Federal Court  Cour fédérale

Date: 20190920

Docket: T-1695-17

Citation: 2019 FC 1193

Ottawa, Ontario, September 20, 2019

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

KEVIN HARRIS

Applicants

And

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is a judicial review in which the Applicant seeks declaratory relief in respect of a process and policy used by the Parole Board of Canada (the "PBC") which he says led to his arbitrary, unnecessary and unlawful detention past his post-suspension statutory release date.

[2] The process followed by the PBC when applying subsection 163(3) of the *Corrections and Conditional Release Regulations*, SOR/92-620 [*CCRR*] is to hear matters in the order in

which they are referred to it by the Correctional Service of Canada [CSC] under paragraph 135(3)(b) of the *Corrections and Conditional Release Act,* SC 1992, c 20 [*CCRA*].

[3] The Applicant contends that the PBC scheduling process infringed his section 7 rights under the *Canadian Charter of Rights and Freedoms*, Part I of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. He alleges that by not scheduling his PBC hearing before his recalculated statutory release date of September 15, 2017, he was detained and deprived of his liberty for 27 days more than should have been the case.

[4] Specifically, the Applicant asks this Court to find that when deciding whether to revoke or cancel his statutory release after receiving a referral from the CSC, the PBC process of prioritizing such decisions based on the wording in subsection 163(3) of the *CCRR* of "within 90 days after the date of referral" violated his *Charter* rights because his statutory release date had passed before the hearing was held and the decision rendered.

[5] In his Notice of Application, the Applicant asks this Court to declare that subsection 163(3) of the *CCRR* should be read to include the additional words emphasized below:

> . . . shall be interpreted to limit the *Board's* discretion to render its decision within 90 days after the date of the referral, or the date of admission of the offender to a penitentiary or to a provincial correctional facility where the sentence is to be served in such a facility, whichever date is the later, <u>but no later than the day on which the offender has served two thirds of the unexpired portion of the sentence after being recommitted to custody as a result of a suspension or revocation under section 135.</u>
>
> (Emphasis in original)

[6] For the reasons that follow, this application is denied. The process established by the PBC to meet the provisions of subsection 163(3) of the CCRR was reasonable. It did not infringe the Applicant's section 7 rights. They were not engaged on these facts. However, even if they were so engaged, there was no violation by the PBC of the principles of fundamental justice.

II. **Background Facts**

[7] On October 21, 2011, the Applicant was convicted and sentenced to six years of imprisonment for the offences of theft under $5000; forcible confinement; breaking and entering and committing an indictable offence (robbery); and, being unlawfully at large.

[8] The Applicant's "Warrant Expiry Date" ("WED") was October 20, 2017. This is the date the Applicant's sentence would officially be completed and CSC would no longer have authority over him.

[9] On April 21, 2017, the Applicant was released from Warkworth Institution on statutory release. As part of his statutory release, the Applicant was required to live at Henry Traill Community Correctional Centre (the "Centre"). His release contained a number of behavioural conditions.

[10] On July 5, 2017, the CSC suspended the Applicant's statutory release because he had an altercation with another resident of the Centre arising from a gambling dispute. The Applicant was then returned to a federal detention centre pursuant to a warrant issued under subsection 135(1) of the *CCRA*.

[11] In an Assessment for Decision ("A4D") dated July 27, 2017, the CSC recommended to the PBC that the suspension of the Applicant's statutory release be cancelled and a reprimand be issued. CSC also recommended that a new statutory release condition be added requiring the Applicant not to gamble.

[12] The A4D indicated that, if the statutory release of the Applicant was revoked, the new statutory release date would be September 15, 2017. The Applicant's WED would remain the same – October 20, 2017.

[13] On September 13, 2017, the Applicant's counsel wrote to the PBC, consenting to the revocation of his suspension and the issuance of the new statutory release date that would have him released from custody on September 15, 2017. The letter also raised allegations of arbitrary detention which would breach the *Charter* if no decision was made by September 15, 2017.

[14] On September 14, 2017, the PBC wrote to Applicant's counsel advising that:

i) the PBC has 90 days after receipt of the Assessment for Decision or the return of the offender to Federal Custody, whichever is later, to make a decision;

ii) the Applicant's WED occurs prior to the 90 day time frame;

iii) the PBC would make all attempts to schedule a hearing before the Applicant's WED;

iv) it should be noted that the Applicant's recalculated statutory release date of September 15, 2017 does not come into play unless and until the PBC renders a decision of revocation.

[15] On September 28, 2017, the Applicant was advised in writing that his PBC hearing had been re-scheduled from October 19, 2017 to October 12, 2017.

[16] On October 12, 2017, the PBC conducted the hearing and the Applicant was statutorily released. On October 13, 2017, the PBC sent the decision sheet to the Applicant in which it largely followed the recommendation of the CSC. The PBC decision is discussed in a separate section of these reasons.

III. **The PBC scheduling process**

[17] The evidence in the record as to the PBC scheduling process was obtained by the Applicant on examination of the Respondent's affiant, Ms. Thomson. At the time, Ms. Thomson was the Acting Regional Manager, Conditional Release Programs, in the Ontario/Nunavut Region of the Parole Board of Canada. Substantively, Ms. Thomson was a Senior Case Review Officer who had accumulated approximately 22 years of service with the Ministry of Public Safety by working in various departments and agencies.

[18] Ms. Thomson testified that the only scheduling concern the PBC has in matters such as the Applicant's is that any decision has to be made within the jurisdictional time frame of "within 90 days of the date of the referral or day in which the offender is returned to custody, whichever is later".

[19] Ms. Thomson also stated that the process of scheduling hearings before the PBC and the order in which they are scheduled involves "a whole number of factors". Her examples included that board member resources, the number of members required to hear a matter, whether it is a panel hearing or a paper decision etc. are all considered. The goal is to hear matters within the 90 days legislated to make a decision.

[20] Ms. Thomson confirmed that the A4D estimate of a new statutory release date is not looked at as part of that scheduling process. Cases are assigned dates based on the priority of legislative time frames for all decisions and, as members are available to take matters in order of those dates.

[21] In reply to a question concerning why the Applicant's review could not have been scheduled any earlier, she indicated that such cases are prioritized in relation to the 90 day time frame from the return to federal custody or the receipt of the A4D, whichever is later. She also observed that there were "other legislative time frames that we have for other offenders who may have been ahead of the 15th of September, which was his estimated date."

[22] Ms. Thomson explained that the estimated new statutory release date is not taken into consideration because it is not a date that exists "in reality" since, if the PBC cancels the suspension, there is no new statutory release. In that event, the offender is released back into the community whether it is a date that is before or after the estimated new statutory release date in the A4D.

[23] The upshot of the evidence is that the PBC schedules hearings based on the assessment of many factors, including requirements of other offenders. The legislative timelines are paramount as the PBC would lose jurisdiction if the review was not conducted within the period set out in subsection 163(3) of the *CCRR*.

IV. **The PBC decision**

[24] On October 12, 2017, a video hearing was conducted by the PBC to make a decision about the suspension of the Applicant's statutory release. The Applicant was statutorily released that day. The decision sheet outlining the reasons of the PBC was released on October 13, 2017.

[25] After outlining the applicable legal criteria and acknowledging receipt of submissions from the Applicant's counsel, the PBC followed the CSC's recommendation and decided to cancel the suspension of the Applicant's statutory release and issue him a reprimand.

[26] The PBC noted the recommendation in the A4D to impose a condition that the Applicant not gamble but it declined to do so as his WED was only a few days away.

[27] The PBC decision described the various criminal offences committed by the Applicant and listed the special conditions already attached to his April 21, 2017 statutory release.

[28] The PBC decision also outlined in some detail the incident that led to the suspension of the Applicant's statutory release, including his gambling and aggressive behaviour. The decision sheet described several behavioural issues of the Applicant, such as angry outbursts and becoming overly agitated at times. However, the PBC determined that some of that behaviour could be attributed to the Applicant's bipolar affective disorder and a lack of medication. The Applicant refused to take his medication. Urinalysis was acknowledged to be negative each of the two times he was tested for drugs and alcohol.

