Federal Court  Cour fédérale

Date: 20120301

Docket: T-493-11

Citation: 2012 FC 284

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, March 1, 2012

PRESENT: The Honourable Madam Justice Bédard

BETWEEN:

GILLES OUELLETTE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision by the Appeal Division of the National Parole Board (the Board) which confirmed a decision by the Board dated June 16, 2010. In that decision, the Board denied the applicant's application for day parole and parole because it was of the opinion that the offender presented a risk of reoffending that is unacceptable to society.

[2] For the following reasons, the application for judicial review is dismissed.

I. Background

[3] Since 1989, the applicant has been serving a life sentence, with no parole eligibility for 25 years, for two first-degree murders. The murders committed were violent and senseless. The applicant has always denied having committed the murders.

[4] Although he has been eligible for day parole since January 7, 2005, and for full parole since January 7, 2008, the applicant has not been granted any form of release into the community to date, aside from authorizations for escorted temporary absences for medical reasons. The Board analyzed the applicant's file on several occasions between 2005 and 2010.

[5] In December 2009, the Board denied the applicant's application for day parole and parole. However, at that time, the Board exceptionally set a date to review the file six months later. This review of the file led to the decision made on June 16, 2010, which is the subject of this application for judicial review.

[6] It is therefore useful to return to the December 2009 decision, which set the stage for the review of the applicant's file.

[7] In its decision on December 16, 2009, the Board refused to grant the applicant day parole and full parole. It was of the opinion that these forms of release were premature because, in its

opinion, the applicant presented an unacceptable risk to society. This basis for this decision included the following elements:

a. The applicant's criminal record begins in 1974 and contains planned, structured crimes, some of which involved violence, including the use of weapons;
b. The principal factors contributing to the applicant's criminal behaviour are related to greed, personality disorders, a significant potential for violence, emotional deprivation and shortcomings in his social and structural development;
c. The various professionals who assessed the applicant diagnosed him with narcissistic personality disorder with paranoid features and antisocial traits. They assessed the applicant's risk of violent re-offence as moderate in the short, medium and long terms, linked to an unpredictable and impulsive personality;
d. The last psychological assessment, dated October 26, 2009, repeats the diagnoses previously given. The psychologist noted, among other things, that some paranoid elements seem to complicate the applicant's self-questioning and his ability to trust and form positive relationships with others. She also noted that the applicant continues to be unreceptive to coaching and uses defence mechanisms that are very rigid. She assessed the applicant's risk of violently reoffending as moderate and concluded that his return to the community had to be very gradual;
e. The applicant's case management team (CMT) states that he has always denied having committed the crimes of which he was found guilty and that his offence cycle and contributing factors have not been treated. The CMT assessed the applicant's potential for social reintegration as low and is of the opinion that there is still a high risk that he will commit further criminal offences;

f. The CMT finds it worrisome to note that, after over 20 years of imprisonment, the applicant is still unable to identify the sources of his criminal behaviour and is not truly prepared to know the reasons for them. The CMT also noted, as have a number of persons involved, that the applicant exhibits some emotional instability;

g. The CMT is also of the opinion that the applicant has not made observable or measurable progress since the beginning of his imprisonment and recommends that he be denied day parole and full parole;

h. The applicant's resistance to treatment is clear from the fact that he has not participated in any prison programs to counter the factors contributing to his criminal behaviour;

i. In 2005 and 2007, the applicant was reminded by the Board that it was essential for him to develop trust with the members of his CMT and to participate in his correctional plan.

[8] The Board also noted that all of the negative decisions since 2005 went against the applicant because of his rigidity and the fact that he has not made use of the internal programs to work on the factors contributing to his criminal behaviour.

[9] The Board also stated that the applicant had made some headway and that it perceived some degree of flexibility, which was new. The Board referred to, among other elements, the fact that he had begun a psychological follow-up with a psychologist, Dr. Saint-Amant, during which he seemed to have begun reflecting on his criminal behaviour. The Board noted that the

psychologist had emphasized that the applicant was making an effort to open up, despite the fact that it was still difficult to establish trust with him, and that he deemed it necessary to continue the follow-up.

[10] As well, the Board noted that the applicant was also meeting with a representative from Option-Vie on a regular basis, had established a good bond with him and had shown openness on an emotional level. The Board stated that this step seemed to have enabled him to better understand his criminal behaviour and to reduce the negative legalistic aspect of his arguments.

