
CANADA / JUDGMENT

Mcmurray v. National Parole Board

2004 FC 462

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Mcmurray v. National Parole Board

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Ottawa, Ontario, this 26th day of March, 2004

Present: The Honourable Justice James Russell

BETWEEN:

KENNETH McMURRAY

Applicant

and

NATIONAL PAROLE BOARD

Respondent

REASONS FOR ORDER AND ORDER

- [1] This application is for judicial review of the decision ("Decision") of the Appeal Division of the National Parole Board ("Appeal Division") dated January 15, 2003, to decline to hear the appeal of Kenneth McMurray ("Applicant") under s. 147 of the Corrections and Conditional Release Act, S.C. 1992, c. 20, as amended ("CCRA"). That appeal concerned the previous decision of the National Parole Board dated September 13, 2002, imposing a residency condition upon the applicant pursuant to a claimed authority under the CCRA.

BACKGROUND

- [2] The Applicant is currently 32 years of age. He is a long-term offender within the meaning of ss. 753.1 and 753.2 of the Criminal Code, R.S.C. 1985, c. C-46, as amended ("Criminal Code") and Part II of the CCRA. The National Parole Board ("Parole Board") is an administrative body, continued under s. 103 of the CCRA, which exercises jurisdiction under the CCRA in respect of federal offenders. The jurisdiction of the Parole Board includes the supervision of offenders subject to long-term supervision orders made under the Criminal Code.
- [3] The Appeal Division of the Parole Board likewise is an administrative body, consisting of a selection of not more than six full-time members of the Parole Board.
- [4] The Applicant is a first-time federal sex offender. On or about September 13, 1999, he pleaded guilty to, and was convicted in the Ontario Court of Justice of, five counts of sexual assault pursuant to s. 271 (1)(a) of the Criminal Code. The Applicant's victims were all male youths, whose ages ranged from 13 to 16 years at the times of the offences.
- [5] On March 14, 2000, the Applicant was sentenced to a period of four years incarceration. With credit for time already served, the actual period of additional incarceration to be served was reduced to 31 months.
- [6] Concurrent with the sentencing process, the Court further prescribed, pursuant to s. 753.2 of the Criminal Code and the CCRA, that the Applicant, upon the conclusion of his sentence, be subject to a long-term supervision order in the community for a period of five years.
- [7] The sentencing judge made several recommendations for terms of the long-term supervision order, none of which could be construed as binding, and none of which included mention of any residency requirement.

- [8] Pursuant to his sentence, the Applicant's Warrant Expiry Date ("WED") of the custodial sentence was October 13, 2002, and his Statutory Release Date ("SRD") was calculated at December 3, 2001. In consequence of a decision made by the Parole Board on November 2, 2001, the Applicant was denied statutory release. In the result, the Applicant remained in federal custody until his WED of October 13, 2002.

DECISION UNDER REVIEW

- [9] On September 13, 2002, the Applicant appeared at a hearing before a panel of the Parole Board for the purpose of determining the special conditions to be imposed for his long-term supervision in the community. On that same date, the Parole Board resolved to impose a number of special conditions, including the impugned residency condition, purportedly under s. 134.1(2) of the CCRA, as follows:

TO RESIDE AT A SPECIFIC PLACE

THE OFFENDER IS REQUIRED TO RESIDE AT A COMMUNITY CORRECTIONAL CENTRE (CCC)

- [10] At the September 13, 2002 hearing and subsequently, the Applicant, through his counsel, has taken the position that whereas he does not object to residing voluntarily in a Correctional Community Centre in the short term upon release, he does not accept the jurisdiction of the Parole Board to impose the contemplated special residency condition.
- [11] The Parole Board's apparent rationale in imposing this special residency condition arises from the following: (1) expressed concerns respecting the provision of monitoring, structure and support to the Applicant in order to assist in managing his overall risk to the community; (2) to assist in promoting his reintegration; and (3) to form the least restrictive measures available for managing risk.
- [12] Subsequent to the September 13, 2003 hearing, the Parole Board informed the Applicant of the residency condition and of his right of appeal to the Appeal Division for "any negative condition regarding conditional release."
- [13] Government of Canada publications suggest that the jurisdiction of the Appeal Division is to be broadly construed, and includes a jurisdiction to consider conditions imposed on offenders subject to a long-term supervision order.
- [14] The Parole Board's September 13, 2002 decision further caused a Long Term Supervision Certificate to be issued on October 11, 2001, wherein the impugned residency condition was reiterated and the Applicant was directed to proceed to the Keele Community Centre, Toronto. When the Parole Board forwarded its written decision to the Applicant, it attached a standard form letter to each decision as an introduction to the actual decision enclosed.

[15] By letter dated October 3, 2002 to the Appeal Division, the Applicant sought to appeal the Parole Board's imposition of the residency condition. He further affirmed his objection to the jurisdiction of the Parole Board to direct it.

[16] By letter dated October 15, 2002, the Vice-Chairperson of the Appeal Division advised the Applicant that, pursuant to s. 99.1 of the CCRA, (marked as "99-1" in the correspondence), the conditions imposed under long term supervision were not subject to review by the Appeal Division. The Appeal Division reiterated this view to the Applicant in several pieces of correspondence.

[17] Section 161(1) of the Corrections and Conditional Release Regulations ("Regulations") provides for standard conditions to be imposed. Section 134.1(1) of the CCRA extends s. 161(1) of the Regulations to apply to Long Term Supervision Orders.

[18] Section 99.1 of the CCRA refers to other sections of the CCRA which are extended to apply to Long Term Supervision Order cases, with such modification as may be required. The references list the various sections, including ss. 140 to 145 of the CCRA which address such items as hearing requirements, disclosure, decision registry. Section 99.1 does not refer to ss. 146 and 147 of the CCRA. These are the provisions that deal with the responsibilities of the Appeal Division.

[19] The purpose of the residency condition applied to the Applicant is to allow for closer supervision and to enhance accountability. The sentencing judge asked for several provisions to ensure that the Applicant would not be able to commit more sexual offences. The purpose of the

residency condition was to ensure the protection of society as it relates to his sexual offences, the age of his victims and his lack of treatment.

[20] The Applicant sought clarification of this position by reply letter dated October 23, 2002.

[21] By letter dated November 14, 2002, the Vice-Chairperson of the Appeal Division repeated the view that the Applicant had no right of appeal to the Appeal Division on this matter. By reply letter dated December 5, 2002, the Applicant again sought clarification of, and justification for, this position and he presented a contrary interpretation of the relevant provisions of the CCRA.

