Federal Court  Cour fédérale

Date: 20110310

Docket: T-855-10

Citation: 2011 FC 285

Ottawa, Ontario, March 10, 2011

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

WARREN MCDOUGALL

Applicant

and

ATTORNEY GENERAL

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] Protection of society is the paramount consideration in decision-making in the context of conditional releases in the federal correctional system (*Corrections and Conditional Release Act*, RSC 1992, c 20 [CCRA] at para 4(*a*)). The federal system aims to contribute to the maintenance of a just, peaceful and safe society (s 3 of the CCRA).

[2] In order to fulfill their legislative mandates, the National Parole Board [NPB] and Correctional Service of Canada [CSC] may require an offender to undertake one or more risk assessments. This Court has distinguished risk assessments from medical health care or treatment as follows:

> [10] There is an important distinction that needs to be drawn between medical and psychological assessments that are done for the benefit of the offender or to establish a diagnosis (mental health procedures), and risk assessments that are done for the protection of the public.
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> …
>
> [15] In summary, risk assessments by CSC are not health care, treatment, or psychological assessments conducted in order to establish a diagnosis or to ascertain whether an offender requires health care or treatment. Risk assessments are a means to determine an offender's likelihood of recidivism and potential danger to the offender, other inmates, staff members and the public. It would be impossible to fulfill this mandate if an offender's consent were required prior to his or her risk being assessed as the consent could often be withheld.

(*William Head Institution v Canada (Attorney General),* 2003 FC 870, 237 FTR 127).

II. Introduction

[3] This case focuses on an inmate who applied for Escorted Temporary Absences [ETAs] and day parole. An ETA is a "temporary absence under escort from a penitentiary" (Temporary Absences and Work Releases, Commissioner's Directive 710-3 [CD 710-3] at para 7) and day parole is "[a] form of conditional release, granted to an offender by the NPB or a provincial parole board, which requires the offender to return to a penitentiary, a Community-Based Residential Facility (CBRF), which includes an authorized private home placement, or a provincial correctional facility each night, unless otherwise authorized in writing" (Pre-Release Decision-Making, Commissioner's Directive 712-1 [CD 712-1] at para 5).

III. Judicial Procedure

[4] This is an application for judicial review challenging decisions of the Acting Warden of the Ferndale Institution and of the NPB, both dated April 29, 2010, seeking declaratory relief to the effect that the law confers upon a Warden or NPB to require inmates serving life sentences to submit to mental health assessments as a condition prior to being considered for conditional release.

IV. Background

[5] The Applicant, Mr. Warren McDougall, is 42 years old and is currently an inmate at the Ferndale Institution, a minimum-security federal penitentiary in Mission, British Columbia.

[6] Mr. McDougall is serving a life sentence for second degree murder committed in May 1996. He has been incarcerated since May 31, 1996, with 14.5 years to serve prior to being eligible for full parole, on April 4, 2013. Since 1982, Mr. McDougall has also been convicted of numerous other offences; namely, breaking and entering, theft, robbery with violence, forcible confinement, possession of stolen property, possession of cannabis, kidnapping, unlawful confinement, escaping lawful custody, possession of property obtained by crime over $12,000, dangerous operation of a motor vehicle, indignity to a dead body, and impersonation with intent.

ETA

[7] On March 8, 2010, Mr. McDougall applied for various ETAs for administrative, parental responsibility, personal development and community service purposes. On March 17, 2010, he applied for additional ETAs for personal development purposes.

[8] Mr. McDougall became eligible for day parole on April 4, 2010; consequently, as of that day, he became eligible for ETAs under the Warden of the Institution's full authority without required approval from the NPB.

[9] On April 29, 2010, Acting Warden Mary Danel, of the Ferndale Institution, dismissed Mr. McDougall's ETA applications. She concluded that no ETAs should be approved until updated psychiatric and psychological risk assessment reports for Mr. McDougall had been received and reviewed by CSC.

[10] On May 11, 2010, Mr. McDougall wrote to Warden Bill Thompson, of the Ferndale Institution, asking him to reconsider the Acting Warden's decision. Warden Thompson replied, on May 18, 2010, confirming the Acting Warden's decision which was consistent with the Commissioner's Directive. On May 19, 2010, a Warden Board meeting was held, during which Mr. McDougall's situation was reviewed. Warden Thompson confirmed, on May 27, 2010, that he was unable to grant the ETA requested, thereby, confirming the Acting Warden's decision (Applicant's Record [AR], Book 1 at 232 and 237).

Day Parole

[11] Mr. McDougall became eligible for day parole on April 4, 2010 and had previously applied for conditional release on day parole on December 14, 2009. On April 22, 2010, Mr. McDougall's institutional parole officer completed an Assessment for Decision, explaining the reason why the case management team recommended against day parole.

[12] Mr. McDougall's day parole review hearing was initially scheduled for May 2010; however, on April 29, 2010, a two-member panel adjourned that hearing for two months in order to obtain psychiatric and psychological mental health assessments of the Applicant.

[13] On May 31, 2010, Mr. McDougall filed a Notice of Application for judicial review for both the Acting Warden's and the NPB decisions refusing the ETAs and the day parole requested.

[14] On June 17 2010, Dr. Saeed Ghaffari completed a psychological risk assessment report regarding Mr. McDougall (Respondent's Record [RR], Vol 2 at 322-327).

[15] On June 21, 2010, Dr. Rakesh Lamba completed a psychiatric risk assessment report regarding Mr. McDougall (RR, Vol 2 at 289-311).

[16] On June 24, 2010, Mr. McDougall filed a motion seeking an interlocutory injunction requiring the reconsideration of the Acting Warden's decision and to force the NPB to schedule the day parole hearing for July 2010.

[17] By June 30, 2010, the NPB was in possession of the current psychiatric risk assessment but had not received the psychological assessment; therefore, the NPB imposed a second adjournment. The psychiatric risk assessment was received by the NPB on July 2, 2010. The NPB was planning to schedule Mr. McDougall's hearing for July 2010; however, on July 8, 2010, Mr. McDougall requested additional time to respond to the mental health assessments. The day parole hearing was postponed until August 12, 2010.

[18] On August 12, 2010, the NPB dismissed Mr. McDougall's application for day parole. The decision was mainly based on the June 2010 psychological and psychiatric reports.

[19] Following the NPB decision, Mr. McDougall's motion to have the Acting Warden's decision reconsidered and to force the NPB to schedule his day parole review in July 2010 had been dismissed as moot by Justice Sean Harrington of the Federal Court, on September 1, 2010.

V. Decision under Review

[20] Mr McDougall's declaratory demands relate to both the Acting Warden's and the NPB decisions. First, on April 29, 2010, the Acting Warden of the Ferndale Institution refused Mr. McDougall's applications for ETAs on the basis that, without updated psychiatric and psychological risk assessments, she was not satisfied that the proposed absences from detention would not pose an undue risk to society.

