Federal Court  Cour fédérale

Date: 20121227

Docket: T-195-12

Citation: 2012 FC 1546

[UNREVISED ENGLISH CERTIFIED TRANSLATION]
Ottawa, Ontario, December 27, 2012

Present: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

GAËTAN TREMBLAY

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant is seeking judicial review pursuant to subsection 18.1(1) of the *Federal Courts Act*, RSC 1985, c F-7, to have set aside a decision rendered on December 12, 2011, by the Appeal Division of the Parole Board of Canada [the Appeal Division], upholding a decision by the Parole Board of Canada [the Board] dated June 8, 2011, denying the applicant's application for day parole and parole.

THE FACTS

[2] The applicant's criminal record dates back to 1969, when he was 19 years old. Between 1969 and 1981, he was convicted of a variety of offences, including automobile theft, theft, causing damage, assault, mischief, breaking and entering with theft, breach of parole, breaking and entering, possession of narcotics for the purposes of trafficking and possession of a weapon. It was determined that violence was an integral and pervasive part of the applicant's lifestyle.

[3] The applicant is now 62 years old and has been serving a life sentence for second degree murder since September 10, 1981, with eligibility for parole after 15 years. On February 11, 1982, he was also sentenced to 10 years' imprisonment for manslaughter, to be served concurrently with the life sentence.

[4] The first murder was initially reported in September 1981 by the Correctional Service of Canada [CSC]. On December 2, 1981, the Board requested a copy of the police report in the second degree murder case. On December 29, 1981, a CSC officer contacted a Sûreté du Québec detective to gather the relevant information. The manslaughter was described only by the applicant, the sole witness to the crime. Another account is provided by the CSC officer.

[5] Between 1982 and 1983, the CSC made several requests to specific CSC institutions and various police forces for investigation reports related to these crimes. On June 9, 1987, the CSC asked the Sûreté du Québec to send it any reports relating to the perpetration of these crimes.

[6] On February 17, 1988, the CSC asked Quebec's Ministère de la Justice to send it the report of the judge and/or of counsel for the Crown as well as a variety of other documents. On February 6, 1991, the CSC asked the Service correctionnel du Québec to provide it with the information presented during the trial.

[7] On April 15, 1995, the Board reviewed the information requests made to the various bodies: the sole account of the murder was contained in the confidential information report already in the file, and no account was available for the manslaughter offence.

[8] On October 5, 1996, the CSC reiterated its request to the Palais de justice de Québec for copies of the tapes containing the Attorney General of Quebec's submissions on sentencing and the reasons given by the court in relation to sentencing, detention, eligibility for parole and recommendations associated with the applicant's alleged crimes. On July 22, 1997, the transcription department informed the CSC that hearings have only been recorded since late 1993 and that it would therefore be impossible to obtain recordings of hearings held before then.

[9] Over the course of the applicant's 30 years of incarceration, several psychological and psychiatric reports have been prepared. These contain other accounts of the crimes provided by the applicant to CSC professionals. Finally, the applicant described the circumstances of the crimes once again during the Board hearing held on June 8, 2011.

THE BOARD'S DECISION

[10] On the same day, June 8, 2011, the Board denied the applicant's application for day parole and full parole on the following grounds: the applicant's convictions dating back to 1969; his repeat offences since then and the aggravation of his offences; the violent circumstances surrounding them; the lack of official information available; the accounts related by the applicant; the statistics relating to offenders with similar profiles; the negative personal factors; the assessments of professionals (psychological and psychiatric reports, the most recent of which is from 2008); the applicant's participation in institutional programs; the difficulties encountered in the institution; his conduct during temporary absences; a major offence report dated September 30, 2010; the applicant's self-perception; a report from his case management team; his background, childhood and personal history; his drug problems; the number of years he has spent in correctional institutions; his explanations regarding the perpetration of his crimes and the concerns and injustices that he raised.

[11] In short, the Board recognized that the applicant had made some progress while incarcerated but noted that he still had a long way to go with respect to certain key areas at the root of his criminal conduct.

THE DECISION OF THE BOARD'S APPEAL DIVISION

[12] Following a file review, the Appeal Division concluded that there were no grounds justifying its intervention or any modification of the Board's decision. It was of the view that the Board had taken into account all the available information relevant to the offences of murder and

manslaughter pursuant to paragraph 101(*b*) of the *Corrections and Conditional Release Act*, SC 1992 c 20 [CCRA]. A summary of the charges to which the applicant pleaded guilty is included in the criminal profile report dated December 13, 1991. The applicant's file also contains various reports, including psychological assessment reports dated September 28, 2004, April 30, 2008, and April 1, 2011, that raise serious concerns about the sadistic nature of the murder and its sexual overtones.

