

CANADA / JUDGMENT

## Marek v. Canada (Attorney General)

2003 FCT 224

COURT

Federal Court

DECIDED

21 February 2003

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Marek v. Canada (Attorney General)

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Vancouver, British Columbia, Friday, the 21st day of February, 2003

Present: THE HONOURABLE MR. JUSTICE LEMIEUX

BETWEEN:

BRAD MAREK

Applicant

- and -

THE ATTORNEY GENERAL

OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

## Background

- [1] These reasons relate to two appeals, dealt with in writing by Order of Pinard J., filed by Brad Marek, an inmate serving an indeterminate sentence at Mountain Institution operated by the Corrections Service of Canada (the "CSC"), from two Orders rendered by Prothonotary Hargrave who: (1) on October 28, 2002, struck Mr. Marek's application for judicial review seeking to quash a correctional plan progress report (the "Progress Report") and assessment for decision (the "Assessment Report"), both dated April 22, 2002, and; (2) refused on October 29, 2002, as a result of his Order of the previous day, Mr. Marek's application for leave to file additional affidavits and documents. Since Mr. Marek appealed the Prothonotary's Orders on November 15, 2002, he needs an extension of time to appeal from this Court.
- [2] Prothonotary Hargrave struck out Mr. Marek's application because he had failed to pursue an adequate alternative remedy - the grievance process provided for in the Corrections and Conditional Release Act (the "Act" or the "CCRA") and the Corrections and Conditional Release Regulations (the "Regulations").
- [3] Having struck the applicant's judicial review application, he considered Mr. Marek's application for the filing of additional affidavits and documents moot.
- [4] One of the branches of the test for granting an extension of time and for striking out a judicial review application is the same - is the application devoid of merit? I therefore need not consider the issue of extending time separately from the merits of the decision by the Prothonotary to strike out the application.
- [5] Moreover, because Prothonotary Hargrave's decision to strike goes to the finality of the proceeding, I must exercise my discretion de novo. (See *Canada v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C. 425 (C.A.))

## Context

- [6] In order to understand the basis upon which Prothonotary Hargrave made his decision to strike Mr. Marek's application, some context is necessary.
- [7] A key element of this context is the relief sought by Mr. Marek in his application and why. He seeks to quash two reports prepared by Kevin Johnson who was his Institutional Parole Officer. He also wants those two reports deleted from his CSC files and new ones prepared for filing with the National Parole Board (the "NPB") for use in its consideration of various forms of releases which might be granted to Mr. Marek.

- [8] When he filed his application on May 28, 2002, that application was defective and Justice MacKay ordered amendments on June 4, 2002. The NPB's review hearing was to occur in July/August 2002. His application record was filed in early September 2002.
- [9] Mr. Marek's application raises several attacks against the Progress Report and the Assessment Report prepared by Mr. Johnson. He alleges Mr. Johnson's Progress Report contains substantial inaccuracies, was contrary to the Act, was incomplete in that certain tasks required under the Standard Operating Practices were not done (such as failure to hold case management meetings, failure to consult) all of which compromised a fair hearing before the NPB since the Assessment Report recommended he not be granted parole.
- [10] In addition, Mr. Marek's affidavits seem to suggest he thinks Mr. Johnson was biased towards him and wilfully blocked his progress towards release which was, he thinks, Mr. Johnson's hidden agenda.
- [11] A further context is the Act. The CCRA of 1992 was a complete revamp of the previous statute law relating to paroles and the penitentiary service. It incorporated a number of elements on prisoners' rights, which flowed from major decisions of the Supreme Court of Canada in the late 1970's and the early 1980's, in terms of procedural fairness always appreciating the carceral context was a special one and an important factor to take into account.
- [12] This new legislation contains obligations on the CSC to collect information (Section 23); to take reasonable steps to ensure that all information about an offender is accurate, up to date and complete as possible, and the requirement for correction or notation (Section 24); the obligation upon the Service to provide the NPB with all the information under its control that is relevant to release decision-making, or to supervision or surveillance of offenders (Section 25).
- [13] Where an offender is by the Act or Regulations entitled to make representations before decision-making, the offender is entitled to receive all relevant information or a summary of that information (Section 27).
- [14] I need not spell out the gamut of decisions made by the CSC to which these disclosure provisions apply.
- [15] Section 90 of the Act provides "there shall be a procedure for fairly and expeditiously resolving offenders' grievances, a procedure operating in accordance with the Regulations."
- [16] Part II of the CCRA deals with conditional release and detention. Section 141 is the provision which calls for disclosure to the inmate of the information (or a summary) to be considered by the NPB on review. The Act also creates an Appeal Division to review NPB decisions and one of the grounds for review is that the NPB based its decision "on erroneous or incomplete information".

[17] Part III of the Act establishes the Office of Correctional Investigator of Canada (the "Investigator"). The function of the Investigator is to conduct "investigations into the problems of offenders related to decisions, recommendations ... acts or omissions [of the CSC]."

[18] I note that in this case, Mr. Marek telephoned the Investigator's office on May 7, 2002, "pertaining to case preparation for your upcoming parole review". The Investigator's investigator, writing to Mr. Marek on May 8, 2002, reviewed the informatics system and noted the Assessment Report "was locked and dated April 24, 2002."

[19] The Commissioner's investigator wrote:

If there is erroneous/inaccurate information on file, I suggest that you submit a request for file corrections as per the enclosed documentation. Given the time constraints, I would also submit any comments you may have, in writing, concerning your case to the National Parole Board for consideration by Board members well in advance of said hearing via the case management team. If your case relates to non-completion of documents, you should direct your comments in writing, to the Unit Manager.