[21] On the same day as the Acting Warden's decision, the NPB administratively adjourned Mr. McDougall's day parole review hearing for two months, pending the NPB receiving updated psychiatric and psychological risk assessments.

VI. Position of the Parties

[22] The Applicant seeks declaratory relief, stating:

a. that ETAs are not a form of conditional release;

b. that the law authorizes only one adjournment not exceeding two months on any parole review where NPB needs more information or more time to render its decision; and

c. that the law confers no power on CSC or the NPB to require that life-sentenced inmates submit to mental health assessments as a condition precedent to consideration for conditional release.

[23] The Applicant submits that while two separate administrative tribunals, in the context of two distinct decisions, concluded that psychological and psychiatric assessments were required before rendering a final decision, the administrative tribunals had rendered their decisions at the same time and for the same 'tactical reason': to coerce the Applicant to submit to psychiatric and psychological exams. Mr. McDougall contends that he had participated in the mental health assessments only under the coercive pressure of denied liberty. He submits that the law confers no jurisdiction upon the Warden or the NPB to require risk assessments as a condition to being considered for ETA or day parole. The Applicant specified that he had not exhausted all of his available internal remedies, having no faith in their efficiency or fairness.

[24] The Respondent argues that this judicial review application is procedurally misconceived for numerous reasons. Firstly, the application is moot, since the Applicant had already undergone the required psychiatric and psychological assessments in June 2010. Secondly, the application purports to challenge two different decisions, made by two different administrative tribunals, which cannot be challenged together. Thirdly, the Applicant had not exhausted all his internal remedies prior to this judicial review.

[25] As to the substantive merit, the Respondent argues that the application is without merit and should be dismissed. Both the Acting Warden and the NPB had the jurisdiction to require psychiatric and psychological risk assessments; also, both the Acting Warden and the NPB rendered reasonable decisions within the limits of their respective jurisdictions.

VII. Issues

[26] (1) Should this application be dismissed on a preliminary basis because it is procedurally misconceived?

(2) Was the Acting Warden's decision a reasonable exercise of her statutory discretion under the CCRA?

(3) Was the NPB adjournment a reasonable exercise of the NPB's authority to adjourn a hearing to review day parole?

VIII. Pertinent Legislative Provisions

[27] Section 17 of the CCRA enables the conditional release of an inmate from a federal penitentiary institution by way of an ETA:

Temporary absences may be authorized	**Permission de sortir avec escorte**
17. (1) Where, in the opinion of the institutional head,	**17.** (1) Sous réserve de l'article 746.1 du *Code criminel*, du paragraphe 140.3(2) de la *Loi sur la défense nationale* et du paragraphe 15(2) de la *Loi sur les crimes contre l'humanité et les crimes de guerre*, le directeur du pénitencier peut autoriser un délinquant à sortir si celui-ci est escorté d'une

personne — agent ou autre — habilitée à cet effet par lui lorsque, à son avis :

(*a*) an inmate will not, by reoffending, present an undue risk to society during an absence authorized under this section,

a) une récidive du délinquant pendant la sortie ne présentera pas un risque inacceptable pour la société;

(*b*) it is desirable for the inmate to be absent from penitentiary, escorted by a staff member or other person authorized by the institutional head, for medical, administrative, community service, family contact, personal development for rehabilitative purposes, or compassionate reasons, including parental responsibilities,

b) il l'estime souhaitable pour des raisons médicales, administratives, de compassion ou en vue d'un service à la collectivité, ou du perfectionnement personnel lié à la réadaptation du délinquant, ou pour lui permettre d'établir ou d'entretenir des rapports familiaux notamment en ce qui touche ses responsabilités parentales;

(*c*) the inmate's behaviour while under sentence does not preclude authorizing the absence, and

c) la conduite du détenu pendant la détention ne justifie pas un refus;

(*d*) a structured plan for the absence has been prepared, the absence may, subject to section 746.1 of the *Criminal Code*, subsection 140.3(2) of the *National Defence Act* and subsection 15(2) of the *Crimes Against Humanity and War Crimes Act*, be authorized by the institutional head

d) un projet structuré de sortie a été établi.

La permission est accordée soit pour une période maximale de cinq jours ou, avec l'autorisation du commissaire, de quinze jours, soit pour une période indéterminée s'il s'agit de raisons médicales.

(*e*) for an unlimited period for medical reasons, or

(*f*) for reasons other than

medical,

(i) for a period not exceeding five days, or
(ii) with the Commissioner's approval, for a period exceeding five days but not exceeding fifteen days.

Conditions

(2) The institutional head may impose, in relation to a temporary absence, any conditions that the institutional head considers reasonable and necessary in order to protect society.

Conditions

(2) Le directeur peut assortir la permission des conditions qu'il juge raisonnables et nécessaires en ce qui touche la protection de la société.

Cancellation

(3) The institutional head may cancel a temporary absence either before or after its commencement.

Annulation de la permission

(3) Il peut annuler la permission même avant la sortie.

Reasons to be given

(4) The institutional head shall give the inmate written reasons for the authorizing, refusal or cancellation of a temporary absence.

Motifs

(4) Le cas échéant, le directeur communique, par écrit, au détenu les motifs de l'autorisation, du refus ou de l'annulation de la permission.

Travel time

(5) In addition to the period authorized for the purposes of a temporary absence, an inmate may be granted the time necessary to travel to and from the place where the absence is

Temps nécessaire aux déplacements

(5) La durée de validité de la permission ne comprend pas le temps que peut accorder le directeur pour les déplacements entre le lieu de détention et la destination du

authorized to be spent.

détenu.

Delegation to provincial hospital

(6) Where, pursuant to an agreement under paragraph 16(1)(*a*), an inmate has been admitted to a hospital operated by a provincial government in which the liberty of patients is normally subject to restrictions, the institutional head may confer on the person in charge of the hospital, for such period and subject to such conditions as the institutional head specifies, any of the institutional head's powers under this section in relation to that inmate.

Délégation au responsable d'un hôpital

(6) Le directeur peut, aux conditions et pour la durée qu'il estime indiquées, déléguer au responsable d'un hôpital sous administration provinciale où la liberté des personnes est normalement soumise à des restrictions l'un ou l'autre des pouvoirs que lui confère le présent article à l'égard des détenus admis dans l'hôpital aux termes d'un accord conclu conformément au paragraphe 16(1).