[13] Furthermore, the Appeal Division is of the view that the Board fairly analyzed and weighed all the available relevant information in analyzing the applicant's risk of re-offending against the pre-release criteria set out in the CCRA and Board policy, and the information was reliable and persuasive. The written reasons for the decision clearly indicate that the Board took into account the positive factors such as the applicant's compliance in the institution, his periods of incarceration in minimum security institutions and his participation in several programs over the years. The Board nevertheless determined that the negative factors outweighed the positive and held that the applicant presented too high a risk of re-offending to be granted day parole or full parole.

[14] In the end, the Appeal Division found that it was reasonable for the Board to deny the applicant's application for day parole and full parole on account of his serious and violent criminality, his limited self-awareness and insight and his lack of progress with the factors contributing to his criminal conduct, which would lower his significant risk of violent recidivism. The Board's determinations are the least restrictive measures consistent with the protection of society.

ISSUE

[15] It must be determined first whether there has been a breach of procedural fairness with respect to the lack of documentary evidence in the Board's file or the failure to provide the applicant with access to it, and then whether the evidence is comprehensive, reliable and persuasive.

STANDARD OF REVIEW

[16] It is well established by the case law of this Court that procedural fairness is a question of law to which the standard of correctness applies (*Miller v Canada (AG)*, 2010 FC 317 at paragraph 39 [*Miller*], citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraphs 54, 79 and 87 and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 43). Therefore, a breach of procedural fairness invalidates a decision about eligibility for day parole and full parole (*Fernandez v Canada (AG)*, 2011 FC 275).

[17] However, "the administrative decision must not be interfered with by this Court failing clear and unequivocal evidence that the decision is quite unfair and works a serious injustice on the inmate" (*Desjardins v Canada (National Parole Board)*, [1989] FCJ no 910 at paragraph 9). Furthermore, "[w]hile parole is not a right but a privilege, and therefore its revocation does not require the judicial-type process more commonly associated with the concept of natural justice, it does require at least an observance of fairness . . . [and] it is necessary to consider what the nature of the consequences is for the person who has allegedly been denied fairness" (*Lathan v*

Solicitor General of Canada et al, [1984] 2 FC 734, at page 744, reiterated in *Aney v Canada (AG)*, 2005 FC 182 at paragraph 31).

APPLICANT'S ARGUMENTS

[18] The applicant's accounts are the main source of information about the circumstances surrounding the crimes, as it seems that none of the police reports, transcripts, psychological and psychiatric reports produced during the hearing, pathologists' reports or other documents relevant to the convictions are available. He himself has been trying since 1991 to obtain the information about his convictions, in particular the recordings and transcripts of the statements made before the Superior Court when his guilty plea was entered in 1981.

[19] The relevant provisions of the CCRA and the case law identify the CSC's and the Board's procedural fairness obligations with respect to both sharing information and ensuring the reliability of the information on which the Board bases its decision. It is established at paragraph 28 of *Gallant v Canada (Deputy Commissioner, Correctional Service Canada)*, [1989] 3 FC 329, that procedural fairness dictates that the inmate must receive all of the relevant information to enable him to make representations regarding decisions likely to affect his rights, privileges and interests. The case law specifies that the Board must take into account all available information that is relevant to a case and ensure that the information on which it is relying is exhaustive (*Mooring v Canada (NPB)*, [1996] 1 SCR 75 at paragraph 29 [*Mooring*]).

[20] The applicant submits that, in this case, the CSC and the Board failed to provide him with important information about the evidence relating to the offences: the failure to provide this

important information represents a breach of the duty to provide information set out in the case law and the CCRA, and therefore a breach of the principle of procedural fairness.

[21] Secondly, the applicant submits that the Board's finding that he must undergo treatment for sexual delinquency is based on information that is neither reliable nor exhaustive, since, on the one hand, very little information is available regarding the circumstances of the offence and, on the other hand, several experts have found in the past that the applicant did not need to participate in a treatment program for sex offenders. The applicant also denies the Board's factual findings indicating that he has a sexual problem and challenges the consideration of this element in the assessment of his eligibility for day parole or full parole.

[22] For these reasons, the applicant is asking the Court to set aside the decision of June 8, 2011, and remit the file to the Board for a new hearing.