[20] The enclosure which the Commissioner's investigator sent Mr. Marek is a three-page document headed "Request for File Correction". It refers to Section 24 of the Act and to the Case Management Manual. The first step is to apprise the case management officer of the inaccuracy. The problem might be solved there or the request for correction may be refused and, if that is so, further steps are available to the inmate including the grievance procedure.

## Discussion and Conclusions

[21] In my view, the CCRA creates a comprehensive and balanced code covering the entire span of an offenders' incarceration to his release. It contains important provisions related to the accuracy of information generated by the Service and the mechanisms for correction. It establishes obligations on the Service and the NPB to disclose to an offender what information their decisions will be based on. An opportunity exists for the inmate to make representations.

[22] More to the point here, the CCRA and the Regulations establish a grievance procedure which, in certain cases, has been held by this court to provide an alternative remedy to judicial review. (See *Tehrankari v. Canada (Correctional Services)* (1998), 162 F.T.R. 289 in the context of the obligation to keep accurate records, *Giesbrecht v. Canada*, [1998] F.C.J. No. 621 in the context of an involuntary transfer, and *Bordage v. Archambault Institution*, [2000] F.C.J. No. 1976 in the context of a security rating.)

[23] The intent behind the grievance procedure (which has four levels: a complaint and three grievance levels) before judicial review is to provide an inmate with a fast, low-cost and easy to access procedure for remedy within timelines established by the Regulations. In this respect it cannot be assumed, as Mr. Marek does, that solutions are not crafted at the

complaint level or at grievance level I, and that inevitably grievance level III is involved. Another purpose is to avoid fragmentation in decision-making and a multiplicity of proceedings.

## Conclusions

- [24] Applying the Act, the case law, and the principles and context touched upon to the facts of this case, I must dismiss Mr. Marek's two appeals from Prothonotary Hargrave's Orders striking out the applicant's application and his motion to adduce new facts and documents.
- [25] What the applicant seeks by judicial review are revisions to the Progress Report and the Assessment Report, which is documentation the NPB has or will consider in the context of his parole applications.
- [26] I am persuaded that the grievance system is, for this type of remedy, an adequate alternative and, in my opinion, a better route to follow than judicial review; although judicial review remains available to correct errors which the level III grievance decision may contain.
- [27] Judicial review presents difficulties for self-represented litigants as this application shows. The grievance procedure is designed to dissipate such problems in terms of time, content, process, access and remedy.
- [28] Furthermore, as suggested to him by the Correctional Investigator, Mr. Marek had another internal remedy: identify and communicate directly to the NPB the deficiencies he felt existed in both reports. That is the purpose of pre-hearing disclosure. The NPB, acting judicially, must consider his submissions and is accountable to the Appeal Division if it errs acting on erroneous information. with the Appeal Division subject to the supervisory jurisdiction of this court.
- [29] The applicant invoked the Charter as a ground for suggesting the grievance procedure was not adequate because the CSC was not competent to deal with such issues. The breaches the applicant complains of are not Charter breaches as such, but breaches of the Act, the Regulations, and operating procedures and manuals internal to the Service. The grievance procedure can account for this type of breach. Put in other words, the Charter was only invoked as a backdrop to statutory, regulatory, procedural or policy breaches.
- [30] The applicant says the Prothonotary was biased in reaching his decision. That ground is completely without merit. The Prothonotary was simply applying the law to the facts.
- [31] Lastly, there is no substance to his argument the Prothonotary exceeded his jurisdiction when dealing with this appeal of his Order to strike. Clearly, a Prothonotary has jurisdiction to strike an originating document under Rule 221 (see *Creighton v. Franko* (1998) F.T.R. 303 (T.D.)). As such, the motion to strike does not directly concern his detention or release (see French text of Rule 50(1)(f)).

- [32] One last point before closing. The record available before me is not clear where Mr. Marek is in the NPB process, but I agree with him the issues he has raised must be considered and dealt with by the Service and by the NPB. They are not moot. Mr. Marek is entitled to have them considered in accordance with the procedures Parliament envisaged and which I have spelled out in these reasons.
- [33] Having struck out Mr. Marek's application, there is no purpose to the appeal relating to filing additional affidavits and documents.

## ORDER

THIS COURT ORDERS that these appeals from the Orders of Prothonotary Hargrave dated October 28 and 29, 2002, are dismissed without costs.

(Sgd.) "F. Lemieux"

Judge

I HEREBY CERTIFY that the above document  
is a true copy of the original filed of record  
in the Registry of the Federal Court of Canada

on the \_\_\_\_ day of \_\_\_\_ A.D. 20 \_\_\_\_

Dated this \_\_\_\_ day of \_\_\_\_ 20 \_\_\_\_

M. Louise Marcotte, Senior Registry Officer

FEDERAL COURT OF CANADA

TRIAL DIVISION

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-882-02

STYLE OF CAUSE: BRAD MAREK

- and -

THE ATTORNEY GENERAL OF CANADA

MOTION IN WRITING WITHOUT APPEARANCE OF COUNSEL

REASONS FOR ORDER AND ORDER: LEMIEUX J.

DATED: February 21, 2003

SOLICITORS OF RECORD:

Brad Marek on his own behalf

Mountain Institution

Agassiz, B.C.

Morris A. Rosenberg for the Respondent

Deputy Attorney General of Canada

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