) il doit respecter la loi et ne pas troubler l'ordre public;

(d) inform the parole supervisor immediately on arrest or on being questioned by the police;

d) il doit informer immédiatement son surveillant en cas d'arrestation ou d'interrogatoire par la police;

(e) at all times carry the release certificate and the identity card provided by the releasing authority and produce them on request for identification to any peace officer or parole supervisor;

e) il doit porter sur lui à tout moment le certificat de mise en liberté et la carte d'identité que lui a remis l'autorité compétente et les présenter à tout agent de la paix ou surveillant de liberté conditionnelle qui lui en fait la demande à des fins d'identification;

(f) report to the police if and as instructed by the parole supervisor;

f) le cas échéant, il doit se présenter à la police, à la demande de son surveillant et selon ses directives;

(g) advise the parole supervisor of the offender's address of residence on release and thereafter report immediately

g) dès sa mise en liberté, il doit communiquer à son surveillant l'adresse de sa résidence, de même que l'informer sans délai de :

(i) any change in the offender's address of residence,

(i) tout changement de résidence,

(ii) any change in the offender's normal occupation, including

(ii) tout changement d'occupation habituelle, notamment un changement

employment, vocational or educational training and volunteer work,	d'emploi rémunéré ou bénévole ou un changement de cours de formation,
(iii) any change in the domestic or financial situation of the offender and, on request of the parole supervisor, any change that the offender has knowledge of in the family situation of the offender, and	(iii) tout changement dans sa situation domestique ou financière et, sur demande de son surveillant, tout changement dont il est au courant concernant sa famille,
(iv) any change that may reasonably be expected to affect the offender's ability to comply with the conditions of parole or statutory release;	(iv) tout changement qui, selon ce qui peut être raisonnablement prévu, pourrait affecter sa capacité de respecter les conditions de sa libération conditionnelle ou d'office;
(h) not own, possess or have the control of any weapon, as defined in section 2 of the *Criminal Code*, except as authorized by the parole supervisor; and	h) il ne doit pas être en possession d'arme, au sens de l'article 2 du Code criminel, ni en avoir le contrôle ou la propriété, sauf avec l'autorisation de son surveillant;
(i) in respect of an offender released on day parole, on completion of the day parole, return to the penitentiary from which the offender was released on the date and at the time provided for in the release certificate.	i) s'il est en semi-liberté, il doit, dès la fin de sa période de semi-liberté, réintégrer le pénitencier d'où il a été mis en liberté à l'heure et à la date inscrites à son certificat de mise en liberté.

ARGUMENTS

The Applicant

The Legal Background

[16] According to the Applicant, the Amendment is a "regulation" as that term is described in the *Interpretation Act*, RSC 1985, c I-21, subsection 2(1):

"regulation" includes an order, regulation, rule, rule of court, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established	Règlement proprement dit, décret, ordonnance, proclamation, arrêté, règle judiciaire ou autre, règlement administratif, formulaire, tarif de droits, de frais ou d'honoraires, lettres patentes, commission, mandat, résolution ou autre acte pris :
(*a*) in the execution of a power conferred by or under the authority of an Act, or	*a*) soit dans l'exercice d'un pouvoir conféré sous le régime d'une loi fédérale;

[17] The Applicant submits that the Amendment is such an instrument issued, made, or established by the Board pursuant to its authority to relieve offenders of any or all conditions of release under subsection 133(6) of the Act. As the Amendment is a regulation, the Applicant says that the limitation period stipulated in section 18.1 of the *Federal Courts Act* does not apply.

[18] Pursuant to sections 97 and 98 of the Act, the Commissioner of Correction passed the Commissioner's Directive 715-1 "Community Supervision" (CD 715-1). CD 715-1, which sets out the reporting requirements of offenders on PRS status (Huang Affidavit, Exhibit A). Should the Applicant fail to abide by the terms of his parole, his parole may be revoked and he will be returned to custody.

[19] The Applicant says it is contrary to CD 715-1 for those with PRS status to face monthly police reporting and to have their travel restricted within certain boundaries (CD 715-1, paragraph 22). CD 715-1 mandates a decreasing level of intervention as an offender's parole progresses. The lowest possible level is "Level E," which requires the offender to report at least every three months. The Applicant has been subject to Level E since the Amendment.

[20] Presently, the Parole Board of Canada Policy Manual, Section 7.1, paragraph 6, says that offenders who have been granted PRS status are relieved of all conditions under the Regulations, other than the requirement to:

a) Obey the law and fulfill all legal and social responsibilities;

b) Notify the district director of any change of address; and

c) Report to one's parole officer as instructed to do so by the parole officer.

Section 7 of the Charter

[21] For the Applicant's section 7 Charter rights to be engaged, his deprivation of liberty must have been caused by the action of the state. The Applicant says that is the case here; the only reason the Applicant's liberty has been curtailed is because of the Amendment.

[22] An individual's liberty interest is engaged whenever a law prevents a person from making fundamental personal choices. The interest protected by section 7 of the Charter must be broadly interpreted in consideration of the principles underlying the Charter as a whole and the need to

protect personal autonomy (*Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 [*Blencoe*] at paragraph 49). Liberty necessarily includes the notions of human dignity, personal autonomy, privacy and choice in decisions regarding an individual's fundamental being (*Blencoe* at paragraphs 50-53).

[23] Liberty interests are engaged in a variety of circumstances, including when persons are compelled to appear for fingerprinting, produce documents or testify, or not loiter in public areas (*Blencoe* at paragraph 49). In the context of correctional law, the Supreme Court of Canada has held that a change in the way a sentence is served can amount to a deprivation of liberty within the meaning of section 7 of the Charter (*Cunningham v Canada*, [1993] 2 SCR 143 [*Cunningham*] at paragraph 14).