[29] The PBC noted that in order to cancel the Applicant's statutory release suspension, it must be satisfied that he would not present an undue risk to society by reoffending before the

expiry of his sentence. The Applicant had put forward a release plan and expressed an interest in maintaining some form of employment. The PBC noted that he had no issue with drugs or alcohol since 2010.

[30] The PBC concluded that the Applicant would not present an undue risk to society if released on statutory release. It found that his release would facilitate his re-integration into society as a law-abiding citizen.

V. **Issues**

[31] There are two preliminary issues to be determined.

A. *The matter is moot, should it be heard?*

[32] The parties acknowledge that the matter is now moot as the Applicant was statutorily released on October 12, 2017.

[33] Nonetheless, they have asked the Court to exercise its discretion to proceed with the judicial review on the basis that the situation where offenders who have 120 days or less remaining until their WED and lose their statutory release frequently arises. For that reason, it would be useful to have a ruling on the matter.

[34] In determining whether to hear a matter that is moot the two-step test set out in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 [*Borowski*] is applied.

[35] The first step is to determine whether the matter is moot. With respect to the present parties, there is no doubt that is the case. The live controversy between these parties ceased to exist when the Applicant was released from incarceration.

[36] The second step is for the Court to decide whether to exercise its discretion to hear the matter notwithstanding that it is moot. In determining whether to exercise such discretion, *Borowski* sets out a multi-part analysis involving the three rationales underlying the mootness doctrine. The application was argued on that basis.

[37] First, I must consider whether an adversarial context is required to determine the issue. This is important to ensure that the issue is well and fully argued by the parties. Counsel for each party expressed the concern that this issue arises often and needs to be resolved.

[38] The facts are not in dispute. A discrete issue is involved. I am satisfied that the application was vigourously argued, as if it was not moot. This militates in favour of exercising my discretion to hear the matter.

[39] Second, I must take into account the concern for judicial economy. I am advised and accept that the possibility that an offender in similar circumstances will not receive a PBC decision before expiry of the re-calculated statutory release date set out in an A4D is an ongoing issue. The CSC has 30 days to prepare the A4D and the PBC has 90 days to review the case unless the offender requests and is granted an adjournment. The usual maximum elapsed time from the date of revocation of statutory release to the date upon which the PBC must decide the matter is the total of the CSC time frame and the PBC time frame, which is 120 days. On that

basis, this is an issue that is recurring often but is of brief duration. That favours hearing the matter.

[40] The third and final consideration is the need for the Court to be sensitive to its role as the adjudicative branch in our political framework. This issue of statutory interpretation involves a federal board applying federal legislation by implementing a particular process or protocol. It falls within the Court's jurisdiction and relief is available under subsection 18.1(3) of the *Federal Courts Act,* RSC 1985, c. F-7. By proceeding to determine the issue, the Court is not departing from its traditional role as an adjudicator. I also observe that counsel for the Respondent, the Attorney General of Canada, has urged the Court to exercise its discretion and hear the matter.

[41] For the foregoing reasons, the Court exercises its discretion to hear this application notwithstanding that the issue is moot.

B. *Is the matter premature?*

[42] Prior to the hearing of this matter, the Court raised the question of whether the matter was premature or "unripe" as the Applicant did not pursue an appeal of the PBC decision.

[43] Section 147(1) of the *CCRA* provides an offender with the opportunity to appeal the PBC decision to the PBC Appeal Division. Section 168 of the *CCRR* requires that an appeal be made in writing within two months of the decision of the PBC. The appeal must state the grounds of appeal and provide information and material in support of the grounds.

[44] Subsection 147(4) of the *CCRA* sets out the forms of relief available to the parties from the Appeal Division:

Decision on appeal	**Décision**
(4) The Appeal Division, on the completion of a review of a decision appealed from, may	(4) Au terme de la révision, la Section d'appel peut rendre l'une des décisions suivantes :
(a) affirm the decision;	a) confirmer la décision visée par l'appel;
(b) affirm the decision but order a further review of the case by the Board on a date earlier than the date otherwise provided for the next review;	b) confirmer la décision visée par l'appel, mais ordonner un réexamen du cas avant la date normalement prévue pour le prochain examen;
(c) order a new review of the case by the Board and order the continuation of the decision pending the review; or	c) ordonner un réexamen du cas et ordonner que la décision reste en vigueur malgré la tenue du nouvel examen;
(d) reverse, cancel or vary the decision.	d) infirmer ou modifier la décision visée par l'appel.

