

Federal Court  
of Appeal



Cour d'appel  
fédérale

**Date: 20110414**

**Docket: A-483-10**

**Citation: 2011 FCA 136**

**CORAM: EVANS J.A.  
DAWSON J.A.  
STRATAS J.A.**

**BETWEEN:**

**ATTORNEY GENERAL OF CANADA AND  
NATIONAL PAROLE BOARD**

**Appellants**

**and**

**JOHN ANTHONY FRANCHI**

**Respondent**

Heard at Toronto, Ontario, on April 11, 2011.

Judgment delivered at Ottawa, Ontario, on April 14, 2011.

REASONS FOR JUDGMENT BY:

EVANS J.A.

CONCURRED IN BY:

DAWSON J.A.  
STRATAS J.A.

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**REASONS FOR JUDGMENT**

**EVANS J.A.**

**Introduction**

[1] This is an appeal by the Attorney General of Canada and the National Parole Board (Board) from a decision of the Federal Court, dated November 24, 2010. In that decision (2010 FC 1179), Justice Harrington (Judge) allowed an application for judicial review by John Anthony Franchi. The Judge set aside a decision of the Appeal Division of the Board, dated March 19, 2010, affirming the Board's revocation of Mr Franchi's day parole and the denial of full parole.

[2] The Board revoked Mr Franchi's parole because he had breached the conditions imposed on him. In particular, he had failed to report immediately any change in his financial situation and to provide to his parole officer full financial disclosure (including assets, debt, income and expenditure) immediately upon request.

[3] The Judge agreed that Mr Franchi had not immediately reported a change in his financial situation. However, he concluded that, when read together, the two conditions were contradictory and ambiguous, and did not clearly inform Mr Franchi of his reporting obligations. Consequently, it was unreasonable of the Board to revoke his day parole and refuse him full parole for not complying with the condition that he immediately report to his parole officer any change in his financial situation. The Judge also held that the Board had breached the duty of fairness because its reasons did not state the basis of its rejection of Mr Franchi's explanation for not providing full financial disclosure as soon as it was requested.

[4] In my respectful view, the Judge erred on both counts. Properly interpreted, the conditions were complementary, not contradictory or ambiguous. They imposed separate and distinct obligations on Mr Franchi: to report immediately, on his own initiative, any change in his financial situation and to provide a full financial disclosure immediately upon request. Further, on a fair reading, the Board's reasons informed Mr Franchi of the bases of its decision.

[5] Accordingly, I would allow the appeal.

## Factual and Statutory Backgrounds

[6] Mr Franchi is 58 years old. In 2007, he pleaded guilty to a series of fraud-related offences committed over several years, and was sentenced to six years' imprisonment. This was his second conviction and six-year sentence for offences of this nature stretching back to 1989. In addition, he committed credit card fraud offences while on day parole during his first sentence.

[7] In March 2009, the Board granted him day parole. His parole was subject to the standard conditions imposed by virtue of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20, subsection 133(2) (*CCRA*).

133. (2) Subject to subsection (6), every offender released on parole, statutory release or unescorted temporary absence is subject to the conditions prescribed by the regulations.

133. (2) Sous réserve du paragraphe (6), les conditions prévues par règlement sont réputées avoir été imposées dans tous les cas de libération conditionnelle ou d'office ou de permission de sortir sans escorte.

[8] The condition relevant to this appeal is contained in subparagraph 161(1)(g)(iii) of the *Corrections and Conditional Release Regulations*, SOR/92-620.

161. (1) For the purposes of subsection 133(2) of the Act, every offender who is released on parole or statutory release is subject to the following conditions, namely, that the offender

161. (1) Pour l'application du paragraphe 133(2) de la Loi, les conditions de mise en liberté qui sont réputées avoir été imposées au délinquant dans tous les cas de libération conditionnelle ou d'office sont les suivantes :

...

[...]

(g) advise the parole supervisor of the offender's address of residence on release and thereafter report

g) dès sa mise en liberté, il doit communiquer à son surveillant l'adresse de sa résidence, de même que

immediately

...

iii) any change in the domestic or financial situation of the offender

...

l'informer sans délai de :

[...]

(iii) tout changement dans sa situation domestique ou financière

[...]

[9] In addition, *CCRA*, subsection 133(3) empowers the Board to impose discretionary conditions on an offender's parole.

133. (3) The releasing authority may impose any conditions on the parole, statutory release or unescorted temporary absence of an offender that it considers reasonable and necessary in order to protect society and to facilitate the successful reintegration into society of the offender.

133. (3) L'autorité compétente peut imposer au délinquant qui bénéficie d'une libération conditionnelle ou d'office ou d'une permission de sortir sans escorte les conditions qu'elle juge raisonnables et nécessaires pour protéger la société et favoriser la réinsertion sociale du délinquant.

[10] The discretionary condition imposed on Mr Franchi by the Board pursuant to this power that is most relevant to this appeal provided as follows:

Must provide full financial disclosure, including assets, debts, income and expenditures, immediately to your parole supervisor upon request.

Another condition stated: "Employment is to be pre-approved by your parole supervisor ...".

[11] Mr Franchi was released on day parole on April 14, 2009, subject to the above conditions. He took employment with his sister's landscaping and construction business, but expressed a concern that his job neither utilized his skills nor paid him enough to enable him to start paying off his debts.

[12] His case management team met on September 1, 2009, to review financial reports on Mr Franchi that the parole office had ordered from Equifax Canada Inc., a credit reporting agency, in preparation for determining whether he should be granted full parole. These reports caused concern, because they indicated that Mr Franchi was employed by an investment firm owned by a cousin. If true, this would have been a breach of a discretionary condition of his parole, because his employment by this firm had not been pre-approved by his parole supervisor. In addition, the report stated that he had engaged in investment activities with the firm, including providing financial guidance to an investor, and had misrepresented his employment in order to enhance his ability to borrow money.

[13] Following a supervision meeting on September 3, 2009, Mr Franchi's case management team suspended his day parole, because of the concerns raised by the Equifax reports. At a post-suspension interview on September 9, 2009, Mr Franchi's parole supervisors told him why his parole had been suspended. He denied that he was employed by the investment firm, and suggested that the Equifax report must have been based on his previous employment with the firm, which ended when he was incarcerated.

[14] On examining the financial disclosure documents produced by Mr Franchi at the supervision meeting of September 3, 2009, the parole officers learned that in August he had borrowed approximately \$53,000 through lines of credit and credit cards, which he had not reported. It subsequently became clear that he had borrowed a total of \$104,000.

[15] When questioned about these transactions at the post-suspension meeting on September 9, 2009, Mr Franchi said that he intended to invest the proceeds of the loans at a high rate of interest through the investment firm, and to pay off his pre-existing debts with the interest thereby earned. However, he provided no documentation to show that the \$104,000 had in fact been invested with the firm.

[16] In its post-suspension decision of December 2, 2009, the Board described Mr Franchi's financial activities while he was on parole and noted that he had not informed his parole officer of these changes in his financial situation when they met in August. The Board also stated (Appeal Book, p. 44) that, while Mr Franchi later provided further information about his \$104,000 loan and his investment of it, he produced

no official documents, receipts or contracts specifying where the funds are invested, at what rate and for how long.

[17] The Board revoked Mr Franchi's parole because he had breached both the standard condition requiring him to report immediately any change in his financial situation, and the discretionary condition requiring him to make full financial disclosure to his parole officer immediately on being asked to disclose. However, the Board found that there was insufficient evidence that he had breached the condition respecting employment. Finally, it denied him full parole on the ground that there was an undue risk that he would reoffend before the expiration of his sentence.