[24] In *R v Beare*, [1988] 2 SCR 387 [*Beare*], the Supreme Court of Canada held that it was a deprivation of liberty for offenders to be compelled to appear at a time and place for identification purposes. However, in that case, the statutory provision in question was determined to be in accordance with the principles of fundamental justice.

[25] In the circumstances of this case, the Applicant says that his liberty has been restricted by reporting requirements and travel restrictions. The Amendment necessarily deprived the Applicant of his liberty rights because any exercise of discretion by parole officers will entail some type of liberty restriction.

[26] The Applicant submits that his right to liberty under section 7 of the Charter has been deprived in a way that is not in accordance with the principles of fundamental justice. This is due to the fact that the Amendment is too broad. While its purpose is to monitor the ongoing risk posed by offenders with PRS status in the community, it inherently deprives the Applicant and other persons on PRS of their liberty without good reason. The Amendment is also arbitrary in its application to the Applicant, as its stated purpose has no bearing on him.

[27] In considering whether a law is overly broad, the Court must determine whether the means chosen are necessary to achieve the objective (*R v Heywood*, [1994] 3 SCR 761 [*Heywood*] at paragraph 49). If the Parole Board used means that are broader than required to accomplish the objective of the Amendment, then the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason (*Heywood*).

[28] The Parole Board's stated objective in this case was to adequately monitor the "ongoing risk posed by offenders in the community who are on [PRS]." The Amendment was made in response to certain events that were said to have shown that it was difficult to maintain contact with some offenders, and that other offenders on PRS had become involved in further criminal activity.

[29] Based on this, it appears that the purpose of the Amendment was to prevent further criminal activity by monitoring offenders on PRS more closely. However, in doing so, the Parole Board was required to use a means that was both proportional to the objective and that did not curtail the freedom of individuals who the law did not need to capture. The Applicant was never accused of not keeping contact, nor is there any suggestion he was committing further offences while on parole.

The uncontroverted evidence is that he was a reformed offender who had integrated himself into his community and had developed a musical career.

[30] In passing the Amendment, the Parole Board unnecessarily restricted the liberty of persons who, like the Applicant, maintained contact with their parole officers and posed no risk to the public. There was no need or legitimate basis on which to increase the Applicant's monitoring, and for that reason the Amendment is too broad.

[31] The Applicant submits that the Parole Board could have used less invasive means to achieve its objective. For example, it could have:

- Conducted a case-by-case analysis of each offender on PRS;
- Conducted a risk analysis before granting PRS to an offender;
- Revoked PRS for those offenders who breach the terms of their parole or otherwise demonstrate that they are incapable of being adequately monitored;
- "Grandfathered" PRS status such that the present definition would only apply to those being granted such privileges and rights for the first time after the Amendment.

[32] In fact, the Act allows for such a case-by-case risk analysis of offenders. The default position is that all offenders will be subject to the conditions in subsection 161(1) of the Regulations, but the Parole Board may relieve or vary the application of parole conditions with respect to a particular offender. On a plain reading of the Act, the Applicant says it is impermissible to vary the parole conditions of offenders, including those discretionary conditions imposed by

parole officers, on anything other than a case-by-case basis. In this case, the Parole Board's mass variance is contrary to its jurisdiction.

[33] The Applicant submits that his case is similar to that of *Hay v Canada (National Parole Board)*, [1985] FCJ No 610 (TD) [*Hay*]. In *Hay*, an inmate serving a life sentence was transferred to a minimum security prison due to his outstanding record and rehabilitation over the course of seven years. As the result of a "policy change," he was transferred out of the minimum security prison. The Federal Court concluded as follows at page 9 of the decision:

> …The decision to effect such an involuntary transfer, without any fault or misconduct on the part of the inmate, as it is abundantly clear was done in the applicant's case is the quintessence of unfairness and arbitrariness.
>
> It may be that the policy change invoked by the respondents affects a contemplated class of inmates, but that, in the absence of fault, cannot prevail over the inmate's individually guaranteed legal rights…
>
> …[H]aving clearly earned the privilege of being placed in the farm annex, this applicant despite his serious crimes in 1977, is not to be moved about like cordwood, simply because he is in a class of inmates contemplated by the change of policy…

[34] In *Hay*, the Court said that had the policy been invoked to prevent Hay's transfer to the minimum security facility at first instance that would have been regrettable, but unassailable. However, the transfer offended sections 7, 9 and 12 of the Charter, and Hay was ordered to be returned to the minimum security institution.

Section 1 of the Charter

[35] The Applicant points out that the Respondent has the burden of justifying the deprivation of the Applicant's rights under the Charter, and submits that the Respondent cannot do so, in this case.

Remedy

[36] Section 24(1) of the Charter says that:

Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.	Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

[37] The Court has flexibility in deciding how to remedy a Charter violation. Subsection 24(1) of the Charter allows the Court to craft a responsive remedy that takes into account the nature of the Charter violation and the context of the specific legislation at issue (*Schachter v Canada*, [1992] 2 SCR 679 [*Schachter*]). Charter remedies should be approached with a generous and expansive view to ensure that those who benefit from the Charter enjoy its full benefit and protection (*Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 [*Doucet-Boudreau*]).

[38] In paragraphs 55-59 of *Doucet-Boudreau*, the Supreme Court of Canada laid out five principles to guide judges in arriving at an appropriate and just remedy:

1) The remedy chosen should meaningfully vindicate the right violated;

2) The means should be legitimate within the framework of our constitutional democracy;

3) The remedy in vindicating the right must not extend beyond the powers of the court;

4) The remedy must be fair to the defendant and should not impose substantial hardships that are unrelated to the securing of the right;

5) The judicial approach to remedies must remain flexible and responsive to the needs of a given case.

