Federal Court  Cour fédérale

Date: 20120720

Docket: T-1223-11

Citation: 2012 FC 923

Ottawa, Ontario, July 20, 2012

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

EDWARD PEARCE

Applicant

and

THE PAROLE BOARD OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Edward Pearce is serving a sentence in a federal penitentiary at Stephenville, Newfoundland. When he was sentenced, the *Corrections and Conditional Release Act* provided a mechanism for an accelerated parole review for eligible offenders. While his case was in a queue for consideration by the Parole Board, amendments to repeal this procedure were brought into effect. Mr. Pearce's application was, therefore, refused. He contends that he was denied procedural fairness and that he was entitled to consideration under the law as it was when his application for accelerated review was submitted.

[2] For the reasons that follow, the application is granted and the matter is remitted to the Board for reconsideration in accordance with these reasons.

BACKGROUND:

[3] Under the *Corrections and Conditional Release Act*, SC 1992, c 20 (hereafter "CCRA") as it read prior to March 28, 2011, aaccelerated parole review was a procedure that permitted an inmate to apply for conditional release after one sixth of his sentence (s.125 of the CCRA).

[4] Mr. Pearce is a substance abuser with a criminal record who sold drugs to support his own habit. He received a five year sentence for drug offences on October 1, 2010. Under the accelerated procedure in place at that time, the applicant would have been eligible for early day parole on August 1, 2011, subject to approval by the Board.

[5] Notwithstanding the length of the term imposed, Mr. Pearce was considered a good candidate for accelerated day and full parole as a first time federal offender by Correctional Service of Canada (CSC) staff at the Western Correctional Centre in Stephenville. His prior criminal history was not recent and had involved relatively minor non-violent property and drug crimes for which he had received provincial sentences. Moreover, he had family and other support in the community. The police agency that had arrested and charged him was not opposed to his release under supervision.

[6] The applicant was informed that CSC was recommending him for accelerated parole on March 17, 2011. CSC staff was aware that Parliament had enacted the *Abolition of Early Parole Act*, SC 2011, c 11 (hereafter "AEPA"). The AEPA received Royal Assent on March 23, 2010. It was brought into force by Order in Council on March 28, 2011. Under that legislation, section 119.1 and 125-126.1 of the CCRA were repealed.

[7] On March 25, 2011, CSC was requested by a Board Case Review Officer to submit all documentation concerning Mr. Pearce's case in order to permit the Board to proceed with the review before the entry into force of the AEPA. His file was one of two at the Stephenville penitentiary that were ready to proceed but the documentation in his file was not received at the Board's Moncton offices until about mid-day on the 25th. At that time, it was placed in a queue of some 65 parole applications. The record does not disclose how many of these were from offenders affected by the change in legislation.

[8] The Board considered the pending applications until 4:30 p.m. at which time it adjourned for the weekend, having dealt with about half of the cases on its list for that day. The Panel resumed its work the following Monday.

[9] On March 31, 2011 the Board denied accelerated parole release to the applicant because of the entry into force of the AEPA. The applicant appealed that decision on April 6, 2011 with the assistance of a CSC employee.

[10] The Appeal Division dismissed the appeal on June 6, 2011 finding that the Board's decision was consistent with the transitional provisions of the AEPA and the applicant could no longer benefit from accelerated parole consideration.

[11] This application for judicial review of the Appeal Division's decision is brought under s.18.1 of the *Federal Courts Act*, RSC, 1985, c F-7.

RELEVANT LEGISLATION:

[12] Sections 5 and 10 of the AEPA are relevant to this application. They read as follows:

