

CANADA / JUDGMENT

Normandin v. Canada (Attorney General)

2004 FC 1404

COURT

Federal Court

DECIDED

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Ottawa, Ontario, the 13th day of October 2004

Present: The Honourable Madam Justice Danièle Tremblay-Lamer

BETWEEN:

DANIEL NORMANDIN

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

- [1] The question raised in this application for judicial review is that of the power of the National Parole Board (the NPB) to impose a special residency condition on an offender who has been declared a dangerous offender pursuant to subsection 753.1(1) of the Criminal Code, R.S.C. 1985, c. C-46 (Cr.C.).
- [2] The applicant served a second federal two-year sentence for sexual offences against the person and possession of illegal substances, and failure to comply with a probation order. The applicant's term of imprisonment ended on June 27, 2004.
- [3] The applicant was declared a dangerous offender under section 753.1 Cr.C. Consequently, the Court ordered that the applicant be the subject of a long-term supervision order in the community pursuant to subsection 753.1(3) and section 753.2 Cr.C. for a maximum period of five years following expiry of the applicant's term.
- [4] On June 3, 2004, the NPB ordered a residency condition from any CCC for a period of 90 days. Consequently, a long-term supervision certificate was issued against the applicant.
- [5] The applicant submitted that, for the following reasons, the NPB did not have the power to impose a residency condition on a dangerous offender.
- [6] Under section 134.1 of the Corrections and Conditional Release Act, S.C. 1992, c. 20 (the Act), "every offender who is required to be supervised by a long-term supervision order is subject to the conditions prescribed by section 161(1) of the Corrections and Conditional Release Regulations, with such modifications as the circumstances require".
- [7] Subsection 161(1) of the Corrections and Conditional Release Regulations (the Regulations) gives a list of conditions and it does not include the residency condition.
- [8] Section 99.1 of the Act provides that "A person who is required to be supervised by a long-term supervision order is deemed to be an offender for the purpose of this Part [that is, Part II of the Act], 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". Section 133(4.1), which allows residency conditions to be imposed on an offender who is eligible for statutory release, is not included in the list of sections which apply mutatis mutandis to dangerous offenders. It therefore does not apply to a long-term supervision order.

- [9] Further, subsection 135.1(1) specifically sets out the circumstances in which a residency condition may be imposed on a dangerous offender. It would be illogical for Parliament to have provided that such a condition could be imposed under 134.1(2).
- [10] Finally, the appellant argued that his right to choose his place of residence is part of the category of limited decisions that deserves the constitutional protection provided by section 7 of the Canadian Charter of Rights and Freedoms (the Charter).
- [11] The respondent, for his part, submitted that the NPB had the power under subsection 134.1(2) of the Act to impose any condition it considered reasonable and necessary to preserve a just, peaceful and safe society, which is the principal object of the Act contained in section 100. Subsection 134.1(2) should be interpreted in light of this guiding principle.
- [12] Although subsection 161(1) of the Regulations does not include the residency condition, that list of conditions is not exhaustive. It contains basic conditions to which others may be added when the NPB considers it reasonable and necessary in the particular circumstances of a case.
- [13] Additionally, the words "place of residence" in subsection 161(1) of the Regulations do not imply that the residence is private or to be chosen by the offender. Thus, the words "place of residence" cover both a residence chosen by the offender and a residence imposed by the NPB, for example a community shelter as in the case at bar.
- [14] Finally, in the respondent's submission the residency condition did not contravene section 7 of the Charter since the applicant is still subject to a long-term supervision order which limits his freedom without requiring that he be in prison. In view of the hearing that took place before the Court, this restriction is consistent with the rules of fundamental justice. Additionally, the residency condition is directly related to the purpose, which is to protect society. Further, it is of short duration and can be reviewed during this period, if the applicant demonstrates his ability to be reintegrated into society. Consequently, the residency condition does not contravene section 7 of the Charter.
- (i) Applicable standard of review
- [15] The only question raised by the case at bar is whether the NPB has the power to impose a residency condition on an offender who has been declared a dangerous offender.
- [16] To begin with, the applicable standard of review must be determined. In *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, the Supreme Court of Canada confirmed that a court reviewing the decision of an administrative tribunal must apply the pragmatic and functional approach in determining the degree of deference that the decision should be accorded. This approach requires the reviewing court to weigh a series of factors to discern whether a particular issue before the administrative body should receive exacting review by the court, undergo significant searching or testing or be left to the near exclusive determination of the decision-maker. Four main factors should be taken into account in determining what standard of judicial review is applicable to the decision of

an administrative body: the presence or absence of a private clause; the purposes of the legislation as a whole and the provision in particular; the expertise of the tribunal relative to that of the reviewing court on the issue in question; and the nature of the question.

- [17] The pragmatic and functional approach should not be applied mechanically. The factors may overlap. "The overall aim is to discern legislative intent, keeping in mind the constitutional role of the courts in maintaining the rule of law" (Dr. Q v. College of Physicians and Surgeons, *ibid.*, para. 26). The Court should select one of the three applicable standards of review, indicating the degree of deference required by the administrative decision – the patent unreasonableness, the reasonableness simpliciter and the correctness standard.
- [18] In the case at bar, the applicant suggested that the appropriate standard of review was that of reasonableness simpliciter, while the respondent suggested the standard of correctness when a question regarding the NPB's powers is to be determined. For the following reasons, I agree with the respondent that the applicable standard of review is that of correctness.
- [19] The main purpose of the Act is contained in section 100 of the Act. It is to contribute to the maintenance of a just, peaceful and safe society by allowing the NPB to impose the conditions necessary to protect society and facilitate the reintegration of the offender into the community. The NPB's function is guided by the principles set out in section 101 of the Act. There is no doubt that Parliament intended the NPB to use its expertise in taking the appropriate decisions to protect society while facilitating the reintegration of the offender into the community. The Court must treat this type of expertise with the greatest restraint.
- [20] However, when the question is simply that of deciding whether, based on the relevant legislative provisions, the NPB has power to impose a residency condition, the question is purely one of law which requires little or no deference. Questions of legislative interpretation are submitted to the courts every day and do not come within the NPB's expertise. The Court is therefore in a better position than the NPB to decide the question. Accordingly, it is the standard of the correct decision which is appropriate. Moreover, this is the standard of review which was applied in *McMurray v. Canada (National Parole Board)*, [2004] F.C.J. No. 565 (QL), in which Russell J. had to determine whether Parliament intended to give dangerous offenders the right to appeal to the Appeal Division.
- [21] I note in passing that the Federal Court of Appeal's judgment in *Cartier v. Canada (Attorney General)*, [2003] 2 F.C. 317 (C.A.), on which the applicant relied, has no bearing on the standard of review applicable in the case at bar. In that case the Court of Appeal considered the function of the Appeal Division when it reviewed a decision of the NPB and the judge hearing an application for judicial review of the Appeal Division's decision. In that case, the original decision at issue was clearly within the expertise of the NPB, since it concerned the latter's assessment of the risk that an offender would reoffend if released.

(ii) NPB's power to impose residency condition on dangerous offender

- [22] The question now is whether the NPB's decision, that it had the power to impose a residency condition on an offender subject to a long-term supervision order, was correct in law.
- [23] The question is one of legislative interpretation. It is well to recalling the guiding principle which the Court should apply in matters of legislative interpretation, as summarized by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27. Nowadays, 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.

Dangerous offender under Cr.C.

