

CANADA / JUDGMENT

Dhaliwal v. Canada (Attorney General)

2016 BCSC 411

COURT

Supreme Court of British Columbia

DECIDED

9 March 2016

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2016 BCSC 411 Dhaliwal v. Canada (Attorney General)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Dhaliwal v. Canada (Attorney General),

2016 BCSC 411

Date: 20160309

Docket: S30483

Registry: Chilliwack

Between:

Jasdeep Singh Dhaliwal

Petitioner

And

The Attorney General of Canada

Respondent

Before: The Honourable Mr. Justice Walker

Reasons for Judgment

Counsel for the Petitioner:

T. Grace

D. Honeyman

Counsel for the Respondent:

S. Stynes

T. Fairgrieve

Place and Date of Hearing:

New Westminster, B.C.

February 26, 2016

Place and Date of Judgment:

Chilliwack, B.C.

March 9, 2016

- [1] Mr. Jasdeep Singh Dhaliwal is currently incarcerated at the Mission Institution, which is a minimum-security correctional facility operated by the Correctional Service of Canada ("CSC").
- [2] Mr. Dhaliwal was sentenced on February 23, 2015, to imprisonment of 29 months, 19 days after previously pleading guilty to one count of trafficking of a Schedule 1 substance (heroin). On the same day of his sentence, he began serving it at the Regional Reception and Assessment Centre.
- [3] Mr. Dhaliwal was eligible for day parole on August 23, 2015 and for full parole on December 26, 2015. His application for parole was rejected by the Parole Board. His appeal of that decision is currently pending before another division of the Parole Board. The parties agree that appeal has nothing to do with the issues that arise on this petition.
- [4] In the meantime, pending his appeal, Mr. Dhaliwal seeks to have his eligibility for accelerated parole considered by the Parole Board. Accelerated parole is available to first-time offenders who were convicted of non-violent offences. The criteria for accelerated parole are less onerous than regular parole.
- [5] As a result of the decisions of Superior Courts in this country concerning the Abolition of Early Parole Act, S.C. 2011, c. 11 [AEPA] eligibility for accelerated parole is available for offences committed prior to March 28, 2011, the day the AEPA came into force. The cases that have been drawn to my attention on the hearing of the petition considered the scope of the AEPA and determined that a retroactive application of the AEPA contravened the Charter because it would impose on the offender a post-sentence increase in punishment: see, e.g., *Canada (Attorney General) v. Whaling*, 2014 SCC 20; *Canada (Attorney General) v. Lewis*, 2015 ONCA 379, leave to appeal ref'd [2015] SCCA No. 325; *D.G. v. Bowden Institute*, 2015 ABQB 373; *Nucci v. Canada (Attorney General)*, 2015 MBCA 122; *Frost v. Canada (Attorney General)*, 2015 ONCA 386, leave to appeal ref'd [2015 SCCA No. 329]; *Lapple v. Canada (Attorney General)*, 2015 ONCA 385, leave to appeal ref'd [2015] SCCA No. 328; *Fehr v. Canada (Attorney General)*, 2015 ABQB 627; *Liang v. Canada (Attorney General)*, 2014 BCCA 190,

leave to appeal ref'd [2014] SCCA No. 298; and *Lalonde v. Canada (Attorney General)*, 2015 ONSC 6937.

- [6] Mr. Dhaliwal pled guilty to one count for trafficking in heroin. He is a first time offender guilty of a non-violent crime. He claims that he is eligible for accelerated parole because the offence to which he pled guilty occurred before and after March 28, 2011. He relies principally on *Lalonde*, a decision of the Ontario Superior Court of Justice, where Mr. Justice Scott determined that eligibility for accelerated parole is available where separate trafficking offences straddled the enforcement of the AEPA. In this case, Mr. Dhaliwal asserts that some of the transactions that are involved in the one count to which he pled guilty occurred prior to March 28, 2011.
- [7] The thrust of Mr. Dhaliwal's complaint in this petition is that the CSC acted unreasonably when it decided not to refer his case to the Parole Board to consider his eligibility for accelerated parole. The CSC determined that he was not eligible for it. The Parole Board has absolute discretion to grant parole. Its jurisdiction to consider accelerated parole is engaged when a prisoner's case is referred to it by the CSC. Since no referral was made, the Parole Board's jurisdiction has never been engaged.
- [8] Mr. Dhaliwal does not seek relief by way of habeas corpus. He also does not ask me to decide whether he is entitled to accelerated parole, because, as I pointed out, that falls within the exclusive jurisdiction of the Parole Board. In effect, however, his submissions dealt directly with the merits of his case. He sought to persuade me that he is eligible for accelerated parole such that I should issue a declaration that the CSC is required to refer his case to the Parole Board and to issue a mandatory injunction compelling the CSC to do that.
- [9] In submissions, Mr. Dhaliwal argued that the facts of the *Lalonde* case are on all fours with his case. I respectfully disagree for the following reasons.
- [10] In *Lalonde*, and unlike this case, the petitioner originally brought an application for habeas corpus, but on being made aware of the court's concern for jurisdiction, the petitioner and the Attorney General asked Scott J. to hear the review not as a habeas corpus application but as an issue involving s. 11(i) of the Charter. In other words, both parties agreed that the court had jurisdiction. The petitioner's argument was that the decision not to grant accelerated parole contravened the Charter because it increased his punishment retroactively. After hearing the parties, Scott J. "reluctantly" concluded that he had jurisdiction insofar as the Charter issue was concerned, and then considered the merits of the Charter arguments as applied to the facts of that case: *Lalonde* at paras. 6-11.
- [11] The Attorney General takes a different position concerning jurisdiction in this case. It argues that given the manner in which the petition is framed, the only court with jurisdiction to review the CSC's decision is the Federal Court.

- [12] As I read them, except for Lalonde (where jurisdiction was conceded by the Attorney General), the cases cited by Mr. Dhaliwal where superior courts took jurisdiction over the dispute involved the doctrine of habeas corpus or Charter issues concerning the validity, breadth, and scope of the AEPA, or both. Those issues are not in play in this case.
- [13] The Attorney General does not dispute CSC's statutory obligation to consider accelerated parole in respect of offenders who committed offences prior to March 28, 2011. According to the Attorney General, the CSC did that, and decided not to refer Mr. Dhaliwal to the Parole Board because it determined that he did not qualify to be considered for it. The Attorney General argues that a review of that decision properly lies in the Federal Court pursuant to s. 18(1) of the Federal Courts Act, R.S.C., 1985, c. F-7. That section provides:
- 18(1) Subject to section 28, the Federal Court has exclusive original jurisdiction
- (a) to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus, or writ of quo warranto, or grant declaratory relief, against any federal board, commission or other tribunal .
- [14] The definition of tribunals and other federal bodies is broad: *Canada (Attorney General v. TeleZone Inc.*, 2010 SCC 62. There is no issue that CSC falls within the scope of s. 18(1).
- [15] I agree with the Attorney General that what I am essentially being asked to do is to conduct a judicial review of the decision of a federal entity. This Court's habeas corpus jurisdiction, which permits it to review decisions of correctional institutions per *Mission Institution v. Khela*, 2014 SCC 24, is not engaged on this petition.
- [16] I disagree with Mr. Dhaliwal's submission that s. 18(1) encompasses habeas corpus because that relief is included in the words "writ of certiorari". Applying *Khela*, he argues that provincial superior courts have concurrent jurisdiction with the Federal Court to review decisions made by the CSC concerning an offender's eligibility for accelerated parole. I disagree. The reference to certiorari in s. 18(1) cannot connote habeas corpus by implication. A quick review of the Federal Courts Act shows that parliament specifically decided not to include habeas corpus in s. 18(1), as a remedy that is solely within the jurisdiction given to the Federal Court. In s. 18(2), which concerns members of the armed forces, parliament specifically included habeas corpus alongside writs of certiorari to be within the exclusive jurisdiction of the Federal Court. There is, therefore, in my opinion, no basis on which to conclude that this Court has jurisdiction to review the CSC's decision absent a habeas corpus application. I agree with the Attorney General that exclusive jurisdiction rests with the Federal Court.
- [17] *Lalonde* does not stand for the opposite conclusion. The reasons for judgment refer to the court's habeas corpus jurisdiction being invoked on the petition. Also, as I noted, the parties agreed to the court's jurisdiction and persuaded Scott J. to hear the case as a Charter infringement case based on the merits.

- [18] In my opinion, jurisdiction to review the CSC's decision in respect of Mr. Dhaliwal lies with the Federal Court. There is a complete and comprehensive code in place in which an offender's eligibility for accelerated parole may be considered, determined, and reviewed (including whether a referral to the Parole Board should be made). The Federal Courts Act provides a comprehensive mechanism to challenge decisions of the CSC and the Parole Board. As I read the case authorities, the jurisdiction of Canadian superior courts to review decisions made by correctional authorities - or putting it another way, the exception to the exclusive jurisdiction of the Federal Court - is with respect to habeas corpus and applications concerning a purported infringement of the Charter: see, e.g., D.G. at paras. 5-11, 24.
- [19] I have not been taken to any decision where, in the absence of habeas corpus relief being invoked, the jurisdiction of Canadian superior courts to review the CSC's decision not to make a referral to the Parole Board has been in issue or decided.
- [20] If the CSC is taking inconsistent approaches to considering referrals to the Parole Board, which Mr. Dhaliwal says is the case because it is applying different standards in Ontario than the rest of the country, then that is a matter to take up before the Federal Court in the exercise of its jurisdiction over the CSC.
- [21] If I am incorrect about this Court's jurisdiction to grant the relief sought by Mr. Dhaliwal, I would exercise my jurisdiction to decline it in the circumstances of this case for three reasons.
- [22] First, there is an established comprehensive and complete code in place to review the decision of the CSC.
- [23] Second, the facts of this case do not involve an infringement of Mr. Dhaliwal's Charter rights because all of the trafficking transaction offences took place after March 28, 2011. In reaching that conclusion, I am not confined to consider only the words of the amended count in considering the merits. I am able to consider the facts as set out in the agreed facts that were before the sentencing judge.
- [24] Third, I do not agree with Mr. Dhaliwal that the facts of his case are aligned with Lalonde. Mr. Dhaliwal likens his situation to Lalonde because he pled guilty to one count, which was amended to reflect a time period that extended back to March 24, 2011; for that reason, he says, he is entitled to accelerated parole. The facts of Mr. Dhaliwal's case are different than Lalonde. In that case, Scott J. determined that the offences committed by the offender, for which he was incarcerated, were a "series of separate trafficking events between March 20, 2011 and July 7, 2011": paras. 17-18. In Mr. Dhaliwal's case, however, the agreed statement of facts that was put before the sentencing judge clearly show that although Mr. Dhaliwal made initial contact with an undercover officer on March 24, 2011, all of the trafficking transactions (or events) involved in the count occurred after March 28, 2011. In addition, habeas corpus and a joint submission that the case engaged Charter rights founded the court's jurisdiction to hear the case.

[25] For all of those reasons, I would dismiss the petition.

"Walker J."

The Honourable Mr. Justice Walker

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