[22] By letter dated January 15, 2003, the Vice-Chairperson of the Appeal Division reiterated the same position and stated as follows:

... it is the position of the National Parole Board that decisions of persons being supervised under a long-term supervision order are not appealable.

Consequences of the Residency Condition

[23] The impugned residency condition has significantly restricted the Applicant's liberty in that it has required him to reside at the Keele Correctional Centre at nights, imposed curfew hours, and has otherwise subjected him to coerced compliance with a variety of onerous rules associated with residing in an institutionalized community.

[24] Though the Applicant would accept voluntary residency at a Community Correctional Centre on an interim basis while he establishes his rehabilitation and reintegration into the community, he raises the following objections:

I) he considers the imposition of the impugned residency condition and its associated restrictions as being an undue constraint on his liberty, punitive, and akin to a modified form of reincarceration even though he has served fully his sentence to his WED;

ii) being an individual with a criminal record of sexually-related offences, he has felt stigmatized, intimidated and physically threatened by other residents while in residence at the Keele Correctional Centre. In the result, he has suffered from increased anxiety and upset, which has served in part to impede his programming progress;

iii) he believes the removal of the residency condition, with its concomitant curfews and other restrictions, would enhance his ability to avoid stressors occasioned by coerced association with fellow residents, by permitting him to leave and return to his place of residence at pleasure;

iv) he has suffered prejudice through stress associated directly with the residency condition imposed on him.

PERTINENT LEGISLATION

Relevant Criminal Code provisions, and the application and development of the CCRA

[25] Offenders who are required to be supervised in the community by order under s. 753.1 of the Criminal Code must be supervised in accordance with the CCRA upon completion of their sentence. Long-term supervision does not form part of the offender's sentence.

[26] One of the stated purposes of the federal correctional system is to assist the rehabilitation of offenders, including those persons subject to a long-term supervision order, and their reintegration into the community as law-abiding citizens. One of the enunciated principles to guide Correctional Services Canada in the achievement of this purpose is the presumption in favour of liberty. This means that offenders retain the rights and privileges of all members of society except those that are necessarily removed or restricted as a consequence of a long-term supervision order.

- [27] Part II of the CCRA provides particular governance for those persons subject to long-term supervision. Under s. 99.1, a person who is required to be supervised by a long-term supervision order is deemed to be an offender for the purposes of Part II.
- [28] Section 99.1 also provides explicitly that ss. 100 ("purpose of conditional release"), 101 ("principles guiding parole boards"), 109 to 111 (respecting "prohibition orders," "clemency," "dissemination of information"), and 140 to 145 (which address parole "review hearings," "disclosure of information" in review hearings, "records and reviews of decisions," "review and evidence") apply to offenders subject to long-term supervision, with such modifications as the circumstances may require. Section 99.1 provides no express restriction on the application to long-term offenders of the benefits of other provisions falling within Part II.
- [29] Section 101(f) of the CCRA, as modified for the circumstances of offenders subject to long term supervision, requires, in part, that the Parole Board should be guided by the principle that offenders have access to the review of Parole Board decisions:
- "...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 [long-term supervision] process."
- [30] Other provisions of Part II of CCRA, though not explicitly enumerated in s. 99.1, have obvious or implicit application to the circumstances of an offender subject to long-term supervision.
- [31] Section 147 of the CCRA provides for the right of offenders under Part II to appeal a decision of the Parole Board to the Appeal Division on the grounds specified. Like s. 101, s. 146 (which constitutes the Appeal Division) and s. 147 each frame the substance of appeals in language of a "review of the case," or "review of the decision."
- [32] Section 134.1 provides for the imposition of conditions on an offender subject to long-term supervision. Subsection 134.1(1) mandates the imposition of specific conditions as prescribed by regulation. Subsection 134.1(2) confers authority on the Parole Board to establish conditions "which it considers reasonable and necessary in order to protect society and to facilitate the successful reintegration into society of the offender." Neither subsection provides express authority for the Parole Board to impose a residency condition on an offender.
- [33] Only one provision in the CCRA provides an express authority to bind a long term offender to reside in a specified place. Where the offender has breached the mandatory or other conditions of his/her supervision, or is seen as about to breach the same, s. 135.1 (1)(c) operates to permit a member of the Parole Board or its designates to:

...authorize the commitment of the offender to a community based residential facility or a mental health facility or, where the member or person is satisfied that commitment to custody is necessary, to custody until the suspension is cancelled, new conditions for the long-term supervision have been established or the offender is charged with an offence under section 753.3 of the Criminal Code.

- [34] Section 134.1 of the CCRA is analogous to s. 133. Section 133 has application for the conditional release of offenders who are on parole, statutory release or unescorted temporary absence, at times before the expiry of their sentence. Subsections 133(2) and (3), respectively, are comparable to ss.134.1(1) and (2) in their language and substance in relation to the mandatory and discretionary imposition of release/supervision conditions.
- [35] Sections 133 and 134.1 diverge appreciably in that s. 133 expressly allows, in ss. (4) and (4.1), for the imposition of, respectively, residency conditions in circumstances of parole or unescorted temporary absence, and statutory release. Section 134.1, in comparison, is silent respecting the conferral of authority to impose a residency condition.
- [36] Clause 135.1(1)(c) of the CCRA which, as noted above, can direct residency in a "community-based residential facility" under the prescribed limited circumstances, is informed directly by s. 133. Subsection 133(4.2) provides the only working definition in Part II of the CCRA for that term.
- [37] With the passage of Bill C-45 in 1995, Parliament amended the CCRA to add s. 133(4.1) to permit the imposition of a residency condition in the circumstances of statutory release.
- [38] When, in 1997, through Bill C-55, Parliament again amended the CCRA to provide for the supervision of a new category of offender (the long-term offender) the Applicant submits that it noticeably failed to include in the new s. 134.1 any express authority for the Parole Board to impose a residency condition. Yet, at the same time, Parliament did include such express authority for the limited circumstances referred to in s. 135.1. The Applicant notes that nowhere in the recorded Parliamentary debates can there be found the intent to confer a generalized authority to impose a residency condition.

ISSUES

- [39] The Applicant raises the following issues:

Does the Parole Board, pursuant to s. 134.1 of the CCRA, have the statutory authority to impose a residency condition on a long-term offender?

Does a long-term offender have the right to appeal a decision of the Parole Board to the Appeal Division pursuant to s. 147 of the CCRA?

Did the Appeal Division err in law in refusing to consider the Applicant's appeal?

