

Federal Court



Cour fédérale

**Date: 20091027**

**Docket: T-270-09**

**Citation: 2009 FC 1094**

**Ottawa, Ontario, October 27, 2009**

**PRESENT: The Honourable Mr. Justice Near**

**BETWEEN:**

**JULIAN BROWNING**

**Applicant**

**and**

**THE ATTORNEY GENERAL  
OF CANADA**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application for judicial review in respect of a decision of the National Parole Board Appeal Division dated January 19, 2009, which affirmed the decision of the National Parole Board dated August 22, 2008. The National Parole Board denied the Applicant's application for accelerated day parole.

I. Background

[2] The Applicant is a federal inmate currently incarcerated in a medium security institution. On August 22, 2008, he was scheduled to appear before a panel of the National Parole Board (the Board) for a hearing to assess if he should be released on day parole. Prior to the hearing, the Applicant's common-law spouse submitted two letters of support to the Board for consideration. The Applicant was also informed by his Counsel on the appropriate process and forms required from his common-law spouse for her to attend the hearing as an observer. The common-law spouse did not submit the forms.

[3] The common-law spouse did not appear at the Applicant's hearing. At the start of the hearing, the Applicant requested an adjournment to allow his spouse to attend as an observer. The Applicant argued before this court that he wanted his spouse to be present at the hearing for three reasons: to help him face the Board's questions; to add credibility to his denial that he ever assaulted her, and to involve her personally in an important part of his sentence.

[4] At the Parole Board Hearing, the Applicant acknowledged that he had Counsel present who was acting as his assistant, that his common-law spouse would not be speaking, that she had submitted two letters for the Board's consideration, that she had not submitted the forms required to attend, and that he did not know if she was in transit to the hearing. The Applicant stated he would waive his rights with regard to the relevant statutory timeframe requirements if the hearing was adjourned.

[5] The Board considered the Applicant's request but declined to adjourn the hearing. The Applicant refused to participate further, acknowledging that the Board would proceed without his input and make their determination on a file-review only. The Board did not direct accelerated day parole and denied full parole.

[6] The Applicant appealed the Board's decision to the Appeal Division of the National Parole Board. The Appeal Division denied the appeal and affirmed the decision of the Board, *inter alia*, to deny the Applicant's request to postpone the hearing as reasonable and justified.

## II. The Decision

[7] The Board denied the Applicant's request for an adjournment. In their written decision, dated August 22, 2008 the Board wrote:

At the start of the hearing, your assistant requested a postponement as your common-law spouse, who was to attend as a support observer, was not present. You had been unable to reach her by telephone and did not know if she was en-route. Your assistant acknowledged that your common-law would not be speaking to the Board and as such, would have no impact on the Board's decision. Nevertheless, the Board agreed to caucus to consider your request. It was the decision of the Board that we were going to proceed with the hearing, as we were in receipt of two letters of support from your common-law and that you had your assistant present. When presented with this position, you declined to proceed with the hearing even after being informed that the Board would be making a decision today.

[8] The Appeal Division determined that the Board's decision to deny the Applicant's request for a postponement and proceed with the hearing was reasonable and that the written reasons clearly set out the reasons for denying the request and were well supported. The Appeal Division noted that it was the Board's discretion to decide whether to postpone and reschedule the hearing and that the Applicant could not explain at the time why his common-law spouse had not submitted the required forms or why she was not present at the hearing.

### III. Standard of Review

[9] When reviewing a decision of the National Parole Board Appeal Division, the standard of review for questions of law and procedural fairness is correctness while other issues are reviewable on a reasonableness standard (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Latham v. Canada*, 2006 FC 284, 288 F.T.R. 37).

[10] The Court should show a high degree of deference to decisions of the Appeal Division as it is a respected expert tribunal (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *Latham*, above).

III. Issues

[11] The issues raised by the Applicant can be set out as such:

(a) Was the decision of the Appeal Division to uphold the Board's refusal to grant an adjournment unreasonable?

(b) Did the decision violate the principles of procedural fairness or result in a denial of natural justice?

[12] It is important to note that the Applicant did not have an absolute right to an observer at his hearing. Section 9.3 of the *National Parole Board Policy Manual* (the Manual) states that the purpose of observers at hearings is to increase the openness and public understanding of the Board's decision making and increase the accountability of the Board.

[13] I agree with the Respondent that the language in the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 s. 140(4) is clear that to attend a hearing as an observer the person must apply in writing. I also agree that the Board's Policy Manual states that a person who wants to attend a hearing as an observer must submit a request in writing sufficiently far in advance of the hearing to permit the Board to make an informed decision (see the Manual, section 9.3).

A. *Adjournments*

[14] The Applicant agrees that the Board's power to grant an adjournment under sections 157 and 158 of the *Correction and Release Regulations*, SOR/92-620 is discretionary, but argues that this power must be exercised with a balanced, judicious and fair approach. I note that these sections do envision the involvement of the offender in the process, as subsections 157(3) and 158(3) address the discretion of the Board to postpone a review with the "consent of the offender".

[15] Under section 9.8 of the Manual, reviews may be postponed for reasons such as, but not limited to, when procedural safeguards cannot be met or the offender's assistant is unable to be present. The Manual continues setting out that a hearing may be postponed at the request of the offender for a valid reason, but not to frustrate the system. The Applicant takes the position that the possible "valid" reasons for an adjournment are unlimited. He argues that his reasons were valid and that there was no evidence that he was using the adjournment request to frustrate or control the system, or in any capricious or vexatious manner.

[16] However, section 9.8, in which the issue of "valid" reasons is raised, is not relevant to this case. Section 9.8 addresses postponements and in this matter the Applicant wanted an adjournment. Adjournments are addressed in section 9.6 of the Manual. Section 9.6 states that the Board may adjourn a detention review at the request of an offender. This is a discretionary decision.

[17] In the event that section 9.8 is considered relevant, as I note that the term postponement was used by the Board and Appeal Division, I agree with the Applicant that the list of possible “valid” reasons is not limited to those listed in section 9.8. However, the Board retains the discretionary decision to determine when a reason is “valid”.

[18] The Board’s exercise of its discretion, either under 9.6 or 9.8 of the Manual, was reasonable and fit within the regulatory scheme and the stated purpose of having observers at the hearing. The Board caucused to consider the Applicant’s request, but did not adjourn the hearing as the Applicant’s common-law wife had submitted two letters of support and would not be speaking at the hearing and the Applicant’s assistant was present. This was reasonable.

B. *Procedural Unfairness and Natural Justice*

[19] It is the Applicant’s position that the Board ignored or misunderstood the fundamental reason for the adjournment, which was the support of his common-law wife, and in doing so acted unreasonably resulting in procedural unfairness.

[20] The duty of fairness requires that there is an opportunity to be heard and present proofs and arguments to the decision maker. The Applicant was given that opportunity, with the assistance of his Counsel. There is no evidence that that Board denied the adjournment in an unreasonable manner or in a violation of justice (see Jones & de Villars, *Principles of Administrative Law*

(Toronto: Thomson Canada Limited, 2004), pp. 309-313; B.S.O.I.W., *Local 752 v. Millwright & Machine Electors, Local 1178 (1992)*, 114 N.S.R. (2d) 303, 7 Admin. L.R. (2d) 179 (NSTD)).

[21] Finally, it is the Applicant's position that the Appeal Division relied on irrelevant information when it noted that the Applicant could not explain why the Applicant's common-law spouse had not submitted the required forms and by asserting that his common-law spouse would have no impact on the decision. In its written decision the Board relied on the fact that they were in receipt of two letters of support from the Applicant's common-law spouse and that the Applicant had his assistant present. The Appeal Division's upholding of these reasons did not result in procedural fairness or offend natural justice.

[22] The decision of the Appeal Division to uphold the decision of the Board was reasonable and there were no errors in procedural fairness or denials of natural justice.



**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES that** this application for judicial review is dismissed with costs to the Respondent.

“ D. G. Near ”  
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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-270-09

**STYLE OF CAUSE:** BROWNING  
v.  
THE ATTORNEY GENERAL OF CANADA

**PLACE OF HEARING:** OTTAWA

**DATE OF HEARING:** OCTOBER 15, 2009

**REASONS FOR JUDGMENT  
AND JUDGMENT BY:** NEAR J.

**DATED:** OCTOBER 27, 2009

**APPEARANCES:**

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