5. The heading before section 125 and sections 125 to 126.1 of the Act [the *Corrections and Conditional Release Act*] are repealed.	5. L'intertitre précédant l'article 125 et les articles 125 à 126.1 de la même loi [la *Loi sur le système correctionnel et la mise en liberté sous condition*] sont abrogés.
10. (1) Subject to subsection (2), the accelerated parole review process set out in sections 125 to 126.1 of the *Corrections and Conditional Release Act*, as those sections read on the day before the day on which section 5 comes into force, does not apply, as of that day, to offenders who were sentenced, committed or transferred to penitentiary, whether the sentencing, committal or transfer occurs before, on or after the day of that coming into force.	10. (1) Sous réserve du paragraphe (2), la procédure d'examen expéditif prévue par les articles 125 à 126.1 de la *Loi sur le système correctionnel et la mise en liberté sous condition*, dans leur version antérieure à la date d'entrée en vigueur de l'article 5, cesse de s'appliquer, à compter de cette date, à l'égard de tous les délinquants condamnés ou transférés au pénitencier, que la condamnation ou le transfert ait eu lieu à cette date ou avant ou après celle-ci.
(2) For greater certainty, the repeal of sections 125 to 126.1	(2) Il demeure entendu que l'abrogation des articles 125 à

of the *Corrections and Conditional Release Act* does not affect the validity of a direction made under those sections before the day on which section 5 comes into force.	126.1 de la *Loi sur le système correctionnel et la mise en liberté sous condition* n'a aucun effet sur la validité des ordonnances rendues sous le régime de ces articles avant la date d'entrée en vigueur de l'article 5.

[13] Sections 119.1, 125(2)&(4), and 126(1) of the CCRA as they read on March 27, 2011 prior to the coming into force of the AEPA are:

119.1 The portion of the sentence of an offender who is eligible for accelerated parole review under sections 125 and 126 that must be served before the offender may be released on day parole is six months, or one sixth of the sentence, whichever is longer.	119.1 Le temps d'épreuve pour l'admissibilité à la semi-liberté est, dans le cas d'un délinquant admissible à la procédure d'examen expéditif en vertu des articles 125 et 126, six mois ou, si elle est supérieure, la période qui équivaut au sixième de la peine.
125. (2) The Service shall, at the time prescribed by the regulations, review the case of an offender to whom this section applies for the purpose of referral of the case to the Board for a determination under section 126.	125. (2) Le Service procède, au cours de la période prévue par règlement, à l'étude des dossiers des délinquants visés par le présent article en vue de leur transmission à la Commission pour décision conformément à l'article 126.
[…]	[…]
(4) On completion of a review pursuant to subsection (2), the Service shall, within such period as is prescribed by the regulations preceding the offender's eligibility date for full parole, refer the case to the Board together with all information that, in its opinion, is relevant to the case.	(4) Au terme de l'étude, le Service transmet à la Commission, dans les délais réglementaires impartis mais avant la date d'admissibilité du délinquant à la libération conditionnelle totale, les renseignements qu'il juge utiles.

126. (1) The Board shall review without a hearing, at or before the time prescribed by the regulations, the case of an offender referred to it pursuant to section 125.	126. (1) La Commission procède sans audience, au cours de la période prévue par règlement ou antérieurement, à l'examen des dossiers transmis par le Service ou les autorités correctionnelles d'une province.

[14] Also pertinent is Section 159 of the *Corrections and Conditional Release Regulations*, SOR/92-620 (hereafter the Regulations):

159. (1) The Service shall review the case of an offender to whom section 125 of the Act applies within one month after the offender's admission to a penitentiary, or to a provincial correctional facility where the sentence is to be served in such a facility.	159. (1) Le Service doit examiner le cas du délinquant visé à l'article 125 de la Loi dans le mois qui suit son admission dans un pénitencier ou dans un établissement correctionnel provincial lorsqu'il doit purger sa peine dans cet établissement.
(2) The Service shall refer the case of an offender to the Board pursuant to subsection 125(4) of the Act not later than three months before the offender's eligibility date for full parole.	(2) Le Service doit, conformément au paragraphe 125(4) de la Loi, transmettre à la Commission le cas du délinquant au plus tard trois mois avant la date de son admissibilité à la libération conditionnelle totale.
(3) The Board shall, pursuant to subsection 126(1) of the Act, review the case of an offender not later than seven weeks before the offender's eligibility date for full parole.	(3) La Commission doit, conformément au paragraphe 126(1) de la Loi, examiner le cas du délinquant au plus tard sept semaines avant la date de son admissibilité à la libération conditionnelle totale.
(4) A panel shall, pursuant to subsection 126(4) of the Act, review the case of an offender before the offender's eligibility date for full parole.	(4) Le comité doit, conformément au paragraphe 126(4) de la Loi, réexaminer le cas du délinquant avant la date de son admissibilité à la libération conditionnelle totale.