### **Decision of the Appeal Division of the Board**

[18] Before the Appeal Division of the Board, Mr Franchi argued that the two conditions were confusing because it was not clear whether he was to make a financial disclosure immediately or only when his parole officer requested it. Moreover, he said, he was not asked at his meetings with his parole officer in August 2009 to make a full financial disclosure. When he was later asked to disclose, he provided all the documentation available to him at that time. Consequently, it was unfair and unreasonable of the Board to revoke his day parole and deny him full parole.

[19] The Appeal Division rejected these and all the other arguments advanced by Mr Franchi. It agreed with the Board's post-suspension decision that he had not "immediately" informed his parole officer of changes to his financial situation, namely, his borrowing of approximately \$104,000 in August and his investment of it. It also agreed that, when he was asked for a full financial disclosure, the information that he provided was incomplete because it did not include "the exact nature of the investment ...." (Appeal Book, p. 119).

[20] On the basis of the above, and when considered in the context of Mr Franchi's criminal history, the Appeal Division held that his release, whether on day or full parole, posed an undue risk to the community. Accordingly, it affirmed the Board's decisions following the post-suspension hearing to revoke the former and to deny the latter, and held that the Board's reasons fully explained the bases for its decision.



## **Analysis**

[21] On his application for judicial review, Mr Franchi again argued that the two conditions were confusing, and the Board's reasons did not clearly explain the basis of its finding that he had not made a full disclosure of the nature of his investment. The Judge agreed.

### **(i) *The conditions***

[22] As already noted, the Judge held that the conditions were contradictory and ambiguous. Standing alone, the standard condition clearly required Mr Franchi to report "immediately" any change in his financial situation. However, in the Judge's view, its meaning was obscured by the addition of the discretionary condition requiring financial disclosure upon request. When read together, he held, the conditions did not clearly inform Mr Franchi that he was to report a change in his financial situation immediately it occurred, whether or not the parole officer requested him to do so.

[23] In these circumstances, the Judge concluded that the Board's decision that Mr Franchi had breached the standard condition resulted in a substantively unfair deprivation of his conditional liberty. In order to avoid this result, he interpreted the duty to disclose "upon request" in the discretionary condition as modifying the duty to report "immediately" in the standard condition.

[24] Accordingly, in the Judge's view, the Board's revocation of Mr Franchi's parole and the denial of his application for full parole could only be justified if it had validly decided that he had breached the duty to make full financial disclosure upon request.

[25] In my opinion, the meaning of parole conditions on parole is a question of law, because they are imposed pursuant to powers delegated by the *CCRA*. Since this is the Board's home statute, its interpretation of parole conditions will normally constitute an error of law only if it is unreasonable, absent a question of fundamental importance to the legal system: *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7 at paras. 25-28.

[26] It is clear from the reasons of the Appeal Division and the Board that they regarded the statutory and discretionary conditions as complementary. In light of the text, purpose, and context of the conditions imposed on Mr Franchi, this was not, in my view, an unreasonable conclusion. Indeed, it was the only interpretation reasonably open to them. Hence, I would conclude that their interpretation of the conditions was correct.

[27] On their face, the conditions impose different obligations. First, like most offenders released on parole, Mr Franchi was required to report "immediately" any change in his financial situation. Borrowing \$104,000 and investing it through his cousin's investment firm qualified as such a change. Mr Franchi did not report these transactions to his parole officer when they met in August, the month that they occurred. He was thus in breach of the standard condition.

[28] The Judge indicated (at para. 21) that he would also have come to this conclusion if Mr Franchi had not also been subject to the discretionary condition. In his oral submissions to this Court, Mr Franchi also agreed that, if the standard condition had stood alone, he had not complied with it.

[29] Because of Mr Franchi's particular criminal history, the Board exercised its discretion to impose an additional condition on him. This required a full financial disclosure, including the documents listed in the discretionary condition, immediately after it was requested by his parole officer, regardless of whether there had been a change in his financial position. Because the parole officer suspected that Mr Franchi had not reported changes in his financial situation as required, he requested a full financial disclosure.

