Court File Number:

FEDERAL COURT

B E T W E E N:

EDWARD SPEIDEL

Applicant

-and-

THE ATTORNEY GENERAL OF CANADA

Respondent

NOTICE OF APPLICATION
Pursuant to sections 18 and 18.1 of the *Federal Courts Act*

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the Applicant. The relief claimed by the Applicant appears on the following pages.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of the hearing will be as requested by the Applicant. The Applicant requests that this application be heard at Vancouver.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the Applicant's solicitor, or where the Applicant is self-represented, on the Applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Vancouver or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

June 14, 2023

Issued by:_____
(Registry Officer)

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OVERVIEW

The applicant is a federal prisoner serving an aggregate sentence of 53 years, 11 months at Matsqui Institution ("Matsqui") in Abbotsford, British Columbia. His last day and full parole hearing was held in July 2022. The Applicant did not receive any legal assistance and was denied parole by the Parole Board of Canada (the "Board").

The Applicant is 63 years old and is terminally ill. He suffers from end stage chronic obstructive pulmonary disease ("COPD"), chronic pain, rheumatoid arthritis and hypertension. He requires the use of oxygen support and a mobility aid at all times.

Since his July 2022 hearing, his health has continued to deteriorate. In March 2023, he received a letter of support for parole from the Matsqui Physician stating that his condition is progressive, he suffers from breathing impairment and the constant feeling of air hunger (i.e., being choked), and his life expectancy is reduced as a result.

The Applicant faces continual challenges with receiving adequate healthcare in prison, including accessing portable oxygen tanks, adequate pain management, and steroidal medication necessary when his COPD symptoms are aggravated. He spends the vast majority of his time in his cell to avoid undue stress.

The Applicant is very afraid that, due to his underlying health conditions, he will die a painful death in prison. On May 10, 2023, the Applicant submitted an institutional request to be assessed for medical assistance in dying ("MAID"). On May 26, 2023, he submitted the provincial form for an official MAID request and is awaiting a formal eligibility assessment.

On March 28, 2023, the Applicant applied for parole by exception to be considered for release as he is not eligible to reapply for day parole until one year from the date of his last hearing, unless the Parole Board of Canada at their discretion determines otherwise (*Corrections and Conditional Release Act*, SC 1992, c 2 ("*CCRA*"), ss. 122(1)). After applying, it may take up to six months for the Board to schedule a hearing (*Corrections and Conditional Release Regulations,* SOR/92-620 ("*CCRR*"), ss. 157(2), 158(2)).

In his application for parole by exception, the Applicant argued that he met the conditions set out in s. 121(b) and (c), namely that his physical and mental health are likely to suffer serious damage should he remain in confinement and that his continued confinement constitutes an excessive hardship not reasonably foreseeable at the time of his sentencing.

In a letter dated March 29, 2023, the Board outlined that it would not consider the Applicant's parole by exception application because he is past his day and full parole eligibility dates under ss. 119 to 120.3 of the *CCRA*. The Board stated that individuals who are already eligible under these sections must apply for parole according to the timeframes set out in ss. 122 and 123 of the *CCRA*.

The Applicant resubmitted an amended application under s. 121(1) on April 12, 2023, which included terminal illness as an additional ground of review. The Applicant also submitted a request to his parole officer asking that she support his application for parole so that the Board may use their discretion to review his application earlier than as required under the *CCRA*. His parole officer denied this request on the basis that the *CCRA* sets out timelines for applying for parole, and the Applicant had not yet reached the required date for applying. The legislation allows the Board to consider applications outside of these limits, however policy requires support of the person's Case Management Team ("CMT") for the Board to use its discretion to consider an application (Parole Board Decision-Making Manual, the "Board Manual", c. 4.1, para. 24). The Applicant submitted a regular application for parole but this was denied by the Board in a letter dated April 18, 2023, which also cited his lack of CMT support as the reason for the denial.

On April 12, 2023, the Board acknowledged receipt of the resubmitted s. 121(1) application. On April 27, 2023, the Board again declined to review the application.

On May 5, 2023, the Applicant submitted an appeal of the April 27, 2023 decision to the Parole Board of Canada's Appeals Division (the "Appeals Division") regarding the Board's refusal to review the Applicant's s. 121(1) application, and asked that the matter be reviewed within two weeks due to the Applicant's health.

