1985 CarswellNat 3
Federal Court, Trial Division

Richards v. Canada (National Parole Board)

1985 CarswellNat 3, 13 Admin. L.R. 29, 45 C.R. (3d) 382

RICHARDS v. NATIONAL PAROLE BOARD

Jerome A.C.J.F.C.

Heard: March 13, 1985
Judgment: April 23, 1985
Docket: Ottawa No. T-323-85

Counsel: *D. M. Midanik*, for applicant.
P. Kirwin, for respondent.

Subject: Criminal; Public

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Criminal Law --- Prisons and prisoners — Release — Parole — Revocation and termination — Procedural rights of prisoner

Criminal Law --- Prisons and prisoners — Release — Parole — Revocation and termination — Review of decision

Sentencing — Prisons and prisoners — Release from prison — Parole — Revocation and termination — Review of decision of parole board — When loss of remission is potential consequence, board can refuse to disclose confidential information but must offer sufficient gist to permit parolee to defend against allegations.

While there may be circumstances in which the parole board can act on confidential information so as to protect its source, the duty of fairness owed to the parolee at a post-suspension hearing includes a proper opportunity to answer allegations. This duty must be commensurate with the possible impact on the parolee's freedom. When loss of earned remission through revocation is a potential consequence, the standard of procedural fairness must be appropriate to the substantial loss of liberty at stake. If evidence is not to be disclosed on grounds of confidentiality, the explanation of the "gist" offered to the parolee must be sufficient to permit him to defend himself. The failure to provide such an explanation justifies the issue of certiorari to quash a decision revoking day parole.

Table of Authorities

Cases considered:

Cadieux v. Dir. of Mountain Inst. (1984), 41 C.R. (3d) 30, 9 Admin. L.R. 50, 13 C.C.C. (3d) 330, 10 C.R.R. 248 (Fed. T.D.) — *followed*

Latham v. Solicitor Gen. (Can.) (1984), 39 C.R. (3d) 78, 5 Admin. L.R. 70, 12 C.C.C. (3d) 9, 9 D.L.R. (4th) 393, 10 C.R.R. 120 (Fed. T.D.) — *followed*

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Statutes considered:

Canadian Charter of Rights and Freedoms, Constitution Act, 1982, Pt. I, ss. 7, 9, 12.

Parole Act, R.S.C. 1979, c. P-2, ss. 10 [am. 1976-77, c. 53, s. 25], 16 [am. 1976-77, c. 53, s. 29], 20 [re-en. 1976-77, c. 53, s. 31].

Regulations considered:

Parole Act, R.S.C. 1970, c. P-2 —

Parole Regulations, SOR/78-428, ss. 20 [am. SOR/81-487, s. 2], 20.1 [en. SOR/81-318], 24, 22 [am. SOR/78-524, SOR/81-487, s. 3].

Application for certiorari to quash decision of parole board revoking applicant's day parole.

***Jerome A.C.J.F.C.*:**

1 This application for a writ of certiorari quashing the decision of the National Parole Board to revoke the applicant's day parole came on for hearing before me at Edmonton, Alberta, on 13th March 1985. At the outset of the hearing, counsel for the applicant acknowledged that this court is without jurisdiction to issue habeus corpus for the immediate release of the applicant, but the application for certiorari is in order. At the conclusion of the hearing I took the matter under consideration but, because of the urgency of the matter, I rendered my decision and filed the following order at Ottawa, 15th March 1985:

> UPON the application for a writ of *certiorari* quashing the decision of The National Parole Board revoking the Applicant's day parole, upon reading the material filed, upon hearing counsel for all parties at Edmonton, Alberta, on March 13, 1985, and upon being satisfied that the decision of Strayer, J. in *Latham v. The Solicitor General of Canada, et al*, 12 C.C.C. (3d) 9, has a direct application to the matters in issue and for written Reasons to be filed,
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> **It is Hereby Ordered and Adjudged:**
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> (1) that *certiorari* issue to remove into this Court the order of the National Parole Board of October 30, 1984, as subsequently confirmed by the Board, revoking the applicant's day parole, and that the said decision and any orders or warrants based thereon by quashed; and
>
> (2) that the Respondent pay the Applicant's costs.