RESPONDENT'S ARGUMENTS

[23] The respondent submits that the Board acted fairly by trying to obtain all of the documents related to the police investigation and the applicant's convictions. It appears from the evidence in the file that the Board and the Appeal Division made several attempts to obtain these documents. However, criminal trials have only been recorded since 1983, and the few documents relating to the police investigation and conviction are already in the Board's file.

[24] The respondent cites paragraph 101(*b*) of the CCRA, which states that the information must be available, in the sense that it must be recorded in any form, so that it may be provided to

the Board. In this case, several documents could not be found in the Board's files and were therefore not available. The non-existence of the documents submitted to the Court and/or the police investigation reports cannot result in a breach of procedural fairness. A new hearing before the Board will not allow for the inclusion of these documents in his file because they do not seem to be available in any form.

[25] Next, the available information must be relevant. Not all the documents in the applicant's file relate to his risk of re-offending with respect to the parole he is seeking. The use of the term "including" in section 102 of the CCRA indicates that the list that follows is not exhaustive. The items following the word "including" are examples of the types of subjects covered by the definition of the term "relevant available information" (*Canada (Information Commissioner) v Canada (Commissioner of the Royal Canadian Mounted Police)*, [2003] 1 SCR 66 at paragraph 29).

[26] Furthermore, ". . . the words 'all available information that is relevant to a case' and 'information and assessments provided by correction authorities' do not contemplate that the Board has an open-ended duty to actively seek potentially relevant information from the CSC" (*Miller* at paragraph 54).

[27] Finally, the respondent submits that the decision of June 8, 2011, is reasonable and based on all the facts available to the Board, regarding which the applicant was given the opportunity to make representations.

ANALYSIS

[28] As a preliminary note, in similar circumstances, the "judge in theory has an application for judicial review from the Appeal Division's decision before him, but when the latter has affirmed the Board's decision he is actually required ultimately to ensure that the Board's decision is lawful" (*Cartier v Canada (AG)*, 2002 FCA 384 at paragraph 10 [*Cartier*]).

[29] I would add that "the requirements of procedural fairness must be assessed contextually" *May v Ferndale Institution*, 2005 SCC 82). The Board was required to share the relevant information with the applicant and ensure its reliability and persuasiveness in order to meet its duty of fairness (*Bouchard v Canada (AG)*, 2007 FC 608 at paragraphs 21-23).

[30] Two sections of the CCRA are relevant to this case, namely, sections 101 and 141:

101. The principles that guide the Board and the provincial parole boards in achieving the purpose of conditional release are as follows:	**101.** La Commission et les commissions provinciales sont guidées dans l'exécution de leur mandat par les principes suivants :
(*a*) parole boards take into consideration all relevant available information, including the stated reasons and recommendations of the sentencing judge, the nature and gravity of the offence, the degree of responsibility of the offender, information from the trial or sentencing process and information obtained from victims, offenders and other components of the criminal justice system, including assessments provided by correctional authorities;	a) elles doivent tenir compte de toute l'information pertinente dont elles disposent, notamment les motifs et les recommandations du juge qui a infligé la peine, la nature et la gravité de l'infraction, le degré de responsabilité du délinquant, les renseignements obtenus au cours du procès ou de la détermination de la peine et ceux qui ont été obtenus des victimes, des délinquants ou d'autres éléments du système de justice pénale, y compris les évaluations fournies par les autorités correctionnelles;
(*b*) parole boards enhance their effectiveness and openness through the timely exchange of relevant	b) elles accroissent leur efficacité et leur transparence par l'échange, au

information with victims, offenders and other components of the criminal justice system and through communication about their policies and programs to victims, offenders and the general public; . . .

(*e*) offenders are 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.

141. (1) At least fifteen days before the day set for the review of the case of an offender, the Board shall provide or cause to be provided to the offender, in writing, in whichever of the two official languages of Canada is requested by the offender, the information that is to be considered in the review of the case or a summary of that information.

(2) Where information referred to in subsection (1) comes into the possession of the Board after the time prescribed in that subsection, that information or a summary of it shall be provided to the offender as soon as is practicable thereafter. . . .

moment opportun, de renseignements utiles avec les victimes, les délinquants et les autres éléments du système de justice pénale et par la communication de leurs directives d'orientation générale et programmes tant aux victimes et aux délinquants qu'au grand public; […]

e) 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.

141. (1) Au moins quinze jours avant la date fixée pour l'examen de son cas, la Commission fait parvenir au délinquant, dans la langue officielle de son choix, les documents contenant l'information pertinente, ou un résumé de celle-ci.