[45] The Respondent submits that it is not clear that the Appeal Division could assume jurisdiction to hear an appeal. The Applicant does not disagree with the outcome of the decision, as it was what he "consented to", but rather he objects that the processing of it took too long, notwithstanding that it fell within the legislated time frame.

[46] I agree that the Applicant had no realistic avenue of appeal. None of the remedies under subsection 147(4) of the *CCRA* could have provided relief to the Applicant. The Applicant wanted to receive a decision by September 15, 2017 so that he would be released that day. Once that date had passed, nothing could be done on appeal to rectify that.

[47] The Applicant is seeking a declaration that the process the PBC followed violated his *Charter* rights. The Appeal Division has no statutory authority to issue such a declaration. For that reason alone it could not have heard the matter.

[48] For the foregoing reasons, I am satisfied that the application is not premature.

C. *The issue to be decided*

[49] The Applicant made it clear at the hearing of this matter that he is not challenging the constitutionality of subsection 163(3) of the *CCRR*, which obliges the PBC to render a decision within 90 days after the date of referral by the CSC. He alleges that his section 7 *Charter* rights were infringed by the interpretation adopted by the PBC to process referrals it receives from CSC in the order they are received rather than taking into account his statutory release date.

[50] The Respondent denies there was a *Charter* breach as the process adopted respected the time frame established in the legislation. If there was such a breach then there was no violation of the principles of fundamental justice.

[51] The Applicant also argued, in the alterative, that the PBC process is unreasonable as it does not meet the requirements of justification, intelligibility and transparency as set out in *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 47 [*Dunsmuir*].

[52] While this argument was mentioned in the written submissions, it was not elaborated upon nor was it addressed at the hearing. It will not be determined.

VI. **Standard of Review**

[53] The Applicant has alleged that the scheduling process followed by the PBC is an interpretation of subsection 163(3) of the *CCRA* through which the PBC has conferred upon itself authority to violate his *Charter* rights. He does not directly challenge the determination that was made by the PBC; he says the process that scheduled his hearing infringed on his liberty interests under section 7 and violated the principles of fundamental justice.

[54] The parties both agree that the standard of review for evaluating the decision of the PBC where *Charter* breaches are alleged is correctness.

[55] I disagree.

[56] The parties each cite *Canada (Human Rights Commission) v Canada (Attorney General)*, 2016 FCA 200 at paragraphs 61 – 64 to support a correctness standard of review. But, at paragraph 62, the Court of Appeal specifically carved out the situation that is present here:

> However, this presumption is inapplicable if the issue under review involves a constitutional question (other than an issue of whether the exercise of discretion violates the *Charter* or does not respect *Charter* values), a question of general importance to the legal system that is outside the decision-maker's specialized expertise, the determination of the respective jurisdiction of two or more administrative decision-makers or a so-called "true" question of *vires*: *Dunsmuir* at paras. 58-61; *Smith* at para. 26; *Mowat* at para. 18; *Alberta Teachers* at para. 30; *NGC* at para. 13; *CN* at para. 55.
>
> (my emphasis)

[57] The factums in this matter were prepared before the Supreme Court released its decision, reported at 2018 SCC 31, upholding the Court of Appeal. The Supreme Court re-iterated the importance of the presumption of reasonableness when an administrative body is considering its

home statute. The Supreme Court at paragraph 54 specifically found that the standard of reasonableness applied, as it did at the Federal Court and Federal Court of Appeal. It did not alter the above-noted finding by the Court of Appeal.

[58] The *CCRA* is the home statute of the PBC. The reasonableness standard applies in cases where a decision-maker is exercising a discretionary power under his or her home statute, and has, by virtue of expertise and specialization, particular familiarity with the competing considerations at play in weighing *Charter* values: *Doré v Barreau du Québec*, 2012 SCC 12 at paragraph 6 [*Doré*].

[59] The standard of review for decisions of the PBC concerning the statutory release of an offender after receipt of an A4D from the CSC is reasonableness; it involves questions of mixed fact and law and an interpretation of the PBC's home statute: *Eakin v Canada (Attorney General)*, 2017 FC 394 at paragraph 14; *Dunsmuir* at paragraph 47.

[60] A decision is reasonable if the decision-making process is justified, transparent and intelligible resulting in a determination that falls within the range of possible, acceptable outcomes which are defensible on the facts and law. Within that framework, there may be a number of possible, reasonable conclusions: *Dunsmuir* at paragraph 47.

[61] I note that the Applicant would also fail on a correctness review as, for reasons that follow; I have found that the Applicant's section 7 *Charter* rights were not engaged. Correspondingly, neither the PBC scheduling process nor the Applicant's continued detention was arbitrary, contrary to the principles of fundamental justice.

VII. **The Applicant's Position**

A. *The theory of the Applicant's case*

[62] The PBC did not hold a hearing and review the A4D until October 12, 2017, well after the Applicant had consented to the recommendation on September 13, 2017.

[63] The Applicant points out that the A4D stated that if the PBC revoked his statutory release, his new statutory release date would have been September 15, 2017. That is the date he uses to say that he spent an extra twenty-seven days wrongly incarcerated.

[64] The Applicant submits that by rendering the decision on October 12, 2017 instead of by September 15, 2017 as he had stipulated, the additional time he spent incarcerated wrongly deprived him of his liberty and violated his section 7 *Charter* rights.

B. *The Charter arguments*

[65] Section 7 of the *Charter* provides that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice". The Applicant says that his section 7 rights were breached because the process adopted by the PBC led to arbitrary detention, contrary to the principles of fundamental justice.

[66] The Applicant put forth a number of reasons to support his theory that the scheduling process was arbitrary, including that:

- the PBC does not take notice of release dates that occur before the expiry of the 90 days within which it has to decide;

- the PBC's goal of processing decisions within the legislative time frame was an abuse of process because the Applicant agreed with the A4D recommendation and, in the alternative, consented to revocation of his statutory release but the PBC made no effort to avoid overholding him thereby paying no attention to his liberty interest;
- the PBC practice for scheduling hearings exploits the 90 day window provided by subsection 163(3), which is unfair and uncaring and would shock the conscience of properly informed, dispassionate members of the community;
- the PBC practice also contravenes the community's basic sense of decency and fair play, which calls into question the integrity of the parole system and the criminal justice system as a whole.

[67] The Applicant submits that by indicating that he would not contest the CSC recommendation, the PBC had before it what amounted to a "joint consent" from the CSC and the Applicant. The PBC ought to have accepted it when the September 13, 2017 letter was sent. If it had done so, the Applicant would have been released on the date established in the A4D.

VIII. **The Respondent's Position**

[68] The Respondent submits that the continuing detention of the Applicant once he was re-incarcerated was lawful. Until the PBC makes a determination on the merits, the suspension of a statutory release remains in place.

[69] The Respondent refers the Court to paragraphs 107(1)(b) – (d) of the *CCRA* which provide the PBC with the exclusive jurisdiction and absolute discretion to: (1) terminate or revoke statutory release; (2) cancel the suspension, termination or revocation of statutory release, and (3) review and decide the case of an offender referred to the PBC pursuant to section 129.

[70] The Respondent submits that unless and until the PBC revoked the statutory release, the date calculated by the CSC could not apply to the Applicant. In that respect, there was nothing to which the Applicant could agree or consent.

[71] Further, subsection 135(5) of the *CCRA* permits the Applicant to be held in custody until the PBC renders a decision "within the period prescribed by the regulations". That period is the 90 days set out in subsection 163(3) of the *CCRR*.

[72] Regarding the principles of fundamental justice, the Respondent submits that the PBC did not violate any of them.

[73] Firstly, it is submitted that the PBC did not act arbitrarily. It acted within the confines of the statutory scheme in place.

[74] Secondly, the PBC action was not overbroad. It related only to offenders who breached their statutory release and required a decision under subsection 135(5) of the *CCRA*.

[75] Finally, the PBC action of adhering to the statutory timeline of within 90 days to make a decision was not so extreme as to be grossly disproportionate to any legitimate government interest. Section 100.1 of the *CCRA* states that in the determination of all cases the protection of society is the paramount consideration for the PBC. The PBC was required to and did take that into consideration when reviewing what to do with the Applicant's statutory release.

IX. **Analysis**

[76] To succeed on this application, the Applicant must show that the implementation by the PBC of the process adopted to decide matters within the 90 day decision-making period required by subsection 163(3) of the *CCRR* breached his section 7 rights by depriving him of his liberty and that such deprivation was contrary to the principles of fundamental justice: *Cunningham v Canada*, [1993] 2 SCR 143 at page 148.

[77] If it is found that the Applicant was deprived of liberty contrary to the principles of fundamental justice, then the Respondent must show that the violation of the Applicant's rights was justifiable under section 1 of the *Charter*.

[78] The Applicant urges the Court to find that the process adopted by the PBC of hearing statutory release matters in the order they are received but within the required statutory time frame breached his section 7 rights and, that the process was arbitrary, contrary to section 9 of the *Charter* and to the principles of fundamental justice.

[79] There are three main principles of fundamental justice under section 7: (i) arbitrariness, (ii) overbreadth, and (iii) gross disproportionality.

[80] The analysis will address the principle of arbitrariness as the Applicant mentioned it but did not make submissions related to overbreadth or gross disproportionality.

A. *Arbitrariness and the Charter*

[81] Regarding detention and incarceration generally, the Supreme Court of Canada has stated that the imprisonment of an individual cannot be said to be "arbitrary" where "it is readily apparent that not only is the incarceration statutorily authorized, but that the legislation narrowly defines a class of offenders with respect to whom it may properly be invoked, and prescribes quite specifically the conditions [under which incarceration may take place]": *R v Lyons*, [1987] 2 SCR 309 at paragraph 62 [*Lyons*].

[82] In *Canada (Attorney General) v Bedford*, 2013 SCC 72 [*Bedford*], the Supreme Court established that arbitrariness requires the Court to ask whether there is a direct connection between the purpose of the law and the impugned effect on the individual.

[83] The degree or nature of the causal connection between the government action and the prejudice suffered by, in this case, the Applicant, is a "sufficient causal connection". To that end, it must be a real, not a speculative, connection.

[84] The Applicant bears the onus of establishing a sufficient connection between the 90 day requirement in subsection 163(3) of the *CCRR* as realized by the PBC scheduling process and the fact that he was not statutorily released on September 15, 2017 as set out in the A4D.

B. *The ongoing detention of the Applicant was not arbitrary*

[85] The Applicant says that his release did not occur on September 15, 2017 because the PBC would not hear the matter in a timely fashion. He submits that after September 15, 2017, he was arbitrarily detained.

[86] *Lyons* establishes that the Applicant's detention was not arbitrary if it was (1) statutorily authorized and (2) the legislation narrowly defines a class of offenders to whom it may properly apply as well as (3) prescribing the specific conditions under which such detention may take place.

[87] Initially, the Applicant was imprisoned for six years as a result of committing indictable offences. His imprisonment was authorized by the *Criminal Code*, RSC 1985, c C-46.

[88] He was subsequently allowed to live in the community at a residential facility on statutory release, authorized under section 127 of the *CCRA.*

[89] When the Applicant violated the terms of his statutory release, his right to remain at large and live in the community was suspended by the CSC. An arrest warrant was then issued in accordance with subsections 135(1) and 135(1.2) of the *CCRA*. The warrant was executed a few hours later and the Applicant was re-incarcerated.

[90] The action of the Applicant at the Centre triggered the provisions of the *CCRA* and the *CCRR*. There was nothing arbitrary about his re-incarceration. There was nothing arbitrary about his ongoing detention pending review of the A4D. It was statutorily authorized at each stage. It was specific to a narrowly defined category of particular offenders – those who had been statutorily released and had their release suspended.

[91] Additional safeguards and protections against arbitrary detention are found in paragraph 135(3)(b) of the *CCRA*. It requires that once an offender is re-incarcerated then, within 30 days, there must be a cancellation of the suspension or, the case must be referred to the PBC. Any referral must be accompanied by an A4D stating any conditions under which the offender could reasonably be returned to statutory release.

[92] The PBC reviewed and determined the matter within the 90 day period provided for in subsection 163(3) of the *CCRR*. When the determination was made, it had the effect of reinstating the Applicant’s statutory release and he was immediately released.

[93] The initial incarceration was statutorily authorized. The class of offenders was narrowly defined in the legislation as being an offender who breached a condition of statutory release and the conditions under which statutory release might be suspended, terminated, revoked or rendered inoperative are quite specifically prescribed in the *CCRA* and the *CCRR*.

[94] The CSC and the PBC adhered to the legislated processes, including rendering a determination within the 90 day period. The Applicant has not pointed to anything to establish his detention was arbitrary as understood in the context of the *Charter*.

C. *The Applicant was not "overheld"*

[95] The Applicant alleges that he was "overheld" because his post-suspension hearing by the PBC did not take place on or before September 15, 2017. In effect, he claims he was entitled to be released on the recalculated and tentative statutory release date set out in the A4D.

[96] The term "overheld" does not appear in the *CCRA* or the *CCRR*. It is a term used in criminal law to refer to the failure of the police to release an arrested person "as soon as practicable". I take the Applicant to mean that he was overheld when he was incarcerated beyond the time during which he legally could be detained. For example, if he ought to have been statutorily released and was, without lawful authority, not released that might be an over holding. Or, if he had reached his WED but was kept incarcerated then he would be being held beyond, or over, his compulsory release date.

[97] Neither of those instances apply to the Applicant. He was released on October 12, 2017, eight days prior to his WED. He was statutorily released the day the PBC determined his review and cancelled the suspension of his statutory release, thereby re-instating it.

D. *The Applicant could not consent to the September 15, 2017 release date nor could he bind the PBC to agree to it*

[98] The lynchpin to the Applicant's argument that he should have been released on September 15, 2017 is that his September 13, 2017 letter agreed with that date. He says that he consented to the revocation of his statutory release which meant that his continued incarceration after that date wrongly deprived him of his liberty.

[99] An offender's entitlement to statutory release is set out in subsection 127(1) of the *CCRA*. It provides that an offender is entitled to be released "on the date determined in accordance with this section", being the date upon which two-thirds of the sentence is completed. But, the opening words of the subsection specifically state that it is "[s]ubject to any provision of this Act".

[100] Subsection 128(2) of the *CCRA* establishes that an offender, while on statutory release, is entitled to remain at large in accordance with the conditions of release unless the statutory release is suspended, cancelled, terminated or revoked:

Freedom to be at large	**Mise en liberté**
(2) Except to the extent required by the conditions of any day parole, an offender who is released on parole, statutory release or unescorted temporary absence is entitled, subject to this Part, to remain	(2) Sauf dans la mesure permise par les modalités du régime de semi-liberté, il a le droit, sous réserve des autres dispositions de la présente partie, d'être en liberté aux conditions fixées et ne peut

at large in accordance with the conditions of the parole, statutory release or unescorted temporary absence and is not liable to be returned to custody by reason of the sentence unless the parole, statutory release or unescorted temporary absence is suspended, cancelled, terminated or revoked.	être réincarcéré au motif de la peine infligée à moins qu'il ne soit mis fin à la libération conditionnelle ou d'office ou à la permission de sortir ou que, le cas échéant, celle-ci ne soit suspendue, annulée ou révoquée.

[101] With the suspension of the Applicant's statutory release, he was no longer free to be at large. He was legally returned to incarceration under the *CCRA* pending review of the A4D.

[102] The CSC calculation of September 15, 2017 in the A4D as a revised statutory release date was made under paragraph 127(5)(a) of the *CCRA*. That calculation would only apply if the Applicant's statutory release was revoked:

If parole or statutory release revoked	**Droit à la libération d'office après la révocation**
(5) Subject to subsections 130(4) and (6), the statutory release date of an offender whose parole or statutory release is revoked is	(5) Sous réserve des paragraphes 130(4) et (6), la date de libération d'office du délinquant dont la libération conditionnelle ou d'office est révoquée est celle à laquelle il a purgé :
(a) the day on which they have served two thirds of the unexpired portion of the sentence after being recommitted to custody as a result of a suspension or revocation under section 135;	a) soit les deux tiers de la partie de la peine qu'il lui restait à purger au moment de la réincarcération qui a suivi la suspension ou la révocation prévue à l'article 135;
(my emphasis)	(Non souligné dans l'original)

[103] Since the PBC did not revoke the Applicant's statutory release, the September 15, 2017 date was nothing more than an observation of what might have been.