2 The applicant is an inmate of the Edmonton institution and is presently serving a sentence which expires on 4th June 1986, in the absence of any remission. On 27th July 1984 he was granted day parole on various conditions, one of which was that he reside at the Grierson Centre in Edmonton. The applicant's parole was suspended on 14th August 1984 by Jerry Christensen, a case management officer employed at the Grierson Centre. The reason given by Mr. Christensen for the suspension was the applicant's failure to return to the centre on time after being issued a day pass effective from 6:30 p.m. to 11:59 p.m. on 14th August. On 22nd August 1984 the applicant requested a post-suspension hearing, which was held on 30th October 1984 before three parole board members.

3 At the commencement of the post-suspension hearing held in accordance with ss. 20 to 22 of the Parole Regulations, Mr. Christensen advised the board that he had information relating to the applicant's behaviour which was of a confidential nature. The board subsequently instructed the applicant and his brother, Ray Richards, who was appearing as his agent, to leave the room. After the board heard the confidential information, the applicant and his brother were permitted to re-enter the hearing room and were informed that it related to the uttering of threats by the applicant to members within the community. The hearing

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continued with a discussion of the applicant's behaviour while at the Grierson Centre. The applicant and his agent were then given an opportunity to respond to the allegations before the board. At the conclusion of the hearing, the board revoked the applicant's day parole with no recredit of remission. The result of this decision is to deny the applicant approximately six months of remission which he had earned prior to this incident.

4 Counsel for the applicant argues that the applicant's right to procedural fairness during the post-suspension hearing was violated for the following reasons:

5 (a) he was not allowed to see or hear the contents of the confidential report;

6 (b) he was excluded from the room where the hearing was taking place for part of the hearing;

7 (c) he was not given an opportunity to make full answer and defence; and

8 (d) with regard to the Canadian Charter of Rights and Freedoms, his rights under ss. 7, 9 and 12 were violated.

9 There are two important legal issues raised in this application. The first deals with the board's duty to act fairly toward this applicant, specifically whether the applicant was sufficiently informed of the allegations against him to permit him to properly reply or defend himself having in mind the possibility of the loss of in excess of six months of accumulated freedom by way of earned remission. The second issue concerns the use by the board of evidence arising from confidential information which was received while the applicant was excluded from the proceedings and which was acted upon by the board without being disclosed to the applicant. Fortunately, both of these issues have recently been extensively canvassed by two of my colleagues, Strayer J. in *Latham v. Solicitor Gen. (Can.)* (1984), 39 C.R. (3d) 78, 5 Admin. L.R. 70, 12 C.C.C. (3d) 9 at 19, 9 D.L.R. (4th) 393, 10 C.R.R. 120, and Reed J. in *Cadieux v. Dir. of Mountain Inst.* (1984), 41 C.R. (3d) 30, 9 Admin. L.R. 50, 13 C.C.C. (3d) 330, 10 C.R.R. 248. In the *Lathum* case, Strayer J. had this to say in regard to the issue of notice of allegations:

> Unquestionably the parolee's "liberty" is at stake when he is threatened with revocation of parole [*R. v. Cadeddu; R. v. Nunnery* (1982) 40 O.R. (2d) 128, 32 C.R. (3d.) 355, 4 C.C.C. (3d) 97, 146 D.L.R. (3d) 629 (H.C.)]. In my view, fundamental justice requires procedural fairness commensurate with the interest affected. For the same reason that the common law would not require here a more judicialized process normally associated with the concept of "natural justice", s. 7 would not either. But it does require fairness and fairness requires at least an outline being given to the person affected of the allegations being considered by a tribunal in deciding whether to deny that person his liberty. A law which purports to deny even this is not a reasonable limitation within the meaning of s. 1 of the Charter of the rights guaranteed in s. 7 thereof.

On the issue of confidential information, Reed J. states in the Cadieux case at p. 345:

> I think it will be rare that an inmate cannot be told at least the *gist* of the reasons against him. This would especially be so if the alleged conduct took place outside the institution when the inmate was at large. I can, however, more easily envisage some situations when it might be *necessary* to refuse to disclose even the gist of the case against him when the information relates to conduct occurring within the institution.