[30] I see no ambiguity or contradiction between these two conditions. They did not put Mr Franchi in the position of being in breach of one by complying with the other. The Board correctly concluded that the conditions were complementary and their meaning clear: Mr Franchi was to disclose changes in his financial situation immediately and, if requested, to immediately make a full, documented financial disclosure. If Mr Franchi had been unsure about the scope of the duties imposed by the conditions, which I very much doubt, he should have asked for a clarification.

[31] Mr Franchi concedes that the conditions themselves were not contradictory, but, he argues, were applied by the parole officers as if they were one. As a result, he was led to believe that he was only required to provide information about his financial position and activities when requested. The short answer to this submission is that the key element of the standard condition is that the offender is obliged immediately to report changes in his financial situation without waiting to be asked, and that only the Board, not parole officers, may vary standard conditions: *CCRA*, subsection 133(6).

[32] Accordingly, the Board's decision that Mr Franchi was in breach of the statutory condition requiring him to report changes in his financial situation immediately was not unreasonable.

**(ii) Appeal Division's reasons**

[33] Mr Franchi had argued before the Appeal Division of the Board that, among other things, he was not in breach of the discretionary condition to make a full financial disclosure on request, because he did not know what his cousin was doing with the money that Mr Franchi was investing through his investment firm.

[34] The Judge agreed. After noting that the Appeal Division found Mr Franchi in breach of the discretionary condition because the financial information that he provided was inadequate, the Judge said (at para. 25):

However, it is not stated why the disclosure was inadequate. The arrangement with his cousin was obviously more informal than in an arm's length relationship. However, it was the cousin's decision what to do with the money. It does not follow that Mr Franchi had particulars of the investment immediately at hand. This failure on the Board's part to articulate constitutes a breach of procedural fairness, and no deference whatsoever is owed.

The Judge returned to this point at the end of his reasons (at para. 30):

The second finding that the disclosure was inadequate because he did not immediately know what his cousin was doing with the money was not explained in any way comprehensible to this Court.

[35] Accordingly, the Judge held, the decision that Mr Franchi was in breach of the discretionary condition was invalid because, without clear reasons, it was made in breach of the

Board's duty of fairness. On this ground, the Judge set aside the revocation of the day parole and the refusal of full parole.

[36] The duty of fairness requires that the reasons of an administrative tribunal must be sufficient to inform the parties and the public of the basis of its decision, to enable the parties to decide whether to pursue an appeal or an application for judicial review, and to equip the reviewing court to perform its function: see *Vancouver International Airport Authority v. Public Service Alliance of Canada*, 2010 FCA 158, 320 D.L.R. (4th) 733 at para. 16.

[37] In assessing whether the Appeal Division's reasons were adequate on a particular issue, the Court must also consider the reasons given by the Board in its post-suspension decision on that issue when, as here, the Appeal Division is affirming the Board. The Board's post-suspension decision was, in turn, informed by a lengthy appraisal report submitted to the Board by Mr Franchi's parole officers, recommending that the Board revoke the day parole and deny full parole. This, too, is part of the administrative record that the Court may consider when determining whether, viewed in the context of the record as a whole, the Appeal Division's reasons adequately explained the basis of its conclusion that, when requested, Mr Franchi had not made the full financial disclosure required by the discretionary condition.

[38] The Appeal Division may not have described in detail the respects in which Mr Franchi's financial disclosure fell short. Thus, after noting that he had had ample opportunity to disclose his loan and his investment of the proceeds, the Appeal Division stated (Appeal Book, p. 119):

The financial information that you had provided was found to be incomplete, unsatisfactory and failed to disclose the exact nature of the investment you had entered into.

[39] In saying this, the Appeal Division was adopting the finding of the Board that Mr Franchi's financial disclosure had been incomplete. In its post-suspension decision the Board stated (Appeal Book, p. 44) that, after his suspension, Mr Franchi had provided further information about his loans and investments, but without

... official documents, receipts or contracts specifying where the funds are invested, at what rate, and for how long.

[40] In my opinion, the reasons of the Appeal Division, when read together with those given by the Board in its post-suspension decision, adequately explain the shortcomings in Mr Franchi's disclosure. As I read the reasons, the finding that he breached the discretionary condition is not based solely on his failure to disclose, immediately after the parole officer requested a financial disclosure, what his cousin was doing with the \$104,000. More important, the essential details about the investments, and supporting documentation, were never produced. I also infer from the Board's references to Mr Franchi's evasiveness, and his evident return to a "continuing pattern of deceit", that it did not find him credible and thus may not have believed that he was as ignorant about the nature of the investments as he claimed.

[41] Since the duty of fairness does not require procedural perfection, the Appeal Division is not to be faulted because it did not deal explicitly with every argument advanced by Mr Franchi in

respect of the extent of his financial disclosure. Whether the reasons informed Mr Franchi of why it found his financial disclosure to be inadequate must be assessed on the basis of the whole record, including the reasons of the Board. Considered in this light, the Appeal Division's reasons, in my respectful view, contain no deficiency warranting the Court's intervention.

[42] Finally, Mr Franchi argued that, in refusing to cancel the suspension of his day parole and revoking it pursuant to *CCRA*, paragraphs 135(5)(a) and (b), the Board failed to consider whether, if released, he would pose an undue risk to society by reoffending before the expiration of his sentence. He pointed out that none of the financial activities in which he was alleged to have engaged while on day parole was illegal.

[43] I disagree. The Board had explained the considerations that it had taken into account when it concluded that day parole should be revoked and full parole refused because the "risk is undue for community release".

In assessing your behaviour during this release against your criminal history, the Board notes that you have an extensive history of engaging in deceitful and fraudulent activity. In the Board's view, your failure to disclose crucial financial information to your parole officer in a timely fashion is evidence of a continuing pattern of deceit. (Appeal Book, p. 45)

The Appeal Division approved this reasoning (Appeal Book, p. 119).

[44] The Board stated that, when viewed in the context of his criminal history, Mr Franchi's breach of his parole conditions was "evidence of a continuing pattern of deceit". It is implicit in this that the Board was assessing the risk of reoffending. This was the Appeal Division's understanding,

as is evident from its comment that it was not its function to substitute its discretion for that of the Board members “who assessed your risk to reoffend” (Appeal Book, p. 154). In assessing Mr Franchi’s community risk, the Board and the Appeal Division were of the view that the positive aspects of his file were outweighed by the negative.

[45] In my view, the Appeal Division’s revocation of Mr Franchi’s day parole and its refusal of full parole were reasonable on the basis of the law and the material before it, and the reasons for its decisions are clear. A finding that he had committed a criminal offence while on parole is not a condition precedent to a negative undue risk assessment.

### **Conclusions**

[46] For these reasons, I would allow the appeal and dismiss Mr Franchi’s application for judicial review with costs here and below.

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“John M. Evans”

“I agree.  
Eleanor R. Dawson, J.A.”

“I agree  
Stratas J.A.”



**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-483-10

**(APPEAL FROM THE ORDER OF THE HONOURABLE MR. JUSTICE HARRINGTON  
DATED NOVEMBER 24, 2010, DOCKET NO. T-662-10)**

**STYLE OF CAUSE:** Attorney General of Canada and  
National Parole Board v. John  
Anthony Franchi

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** April 11, 2011

**REASONS FOR JUDGMENT:** EVANS J.A.

**CONCURRED IN BY:** DAWSON, STRATAS J.J.A.

**DATED:** April 14, 2011

**APPEARANCES:**

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