In the appeal, the Applicant argued that s. 121(1) makes clear that anyone is able to apply for parole by exception at any time and that the Board has no jurisdiction to refuse to review his application. The Applicant also argued that the Board committed an error of law in failing to review his application and that the decision deprived the Applicant's life and liberty in a manner that does not accord with the principles of fundamental justice.

The Board's interpretation of s. 121(1) is wrong as it does not align with the ordinary language of the *CCRA*, its application creates contradictions and absurdities, and it restricts the availability of parole for those described in s. 121(1). Limiting s. 121(1) to only those individuals prior to their eligibility dates is an unlawful fetter on the Board's discretion to grant parole at any time to an individual who meets the criteria set out in subsections (a) to (d).

The Applicant relied on the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), submitting that the Board's refusal to review his application deprived him of his right to life and liberty contrary to s. 7 of the *Charter* and constituted cruel and unusual punishment contrary to s. 12. The Applicant also submitted that the Board's decision not to review his application under s. 121(1) results in discrimination contrary to s. 15 of the *Charter*.

The conditions of the Applicant's current confinement, which include instances when he has not been provided with portable oxygen such that he may move freely throughout the institution, and has been denied medications necessary to treat his COPD when his symptoms are exacerbated, are unjustifiable in a democratic society that should protect the dignity of all persons. The treatment is also grossly disproportionate to the nature and circumstances of the

Applicant's offences, which the Correctional Service Canada ("CSC") and the Board have recognized have not caused serious harm.

The fact that the Applicant has put in a request for medical assistance in dying, for which an application is to be reviewed expeditiously in line with CSC's Guidelines 800-9, is an indication that his punishment has become abhorrent and intolerable.

The Applicant also argued that the Board's refusal to review his s. 121(1) application constitutes discrimination against the Applicant's age and physical disability, contrary to s. 15 of the *Charter*. The Applicant's COPD is progressive and therefore worsens as time goes on. While the Board's refusal to process s. 121(1) applications for individuals past their eligibility dates applies equally to all individuals in CSC custody, this policy creates adverse effects for older individuals and those with progressive diseases.

On May 17, 2023, the Appeals Division provided their decision stating that they were unable to accept the Applicant's appeal as they concurred with the Board's interpretation of s. 121(1). The Appeals Division erred on the substantive issues on appeal as they did not address any of the Applicant's arguments regarding errors of law, jurisdiction, or failing to observe principles of fundamental justice yet made a determinative finding with respect to the interpretation of s. 121(1). Further, the Appeals Division committed an error of law and jurisdiction by failing to accept the Applicant's appeal, as the issues raised on the appeal are within the jurisdiction of the Appeals Division per s. 147(1) of the *CCRA* and the Appeals Division did not provide any ground for refusing to accept the appeal under s. 147(2) of the *CCRA*.

Additionally, in the May 17, 2023 decision, the Appeals Division addressed the Applicant's other application for parole under ss. 122(4) and 123(6). The Appeals Division wrote that paragraph 24(b) of Policy 4.1 of the Board Manual states that the Board may accept an application and conduct a review for parole earlier than the timeframes set out in subsections 122(4), 123(6), and 138(5) of the *CCRA*, when there is a positive referral from CSC. In doing

so, the Appeals Division erred in law and jurisdiction by failing to accept the Applicant's appeal on this basis, as the Board's exercise of discretion under those subsections is subject to appeal. Further, in upholding the requirement under paragraph 24(b) of Policy 4.1, the Appeals Division committed an error as the effect of this policy is an unlawful fettering of the Board's discretion to hear applications outside the regular timeframes set out in the *CCRA*.

Given the Applicant's underlying health conditions and low risk of reoffending, the clear and plain reading of the statute, and the Applicant's constitutional rights to life, security of the person, and to be free from cruel and unusual treatment or punishment and discrimination, there is only one reasonable option available to the Board that complies with the *Charter*: the Applicant's immediate review for parole by exception under s. 121(1).

The Applicant makes application for:

I. An order quashing the Appeals Division's decision dated May 17, 2023 refusing to process the Applicant's parole by exception application;
2. An order directing the Parole Board of Canada to process the Applicant's parole by exception application and conduct a review to determine his eligibility for parole under ss. 102 and 121(1) of the CCRA within the next 30 days;
3. A declaration that prisoners are eligible to apply for parole by exception after their day and/or full parole eligibility dates;
4. Interim or interlocutory relief as may be requested by the Applicant; and
5. Such further and other relief as counsel may request and this Honourable Court may permit.

The grounds for the application are:

1. The Applicant is terminally ill and is diagnosed with a progressive and incurable medical disease that causes him severe pain and suffering, which is exacerbated by his continued confinement in a penitentiary.

2. The Applicant has been incarcerated since 1982 for robbery, narcotics and other theft-related offences. The purpose of the federal correctional system as stated in s. 3 of the *CCRA* 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. The Applicant reasonably fears that he may die a painful death in prison in the imminent future.
4. The Applicant would not present an undue risk to society were he to be released on parole.
5. The matter is urgent given the Applicant's severe health conditions, which have worsened since his last parole hearing.
6. The Applicant is not eligible to apply for parole again until July 8, 2023, or until such a time that the Parole Board of Canada uses its discretion to accept his application, which it has indicated it will not do without the support of the Applicant's case management team (per the Board Manual, s. 4.1). After applying, the Parole Board of Canada has a further six months to schedule a hearing (per ss. 157(2) and 158(2) of the *CCRR*).
7. Paragraph 24(b) of Policy 4.1 of the Board Manual is an unlawful fettering of the PBC's discretion to hear an application earlier than the timeframes set out in ss. 122(4), 123(6) and 138(5) of the *CCRA* (*Latimer v. Canada*, 2010 FC 806 at paras. 50-55 [*Latimer*]). Nowhere in those subsections of the *CCRA* is it indicated that a positive referral from CSC is a condition precedent to the Board's exercise of discretion to hear a parole application outside the regular timeframes. The Board is to make the least restrictive determinations consistent with the protection of society (*Latimer* at para. 55).
8. As set out in section 121(1) of the *CCRA*, parole may be granted <u>at any time</u> to an offender:

a. who is terminally ill;
b. whose physical or mental health is likely to suffer serious damage if the offender continues to be held in confinement;
c. for whom continued confinement would constitute an excessive hardship that was not reasonably foreseeable at the time the offender was sentenced; or
d. who is the subject of an order of surrender under the *Extradition Act* and who is to be detained until surrendered. [Emphasis added].

9. In contrast to this, section 4.1.1 of the Board Manual states:

"Section 121 of the Corrections and Conditional Release Act (CCRA) is an exceptional provision that allows an offender <u>who has not yet reached their day and/or full parole eligibility dates</u> to be considered for parole. Pursuant to section 121 of the CCRA, parole by exception may be granted to an offender:

a) who is terminally ill;
b) whose physical or mental health is likely to suffer serious damage if the offender continues to be held in confinement;
c) for whom continued confinement would constitute an excessive hardship that was not reasonably foreseeable at the time the offender was sentenced; or
d) who is the subject of an order of surrender under the Extradition Act and who is to be detained until surrendered." [Emphasis added].

10. Parole by exception is a mechanism that is meant to allow for an expeditious and early review of parole applications. Given the Applicant's medical conditions, it is crucial that he have access to parole by exception to receive an expeditious review and avoid additional risk to his physical and mental health.

11. The Board has no jurisdiction to refuse to hear a parole by exception application, other than for prisoners serving life sentences imposed as minimum punishment or indeterminate sentences (per the specific exception as set out in s. 121(2) of the *CCRA*).

12. The Board's attempt to restrict s. 121(1) to only those who have not yet reached their parole eligibility dates is at odds with the scheme and object of the *CCRA* and the

obvious intention of Parliament. Section 121(1) is aimed at providing timely and effective relief for individuals experiencing severe suffering and is clearly rooted in humanitarian and compassionate grounds. There is no reason why terminally ill individuals prior to their eligibility dates should have more timely access to parole than terminally ill individuals who are past their eligibility dates.

13. The "at any time" function of s. 121(1) is subject only to section 102, meaning that the provision can be applied to anyone, at any time, so long as that person does not constitute an undue risk to society. The Board's policies with respect s. 121(1) are out of line with the objective of the provision.
14. The Board's refusal to consider the Applicant's application results in effects on the life and liberty of the Applicant, and any individual past their parole eligibility dates, that are so grossly disproportionate to the purposes behind the provision that they cannot be rationally supported.
15. The refusal to review the Applicant's application results in a deprivation to his life and liberty. The violation of the Applicant's section 7 *Charter* rights does not accord with the principles of fundamental justice as the severe consequences of his continued confinement in prison are arbitrary, grossly disproportionate, and overly broad relative to the principles, objectives and goals of the correctional system and Parole Board of Canada (and to the nature and severity of the Applicant's offences).
16. Refusing to process and review the Applicant's parole by exception application violates the Applicant's rights under section 12 of the *Charter* to be free from cruel and unusual treatment or punishment and his right to equal protection and equal benefit of the law without discrimination based on age and disability.
17. The violations of the Applicant's *Charter* rights are not reasonably justifiable in a free and democratic society.
18. The refusal to even review whether the Applicant meets the criteria under s. 121(1) on the basis that he is past his eligibility dates results in significant and unnecessary delay to the Applicant's ability to apply for parole because, though he is "past" his eligibility

dates, he is not actually eligible to apply for parole until July 8, 2023 unless the Board employs their discretion to allow him to apply earlier (which they have indicated they will not unless his case management team supports him, per the Board's policy). After applying, he would then be subject to the timeframes set out in ss. 157(2) and 158(2) of the *CCRR*, which could take up to 6 months.

19. The Board's interpretation of s. 121(1) is at odds with the prevailing interpretation by the judiciary across many provinces: see *R. v. Saheli,* 2022 BCCA 1, para. 67; *R. v. Milani,* 2021 ONCA 567, para. 55; *R. v. Ziegler,* 2017 ABQB 515, para. 98; *R. v. Stauffer,* 2007 BCCA 7, para. 54; and *R. v. Ferguson,* 2006 ABCA, para. 79.
20. Administrative inconvenience cannot outweigh the Applicant's *Charter* rights.
21. The refusal to review the Applicant's application would result in absurdity (see *Dixon v. Canada,* 2008 FC 889 at paras. 37-39) and is not in line with the principles of statutory interpretation as set out in *Rizzo & Rizzo Shoes Ltd. (Re),* 1998 CanLII 837 (SCC).
22. The purposes of s. 121(1)(a), (b) and (c) are clearly grounded in compassionate and humanitarian concerns. The Board's interpretation of s. 121(1) does not accord with the purposes underlying the statute.
23. The Parole Board of Canada's decision-making policy manual is a non-statutory instrument and may not contradict statute (*Latimer* at paras. 52-54). Policies inconsistent with the statute or those that help to restrict the application of s. 121(1) are invalid.
24. The issues on appeal were within the jurisdiction of the Appeals Division and a full review should have been conducted to determine the Applicant's eligibility under s. 121(1) and an early discretionary review under ss. 122(4) and 123(5). Regardless, the Appeals Division erred in law by agreeing with the Board regarding the Applicant's eligibility, despite "refusing" to hear the appeal.
25. The appeal decision was a decision by the Vice-Chairperson under s. 147(2) of the *CCRA*. However, the appeal decision did not provide the grounds under which the Vice-Chairperson was refusing to hear the appeal. The appeal should have been

decided pursuant to s. 147(4) of the *CCRA*.

26. *Corrections and Conditional Release Act*, SC 1992, c 20, sections 100, 101, 102, 107, 121(1), 122(4), 123(5), 138, 147;
27. *Corrections and Conditional Release Regulations*, SOR/92-620, sections 157(2), 158(2);
28. *Canadian Charter of Rights and Freedoms,* ss. 7, 12, 15, and 24(1); and
29. *Federal Courts Act*, RSC 1985, c. F-7, sections 18(1) and 18.1.

The application will be supported by the following material:

1. The Affidavit of Edward Speidel dated June 13, 2023;
2. Such other affidavits and material as the Applicant may advise.

Dated: June 14, 2023

Lisa Crossley

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