ARGUMENTS

Applicant

Standard of Review

[1] The Applicant points out that Canadian Courts take a pragmatic and functional approach to the review of administrative decisions. In determining the applicable standard of review within this approach, Courts will take the following four (4) factors into account:

- I) the presence or absence of a privative clause or statutory right of appeal;
- ii) the expertise of the tribunal relative to that of the reviewing judge on the issue in question;
- iii) the purposes of the legislation and the provision in particular;
- iv) the nature of the problem.

Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982, at paras. 23-38, Barrie Public Utilities v. Canadian Cable Television Assn., 2003 SCC 28, para. 10

- [2] In judicial review of findings of fact by the Appeal Division, where the Appeal Division has exercised its own jurisdiction of review under s. 147(4) of the CCRA, this Court has shown deference to the determinations of the Appeal Division and has applied a standard of review of "manifestly unreasonable" before judicial intervention is warranted (*Costiuc v. Canada (Attorney General)*, [1999] F.C.J. No. 241 (F.C.T.D.), at para. 6, *Dupuis v. Canada (Attorney General)*, 2002 FCT 508, at paras. 21-23)
- [3] Where, however, the Appeal Division has exercised its jurisdiction under the CCRA, s. 147(4) to review determinations made by the Parole Board on questions of law, this Court has seen fit to apply the less deferential review standard of "reasonableness". In so doing, the Court has said that the determination made ultimately is to ensure that the Parole Board's decision was "lawful." (*Cartier v. Canada (Attorney General)*, 2002 FCA 384, at paras.8-10).
- [4] The Applicant submits that in circumstances such as exist in the case at bar where the Appeal Division has conducted no review of the Parole Board's determination under s. 147(4) of the CCRA, but has refused to hear an appeal based upon a denial of jurisdiction under s. 99.1 and/or s. 147, or even upon a refusal pursuant to s. 147(2), then this Court should apply the even lower threshold standard of review of "correctness."

(I) Absence of "Privative Clause"

- [5] The CCRA contains no privative clause respecting judicial review of determinations made by the Appeal Division. The absence of a privative clause does not necessarily imply a high standard of judicial scrutiny where other factors suggest a low standard. On the other hand, the presence of a "full" privative clause is compelling evidence that a Court ought to show deference to a tribunal's decision unless other factors strongly indicate the contrary (*Pushpanathan*, *supra*, at para. 30).

(ii) Expertise of the tribunal

[6] The proper concern of the reviewing court is not the expertise of the decision maker in general but its expertise relative to the court itself vis-à-vis the particular issue. In determining the standard of review, the focus of the inquiry is on the particular provision being invoked and interpreted by the tribunal. Some provisions within the same statute may require greater curial deference than others. "Jurisdictional questions" must be answered "correctly" by the tribunal (Pushpanathan, *supra*, at paras. 28 and 33, Barrie Public Utilities, *supra*, at para. 12).

[7] Making an evaluation of relative expertise has three dimensions:

- i. the court must characterize the expertise of the tribunal in question;
- ii. the court must consider its own expertise relative to that of the tribunal; and
- iii. the court must identify the nature of the specific issue before the administrative decision-maker relative to this expertise.

Pushpanathan, *supra*, at para. 33

(iii) Purpose of the legislation and relevant provisions

[8] The purpose the CCRA is enunciated in s. 3, which provides as follows:

3. The purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful and safe society by
 - (a) carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and
 - (b) assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community.
3. Le système correctionnel vise à contribuer au maintien d'une société juste, vivant en paix et en sécurité, d'une part, en assurant l'exécution des peines par des mesures de garde et de surveillance sécuritaires et humaines, et d'autre part, en aidant au moyen de programmes appropriés dans les pénitenciers ou dans la collectivité, à la réadaptation des délinquants et à leur réinsertion sociale à titre de citoyens respectueux des lois.

[9] The administration of the CCRA by Correctional Services Canada is guided by legislatively-prescribed principles. These principles include the following:

that the protection of society be the paramount consideration in the corrections process;

that the Service use the least restrictive measures consistent with the protection of the public, staff members and offenders;

that offenders retain the rights and privileges of all members of society, except those rights and privileges that are necessarily removed or restricted as a consequence of the sentence.

[10] The function of the Appeal Division can be seen as quasi judicial when it exercises its jurisdiction. The Appeal Division is a "hybrid": it possesses authority to hear "appeals" and to reverse, cancel or vary decisions; yet the grounds of appeal listed in s. 147(1) are essentially those associated with judicial review. The Parole Board itself has described its Appeal Division's role as follows:

...to ensure that the law and the Board policies are respected, and that the rules of fundamental justice are adhered to and that the Board's decisions are based upon relevant and reliable information:

Cartier, *supra*, para. 6

(iv) Nature of the Problem

[11] The Applicant says that the essence of this application is the authority of the Parole Board to impose the impugned residency condition. A subsidiary issue is the jurisdiction of the Appeal Division to hear and rule upon the Applicant's contention that the Parole Board lacks the statutory means to impose such a condition. Both these issues are jurisdictional, and, the Applicant argues, are pure questions of law.

[12] The Applicant submits that the expertise of the Parole Board and its Appeal Division lies largely in the assessment, evaluation, determination and application of fact. In resolving factual issues, the Parole Board and Appeal Division engage in a "protective", "polycentric" role of the type which "involves a large number of interlocking and interacting interests and conditions" which could include considerations of public safety, the interests of victims, and the rehabilitation and reintegration interests of an offender. In such matters of fact or policy, the standard of review should properly be that of "reasonableness" and marked by curial deference. (Pushpanathan, *supra*, at para. 36).

[13] However, in matters of pure law that lie at the heart of this Application, the Applicant points out that Courts hold greater expertise than administrative tribunals. Questions of statutory interpretation, going to the core and delineation of jurisdiction as they do here, are matters well-suited for resolution by the Courts; such questions cannot be claimed by the Parole Board or its Appeal Division as falling within their unique and specialized expertise so as to attract a greater curial deference.

[14] The Applicant suggests that where the Appeal Division seeks to deny individuals such as the Applicant the fundamental right of review of decisions by the Parole Board, the Courts should be vigilant in protecting the interests of such applicants and adopt a lesser threshold for judicial intervention. The risk, otherwise, is that the Parole Board might trammel the interests of vulnerable persons without scrutiny and accountability.

- [15] Applying the pragmatic and functional approach in the circumstances of this Application, the Applicant submits that this Court should apply the more stringent review standard of "correctness" to the subject determinations of the Parole Board and its Appeal Division.

Guiding Principles of Statutory Interpretation

- [16] The Applicant says that, in modern times, the starting point for statutory interpretation has been accepted as follows:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Barrie Public Utilities, *supra*, at para. 20, citing Dredge's Construction of Statutes, (2nd ed. 1983), at p. 87

- [17] This directive finds confirmation in s. 12 of the Interpretation Act, which holds as follows:

Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

Interpretation Act, R.S.C. 1985, c. I-21

- [18] The modern approach to statutory interpretation requires the Court to interpret a legislative provision in its total context. The Court should consider and take into account all relevant and admissible indicators of legislative meaning and intent. The purpose and intention of Parliament are to be determined on the basis of intrinsic and admissible extrinsic sources regarding a statute's legislative history and the context of its enactment. The Court's interpretation should comply with the legislative text, promote the legislative purpose, reflect the legislature's intent and produce a reasonable and just meaning (Ontario (Minister of Transport) v. Ryder Truck Rental Canada Ltd., [2000] O.J. No. 297 (Ont. C.A.), at para. 11, affirming R. v. Gladue, [1999] 1 S.C.R. 688 at 704).
- [19] It is a fundamental principle of statutory interpretation that, in determining the general objectives of the legislature, or the meaning of any particular passage, it is obvious that the intention which appears to be most in accord with convenience, reason, justice, and legal principles should, in all cases of doubtful significance, be presumed to be the true one (Wolfe Island (Township) v. Ontario (Ministry of the Environment), [1995] O.J. No. 1537 (Ont. C.A.) at p. 9).
- [20] Not only must the whole statute be read, but every provision should, if possible, be given meaning; hence, if there are rival constructions, the general principle is that the construction that gives effect to the whole of the statute, or to the provision under consideration, should be adopted in preference to one that renders a part of the statute meaningless (E. A. Dredge, *The Construction of Statutes*, Butterworths, 1974 at p.72 as approved in *Gendron v. Baie James (Municipalité)*, [1986] 1 S.C.R. 401, at para. 62).

- [21] The Applicant also says that the legal maxim *expressio unius est exclusio alterius* (the "implied exclusion" rule of statutory interpretation) aids in the appropriate interpretation of the CCRA in this case respecting the authority of the Parole Board to impose the impugned residency condition under s. 134.1. "An implied exclusion argument lies whenever there is reason to believe that if the Legislature had meant to include a particular thing within the ambit of its legislation, it would have referred to that thing expressly." The basis for exclusion is the expectation of express reference (E. A. Dredge, *Construction of Statutes*, supra, at pp. 168, 173, and as approved in *Wolfe Island v. Ontario*, supra, at pp. 9-10).
- [22] Before amending the CCRA to provide for the supervision of long-term offenders, Parliament had recognized the need to enact express statutory authority to permit the imposition of a residency condition on offenders who obtain statutory release. In this contextual framework, Parliament's silence in not advancing a similar express statutory authority when promulgating the long-term supervision provisions, must have significance. Offenders who obtain statutory release are still under sentence and thus subject to reincarceration. Offenders subject to long-term supervision orders, whose sentences have been completed, have a greater claim to liberty than offenders whose sentences still subsist.

Charter Implications

[23] Section 7 of the Charter provides as follows:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

[24] Section 24(1) of the Charter provides as follows:

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
24. (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

[25] The Applicant points out that the right to "liberty" within the meaning of s. 7 of the Charter does not mean a right to unconstrained freedom. Freedom of the individual to do what he or she wishes must, in any organized society, be subjected to numerous constraints for the common good. The state has the right to impose many types of restraints on individual behaviour, and not all will attract Charter scrutiny. On the other hand, liberty does not mean mere freedom from physical restraint. In a free and democratic society, the individual must be allowed room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance. The liberty interest is thus rooted in the

fundamental concepts of human dignity, personal autonomy, privacy and choice in decisions going to the individual's fundamental being (*B. R. v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, at para. 80, *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, at para. 65).

- [26] The autonomy protected by the s. 7 Charter right to liberty encompasses only those matters which can properly be characterized as fundamentally or inherently personal such that, by their very nature, they involve basic choices going to the core of what it means to enjoy individual dignity and independence. Choosing where to establish one's home is a quintessentially private decision going to the very heart of personal or individual autonomy. Choosing where to live will be influenced in each individual case by the particular social and economic circumstances of the person making the choice and, even more significantly, by his or her aspirations, concerns, values and priorities. Hence, the Applicant argues, choosing where to establish one's home is one of those narrow classes of decisions deserving constitutional protection under s. 7 (*Godbout. supra*, at paras. 66-68).
- [27] The Applicant submits that his right to choose his place of abode qualifies as one of those "narrow classes of decisions deserving of constitution protection" within the meaning of s. 7 of the Charter.
- [28] Deprivations by the state of an individual's right to liberty will not violate the Charter unless they contravene the "principles of fundamental justice." This term has been interpreted to include a substantive component as well as rules of procedure. If such deprivations are to survive Charter scrutiny, they must be "fundamentally just" not only in terms of the process, but also when measured against the basic general tenets of our judicial system (*Godbout. supra*, at para. 74).
- [29] The Applicant points out that the meaning of "fundamental justice" must be viewed contextually in any given case. It will depend upon the nature of the s. 7 Charter right asserted and the character of the alleged violation. It requires a balancing of the constitutional rights of the individual claimant against the countervailing interests of the state in causing the infringement. This balancing is eminently sensible and consistent with the aim and import of s. 7, since the notion that individual rights may, in some circumstances, be subordinated to substantial and compelling collective interests is itself a basic tenet of our legal system and is at or very near the core of our most deeply rooted juridical convictions (*Godbout. supra*, at paras. 75-76).
- [30] The Applicant says that, in determining whether the Parole Board and its Appeal Division have infringed the Applicant's s. 7 Charter right to liberty, an analysis respecting the principles behind the CCRA and legislative practice is required. The purpose of the federal correction system is to contribute to the maintenance of a just, peaceful and safe society by means including safe and humane supervision of offenders and the promotion of their rehabilitation and reintegration into the community as law-abiding citizens. To guide the system in this purpose the protection of society is the paramount consideration, but

offenders should retain the rights and privileges of all members of society as much as reasonably possible.

[31] It is submitted by the Applicant that the determinations made by the Parole Board to impose the residency condition and by the Appeal Division to refuse to hear the Applicant's appeal unjustifiably deny the Applicant's liberty right and thus offend against s. 7 of the Charter. The basic tenets and principles of our society include the obligation of an administrative tribunal to act within its lawful jurisdiction. They include the obligation to act fairly. They include the principles of accountability. As addressed above, Parliament has prescribed narrow circumstances in which a residency condition should be imposed; these do not include the present circumstances. Under s. 147 of the CCRA, Parliament has further conferred on offenders a broad right of appeal to challenge the grounds on which the Parole Board makes its decisions. Parliament has thus affirmed the important societal interest that determinations of administrative bodies should be susceptible to challenge and account. The blanket denial of a right of appeal would render the Applicant, and others similarly situated, powerless under the CCRA to ensure that the Parole Board has followed its own processes, for example, or that it has acted fairly. This loss of scrutiny and accountability of the Parole Board under the mechanisms of the CCRA represents an untenable violation of our fundamental legal and juridical tenets.

[32] The Applicant submits that this Court has the authority under s. 24(1) of the Charter to remedy appropriately the asserted s. 7 infringement.

Respondent

The Ability Of The Parole Board To Impose Residency Requirements On Long-term Offenders

[33] Section 134.1(2) of the CCRA provides as follows:

The Board may establish conditions for the long-term supervision of the offender that it considers reasonable and necessary in order to protect society and to facilitate the successful reintegration into society of the offender

[34] The Respondent points out that this provision does not make specific mention of residency conditions, nor does it say that residency requirements cannot be imposed.

[35] Section 133(4) of the CCRA provides the following with respect to parolees:

Where, in the opinion of the releasing authority, the circumstances of the case so justify, the releasing authority may require an offender, as a condition of parole or unescorted temporary absence, to reside in a community-based residential facility.

[36] The Respondent notes that the Applicant relies on the implied exclusion principle of statutory interpretation (*expressio unius est exclusio alterius*) to state that, because the power to impose residency conditions was not expressly conferred within s. 134. 1 of the CCRA, it was not meant to be conferred at all.

[37] This issue, however, has been considered by the Ontario Superior Court of Justice in the case of *R. v. V. M.*, [2003] O.J. No. 436.

[38] In *V.M.*, *supra*, the Crown made the same argument as the Applicant that residency conditions could not be imposed because they were not expressly provided for in the relevant statutory provision. Wilson J.'s rejection of that argument supports the Respondent's position:

[Such an interpretation]

... flies in the face of the purpose of long-term supervision orders to protect the public. It would make little sense for the NPB to have the authority to order that ordinary offenders on parole be subject to residency conditions, and not have the authority to make similar orders for identified high risk, high need offenders.

Ibid at para 143

[39] The court in that instance looked at the overall, long-term supervision test in the Criminal Code R.S.C. 1985, c. C-46, as amended in s. 753.1, which refers to "a reasonable possibility of eventual control of the risk in the community." Section 99.1 of the CCRA specifically provides as follows:

A person who is required to be supervised by a long-term supervision order is deemed to be an offender for the purposes of this Part, and sections 100, 101, 109 to 111 and 140 to 145 apply, with such modifications as the circumstances require, to the person and to the long-term supervision of that person.

[40] Section 100 of the CCRA is also relevant and provides as follows:

The purpose of conditional release is to contribute to the maintenance of a just, peaceful and safe society by means of decisions on the timing and conditions of release that will best facilitate the rehabilitation of offenders and their reintegration into the community as law-abiding citizens.

[41] Clearly then, the Respondent argues, the statute specifically makes the maintenance of a just, peaceful and safe society its primary concern. And it is through this driving principle that s. 134.1(2) must be interpreted.

[42] In *Re Rizzo and Rizzo Shoes Limited*, [1998] 1 S.C.R. 27, at para 21, the Supreme Court of Canada, citing *Dredge*, *supra*, made the following guiding statement about statutory interpretation:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[43] The Interpretation Act reads as follows:

Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[44] The Respondent argues that the imposition of a residency condition on a long-term offender satisfies the broad language of s. 134.1. The principle of protecting society is met.

[45] By the plain wording of the section the Parole Board is entitled to impose any condition that it considers reasonable or necessary to protect society and- facilitate the successful reintegration of the offender into society. The Respondent submits that the imposition of residency conditions not only satisfies the applicable requirements of statutory interpretation and the general purpose of the CCRA, but it also benefits the Applicant.

[46] In *V.M.*, *supra*, Wilson J. analysed three other rules of general statutory interpretation to come to a conclusion that the Parole Board did have the jurisdiction to impose residency conditions.

[47] At paragraph 157 of her decision she states as follows:

First, when a provision in penal statutes are (sic) capable of two interpretations, it should be interpreted in a manner favourable to the accused. If the NPB does not have the jurisdiction to impose residency requirements during long-term supervision order, then, for many offenders, the risk they pose would not be reasonably capable of being eventually managed in the community. These offenders would in all probability be classified as dangerous offenders.

[48] Wilson J. goes on to state that the courts should interpret legislation so as to avoid absurd results. She posits that it would be an absurd result "to interpret legislation that is primarily intended to protect the public from high risk offenders as precluding the jurisdiction to impose a residency requirement, when jurisdiction exists to make such orders for lower risk individuals who are on parole." (*V.M.*, *supra*, para. 158)

[49] Finally, Wilson J. says in *V.M.*, *supra*, that where a provision is capable of more than one interpretation, the court should choose the interpretation that is consistent with the Charter (para. 959, see also *R. v. Wust* (2000), 143 C.C.C. (3d) 129 (S.C.C.) at para. 34).

[50] Wilson J. says that the long-term offender provisions ensure that only offenders whose condition is pathologically intractable become "dangerous offenders" with a mandatory indeterminate sentence.

[51] Ryan J.A. of the British Columbia Court of Appeal in the recent decision in *R. v. Johnson*, [2001] B.C.J. No. 2021 at para. 98 described the purpose of the dangerous offender designation as follows:

... the dangerous offender designation under the new provisions is designed to ensure that those offenders who are truly dangerous, whose behaviour is unlikely to be modified or controlled, will be sentenced to an indeterminate sentence for the highest degree of state control. An offender whose conduct or behaviour is not pathologically intractable, in the sense that the offender can at least reach a stage where, though not curable, he or she can be safely controlled in the

community and who would likely have been found to be a dangerous offender under the former provisions, may now qualify for long-term rather than dangerous offender status. This offender would at least have the possibility, when the offender is no longer a risk in the community, to one day be free of state control.

[52] The imposition of residency controls on long-term supervised offenders forms a bridge between the concepts of protecting the public and avoiding over-incarceration.

