Federal Court  Cour fédérale

Date: 20180515

Docket: T-1542-17

Citation: 2018 FC 508

Ottawa, Ontario, May 15, 2018

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

DARYLE WILLIAM HAUG

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Daryle Haug, who is self-represented, seeks judicial review of a decision of the Parole Board of Canada [PBC]. The hearing of this application took place by video conference in Halifax, NS on April 11, 2018.

[2] Mr. Haug argues that the PBC made an error when it refused to consider his application for parole because it was not filed within the required timeframe. He argues that he should have the right to reapply for parole consideration within six months of a denial. In support of this

argument he relies upon the provisions of the *Corrections and Conditional Release Act* [CCRA] as they were at the time he was sentenced. In 2012, the CCRA was amended to increase the reapplication period to one year.

[3] For the reasons that follow, I have concluded that the PBC did not make an error by applying the newer version of the CCRA to Mr. Haug. The PBC decision is therefore reasonable and this judicial review is dismissed without costs.

I. Relevant Background

[4] Mr. Haug is an inmate at Dorchester Penitentiary. In 2003 he was arrested and taken into custody for sexual assault offences. In 2006 he was found guilty and sentenced. Mr. Haug's appeal was unsuccessful and on appeal he was designated a dangerous offender and given an indeterminate sentence which he is currently serving.

[5] When Mr. Haug was originally sentenced in 2006, and when he was designated as a dangerous offender in 2008, different provisions of the CCRA applied for parole reapplications after a denial. Previously section 122(4) of the CCRA provided that if day parole was denied, Mr. Haug could reapply within six months. Section 123(6) provided the same six month time frame for reapplying after a denial of full parole.

[6] In 2012, the CCRA timelines to apply for reconsideration after a denial of full parole and day parole were increased from six months to one year.

[7] On February 17, 2017, Mr. Haug's first parole application was denied and his appeal to the PBC Appeal Division was rejected on June 26, 2017.

[8] On July 29, 2017, Mr. Haug filed another application for full parole to the PBC. On August 3, 2017, the PBC informed him that it would not consider his application until February 2, 2018. Mr. Haug appealed to the PBC Appeal Division, which affirmed the PBC's decision not to accept the application. He filed yet another application for full parole which the PBC again refused to consider.

[9] On September 21, 2017 Mr. Haug filed a third application for parole. On September 26, 2017, the PBC advised him that it would not take action as the application was not filed within the timelines set out in the CCRA.

[10] On September 28, 2017, the PBC rejected Mr. Haug's application, stating that he could not reapply for parole consideration until February 2, 2018. It is this decision for which Mr. Haug seeks judicial review.

II. PBC Decision

[11] As noted, it is the decision the PBC of September 28, 2017 which is under review. In its letter to Mr. Haug, the PBC states:

> The application received by the Board on September 25, 2017 was rejected as it was received prior to the one year following denial as per section 122 (4) & 123(3) of the Corrections and Conditional Release Act (CCRA). Therefore, you are not eligible to apply for day and/or full parole on/or before February 2, 2018.

> When that section of the CCRA was amended in 2012 as a result of the Safe Streets and Community Act, (formally Bill C-10), it increased the waiting period for re-application for day or full parole after a negative Board decision from six months to a year. This amendment is applicable for offenders who were previously sentenced.

[12] The PBC later noted an error in this decision and confirmed that since Mr. Haug's application for parole was denied on February 17, 2017, he was barred from reapplying for parole until February 17, 2018—not February 2, 2018.

[13] Despite the reference to s.123(3) which does not appear relevant to Mr. Haug's circumstances (Mr. Haug's *reapplicatio*n for full parole, as noted above, is governed by s.123(6)), the PBC's decision is clear: Mr. Haug was unable to reapply for parole consideration until one year expired from his last denial.

III. Issues

[14] The issues are as follows:

A. What is the standard of review applicable to the PBC decision?

B. Did the PBC apply the proper provisions of the CCRA?

C. Does a *Charter of Rights and Freedoms* [*Charter*] issue arise?

IV. Analysis

A. *What is the standard of review applicable to the PBC decision?*

[15] Mr. Haug argues that the applicable standard of review to the PBC decision is correctness. He relies upon *Dixon v Canada (Attorney General),* 2008 FC 889 [*Dixon*] which held that a question of law was subject to the correctness standard because it involved statutory interpretation. Mr. Haug argues that as the PBC was interpreting the statutory provisions of the CCRA; based upon *Dixon,* the decision should be considered against the correctness standard.

[16] However, after the decision in *Dixon,* there have been developments in the law relating to standard of review. *Dunsmuir v New Brunswick,* 2008 SCC 9 [*Dunsmuir*] and cases following it have held that deference is owed to a decision-maker on questions of law (*Smith v Alliance Pipeline Ltd*., 2011 SCC 7 at para 37). Deference applies when a decision-maker (the PBC here) interprets its home or closely related statutes (the CCRA and the *Criminal Code*), and the standard of review that is presumed to apply is reasonableness (*Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*., 2016 SCC 47 at para 22).

[17] This presumption can be rebutted based upon the categories identified in *Dunsmuir* (at paras 43-65). Here the only category which might apply is where constitutional questions are raised. In his written submissions Mr. Haug argued that the application of the amended CCRA provisions was a violation of his s.11(h) *Charter* rights because it imposed retroactive punishment. While this could be a constitutional question subject to correctness review, the Supreme Court of Canada has also cautioned that the reasonableness standard applies to

discretionary decisions of administrative decision-makers implicating constitutional rights where the statutory provision is not directly challenged (*Doré v Barreau du Québec*, 2012 SCC 12).

[18] Here Mr. Haug is not directly challenging these provisions of the CCRA. Rather, he is arguing that they should not be applied to him. Further, in his oral submissions, Mr. Haug confirmed that he is not raising a *Charter* issue. Accepting this, and accepting that reasonableness is the presumptive standard of review, I have determined that the decision of PBC is reviewable on the reasonableness standard.

B. *Did the PBC apply the proper provisions of the CCRA?*

[19] Mr. Haug argues that the PBC should have applied the provisions of the CCRA with respect to his parole reapplications as they were at the time of his offence. He argues that the changes to the CCRA in 2012 should not apply in a retroactive or retrospective manner to his situation.

[20] At law there is a presumption that statutes will not apply in a retrospective or retroactive manner. As noted in *Tran v Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50 at para 43 [*Tran*], the purpose of the presumption is: "to protect acquired rights and prevent a change in the law from 'look[ing] to the past and attach[ing] new prejudicial consequences to a completed transaction." Under the presumption "statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act" (see also *British Columbia v Imperial Tobacco Canada Ltd.*, 2005 SCC 49 at para 71).

[21] To support this retrospectivity argument, Mr. Haug relies upon *Abel v Canada (Director of Edmonton Institution for Women)*, 2000 ABQB 851 [*Abel*] and in particular the last paragraph of that decision which states:

> 16 The *Gamble* decision makes it clear that it is fundamental to any legal system which recognizes the rule of law, that an accused must be tried and punished under the law in force at the time of the offence. *Gamble* goes on in interpreting that statement to include parole eligibility as an element of "punishment". While the Respondents say that those cases that clearly follow that principle all deal with the issue at the time that the trial judge imposes sentence, they do not apply where the provisions of the *Corrections and Conditional Release Act* affect eligibility for parole. That is a distinction without a material difference. It is firmly established in our law that the availability of parole is an element that fits within the concept of punishment and so the law that was applicable at the time that the offence occurred should be the law that governs the terms of the accused's punishment. As a result I have concluded that it is appropriate for this Court to issue a declaration that the eligibility for parole of this Applicant should be determined by the provisions of the *Corrections and Conditional Release Act* in effect at the time of the commission of the offence.

[22] This paragraph of *Abel* addresses the issue of *eligibility* for parole in relation to the provisions of the CCRA in effect at the time of the commission of the offence. It does not address reapplications for parole after a denial. Eligibility and reapplications are two different processes governed by different statutory provisions.

[23] Here, Mr. Haug's eligibility for parole dates were determined by s. 119 (1) of the CCRA and s. 761 of the *Criminal Code* as outlined in Annex A.

[24] These provisions, which were in effect at the time of Mr. Haug's offences, and at the time he was designated as a dangerous offender in 2008, are the provisions which determine his

parole eligibility dates. His eligible date for day parole was August 2007 based upon section 119(1) the CCRA; and his eligible date for full parole was August 2010 based upon section 761(1) of the *Criminal Code.* These dates are noted in the Assessment for Decision report which was prepared to provide recommendations to the PBC for Mr. Haug's automatic review for day and full parole. Mr. Haug does not dispute these dates. Importantly, these dates were not changed by the provisions of the CCRA which were applied by the PBC to Mr. Haug.

[25] This is an important distinction which makes Mr. Haug's case different from the *Abel* case. An inmate cannot apply for parole consideration until they have reached their parole eligibility date. The provisions of the statutes which dictate parole eligibility dates for Mr. Haug are not the provisions at issue and are not the provisions applied by the PBC in the decision under review. Here the PBC applied sections 122(4) and 123(6) of the CCRA which are the provisions relating to the timing of parole reapplications after a denial of parole. The changes in 2012 increased the time to reapply after a denial of parole from six months to twelve months. These changes did not change Mr. Haug's parole eligibility dates.

[26] There is no evidence on the record that Mr. Haug applied for parole prior to 2017. Therefore when these changes were made to the CCRA in 2012, Mr. Haug did not lose a benefit or right which he had otherwise acquired at that time. In fact, he only acquired the right to reapply for parole consideration after the denial of his request for parole in 2017. This 2017 denial was well after the 2012 changes to the CCRA. Therefore, the changes to the time frames for reapplication did not impact Mr. Haug's rights as of the time when he could exercise those rights (*R v Puskas*, [1998] 1 SCR 1207 at para 14). To put it another way, the changes to sections

122(4) and 123(6) of the CCRA did not attach consequences for the future to an event which occurred in the past for Mr. Haug. The triggering event – which is the denial of parole – had not yet happened for Mr. Haug at the time of the amendments of these provisions.

[27] The distinction between parole eligibility and the right to reapply for parole is clear from the Supreme Court of Canada's decision in *Canada (Attorney General) v Whaling*, 2014 SCC 20 [*Whaling SCC*]. In *Whaling SCC*, the issue was the abolition of accelerated parole provisions which had the effect of retrospectively repealing early parole eligibility for offenders who had already been sentenced. The Court found that this was a retrospective change which engaged *Charter* rights. In Mr. Haug's case however, the changes to the CCRA did not affect parole eligibility in the *past*, but only affected his right to reapply in the *future*.

[28] Therefore, the application of ss. 122(4) and 123(6) of the CCRA to Mr. Haug's circumstances did not constitute a retrospective or retroactive application of the legislation. The PBC applied the legislative provisions of the CCRA in force at the time of his application. In the circumstances, this was proper for the PBC.

C. *Does a Charter issue arise?*

[29] In his written submissions Mr. Haug relies upon *Whaling v Canada (Attorney General),* 2012 BCCA 435 (aff'd at *Whaling SCC)* and argues that the decision of the PBC is a form of increased punitive measures which engages s.11(h) of the *Charter*. Although in his oral submissions Mr. Haug stated that he was not relying upon the *Charter*, he did argue that the PBC uses the language "not eligible" in their denial letter and the PBC has made it clear that they will

not reconsider his application until one full year has passed. According to Mr. Haug, this is increased “punishment”.

[30] Section 11 (h) of the *Charter* provides:

Proceedings in criminal and penal matters	**Affaires criminelles et pénales**
11. Any person charged with an offence has the right	**11.** Tout inculpé a le droit:
[…]	[…]
(h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and	h) d'une part de ne pas être jugé de nouveau pour une infraction dont il a été définitivement acquitté, d'autre part de ne pas être jugé ni puni de nouveau pour une infraction dont il a été définitivement déclaré coupable et puni;

[31] In the parole context, s.11(h) *Charter* considerations are the “extent to which an offender’s settled expectation of liberty has been thwarted by retrospective legislative action. It is the retrospective frustration of liberty that constitutes punishment” (*Whaling SCC*, at para 60). Accordingly, a prospective (future) change does not raise the same rule of law and constitutional concerns that a retrospective or retroactive change does (*Tran*, at para 44).

[32] Here, the application of ss. 122(4) and 123(6) of the CCRA to Mr. Haug did not increase or lengthen his period of incarceration before he was eligible for parole consideration. Rather, the increase was to the time when he could have a denial of parole reconsidered. The increases were not retrospective to his parole eligibility or sentence but, as noted above, are prospective

and came into force before Mr. Haug's right to reapply was triggered by a denial. Therefore it cannot be said that these provisions constitute increased "punishment" breaching Mr. Haug's s.11(h) *Charter* rights.

[33] Even if the 2012 CCRA amendments could be characterized as retrospective, that is not the end of the matter. The Court in *Whaling SCC* stated as follows at para 63:

> Generally speaking, a retrospective change to the conditions of a sentence will not be considered punitive if it does not substantially increase the risk of additional incarceration. Indicators of a lower risk of additional incarceration include a process in which individualized decision making focused on the offender's circumstances continues to prevail and procedural rights continue to be guaranteed in the determination of parole eligibility.

[34] Here there are sufficient safe guards in the CCRA which allow for the type of individualized decision-making contemplated in *Whaling SCC*. Section 123 (5) of the CCRA and s.776 (1) of the *Criminal Code* mandate the PBC to conduct a review every two years it decides not to grant parole. Section 123(6) of the CCRA also allows for an earlier review at the behest of the PBC as follows:

No application for one year	Demande : délai de présentation
(6) No application for full parole may be made until one year after the date of the Board's decision — or until any earlier time that the regulations prescribe or the Board determines — if, following a review, the Board does not grant full parole or cancels or terminates parole.	**(6)** Si, au terme de tout examen, la Commission soit refuse d'accorder la libération conditionnelle totale du délinquant, soit annule ou met fin à sa libération conditionnelle, celui-ci doit, pour présenter une demande de libération conditionnelle totale, attendre l'expiration d'un délai d'un an après la date de refus, d'annulation ou

de cessation ou du délai inférieur que fixent les règlements ou détermine la Commission.

[35] These safe guards in the CCRA allow Mr. Haug's circumstances to be considered outside of the one year reapplication timeframe.

V. Costs

[36] While costs would normally be granted to the successful party, considering Mr. Haug's circumstances, I decline to award costs against him.

JUDGMENT in T-1542-17

THIS COURT'S JUDGMENT is that:

1. The judicial review is dismissed; and

2. No costs are awarded.

"Ann Marie McDonald"
Judge

ANNEX A

Corrections and Conditional Release Act

Time when eligible for day parole	**Temps d'épreuve pour la semi-liberté**
119 (1) Subject to section 746.1 of the *Criminal Code*, subsection 226.1(2) of the *National Defence Act* and subsection 15(2) of the *Crimes Against Humanity and War Crimes Act*, the portion of a sentence that must be served before an offender may be released on day parole is	**119 (1)** Sous réserve de l'article 746.1 du *Code criminel*, du paragraphe 226.1(2) de la *Loi sur la défense nationale* et du paragraphe 15(2) de la *Loi sur les crimes contre l'humanité et les crimes de guerre*, le temps d'épreuve pour l'admissibilité à la semi-liberté est :
(a) one year, where the offender was, before October 15, 1977, sentenced to preventive detention;	**a)** un an, en cas de condamnation à la détention préventive avant le 15 octobre 1977;
(b) where the offender is an offender, other than an offender referred to in paragraph (b.1), who was sentenced to detention in a penitentiary for an indeterminate period, the longer of	**b)** dans le cas d'un délinquant — autre que celui visé à l'alinéa b.1) — condamné à une peine de détention dans un pénitencier pour une période indéterminée, la période qui se termine trois ans avant l'admissibilité à la libération conditionnelle totale déterminée conformément à l'article 761 du *Code criminel* ou, si elle est supérieure, la période qui se termine trois ans avant l'admissibilité à la libération conditionnelle totale déterminée conformément au paragraphe 120.2(2);
(i) the period required to be served by the offender to reach the offender's full parole eligibility date, determined in accordance with section 761 of the *Criminal Code*, less three years, and	
(ii) the period required to be served by the offender to reach the offender's full parole eligibility date, determined in accordance	

with subsection 120.2(2), less three years;

(b.1) where the offender was sentenced to detention in a penitentiary for an indeterminate period as of the date on which this paragraph comes into force, the longer of

(i) three years, and

(ii) the period required to be served by the offender to reach the offender's full parole eligibility date, determined in accordance with subsection 120.2(2), less three years;

b.1) dans le cas d'un délinquant condamné, avant la date d'entrée en vigueur du présent alinéa, à une peine de détention dans un pénitencier pour une période indéterminée, trois ans ou, si elle est supérieure, la période qui se termine trois ans avant l'admissibilité à la libération conditionnelle totale déterminée conformément au paragraphe 120.2(2);

(c) where the offender is serving a sentence of two years or more, other than a sentence referred to in paragraph (a) or (b), the greater of

(i) the portion ending six months before the date on which full parole may be granted, and

(ii) six months; or

c) dans le cas du délinquant qui purge une peine d'emprisonnement égale ou supérieure à deux ans, à l'exclusion des peines visées aux alinéas a) et b), six mois ou, si elle est plus longue, la période qui se termine six mois avant la date d'admissibilité à la libération conditionnelle totale;

(d) one half of the portion of the sentence that must be served before full parole may be granted, where the offender is serving a sentence of less than two years.

d) dans le cas du délinquant qui purge une peine inférieure à deux ans, la moitié de la peine à purger avant cette même date.

Time when eligible for day parole

(1.1) Notwithstanding section 746.1 of the *Criminal Code*, subsection 226.1(2) of the

Temps d'épreuve pour la semi-liberté

(1.1) Par dérogation à l'article 746.1 du *Code criminel*, au paragraphe 226.1(2) de la *Loi*

National Defence Act and subsection 15(2) of the *Crimes Against Humanity and War Crimes Act*, an offender described in subsection 746.1(1) or (2) of the *Criminal Code* or to whom those subsections apply pursuant to subsection 226.1(2) of the *National Defence Act* or subsection 15(2) of the *Crimes Against Humanity and War Crimes Act*, shall not, in the circumstances described in subsection 120.2(2) or (3), be released on day parole until three years before the day that is determined in accordance with subsection 120.2(2) or (3).

sur la défense nationale et au paragraphe 15(2) de la *Loi sur les crimes contre l'humanité et les crimes de guerre*, dans les cas visés aux paragraphes 120.2(2) ou (3), le temps d'épreuve pour l'admissibilité à la semi-liberté est, dans le cas du délinquant visé aux paragraphes 746.1(1) ou (2) du *Code criminel* ou auquel l'une ou l'autre de ces dispositions s'appliquent aux termes du paragraphe 226.1(2) de la *Loi sur la défense nationale* ou du paragraphe 15(2) de la *Loi sur les crimes contre l'humanité et les crimes de guerre*, la période qui se termine trois ans avant la date déterminée conformément aux paragraphes 120.2(2) ou (3).

When eligible for day parole — young offender sentenced to life imprisonment

Temps d'épreuve pour la semi-liberté — personne âgée de moins de dix-huit ans

(1.2) Notwithstanding section 746.1 of the *Criminal Code*, subsection 226.1(2) of the *National Defence Act* and subsection 15(2) of the *Crimes Against Humanity and War Crimes Act*, in the circumstances described in subsection 120.2(2), the portion of the sentence of an offender described in subsection 746.1(3) of the *Criminal Code* or to whom that subsection applies pursuant to subsection 226.1(2) of the *National Defence Act* or subsection 15(2) of the *Crimes Against Humanity and War Crimes Act* that must be served before the offender may be

(1.2) Par dérogation à l'article 746.1 du *Code criminel*, au paragraphe 226.1(2) de la *Loi sur la défense nationale* et au paragraphe 15(2) de la *Loi sur les crimes contre l'humanité et les crimes de guerre*, dans les cas visés au paragraphe 120.2(2), le temps d'épreuve pour l'admissibilité à la semi-liberté est la période qui se termine, dans le cas d'un délinquant visé au paragraphe 746.1(3) du *Code criminel* ou auquel ce paragraphe s'applique aux termes du paragraphe 226.1(2) de la *Loi sur la défense nationale* ou du paragraphe 15(2) de la *Loi sur les crimes contre l'humanité et*

released on day parole is the longer of

(a) the period that expires when all but one fifth of the period of imprisonment the offender is to serve without eligibility for parole has been served, and

(b) the portion of the sentence that must be served before full parole may be granted to the offender, determined in accordance with subsection 120.2(2), less three years.

les crimes de guerre, au dernier cinquième du délai préalable à l'admissibilité à la libération conditionnelle ou, si elle est supérieure, la période qui se termine trois ans avant l'admissibilité à la libération conditionnelle totale déterminée conformément au paragraphe 120.2(2).

Short sentences

(2) The Board is not required to review the case of an offender who applies for day parole if the offender is serving a sentence of less than six months.

Courtes peines d'emprisonnement

(2) La Commission n'est pas tenue d'examiner les demandes de semi-liberté émanant des délinquants condamnés à une peine d'emprisonnement inférieure à six mois.

Criminal Code

Review for parole

761 (1) Subject to subsection (2), where a person is in custody under a sentence of detention in a penitentiary for an indeterminate period, the Parole Board of Canada shall, as soon as possible after the expiration of seven years from the day on which that person was taken into custody and not later than every two years after the previous review, review the condition, history and

Révision

761 (1) Sous réserve du paragraphe (2), la Commission des libérations conditionnelles du Canada examine les antécédents et la situation des personnes mises sous garde en vertu d'une sentence de détention dans un pénitencier pour une période indéterminée dès l'expiration d'un délai de sept ans à compter du jour où ces personnes ont été mises sous garde et, par la suite, tous

circumstances of that person for the purpose of determining whether he or she should be granted parole under Part II of the *Corrections and Conditional Release Act* and, if so, on what conditions.

les deux ans au plus tard, afin d'établir s'il y a lieu de les libérer conformément à la partie II de la *Loi sur le système correctionnel et la mise en liberté sous condition* et, dans l'affirmative, à quelles conditions.

Idem

(2) Where a person is in custody under a sentence of detention in a penitentiary for an indeterminate period that was imposed before October 15, 1977, the Parole Board of Canada shall, at least once in every year, review the condition, history and circumstances of that person for the purpose of determining whether he should be granted parole under Part II of the *Corrections and Conditional Release Act* and, if so, on what conditions.

Idem

(2) La Commission des libérations conditionnelles du Canada examine, au moins une fois par an, les antécédents et la situation des personnes mises sous garde en vertu d'une sentence de détention dans un pénitencier pour une période indéterminée imposée avant le 15 octobre 1977 afin d'établir s'il y a lieu de les libérer conformément à la partie II de la *Loi sur le système correctionnel et la mise en liberté sous condition* et, dans l'affirmative, à quelles conditions.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1542-17
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DATED:	MAY 15, 2018

APPEARANCES:

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