[11] Despite those steps, the Board was of the opinion that the applicant still presented an unacceptable risk to society. The steps taken by the applicant had, nonetheless, led the Board to set a date to review his file six months later. The Board also informed the applicant that it had the following expectations: (1) he had to work closely with his parole officer (PO) to identify goals to meet in order to lower his security classification and become eligible for “security cascading”; (2) he had to continue his psychological follow-up; (3) he had to focus on developing greater flexibility and openness; and (4) he had to work with his CMT on developing a release plan.

[12] This, therefore, is the specific context in which the hearing of June 16, 2010, was held. The Board had the applicant’s entire file on hand, including the psychological therapy report prepared by Dr. St-Amant on February 10, 2010, and the Assessment for Decision prepared for the Board by the applicant’s CMT on April 11, 2010. The applicant also testified at the hearing.

[13] Dr. Saint-Amant's therapy report summarizes the follow-up the applicant received from September 14, 2009, to January 21, 2010. Dr. Saint-Amant states that the applicant participated well in the follow-up process, but that there is still work to be done in terms of his offence cycle and social skills. He also noted that the applicant has demonstrated his capacity to make a positive contribution to his own therapy, which is a step forward. However, he also stated that the process had not reduced the applicant's risk of reoffending.

[14] The CMT prepared an Assessment for Decision in which it recommended that the applicant's application for day parole and parole be denied because it was of the opinion that the applicant still presented a risk of reoffending that was unacceptable to society. The CMT set out the full history of the applicant's file, his various psychiatric and psychological assessments, the steps he has taken and the headway he has made since the hearing in December 2009. The CMT stated not having noted any significant, long-lasting progress over the period covered by the assessment, despite the fact that the applicant has completed his psychological follow-up. As well, the CMT stated that the applicant still had not created a bond of trust with his PO, that his requests remained utilitarian and that he was not dealing with the aspects of his criminal behaviour. The CMT further noted that the applicant seemed to believe that he would not reoffend, without having demonstrated that he knew himself well or having addressed the principal anxiety triggers that he could encounter upon his release.

[15] The Board denied the applicant's application, being of the opinion that he still presented a risk of reoffending that is unacceptable to society. In its decision, the Board re-summarized the

applicant's entire file and his progress and dealt with the expectations set out by the Board at the hearing in December 2009.

[16] First, the Board stated that the goal of the close work which the applicant had to engage in with his CMT to enable him to lower his security classification and become eligible for "security cascading" had not been met. The Board noted that the applicant was still a demanding, self-rationalizing and self-centred individual and that he seemed determined to hold fast to his position.

[17] Second, the Board acknowledged that the applicant had completed the psychological follow-up begun with Dr. Saint-Amant, but it also noted that the psychologist had been unable to conclude that the psychological follow-up had reduced the applicant's risk of reoffending. However, the Board noted that the fact that he was able to engage in this process with someone from the Correctional Service was a sign that he was opening up. The Board also made note of the applicant's follow-up with an Option-Vie representative.

[18] In addition, the Board was of the opinion that the applicant would benefit from continuing his introspection through therapy. The Board noted that the applicant was unable to identify the obstacles that could arise upon his release, which attested to a misconception of the daily reality he would have to face.

[19] Third, the Board noted that the applicant had presented a release plan which included receiving support from various sources, including support from members of his family.

However, it was of the opinion that the applicant's release plan was [TRANSLATION] "clearly premature". The Board made the following comments on the applicant's release plan:

> [TRANSLATION]
> After 28 years of incarceration, it would be very naive and presumptuous to believe that your return to the community will be problem-free. The Board finds it difficult to believe that you would be capable of demonstrating openness, cooperation and transparency towards CSC workers in the community when you are unable to do so in the institution.
>
> Your release plan may be well prepared, but it is clearly premature. All of the professionals who have worked on your case agree unanimously that it is necessary for your security cascading process and temporary absence program to be gradual. There is no point in cutting corners, since the consequences could be even more severe for society and for yourself.

III. Decision of the Appeal Division of the Board

[20] The applicant appealed the Board's decision to the Appeal Division. In his appeal, the applicant contended, first, that the Board had violated the rules of procedural fairness because he had been unable to provide a complete testimony on account of the numerous interruptions and interventions of the board members who prevented him from giving complete answers to their questions.