[53] The Respondent submits that a residency condition can be imposed in the case of long-term supervision orders.

There Is No Access to the Appeal Division Granted to Long-term Offenders

[54] Following the same concepts of statutory interpretation outlined above, and following the plain language reading of the statute, the Respondent argues that s. 99.1 of the CCRA makes clear reference to the provisions that apply to long-term offenders:

A person who is required to be supervised by a long term supervision order is deemed to be an offender for the purposes of this Part, and sections 100, 101, 109 to 111 and 140 to 145 apply, with such modifications as the circumstances require, to the person and to the long-term supervision of that person.

[55] Sections 146 and 147 deal with an offender's access to the Appeal Division. The plain reading of para. 99.1 makes it clear that these two sections are not applicable to a long-term offender.

[56] The Respondent says it is clear that the Appeal Division does not have the jurisdiction to hear a challenge to imposed conditions made pursuant to a long-term supervision order. The provisions of the statute make an explicit list of those sections that apply to long-term offenders. There is no ability to read two meanings into s. 99.1, nor is there any ambiguity over which paragraphs apply to long-term offenders.

[57] This does not mean that an offender subject to long-term supervision does not have an avenue to challenge a decision of the Parole Board. But the avenue is not through the Appeal Division set up in ss. 146 and 147 of the CCRA.

[58] The Respondent points to s. 18(1)(b) of the Federal Court Act which provides as follows:

Subject to section 28, the Trial Division has exclusive original jurisdiction to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

[59] Section 18(3) of the Federal Court Act is also relevant:

The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.

[60] The Respondent says that the Applicant has a right to judicial review of his long-term offender determination through this Court.

The Imposition of a Residency Condition Was a Reasonable Means to Ensure the Protection of Society

1) The Applicable Standard of Review is Curial Deference

[61] At para. 50 of the Applicant's Memorandum of Fact and Law, the Applicant submits that the expertise of the Parole Board lies largely in the assessment, evaluation, determination and application of fact. He submits that the Parole Board engages in a "protective" and "polycentric" role which could include considerations of public safety, the interests of victims, and the rehabilitation and reintegration interests of an offender. The Applicant suggests that in such "matters of fact or policy, the standard of review may properly be that of "reasonableness" and marked by curial deference.

[62] The Respondent submits that the Parole Board is applying its expertise in the assessment, evaluation, determination and application of fact. This Court has often applied a standard of patent unreasonableness to the Appeal Division in its review of findings of fact (*Costiuc v. Canada (Attorney General)*, [1999] F.C.J. No. 241 (F.C.T.D.), at para. 6, *Cartier v. Canada (Attorney General)*, [2002] FCA 384, at paras 8-10, *Migneault v. Canada (Attorney General)*, [2003] F.C.J. 372 (F.C.T.D.)).

[63] The Respondent submits that the Court should apply the same standard of review of patent unreasonableness to the decision of the Parole Board in establishing a residency condition. The Parole Board is clearly within its expertise in assessing, evaluating, determining and applying the facts of the Applicant's supervision requirements in order to reach its decision.

2) The Rationale for the Residency Condition was Reasonable and Necessary

[64] The Applicant was convicted of five counts of sexual assault with underage teenage boys. In the Ontario court's determination that the Applicant was a long-term offender and should be supervised for five years, the court urged the Parole Board as follows:

... inclusion in Kenneth McMurray's long-term offender supervision order that this accused for the duration of the order be prohibited from attending a public park, or public swimming area where persons under the age of 14 years are present or can reasonably be expected to be present, or a day-care centre, school-ground, play-ground, or community centre. I also urge the Board to impose a condition that he be prohibited from seeking, obtaining, or continuing any employment, whether or not the employment is remunerated, or becoming a volunteer in a capacity that involves being in a position of trust or authority towards persons under the age of 16 years. I urge the Board to order him to attend for psychological counselling, assessment, and treatment for his sexual deviance.

[65] In response, when assessing the conditions to be imposed during the Applicant's long-term supervision, the Parole Board specifically considered the need for a residency condition.

- [66] The Parole Board had already ordered the Applicant detained until his warrant expiry due to concerns that, if released, he would be likely to commit a sexual offence involving a child before the expiration of his sentence.
- [67] The Applicant at WED remained an untreated sex offender. The Applicant has not participated in any program to address his correctional needs.
- [68] A phallometric test showed the Applicant to have a deviant arousal to stimuli involving adolescent males.
- [69] The assessment further reported that the Applicant was still engaged in his offence cycle.
- [70] The assessment determined that the Applicant was highly likely to reoffend.
- [71] The residency condition was imposed for the following reasons and purposes:

Residency at a CCC would provide additional structure and support in addition to more frequent contact and supervision. It would require the offender to return to the centre each night for a required curfew and would essentially limit the time he spends in the community. Residency at the Keele CCC would afford him close contact with the psychology department if this were deemed necessary. The programming department is also located in the same building and he would not be required to travel to address his programming needs.

The offender's risk is only viewed as being manageable within the community without a residency condition if he has taken the necessary steps to address his problem areas and to show some commitment to changing his lifestyle. Until these steps are taken this writer feels that a residency condition is the least restrictive measure for managing this case.

Evenson affidavit, Exhibit "B", Applicant's Application Record, Tab 2, p. 38.

- [72] There were no dissenting opinions in this assessment. The assessment was used in rendering a decision that the final condition of the Applicant's long-term supervision order be an imposed residency to be in effect for 90 days.
- [73] The Parole Board has not failed to give its reasons for making the order and there is no palpable error in its decision-making process. The Respondent submits that, given the Applicant's criminal record, his lack of treatment at that time and his continued sexual deviancy towards children, it is a supportable decision of the Parole Board to impose a 90-day reviewable residency condition to make sure that the Applicant is capable of reintegrating into society without reoffending.

Charter Implications

- [74] As regards s. 7 of the Charter, the Respondent points out that the Supreme Court of Canada has distinguished three types of liberty interest in the context of correctional law. Lamer J. (as he then was) in *Dumas v. Leclerc Institute*, [1986] 2 S.C.R. 459 at p. 464 identified these interests as follows:

- I) The initial deprivation of liberty;
- ii) A substantial change in conditions amounting to a further deprivation of liberty; and
- iii) A continuation of the deprivation of liberty.

- [75] The Applicant has framed his liberty interest as that of choosing where to live. He contends that such interest has been infringed by the residency condition.
- [76] The Applicant remains under the direction of a long-term supervision order that restricts his liberty without requiring incarceration.
- [77] The Respondent submits that the Applicant has not established under which branch his liberty interests have been infringed, given his restrictions under a long-term supervision order.
- [78] The Respondent argues that if this Court finds that there is a liberty interest engaged which attracts the protection of the Charter then the limit is in accordance with the rules of fundamental justice.
- [79] The Respondent also submits that a long-term supervision order is not a form of conditional release akin to parole. Long-term supervision orders begin to run after the warrant expiry of an offender's sentence because he/she is still considered a risk to the community.
- [80] Conversely, a long-term supervision order is akin to the dangerous offender situation, but is of a lesser magnitude and does not require indeterminate sentences for the highest degree of state control.
- [81] The Respondent submits that Wilson J. in *V.M.*, supra, considered residency restrictions to be in keeping with the Charter because they protect the public, but avoid the over-incarceration that might occur if offenders are classified as dangerous offenders because they could not have structure, treatment and controls imposed upon them.
- [82] The Respondent further submits that fundamental justice requires that a fair balance be struck between the individual's liberty interest and the protection of society (*Cunningham v. Canada*, [1993] 2 S.C.R. 143).
- [83] The Respondent says that the residency restriction is directly related to the purpose of protecting society. There is clear evidence that the Applicant is an untreated sex offender. There is a risk to the public that must be addressed.
- [84] The Respondent further submits that the residency restriction also appropriately balances the Applicant's liberty interest with the protection of the public safety. The Applicant only has to meet a curfew at night, leaving him free to interact with the community during the day subject to the other restrictions on his long-term supervision which are not subject to this judicial review.

- [85] Further, the residency restriction is only enacted for periods of 90 days. There is a possibility for review in those periods to measure the Applicant's progress and determine whether the continuation of the restriction is warranted. The residency condition is not indeterminate, but depends entirely upon the Applicant's ability to complete his programming and demonstrate his ability to integrate into society.
- [86] The Respondent submits that the residency restriction does not contravene s. 7 of the Charter.

Neither the Parole Board Nor the Appeal Division Have Failed to Adhere to Their Own Processes

- [87] The Applicant submits that the Parole Board's and the Appeal Division's failure to adhere to their own processes attracts Charter consideration.
- [88] The Respondent has already put forward its arguments as to why the Parole Board has the right to include residency conditions in a long-term supervision order. The Respondent has also already submitted that the Appeal Division does not have the jurisdiction to review the decision of the Parole Board with respect to a long-term supervision order. It is the Respondent's position that both bodies have adhered to their duties.
- [89] Nonetheless, the Respondent submits that if the Court finds that the Parole Board or the Appeal Division erred in their decision-making, then the appropriate remedy would be to send the matter back to the Parole Board or the Appeal Division with directions.
- [90] The jurisprudence of *V.M.*, supra, seems to contemplate the exact situation presented in this application for judicial review, although in that instance it was the defence who asked for the residency condition and not the Crown.
- [91] Although this situation has not been contemplated in the Federal Court, the decision of *V.M.*, supra, has not been appealed in Ontario. The Respondent urges the Court to apply the same reasoning to the facts of this situation and reach a similar result to ensure harmony of the jurisprudence.
- [92] The Respondent requests that the application for judicial review be dismissed.

ANALYSIS

- [93] Although the Applicant raises substantive arguments in this Application concerning the power and jurisdiction of the Parole Board to impose a residency condition on him pursuant to the CCRA, this is an application that, by its terms, requests judicial review of the Decision of the Appeal Division confirmed by letter dated January 15, 2002, that declined to hear the Applicant's appeal under s. 147 of the CCRA.

- [94] This being the case, the Court is of the view that the only issue raised by the Applicant for proper consideration by the Court concerns the Decision of the Appeal Division to decline to hear the Applicant's appeal.
- [95] Although the Applicant is concerned with the jurisdiction of the Parole Board to impose a residence requirement, that matter was not part of the Appeal Division's Decision not to hear the Appeal and the Court is of the view that the Applicant cannot indirectly attack the decision of the Parole Board through an Application for judicial review of the Appeal Division's Decision. The power and jurisdiction of the Parole Board to impose a residence requirement on the Applicant are not relevant to a review of the Appeal Division's jurisdiction to hear the Applicant's appeal.
- [96] At the hearing of this matter on February 24, 2004, the Applicant sought leave to extend the time for launching an application for judicial review of the Parole Board decision and/or an amendment to the present Application to allow the Applicant to argue his case against the Parole Board. The Court declined to grant such application on the grounds that there was no evidence or acceptable argument to support either an extension of time or an amendment to the present Application. Consequently, the Court asked both counsel to confine their arguments to the Appeal Division Decision and the issue of whether the Appeal Division should have declined to hear the Applicant's appeal pursuant to s. 147 of CCRA.
- [97] Both parties agreed that, applying a pragmatic and functional approach to the Decision of the Appeal Division on this issue, the applicable standard of review is correctness. I agree that this issue raises a question of law that goes to the jurisdiction of the Appeal Division and that the appropriate standard of review is correctness.
- [98] In summary on this point, the Applicant argues that the Appeal Division erred in declining to hear the appeal because s. 147 of CCRA confers a broad right of appeal that is available to persons in the position of the Applicant that is not removed by any specific provision of the CCRA, and it was clearly Parliament's intent that long-term offenders would enjoy the appeal rights granted by s. 147. The Respondent argues that it is clear that Parliament did not so intend and that long-term offenders do not have a right at appeal under s. 147 of CCRA but do have a right to apply directly to this Court for judicial review of a decision of the Parole Board. Hence, the Court is being asked to engage in the statutory interpretation of s. 147 of CCRA.
- [99] Sections 146 and 147 of CCRA deal with the creation of the Appeal Division and with the right of an "offender" to appeal to the Appeal Division from a decision of the Parole Board. "Offender" is defined under Part II of CCRA as follows:
- "offender" means
- (a) a person, other than a young person within the meaning of the Youth Criminal Justice Act, who is under a sentence imposed before or after the coming into force of this section

(I) pursuant to an Act of Parliament or, to the extent that this Part applies, pursuant to a provincial Act, or

(ii) on conviction for criminal or civil contempt of court if the sentence does not include a requirement that the offender return to that court, or

(b) a young person within the meaning of the Youth Criminal Justice Act with respect to whom an order, committal or direction under section 76, 89, 92 or 93 of that Act has been made, but does not include a person whose only sentence is a sentence being served intermittently pursuant to section 732 of the Criminal Code;

« *délinquant* »

a) Individu condamné - autre qu'un adolescent au sens de la Loi sur le système de justice pénale pour les adolescents -, avant ou après l'entrée en vigueur du présent article, à une peine d'emprisonnement_:

(I) soit en application d'une loi fédérale ou d'une loi provinciale dans la mesure applicable aux termes de la présente partie,

(ii) soit à titre de sanction d'un outrage au tribunal en matière civile ou pénale lorsque le délinquant n'est pas requis par une condition de sa sentence de retourner devant ce tribunal;

b) adolescent, au sens de la Loi sur le système de justice pénale pour les adolescents, qui a fait l'objet d'une ordonnance, d'une détention ou d'un ordre visés aux articles 76, 89, 92 ou 93 de cette loi.

La présente définition ne vise toutefois pas la personne qui, en application de l'article 732 du Code criminel, purge une peine de façon discontinue.

[100] Long-term offenders in the position of the Applicant do not qualify under this definition. Hence, we have to turn to s. 99.1 to discover how the provisions of Part II of CCRA should apply to long-term offenders:

99.1 A person who is required to be supervised by a long-term supervision order is deemed to be an offender for the purposes of this Part, and sections 100, 101, 109 to 111 and 140 to 145 apply, with such modifications as the circumstances require, to the person and to the long-term supervision of that person.

99.1 La personne soumise à une ordonnance de surveillance de longue durée est assimilée à un délinquant pour l'application de la présente partie; les articles 100, 101, 109 à 111 et 140 à 145 s'appliquent, avec les adaptations nécessaires, à cette personne et à la surveillance de celle-ci.

[101] Because the appeal provisions of ss. 146 and 147 are not specifically referred to s. 99.1, the problem is to determine whether Parliament's intent was that long-term offenders should or should not have access to the appeal process.

[102] The parties agree on the applicable rules of statutory interpretation, but they disagree on the result when those rules are applied in this case. Both sides refer to the well-known principle that can be found in the Supreme Court of Canada decision in *Re Rizzo and Rizzo Shoes Limited*, *supra*, at para. 21:

Today there is only one principle of approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament

[103] The Applicant argues that his interpretation of s. 99.1 and s. 147 of the CCRA is consistent with the general purpose of the statute as found in provisions such as s. 3 and s. 101, as well as with Parliament's intent in amending the CCRA to deal with the category of persons known as long-term offenders.

[104] The Applicant says that no specific reference is made to ss. 146 and 147 in s. 99.1 because such a reference is not necessary. Read as a whole, Part II of CCRA makes it clear that a right of appeal to the Appeal Division under s. 147 is granted to both generic offenders and long-term offenders. The only reason that certain sections are singled out for mention in s. 99.1 is for purposes of clarification. There are some provisions in Part II that are not specifically referred to in s. 99.1 that are clearly applicable to long-term offenders, so the fact that s. 147 is not cited in s. 99.1 cannot mean that Parliament did not intend to allow long-term offenders to have access to the appeal process under Part II.

[105] The Applicant has also drawn the Court's attention to the way that key wording found in the guiding principles under s. 107 is picked up on ss. 146 and 147, thus suggesting that the whole scheme of Part II, including ss. 146 and 147, should be considered to be available to long-term offenders. The Applicant also lays particular emphasis on the fact that there is no provision in the CCRA that specifically excludes ss. 146 and 147 from long-term offenders, and, if a right and a benefit are going to be denied to a particular category of persons in a statute, Parliament must do so in a clear and unequivocal way.

[106] The Applicant argues further that, because of its expertise, the Appeal Division is the appropriate forum for all appeals from the Parole Board and long-term offenders should not be denied the benefit of this expertise and made to come directly to the Federal Court by way of a judicial review application from Parole Board decisions. Sections 147(2)(a) makes it clear that any concern over an excess of appeals can be controlled where frivolous and vexatious grounds exist.

[107] The Respondent says that, in amending the CCRA in 1997 to deal with long-term offenders, Parliament did not need to refer specifically to every provision of Part II because it is clear that some provisions (ss. 134.1 and 135.1 for instance) are directly applicable. Other provisions of Part II, however, only use the term "offender," so that it was necessary to specify whether they should apply to long-term offenders.

- [108] This is the purpose of s. 99.1. The designated sections in 99.1 are provisions that deal either with guiding principles or with the rights of offenders, so that unless direct reference is made to them, it would not be clear whether they are intended to apply to long-term offenders.
- [109] So the rationale behind s. 99.1, says the Respondent, is that where a provision in Part II is not specific to long-term offenders, Parliament has directed that it will be applicable through s. 99.1.
- [110] The Respondent also points out that there are numerous provisions in Part II of CCRA that, if the Applicant's interpretation of s. 99.1 were accepted, would cause serious difficulties for the Parole Board and the Canada Corrections Service generally. For the most part, Part II deals with generic offenders, and Parliament could not have intended that all of the options available to persons in that class would also be available to long-term offenders. This is why, says the Respondent, Parliament used s. 99.1 to make it clear which provisions should apply. To exclude long-term offenders from ss. 146 and 147 is not unfair because they can come directly to the Federal Court by way of judicial review if they are unhappy with a Parole Board decision.
- [111] Having considered the various arguments raised by counsel on this point, and having reviewed the general scheme and purpose of CCRA (with specific regard to Part II and the provisions introduced to deal with long-term offenders), it is the view of the Court that context, scheme, purpose and the ordinary meaning of the words reveal that s. 99.1 refers to specific provisions for the purpose of making it clear that, where it is not obvious, they are to be applied to long-term offenders "with such modifications as the circumstances require." Other provisions not mentioned in s. 99.1 also apply to long-term offenders, but this is because the provisions themselves make it clear that this is the case. If Parliament had intended to make ss. 146 and 147 available to long-term offenders, then Parliament would have specifically said so in s. 99.1.
- [112] Most telling in my opinion is that the review process provisions in Part II begin at s. 140 and continue to s. 147. The appeal process is part of the normal scheme of review, but ss. 99.1 says that sections 140 to 145 will apply to long-term offenders. It would make no sense, in my opinion, in the context of review to leave sections 146 and 147 out of s. 99.1 if Parliament had intended that review by the Appeal Division would also be available to long-term offenders. Hence, my conclusion is that it is not.

ORDER

THIS COURT ORDERS that:

1. This Application for judicial review is dismissed.
2. The Respondent shall have costs of this Application.

"James Russell"

JFC

FEDERAL COURT OF CANADA

Names of Counsel and Solicitors of Record

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