[39] Courts have a very broad discretion to right the wrongs that arise in each particular case (*Doucet-Boudreau* at paragraph 52). This discretion is so broad that it has allowed courts to reduce criminal sentences to reflect and denounce Charter breaches (*R v Nasogaluak*, 2010 SCC 6) and award monetary damages, even absent bad faith on the state's part (*Vancouver (City) v Ward*, 2010 SCC 27).

[40] The Applicant submits that the Court should look at what has been taken away from him, and attempt to return those rights to him to the greatest extent possible. The Applicant earned the freedom he previously enjoyed by over twenty years of social progression, rehabilitation, and compliance with the law and his parole conditions. In his case, he ought to be returned to the state of freedom he enjoyed before he was arbitrarily deprived of that freedom by the Amendment.

[41] This remedy is supported by the factors listed in *Doucet-Boudreau*. It is a meaningful vindication of the Applicant's rights, it is legitimate within the framework of the Constitution, and it does not prevent the Parole Board from monitoring the Applicant. However, even if the remedy

requested does impact the Parole Board's role, the court is justified in ordering it so long as it does not "unnecessarily depart" from its adjudicative role in granting remedies that address the Charter violation (*Doucet-Boudreau* at paragraph 56). The remedy also does not go beyond the Court's role and it is fair to the Respondent. The Respondent would actually be required to allocate fewer resources to supervising the Applicant, and the Respondent cannot reasonably suggest that the remedy would expose the public to any risk.

[42] Finally, the remedy is flexible and responsive to the needs of this case. Although the class of persons subject to PRS is unknown, it is reasonable to believe it is both small in size and finite in time. If the Respondent disagrees with this it is free to provide information to the contrary, but the Respondent has chosen not to do so. Furthermore, this is not a case of the Applicant seeking a constitutional exemption. He is not asking to be exempt from the parole scheme; he is seeking to have his liberty interests and significant efforts to rehabilitate himself respected. The Amendment, in and of itself, is not a deprivation of anyone's liberty; however, because it is overbroad in the means employed, it deprives the Applicant of his liberty. Thus, an individual remedy should be tailored to the Applicant.

[43] The Applicant seeks the following relief, in addition to costs:

- A declaration that his rights have been and continue to be infringed by the Respondent;
- A declaration that the Amendment is *ultra vires* the Parole Board's jurisdiction;
- A declaration that any variation of the terms of the Applicant's parole conditions since 19 February 1996 was done without jurisdiction to do so;

- An order of *certiori* quashing the parole conditions currently on the Applicant, other than those in place on 18 February 1996; and
- A permanent injunction prohibiting the Respondent, and all persons having notice of this Order, from imposing any conditions on his parole, other than those in place on 18 February 1996, unless and until he conducts himself in a manner that would lawfully justify changing those conditions.

The Respondent

Preliminary Issue

[44] Section 18.1 of the *Federal Courts Act* states that an applicant has 30 days to file an application for judicial review from the time the decision is made. The impugned decision in this case, the Amendment, is dated 19 February 1996. The Applicant concedes that the Amendment was communicated to him in writing on 24 January 2011, and verbally in 1996. The Notice of Application for this proceeding was issued on 25 May 2012, fifteen years after the decision and 16 months after the decision was communicated to the Applicant by way of letter.

[45] Based on either date discussed above, the Applicant is clearly and substantially out of time to seek judicial review of this decision. The Applicant has not sought leave to extend the time to commence his application for judicial review, nor has he provided any evidence on this application that would justify the exercise of the court's discretion to extent the time.

[46] The factors considered for an extension of time were laid out in *Canada (Attorney General) v Hennelly*, (1999) 167 FTR 158 (FCA):

1) A continuing intention to pursue the application;

2) That the application has some merit;

3) That no prejudice to the respondent has arisen from the delay;

4) That a reasonable explanation for the delay exists.

[47] First, the Applicant's failure to apply for an extension of time within a timely manner, or at all, indicates an absence of continuing intention to pursue the application for judicial review throughout the entire delay.

[48] Second, this judicial review application has no merit. The Amendment does not prescribe any specific reporting requirement but rather leaves the frequency of reporting to the discretion of the parole supervisor. This decision simply reaffirms the application of subsection 161(1) of the Regulations, and if the Applicant is dissatisfied with the current quarterly reporting requirements, his remedy must lie elsewhere.

[49] Third, the Applicant has not shown an absence of prejudice. Bringing an application for judicial review long after the decision has been made can be prejudicial, in that it is contrary to the principle of finality of administrative decisions. As was said in *Apotex Inc v Canada (Minister of Health)*, 2011 FC 1308 [*Apotex*] at paragraphs 20-21:

> 20 Allowing Apotex to avoid the 30-day filing requirement on this application would open the door to a multitude of similar belated applications and thereby effectively extinguish the requirement. It would also sidestep the need for finality for discrete administrative decisions that are, as here, directly attacked as unlawful. The Federal

Court of Appeal well-expressed the principle of finality in the following passages from *Canada (AG) v Trust Business Systems*, 2007 FCA 89, [2007] F.C.J. No. 379 (QL):

> 28 In *Canada v. Berhad*, [2005] F.C.J. No. 1302, 2005 FCA 267, Létourneau J.A. wrote that the thirty-day limit for commencing judicial review applications is in the best interest of the public because it brings finality to administrative decisions and security to those who comply with the decision or who enforce compliance with it. At paragraph 60 he stated:
>
> The importance of that public interest is reflected in the relatively short time limits for the commencement of challenges to administrative decisions -- within 30 days from the date on which the decision is communicated, or such further time as the Court may allow on a motion for an extension of time. That time limit is not whimsical. It exists in the public interest, in order to bring finality to administrative decisions so as to ensure their effective implementation without delay and to provide security to those who comply with the decision or enforce compliance with it, often at considerable expense.
>
> 29 Accordingly, when the Tribunal issued its determination on the motion on April 25, 2005, the applicant was required under subsection 18.1(2) of the *FCA* to file its notice of application for judicial review within thirty days, as Trust's substantive right to its complaint were finally decided. As the applicant did not do so within the allotted time frame, it is now time-barred to challenge this issue. The authorities relied on by the applicant in Ernst Zündel and Canadian Association for *Free Expression Inc.*, [2000] 4 F.C. 255 and *R. v. Seaboyer*; *R. v. Gayme*, [1991] 2 S.C.R. 577 are distinguishable as they deal with interlocutory issues as opposed to those that have the potential to bring finality to the proceedings.