[104] The Applicant also suggests that his "consent" or "agreement" with the A4D should, in effect, have been rubber-stamped by the PBC. He likens it to what is called in the Ontario Superior Court of Justice a "basket motion". Under the *Federal Courts Rules*, SOR/98-106 the equivalent is a motion in writing made on consent under rule 369. The Applicant did not point to any provision in the *CCRA* or the *CCRR* or to any process within the CSC or the PBC that supports this position.

[105] In any event, there was no "basket motion" or motion on consent requiring the attention of the PBC. The CSC made a recommendation to the PBC in the A4D. The CSC would be well aware that the PBC might not agree with the A4D recommendations. In fact, ultimately the PBC did not entirely adopt the recommendation, as it decided not to include the gambling prohibition.

[106] The PBC possesses the exclusive jurisdiction and absolute discretion under paragraphs 107(1)(b) and (c) of the *CCRA* to: (1) terminate or revoke statutory release; and (2) cancel the suspension, termination or revocation of statutory release. The CSC could not bind the PBC to make a particular determination.

[107] In summary, the PBC was not bound by the Applicant's purported agreement with the recommendation of CSC. The A4D did not contain an offer capable of acceptance by the Applicant. Painted in the very best possible light, most favourable to the Applicant, his September 13, 2017, letter attempted to make a bargain with the PBC based on a contorted reading of the A4D made without acknowledging the relevant legislative provisions.

E. *The PBC did not act arbitrarily in scheduling the Applicant's hearing*

[108] As of the date of the Applicant's letter on September 13, 2017, his statutory release had been suspended pending a determination by the PBC pursuant to subsection 163(3) of the *CCRR*. Without the benefit of a statutory release, the Applicant was legally incarcerated.

[109] When the PBC did not schedule the Applicant's hearing in the two-day window provided by him on September 13, 2017 there was no new or further deprivation of his liberty interest. He had no right to be released on September 15, 2017.

[110] The PBC's letter in response to the Applicant indicated that "all attempts will be made to schedule a hearing prior to [the] Warrant Expiry Date" which was October 20, 2017. The hearing was held on October 12, 2017 and the Applicant was released that day.

[111] The evidence of Ms. Thomson concerning how the PBC hearings are scheduled was clear. The overriding factor is the 90 day window in subsection 163(3) of the *CCRR* requiring the PBC to "render its decision within 90 days after the date of the referral".

X. **Conclusion**

[112] Considering the requirement that the Applicant show a sufficient causal connection between the scheduling process and the deprivation he suffered, I am satisfied that he has established neither.

[113] The scheduling process did not cause him to be incarcerated for a period beyond that of his original sentence. The A4D referral to the PBC was made on July 27, 2017. Ninety days after

that date was October 25, 2017. He was released on October 12, 2017, prior to his WED of October 20, 2017 and prior to the expiry of the 90 day period.

[114] At answer #118 of her examination, Ms. Thomson provided a reasonable and logical explanation of the underlying rationale for the process. It is based on the specific legislation, the operational realities of government and the overall assessment of the universe of offenders who might be affected by a PBC determination within the 90 day window available for the Applicant's review and determination.

[115] Considering the evidence and the legislative provisions, I find that the Applicant has not satisfied his onus to prove the PBC scheduling process was arbitrary within the *Charter* context.

[116] He has failed to establish a sufficient connection between the 90 day requirement in subsection 163(3) of the *CCRR*, as implemented by the PBC scheduling process, and the fact that he was not statutorily released on September 15, 2017 as set out in the A4D. As explained in these reasons for judgment, the Applicant was not statutorily released on September 15, 2017 because his statutory release had not been revoked.

[117] The application is dismissed, without costs.

JUDGMENT in T-1695-17

THIS COURT'S JUDGMENT is that the application is dismissed, without costs.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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