I, of course, consider myself bound by these decisions, but in any case I have no reason to disagree with either of them. Applying the reasoning in those cases to the facts of the present dispute, it is understood that there will be circumstances in which the parole board will feel compelled to act upon confidential information in such a way as to protect their sources. Nor do I suggest that hearings by the parole board require the kind of summons or detailed information which accompanies the general criminal preceeding. Clearly, however, the duty to the parolee must be commensurate with the possible impact on his personal freedom. The powers of the parole board are contained in ss. 10, 16 and 20 of the Parole Act:

> 10. (1) The Board may ...
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> (*e*) in its discretion, revoke the parole of any paroled inmate other than a paroled inmate to whom a discharge from parole has been granted, or revoke the parole of any person who is in custody pursuant to a warrant issued under section 16 notwithstanding that his sentence has expired.

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> (2) The Board or any person designated by the Chairman may terminate a temporary absence without escort granted to an inmate pursuant to section 26.1 or 26.2 of the *Penitentiary Act* or the day parole of any paroled inmate and, by a warrant in writing, authorize the apprehension of the inmate and his recommitment to custody as provided in this Act ...
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> 16. (1) A member of the Board or a person designated by the Chairman, when a breach of a term or condition of parole occurs or when the Board or person is satisfied that it is necessary or desirable to do so in order to prevent a breach of any term or condition of parole or to protect society, may, by a warrant in writing signed by him,
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> (*a*) suspend any parole other than a parole that has been discharged;
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> (*b*) authorize the apprehension of a paroled inmate; and
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> (*c*) recommit an inmate to custody until the suspension of his parole is cancelled or his parole is revoked ...
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> (4) The Board shall, upon the referral to it of the case of a paroled inmate whose parole has been suspended, review the case and cause to be conducted all such inquiries in connection therewith as it considers necessary, and forthwith upon completion of such inquiries and its review it shall either cancel the suspension or revoke the parole ...
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> 20. ...
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> (2) Subject to subsection (3), when any parole is revoked, the paroled inmate shall, notwithstanding that he was sentenced or granted parole prior to the coming into force of this subsection, serve the portion of his term of imprisonment that remained unexpired at the time he was granted parole, including any statutory and earned remission, less
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> (*a*) any time spent on parole after the coming into force of this subsection;
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> (*b*) any time during which his parole was suspended and he was in custody;
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> (*c*) any remission earned after the coming into force of this subsection and applicable to a period during which his parole was suspended and he was in custody; and
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> (*d*) any earned remission that stood to his credit upon the coming into force of this subsection.
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> (3) Subject to the regulations, the Board may recredit the whole or any part of the statutory and earned remission that stood to the credit of an inmate at the time he was granted parole.

Accordingly, the board can either cancel the suspension of day parole, terminate the day parole or revoke it, but the consequences to the parolee are dramatically different in each case, since revocation carries with it the loss of earned remission. In my view, there is an obligation on the board, where the possibility of loss of earned remission through revocation exists, to be sure that the parolee is aware of that consequence and has the opportunity to defend himself accordingly at the post-suspension hearing. In the present case, the procedures followed would be adequate were the only result the termination of day parole, and indeed the material filed by the applicant acknowledges that. I have the impression, however, that the issue of the applicant's general suitability for parole came up almost Incidentally and I am far from satisfied that the standard of procedural fairness appropriate to such substantial loss of liberty was met. From a review of the evidence, it also appears that the board used the word "gist" of the evidence in response to the decision of Reed J., but surely more is required than simply adopting the terminology. If the evidence is not to be disclosed, the explanation must at least be sufficient to permit the accused person to defend himself, and here I accept the submission of counsel for the applicant that the cross-examination of Ronald F. Boucher, a member of the National Parole Board, confirms that the "gist" given to the applicant simply would not permit him to do so.

10 Accordingly, the duty to treat this applicant fairly was not fulfilled in a manner commensurate with the possibility of some additional six months in prison and a writ of certiorari to quash the decision is justified.

Application allowed.

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