21 I agree with counsel for the Respondent that Apotex's position "is no more than a colourable device intended to permit Apotex to avoid violating both the letter and the spirit of section 18.1(2) of the *Federal Courts Act* and Rule 302". In my view, the 30-

> day filing requirement does apply to this application and can only be overcome by a meritorious motion to extend time.

[50] As in *Apotex*, the Applicant mischaracterizes the nature of the government action to remove it from the reach of section 18.1. He attempts to circumvent the 30-day limitation by characterizing the decision as a "regulation" as defined in the *Interpretation Act*, in effect arguing that it is therefore not subject to the time limit.

[51] The Respondent submits that the Amendment is a discrete administrative decision within the Board's discretionary jurisdiction and, therefore, the 30-day limitation applies. The decision did not enact a regulation or other legislation or quasi-legislative instrument, nor did it create new policy. Rather, it confirmed that the Parole Board would no longer exercise its discretion to permit a modification of the standard requirements of subsection 161(1) of the Regulations. Put another way, the Decision confirmed the application of subsection 161(1) to offenders on PRS, as it also applies to all other paroled offenders.

[52] The Amendment also does not have the ongoing effects that the Applicant attributes to it, and it does not, on its face, apply any restrictions to the Applicant such that it can be characterized as a policy or regulation. The minimal reporting requirement that it placed on the Applicant stems from subsection 161(1) of the Regulations, and not from any ongoing Parole Board policy. The Decision is therefore not an ongoing course of conduct affecting the Applicant to which the 30-day limitation does not apply (*Krause v Canada*, [1999] FCJ No 179).

Section 7 of the Charter

[53] The Supreme Court of Canada discussed section 7 liberty interests in the specific context of correctional law in *Cunningham*, above. For the Applicant to succeed, he must show that the Amendment constitutes a violation of his section 7 rights and that this deprivation is contrary to the fundamental interests of justice. As to whether there has been a deprivation of liberty which attracts the protection of section 7 of the Charter, the two subsidiary questions to be asked are whether there has been a demonstrated deprivation of liberty and, if so, whether the deprivation is serious enough to attract Charter protection (*Cunningham*, at paragraph 7).

[54] The Amendment has not resulted in a violation of the Applicant's rights under section 7 of the Charter. It does not impose any new conditions on the Applicant, but rather refers him back to subsection 161(1) of the Regulations, which in turns leaves the frequency of reporting within the discretion of his parole supervisor.

[55] Furthermore, the Applicant's own evidence is that he has enjoyed a full life in the community, despite any change in the reporting requirements. It appears as though the reporting requirements have not deprived the Applicant of his liberty at all. However, if it is found that there has been a deprivation of the Applicant's section 7 rights, the Respondent submits that this deprivation is in accordance with the principles of fundamental justice.

[56] The Supreme Court discussed the principles of fundamental justice in this context at paragraph 17 of *Cunningham*:

> Having concluded that the appellant has been deprived of a liberty interest protected by s. 7 of the Charter, we must determine whether this is contrary to the principles of fundamental justice under s. 7 of the Charter. In my view, while the amendment of the *Parole Act* to eliminate automatic release on mandatory supervision restricted the appellant's liberty interest, it did not violate the principles of fundamental justice. The principles of fundamental justice are concerned not only with the interest of the person who claims his liberty has been limited, but with the protection of society. Fundamental justice requires that a fair balance be struck between these interests, both substantively and procedurally (see *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at pp. 502-3, per Lamer J.; *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, at p. 212, per Wilson J.; *Pearlman v. Manitoba Law Society* Judicial Committee, [1991] 2 S.C.R. 869, at p. 882, per Iacobucci J.). In my view the balance struck in this case conforms to this requirement.

[57] The change at issue in *Cunningham* had the potential to affect the offender to a much greater degree that the Amendment in the present case. In *Cunningham*, the change in policy deprived the offender of the opportunity for release after serving 2/3 of his sentence. It is beyond question that the possible deferral of an offender's release date by 1/3 of his sentence engages his liberty interest to a much greater extent that a quarterly reporting requirement for an offender who already has the privilege of full parole. Nonetheless, in *Cunningham* the Supreme Court determined that the deprivation of liberty was not contrary to the principles of fundamental justice:

> 18. The first question is whether, from a substantive point of view, the change in the law strikes the right balance between the accused's interests and the interests of society. The interest of society in being protected against the violence that may be perpetrated as a consequence of the early release of inmates whose sentence has not been fully served needs no elaboration. On the other side of the balance lies the prisoner's interest in an early conditional release.

> 19. The balance is struck by qualifying the prisoner's expectation regarding the form in which the sentence would be served. The expectation of mandatory release is modified by the amendment permitting a discretion to prevent early release where society's interests are endangered. A change in the form in which a sentence is served, whether it be favourable or unfavourable to the prisoner, is not, in itself, contrary to any principle of fundamental justice. Indeed, our system of justice has always permitted correctional authorities to make appropriate changes in how a sentence is served, whether the changes relate to place, conditions, training facilities, or treatment. Many changes in the conditions under which sentences are served occur on an administrative basis in response to the prisoner's immediate needs or behaviour. Other changes are more general. From time to time, for example, new approaches in correctional law are introduced by legislation or regulation. These initiatives change the manner in which some of the prisoners in the system serve their sentences.
>
> 20. The next question is whether the nature of this particular change in the rules as to the form in which the sentence would be served violates the Charter. In my view, it does not. The change is directly related to the public interest in protecting society from persons who may commit serious harm if released on mandatory supervision. Only if the Commissioner is satisfied on the facts before him that this may be the case can he refer the matter to the Parole Board for a hearing. And only if the Board is satisfied that there is a significant danger of recidivism can it order the prisoner's continued incarceration. Thus the prisoner's liberty interest is limited only to the extent that this is shown to be necessary for the protection of the public. It is difficult to dispute that it is just to afford a limited discretion for the review of parole applicants who may commit an offence causing serious harm or death. Substantively, the balance is fairly struck.

[58] The Respondent submits that the present case involves a fair balance between the Applicant's liberty interest and the public's interest in having offenders on parole properly supervised. This balance is struck by leaving reporting requirements to the parole supervisor's discretion, as reflected in subsection 161(1)(a) of the Regulations.

Section 1 of the Charter

[59] Even if the Court finds a breach, the Amendment is saved by section 1 of the Charter. The Respondent submits that the evidence demonstrates that the impugned action: (1) pursues the pressing and substantial objective of the protection of society; (2) is rationally connected to that objective in that it is directed at the supervision of the offender while on full parole; (3) minimally impairs a Charter right in that it does not impose any new conditions on the offender; and (4) does not have a disproportionately severe effect on the offender to whom it applies (*R v Oakes*, [1986] 1 SCR 103 at page 139).

Remedy

[60] The Respondent submits that the goal sought by the Applicant, namely to be returned to his pre-1996 parole reporting conditions, cannot be obtained through a challenge to the Amendment. The Applicant's complaint relates to decisions made by his parole supervisors under the authority of subsection 161(1) of the Regulations, and does not arise from the Decision itself.

[61] All the declarations and remedies sought by the Applicant relate to his parole conditions, none of which originate from the Parole Board's Decision. All the Amendment does is state that it is the parole supervisor who determines the level of reporting. As such, the remedies sought by the Applicant are not rationally connected to the Decision. The remedies sought by the Applicant relate to matters falling within the jurisdiction and authority of the Correctional Service of Canada and the

discretion of the Applicant's parole supervisor. If the Applicant wishes to have a different reporting frequency, he must do so through the appropriate channels.

ANALYSIS

[62] The impact of the Amendment upon the Applicant was that, instead of reporting to his parole supervisor once every 12 months, he was required "to report to the parole supervisor as instructed by the parole supervisor, as prescribed by subparagraph 161(1)(*a*) of the *Corrections and Conditional Release Regulations*."

[63] Clearly, the Amendment itself does not change or stipulate the frequency of reporting required of the Applicant. This was left to the parole supervisor.

[64] Since the Amendment came into force in 1996, the Applicant has reported to his parole supervisor every three months, and he says that the change from annual reporting to quarterly reporting is a breach of his section 7 Charter rights.

[65] In his affidavit and other materials submitted with this application, the Applicant also complains of various other reporting requirements and conditions he has been subjected to since 1996 but, in my view, those requirements and conditions were the result of decisions made by his successive parole supervisors, which decisions are not before me and for which there is no adequate record that would allow the Court to assess them for reviewable error, even though I think it is clear

that the Amendment did not authorize restrictions such as travel, and any such restrictions would require a basis in law other than the Amendment.

[66] In my view, then, this application relates solely to the 1996 Amendment of the Parole Board whereby it exercised its statutory discretion to discontinue the annual reporting requirements for offenders such as the Applicant, who at that time enjoyed the PRS. That Amendment did not, in itself, change the frequency of reporting for those offenders with PRS; rather, it left the frequency of reporting to the offender's parole supervisor in accordance with in section 161 of the Regulations. However, given the Commissioner's Directive 715-1, "Community Supervision" (CD 715-1), the change affected by the Amendment had the inevitable consequence that he would have to report at least once every three months, rather than annually.

Timeliness

[67] The impugned Decision is dated February 19, 1996. The Applicant says that he was advised of the Amendment by his parole supervisor in 1996 and has abided by his quarterly reporting requirements since that time. He also concedes that the Amendment was formally communicated to him on January 24, 2011. Whichever date we use for the purpose of the time limitation set out in paragraph 18.1(2) of the *Federal Courts Act*, the Applicant is well beyond the prescribed 30 days and he has not requested or attempted to justify an extension of time. His position is that his application does not impugn an "order" or "decision" and so does not fall under paragraph 18.1(2); rather it is a "matter in respect of which relief is sought" and so falls under paragraph 18.1(1) of the *Federal Courts Act* and, as such, is not subject to any time limitation.

[68] The Applicant says that this is not a discrete administrative decision that concludes a hearing process for which he was given notice and in which he was allowed to participate in accordance with the usual rules of procedural fairness. This is more in the nature of an ongoing policy that is unlawful and unconstitutional and which may be challenged at any time by way of an application for judicial review. I agree with the Applicant on this issue.

[69] Contrary to the Respondent's argument, in my view the Amendment has ongoing effects. So long as it is in place, the Applicant's reporting frequency is at the discretion of parole officers. Under the previous policy, he enjoyed the certainty that, provided his behaviour did not deteriorate, he would have to report only once per year. Furthermore, in combination with Commissioner's Directive 715-1 "Community Supervision" (CD 715-1), the new policy had the effect that the Applicant must report at least once every three months. These consequences attach to the Applicant not because of any facts relating to him individually that were considered by the Board, but because he falls within a class of persons covered by the policy.

[70] Paragraph 18.1(1) of the FCA states:

> An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

[71] Paragraph 18.1(2) states (in part):

> An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated… to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow…

[72] The category of "matter[s] in respect of which relief [may be] sought" has been held to be broader than the category of "decision[s] or… order[s] of a federal board, commission or other tribunal" (*Krause v Canada*, [1999] 2 FC 476 (FCA) at para 21). This has two important consequences: 1) it is not only "decisions or orders of a federal board, commission or other tribunal" that can be challenged through judicial review in the Federal Court; and 2) the 30 day limit set out in s. 18.1(2) does not apply to the judicial review of matters that are not "decisions or order of a federal board, commission or other tribunal".

[73] *Krause* is authority that a general decision does not trigger a time limit that prevents the review of the implementation steps, on the unassailable logic that one should not be barred from relief "solely because the alleged… unlawful act stemmed from a decision to take the alleged unlawful step." *Krause* does not state that the general decision is itself reviewable. However, subsequent cases have applied *Krause* in a manner that permits a reviewing court to focus on the general decision, the implementation steps, or a combination of the two where they combine to result in unlawful government action vis-à-vis the applicant.

[74] In *Sweet v R*, [1999] FCJ No 1539, 249 NR 17 (FCA, docket A-324-98), where an inmate of the Warkworth penitentiary challenged the practice of "involuntary double-bunking" in medium and maximum security prisons, the Court of Appeal found:

> [11] What the appellant is attacking is not so much the decision of the Correctional Service of Canada ("the Service") to force him to share a cell, as much as the policy of double-bunking in itself. The thrust of the appellant's argument is that the policy of double-bunking, which affects the appellant and many other inmates, should be declared invalid. That policy is an on-going one which may be

> challenged at any time; judicial review, with the associated remedies of declaratory, prerogative and injunctive reliefs, is the proper way to bring that challenge to this Court (see *Krause v. Canada*, [1999] 2 F.C. 476 (F.C.A.)).

[75] In *Moresby Explorers Ltd. v Canada (Attorney General)*, 2007 FCA 273, the court also focused its review on the policy itself. In that case, a policy put in place by a management board responsible for overseeing the Gwaii Haanas National Park Reserve. While ultimately finding there was nothing unlawful about the policy, the Court of Appeal found that the policy could be challenged on judicial review, and that such an application was not subject to the time limit set out in s. 18.1(2) [emphasis added]:

> [23] …The respondent alleges (at para. 46 of the Attorney General's factum) that because the object of Moresby's challenge is a policy adopted pursuant to the Regulations rather than the Regulations themselves, the application cannot succeed, since mere policies (as opposed to decisions based on policies) are not subject to review.
>
> [24] The grounds on which a policy may be challenged are limited. Policies are normally afforded much deference; one cannot, for example, mount a judicial challenge against the wisdom or soundness of a government policy (*Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2, at 7-8). This does not, however, preclude the court from making a determination as to the legality of a given policy (*Canada (Attorney General) v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735 at 751-752; *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at 140). Because illegality goes to the validity of a policy rather than to its application, an illegal policy can be challenged at any time; the claimant need not wait till the policy has been applied to his or her specific case (*Krause v. Canada* (C.A.), [1999] 2 F.C. 476, at para. 16).

[76] In *Canadian Association of the Deaf v R*, 2006 FC 971, Justice Mosley reviewed a series of decisions implementing government guidelines for sign-language translation. The decisions were made by different departments and affected different applicants. He observed that [emphasis added]:

> [2] At first impression, the applicants' case presents difficulties, not the least of which is that they seek judicial review in one application of alleged acts of discrimination on different occasions by various persons, some unidentified, employed by several departments. Only two of the fact situations presented concern events of a similar nature involving the same agency. Moreover, the timeliness of the application has been called into question, the standing of the corporate applicant is challenged and the justiciability of the process by which the government seeks input into the policy development process is in issue. Nonetheless, I have reached the conclusion that they have established a breach of the Charter and are entitled to a remedy.

[77] Justice Mosley considered whether the separate decisions were sufficiently closely connected to constitute a single matter, and provided the following analysis focusing on the guidelines as the connecting factor [emphasis added]:

> [60] The respondent cites a recent decision of this Court which held that it is a contravention of Rule 302 for an applicant to challenge two decisions within one application unless it can be shown that the decisions formed part of a 'continuing course of conduct': *Khadr (Next Friend of) v. Canada (Minister of Foreign Affairs)* (2004), 266 F.T.R. 20, 2004 FC 1145.
>
> …
>
> [62] The applicants submit that this Court has recognized that section 18.1(2) of the Federal Courts Act, R.S.C. 1985, c. F-7 may encompass an on-going situation where a number of decisions are taken: *Puccini v. Canada*, [1993] 3 F.C. 557, 65 F.T.R. 127 (F.C.T.D.).
>
> …
>
> [64] The applicants cite Truehope Nutritional Support Ltd v. Canada (Attorney General) (2004), 251 F.T.R. 155 at paras. 18-19, 2004 FC 658 [Truehope] in which the Court stated that the "distinctions between the two decisions as argued by the respondents do not outweigh the similarities, the distinctions are not so complex as to create confusion and to require two separate judicial review applications be made, given the similarities, would be a waste of time

> and effort." In this case, the applicants assert that it would be unreasonable to ask them to split their application for judicial review into four separate matters.
>
> [65] *Truehope* was a motion for leave to file an amended Notice of Application to seek judicial review of two decisions in the same application. The decisions, although separate in time, involved the same decision maker (i.e., the same government branch, albeit different officials) and the same subject matter. The factual underpinnings, save for the date, and legal arguments would be the same. Accordingly the motion was granted.
>
> [66] In this case, the commonality among the four applicants is that their situations arose out of the application of the same set of guidelines for the provision of interpretation services. While each incident involved its own facts and decision-makers (different government departments and different employees), the heart of the matter is the application of the same policy to the same interested community. Accordingly, I agree that it would be unreasonable to split the application.

[78] With specific reference to time limits, Justice Mosley observed the following [emphasis added]:

> [71] The applicants' submit that their claims are not out of time because they are not seeking review and reconsideration of final decisions, but rather redress for systemic acts of discrimination that by their very nature, are continuing. The denial of sign language interpretation was purely administrative, and did not constitute "decisions or orders" subject to the time limitation of 18.1(2) of the Federal Courts Act. The only remedy sought is declaratory relief. Thus, it is appropriate to bring an application for judicial review, and the nature of declaratory relief allows the Court to waive the 30-day requirement.
>
> [72] I accept the applicants' contention that where the judicial review application is not in respect of a tribunal's decision or order, the 30-day limitation does not apply. As stated by the Federal Court of Appeal in *Sweet v. Canada* (1999), 249 N.R. 17 at para. 11, [1999] F.C.J. No. 1539 (QL) concerning a "double-bunking" policy in a correctional institute "[t]hat policy is an ongoing one which may be challenged at any time; judicial review, with the associated remedies of declaratory, prerogative and injunctive relief is the proper way to bring that challenge to this Court."

> [73] Unreasonable delay in bringing an application may, however, bar the applicant from obtaining a remedy: *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, 88 D.L.R. (4th) 1. This has been applied by this Court in *Larny Holdings v. Canada (Minister of Health)* (2002), 222 F.T.R. 29 at para. 20, 2002 FCT 750 (F.C.T.D.). In determining whether delay is "undue", courts consider the length of the delay and any justification that the applicant offers for it, as well as any impact judicial intervention would have on public administration and on the rights of third parties.

[79] In my view, the reasoning of Justice Kelen in *Olah v Canada (Attorney General)*, 2006 FC 1245 (*Olah*), and that of Justice Phelan in *Airth v Minister of National Revenue*, 2006 FC 1442 (*Airth*), captures the intent of Krause by making it clear that the important point is not whether the policy itself or individual steps to implement it are challenged, but whether there is a closely connected course of allegedly unlawful government action that the applicant seeks to restrain by means of the prerogative writs of *mandamus*, declaration, prohibition, or certiorari (see also *Manuge v R*, 2008 FC 624 at paras 11, 14, per Justice Barnes; *Popal v Canada (Minister of Citizenship and Immigration)*, [2000] 3 FC 532 at paras 29-31, per Justice Gibson; *Jodhan v Canada (Attorney General)*, 2008 FC 781 at para 21, per Prothonotary Aalto).

[80] As a consequence, I do not find that this application is statute barred.

Causal Connection

[81] Because the Amendment does not, on its face, have any impact upon the frequency of the Applicant's supervision contact, but rather leaves that matter to be determined by the Applicant's

parole supervisor in accordance with whatever directives are in place, there is a significant issue as to whether there is any causal connection between the Amendment and the section 7 Charter breaches that the Applicant claims to have suffered.

[82] In *Blencoe*, above, at paragraph 60, the Supreme Court of Canada explained the issue as follows:

> While it is incontrovertible that the respondent has suffered serious prejudice in connection with the allegations of sexual harassment against him, there must be a sufficient causal connection between the state-caused delay and the prejudice suffered by the respondent for s. 7 to be triggered. In *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p. 447, Dickson J. (as he then was) concluded that the causal link between the actions of government and the alleged Charter violation was too "uncertain, speculative and hypothetical to sustain a cause of action". In separate concurring reasons, Wilson J. also conveyed the need to have some type of direct causation between the actions of the state and the resulting deprivation. She stated, at p. 490:
>
> > It is not necessary to accept the restrictive interpretation advanced by Pratte J., which would limit s. 7 to protection against arbitrary arrest or detention, in order to agree that the central concern of the section is direct impingement by government upon the life, liberty and personal security of individual citizens. At the very least, it seems to me, there must be a strong presumption that governmental action which concerns the relations of the state with other states, and which is therefore not directed at any member of the immediate political community, was never intended to be caught by s. 7 even although such action may have the incidental effect of increasing the risk of death or injury that individuals generally have to face. [Emphasis added.]

[83] In the present case, the Applicant's argument appears to be that the Decision to leave the frequency of reporting to his parole supervisor resulted in the inevitable consequence that he would

have to report quarterly rather than annually. There is evidence before me that the frequency of reporting is not entirely a matter for the individual discretion of the parole supervisor, and that quarterly reporting is as low as the present system allows. For example, the report of parole officer Theresa Seto of July 3, 2011, says that

> Mr. Fisher's level of intervention based upon his Static/Dynamic factors is currently low for both. As such, Mr. Fisher's assessed frequency of contact remains Level E (once every three months). This frequency is deemed to be reasonable and the best restrictive measure at this time.

So I am willing to accept that the effect of the Amendment was to move the Applicant from annual reporting and into a regime where he had to report quarterly. The issue, however, is whether this triggered his section 7 Charter rights.

[84] The Applicant's affidavit submitted with this application lists various restrictions he has faced as a result of decisions made by the many parole officers he has dealt with over the years. Most of these problems appear to have nothing to do with the frequency of reporting and, in any event, those decisions are not before me and I have no record upon which to review them. In addition, the Applicant gives evidence that, even though he once thought otherwise, he has always enjoyed PRS status since 1991, and that there are presently no restrictions upon him except that he must obey the law, notify the district director of any change of address, and report to his parole officer as instructed to do so.

[85] As for the inevitable impact of the quarterly reporting that his supervisor asked him to commence in 1996, the Applicant tells the Court that he was told that he "needed to report every 3

months and that I would need a travel permit to go anywhere." Yet it turns out, as he attests, that he did not need Parole Board approval to travel.

[86] All of this took place a long time ago, so that I do not fault the Applicant for the lack of explanation on this significant point. It seems from his own evidence, however, that it was the travel restrictions that really impacted his life — "my days as a traveling musician were basically over because of this restriction to my freedom" —, yet it now appears that he can travel freely and has always retained his PRS status. He does not, in his own evidence, connect his loss of freedom with the quarterly reporting requirement, or mention any occasion when he could not perform as a musician in any location because he was required to report on a quarterly rather than an annual basis.

[87] In my view, then, the Applicant has not established — in fact, he has not even alleged in his evidence — that any restrictions he may have suffered can be attributed to quarterly reporting. From his evidence, it looks very much as though what he regards as restrictions on his rights have been the result of decisions of individual parole supervisors, which decisions he has chosen not to review and which are not before me.

[88] When I asked counsel what impact the move to quarterly reporting following the Amendment has had upon the Applicant, his answer was that it has affected his dignity and autonomy, but has not affected his day-to-day life. This, however, is counsel giving evidence. I do not see evidence of this in the Applicant's affidavit. Counsel refers me to paragraph 86 of the Applicant's affidavit where he says

> All these changes in conditions have significant [*sic*] impacted my dignity. I have been brought to tears on occasion. I have been treated as though I have no human rights and my liberty to travel can be arbitrarily taken away with a phone call. My various parole supervisors have threatened to further restrict my liberty for little or no reason.

This does not say that the impact on dignity has been caused by the move to quarterly reporting. It is clear from the whole context, that the Applicant is principally concerned with his liberty to travel and other changes that have been made by individual parole supervisors.

[89] I am aware, of course, that the liberty interests protected by section 7 of the Charter are not restricted to mere freedom from physical restraint. The Supreme Court of Canada made this clear in *Blencoe*, above:

> 49 The liberty interest protected by s. 7 of the Charter is no longer restricted to mere freedom from physical restraint. Members of this Court have found that "liberty" is engaged where state compulsions or prohibitions affect important and fundamental life choices. This applies for example where persons are compelled to appear at a particular time and place for fingerprinting (*Beare, supra*); to produce documents or testify (*Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425); and not to loiter in particular areas (*R. v. Heywood*, [1994] 3 S.C.R. 761). In our free and democratic society, individuals are entitled to make decisions of fundamental importance free from state interference. In *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, at para. 80, La Forest J., with whom L'Heureux-Dubé, Gonthier and McLachlin JJ. agreed, emphasized that the liberty interest protected by s. 7 must be interpreted broadly and in accordance with the principles and values underlying the Charter as a whole and that it protects an individual's personal autonomy:
>
> > ... liberty does not mean mere freedom from physical restraint. In a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make

> decisions that are of fundamental personal importance.
>
> 50 In *R. v. Morgentaler*, [1988] 1 S.C.R. 30, Wilson J., speaking for herself alone, was of the opinion that s. 251 of the Criminal Code violated not only a woman's right to security of the person but her s. 7 liberty interest as well. She indicated that the liberty interest is rooted in fundamental notions of human dignity, personal autonomy, privacy and [page341] choice in decisions regarding an individual's fundamental being. She conveyed this as follows, at p. 166:
>
> > Thus, an aspect of the respect for human dignity on which the Charter is founded is the right to make fundamental personal decisions without interference from the state. This right is a critical component of the right to liberty. Liberty, as was noted in Singh, is a phrase capable of a broad range of meaning. In my view, this right, properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance.
>
> The above passage was endorsed by La Forest J. in *B. (R.), supra*, at para. 80. This Court in *B. (R.)* was asked to decide whether the s. 7 liberty interest protects the rights of parents to choose medical treatment for their children. The above passage from Wilson J. was applied by La Forest J. to individual interests of fundamental importance in our society such as the parental interest in caring for one's children.

[90] However, the Supreme Court of Canada also had the following to say in *Blencoe*:

> 54 Although an individual has the right to make fundamental personal choices free from state interference, such personal autonomy is not synonymous with unconstrained freedom. In the circumstances of this case, the state has not prevented the respondent from making any "fundamental personal choices". The interests sought to be protected in this case do not in my opinion fall within the "liberty" interest protected by s. 7.

[91] In the present case, the Applicant has not provided the Court with sufficient evidence as to how quarterly reporting has prevented him from making any fundamental personal choices. He

explains how travel restrictions affected his life fundamentally, but travel restrictions cannot be connected to the Amendment under review. Those travel restrictions may have had no legal basis but I have no means of determining this issue which is not before me. In addition, the Applicant has not explained why, if quarterly reporting was affecting his personal choices, he did not place the matter before his parole supervisor and seek whatever accommodation he needed to make the personal choices he wanted to make.

[92] There is also no evidence before me to establish that what the Applicant had to provide by way of quarterly reporting was more onerous than what he had had to do as part of his annual reporting.

[93] In other words, it seems to me that, on the facts of this case and the evidence before me, the impugned Amendment did not itself impact the Applicant's Charter rights, and the causal link between the Amendment and the alleged Charter violations is too uncertain, speculative and hypothetical to sustain a cause of action. Even the Applicant's stated concerns about an inability to travel, which seem to have been his principal complaint, came about as the result of a mistake, and not as a result of quarterly reporting.

[94] Having reached these conclusions to the effect that the Applicant has not established a liberty interest that has been curtailed as a result of the state action embodied in the Amendment, there is no point in proceeding to examine issues surrounding the fundamental justice section of the Charter.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is dismissed with costs to the Respondent.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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