- [24] The starting point of our analysis is in the Cr.C. Under subsection 753.1(1) Cr.C., the Court may declare an offender who meets the following criteria a "dangerous offender":
- (a) it would be appropriate to impose a sentence of imprisonment of two years or more for the offence for which the offender has been convicted;
 - (b) there is a substantial risk that the offender will reoffend; and
 - (c) there is a reasonable possibility of eventual control of the risk in the community.
- [25] Additionally, under subsection (2) of the same section, the Court is satisfied that there is a substantial risk the offender will reoffend if:
- (a) first, the offender has been convicted of an offence under sections 151 (sexual interference), 152 (invitation to sexual touching) or 153 (sexual exploitation), subsections 163.1(2) (making child pornography), 163.1(3) (distributing of child pornography), 163.1(4) (possession of child pornography) or 163.1(4.1) (accessing child pornography), section 172.1 (luring a child), subsection 173(2) (exposure) or sections 271 (sexual assault), 272 (sexual assault with a weapon) or 273 (aggravated sexual assault), or has engaged in serious conduct of a sexual nature in the commission of another offence of which the offender has been convicted; and
 - (b) the offender
 - (i) has shown a pattern of repetitive behaviour, of which the offence for which he or she has been convicted forms a part, that shows a likelihood of the offender's causing death or injury to other persons or inflicting severe psychological damage on other persons, or
 - (ii) by conduct in any sexual matter, including that involved in the commission of the offence for which the offender has been convicted, has shown a likelihood of causing injury, pain or other evil to other persons in the future through similar offences.
- [26] In the case at bar, the Court concluded that the applicant met all these criteria and declared him a dangerous offender.
- [27] Consequently, the Court ordered that the applicant be subject to long-term supervision in the community pursuant to section 753.2 Cr.C.

[28] It is clear that the word "supervision" by implication suggests the existence of conditions. In *R. v. V.M.*, [2003] O.J. No. 436 (QL), Wilson J. came to this conclusion. The relevant provisions are found in the "Conditions for Long-Term Supervision" section of the Act.

[29] However, before considering these provisions, it is important to understand how the Act works regarding offenders subject to a long-term order. To this end, we must look at section 99.1 of the Act, which provides:

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.

[30] Parliament accordingly sought to indicate, when it is not clear, that certain provisions apply to dangerous offenders *mutatis mutandis*.

[31] Other special provisions will also apply, but only when it is clear they apply (McMurray, *supra*).

[32] The residency condition is set out in subsections 133(4.1) and 135.1(1). As the applicant noted, the residency condition is not part of the provisions listed in section 99.1. It is specifically set out in subsection 133(4.1) for an offender eligible for statutory release when certain criteria mentioned in the section have been met:

133 (4.1) In order to facilitate the successful reintegration into society of an offender, the releasing authority may, as a condition of statutory release, require that the offender reside in a community-based residential facility or in a psychiatric facility, where the releasing authority is satisfied that, in the absence of such a condition, the offender will present an undue risk to society by committing an offence listed in Schedule I before the expiration of the offender's sentence according to law.

133 (4.1) L'autorité compétente peut, pour faciliter la réinsertion sociale du délinquant, ordonner que celui-ci, à titre de condition de sa libération d'office, demeure dans un établissement résidentiel communautaire ou un établissement psychiatrique si elle est convaincue qu'à défaut de cette condition la commission par le délinquant d'une infraction visée à l'annexe I avant l'expiration légale de sa peine présentera un risque inacceptable pour la société.

[33] Further, subsection 135(1) provides the circumstances in which a residency condition may be imposed on a dangerous offender:

135. (1) A member of the Board or a person, designated by name or by position, by the Chairperson of the Board or by the Commissioner, when an offender breaches a condition of parole or statutory release or when the member or person is satisfied that it is necessary and reasonable to suspend the parole or statutory release in order to prevent a breach of any condition thereof or to protect society, may, by warrant,
135. (1) En cas d'inobservation des conditions de la libération conditionnelle ou d'office ou lorsqu'il est convaincu qu'il est raisonnable et nécessaire de prendre cette mesure pour empêcher la violation de ces conditions ou pour protéger la société, un membre de la Commission ou la personne que le président ou le commissaire désigne nommément ou par indication de son poste peut, par mandat :
- (a) suspend the parole or statutory release;
 - a) suspendre la libération conditionnelle ou d'office; (b) authorize the apprehension of the offender; and
 - b) autoriser l'arrestation du délinquant;
 - (c) authorize the recommitment of the offender to custody until the suspension is cancelled, the parole or statutory release is terminated or revoked or the sentence of the offender has expired according to law.
 - c) ordonner la réincarcération du délinquant jusqu'à ce que la suspension soit annulée ou que la libération soit révoquée ou qu'il y soit mis fin, ou encore jusqu'à l'expiration légale de la peine.
- [34] There is thus no specific provision for the imposition of a residency condition immediately following the expiry of a dangerous offender's term. The applicant concluded, based on the legislative principle of implicit exclusion, *expressio unius est exclusio alterius*, that as the power to impose conditions regarding residence was not expressly conferred in section 134 of the Act it was not conferred at all.
- [35] I do not share this view. To begin with, section 134.1 deals with conditions which may be imposed by the NPB on an offender subject to a long-term supervision order:
- 134.1 (1) Subject to subsection (4), every offender who is required to be supervised by a long-term supervision order is subject to the conditions prescribed by subsection 161(1) of the Corrections and Conditional Release Regulations, with such modifications as the circumstances require.
- 134.1 (1) Sous réserve du paragraphe (4), les conditions prévues par le paragraphe 161(1) du Règlement sur le système correctionnel et la mise en liberté sous condition s'appliquent, avec les adaptations nécessaires, au délinquant surveillé aux termes d'une ordonnance de surveillance de longue durée.

[36] Subsection 161(1) of the Corrections and Conditional Release Regulations (the Regulations) sets out a list of conditions which does not include the residency condition. The respondent submitted that these were basic conditions, to which others could be added when it was considered necessary and reasonable by the Board in each case. This power is conferred in subsection 134.1(2) of the Act, which is broad enough to allow the NPB to impose any condition it considers reasonable and necessary to protect society and facilitate the successful reintegration of the offender into the community. I think he is right. It is clear Parliament intended to leave the NPB with broad discretion in subsection 134.1(2), which reads as follows:

134.1 (2) 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.

134.1 (2) La Commission peut imposer au délinquant les conditions de surveillance qu'elle juge raisonnables et nécessaires pour protéger la société et favoriser la réinsertion sociale du délinquant.

[37] Parliament enacted a flexible residual legislative provision which serves the general purpose of the Act and Parliament's intention to protect society while facilitating the reintegration into society of the offender. It would be contrary to the scheme of the Act, read together with the applicable provisions of the Cr.C., to exclude the NPB's power to impose a residency condition on a dangerous offender when such a condition is considered reasonable and necessary in the offender's particular situation, but would not be so in the case of some other offender.

[38] As Wilson J. noted in *R. v. V.M.*, supra, it would not be very logical for the NPB to have the power to impose residency conditions on ordinary offenders who were eligible for statutory release but not have such a power over offenders who present a serious risk. Further, contrary to the applicant's argument, I feel that Russell J.'s judgment in *McMurray* leads to the same conclusion. Russell J. said:

150. 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. (Emphasis added.)

[39] Interpreting the Act in its general context based on its purpose and the intention of Parliament, it seems clear and obvious that subsection 134.1(2) applies to a dangerous offender, contrary to the appeal provisions which were the subject of the case in *McMurray*, *supra*.

[40] For all these reasons, I consider that the NPB has the power to impose a residency condition on a dangerous offender.

(iii) Whether residency condition is breach of Charter

[41] The applicant compared his right to freedom to that of choosing his place of residence. He maintained that this right was infringed by the residency condition.

[42] However, as the respondent noted, the applicant is still subject to a long-term supervision order which limits his freedom. First, in view of the hearing which took place before the Court, this restriction is consistent with the rules of fundamental justice. Second, the residency condition is directly related to the purpose of protecting society. The restrictions imposed on residency are consistent with the Charter, because their purpose is to protect the public and avoid recourse to committal, to which offenders classified as dangerous offenders may be subject because it is not possible to impose a structure, treatment and control measures on them.

[43] Finally, the residency condition was only imposed for a period of 90 days. The condition can always be reviewed during that period if the applicant has demonstrated his ability to reintegrate into society.

[44] Consequently, I consider that the residency condition does not contravene section 7 of the Charter.

[45] For these reasons, the applicant's application for judicial review is dismissed without costs.

ORDER

THE COURT ORDERS that the application for judicial review be dismissed without costs.

"Danièle Tremblay-Lamer"

Judge

Certified true translation

Jacques Deschênes, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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DATED: October 13, 2004

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