[21] The applicant also criticized the Board for having made statements that were unsupported by the facts and incomplete. As well, the applicant criticized the Board for having failed to take into account his particular situation with the Correctional Service that had resulted in the government's paying substantial compensation. The applicant further criticized the Board for having erred in its assessment of his risk of violently reoffending. The Board's Appeal Division dismissed the appeal in a decision dated February 17, 2010.

[22] The Appeal Division was of the opinion that the rules of procedural fairness had not been breached and that the applicant had had ample opportunity to present his case, express his point of view and answer the Board's questions. It also took the view that the interventions by the Board members had been intended to redirect the discussion onto the matter of the applicant's risk of reoffending and the progress he had made since the hearing in December 2009 and that the Board had given him a just and fair hearing. The Appeal Division further deemed the Board's assessment of the evidence to be reasonable and in compliance with the criteria set out in the *Corrections and Conditional Release Act*, SC 1992, c 20 (the Act) and with the Board's statements. In addition, the Appeal Division found that the Board had not made any erroneous statements.

III. Issues

[23] This is an application for judicial review of the decision by the Appeal Division which confirmed the Board's decision. The case law has recognized that, in such a situation, the Court's role is essentially to ensure that the Board's decision is lawful (*Cartier v Canada (Attorney General)*, 2002 FCA 384, [2003] 2 FC 317 [*Cartier*]); *Mymryk v Canada (Attorney General)*, 2010 FC 632, 382 FTR 8).

[24] The applicant's criticisms of the Board's decision are essentially the same as those argued in the appeal of that decision. This case therefore raises the following issues:

(1) Did the Board breach the rules of procedural fairness by not allowing the applicant to fully participate in the hearing held on June 16, 2010?

(2) Did the Board err in its assessment of the file and of the applicant's circumstances?

IV. Standards of review

[25] A breach of procedural fairness would render the Board's decision invalid (*Sketchley v Canada (Attorney General)*, 2005 FCA 404 at paragraph 53, [2006] 3 FCR 392).

[26] In addition, the Court must show deference in respect of the Board's decision on the merits. The Board's decision falls within its particular area of expertise and essentially involves an assessment of the facts and circumstances of the applicant's file. Such a decision must be reviewed on the reasonableness standard (*Cartier*, above at paragraphs 6-10, *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*]).

[27] The Court's role in reviewing a decision on the reasonableness standard was expressed as follows in *Dunsmuir*, above, at paragraph 47:

> 47 Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

V. Analysis

(1) *Did the Board breach the rules of procedural fairness by not allowing the applicant to fully participate in the hearing held on June 16, 2010?*

[28] The applicant submits that the hearing on June 16, 2010, was made invalid by a significant number of interruptions by the Board members which prevented him from providing complete answers, explaining his situation and testifying about the conflict between himself and the Correctional Service representatives. The applicant submits that he pointed out the problem at the hearing and asked the Board members to let him complete his answers, but to no avail.

[29] The respondent rebuts this allegation and submits that the applicant received a fair hearing and that the Board members' interventions were intended to focus the discussion and were appropriate.

[30] It is important to bear in mind the fact that the hearing on June 16, 2010, was held as part of a follow-up on the Board's decision dated December 16, 2009, and that the purpose of the hearing was to check up on the applicant's progress and headway with regard to the openness noted six months earlier and the specific expectations set out by the Board. The hearing therefore had a specific objective and purpose.

[31] Furthermore, the Board's role is circumscribed by the Act. Section 100 of the Act sets out the purpose of conditional release, which "is to contribute to the maintenance of a just, peaceful and safe society by means of decisions on the timing and conditions of release that will best

facilitate the rehabilitation of offenders and their reintegration into the community as law-abiding citizens." Paragraph 101(*a*) of the Act states that the protection of society is the paramount consideration in the determination of any case and, in accordance with section 102 of the Act, the Board may grant parole if, in its opinion, the offender will not, by reoffending, present an undue risk to society. The Board's mandate was therefore to assess that risk. To do so, it took into account all of the relevant, available information (paragraph 101(*b*) of the Act), including the applicant's representations. Furthermore, the Board's hearings are inquisitorial, not adversarial (*Mooring v Canada (National Parole Board)*, [1996] 1 SCR 75), at paragraphs 26–27 (available on CanLII); *Yaari v Canada (Attorney General)*, 2005 FC 1353 at paragraph 7, 275 FTR 291). Therefore, it was normal for the Board to ask pointed questions.

[32] I have reread the full transcript of the hearing before the Board, and I share the opinion of the Board's Appeal Division. It is true that the Board members intervened on a number of occasions, but their interventions were intended to re-centre the debate. Considering the Board's role and the purpose of the hearing, I am of the opinion that the applicant had the opportunity to participate fully in the process and to express himself on all of the relevant aspects of the decision to be made by the Board. The applicant was able to answer the Board members' questions and had the opportunity to make submissions and provide the Board with the explanations that were relevant to examining the headway he had made over the course of the past six months.

(2) *Did the Board err in its assessment of the file and of the applicant's circumstances?*

[33] The applicant criticizes the Board for having made statements that are incomplete and false. He submits that in so doing, the Board drew conclusions by ignoring important pieces of evidence, which would contravene paragraph 101(*b*) of the Act. He also criticizes the Board for having refused to take into consideration the very particular situation between himself and the Correctional Service, which was relevant information that could not be ignored.

[34] The applicant further submits that the Board conducted an incomplete analysis of his risk of reoffending and failed to consider the criteria set out at sections 100 to 102 of the Act, which spring from the criteria stated by the Supreme Court in *Steele v Mountain Institution*, [1990] 2 SCR 1385 (available on CanLII).

[35] The respondent, for its part, submits that the Board's decision was reasonable. I agree.

[36] The purpose of the review was to measure the applicant's progress over the past six months and assess whether the headway he had made had reduced the risk of reoffending which he represents for society. The Board's review focused on this issue and analyzed the evidence in respect of the expectations the Board had established in December 2009. I am of the opinion that the Board analyzed and considered all of the elements that were relevant for the purposes of its review and that the conclusions it drew were reasonable with regard to all of the information it had and the applicant's testimony. The Board's decision also shows that that it reviewed the applicant's case in accordance with the parameters set out in the Act; although it

wishes to facilitate the applicant's reintegration into society, the Board had to determine whether the applicant's release would result in an unacceptable risk for society, the protection of society being the paramount consideration, and it had to conduct its analysis on the basis of all of the relevant information available.

[37] In setting out his criticisms against the Board, the applicant dissects and isolates elements in his file and passages from his testimony before the Board. He asks the Court to conduct a microscopic analysis of both the evidence and the Board's reasons. The Board was not required to mention all of the elements in the applicant's file or the entirety of his testimony. The Board's decision is sufficiently detailed and deals with elements that were relevant to deciding the issue regarding the applicant's risk of reoffending in the specific context of the process engaged in over the past six months. In *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, at paragraphs 14–16, 424 NR 220, the Supreme Court stated that the reasons for a decision must be read together with the outcome and in light of the file as a whole:

> 14 . . . It is a more organic exercise — the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes" (para. 47).
>
> 15 In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.

> 16. Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

[38] In this case, it was reasonable for the Commission to conclude that the applicant's progress over the previous six months had not reduced his risk of reoffending. The evidence clearly showed that the applicant had not improved his relationship with the CMT during the period at issue and had therefore not worked with his PO to set goals with the aim of having his security classification reduced. It is evident from the file as a whole that the applicant must develop a relationship of trust with his CMT, with which he will have to maintain close ties even after his release. The evidence has also shown that the psychological follow-up conducted with Dr. Saint-Amant did not reduce his risk of reoffending. I am also of the view that, in light of the applicant's testimony, it was reasonable for the Board to find that the applicant had not fully taken stock of the difficulties he may face upon his release and that he still had some self-analysis to do.

[39] The passages the applicant focuses on in the decision must be read in the decision's overall context while bearing in mind that the Board does not have to mention every piece of evidence. After having analyzed all of the evidence in the file, including the applicant's testimony before the Board, I am of the opinion that the Board's statements were reasonably

grounded in the evidence and that the conclusions it drew fell within “a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*, above, at paragraph 47). In addition, the reasons for the decision do make it possible to understand the basis on which it was made.

[40] Therefore, this Court should not intervene.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed with costs.

"Marie-Josée Bédard"
Judge

Certified true translation
Sarah Burns

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-493-11
STYLE OF CAUSE:	GILLES OUELLETTE v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	February 7, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	BÉDARD J.
DATED:	March 1, 2012

APPEARANCES:

Maxime Hébert Lafontaine	FOR THE APPLICANT
Nicholas R. Banks	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Maxime Hébert Lafontaine	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT