

Date: 20080605

Docket: A-389-07

Citation: 2008 FCA 202

**CORAM: LÉTOURNEAU J.A.
NOËL J.A.
TRUDEL J.A.**

BETWEEN:

JEAN-CLAUDE BOUCHARD

Appellant

and

**ATTORNEY GENERAL OF CANADA
and
CORRECTIONAL SERVICE OF CANADA**

Respondents

Hearing held at Montréal, Quebec, on June 4, 2008.

Judgment delivered at Montréal, Quebec, on June 5, 2008.

REASONS FOR JUDGMENT BY:

LÉTOURNEAU J.A.

CONCURRED IN BY:

**NOËL J.A.
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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

[1] The appellant is appealing a decision of Justice Shore of the Federal Court (the judge), who dismissed the appellant's application for judicial review of a third-level grievance decision of the Correctional Service of Canada. The grievance concerned two issues: the raising of the appellant's security classification and his transfer. His security classification was increased from minimum to medium, and he was transferred from a minimum-security institution to a medium-security one.

[2] The appellant represented himself. His appeal seeks a number of remedies that are not in our jurisdiction to grant in the context of the present appeal. Furthermore, he mentions topics in his memorandum of fact and law that were not before the judge and that we therefore cannot rule on.

[3] Furthermore, it is not easy to identify the issues that are being appealed before us. The safest way in this case is to examine the decision the judge made on the following four issues, over which the parties seemed to have been in agreement in first instance:

1. Did the Assistant Commissioner of penitentiaries (the Commissioner) err when he refused to decide the issue of whether administrative segregation was justified?
2. Did the Commissioner commit a patently unreasonable error by determining that the delay in responding to the appellant's grievance was not prejudicial to the appellant?
3. Was the information provided to the appellant regarding the reasons to justify the appellant's raised security classification and transfer insufficient so as to amount to a breach of procedural fairness?
4. Did the decision-maker commit a patently unreasonable error in determining that the reasons underlying the applicant's raised security classification and transfer justified these two measures?

[4] The judge's answer to each of these questions was no. The task before us is, first, to determine whether the judge chose the correct standard of review to analyse the administrative decision-maker's decision. Second, if the judge chose the correct standard of review, we must ensure that it was correctly applied to the facts in the case. If an incorrect standard was chosen, we

must analyse the administrative decision maker's decision by applying the correct standard of review.

[5] Since *Dunsmuir v. New Brunswick*, 2008 SCC 9, dated March 7, 2008, the patent unreasonableness standard has disappeared, having been replaced by that of unreasonableness *simpliciter*. However, the more exacting standard of patent unreasonableness prevailed at the time the Federal Court delivered its judgment on February 7, 2007. That said, I do not think that the judge's conclusions would have differed whether he applied one or the other standard.

[6] With respect to the first question, the judge did not err in concluding that the issue of administrative segregation had not been before the administrative decision-maker, as it had already been the subject of a different third-level grievance, and the unchallenged decision on this grievance was *res judicata*.

[7] The judge was also right to endorse the findings of the authorities, according to which the six-day delay in responding to the second-level grievance did not prejudice the appellant.

[8] Lastly, as for the two other issues, the judge stated the law correctly with respect to the principles applicable to the required sharing of information with an inmate to allow him or her to verify and challenge the reasonableness and seriousness of the belief on which a transfer decision is based: see *Gallant v. Canada (Deputy Commissioner, Correctional Service Canada)*, [1989] 3 F.C. 329 (F.C.A.); *Cartier v. Canada (Attorney General)*, [1998] F.C.J. No. 1211 (Trial Division) (QL);

Blass v. Canada (Attorney General), 2002 FCA 220; *Canada (Attorney General) v. Boucher*, 2005 FCA 77.

[9] He was right not to interfere with the Commissioner's decision to raise the appellant's security classification and order his transfer.

[10] The evidence on record established the reasonableness and seriousness of the decision.

[11] The assessment reports and notification of decision for the involuntary transfer show that the appellant's attitudes and behaviour had deteriorated and that he had behaved in a threatening manner towards other inmates, resisted instructions, not co-operated with the reintegration team, despite a warning, and challenged the objectives that had been set for him. From this, the authorities concluded that the appellant posed an undue risk to a minimum-security institution.

[12] Before concluding, I have to refer to the following *obiter* that the judge added not to his reasons, but, astonishingly, at the end of his formal judgment:

JUDGMENT

THE COURT ORDERS that the application for judicial review be dismissed;

OBITER

The length of time served may be one of the circumstances considered in applying the statutory criteria to an individual's circumstances. It may not of itself justify parole but it may well serve as an indication that the inmate is no longer dangerous. As well, a lengthy incarceration with the

concomitant institutionalizing effect upon the inmate may serve to explain and perhaps to some extent excuse certain breaches of discipline.

(Steele v. Mountain Institution, [1990] 2 S.C.R. 1385.)

Despair often engenders frustration. Mr. Bouchard has spent nearly 25 years of his life in prison. For 17 years, his conduct was exemplary. In 2002, the decision to reduce his full parole eligibility period created in Mr. Bouchard an expectation of imminent release from incarceration and re-entry into the community. However, since the incidents reported by the CSC in 2002-2003, Mr. Bouchard has lost hope and his situation is deteriorating. The refusal to grant parole in 2003 threw him into a cycle of frustration of the sort referred to above. Indeed, Mr. Bouchard's refusal to cooperate with the National Parole Board (NPB) can be traced back almost exclusively to his most recent years of imprisonment. Since that time, this behaviour has been the product of his frustration, and he is focussing his energy on alternative legal remedies to secure his release.

In light of the foregoing, the decision in Mr Bouchard's parole review scheduled for 2008 must be based on the criteria set out by Mr. Justice Peter deCarteret Cory in *Steele, supra*, at paragraph 65; in other words, the Board will grant parole where **(i) the inmate has derived the maximum benefit from imprisonment, (ii) the inmate's reform and rehabilitation will be aided by the grant of parole, and (iii) the inmate's release would not constitute an undue risk to society.** In *R. v. Lyons*, [1987] 2 S.C.R. 309, at pages 340-341, Mr. Justice Gérard V. La Forest described as follows the fundamental importance of these criteria in the Board's assessment of offender sentences:

[48] ... in the context of a determinate sentencing scheme the availability of parole represents an additional, superadded protection of the liberty interests of the offender. In the present context, however, it is, subsequent to the actual imposition of the sentence itself, the sole protection of the dangerous offender's liberty interests. [...] Seen in this light, therefore, the parole process assumes the utmost significance for it is that process alone that is capable of truly accommodating and tailoring the sentence to fit the circumstances of the individual offender.

Therefore, these criteria will serve as guidelines for the Board to take into consideration as it assesses the progress of Mr. Bouchard, not only since the incidents that occurred in 2002, but also for the 17 years before that.

i) Has the inmate derived the maximum benefit from imprisonment?

Throughout Mr. Bouchard's incarceration, specialists' reports have stated that he was deriving the maximum benefit from his imprisonment. First, the grant of parole in 2002 was based on abundant evidence of good conduct and the fact that, having given up drugs and alcohol since 1984-85, he had participated in numerous rehabilitation programs and completed more than ninety (90) escorted temporary absences (ETA). In that regard, it is important to note that all of the ETA reports dated 2000 to 2001 are positive and all

assessment reports subsequent to temporary absences or work releases dated 2001 to 2003 are positive, except for the one dated August 7, 2001 (Exhibit D-9).

Secondly, according to the assessment of criminological factors dated February 3, 2002 (Exhibit D-5), Mr. Bouchard made significant progress towards a re-entry into the community. Certain parts of that report should be noted for a better understanding of the sort of progress Mr. Bouchard has achieved since the outset of his incarceration:

Re behaviour:

[TRANSLATION]

[Mr. Bouchard] presents in the interview as being relatively at ease. He was extremely cooperative with me. The atmosphere quickly became conducive to a productive exchange. His speech was candid and straightforward and he demonstrated openness and authenticity. His thinking was coherent and his vocabulary was appropriate. This is a sociable, approachable, fairly articulate person. He is modest and humble in his presentation and description of himself. He likes to talk to people and shows an interest in becoming a better person.

He spoke to me frankly about his past, present and future and was open and transparent about past thoughts and actions that had the potential to cast him in a bad light. He courageously told me about his beliefs, his truth. He was not afraid to bare himself psychologically, and did so with surprising candour; indeed, this openness seems to be part of who he is now.

I was not able to detect any kind of manipulation on his part such as diversion, systematic obstruction, direct or veiled intimidation, prevarication, flattery, seduction or overstated victimization. His version of his life story corresponds in every respect to all of the other assessments on file that have been carried out to date.

Mr. Bouchard appears to have a strong potential for introspection, which allows him to care about others and adapt while developing effective personal and social skills so as to derive a sense of personal achievement from it.

Self-criticism is fairly articulate. He recognizes his criminal orientation from that time, his inconsistent and egocentric behaviour, his rigid approach, his lack of social empathy, his moral judgment narrowed and perverted by criminal objectives. He admits that he mortgaged the lives of many members of his family and those of others (his victims) as well as his own life. He has a clear perception of his former personal deficiencies, and over time, he has come to identify fairly clearly the dynamic anchors that motivated him at that time in his life.

His affect is modulated to his speech. He is capable of interpersonal sensitivity and well-adapted emotions. He becomes sad when he talks about

the various losses in his life (parents, siblings) and shows optimism about the future. He is capable of affective attachment; we noted that he is highly receptive to others' points of view and demonstrates an excellent ability to interact with others. His attitude appears natural and sincere, not superficial or forced: Mr. Bouchard does not exhibit any kind of manipulation aimed at creating a favourable image of himself. This is a communicative and expressive person. He has good adaptive resources and effective control.

His overall demeanour is confident and self-assured, without being presumptuous or rash. In other words, this is someone who is not fearful or apprehensive in the face of obstacles; rather, he is determined, energetic and anxious to realize his full potential.

(Exhibit D-5, pages 3-4)

Re his progress over the course of his sentence:

[TRANSLATION]

[...] The death of his brothers and a sister at the end of the 1980s [...] was a very painfully emotional experience for the subject, one that appears to have set in motion a gradual, noticeable softening of his adaptive mechanisms. He has started to appear more reasonable and interactive towards authority and his entourage, adopting a more constructive, less arrogant and resistant approach. He listens more (he did not listen at all before) and he participates in institutional programs at a significant level. In short, since 1990, we detect a certain desire to distance himself from his former deviant and antisocial attitudes.

[...] Since 1990, therefore, there has been a noticeable calming in terms of his behaviour. The initial changes were not dazzling, but they occurred quietly, one by one, and evolved over a period of lengthy reflection. This period was followed by a slight opening up to things that could help him in his process of change. He got involved in the Toastmasters Program. Then came the Self-Awareness Program and the Lifeskills Program. He did a lot of reading at that time and started writing as well. Writing about himself, his life, his family—it all gradually enabled him to explore his inner life more closely and brought him to realize that he needed help.

In 1995, he asked to meet with a psychologist and started regular psychotherapeutic counselling for approximately one year [...]

He enrolled in all treatment programs that the Correctional Service offered to him and his involvement was qualitative and sincere. He also took on more altruistic projects such as World Vision and the Life-Hope group (of which he was also president for one year) and became involved in religious workshops as well. He was also president of the Inmates Committee for close to two years. He acquitted himself of these responsibilities very well.

All of this led to a gradual downgrading of his security classification until, in June 1998, he was transferred to Ste-Anne-des-Plaines Institution to start a social reintegration program and he entered the Living Units program.

Since 2000, Mr. Bouchard has been granted about 60 escorted temporary absences for family contact, personal development and community services; he has not caused any problems of a security nature. In two ETAs out of 60, the comments of the escort (the same person both times) were negative. All other ETAs transpired without any difficulty, and the ETA reports were written by some 18 different escorts, based on the information we have at this time.

(Exhibit D-5, at pages 6-8)

Criminological Assessment:

[TRANSLATION]

[...] He has been working on this for over eleven years now, and his determination has been noticed; all of his caseworkers, including myself, consider it beneficial. Through all these years, through his participation in all treatment programs offered by the CSC and through psychological counselling, which appears to have propelled him towards a wholesale reconstruction of his personality, we are seeing the gradual development of a greater awareness of himself and of others that has led Mr. Bouchard to “mature” relationally, affectively and emotionally.

[...] His lengthy imprisonment (more than nineteen years) appears to have eroded his antisocial personality traits, finally promoting a process of introspection. He understands that the trajectory of his life at the time was leading him nowhere except into a dead end. It appears that Mr. Bouchard has not used drugs or alcohol for over seventeen years.

[...] We detect in Mr. Bouchard a great ability and willingness to adhere to current prosocial values. On the other hand, this adherence appears to have peaked—it cannot go any farther in his current living conditions. **In the early stages of incarceration, the closed environment can be ideal for stopping and learning to face up to oneself. But over time, it has less and less to offer in terms of the stimuli of real life in society. As a result, the subject’s progress has now reached a kind of stagnation point.**

He needs to move beyond the stagnation and developmental dead-end he is experiencing, having reached a ceiling, a saturation point in the prison environment. His institutional and personal progress reveals to us an individual firmly in control of himself thanks to a better awareness of himself, his limitations and his strengths [...] (emphasis added)

(Exhibit D-5, at pages 9-13)

Finally, the documentary evidence reveals that since the 2003 incident, Mr. Bouchard has been incarcerated at the Federal Training Centre in Laval, a reinforced *minimum* security penitentiary. Moreover, the applicant has been pursuing his secondary school studies with the goal of upgrading his education; he has also been trying to become involved in activities such as the occupational health and safety group.

ii) Will the inmate's reform and rehabilitation be aided by the grant of parole?

Mr. Bouchard's situation since the incidents of 2002-2003 has been deteriorating; despair and frustration have been controlling his life and preventing him from progressing within the institutional setting. The documentary evidence clearly shows that in Mr. Bouchard's case parole merits thorough consideration:

[TRANSLATION]

This gradual return to society does not appear to pose any undue risk to the public at this time. It will enable the subject to continue making the kind of progress he has initiated so successfully within our institutions and adjust it to the realities of life on the outside. He will be empowered to find and rebuild a place for himself within society where he can make a worthwhile contribution and continue to reform his life appropriately and prosperously. His current incarceration and the loss of certain members of his family appear to have affected Mr. Bouchard deeply and painfully; they have most definitely had a powerful and lasting deterrent effect upon him as he now strives to lead the life of a well-adjusted, responsible person. He is willing and able, and in addition, Mr. Bouchard has managed to create for himself an appropriate and healthy social support network comprised of family members and their friends, particularly his brother Marcel and his friends. Mr. Bouchard is 48 years old and wants to live out his final years outside of penitentiary [*sic*] walls; we believe that, with the help he will receive from the CSC for the rest of his life, he can do it.

(Criminological Report, Exhibit D-5, at pages 13 and 14)

iii) Will the inmate's release constitute an undue risk to society?

Protecting society is one of the imperatives of the correctional system. If an inmate's release continues to constitute an undue risk to the public, then his or her detention can be justifiably maintained for a lifetime. (*Steele, supra*, at paragraph 71.)

However, according to the documentary evidence from January 3, 2002, Mr. Bouchard did not pose a danger to society at the time:

This gradual return to society does not appear to pose any undue risk to the public at this time....

(Criminological Report, Exhibit D-5, at page 12)

Moreover, he has taken part in several rehabilitation programs and completed more than ninety (90) escorted temporary absences (ETA). It is important to note in this regard that all of the ETA reports dating from 2000 to 2001 are positive and all of the assessment reports following a temporary absence or work release dated 2001 to 2003 are positive, except for the one from August 7, 2001.

The length of the term served may be one of the assessment factors considered in applying the statutory criteria to an individual's circumstances. It may not of itself justify parole but it may well serve as an indication among an array of factors that the inmate is no longer dangerous and could be paroled.

Finally, since the incidents of 2002-2003, Mr. Bouchard has been incarcerated at the Federal Training Centre in Laval, a reinforced **minimum** security institution.

On this point, an analysis should take into account the incidents that occurred in 2002-2003 and any explanations as to the reasons for their occurrence. A lengthy incarceration with the concomitant institutionalizing effect upon the inmate may serve to explain and perhaps to some extent excuse certain breaches of discipline. Rather than focussing indiscriminately on breaches of discipline, the analysis must concentrate on the crucial issue of whether granting parole would constitute an undue risk to society (*Steele, supra*, at paragraphs 77-79)

In short, to break the perpetual cycle of despair and frustration and to assess the potential risk to the public, it is vital that Mr. Bouchard and the CSC re-establish [*sic*] meaningful contact with each other in order to come to an understanding that takes due account of the concerns of both parties and does not minimize the rationale for his prolonged incarceration thus far.

For the sake of society's and Mr. Bouchard's welfare, there needs to be an analysis not just of acts that have been committed, but of attitudes leading to action, in order to achieve a collective result based on cooperation and a sincere desire for change—which in itself represents the goal of the correctional system. [Emphasis in original.]

[13] Strictly speaking, this is not an *obiter*, as its content does not refer to the decision that was made but flatly goes beyond the scope. However well intentioned it may be, this *obiter* is inappropriate. As we were able to see at the hearing, its effect was to create expectations. The appellant, who is an inmate and subject to the rules of his detention facility, tried to obtain the

services of an in-house arbitrator or mediator to settle or negotiate what he perceives as a dispute between himself and the penitentiary administration.

[14] It is also likely that it resulted in polarizing the appellant's and the penitentiary administration's positions and caused an estrangement rather than a reconciliation between the parties.

[15] I believe that it is worthwhile, particularly in the context of correctional law, to recall the wise words of Justice Beetz in *Cie Immobilière Viger v. L. Giguère Inc.*, [1977] 2 S.C.R. 67, at page 77:

The judge is bound by the issues before him, and does not extend his ruling beyond what is necessary to settle them.

[16] I would dismiss the appeal, but without costs, given the circumstances.

“Gilles Létourneau”

J.A.

“I concur.
Marc Noël, J.A.”

“I concur.
Johanne Trudel, J.A.”

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

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