[15] Section 43 of the *Interpretation Act*, RSC 1985, c-I-21 is also relevant:

43. Where an enactment is repealed in whole or in part, the repeal does not	43. L'abrogation, en tout ou en partie, n'a pas pour conséquence :
(*a*) revive any enactment or anything not in force or existing at the time when the repeal takes effect,	*a*) de rétablir des textes ou autres règles de droit non en vigueur lors de sa prise d'effet;
(*b*) affect the previous operation of the enactment so repealed or anything duly done or suffered thereunder,	*b*) de porter atteinte à l'application antérieure du texte abrogé ou aux mesures régulièrement prises sous son régime;
(*c*) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed,	*c*) de porter atteinte aux droits ou avantages acquis, aux obligations contractées ou aux responsabilités encourues sous le régime du texte abrogé;
(*d*) affect any offence committed against or contravention of the provisions of the enactment so repealed, or any punishment, penalty or forfeiture incurred under the enactment so repealed, or	*d*) d'empêcher la poursuite des infractions au texte abrogé ou l'application des sanctions — peines, pénalités ou confiscations — encourues aux termes de celui-ci;
(*e*) affect any investigation, legal proceeding or remedy in respect of any right, privilege, obligation or liability referred to in paragraph (*c*) or in respect of any punishment, penalty or forfeiture referred to in paragraph (*d*),	*e*) d'influer sur les enquêtes, procédures judiciaires ou recours relatifs aux droits, obligations, avantages, responsabilités ou sanctions mentionnés aux alinéas *c*) et *d*).

and an investigation, legal proceeding or remedy as described in paragraph (*e*) may be instituted, continued or enforced, and the punishment, penalty or forfeiture may be imposed as if the enactment had not been so repealed.	Les enquêtes, procédures ou recours visés à l'alinéa *e*) peuvent être engagés et se poursuivre, et les sanctions infligées, comme si le texte n'avait pas été abrogé.

ISSUES:

[16] The respondent raised a preliminary objection to arguments advanced by the applicant in his memorandum with respect to the interpretation of s. 10 of the AEPA as they were not referenced in his Notice of Application. I ruled in favour of the applicant at the hearing with brief oral reasons. My reasons for that ruling are set out below in the analysis.

[17] Apart from the preliminary objection, the issues raised on this application are:

a. What is the appropriate standard of review?

b. Was the decision of the Appeal Division correct in law?

c. Did the Board breach its duty of procedural fairness to the applicant?

ANALYSIS:

1. Standard of Review

[18] The appropriate standard of review for decisions of the Appeal Division has been found to be reasonableness: *Scott v Canada (Attorney General)*, 2010 FC 496 at para 32; *Tozzi c Canada*

(Procureur général), 2007 CF 825 at paras 23-35; *Latham v Canada*, 2006 FC 284 at paras 6-8; and *Bouchard v Canada (National Parole Board)*, 2008 FC 248 at paras 22-28.

[19] The applicant submits that this application raises a pure question of law. Such questions are normally reviewable upon a standard of correctness: *Canada (Attorney General) v JP*, 2010 FCA 90 paras 20-21 and 45; and *McMurray v Canada (National Parole)*, 2004 FC 462 at para 136.

[20] The respondent contends that any question of law at issue in these proceedings is not of central importance to the legal system: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 60. In *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paragraph 39, the Supreme Court stated that it should be presumed that the appropriate standard is reasonableness when the decision of the tribunal under review concerns the interpretation or application of its home statute.

[21] This matter primarily concerns the application by the Appeal Division of s.10 of the AEPA to specific facts. It raises questions of statutory interpretation concerning the effect of possibly vested rights and privilege which are associated under common law and the *Interpretation Act*. In *JP v Canada (Attorney General)*, 2009 FC 402, aff'd by 2010 FCA 90, at para 15 the Court stated:

> [15] Here, the Board interpreted its "home statute" (the CCRA) and a related statute (the YCJA) but the questions at issue in these proceedings have not arisen in the context of the Board's usual administrative regime respecting the grant of parole to adult offenders. In the particular circumstances in which this application has been brought, I have no reason to believe that the Board has any greater degree of expertise than the Court in construing the interplay between the two statutes. The questions of law that arise may be considered to be of significant importance to the youth justice system and outside the Board's expertise. Accordingly, I am satisfied that the Board's decision does not require deference and that I must be concerned

> with whether the Board correctly interpreted the applicable legislation in its calculation of J.P.'s parole eligibility.
>
> [Emphasis added]

[22] The Appeal Division does not possess any special expertise with respect to the *Interpretation Act* and the common law. The interplay between the CCRA, the transitional provisions of the AEPA, principles of common law and the *Interpretation Act* lies outside the tribunal's area of expertise. Furthermore, the questions of law raised by this application can only have one answer: whether the applicant's entitlement to accelerated review was protected or not. There is no range of possible reasonable outcomes. I conclude, therefore, that the question of law in this matter is subject to the correctness standard of review.

[23] The appropriate standard of review for questions of procedural fairness is correctness: *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43.

2. *Preliminary objection to interpretation arguments*

[24] The principal ground of review relied upon in the Notice of Application was a breach of procedural fairness:

> The Parole Board failed to exercise its jurisdiction by unfairly delaying a decision upon the Applicant's application for accelerated release from March 25, 2011 until March 28, 2011 – the date that legislation (Abolition of Early Parole Act) came into effect abolishing accelerated release.

[25] The interpretation arguments were first developed in the applicant's Memorandum of Fact and Law. The respondent contends that this was contrary to Rule 301(e) of the *Federal Courts Rules*, SOR/98-106.

[26] As Justice MacKay stated in *Friends of Point Pleasant Park v Canada (Attorney General)*, [2000] FCJ No 2012 at paragraph 15: "[a]voidance of surprise is the objective of the Court's Rules, in particular Rule 301(e)…". In this instance, the respondent could not reasonably argue surprise.

[27] When pressed at the hearing, counsel for the respondent fairly acknowledged that she could not readily identify what prejudice her client may have experienced as a result of the failure of the applicant to raise the arguments at the first instance. In particular, she could not describe what type of affidavit evidence the respondent might have presented to what are, essentially, questions of law. Counsel also acknowledged that she had had an adequate opportunity to provide written representations and prepare oral submissions in response to the interpretation arguments. There was no request to submit supplementary affidavit evidence in support of the respondent's position.

[28] In *Stumpf v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 148, 289 NR 165, the Court of Appeal allowed the applicants to raise an issue in oral argument which had not been raised in the judicial review or in any of the proceedings before the Board, considering that the record disclosed all of the relevant facts and there was no suggestion that the Minister would be prejudiced if the issue was considered.

[29] I am satisfied that the record in these proceedings discloses all of the relevant facts and that the Minister is not prejudiced by consideration of the arguments. Had prejudiced been established, I would have considered an adjournment to allow the respondent to submit supplementary affidavit evidence. That remedy was not requested. As the matter was of particular importance to the applicant I concluded that I should exercise my discretion in his favour: see *Kinsey v Canada (Attorney General)*, 2007 FC 543 at paras 33-34.

3. Was the Appeal Division's decision correct?

[30] The evidence is that by mid-day on March 25, 2011, three days prior to the coming into force of the AEPA, the Board had received all of the documentation required from CSC to consider the applicant's eligibility for accelerated parole. The applicant had been informed that CSC had recommended that he be granted early parole.

[31] The Board was aware that March 25, 2011 was the last day on which they could review his case assuming they did not sit on the weekend. There is no evidence that the Board purposefully and willfully delayed its decision on the applicant's case. The Board is entitled to determine what priority it will give to the applications before it when it conducts hearings and to fix its own hearings schedule.

[32] When it reached the applicant's file on March 31, 2011, the Board considered on a reading of s.10 of the AEPA that it could not review the applicant's case as it had lost the authority to grant

early parole as of March 28, 2011 when the AEPA was brought into effect. The Appeal Division found no error in that determination.

[33] Section 10 is a transitional provision which provides, subject to the limitation in subsection 10 (2), that the accelerated parole review process no longer applies to offenders who were sentenced, committed or transferred to penitentiary before the coming into force of the repeal of CCRA sections 125 to 126.1.

[34] Subsection 10 (2) of the AEPA states that the repeal of CCRA sections 125 to 126.1 does not affect the validity of a direction ("ordonnances") made under those provisions before the day on which section 5, the enactment giving effect to the repeal, comes into force. In effect, the subsection safeguards decisions ("directions", "ordonnances") made under the regime as it was prior to the abolition of the accelerated parole review provisions of the CCRA.

[35] At first impression, the transitional provisions are clear: subsection 10(1) indicates that all offenders are covered by the repeal including those sentenced and committed to a penitentiary prior to the enactment of the AEPA; and subsection 10(2) specifies that any early parole decision made prior to the coming into force of the legislation are not affected.

[36] There is no indication in the record, however, that the Board or the Appeal Division considered the effect of s. 43 of the *Interpretation Act* on its reading of the transitional provisions of the AEPA. The *Interpretation Act* is not silent on the effect of repeals.

[37] For convenient reference, the relevant provisions of section 43 of the *Interpretation Act* are set out again below:

43. Where an enactment is repealed in whole or in part, the repeal does not	43. L'abrogation, en tout ou en partie, n'a pas pour conséquence :
…	…
(*c*) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed,	*c*) de porter atteinte aux droits ou avantages acquis, aux obligations contractées ou aux responsabilités encourues sous le régime du texte abrogé;
…	…
(*e*) affect any investigation, legal proceeding or remedy in respect of any right, privilege, obligation or liability referred to in paragraph (*c*) …	*e*) d'influer sur les enquêtes, procédures judiciaires ou recours relatifs aux droits, obligations, avantages, responsabilités ou sanctions mentionnés aux alinéas *c*) et *d*).
and an investigation, legal proceeding or remedy as described in paragraph (*e*) may be instituted, continued or enforced …	Les enquêtes, procédures ou recours visés à l'alinéa *e*) peuvent être engagés et se poursuivre, et les sanctions infligées, comme si le texte n'avait pas été abrogé.

[Emphasis added]

[38] The respondent submits that the effect of s. 43 is to protect vested rights acquired under the repealed legislation. Parole is not a right but a privilege: *Mitchell v R*, [1976] 2 SCR 570 at para 7; *Lopez v Canada (National Parole Board)*, 2001 BCCA 742 at para 32; and *Berenstein v Canada*

(National Parole Board), [1996] FCJ No 448 at para 18. The respondent submits further that no one has a legal right to have an application for a statutory benefit determined in accordance with the eligibility criteria in place when the application was made: *Apotex Inc v Canada (Attorney General)*, [2000] 4 FC 264, Evans JA.'s concurrence, at para 82.

[39] The respondent is correct that parole has been characterized by the Courts as a privilege rather than a right. However, s.43 of *Interpretation Act* includes privileges accrued or accruing under the repealed legislation as well as rights. The French version refers to "droits ou avantages acquis". Repeals do not affect an accrued or accruing privilege, do not affect any proceedings related to that privilege and proceedings are to continue as if the repealed provision was still in effect.

[40] The doctrine of vested rights applied to privilege at common law. The following comment was made by Justice Dickson, as he was then, referring to section 35 of the *Interpretation Act, RSC* 1970, c I-23 (now s.43 of the *Interpretation Act*), at p.283-284 of *Gustavson Drilling (1964) Ltd v Minister of National Revenue*, [1977] 1 SCR 271:

> This section is merely the statutory embodiment of the common law presumption in respect of vested rights as it applies to the repeal of legislative enactments and in my opinion the section does nothing to advance appellant's case. Appellant must still establish a right or privilege acquired or accrued under the enactment prior to repeal, and this it cannot do.

[41] The interests protected by "privileges" and "rights" are very similar. In *Le Strange v Pettefar*, (1939) 161 LT 300 at 301, cited by *Canadian Union of Postal Workers v Canada Post Corp*, [1994] 3 FC 140 at paragraph 39 and *Hall v Canada (Minister of Employment and*

Immigration), [1983] OJ No 376 at paragraph 23, Luxmoore L.J. defines privilege as follow: "[a] 'privilege' describes some advantage to an individual or group of individuals, a right enjoyed by a few as opposed to a right enjoyed by all" [emphasis added]. This definition is supported by the *Oxford English Dictionary*: "a special right, advantage, or immunity granted or available only to a particular person or group."

[42] The Ontario Court of Appeal defined "right" at paragraph 19 of *Health Network v Ontario (Minister of Finance)*, 2001 OJ No 4485 (ONCA):

> [19] A tax exemption is a right. A convenient definition of "right" is found in Black's Law Dictionary, 6th ed. (St. Paul, Minn.: West Publishing, 1990) at p. 1324:
> - a power, privilege, faculty, or demand, inherent in one person and incident upon another ...
> - a power, privilege, or immunity guaranteed under a constitution, statutes or decisional laws, or claimed as a result of long usage ...

The French expression "droit subjectif" meaning "right" as opposed to droit objectif "law" is similarly defined:

> **DROIT SUBJECTIF** [(*Right*)] Prérogative reconnue à une personne par le droit objectif, dont celle-ci peut se prévaloir pour faire, exiger ou interdire quelque chose dans son propre intérêt ou, parfois, dans l'intérêt d'autrui.
>
> (Hubert Reid, *Dictionnaire de droit québécois et canadien*, 4e éd. (Montréal : Éditions Wilson & Lafleur, 2010) at p.221)

[43] In my view, the definition of privilege reveals that the difference between a privilege and a right is simply that the former is either uncommon or acquired through a specific process or action, such as applying for parole. This is probably the reason why s.43 of the *Interpretation Act* and the common law protect both accruing rights and privileges.

[44] Parole is a discretionary grant of remission from incarceration and therefore a privilege. It is less clear whether the ability to have one's case reviewed by the Parole Board qualifies as a privilege or a right. In this matter, I consider it unnecessary to determine if Mr. Pearce has an accrued right or privilege for the purposes of this application.

[45] The Supreme Court identified criteria that serve as guide to determine the existence of an accrued right or privilege in *Dikranian v Quebec (Attorney General)*, 2005 SCC 73 at paragraphs 39-40. These criteria are: (1) the individual's legal situation must be tangible and concrete rather than general and abstract; and (2) this legal situation must have been sufficiently constituted at the time of the new statute's commencement.

[46] The Federal Court of Appeal stated in *Hutchins v Canada (National Parole Board)*, [1993] FCJ No 679 (FCA) that:

> [14] There is consensus among the authorities on the need to satisfy statutory conditions precedent to the existence of a right before claiming it. After reviewing a number of cases dealing with the notion of "accruing rights", Cameron J.A. wrote in Scott v. College of Physicians and Surgeons:
>
> > "In each of these cases "rights", as such, had become specific to the person claiming them, and the events or conditions specified in the repealed statute had occurred or been met before repeal. And so in each, the person asserting the right was held to have had an "acquired" or "accrued right" as of the day of repeal."

[47] The applicant was eligible for early parole under the repealed provisions, and was personally entitled to have his application considered by the Board. He had received a positive recommendation from CSC. Finally, CSC had submitted his application before the date of the repeal. A decision from the Board was the last step required. The applicant meets the *Dikranian*

criteria. I thus find the applicant had an accruing right or privilege under common law and s.43 of the *Interpretation Act* to have his parole application reviewed by the Board under the repealed accelerated parole provisions.

[48] The question remaining is whether the doctrine of vested rights is applicable to this case considering the transitional provisions of the AEPA. In *Dikranian*, above, Justice Bastarache stated at paragraphs 36-40 that:

> [36] ... As Professor Sullivan says, care must be taken not to get caught up in the last vestiges of the literal approach to interpreting legislation:
>
> > In so far as this language echoes the plain meaning rule, it is misleading. The values embodied in the presumption against interfering with vested rights, namely avoiding unfairness and observing the rule of law, inform interpretation in every case, not just those in which the court purports to find ambiguity. The first effort of the court must be to determine what the legislature intended, and . . . for this purpose it must rely on all the principles of statutory interpretation, including the presumptions. [p. 576]
>
> Since the adoption of the modern approach to statutory interpretation, this Court has stated time and time again that the "entire context" of a provision must be considered to determine if the provision is reasonably capable of multiple interpretations (see, for example, *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 29).
>
> [emphasis added]

[49] Professor Sullivan notes that there is a strong presumption against the interference of repeals with vested rights or privileges. This presumption can only be rebutted by clear statutory language. When a statute is subject to multiple possible interpretations, the interpretation preserving the accruing right must be preferred. (See Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham (ON): LexisNexis, 2008) at p.711-712 and 719-721).

[50] Sections 5 and 10 of the AEPA read together indicate that the early parole provisions are abolished; the amended CCRA applies to everyone; and the directions made before the repeal remain valid. The AEPA does not directly address the situation of Mr. Pearce. Following the reasoning of the Supreme Court in *Dikranian*, above, and s.43 of the *Interpretation Act*, the AEPA must be interpreted, considering the absence of clear statutory language regarding accruing rights or privileges, as preserving the accrued right or privilege of Mr. Pearce in order to avoid unfairness.

[51] I believe it is important to note that my conclusion does not give the applicant the right to obtain parole, but rather requires that his case be reviewed under the repealed provisions. Offenders who were eligible for early parole before the entry into force of the AEPA but for whom CSC did not submit all the required documents to the Board could not avail themselves of the above mentioned privilege or right.

4. Did the Board breach its duty of procedural fairness to the applicant?

[52] The applicant submits that the Appeal Division and the Board breached their duty of procedural fairness as set out in *Mooring v Canada (National Parole Board)*, [1996] 1 SCR 75 at paras 34-35. Specifically, the applicant alleges that he had a legitimate expectation to have his case reviewed by the Board on March 25, 2011.

[53] The factors to consider when determining the existence of a legitimate expectation are discussed in *Canada (Attorney General) v Mavi*, 2011 SCC 30. At paragraph 68 Justice Binnie stated:

> Where a government official makes representations within the scope of his or her authority to an individual about an administrative process that the government will follow, and the representations said to give rise to the legitimate expectations are clear, unambiguous and unqualified, the government may be held to its word, provided the representations are procedural in nature and do not conflict with the decision maker's statutory duty. Proof of reliance is not a requisite. See *Mount Sinai Hospital Center*, at paras. 29-30; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 S.C.R. 249, at para. 78; and *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539, at para. 131. It will be a breach of the duty of fairness for the decision maker to fail in a substantial way to live up to its undertaking: Brown and Evans, at pp. 7-25 and 7-26.

[54] In this instance, the applicant alleges that the Board had informed CSC staff, who in turn informed the applicant, that they were aware of the coming into force of the AEPA and that the applicant's case had to be "voted on" on March 25, 2011. In those circumstances, he contends, the failure of the Board to make its decision on March 25, 2011 constituted a breach of procedural fairness. In essence, he contends that he had a legitimate expectation that the decision would be made on that date based on an undertaking by the Board that it failed to live up to.

[55] Although it appears that the applicant was led to believe that a decision would be made on March 25, 2011, the Board made no representations directly to him. The language in the email sent to the CSC staff member is not sufficiently clear, unambiguous and unqualified to constitute an undertaking by the Board to the applicant that his case would be reviewed on March 25, 2011. It conveys information about the looming deadline but offers no assurance that the Board would deal with the matter on that date. Accordingly, I am unable to conclude that there was a breach of procedural fairness by the Board and the Appeal Division.

COSTS:

[56] The parties are agreed that costs in this matter should be fixed at $2500.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. the application for judicial review is granted;
2. the application for accelerated parole is remitted to the Appeal Division of the Parole Board of Canada for reconsideration; and
3. the applicant is awarded costs fixed in the amount of $2500.

"Richard G. Mosley"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1223-11
STYLE OF CAUSE:	EDWARD PEARCE and THE PAROLE BOARD OF CANADA
PLACE OF HEARING:	St. John's, Newfoundland
DATE OF HEARING:	April 5, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	MOSLEY J.
DATED:	July 20, 2012

APPEARANCES:

Erin K. Breen	FOR THE APPLICANT
Melissa Chan	FOR THE RESPONDENT

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