[28] Sections 101 and 102 address the NPB's guiding principles as well as the criteria which must be followed by the NPB in granting parole:

Principles guiding parole boards

Principes

101. The principles that shall guide the Board and the provincial parole boards in achieving the purpose of conditional release are

101. La Commission et les commissions provinciales sont guidées dans l'exécution de leur mandat par les principes qui suivent :

(*a*) that the protection of society be the paramount consideration in the determination of any case;

a) la protection de la société est le critère déterminant dans tous les cas;

(*b*) that parole boards take into consideration all available information that is relevant to a case, including the stated reasons and recommendations of the

b) elles doivent tenir compte de toute l'information pertinente disponible, notamment les motifs et les recommandations du juge qui a infligé la peine, les

sentencing judge, any other information from the trial or the sentencing hearing, information and assessments provided by correctional authorities, and information obtained from victims and the offender;

renseignements disponibles lors du procès ou de la détermination de la peine, ceux qui ont été obtenus des victimes et des délinquants, ainsi que les renseignements et évaluations fournis par les autorités correctionnelles;

(*c*) that parole boards enhance their effectiveness and openness through the timely exchange of relevant information with other components of the criminal justice system and through communication of their policies and programs to offenders, victims and the general public;

c) elles accroissent leur efficacité et leur transparence par l'échange de renseignements utiles au moment opportun avec les autres éléments du système de justice pénale d'une part, et par la communication de leurs directives d'orientation générale et programmes tant aux délinquants et aux victimes qu'au public, d'autre part;

(*d*) that parole boards make the least restrictive determination consistent with the protection of society;

d) le règlement des cas doit, compte tenu de la protection de la société, être le moins restrictif possible;

(*e*) that parole boards adopt and be guided by appropriate policies and that their members be provided with the training necessary to implement those policies; and

e) elles s'inspirent des directives d'orientation générale qui leur sont remises et leurs membres doivent recevoir la formation nécessaire à la mise en oeuvre de ces directives;

(*f*) 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 conditional release process.

f) de manière à assurer l'équité et la clarté du processus, les autorités doivent donner aux délinquants les motifs des décisions, ainsi que tous autres renseignements pertinents, et la possibilité

de les faire réviser.

Criteria for granting parole

102. The Board or a provincial parole board may grant parole to an offender if, in its opinion,

(*a*) the offender will not, by reoffending, present an undue risk to society before the expiration according to law of the sentence the offender is serving; and

(*b*) the release of the offender will contribute to the protection of society by facilitating the reintegration of the offender into society as a law-abiding citizen.

Critères

102. La Commission et les commissions provinciales peuvent autoriser la libération conditionnelle si elles sont d'avis qu'une récidive du délinquant avant l'expiration légale de la peine qu'il purge ne présentera pas un risque inacceptable pour la société et que cette libération contribuera à la protection de celle-ci en favorisant sa réinsertion sociale en tant que citoyen respectueux des lois.

[29] Section 122 of the CCRA addresses day parole applications reviewed by the NPB:

Day parole review

122. (1) Subject to subsection 119(2), the Board shall, on application, at the time prescribed by the regulations, review, for the purpose of day parole, the case of every offender other than an offender referred to in subsection (2).

Special cases

(2) The Board may, on application, at the time prescribed by the regulations, review, for the purpose of day parole, the case of an offender who is serving a sentence of two years or more in a provincial correctional facility

Examen : semi-liberté

122. (1) Sur demande des intéressés, la Commission examine, au cours de la période prévue par règlement, les demandes de semi-liberté.

Cas spéciaux

(2) Elle peut également le faire dans les mêmes conditions, dans le cas des délinquants qui purgent une peine de deux ans ou plus dans un établissement correctionnel provincial dans une province où aucun programme de semi-

in a province in which no program of day parole has been established for that category of offender.

liberté visant cette catégorie de délinquants n’a été mis sur pied.

Decision or adjournment

(3) With respect to a review commenced under this section, the Board shall decide whether to grant day parole, or may adjourn the review for a reason authorized by the regulations and for a reasonable period not exceeding the maximum period prescribed by the regulations.

Décision

(3) Lors de l’examen, la Commission accorde ou refuse la semi-liberté, ou diffère sa décision pour l’un des motifs prévus par règlement; la durée de l’ajournement doit être la plus courte possible compte tenu du délai réglementaire.

Renewal of application

(4) Where the Board decides not to grant day parole, no further application for day parole may be made until six months after the decision or until such earlier time as the regulations prescribe or the Board determines.

Nouvelle demande

(4) En cas de refus, le délinquant doit, pour présenter une nouvelle demande, attendre l’expiration d’un délai de six mois à compter de la date du refus ou du délai inférieur que fixent les règlements ou détermine la Commission.

Maximum duration

(5) Day parole may be granted to an offender for a period not exceeding six months, and may be continued for additional periods not exceeding six months each following reviews of the case by the Board.

Durée maximale

(5) La semi-liberté est accordée pour une période maximale de six mois; elle peut être prolongée pour des périodes additionnelles d’au plus six mois chacune après réexamen du dossier.

Withdrawal of application

(6) An offender may withdraw an application for day parole at any time before the commencement of the review under this section.

Retrait de la demande

(6) Le délinquant peut retirer sa demande tant que la Commission n’a pas commencé l’examen de son dossier.

[30] The *Correctional and Conditional Release Regulations*, SOR/92-620 [CCRR], provide further details with regard to the adjournment of day parole reviews and the authorization of ETAs by the releasing authority:

Unescorted Temporary Absences	**Permissions de sortir sans surveillance**
155. For the purposes of sections 116 and 117 of the Act, the releasing authority may authorize an unescorted temporary absence of an offender	**155.** Pour l'application des articles 116 et 117 de la Loi, l'autorité compétente peut accorder au délinquant une permission de sortir sans surveillance dans l'un des cas suivants :
(*a*) for medical reasons to allow the offender to undergo medical examination or treatment that cannot reasonably be provided in the penitentiary;	*a*) pour des raisons médicales, afin de lui permettre de subir un examen ou un traitement médical qui ne peut raisonnablement être effectué au pénitencier;
(*b*) for administrative reasons to allow the offender to attend to essential personal affairs or legal matters or to matters related to the administration of the sentence that the offender is serving;	*b*) pour des raisons administratives, afin de lui permettre de vaquer à des affaires personnelles importantes ou juridiques, ou à des affaires concernant l'exécution de sa peine;
(*c*) for community service purposes to allow the offender to undertake voluntary activity with a non-profit community institution, organization or agency, or for the benefit of the community as a whole;	*c*) à des fins de service à la collectivité, afin de lui permettre de faire du travail bénévole pour un établissement, un organisme ou une organisation à but non lucratif ou au profit de la collectivité toute entière;
(*d*) for family contact purposes to assist the offender in maintaining and	*d*) à des fins de rapports familiaux, afin de lui permettre d'établir et

strengthening family ties as a support to the offender while in custody and as a potential community resource on the offender's release;

d'entretenir des liens avec sa famille pour qu'elle l'encourage durant sa détention et, le cas échéant, le soutienne à sa mise en liberté;

(*e*) for parental responsibility reasons to allow the offender to attend to matters related to the maintenance of a parent-child relationship, including care, nurture, schooling and medical treatment, where such a relationship exists between the offender and the child;

e) à des fins de responsabilités parentales, afin de lui permettre de s'occuper de questions concernant le maintien de la relation parent-enfant, y compris les soins, l'éducation, l'instruction et les soins de santé, lorsqu'il existe une telle relation entre le délinquant et l'enfant;

(*f*) for personal development for rehabilitative purposes to allow the offender to participate in specific treatment activities with the goal of reducing the risk of the offender re-offending, and to allow the offender to participate in activities of a rehabilitative nature, including cultural and spiritual ceremonies unique to Aboriginal peoples, with the goal of assisting the reintegration of the offender into the community as a law-abiding citizen; and

f) pour du perfectionnement personnel lié à sa réadaptation, afin de lui permettre de participer à des activités liées à un traitement particulier dans le but de réduire le risque de récidive ou afin de lui permettre de participer à des activités de réadaptation, y compris les cérémonies culturelles ou spirituelles propres aux autochtones, dans le but de favoriser sa réinsertion sociale à titre de citoyen respectueux des lois;

(*g*) for compassionate reasons to allow the offender to attend to urgent matters affecting the members of the offender's immediate family or other persons with whom the offender has a close

g) pour des raisons humanitaires, afin de lui permettre de s'occuper d'affaires urgentes concernant des membres de sa famille immédiate ou d'autres personnes avec lesquelles il a une relation

personal relationship.

…

Day Parole Reviews

157. (1) Where an offender applies for day parole pursuant to subsection 122(1) or (2) of the Act, the application shall be submitted to the Board not later than six months before the expiration of two thirds of the term of imprisonment to which the offender was sentenced.

(2) Subject to subsection (3), the Board shall review the case of an offender who applies, in accordance with subsection (1), for day parole within six months after receiving the application, but in no case is the Board required to review the case before the two months immediately preceding the offender's eligibility date for day parole.

(3) The Board may postpone a day parole review with the consent of the offender.

(4) The Board may adjourn a day parole review for a period of not more than two months where the Board requires

(*a*) further information relevant to the review; or

personnelle étroite.

[...]

Examens de demandes de semi-liberté

157. (1) La demande de mise en semi-liberté faite en vertu des paragraphes 122(1) ou (2) de la Loi doit être présentée à la Commission au plus tard six mois avant l'expiration des deux tiers de la peine d'emprisonnement du délinquant.

(2) Sous réserve du paragraphe (3), la Commission doit examiner le cas du délinquant qui présente une demande de mise en semi-liberté conformément au paragraphe (1) dans les six mois suivant la réception de la demande, mais elle n'est pas tenue de le faire plus de deux mois avant la date de l'admissibilité du délinquant à la semi-liberté.

(3) Avec l'accord du délinquant, la Commission peut reporter l'examen visant une mise en semi-liberté.

(4) La Commission peut ajourner, pour une période d'au plus deux mois, l'examen visant une mise en semi-liberté lorsque, selon le cas, elle a besoin :

a) de plus de renseignements pertinents;

(*b*) further time to render a decision.

b) de plus de temps pour prendre une décision.

[31] Pursuant to his jurisdiction under sections 97 and 98 of the CCRA, the Commissioner of CSC has issued Directives with respect to conditional release:

Rules

97. Subject to this Part and the regulations, the Commissioner may make rules

(*a*) for the management of the Service;

(*b*) for the matters described in section 4; and

(*c*) generally for carrying out the purposes and provisions of this Part and the regulations.

Commissioner's Directives

98. (1) The Commissioner may designate as Commissioner's Directives any or all rules made under section 97.

Accessibility

(2) The Commissioner's Directives shall be accessible to offenders, staff members and the public.

Règles d'application

97. Sous réserve de la présente partie et de ses règlements, le commissaire peut établir des règles concernant :

a) la gestion du Service;

b) les questions énumérées à l'article 4;

c) toute autre mesure d'application de cette partie et des règlements.

Directives du commissaire

Nature

98. (1) Les règles établies en application de l'article 97 peuvent faire l'objet de directives du commissaire.

Publicité

(2) Les directives doivent être accessibles et peuvent être consultées par les délinquants, les agents et le public.

[32] The CD 710-3 and CD 712-1 are particularly pertinent to this case and will be further examined in the Court's analysis below.

IX. Standard of Review

[33] In *Bonamy v Canada (Attorney General)*, 2010 FC 153, 8 Admin LR (5th) 221 [*Bonamy*], this Court referred to *Dunsmuir v New-Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*], regarding the applicable standard of review:

> [41] *Dunsmuir* … at para. 62 established a two-step process for determining the standard of review. First, the court ascertains whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, the court must proceed to an analysis of the factors making it possible to identify the proper standard of review.

[34] The parties disagree as to the standard of review. The Applicant submits that the appropriate standard of review is correctness, while the Respondent argues that the decisions should be reviewed against the deferential standard of reasonableness.

[35] The present case could raise three separate issues: the procedural conception of the case, the limits of jurisdiction conferred by the law to the Warden's Institution and to the NPB and, finally, the judicial review of the decisions themselves. In examining the Warden's statutory discretion under the CCRA and the NPB's authority to adjourn a day parole review hearing, as related to the declaratory relief asked in the Applicant's application, the Court could rely on the standard of correctness which should be applied to a question of statutory interpretation of law (*Dixon v Canada (Attorney General)*, 2008 FC 889 at para 10, 331 FTR 214).

[36] Nonetheless, the present case mainly addresses the judicial review of the decisions of the Acting Warden and of the NPB. A reasonableness standard will be applied by the Court in respect of the decisions as to the ETAs and the day parole. In examining the substantial merit of both

decisions, which constitute, in fact, the main issues to be resolved, the case of *Gagné v Canada (Correctional Service)*, 2010 FC 355, with regard to a judicial review of a decision refusing an ETA application on the basis that the Applicant might present an undue risk to society, the reasonableness standard is applied by the Court:

> [7] Subsection 17(1) of the Act states that a warden of a penitentiary ‘‘may’’ authorize an ETA,
>
> Where, in the opinion of the institutional head,
>
> > (a) an inmate will not, by reoffending, present an undue risk to society during an absence authorized under this section,
> >
> > (b) it is desirable for the inmate to be absent from the penitentiary, escorted by a staff member or other person authorized by the institutional head, for medical, administrative, community service, family contact, personal development for rehabilitative purposes, or compassionate reasons, including parental responsibilities,
> >
> > (c) the inmate’s behaviour while under sentence does not preclude authorizing the absence, and
> > (d) a structured plan for the absence has been prepared.
>
> [8] The use of the verb ‘‘may’’ in this section indicates that Parliament intended the power to authorize an ETA to be discretionary (see section 11 of the *Interpretation Act*, R.S.C. 1985, c. I-21), even though it adopted criteria which must guide the exercise of this power.

[37] Under *Dunsmuir*, above a paragraph 47, the decisions from administrative tribunals must fall “within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” to be deemed reasonable.

[38] As for the procedural merit of the case, specifically, to determine whether the Court should hear the judicial review despite the Applicant’s failure to exhaust his remedies under the grievance process, the Court found:

> [12] There is no standard of review in respect of the first issue. The Court is required to consider relevant factors and to reach a reasonable conclusion regarding the exercise of its discretion. The Court's discretion with respect to hearing a judicial review where there is an adequate alternative remedy is subject to consideration of whether there are exceptional circumstances which might otherwise require the Court to hear a matter despite the existence of an adequate alternative remedy (see *Froom v. Canada (Minister of Justice)*, 2004 FCA 352 and *McMaster v. Canada (Attorney General)*, 2008 FC 647 at paras. 23 and 27).

(*Spidel v Canada (Attorney General)*, 2010 FC 1028).

X. Analysis

(1) Should this application be dismissed on a preliminary basis because it is procedurally misconceived?

[39] The Respondent submits several reasons as to why the judicial review should be considered as procedurally misconceived.

(a) Two Different Decisions

[40] The Respondent submits that Mr McDougall's application purports to challenge two separate decisions made under different statutory provisions, which is contrary to Rule 302 of the *Federal Courts Rules*, SOR/98-106:

302. Unless the Court orders otherwise, an application for judicial review shall be limited to a single order in respect of which relief is sought.	**302.** Sauf ordonnance contraire de la Cour, la demande de contrôle judiciaire ne peut porter que sur une seule ordonnance pour laquelle une réparation est demandée.

[41] When dealing with a two-decision judicial review, the Federal Court of Appeal rejected the argument of an applicant who had proposed that one of the decisions "did not have a life of its own" and constituted an accessory to the main decision:

> [26] The fact of the matter, however, is that conservatory measures are not necessarily pronounced in the course of every investigation. They are pronounced

> "for the protection of an estate" which presupposes that the assets are in a state of danger. This Court, in *Tremblay v. Canada (Superintendent of Bankruptcy)* (2001), 277 N.R. 376 (F.C.A.) at page 9, stated that "[a] person using or wishing to use conservatory measures must have reasonable grounds to believe the estate is threatened and it is necessary to preserve it". Conservatory measures answer to different criteria than those of the investigation itself. It is conceivable that, in some cases, conservatory measures could be set aside while the investigation itself could be held valid. A decision to issue conservatory measures is therefore distinct from a decision to investigate.

(*Pfeiffer v Canada (Superintendent of Bankruptcy)*, 2004 FCA 192, 131 ACWS (3d) 382).

[42] In addition, this Court expressly stated that only one decision per application should be challenged, even in the case where the application is in the form of a declaratory relief:

> [37] Under Rule 302 of the *Federal Court Rules*, SOR/98-106, only one decision should be challenged in an application for judicial review, even though the action at bar is in the form of declaratory relief. As the action is focused primarily on the CSC Commissioner's Directive, the Court will not rule on any other policy or rule of the Commissioner prohibiting smoking inside cells and PFV facilities and will thus confine itself to the Directive.

(*Boucher v Canada (Attorney General)*, 2007 FC 893, 325 FTR 122; in a similar but not identical case with respect to where rights begin and end: *Mercier v Canada (Correctional Service)*, 2010 FCA 167, 320 DLR (4th) 429).

[43] On the question of separate orders, the Applicant argues that both decisions were merely tactics by which the tribunals coerced him to undergo mental health assessments. The Court does not subscribe to the Applicant's presumption; moreover, the Acting Warden and the NPB made their respective decisions in two totally different and separate contexts:

> [24] While it is no doubt true that there are exceptions to the rule that an application for judicial review should be limited to a single order, I do not think that the facts underlying the present application call for such an exception. I fail to see, in particular, how the decision of the Minister to appoint the adjudicator and the decision reached by that adjudicator can be assimilated to a continuing process.

> Quite to the contrary, they appear to me to be two discrete decisions of an entirely different nature. One is administrative and discretionary, and the other is quasi-judicial and circumscribed by legal principles as applied to the evidence.

(*Bank of Montreal v Brown*, 2006 FC 503, 291 FTR 71 [*Bank of Montreal*, 2006 FC 503], aff'd 2007 FCA 23, 155 ACWS (3d) 2).

[44] The Court is in full agreement with the Respondent that it could dismiss this application on a preliminary basis. In addition, under section 301 of the *Federal Courts Act*, RSC 1985, c F-7, the Respondent asserts that the Applicant's memorandum contains a new claim regarding an additional remedy which did not appear in the Notice of Application; that is, a declaration to the effect that the NPB cannot adjourn the day parole hearing to await risk assessments. This Court must deal with a new argument:

> [26] As Justice Gibson pointed out in *Arona v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 24, at para. 9:
>
> > [T]he principle that the court will deal only with the grounds of review invoked by the applicant in the originating notice of motion and in the supporting affidavit must, I am satisfied, govern. If, as here, the applicant was able to invoke new grounds of review in his memorandum of argument, the respondent would conceivably be prejudice [sic] through failure to have an opportunity to address the new ground in her affidavit or, once again as here, to at least consider filing an affidavit to address the new issue. In the result, I determine that the second issue raised on behalf of the applicant is not properly before the Court.

(*Bank of Montreal*, 2006 FC 503 above).

[45] In the present case, the Court recognizes that the NPB's jurisdiction in respect of the adjournment is indicated within the grounds of the Notice of Application, themselves. In the case where the claim would be incomplete, the Court could have allowed the parties to make the

appropriate modifications; however, as it has been the case in *Bank of Montreal*, 2006 FC 503 above, this will not be necessary, for self-explanatory reasons explained below.

(b) The Decision is Moot

[46] According to the Respondent, this judicial review serves no practical purpose as Mr. MacDougall had already undergone psychiatric and psychological assessments; and, the specific risk assessments, themselves, had been subsequently reviewed in August 2010 by the NPB, on which basis the Applicant's day parole had been denied. On similar grounds, Justice Harrington, on September 1, 2010, dismissed the Applicant's interlocutory injunction due to mootness, in recognition of the fact that the NPB hearing had already taken place.

[47] The Applicant submits that the case is not moot, based on the fact that the Acting Warden and the NPB will require future mental health risk assessments, in the course of subsequent proceedings such as ETAs or other day parole applications. This Court has previously considered the doctrine of mootness in a similar matter, however, therein, the grievance process:

> [35] Under the doctrine of mootness, a court may decline to decide a case which raises merely hypothetical or abstract questions. Mootness applies when the decision of the court will not have the effect of resolving a controversy which affects or might affect the rights of the litigants. However, even when a case is moot, a court may still decide to render judgment in certain circumstances. The leading decision concerning mootness is *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342.

(*Bonamy* above).

[48] In *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342, 57 DLR (4th) 231, the Supreme Court of Canada established a two-step analysis with regard to the mootness of a case:

> 15 The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be pre-sent not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.
>
> 16 The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.

[49] Again, the Court is in agreement with the Respondent that it could dismiss this application on a preliminary basis; nevertheless, the matter will be further analysed, recognizing that the situation could be considered as one, at an interim stage, wherein the intervention of the Federal Court would not be warranted. The Court has decided, as is evident, to use its discretion to hear the case.

(c) Available Internal Remedies

[50] The Applicant had not exhausted all internal remedies prior to pursuing his application for judicial review to the Federal Court: “[i]t is well settled that the Court cannot hear a case so long as another appropriate remedy exists” (*Bakayoko v Bell Nexxia,* 2004 FC 1408 at para 32, 262 FTR 192).

(d) NPB Decision

[51] The Applicant did not avail himself of all available remedies, including an appeal of the NPB's decision to the NPB Appeal Division. The NPB Appeal Division has broad appellate jurisdiction, which includes consideration of procedural breaches and errors of law (ss 147(1) of the CCRA). In *Lafontaine v Canada (Attorney General)*, 2001 FCT 495 at paragraphs 11-15, 205 FTR 68, Justice Pierre Blais specifies that an appeal to the Appeal Division of the NPB is available to an applicant and that all appeals must be exhausted prior to a judicial review to the Federal Court.

[52] The Applicant purposely specified that he did not appeal the NPB decision to the NPB Appeal Division. He alleged that he avoided the internal process as it was "futile", given that many inmates had exhausted their internal remedies to no effect. Mr. McDougall is of the opinion that "[a]ll NPB members are interchangeable between divisions and have contributed to policy development, it seems unlikely the Appeal[] Division would contradict their Chairperson" (Applicant's Memorandum of Fact and Law at para 34).

[53] In the Affidavit, itself, Mr. MacDougall asserts that:

> 4. In February 2004, while imprisoned in Matsqui, a medium security penitentiary in Abbotsford, B.C., I heard about the National Parole Board (NPB) policy, which requires life-sentenced prisoners to submit to psychiatric assessment before being considered for conditional release. I heard that many men were being held without review long past their eligibility dates because NPB was routinely and repetitively adjourning the review hearings of life-sentenced cases that did not have psychiatric assessments available.
>
> ...
>
> 50. I considered submitting an appeal to NPB Appeal Division but decided against it for many reasons. First, as I understand it, when I file an appeal the Appeals Division requisitions my entire file for the purpose of review. Such reviews take, in my experience, about five months. Since the adjournment is only two months,

> a favourable decision after five months is no adequate remedy. Conversely, should the assessment reports be available and the NPB be prepared to review my case in July, they would be unable to do so as long as Appeals Division is reviewing my files. Then what, another adjournment, to wait for Appeals Division to return my files? Besides, NPB has had ample opportunity to review these issues and still I feel compelled to launch these proceedings.

(AR, Affidavit of Warren McDougall, dated June 21, 2010).

[54] The Court does not subscribe to the Applicant's arguments on the alleged inadequacies of the internal administrative tribunal process. The Applicant should have availed himself of all internal remedies prior to this application for judicial review to the Federal Court.

(e) Acting Warden's Decision

[55] As for the Acting Warden's decision, it was open to the Applicant to file a grievance pursuant to section 90 of the CCRA. Again, the Applicant alleged that he offered his assistance to other inmates to file grievances within the ETA application procedure; moreover, he had written to Warden Thompson, for a review of the Acting Warden's decision. Warden Thompson confirmed the decision on May 27, 2010.

[56] On many occasions, this Court stated that the CCRA grievance process constitutes an adequate remedy which should be pursued by the Applicant prior to a judicial review:

> [32] It has been well established by this Court and by the Federal Court of Appeal that through the CCRA and the CCRR, Parliament and the Governor-in-Council have established a comprehensive scheme to deal with grievance by inmates lodged in federal prisons and such grievance system constitutes an adequate alternative remedy to judicial review which would generally lead the Federal Court to decline its judicial review jurisdiction until inmates have exhausted those procedures (see *Condo v. Canada (Attorney General)*, [2003] F.C.J. No. 310; *Giesbrecht v. Canada*, [1998] F.C.J. No. 621 (Giesbrecht); *Marek v. Canada (Attorney General)*, 2003 FCT 224; *Collin v. Canada (Attorney General*), [2006] F.C.J. No. 729; *McMaster v.*

Canada (Attorney General), 2008 FC 647 (McMaster)). The alternative remedy need not be perfect; it must be adequate (see *Froom v. Canada (Minister of Justice),* 2004 FCA 352).

[33] Mr. Ewert argues *May v. Ferndale* has overtaken this jurisprudence. I do not agree and neither do my colleagues. In particular, I cite the analysis of my colleague Justice Dawson in McMaster, above at paragraphs 29 and 32:

> **29** In my view, counsel's reliance upon the May decision is misplaced. There, the issue was the availability of the remedy of habeas corpus from provincial superior courts when there was an existing right to seek judicial review in the Federal Court. The majority of the Supreme Court found that inmates may choose to challenge the legality of a decision affecting their residual liberty either in a provincial superior court by way of habeas corpus or in the Federal Court by way of judicial review. In so finding, the Supreme Court relied, at least in part, on the fact that historically, the writ of habeas corpus has never been a discretionary remedy. Unlike other prerogative relief, and declaratory relief, the writ of habeas corpus issues as of right. The May decision does not, in my view, alter the obligation of an inmate to pursue the internal grievance procedure before seeking discretionary declaratory relief on judicial review.
>
> […]
>
> **32** Subsection 81(1) operates to stay the grievance procedure while an inmate pursues an alternate remedy. That regulatory stay cannot operate to take away or limit the Court's discretion on judicial review. Similarly, the Supreme Court did nothing more than recognize that the existence of the grievance procedure did not preclude an inmate from pursuing a legal remedy. The Court did not alter existing jurisprudence concerning how a reviewing court would treat an application for judicial review where existing grievance procedures were not followed.

[34] That is not to say, that in certain circumstances, a judge of this Court may be persuaded not to decline judicial review jurisdiction: urgency and evident inadequacy in the grievance procedure. [Emphasis added]

(*Ewert v Canada (Attorney General)*, 2009 FC 971, 355 FTR 170).

[57] The Applicant argues that internal remedies are inadequate, that members are, at best, negligent and, at worst, acting in bad faith. In addition, the Applicant submits that the Court may

exercise its discretion to review matters raised for judicial review without first requiring applicants to exhaust all internal remedies due to urgency. In *Spidel* above, the facts relate to the Applicant's case and arguments and his name is prominently specified:

> [18] There is no evidence that the conclusion of the Applicant's grievance process is a foregone conclusion nor is there any reason to believe that the grievance will not be fairly considered. In any event those claims are not "exceptional circumstances" which require Court intervention at this point in the grievance process.
>
> [19] Concerning the Applicant's claims of systemic delays, it is noteworthy that there is no indication that this particular grievance has been unduly delayed. Any delay has been caused by the Applicant's choice of seeking judicial review which operates as a stay of the grievance process. It is therefore impossible at this stage to claim a systemic delay when no delay exists.
>
> [20] With respect to the Applicant's arguments that his grievance has been frustrated, that it has not been forwarded properly up the chain of command and that somehow his case is related to another prisoner, a Mr. McDougal, it is less than clear how these arguments are relevant. If there is improper handling of the grievance, that may be rectified within the process or upon later review. [emphasis added].

[58] On the matter of inadequacy of internal remedies and that of urgency, the Court disagrees with the Applicant. Consequently, all internal remedies should have been exhausted by the Applicant prior to judicial review. Nevertheless, the Court continues its consideration to demonstrate to Mr. McDougall that, even if the Court were to consider the issues which he brought to the Federal Court, he would be no further ahead, other than to, hopefully, understand the predicament in which he finds himself and upon which he could extricate himself by pursuing the internal remedies available to him.

(2) Was the Acting Warden's decision a reasonable exercise of her statutory discretion under the CCRA?

[59] The Court fully accepts the Respondent's position under which the Acting Warden could not have authorized Mr. McDougall's absence from the Ferndale Institution without having satisfied conditions which would allow for such with an undue risk to society:

Temporary absences may be authorized	**Permission de sortir avec escorte**
17. (1) Where, in the opinion of the institutional head,	**17.** (1) Sous réserve de l'article 746.1 du Code criminel, du paragraphe 140.3(2) de la Loi sur la défense nationale et du paragraphe 15(2) de la Loi sur les crimes contre l'humanité et les crimes de guerre, le directeur du pénitencier peut autoriser un délinquant à sortir si celui-ci est escorté d'une personne — agent ou autre — habilitée à cet effet par lui lorsque, à son avis :
(*a*) an inmate will not, by reoffending, present an undue risk to society during an absence authorized under this section,	*a*) une récidive du délinquant pendant la sortie ne présentera pas un risque inacceptable pour la société;
…	[...]

[60] In addition, the relevance and importance of up-to-date psychological and psychiatric risk assessments are reinforced by the Commissioner's Directives which assist in providing more ample information as to the purpose for psychiatric and psychological risk assessments; therefore, in a May 18, 2010 letter (RR at 35), addressed to Mr. McDougall from Warden Thomson, paragraphs 62 and 66 from CD-712-1 were included. In respect of psychological and psychiatric assessments, the Directives note the following:

> Commissioner's Directive 712-1 paragraph 66 notes that "When an offender who is serving a life (minimum or maximum) or indeterminate sentence first applies for any type of conditional release other than a medical or compassionate escorted temporary absence, a new psychiatric assessment is required.
>
> Commissioner's Directive 712-1 paragraph 62 notes that "A pre-release psychological assessment will be considered to be current for a period of two years."

[61] In a judicial review, the Court must consider only the evidence as submitted before the first instance administrative tribunal (*Bouchard c Canada (Procureur général)*, 2006 CF 775). The psychiatric assessment dated December 8, 1998 and the psychological assessment dated November 26, 2004 (RR, Vol 1 at 49 and 121), relating to Mr. McDougall's situation, were the most recent reports, at that specific time, available to the Acting Warden in the preparation of her decision. [The whole case hinges on the fact that Mr. McDougall (at the time), did not want assessments by psychologists or psychiatrists as he felt it was an intrusion on his person. The reason for the continuation of the case is due to a matter of principle to which Mr. McDougall holds. That principle is that inmates, according to his reasoning, should not be obliged to be assessed by psychologists and psychiatrists in respect of requested absences from detention.]

[62] With regard to the fundamental objectives of the CCRA and the guiding principles enunciated in the Commissioner's Directives, it was reasonable for the Acting Warden to refuse to consider Mr. McDougall's case on the sole basis of the 1998 and 2004 reports, which were out-of-date, and, thus, inadequate to assess current risk; furthermore, Mr. McDougall, himself, described his previous psychiatric and psychological reports as "out of date" (AR, Letter dated May 3, 2010, Book I at 197).

[63] In both psychiatric and psychological assessments, the health professionals had concerns in respect of the risk posed by Mr. McDougall. The December 1998 psychiatric report, completed by Dr. Ian M. Postnikoff, diagnosed Mr. McDougall with a number of personality disorders. It described him as a pathological liar and stated that Mr. McDougall's only regret in regard to the victim's death is that he now has to spend time in jail. The November 2004 psychological report, completed by Dr. Arthur Lindblad, described Mr. McDougall as having made improvements but remaining "relatively devoid of demonstrable emotion" (RR, Vol 1 at 135).

[64] The Acting Warden decision relied on a comprehensive and detailed 16 page-long Assessment for Decision report written and submitted by a case management team on April 28, 2010. The assessment report examined Mr. McDougall's case in detail, examining the status of the case, the composition of the case management team, an assessment of progress and behaviour, a structured plan for the proposed temporary absences, and a risk analysis (RR, Assessment for Decision, Vol 1 at 4-19).

[65] Mr. McDougall also argues that both respective decisions, that of the Acting Warden and also that of the NPB, had attempted to compel him to submit to mental health treatment rather than his viewing them as assessments. In *Benoit v Canada (Attorney General)*, 2007 FC 150, 63 Admin LR (4th) 92, the Court differentiates a risk assessment from a medical treatment, which, as yet, has not been recognized by Mr. McDougall:

> [17] I agree with counsel for the Respondent the distinction drawn by the Assistant Commissioner is recognized by this Court. I cite, in particular, Inmate Welfare Committee William Head Institution v. Canada (A.G.), 2003 FC 870, where Justice Tremblay-Lamer set out the arguments at paragraph 4 and 5 of her decision and her findings at paragraphs 9 to 15 all of which I quote below:

[9] One of the ways to achieve this objective is through risk assessments. Employees of CSC must assess the risk that an offender poses while incarcerated and prior to release in order to protect the public and to achieve the statutory objectives of the Act.

[10] There is an important distinction that needs to be drawn between medical and psychological assessments that are done for the benefit of the offender or to establish a diagnosis (mental health procedures), and risk assessments that are done for the protection of the public.

[11] On the one hand, CSC has an obligation to administer health care for the benefit of inmates. This obligation is found in sections 85 to 88 of the Act. Anything that CSC does pertaining to health care, including psychological assessment, diagnosis, or treatment that is done for the benefit of an inmate requires informed consent.

[12] On the other hand, CSC has a legislative mandate to assess risk in order to protect the public. Risk assessments do not require informed consent. Such a requirement would make it impossible for CSC to fulfill its legislative mandate of protecting the public as the consent could often be withheld.

[13] There are many examples in the Act illustrating the necessity for employees of CSC to perform a risk assessment in order to make a decision that affects the safety of the public. These include decisions involving the authorization of unescorted temporary absences in the community, the granting of work release, the conditional release of offenders, and the granting of parole to offenders.

[14] Contrary to the applicant's submissions, a risk assessment is not the same thing as a PCL-R (Psychological Checklist-Revised) assessment. The PCL-R assessment was developed by Dr. Hare and is used to assess psychopathic personality disorders in offenders. This information can be used to predict recidivism which in turn, can be used to measure the degree of risk that an offender poses to society. The PCL-R rating is just one type of rating or scale which may be referred to in a risk assessment. Risk assessments can encompass many other ratings or scales, and need not contain any reference to a PCL-R rating.

[15] In summary, risk assessments by CSC are not health care, treatment, or psychological assessments conducted in order to establish a diagnosis or to ascertain whether an offender requires health care or treatment. Risk assessments are a means to determine

> an offender's likelihood of recidivism and potential danger to the offender, other inmates, staff members and the public. It would be impossible to fulfill this mandate if an offender's consent were required prior to his or her risk being assessed as the consent could often be withheld...
>
> [18] This case is clearly on point and accords with the statutory purpose of the federal correctional system which is to assist in the rehabilitation of offenders and their reintegration into the community.

(Reference is also made to *Canada (Attorney General) v Grover*, 2007 FC 28, 307 FTR 294 on similar issues, aff'd 2008 FCA 97, 165 ACWS (3d) 96).

[66] Given the fact that Mr. McDougall has a history of violent crimes and had previously been diagnosed with personality disorders, it was reasonable for the Acting Warden to determine that Mr. McDougall should be undergoing psychological and psychiatric risk assessments prior to granting ETAs and, also, therefore, to dismiss ETA applications in their absence.

(3) Was the NPB adjournment a reasonable exercise of the NPB's authority to adjourn a hearing to review day parole?

[67] When the NPB has jurisdiction to grant day parole, it is obligated to conduct a meaningful risk assessment, and to evaluate the possibility of an "undue risk to society" (s 102 of the CCRA); moreover, the NPB Policy Manual examines the purpose of the psychological and psychiatric assessments with regard to the NPB decision:

> Professional assessments by psychologists and psychiatrist can provide critical information about the mental status of an offender, and about behavioural characteristics and other risk factors which can assist the members of the National Parole Board in making conditional release decisions. Consideration of such assessments is one element of the comprehensive analysis Board members must perform in reviewing a case and making a decision about the offender's risk factors and reintegration potential. This policy will establish the type of assessments required by the Board.

(AR, Book III at 531-532).

[68] The NPB must respect its legislative, regulatory and policy obligations when exercising its jurisdiction as it relates to adjournments. The Applicant became eligible for day parole, on April 4, 2010, and had applied for conditional release on day parole, on December 14, 2009. The first NPB hearing was scheduled for May 2010. On April 29, 2010, the NPB had adjourned the hearing until July 2010 (in accordance with para 157(4)(*a*) of the CCRR). On June 30, 2010, the NPB adjourned the hearing for a second time, since Mr. McDougall's psychological report had not been received. The reports were received on July 2, 2010. At that time, the NPB had not, as yet, had the opportunity to set a date, since the Applicant himself required an adjournment of the hearing until August 2010 (in accordance with ss 157(3) of the CCRR). It was the correct course of action for the NPB to wait for the psychological report. Consideration of the report was required for a decision to be taken in respect of Mr. McDougall's request.

[69] On April 29, 2010, the NPB had received an Assessment for Decision, dated April 14, 2010 (RR, Vol 2 at 278-287), recommending denial of Mr. McDougall's day parole application. The Assessment for Decision also underlines the fact that, due to his institutional behaviour, Mr. McDougall's security classification was elevated, resulting in his transfer to a higher security level institution in 2007. As for the June 2010 psychological and psychiatric risk assessments, they were examined in August 2010, and the NPB then refused to approve day parole. In the June 21, 2010 report, Dr. Lamba assessed Mr. McDougall's risk of violence: he recommended caution in granting conditional release to Mr. McDougall:

> * At present, I would recommend a cautious approach to Mr. McDougall's release to the community. This is based on the level of risk he presents, and

> particularly considering his extremely high factor I score, which indicates the presence of core interpersonal-affective features of his personality and are likely to pose particular challenges in supervising and managing him in the community. This is likely more so, given the history of negative, confrontational, non-collaborative approach and attitudes he has taken in the institutions.

(AR, Psychiatric Risk Assessment Report at 310).

[70] In light of the information that had been duly provided to the NPB, as of April 29, 2010, it was reasonable for the NPB to adjourn the day parole hearing pending further information.

XI. Conclusion

[71] For all the above reasons, the Acting Warden was justified in dismissing the Applicant's ETA applications and to require psychiatric and psychological risk assessments. The NPB was also justified in adjourning the day parole hearing prior to receiving the risk assessments; consequently, this application for judicial review is dismissed.

JUDGMENT

THE COURT'S JUDGMENT is that the Applicant's application for judicial review and declaratory relief be dismissed; however, the Applicant is not to be imposed with costs.

(No costs have been imposed in recognition of the almost nil financial position of the Applicant, as clearly specified in his evidence. The Applicant allocates his entire detention earnings of $67.00 every two weeks, *inter alia*, to sundry hygiene necessities, materials for correspondence, stamps, photocopies, mailings, phone calls to family and an occasional food-treat for his immediate family members, in addition, to continuous college payments for a paralegal diploma, consisting of $35.00 a month in a seventeen-year payment schedule.)

Obiter

A singular reflection is warranted in respect of Mr. Warren McDougall who represented himself. He is pursuing law studies for the last seven years while in detention. In this proceeding, Mr. Warren McDougall's legal studies have shown to have provided him with significant knowledge of the law and jurisprudence regardless of the outcome of the current proceeding. His continued pursuit of legal studies and his growing proficiency therein should give him, in and of itself, hope for the future.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-855-10
STYLE OF CAUSE:	Warren McDougall v Attorney General
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	March 3, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	SHORE J.
DATED:	March 10, 2011

APPEARANCES:

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Ms. Banafsheh Sokhansanj	FOR THE RESPONDENT

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