IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Finck v. National Parole Board of Canada, 2006 NSSC 376

Date: 20061213
Docket: S.Am. 267595
Registry: Amherst

Between:

Lawrence Ross Finck and
Carline Antonia Vanden Elsen

Applicant

v.

National Parole Board of Canada;
Correctional Service of Canada

Respondent

DECISION

Judge:	The Honourable Justice C. Haliburton
Heard:	10 November 2006, in Amherst, Nova Scotia
Written Decision:	December 13, 2006
Counsel:	Applicants self represented Mr. Dean Smith, for the respondent

By the Court:

[1] This is an application for *habeas corpus* brought by Lawrence Ross Finck in connection with his failure to obtain parole as a result of a hearing of the parole board that was held some time ago, February or March of this year. Mr. Finck seeks to have the court order full parole from his confinement in an institution, where he is confined pursuant to a sentence of my fellow Judge Wright, which was imposed on June 29th, 2005. My view with respect to that application, or the proposed remedy, as I've indicated earlier, is that ordering parole is not something which is within my authority. I think I may, however, make some order to rectify errors of procedural fairness, if necessary, and if I conclude that such errors occurred.

[2] Mr. Finck is eligible for full parole on April 6th coming, 2007. His parole hearing was held the 23rd of March 2006 in the morning hours, and was recorded in a computer program where a decision was filed at 12:57 of that day. Now I understand the local parole office, or Correctional Services headquarters would be in Moncton. On the other hand, I know that the national office would have been in Ottawa. This presumably is a national

computer system. This time lock reference which was mentioned of 12:57 then may be 12:57 Moncton time or 12:57 Ottawa time.

[3] The basis of the application brought by Finck is that the decision of the parole board had been made even before the hearing was held. In support of that, he cites the impossibility of the time frame. That is, that the hearing was held in the morning and here is a written decision filed before 1:00 o'clock the same day. He also says that the written decision differs from the words which were used by the board members when they dismissed his application verbally. I am satisfied with the evidence of Mr. Lowerison, his prison parole officer, that the written decision is recorded by the parole board members while they are in the process of deliberating, and that the technology that they use makes the decision filing virtually contemporaneous with their deliberations, and probably took place, although I guess Mr. Lowerison didn't say this, probably took place even before the oral representation of that decision was made to Mr. Finck.

[4] With respect to his expressed concern that the oral decision which he heard differs from the written decision, it's apparent from that, from what I

understand to be the manner in which this process takes place, that the written decision is not a transcription of whatever decision is delivered orally.

[5] The second basis on which he seeks an order for *habeas corpus* is that the National Parole Board panel had access to information which was not shared with him. Section 101sets out the purposes, under the purposes and principles of the parole board, their objectives are set out in paragraph 100, and then paragraph 101 says:

> The principles that shall guide the Board and the provincial parole boards in achieving the purpose of conditional release are
>
> > (a) that the protection of society will be...paramount
> >
> > (b) that parole boards take into consideration all available information that is relevant to a case, including the stated reasons and recommendations of the sentencing judge, any other information from the trial or the sentencing hearing, information and assessments provided by the correctional authorities, and information obtained from victims and the offender; (emphasis added)

And then subsection (d) goes on to say:

> (d) that parole boards make the least restrictive determination consistent with the protection of society;

And (f), which is, I think significant:

> (f) that offenders be provided with relevant information, reasons for decisions and access to the review of decisions in order to ensure a fair and understandable conditional release process.

And then section 102 establishes that the parole board, in exercising their expertise (they are specialists in the field of parole and parole board hearings).

Section 102 says that:

> The board may grant parole...if, in its opinion,
>
> (a) the offender will not, by reoffending, present an undue risk...and
>
> (b) the release of the offender will contribute to the protection of society by facilitating reintegration of the offender into society as a law-abiding citizen.

Section 102 makes it clear that the decision making power of the parole board is discretionary. It is a matter which it would be quite inappropriate for a court to second guess, unless there was an obvious miscarriage of justice or a breach of the Charter rights of an inmate or whatever.

[4] I am satisfied, on the basis of Mr. Finck's evidence and the materials that he's provided, that there was information available to the National Parole Board in Correctional Services files which was not made available to him. It's maintained apparently on some particular database that was referenced in the evidence. That information was excluded from the information provided to him when he made an "information request". Mr. Lowerison, his parole officer in the prison, says that all the information that was available to him in preparation, that is to him Lowerison, in preparation or in assisting Mr. Finck to prepare for his parole hearing, was available to the inmate upon request. His evidence was that in the normal course, all such information as it's generated is mailed to the inmate so that there is no need to request it. So that information, all the information that was available to Mr. Lowerison as his parole officer was available, was either supplied to Mr. Finck or was available to him upon his request. Apparently there is a sheet of information, a sheet, if I understood the evidence, indexing the information which would be shared with the inmate.

[5] With respect to the information that is to be in the hands of the inmate, section 141 of the *Corrections and Conditional Release Act* provides:

> At least fifteen days before the day set for the review of the case of an offender, the Board shall provide or cause to be provided to the offender, in writing, in whichever of the two official languages of Canada is requested by the offender, the information that is to be considered in the review of the case, or a summary of that information.

And then there is an exception in subparagraph (4):

> Where the Board has reasonable grounds to believe
>
> > (a) that any information should not be disclosed on the grounds of public interest, or
> >
> > (b) that its disclosure would jeopardize
> >
> > > (i) the safety of any person,
> > >
> > > (ii) the security of the correctional institution, or
> > >
> > > (iii) the conduct of any lawful investigation
>
> the Board may withhold from the offender as much information as is strictly necessary in order to protect the interest identified in paragraph (a) or (b).

[6] There is no evidence before me today regarding what information was not disclosed or what the grounds of the reluctance to disclose is, or what interest would be jeopardized by the failure to disclose such information. In order to assess whether or not that information was appropriately withheld

from the inmate and to adjudicate that issue, it would be necessary for the court to see the information, or at least a summary of the information in order to make an assessment.

[7] The Charter, section 7 requires that an accused not be detained unless that detention is lawful and established to be so. The Charter requires procedural fairness. The spirit of the *Corrections and Conditional Release Act* requires procedural fairness. There is no question but that Mr. Finck is lawfully, was lawfully confined pursuant to the order of committal of Justice Wright. The question today is whether the continuation of that confinement, when he has passed that time frame when he is eligible for parole, the question is whether the department, or Correctional Services has established; the respondent, that is to say, has established that the authority exercised in declining to grant parole as a result of the parole hearing has been properly exercised. I am persuaded that that onus has not been met, on the basis of the evidence which I've heard.

[8] It's my impression of the evidence, my impression of the ultimate determination made by the parole board that there may very well be valid

reasons for continuing Mr. Finck's detention in an institution; but the fact that I might surmise that, or that the information that has been brought forward by Corrections Services on this application suggests that, does not respond adequately to the rights of the applicant to have his issue adjudicated fairly and openly, with an opportunity to respond to any information which may be before the tribunal that is making the decision.

[9] I am going to order that there be a further parole hearing for Mr. Finck, that it take place within 30 days, that it be held before a new panel, and that it proceed on the basis of shared information only. In the event that that panel is to have information that is not shared, then there will necessarily be a summary provided to Finck so that he may know the nature of the information that's being withheld from him, and the reason for withholding that information. In other words, a summary of the information and the reasons why it cannot be disclosed.

[10] So upon those terms, the application is granted with respect to Mr. Finck.

J.