(2) La Commission fait parvenir le plus rapidement possible au délinquant l'information visée au paragraphe (1) qu'elle obtient dans les quinze jours qui précèdent l'examen, ou un résumé de celle-ci.[…]

[31] According to subsection 141(1) of the CCRA, the Board was required to share the relevant information with the applicant at least 15 days before the hearing, which was held on June 8, 2011. The CCRA specifically states that it is the "relevant information" that must be shared and not all the existing information (*Strachan v Canada (AG)*, 2006 FC 155 at paragraph 20 [*Strachan*]). The evidence shows in this case that the Board indeed provided the

applicant with all of the relevant information available to it. I adopt as my own the following words of Justice Crampton (as he then was) regarding paragraph 101(*a*) of the CCRA (formerly paragraph 101(*b*) of the CCRA) in *Miller*:

> . . . the words "all available information that is relevant to a case" and "information and assessments provided by correction authorities" do not contemplate that the Board has an open-ended duty to actively seek potentially relevant information from the CSC. Rather, insofar as the CSC is concerned, those words simply require the Board to take into consideration all information received from the CSC that is relevant to a case.

[32] In this case, not only were some documents unavailable or not provided by the correctional authorities on the grounds, for example, that cases prior to 1983 were not recorded, but the Board also made a considerable effort to obtain the greatest number of relevant documents possible. The same can be said for the actions taken by the correctional authorities. The situation is complicated by the fact that the applicant is the sole witness to the crimes in question. I would also add that not all of the documents in the Board's possession were relevant to the assessment of the applicant's risk of re-offending. It was open to the Board to determine which were relevant (*Miller* at paragraph 54). While the applicant alleges that he did not receive a number of documents relating to his trial before the Superior Court, those documents were not relevant to the Board's decision as to the existence of a *current* risk of re-offending.

[33] As for the reliability and quality of the information provided to the applicant, there is no evidence to suggest that the information before the Board is not [TRANSLATION] "exhaustive, clear and persuasive". To the contrary, the Board relied on official documents that the applicant

also has in his possession. I also adopt the following conclusions of Justice Létourneau in *Zarzour v Canada*, [2000] FCA 2070 at paragraph 38:

> I do not think, as the respondent appears to be arguing, that it is always necessary to conduct an inquiry to verify information that the Board receives. Given its needs, resources and expertise, the Board must be given some latitude, obviously within some legal parameters, as to the appropriate methods for guaranteeing the reliability of information that is supplied to it. It may be appropriate to do so by an investigation or by merely inquiring further. But confronting the person primarily affected with the allegations made in his regard, and enabling him to comment on them and rebut them, is also a significant method of verification which is generally done unless there is some security problem: see section 141 of the Act and the *National Parole Board Policy Manual*. Furthermore, in terms of fairness, the confrontation ensures compliance with those principles and, in terms of the release objective, is a way of gauging the inmate's reaction and his sincerity in the face of the allegations. (Emphasis added.)

[34] In this case, as in *Miller*, the applicant was given many opportunities to comment on the allegations or circumstances surrounding the crimes, and "[t]he Board was under no obligation to go further and actively seek to obtain Mr. Miller's Casework Record" (*Miller* at paragraph 51). Furthermore, most of the documents used by the Board were official; there were criminal records, professional reports, reports from the current institution or other institutions attended by the applicant, written representations and testimony provided by the applicant himself.

[35] Therefore, in the circumstances of this case, I am of the view that the applicant received enough reliable and persuasive information to enable him to make his case fully and respond to the Board's allegations at the hearing on June 8, 2011. He was also given the opportunity to rebut each of the allegations. Nevertheless, the Board was not satisfied with his explanations.

After weighing all the relevant factors, the Board found that the applicant still had much work to do before he could reintegrate into society.

[36] The requirements of procedural fairness were therefore met. Accordingly, this application for judicial review is dismissed without costs.

JUDGMENT

THIS COURT'S JUDGMENT IS that the application for judicial review is dismissed without costs.

"Danièle Tremblay-Lamer"
Judge

Certified true translation
Francie Gow, BCL, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-195-12
STYLE OF CAUSE:	*Gaëtan Tremblay v Attorney General of Canada*
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APPEARANCES:

Nadia Golmier	FOR THE APPLICANT
Véronique Forest	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Nadia Golmier Montréal, Quebec	FOR THE RESPONDENT
William F. Pentney Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT