Federal Court  Cour fédérale

Date: 20131119

Docket: T-1720-12

Citation: 2013 FC 1175

Ottawa, Ontario, November 19, 2013

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

NEIL VAN BOEYEN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application under subsection 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, for judicial review of the decision of the Parole Board of Canada, Appeal Division [Appeal Board] dated August 7, 2012 that denied the Applicant's appeal of the Parole Board of Canada's [PBC] decision to deny him both full parole and day parole.

BACKGROUND

[2] The Applicant has been serving an indeterminate sentence in a federal penitentiary since he was designated as a dangerous offender on May 4, 1990. This sentence followed convictions for several offences, including sexual assault with a weapon, sexual assault, kidnapping and attempted kidnapping, stemming from four separate attacks on female victims ranging in age from 12 to 30. Counting pre-trial detention, he has been incarcerated since December 7, 1988.

[3] During his incarceration, the only correctional programming in which the Applicant participated up until 2011 was the Offender Substance Abuse Program in 1994 and the Caregiver/Peer Counselling Program in 1999. The Applicant says that he did not participate in more programs because he was not allowed to enter treatment programs up until 2006. Thereafter, he says he refused to participate because he feared he would be kicked out of the treatment programs and then labelled "untreatable," since he continued to maintain his innocence. He wanted written assurances that he could participate and successfully complete the programs while maintaining his innocence, and that he would not suffer negative consequences for doing so.

[4] After being told by way of letter dated November 4, 2010 (Van Boeyen Affidavit, Respondent's Record, Exhibit B) that he could enrol in the Integrated Correctional Program Model Sex Offender High Intensity Program [ICPM Program] while maintaining his innocence, and that he would not suffer negative consequences for doing so, the Applicant enrolled in and successfully completed the ICPM Program on June 17, 2011.

[5] On December 20, 2011, the Applicant's Institutional Parole Officer [IPO] completed an Assessment for Decision (A4D) for the purpose of assessing the Applicant's suitability for full parole and day parole (Van Boeyen Affidavit, Respondent's Record, Exhibit D). The Parole Officer acknowledged that the Applicant had successfully completed the ICPM Program, but observed that because the Applicant had not acknowledged guilt for any of his offences that were sexual in nature, all the skills the Applicant acquired through the ICPM Program were obtained in the context of his non-sexual offences. The Parole Officer noted that the sexual offences were the Applicant's index offences – that is, the offences that resulted in his designation as a dangerous offender – and that the Applicant remained an untreated sexual offender. The Applicant was rated as presenting a moderate to high risk for general and violent recidivism and a high risk for sexual recidivism. His reintegration potential was rated as low. As such, his case management team [CMT] recommended against day or full parole.

[6] On December 22, 2011, a psychological report was completed for the purposes of the Applicant's upcoming parole hearing by Dr. Robert Zanatta, a Clinical Psychologist at the Mountain Institution (Van Boeyen Affidavit, Respondent's Record, Exhibit F). The report noted that the Applicant had successfully completed the ICPM Program, but that this was in the context of treating his prior lifestyle as a crime cycle and not for any of the sexual offences for which he was convicted. Dr. Zanatta stated that due to the Applicant's denial of the index sexual offences, a more accurate appraisal of his crime cycle, underlying sexual deviancy, and other risk factors was not possible. His overall assessment was that the Applicant remained at least a moderate risk to reoffend, despite his advancing age and apparent physical difficulties.

[7] The Applicant took issue with a number of observations in Dr. Zanatta's report, and wrote a detailed letter seeking changes or clarification. While this letter did not receive a response, it was provided to the PBC at the Applicant's parole hearing.

The PBC Decision

[8] On January 24, 2012, the PBC held a hearing to review the Applicant's case for day and full parole (Hymander Affidavit, Respondent's Record, Exhibit A). At the hearing, the Applicant submitted that because he was convicted and sentenced before the *Corrections and Conditional Release Act*, SC 1992, c 20 [CCRA] came into force, that law could not be applied to his parole hearing. Rather, he argued, the law governing parole at the time of the offence had to be applied.

[9] The PBC heard submissions related to the Applicant's programming and his ongoing denial of the index offences, and questioned both the Applicant and his IPO. The Applicant submitted a detailed rebuttal to the psychological report and a relapse prevention plan. The Applicant requested an opportunity to ask questions of his IPO, which the Board refused. The Applicant's mother attended the hearing as his assistant and spoke in favour of his release.

[10] The PBC found that the Applicant remained a moderate to high risk to re-offend generally, violently and sexually, despite having completed programming. A particular concern was that the Applicant did not believe a special condition was necessary requiring him not to associate with females of 18 years of age and under unless supervised. The PBC noted that the Applicant's

improvements in programming were recent, and that he had not had an opportunity to internalize the gains.

[11] The PBC concluded that the Applicant would pose an undue risk if released and denied day and full parole. On May 24, 2012, the Applicant appealed this decision to the Appeal Board.

DECISION UNDER REVIEW

[12] On August 7, 2012, the Appeal Board affirmed the decision of the PBC to deny the Applicant day and full parole. The Applicant's appeal submissions involved issues of bias, sharing of information, and errors of law.

[13] The Applicant submitted that the PBC displayed bias because he was not allowed to question his Parole Officer, the PBC placed little value on his submissions, and erroneous statements were made about his life. The Applicant said that the PBC interrupted him and redirected his submissions.

[14] The Appeal Board reviewed the pertinent case law on bias, and noted that an "alleged apprehension of bias must be based on substantial and serious grounds, not mere suspicion." The Appeal Board reviewed the audio-recording of the hearing, and found that a reasonable and informed person would not conclude that the PBC members had predetermined views or displayed bias. The members had asked him fair and relevant questions, and had interacted with the Applicant

in a professional manner that provided him with a full opportunity to respond to their questions, express his views and present his case.

[15] The Applicant argued that the PBC erred in law and prevented him from making full answer and defence by:

- denying him an opportunity to introduce relevant case law and to question his IPO;
- failing to properly consider the manual for the ICPM Program, which he presented as a rebuttal to the view that treatment while maintaining his innocence would not be effective in preventing future sexual offences; and
- relying on information that was not shared with him in advance, which he claimed was contained in the testimony of his IPO.

The Appeal Board rejected each of these arguments. It found that the Applicant was not unduly refused the opportunity to question his IPO, as the case law established that the PBC is not a judicial or quasi-judicial body. Hearings before the PBC are administrative in nature, with no formal rules of evidence. Based on a review of the audio recording, the Appeal Board found that the IPO's testimony did not contain information that had not been shared with the Applicant in advance. It found that the program manual for the ICPM Program was a general information document that did not need to be admitted into the record, as the final report following his completion of the program contained sufficient relevant, reliable and persuasive information to allow the PBC to assess his risk factors following this treatment.

[16] The Applicant also submitted that the PBC had erred by considering a Criminal Profile Report [CPR] compiled in 1990, which he did not remember having seen before, and which he

claimed was inaccurate, out of date and unreliable. The Appeal Board pointed out, however, that this issue was raised by the PBC and the Applicant confirmed that the CPR had been shared with him in 1996. The PBC noted that the document was in the Applicant's file and that he had options available to him should he wish to challenge its accuracy. The Applicant confirmed to the PBC that he did not want to postpone the hearing in order to make such a challenge.

[17] The Applicant argued that the PBC did not have jurisdiction to apply the CCRA in the Applicant's case, and that legislation that was in place at the time the Applicant was sentenced (namely the *Parole Act*, RSC 1985, c P-2 [*Parole Act*], and the *Penitentiaries Act*, RSC 1985, c P-5) should have been applied to his case. The Appeal Board determined that there was no merit to this argument and that, consistent with section 223 of the CCRA, any offender who began his sentence under the former legislation was to be treated as if he had begun his sentence under the CCRA.

[18] The Applicant also argued that it was unreasonable for the PBC to consider him an untreated sex offender. He alleged that the PBC had made a variety of factual errors, and that the PBC's conclusions were based on incomplete or inaccurate information. The Appeal Board found no merit to these arguments, and stated that the PBC's reasons were clearly set out and based on relevant, reliable and persuasive information that was discussed at the hearing and contained in the Applicant's file. The PBC also specifically discussed the Applicant's status as a sex offender, and did not conclude that the Applicant was an untreated sex offender. Rather, the PBC noted that he had successfully completed the sex offender program. The PBC determined that the Applicant's refusal to admit his guilt was not an impediment to him eventually being granted parole, but found that he had yet to mitigate his risk despite some recent gains.

[19] The Appeal Board considered both the psychological report and the A4D to contain accurate, reliable and persuasive information that was accurately considered by the PBC. The psychological report included statements that the Applicant had previously admitted to his involvement in the index offences, and had offered a plethora of excuses for not participating in treatment programs. The report and the Applicant's rebuttal submissions were discussed at the hearing. The PBC considered the reasons the Applicant did not previously want to attend sex offender programming, and his explanations regarding the gains he had made. The PBC also raised the CMT's position that his sexual behaviour remained unaddressed, and provided an opportunity for the Applicant to respond.

[20] The Appeal Board noted that, according to section 102 of the CCRA, the criteria for granting parole are that the Applicant's release does not constitute an undue risk to the public, and that the Applicant's release will contribute to the protection of society by facilitating his re-entry into the community as a law-abiding citizen. Undue risk is determined based on the likelihood of re-offending, taking into consideration the nature and severity of the offence.

[21] In conclusion, the Appeal Board found that the PBC came to a decision that was reasonable and well supported, and that weighed positive and negative factors in a fair manner. The PBC had noted its extraordinary responsibility in dealing with an inmate with an indeterminate sentence, and that it had to ensure that his incarceration did not become grossly disproportionate. The Appeal Board affirmed the PBC's decision, and denied the Applicant full and day parole.

ISSUES

[22] The Applicant has raised numerous issues in this application, but his principal grounds of review are as follows:

a. Whether the Appeal Board erred by retrospectively applying the CCRA in rendering the decision;

b. Whether the Appeal Board erred by using the label "untreated sex offender" in reference to the Applicant;

c. Whether the Appeal Board erred by failing to take into consideration the sentencing judge's intention in imposing the indeterminate sentence;

d. Whether the Appeal Board committed a breach of procedural fairness by altering the wording of the grounds provided by the Applicant in his written appeal before responding to them;

e. Whether the Appeal Board failed to effect service of its Decision upon the Applicant as required by law and within the mandated timeframe.

STATUTORY PROVISIONS

[23] The following provisions of the CCRA, as it read on the date of the Applicant's hearing before the PBC, are applicable to this proceeding:

Accuracy, etc., of information	**Exactitude des renseignements**
24. (1) The Service shall take all reasonable steps to ensure that any information about an	**24.** (1) Le Service est tenu de veiller, dans la mesure du possible, à ce que les

offender that it uses is as accurate, up to date and complete as possible.

renseignements qu'il utilise concernant les délinquants soient à jour, exacts et complets.

Correction of information

Correction des renseignements

(2) Where an offender who has been given access to information by the Service pursuant to subsection 23(2) believes that there is an error or omission therein,

(a) the offender may request the Service to correct that information;

(2) Le délinquant qui croit que les renseignements auxquels il a eu accès en vertu du paragraphe 23(2) sont erronés ou incomplets peut demander que le Service en effectue la correction; lorsque la demande est refusée, le Service doit faire mention des corrections qui ont été demandées mais non effectuées.

[…]

[…]

Purpose of conditional release

Objet

100. The purpose of conditional release 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.

100. La mise en liberté sous condition vise à contribuer au maintien d'une société juste, paisible et sûre en favorisant, par la prise de décisions appropriées quant au moment et aux conditions de leur mise en liberté, la réadaptation et la réinsertion sociale des délinquants en tant que citoyens respectueux des lois.

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 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;

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 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;

[…]

[…]

Criteria for granting parole

Critères

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

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.

(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.

[…]

[…]

Reviews in progress	**Examen des dossiers en instance**
223. A review of the case of an offender begun under the former Act shall be continued after the commencement day as if it had been begun under this Act.	**223.** L'examen des dossiers en instance se poursuit indépendamment de la loi antérieure sous le régime de la présente loi.

STANDARD OF REVIEW

[24] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paragraph 48 [*Agraira*].

[25] Some of the issues which the Applicant brings forward are matters of statutory jurisdiction and interpretation. The appropriate standard of review for questions of law, including matter of *vires*, is that of correctness (*Dunsmuir*, above; *Canada v Canadian Council for Refugees*, 2008 FCA 229).

[26] Other matters brought forward by the Applicant are matters of procedural fairness. In *Canadian Union of Public Employees (C.U.P.E.) v Ontario (Minister of Labour)*, 2003 SCC 29, the

Supreme Court of Canada held at paragraph 100 that it "is for the courts, not the Minister, to provide the legal answer to procedural fairness questions." Further, the Federal Court of Appeal in *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at paragraph 53 held that the "procedural fairness element is reviewed as a question of law. No deference is due. The decision-maker has either complied with the content of the duty of fairness appropriate for the particular circumstances, or has breached this duty." The standard of review applicable to these issues is correctness.

[27] Other issues raised by the Applicant involve an evaluation of the Board's factual determinations, which are reviewable on a reasonableness standard (*Fournier v Canada (Attorney General)*, 2004 FC 1124; *Cotterell v Canada (Attorney General)*, 2012 FC 302). When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

ARGUMENTS

The Applicant

[28] According to the Applicant, it was an error for the Appeal Board to retroactively apply the CCRA to his case. The legislation that was in effect when he was sentenced should have been

applied. The Applicant submits that this is a jurisdictional error because there is no transitional provision in the CCRA.

[29] In support of this argument, the Applicant points to *Langard v Canada (National Parole Board)*, [1993] FCJ No 1168 (QL) (FCTD) [*Langard*] at paragraphs 17-21:

> 17 In my view, both the Board and the applicant have given interpretations to Sections 225. (1) and 139. (1) which they cannot bear. The language of Section 225. (1) is very clear in my view. It is a substantive transitional provision. Parliament clearly intended that the CCRA would not have retroactive effect and that sentences imposed under the Parole Act regime would, for the purposes of day parole calculations, be treated according to the Parole Act formula.
>
> 18 In light of the clear language of the section and the absence of any qualifying or contrary language elsewhere in the CCRA, I'm of the opinion that Section 225. (1) applies to sentences imposed before November 1st, 1992, whether or not there are additional sentences imposed on an offender under the CCRA. The Board erred in law in disregarding Section 225. (1) in this case and treating the entire 10-year sentence as one imposed under the CCRA and subject only to its formula.
>
> 19 Counsel for the Board submitted that Section 139. (1) was an interpretation section and that Section 15. (2) (a) of the Interpretation Act applies. Without deciding whether Section 139. (1) is an interpretation section, I have concluded that Section 15. (2) (a) is not helpful because, in my view, Section 225. (1) of the CCRA is evidence of contrary intention. That is that sentences imposed under the Parole Act are not brought under the CCRA formula for the calculation of day parole.
>
> 20 I also find that the applicant's position strains the language of Sections 225. (1) and 139. (1). The applicant's reading of 139. (1) is unreasonable as it unduly expands the operation of the transitional provision by extending it to sentences imposed under the CCRA.
>
> 21 As counsel for the Parole Board pointed out, transitional provisions are intended to have a certain finality and should not be read to extend unduly into the future.

[30] The Applicant provided the PBC with the decision in *Abel v Edmonton Institution for Women*, 2000 ABQB 851 [*Abel*], which holds as follows:

> 16 The Gamble decision makes it clear that it is fundamental to any legal system which recognizes the rule of law, that an accused must be tried and punished under the law in force at the time of the offence. Gamble goes on in interpreting that statement to include parole eligibility as an element of "punishment". While the Respondents say that those cases that clearly follow that principle all deal with the issue at the time that the trial judge imposes sentence, they do not apply where the provisions of the Corrections and Conditional Release Act affect eligibility for parole. That is a distinction without a material difference. It is firmly established in our law that the availability of parole is an element that fits within the concept of punishment and so the law that was applicable at the time that the offence occurred should be the law that governs the terms of the accused's punishment. As a result I have concluded that it is appropriate for this Court to issue a declaration that the eligibility for parole of this Applicant should be determined by the provisions of the Corrections and Conditional Release Act in effect at the time of the commission of the offence.

[31] By retrospectively applying the CCRA in determining his eligibility for day or full parole, the Applicant argues that the PBC and Appeal Board acted outside their jurisdiction and outside of the laws of Canada: *Abel*, above; *Langard*, above; and *Le v Canada (Attorney General)*, [2001] FCT 156 (FCTD) [*Lee*]. He says that the only parole regime that can properly be applied to his parole determinations, currently and at all times since he was incarcerated, is the *Parole Act*, RSC 1985, c P-2, as am. by c 35 (2nd Supp) [*Parole Act*] and the *Parole Regulations*, SOR/78-428.

[32] The Applicant also says that he was not allowed to introduce relevant jurisprudence on this point into the record while presenting his case before the PBC, and that it was an error for the Appeal Board to state that it was an administrative tribunal and did not need to follow the formal rules of evidence. The Applicant contends that this jurisprudence was essential to his position, and

there is no provision in the CCRA that gives the PBC or the Appeal Board the power to exclude or prevent the introduction of relevant information. He says it was unreasonable for the Appeal Board to conclude that the PBC did not err by disallowing the Applicant to present it.

[33] The Applicant further submits that he has been incarcerated far beyond the time when he should have been paroled, and this is in violation of section 12 of the *Charter*. His argument is that the PBC and the Appeal Board failed to tailor his indeterminate sentence to the circumstances, resulting in cruel and unusual punishment contrary to section 12 of the *Charter* (*Steele v Mountain Institution*, [1990] 2 SCR 1385 [*Steele*]).

[34] The Applicant says that the reasoning in *Steele* applies to his case, because the Appeal Board in denying him parole improperly applied the objective stated in section 100.1 of the CCRA (subsection 101(a) at the time of the PBC hearing), which makes the protection of society the paramount consideration for parole determinations. In doing so, it disregarded the criteria that should have been applied to his case, as set out in subsection 16(1) of the former *Parole Act*. He argues that section 100.1 of the CCRA effectively operates as an override clause that allows the PBC to disregard his liberty and security of the person interests under sections 7 and 12 of the *Charter* in favour of the "protection of society".

[35] He also argues that the Appeal Board should have considered the sentencing judge's estimated time in custody as an effective means of gauging the duration of time he should have spent in custody under the parole regime that existed when he was sentenced. By this measure, he

has suffered cruel and unusual punishment due to the repeated application of the wrong statute to his parole determinations over the course of many years.

[36] The Applicant refers to the reasoning in *Galbraith v Mountain Institution*, [1988] BCJ No 2043 (QL) (BCSC) at page 9, which he says should have been applied in his case:

> The Parole Board must consider specific criteria that are set out in s. 10 of the *Parole Act*, R.S.C. 1970, c.P-2. That section reads:
>
> > "10.(1)
> >
> > The Board may:
> >
> > (a) grant parole to an inmate, subject to any terms and conditions it considers desirable, if the Board considers that:
> >
> > (i) In the case of a grant of parole other than day parole, the inmate has derived the maximum benefit from imprisonment,
> > (ii) The reform and rehabilitation of the inmate will be aided by the grant of parole and;
> > (iii) The release of the inmate on parole would not constitute an undue risk to society;"
>
> La Forest J. held that the mandatory review based on the criteria outlined above save the indeterminate term of imprisonment from violating s. 12. His Lordship stated on p. 342 that:
>
> > "While the criteria embodied in s. 10(l)(a) do not purport to replicate the factual findings required to sentence the offender to an indeterminate term of imprisonment, they do afford a measure of tailoring adequate to save the legislation from violating s. 12. It must be remembered that the offender is being sentenced indeterminately because at the time of sentencing he was found to have a certain propensity. The sentence is imposed "in lieu of any other sentence" that might have been imposed and, like any other such sentence must be served according to its tenor. The offender is not being sentenced to a term of imprisonment until he is no longer a dangerous

> offender. Indeed, s. 695.1 provides that the circumstances of the offender be reviewed for the purpose of determining whether parole should be granted and, if so, on what conditions; it does not provide that the label of dangerous offender be removed or altered. Finally, the very words of s. 695.1 of the code and s. 10(l)(a) of the *Parole Act* establish an on-going process for rendering the sentence meted out to a dangerous offender, one that accords with his or her specific circumstances."

[37] The Applicant submits that it was unreasonable for the Appeal Board to find that he had not yet mitigated his risk, despite recent gains. The Applicant went through the high-intensity ICPM program, and successfully completed the program with improvements in all areas. He received an overall rating of "good," which is the highest grade available, as the policy amongst facilitators is to leave room for improvement. The conclusion that the Applicant had not yet mitigated his risk was central to the Decision, and it was unreasonable.

[38] Further, he says it was unreasonable for the Appeal Board to refer to the Applicant as an "untreated sex offender," or to state that he has yet to mitigate his risk despite undergoing treatment, which the Applicant submits is an equivalent phrase. The Applicant has successfully completed available programming, so he should not be referred to as "untreated." The Applicant is also not permitted to take the program again, which leaves him in a position where he will never be considered to be "treated." In *Pinkney v Canada (Correctional Service)*, 2001 FCT 1053 (FCTD), the Court ordered that the Correctional Board refrain from using the "psychopath" label arising from a questionable risk assessment.

[39] The Applicant says that it was also unreasonable for the Appeal Board not to take into account the statements of the sentencing judge that he expected the Applicant would serve between 5 and 7 years in prison. The Applicant says that the purpose of the CCRA, as set out in section 100, and the guiding principles set out in section 101 require that the sentencing judge's intentions be considered, as indicated by the words in subsection 101(b) that "parole boards take into consideration all available information that is relevant to a case, including the stated reasons and recommendations of the sentencing judge".

[40] The Appeal Board also improperly altered the wording of the CCRA when it stated: "Please note that consistent with section 223 of the CCRA, any offender who began his sentence under the former Act will be dealt with as if he had begun his sentence under this Act." The Applicant points out that section 223 actually reads: "A review of the case of an offender begun under the former Act shall be continued after the commencement day as if it had been begun under this Act." The Applicant says that this constitutes a failure of the Appeal Board to comply with its statutory mandate, and causes it to lose jurisdiction. The Applicant suggests that as a result of this loss of jurisdiction, all subsequent decisions are invalid, his detention is unlawful, and the Court ought to examine the remedy of *habeas corpus*: *Fraser v Kent Institution*, (1997) 167 DLR (4^{th}) 457 (BCCA) [*Fraser*].

[41] The Applicant also says the Appeal Board failed to fully address the issues raised in his appeal. Acknowledging the grounds raised does not equate to responding to them, and the failure to do so amounts to a failure to exercise the Appeal Board's jurisdiction. The Applicant asks the Court to issue a declaration that this was unlawful.

[42] The Applicant further argues that having denied him permission to cross examine his IPO, the PBC failed in its duty to ensure he received a fair hearing by refusing to put questions to the IPO which were raised by the Applicant. Given the objections raised by the Applicant about the factual accuracy of the information before the PBC, the Board had a duty to at least make a reasonable attempt to ascertain whether the information was false or in some way compromised.

[43] The Applicant also submits that he did not receive all relevant materials 15 days before the hearing, and that this constituted a breach of procedural fairness: *Fraser*, above.

[44] The Applicant argues that the above-noted breaches of procedural fairness should result in the quashing of the Decision, whether or not they resulted in a substantial miscarriage of justice: *Pickard v Mountain Institution* (1994), 75 FTR 147 (FCTD).

The Respondent

Procedural Fairness

[45] The Respondent submits that the Applicant does not have the right to cross-examine at a parole hearing before the PBC or the Appeal Board. Neither body acts in a judicial or quasi-judicial capacity, and the traditional rules of evidence do not apply (*Mooring v Canada (National Parole Board)*, [1996] 1 SCR 75 [*Mooring*] at paragraphs 25-29).

[46] The PBC's alleged failure to accept case law put before it by the Applicant also does not constitute a breach of procedural fairness. The Appeal Board did not err in concluding that the PBC acted reasonably on this issue. The PBC did accept a copy of the *Abel* decision for their record, and did consider it, but found that it did not apply. Further, even if the PBC had not considered this decision, it would not be tantamount to a breach of procedural fairness or any other unlawful act. As noted above, the hearing was an administrative process with no formal rules of evidence, and there was no requirement that the PBC interpret and apply jurisprudence. The PBC was acting in an inquisitorial capacity to determine whether the Applicant would present an undue risk to society if released on parole.

[47] As regards the Applicant's contention that there was a breach of procedural fairness because he did not receive all relevant materials within the statutory timeframe, this would not have affected the ultimate reasonableness of the Decision, so judicial review should not be granted. The process does not have to be executed perfectly for it to be fair: *Yu v Canada (Attorney General)*, 2009 FC 1201 [*Yu*] at paragraphs 28-30; *Uniboard Surfaces Inc. v Kronotex Fussboden GmbH and Co.*, 2006 FCA 398 [*Uniboard Surfaces*] at paragraph 48.

[48] In this case, there was no omission on the part of the PBC, but rather an administrative delay of nine days in delivering the reasons for its decision to the Applicant. The Applicant had already been informed of the decision to deny him parole at the conclusion of his parole hearing on January 24, 2012. The Applicant was not prejudiced by this delay in any way (*Yu*, above, at paragraph 30). The Applicant was able to bring his appeal before the Appeal Board.

Jurisdiction

[49] The Applicant states that the Appeal Board's application of provisions of the CCRA is constitutionally invalid and is a violation of his rights under section 12 of the *Charter*, but the Respondent says that the Appeal Board was correct in referring to section 223 of the CCRA in finding that the CCRA applies as of the commencement date of the Act, which is 1 November 1992. The Appeal Board did not apply the wrong statute: *Roxborough v Canada (National Parole Board)*, (1994) 80 FTR 26 (FCTD) [*Roxborough*] at paragraphs 37, 44.

[50] Furthermore, the manner in which the Appeal Board referred to section 223 of the CCRA did not cause it to lose jurisdiction. The Appeal Board did not modify the language of the CCRA; it simply explained to the Applicant that his sentence, including his parole reviews, is governed by the CCRA, despite the fact that he commenced his sentence under the former legislation.

[51] Even if the Court were to find that the Appeal Board erred in paraphrasing section 223 of the CCRA, the Respondent submits that this is not a material error. It has no impact on the legal test that was required to be applied in determining whether the Applicant should be granted parole. The CCRA clearly applies to the Applicant. The PBC conducted a full review of the Applicant's file, heard the Applicant's submissions and applied the correct legal criteria to determine whether the Applicant's release would constitute an undue risk to the public: *Cartier v Canada (Attorney General)*, 2002 FCA 384 [*Cartier*] at paragraphs 29-36.

Errors of Law

[52] There is no merit to the Applicant's argument that it was an error for the PBC not to explicitly consider the sentencing judge's intention in imposing the Applicant's sentence, the Respondent argues. There is an obligation under subsection 101(a) of the CCRA to consider the reasons for the sentence, but there is no obligation to consider a sentencing judge's "intentions".

[53] Moreover, a tribunal member is presumed to have considered all the evidence unless the Applicant provides evidence to the contrary: *Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (FCA). The Applicant has not demonstrated that the PBC failed to consider the sentencing judge's reasons for the sentence. Furthermore, the Applicant did not raise this as an issue before the Appeal Board, so there can be no issue in the Appeal Board failing to consider an issue that was not placed before it.

[54] The Applicant also claims that the Appeal Board failed to respond to the grounds listed in the Applicant's appeal of the PBC decision. The Applicant, however, has failed to articulate what grounds of appeal the Appeal Board did not address. Moreover, although the Appeal Board may have summarized some of the grounds of appeal, a review of the Decision makes it clear that the Appeal Board responded to all of the Applicant's concerns.

Reasonableness

[55] The Applicant objects to the use of the term "untreated sex offender," and says that the Appeal Board erred by failing to recognized that this term is based on unsupported and false information. The Respondent submits that there is no merit to this argument.

[56] First, the professional opinions included in the Applicant's file fully take into account his successful completion of the ICPM Program. Second, the Appeal Board is not in a position to second guess the opinions of these experts. The Appeal Board and the PBC are entitled to rely on whatever materials in the Applicant's file they find to be reliable and persuasive: *A.S.R. v Canada (National Parole Board)*, 2002 FCT 741 (FCTD). Finally, as noted by the Appeal Board, if the Applicant believes that his assessment as an "untreated sex offender" in the psychological report is an error, the proper recourse is to make a request pursuant to subsection 24(2) of the CCRA to correct information that he considers to be erroneous.

***Charter* Rights**

[57] The Respondent submits that there is no merit to the Applicant's argument that he has suffered a breach of his section 12 *Charter* rights. The Applicant's submissions in this respect are based on his erroneous argument that the repealed former legislation applies to his parole review. As outlined above, it is the CCRA that applies to the Applicant's parole review: *Collier v Canada (Attorney General)*, 2006 FC 728 [*Collier*].

[58] Moreover, the application of the CCRA to the Applicant's parole review did not result in a breach of his section 12 *Charter* rights. In the case of someone serving an indeterminate sentence, the offender's continued incarceration may be found to infringe section 12 of the *Charter* if the PBC fails to apply the statutory criteria for parole to the individualized circumstances of the offender's case: *Steele*, above, at paragraphs 61-67; *Bouchard v Canada (National Parole Board)*, 2008 FC 248 at paragraphs 42-44.

[59] In this case, the Appeal Board correctly noted that the PBC considered whether the circumstances of the Applicant's case were properly addressed to ensure that his continued incarceration had not become grossly disproportionate. The PBC did a full review of the Applicant's file, and concluded that the gains he had made were recent and that these gains were not sufficient to mitigate the risk that he may re-offend. The PBC also referenced efforts to accommodate the Applicant's needs and the progress that he is making in his correctional plan. Thus, the PBC reasonably concluded that the circumstances of the Applicant's case do not establish a breach of section 12 of the *Charter*.

Remedy

[60] Should the Court find that the Appeal Board erred in its consideration of the documents referring to the Applicant as an "untreated sex offender," the Respondent submits that the remedies requested by the Applicant are not appropriate. The appropriate recourse is for the Applicant to pursue a grievance by way of subsection 24(2) of the CCRA. In any event, the psychological report and the A4D are not before this Court for review.

ANALYSIS

[61] The Applicant has made extensive written submissions in this application, some of which are irrelevant to the issues before me and some of which are highly repetitive. As the Applicant explained in the hearing before me, as a self-represented litigant, he has had to undertake considerable research and self-education so that he now understands far better than he did when he composed his Memorandum of Fact and Law how to frame and argue his points of concern.

[62] By the time of the hearing before me, in fact, I am satisfied that the Applicant had a solid grasp of the relevant issues he raises on review and of the applicable legal principles. He is highly articulate and demonstrated considerable skills as an advocate.

Applicability of CCRA

[63] Underlying the Applicant's grounds for review is a central allegation that it was an error of law and an excess of jurisdiction for the PBC and the Appeal Division to assess his eligibility for day or full parole under the CCRA. He says that he should have been assessed under the former *Parole Act* and he relies upon the cases of *Steele*, *Le*, *Langard* and *Abel*, above, as authority for this proposition. My review of these cases suggests to me that they do not address the issue.

[64] This matter was raised by the Applicant before the Appeal Board which found that, as a consequence of section 223 of the CCRA, the Applicant's request for parole was correctly dealt with under the CCRA. Section 223 reads as follows:

223. A review of the case of an offender begun under the former Act shall be continued after the commencement day as if it had been begun under this Act.	223. L'examen des dossiers en instance se poursuit indépendamment de la loi antérieure sous le régime de la présente loi.

[65] The Applicant argues that this section means that the CCRA, insofar as the criteria for assessment are concerned, is not applicable to his assessment. He says it only applies to the "review of the case," so that the review will continue under CCRA but will be conducted in accordance with the criteria set forth in the old *Parole Act*.

[66] The Respondent takes the view that the Appeal Division correctly referred the Applicant to section 223 of the CCRA, and that *Roxborough*, above, has settled this issue.

[67] The Respondent argues, by analogy with *Roxborough*, that since the Applicant's hearing with the PBC took place on January 24, 2012, it did not begin under the *Parole Act*, and therefore "it is the law that existed at the time the [parole hearing] took place which must be applied." The Applicant says that this interpretation of section 223 by Justice Teitelbaum in *Roxborough* has been reversed and superseded by the decisions in *Steele*, *Le*, *Langard* and *Abel*, all above, but he fails to explain how.

Overview of Conclusions Regarding Applicability of the CCRA

[68] Based upon a review of the relevant jurisprudence, the Court cannot accept the Applicant's argument that, while the CCRA may govern the parole review process, it is the criteria set out in subsection 16(1) of the former *Parole Act* that must govern parole determinations in his case. In coming to this conclusion, I make the following general observations, before coming to a more detailed discussion of the relevant case law:

- The transitional provisions of the CCRA do not provide for the application of the former *Parole Act* in the Applicant's circumstances. They do provide for such application in other specific circumstances (see *Langard*, above), suggesting that if Parliament had intended the *Parole Act* to apply to the present circumstances, it would have said so;

- Section 223 of the Act, discussed in *Roxborough*, above and cited by the Respondent in explaining why the CCRA applies, is relevant here, but only indirectly. The CCRA applies, but not by virtue of section 223;

- The Federal Court of Appeal has recently affirmed, in response to an argument very similar to the Applicant's argument here, that it is the criteria set out in the CCRA that apply to offenders sentenced before that Act came into force, at least in the absence of a successful constitutional challenge (see *Ouellette c Canada (Procureur général)*, 2013 CAF 54 [*Ouellette*], discussed below but not cited by the parties);

- From a constitutional perspective, the issue of retrospective application must be considered in the context of the specific *Charter* provision at issue. While subsection 11(i) (at issue in

Abel, above) is not relevant here, subsection 11(h) (at issue in *Whaling v Canada (Attorney General)*, 2012 BCSC 944, aff'd 2012 BCCA 435, leave to appeal granted [2012] SCCA No 431 [*Whaling*], discussed below but not cited by the parties) could be. Most relevant is section 12 (discussed in *Steele*, above and *R v Lyons*, [1987] 2 SCR 309), upon which the Applicant bases his argument about retrospective application of the CCRA;

- In the end, it is my view that the constitutional concern that arises is not one of retrospective application, but whether the new criteria are capable of ensuring that the punishment does not become grossly disproportionate to the crimes committed, contrary to section 12 of the *Charter*;

- It seems to me that Parliament has raised the bar for parole determinations (at least in the context of indeterminate sentences) through the enactment of subsection 102(b) of the CCRA. The Applicant argues that section 100.1 also raises the bar. Whether this could result in grossly disproportionate (and thus cruel and unusual) punishment I discuss below;

- If I were to conclude that the CCRA criteria themselves pass constitutional scrutiny under section 12 (or that the issue has not been properly raised), *Steele*, above, mandates that the Court consider whether the PBC has properly applied those criteria to the individual case so as to ensure that the punishment does not become cruel and unusual;

- It is not clear to me that there is a sufficient record or sufficient argument on point before me to determine whether the application of subsection 102(b) and section 100.1 of the CCRA to an offender with an indeterminate sentence could result in cruel and unusual punishment contrary to section 12 of the *Charter*. Because I have concluded that the punishment of the

Applicant personally has not reached the level of gross disproportionality, in my view it is not necessary to decide this question; it can be deferred to a proper case.

[69] My review of the relevant case law leads me to the following conclusions:

- *Langard*, above, does not assist the Applicant, as it dealt with the interpretation of a specific transition provision (dealing with day parole eligibility) that is not at issue here. If anything, the existence of that provision supports the Respondent's position: where Parliament intended parts of the former *Parole Act* to still apply, it specifically provided for this in the CCRA;

- *Le*, above, dealt with similar facts to *Langard* in light of subsequent amendments that are not relevant here. While it dealt briefly with the issue of retroactivity, the analysis is not of much assistance here: the Court did not decide whether it is acceptable to apply parole eligibility provisions retrospectively; it simply found that what occurred in *Le* did not amount to a retrospective application of the Act. I come to a similar conclusion regarding the current matter, but for different reasons than those cited in *Le*;

- In *Roxborough*, above, the Court found that the current provisions of the CCRA applied, essentially because neither the transitional provisions nor section 7 of the *Charter* entitled the applicant to have the former *Parole Act* apply to him. This is relevant to the current matter, but *Ouellette* (discussed below) is more directly on point. Note, too, that in my view section 223 was not decisive in *Roxborough* and is not directly applicable here (see discussion below);

- *Abel*, above, and two other cases, which come to the opposite conclusion on the same point (*Berenstein v Commission national des liberation conditionnelles*, (1996) 111 FTR 231 (FCTD) [*Berenstein*] and *R v Caruna*, [2002] OJ No 162 (QL) (Ont Sup Ct) [*Caruna*]), are not directly relevant here because: 1) they dealt with parole eligibility, which is not at issue here; and 2) they dealt with changes to the law that occurred between the offence and sentencing and not (as here) changes to the law after sentencing. Thus (although the language in *Abel*, above, obscures this somewhat), these cases turned on the proper application of subsection 11(i) of the *Charter*, which is not relevant here;

- *Steele*, above, is relevant to the present case, and must be read in conjunction with *Lyons*, also above, where the Supreme Court of Canada found that the parole review process saved the indeterminate sentencing provisions of the Criminal Code from constitutional invalidity. In *Steele*, the Court found that the PBC erred in applying the statutory criteria for parole, resulting in a punishment that was grossly disproportionate to the crimes committed and was thus cruel and unusual contrary to section 12 of the *Charter*. In my view (see also *Ouellette*, above, on this point), *Lyons* and *Steele* do not say that the criteria set out in subsection 16(1) of the former *Parole Act* are constitutionally mandated. On the other hand, they make it clear that the specific criteria to be applied on parole review are relevant to the constitutional validity of the indeterminate sentence regime: the criteria must be capable of ensuring that the punishment does not become grossly disproportionate. As such, amendments to those criteria are a proper subject for constitutional scrutiny under section 12 of the *Charter* in relation to the indeterminate sentence regime. In other words, it is my view that the Applicant has at least raised a legitimate constitutional concern;

- *Ouellette*, above, involved an offender sentenced to life in prison who argued, based on *Steele*, above, that the PBC had to consider whether he had derived the maximum benefit from imprisonment (one of the criteria under the former *Parole Act*). The Federal Court of Appeal found that the applicant misunderstood *Steele*: that case did not state that the criteria from the former *Parole Act* were constitutionally mandated. The Court affirmed that, absent a constitutional challenge, it is the criteria for parole set out in CCRA that apply to individuals serving sentences that were imposed before that Act came into force. However, the Court did not rule out the possibility of a successful constitutional challenge, and emphasized the unique circumstances of those sentenced to indeterminate sentences;

- *Whaling*, above, is a recent B.C. case where both the trial court and the B.C. Court of Appeal found to be unconstitutional the retrospective application of amendments to the CCRA that extended the plaintiffs' parole ineligibility by eliminating accelerated day parole. The Supreme Court of Canada has just heard an appeal in this case and reserved judgment. The B.C. trial and appeal courts found that the retrospective application of the amendments violated subsection 11(h) of the *Charter*, because it made the sentence more harsh and amounted further punishment.

[70] The question this finding from *Whaling*, above, raises for the present matter is whether a change in the statutory test for parole (as opposed to parole eligibility) can have the same effect. My view is that there is an important difference: parole determinations turn on considerations that are not related to the fitness of the sentence (they relate rather to fitness for release). By contrast, the

Court found in *Whaling* that prior determinations of parole ineligibility really relate to considerations of punishment, at least in part. In view of this distinction, retrospective application does not arise here: the CCRA applies current criteria to current circumstances in making parole determinations. Parole review does not relate to punishment for past crimes, but rather involves a determination of whether an applicant is (in the present) fit for release.

[71] This analysis suggests to me that whether or not the CCRA criteria can lawfully be applied to parole determinations in the Applicant's case turns on whether doing so violates section 12 of the *Charter*.

[72] I will now review the important and relevant cases in more detail.

Review of Case Law Regarding "Retrospective Application" of the CCRA

[73] In my view, *Roxborough*, above, does not address circumstances directly analogous to the current case, but it does speak to relevant principles, at least by implication. The transitional provision in question, section 223 of the Act, is the same one raised in the present proceeding.

[74] The case involved a prisoner who was granted day parole under the former *Parole Act*, breached a parole condition on the day of his release by consuming alcohol, and had his parole suspended and was taken back into custody under the former *Parole Act*. However, by the time the post-suspension hearing was conducted by the PBC (to determine the longer term implications of his parole breach), the CCRA had come into force. The old law provided greater scope for leniency

than the new law, so Mr. Roxborough argued that he was entitled to have the old law applied on constitutional grounds. He argued that delays in having him transferred back to a federal institution led to delays in his post-suspension hearing, which negatively impacted his liberty interests under section 7 of the *Charter*.

[75] Justice Teitelbaum reviewed the different types of liberty interest involved in the context of correctional law, as set out in *Dumas v Leclerc Institute*, [1986] 2 SCR 459, and was not persuaded that any of them were negatively impacted. Thus, section 7 of the *Charter* did not entitle Mr. Roxborough to have his case considered under the *Parole Act* (paragraph 46).

[76] Justice Teitelbaum also found that the fact that the parole suspension occurred under the *Parole Act* did not mean that the "review" had commenced under that Act. While the language of the judgment (at paragraph 44) obscures this point, on a plain reading of section 223, the opposite finding would not have led to the *Parole Act* being applied. In fact, section 223 has exactly the opposite import:

> 223. A review of the case of an offender begun under the former Act shall be continued after the commencement day as if it had been begun under this Act.

[77] Thus, section 223 did not have direct application in *Roxborough*, above (the review at issue had not begun under the *Parole Act*), and it has no direct application in this case (the review at issue here did not begin under the *Parole Act* either). If section 223 has relevance it is by implication: if reviews commenced under the previous *Parole Act* are to be treated as if they began under the current Act, surely reviews begun after the CCRA came into force must be conducted in the same

manner, as the opposite conclusion would be absurd. Thus in my view, the Appeal Board in the present case was correct in stating that it is "consistent with" section 223 to apply the CCRA to the Applicant's case, though it would not be correct to say that the CCRA applies "by virtue of" section 223.

[78] The real import of *Roxborough*, above, for the current case, in my view, is the finding that it was the Act in effect at the date of the hearing that had to be applied (see also *Ouellette*, above, discussed below). This was so because neither the constitution nor the transitional provisions of the CCRA entitled the applicant to have the provisions of the former *Parole Act* applied. This is in contrast to *Langard*, above, where there was a specific transitional provision that applied to the facts of the case, making certain provisions of the previous *Parole Act* applicable.

[79] *Abel*, above, is one of several decisions that have addressed situations where the law regarding parole eligibility has changed between the commission of the offence and the date of sentencing. These cases have considered whether subsection 11(i) of the *Charter* requires that the previous (more lenient) parole eligibility provisions be applied, and have come to different conclusions.

[80] Subsection 11(i) of the *Charter* provides that:

11. Any person charged with an offence has the right	11. Tout inculpé a le droit :
[…]	[…]
(i) if found guilty of the offence and if the punishment for the offence has been varied	i) de bénéficier de la peine la moins sévère, lorsque la peine qui sanctionne l'infraction dont

between the time of commission and the time of sentencing, to the benefit of the lesser punishment.	il est déclaré coupable est modifiée entre le moment de la perpétration de l'infraction et celui de la sentence.

[81] *Abel*, above, found at paragraph 16 (relying on *R v Gamble*, [1988] 2 SCR 595 [*Gamble*]) that parole ineligibility, whether imposed by a judge or by statute, is part of the punishment imposed, and so the more lenient provision (or "the law that was applicable at the time that the offence occurred") must govern. Two other cases, *Berenstein* and *Caruna*, both above, have come to the opposite conclusion, finding that parole ineligibility imposed by statute affects only the "manner in which a sentence of detention is to be served" and thus "does not impose a 'punishment'" within the meaning of subsection 11(i) of the *Charter* (*Berenstein* at 236, quoted with approval in *Caruna* at paragraph 7). As such, it is the law in force at the time of sentencing that controls "the conditions under which a judicial sentence must be served," including parole ineligibility (*Caruna* at paragraph 9).

[82] *Abel*, *Berenstein* and *Caruna* are not, in my view, directly applicable to the present circumstances, for two reasons. First, this case does not relate to parole eligibility (Mr. Van Boeyen is eligible for parole but the PBC has decided not to grant it). Second, no change in the law between the commission of the offence and sentencing is at issue here. Rather, it is a change in the law subsequent to sentencing that is at issue. Thus, subsection 11(i) of the *Charter* is not relevant, though there could be an argument that subsection 11(h) is relevant if the change in the test for parole amounts to an increase in the "punishment" imposed on the Applicant: see *Whaling* discussed below.

[83] Some confusion regarding the basis for the decision in *Abel* could arise from the language of paragraph 16, which is cited by the Applicant and appears on the surface to base the outcome not on subsection 11(i) of the *Charter* but on the principle stated in *Gamble*, above, that "an accused must be tried and punished under the law in force at the time of the offence." However, in my view, that paragraph must be read in conjunction with the preceding one, which makes it clear that the case turns on the proper application of subsection 11(i) (see *Whaling*, above, at paragraph 71, which also adopts this reading of *Abel*, also above). The relevant paragraphs read as follows:

> **15** The Respondents referred me to *Berenstein v. Commission nationale des liberations conditionnelles* (1996) 111 F.T.R. 231. In that case a similar fact situation arose in that the Applicant committed an offence at a time when day parole could be available after serving one-sixth of the sentence but was sentenced after changes were made to the Act increasing the period of parole ineligibility to one-third of the sentence. The National Parole Board refused to hold a hearing on day parole after he had served one-sixth of the sentence and the inmate applied for a mandamus to compel the Board to hold a hearing claiming that s. 11(i) of the *Charter* of Rights and Freedoms entitled him to the benefit of lesser "punishment". The Court found in dismissing the application that s. 11(1) [sic] of the *Charter* applied only to the process of indictment, trial and sentencing. It did not apply to the Corrections and Conditional Release Act which did not impose "punishment" within the meaning of s. 11(i) but merely set out how a sentence was to be served.
>
> **16** The *Gamble* decision makes it clear that it is fundamental to any legal system which recognizes the rule of law, that an accused must be tried and punished under the law in force at the time of the offence. *Gamble* goes on in interpreting that statement to include parole eligibility as an element of "punishment". While the Respondents say that those cases that clearly follow that principle all deal with the issue at the time that the trial judge imposes sentence, they do not apply where the provisions of the Corrections and Conditional Release Act affect eligibility for parole. That is a distinction without a material difference. It is firmly established in our law that the availability of parole is an element that fits within the concept of punishment and so the law that was applicable at the time that the offence occurred should be the law that governs the terms of the accused's punishment. As a result I have concluded that it is

> appropriate for this Court to issue a declaration that the eligibility for parole of this Applicant should be determined by the provisions of the Corrections and Conditional Release Act in effect at the time of the commission of the offence.

[84] The determinative finding (that parole ineligibility forms part of the punishment) is made in the context of distinguishing the analysis in *Berenstein*, above, on the proper application of subsection 11(i) of the *Charter*. In addition, the principle that "an accused must be tried and punished under the law in force at the time of the offence" was stated in *Gamble*, above, as a fundamental principle of justice within the context of section 7 of the *Charter*, not as a free-standing common law principle (in which case it could be displaced by statue), and it must be understood and applied in the *Charter* context. This principle was used in *Abel*, above, to inform the proper application of subsection 11(i), while in *Gamble* (discussed below) it was the basis of a successful argument based on section 7.

[85] Based on the above discussion, *Gamble* and *Abel* do not have the effect of preventing the application to the Applicant's case of statutory criteria for parole that were enacted after he was sentenced. Rather, the application of the new criteria would be prohibited only if it is established that applying the new test would violate the *Charter*. I believe the recent Federal Court of Appeal decision in *Ouellette* (discussed below) is conclusive on this point. See also *Whaling* (discussed below).

[86] *Steele*, above, is relied upon heavily by the Applicant but *Steele* must be understood in conjunction with the Supreme Court of Canada's prior decision in *Lyons*, above. In that case, the Supreme Court considered whether the dangerous offender provisions in the *Criminal Code* (and

specifically the provision for an indeterminate sentence) violated sections 7, 9, 11 or 12 of the *Charter*. Particularly relevant to *Steele* is the Court's consideration in *Lyons* of the section 12 issues. The Court found that section 12 concerns are heightened in the dangerous offender context, giving parole determinations special constitutional significance:

> 47 In truth, there is a significant difference between the effect of a Part XXI [now Part XXIV] sentence and other, more typical, sentences. When a person is imprisoned for an absolute and determinate period, there is at least the certainty that the incarceration will end at the termination of that period... For the offender undergoing an indeterminate sentence, however, the sole hope of release is parole… [W]hatever the legal nature of the interest in the availability of parole may be in general, it seems to me that, as a factual matter, the availability of parole is not as important a factor in deciding whether a determinate sentence is cruel and unusual as it is in assessing the constitutionality of a Part XXI [now Part XXIV] sentence.
>
> 48 This is so because in the context of a determinate sentencing scheme the availability of parole represents an additional, superadded protection of the liberty interests of the offender. In the present context, however, it is, subsequent to the actual imposition of the sentence itself, the sole protection [page341] of the dangerous offender's liberty interests. Indeed, from the point of view of the dangerous offender his or her detention is never complete until it is factually complete. In this sense, each opportunity for parole will appear to the dangerous offender as the sole mechanism for terminating his or her detention, for rendering it certain. Moreover, it is clear that an enlightened inquiry under s. 12 must concern itself, first and foremost, with the way in which the effects of punishment are likely to be experienced. Seen in this light, therefore, the parole process assumes the utmost significance for it is that process alone that is capable of truly accommodating and tailoring the sentence to fit the circumstances of the individual offender.
>
> [Emphasis added]

[87] The Supreme Court of Canada in *Lyons*, above, found that in the absence of regular individualized review, the dangerous offender provisions would be likely in some cases to result in

grossly disproportionate punishment contrary to section 12 of the *Charter*, but that the provisions were saved from unconstitutionality by the parole review process itself:

> 49 In my opinion, if the sentence imposed under Part XXI was indeterminate, simpliciter, it would be certain, at least occasionally, to result in sentences grossly disproportionate to what individual offenders deserved. However, I believe that the parole process saves the legislation from being successfully challenged under s. 12, for it ensures that incarceration is imposed for only as long as the circumstances of the individual case require.
>
> [Emphasis added]

[88] The Supreme Court in *Lyons*, above, undertook a careful analysis of the criteria applied to such parole reviews, by virtue of (then) subsection 695.1(1) of the *Criminal Code* (now subsection 761(1)) and (then) subsection 10(1)(a) of the *Parole Act*, which were the same as the criteria set out in subsection 16(1) of the *Parole Act* when Mr. Van Boeyen was sentenced as a dangerous offender. While the Supreme Court did not state that these criteria were constitutionally mandated (see *Ouellette*, above, discussed below), the Court's opinion that these criteria were well-suited to the purpose of tailoring indeterminate sentences to the specific circumstances of each case was clearly important to its finding that the parole review process saved the dangerous offender provisions from constitutional invalidity. Put differently, it cannot be assumed that this process would pass constitutional muster in relation to dangerous offenders regardless of the criteria applied: the criteria were central to the constitutional analysis in *Lyons* (see paragraphs 50-56). At the same time, the Supreme Court observed that the term "grossly proportionate" indicates that Courts should "not hold Parliament to a standard so exacting, at least in the context of section 12, as to require punishments to be perfectly suited to accommodate the moral nuances of every crime and every offender."

[89] Against this backdrop, the Court in *Steele*, above, considered whether the continued imprisonment of a dangerous offender who had been incarcerated for 37 years amounted to cruel and unusual punishment contrary to section 12 of the *Charter*. The Court found that the "inordinate length" of Mr. Steele's incarceration had "long since become grossly disproportionate to the circumstances of this case" (paragraph 79). This was not the result of structural flaws in the scheme governing indeterminate sentences, but due to the failure of the PBC to properly apply the criteria for parole (paragraphs 63, 67). The Court placed significant emphasis on these criteria, citing *Lyons* for the proposition that "it is fundamentally important that the Board consider these criteria" and "[i]t is only by a careful consideration and application of these criteria that the indeterminate sentence can be made to fit the circumstances of the individual offender. Doing this will ensure that the dangerous offender sentencing provisions do not violate section 12 of the *Charter*" (at paragraphs 66-67; see also paragraph 83).

[90] In *Steele*, the PBC had "misapplied or disregarded those criteria over a period of years" (paragraph 67). In particular, the PBC placed undue focus on parole violations (missing curfews and drinking alcohol) that occurred on each occasion that Mr. Steele was released on day parole, which were indicative of minor adjustment issues, "rather than focusing upon the crucial issue of whether granting him parole would constitute an undue risk to society" (paragraph 79). In consequence, "the parole review process has failed to ensure that Steele's sentence has been tailored to fit his circumstances" (paragraph 79). The Court found that it was "difficult to find any evidence of acts committed by Steele during the past two decades that would suggest that he remained an undue risk to society" (paragraph 75), and noted that thirteen of sixteen psychiatrists and psychologists who expressed an opinion over the years on whether Mr. Steele should be paroled had recommended

some form of parole (paragraph 72). The Court's assessment of the case, and of the threshold for similar findings, is reflected in the following paragraphs:

> 79 In my view the evidence presented demonstrates that the National Parole Board has erred in its application of the criteria set out in s. 16(1)(a) of the Parole Act. The Board appears to have based its decision to deny parole upon relatively minor and apparently explicable breaches of discipline committed by Steele, rather than focusing upon the crucial issue of whether granting him parole would constitute an undue risk to society. As a result of these errors, the parole review process has failed to ensure that Steele's sentence has been tailored to fit his circumstances. The inordinate length of his incarceration has long since become grossly disproportionate to the circumstances of this case.
>
> 80 It will only be on rare and unique occasions that a court will find a sentence so grossly disproportionate that it violates the provisions of s. 12 of the *Charter*. The test for determining whether a sentence is disproportionately long is very properly stringent and demanding. A lesser test would tend to trivialize the *Charter*.

[91] As in *Lyons*, the Court in *Steele*, both above, stopped short of saying that the criteria set out in subsection 16(1) of the former *Parole Act* were constitutionally mandated, but placed significant emphasis on those criteria in its constitutional analysis. It also signalled that whether an offender continues to pose an undue risk to society was the "most important factor," and stated that "[i]f an inmate's release continues to constitute an undue risk to the public, then his or her detention can be justifiably maintained for a lifetime" (paragraph 71).

[92] It is also notable, in relation to the Applicant's argument in the present case, that the Supreme Court in *Steele* applied the law on parole as it existed at the time of the PBC decision under review, not the law as it existed when Mr. Steele's indeterminate sentence was imposed. Mr. Steele was sentenced in 1953. At that time, the provision governing parole was subsection 8(a)

of the *Parole Act*, which did not include risk to the public as a criterion (see *Steele*, above, at paras 64-65).

[93] *Collier*, above, like the present case, involved a dangerous offender sentenced to an indeterminate sentence prior to the coming into force of the CCRA. The applicant argued, based on *Steele*, that his continuing imprisonment amounted to grossly disproportionate punishment contrary to section 12 of the *Charter*.

[94] In reviewing the *Steele* precedent, above, Justice Lemieux noted the repeal and replacement of the former *Parole Act* (paragraph 34). He seemed to accept that it was the new parole criteria set out in the CCRA that applied (see paragraph 44), including the requirement embodied in sections 101 and 102 of the Act that the PBC must be guided by the protection of society as a paramount consideration in the determination of parole, balanced with making the least restrictive choice (see paragraph 20). The applicant in that case does not appear to have argued that the provisions of the former *Parole Act* should have applied, and so there is no discussion on this point.

[95] In *Ouellette*, above, the Federal Court of Appeal considered the situation of an individual sentenced to life in prison with no eligibility of parole for 25 years. The sentence was imposed in 1989, prior to the coming into force of the CCRA. The Court affirmed that the criteria governing release on parole were those set out in section 102 of the CCRA.

[96] The Court considered the applicant / appellant's argument, based on *Steele* (see paragraph 40), that in order to comply with section 12 of the *Charter*, the PBC had to consider whether he had

derived the maximum benefit from imprisonment – one of the criteria set out in subsection 16(1) of the former *Parole Act*, which does not appear in the CCRA. The Court found that this argument misunderstood *Steele* in two ways. First, it is important to distinguish between individuals sentenced to life in prison, such as the appellant in that case, and dangerous offenders sentenced to indeterminate sentences. *Steele* dealt with the latter case, and was not necessarily relevant in relation to a sentence of life imprisonment. Second, the Court's analysis in *Steele* simply reflects the criteria for parole set out in the legislation in force at the time, which have since changed. The Supreme Court of Canada did not say in *Steele* that those specific criteria were constitutionally mandated. Parliament is free to change these criteria or put new ones in place provided they conform with the *Charter*. Since the constitutionality of the new criteria was not challenged, there was no basis for finding that the PBC's decision was contrary to the *Charter* or the principles in *Steele* (see paragraphs 46 – 50).

[97] In my view, the analysis in *Ouellette*, above, is highly relevant to the present case. First, the Court of Appeal affirmed that, absent a constitutional challenge, it is the criteria for parole set out in the CCRA that apply to individuals currently serving sentences that were imposed prior to the coming into force of that Act. Second, the Court did not rule out the possibility that the application of these criteria to individuals sentenced prior to 1992 could be challenged on the basis of section 12 of the *Charter*. Third, the Court's analysis of *Steele* suggests that constitutional scrutiny of those criteria may be particularly appropriate in relation to indeterminate sentences.

[98] In *Whaling*, above, (appeal heard and judgment reserved by the Supreme Court of Canada on October 15, 2013), three plaintiffs challenged the retrospective application of the *Abolition of*

Early Parole Act, SC 2011, c 11, which amended the CCRA to eliminate accelerated day parole. According to the law when they were sentenced, these offenders would have been eligible for release to a halfway house after serving one-sixth of their sentences. After the amendments, they would have to serve one-third of their sentences, and would have to go through the normal parole review process rather than the more streamlined parole review process that previously applied to accelerated day parole. The normal parole review process also involved a more onerous test for parole. The plaintiffs argued that these changes amounted to additional "punishment" imposed after sentencing, thus violating subsection 11(h) of the *Charter* which protects offenders who have been punished for their offences from being punished for those same offences again (paragraph 3). They also argued that his violated their rights under section 7 of the *Charter*, but this question was not decided by either the trial or appeal courts in light of their conclusions on the subsection 11(h) issue.

[99] Subsection 11(h) of the *Charter* reads:

11. Any person charged with an offence has the right	11. Tout inculpé a le droit :
[…]	[…]
(h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again;	h) d'une part de ne pas être jugé de nouveau pour une infraction dont il a été définitivement acquitté, d'autre part de ne pas être jugé ni puni de nouveau pour une infraction dont il a été définitivement déclaré coupable et puni;

[100] The Crown argued that the CCRA amendments changed only the manner in which the plaintiffs' sentences were served, since the offenders are still serving their sentence whether

incarcerated or out on parole – that is, the amendments affected "sentence administration" and not the punishment itself. The trial Court reviewed Supreme Court of Canada jurisprudence that has drawn a distinction between a criminal sentence and the manner in which it is served (including *R v Chaisson*, [1995] 2 SCR 1118; *R v Zinck*, 2003 SCC 6, [2003] 1 SCR 41; *R v CAM*, [1996] 1 SCR 500; *Cunningham v Canada*, [1993] 2 SCR 143; *R v Wust*, 2000 SCC 18, [2000] 1 SCR 455), but found that, when closely examined, these cases show that while "[t]he sentencing and parole regimes have different functions and spheres of responsibility,… they do not exist in separate watertight compartments" (paragraph 112). Changes in parole law were capable of increasing the "harshness" of the sentence, which amounts to additional punishment (paragraph 114). Here, the retrospective increase in the period of parole ineligibility was found to amount to additional punishment, contrary to subsection 11(h):

> 114 That is not to say that no change can be made to corrections and parole law and policy without distorting the sentence imposed. McLachlin J., in *Cunningham*, explained that many changes for administrative and other reasons are inevitable and constitutionally unimpeachable: *Cunningham*, at 152. But, in my view, such changes do not include significant limitations, regardless of any exercise of the Board's discretion, to the parole eligibility of offenders who were sentenced before the legislated changes came into force. When such a change increases the harshness of the sentence, and does so after the judge has imposed it, the change surely occasions additional "punishment".
>
> 115 I therefore conclude that the retrospective effect of the AEPA amendments adds "punishment" over and above the punishment which was contemplated in and imposed by the offenders' sentences. The Transitional Provision therefore violates the offenders' rights under s. 11(h) not to be "punished . . . again" for their offences.
>
> [Emphasis added]

[101] As the words "regardless of any exercise of the Board's discretion" in paragraph 114 above imply, the fact that parole ineligibility removes any opportunity for the exercise of the PBC's

discretion was key to the Court's finding in *Whaling*, above, that parole ineligibility impacts the sentence itself and not just sentence administration (see also the discussion of relevant Supreme Court jurisprudence and U.S. jurisprudence at paragraphs 62, 85, 88-92, 109 and 111). The reasoning seems to be that the involvement of the PBC and the exercise of its discretion shift the focus to fitness for release, whereas an up-front determination of parole ineligibility is at least partially about fitness (or proportionality) of the punishment.

[102] In my view, the relevant question in the current matter is whether a change in the test applied to parole determinations is capable of increasing the harshness of the sentence in a manner that implicates the Applicant's right not to be re-punished under subsection 11(h) of the *Charter*. If changing the test has the effect of increasing the punishment, applying it to the Applicant would violate subsection 11(h). If it has nothing to do with the punishment, but is purely about administration of the sentence, then arguably it is not a retrospective application of anything: it simply applies current criteria to current circumstances.

[103] There is no question that a tougher test may result in longer incarceration, but I do not think that this is sufficient, in itself, to conclude that it increases the sentence. The sentence is indeterminate. The length of incarceration associated with the sentence is only known upon parole (and ultimately, considering the possibility of re-incarceration due to parole violations, upon the death of the dangerous offender). This undoubtedly presents a risk that the sentence could become grossly disproportionate to the crimes committed (as observed in *Lyons*, above), but this is a matter to be considered under section 12 of the *Charter*, not an issue of retrospective application of the law that brings subsection 11(h) into play.

[104] The Applicant in the present case seems to argue, at least by implication, that the sentencing judge imposed the indeterminate sentence with a particular test for parole in mind, and resulting assumptions about the likely length of incarceration that would result. I deal with this matter below but, in any event, there is authority suggesting that the likelihood of parole is not an appropriate consideration for a sentencing judge when assessing the proper sentence. In disagreeing with a legal finding of the trial judge that was not central to the outcome – namely, that that parole considerations are relevant to trial judges in imposing sentences – the B.C. Court of Appeal in *Whaling*, above, made the following observation:

> 52 The jurisprudence of this Court is clear that in imposing a sentence a judge is not to consider how parole may affect it: see *R. v. Bernier*, 2003 BCCA 134 at paras. 45 (per Southin J.A.) and 85-86 (per Prowse J.A. concurring), and *R. v. Tao*, 2010 BCCA 280 at paras. 12-13. Madam Justice Southin said this in Bernier:
>
> > To put this another way, judges, in determining a fit sentence, are to put the powers conferred by the Corrections and Conditional Release Act on the National Parole Board out of their minds. Parliament has given certain powers to the judiciary and others to the Board and it is not for the one to trespass into the field of the other.

[105] These cases provide persuasive authority in support of the view that the sentencing judge's views or assumptions about the likely length of incarceration are not relevant to the imposition of an indeterminate sentence, which was to be governed instead by the test set out in the *Criminal Code*.

[106] In *Whaling*, the Court of Appeal found that despite this "separation of the roles of the sentencing judge and the corrections authorities," the trial judge was right to conclude that the effect of lengthening parole ineligibility was to increase the harshness of the sentence (paragraph 53). In

effect, the trial judge's observation that the sentencing and parole regimes were not "separate watertight compartments" was valid despite the above-noted error.

[107] In the current case, however, it is not parole ineligibility that is at issue, but a change in the test for parole. In this context, the observation that the test for the imposition of an indeterminate sentence (applied at sentencing and governed by the dangerous offender provisions in the *Criminal Code*) is completely separate from the test for when the resulting incarceration should end through parole (governed by the CCRA) is of greater consequence. It suggests to me that a change in the test for parole should not be viewed as changing the sentence (or the punishment) itself. Thus, the constitutional concern that arises is not one about retrospective application of the law engaging subsection 11(h) of the *Charter*. Retrospective application does not arise in this case, because the parole determination applies current criteria to current circumstances. Parole review does not relate to punishment for past crimes, but rather involves a determination of whether an applicant is (in the present) fit for release.

[108] However, the constitutional concern that arises from a change in the test for parole is whether the new statutory test is capable of ensuring that the sentence does not become grossly disproportionate. This is a matter to be considered under section 12 of the *Charter*, in accordance with the analysis set out in *Lyons*, above.

Section 12 of the Charter

[109] I think it would be useful at this point to set out a comparison of the criteria the Applicant wishes to have considered (which were the same as those considered and approved in *Lyons* and *Steele*, both above) versus those that currently appear in the CCRA.

Parole Act, RSC 1985, c P-2	**Corrections and Conditional Release Act, SC 1992, c 20**
[No equivalent]	**Paramount consideration**
	100.1 The protection of society is the paramount consideration for the Board and the provincial parole boards in the determination of all cases.
	[…]
Powers of Board	**Criteria for granting parole**
16. (1) The Board may	102. The Board or a provincial parole board may grant parole to an offender if, in its opinion,
(a) grant parole to an inmate, subject to any terms or conditions it considers reasonable, if the Board considers that	
(i) in the case of a grant or parole other than day parole, the inmate has derived the maximum benefit from imprisonment,	(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
(ii) the reform and rehabilitation of the inmate will be aided by the grant of parole, and	(b) the release of the offender will contribute to the protection of society by facilitating the reintegration

(iii) the release of the inmate on parole would not constitute an undue risk to society;

of the offender into society as a law-abiding citizen.

Loi sur la libération conditionnelle, L.R.C. (1985), ch. P- 2

[Aucun équivalent]

Loi sur le système correctionnel et la mise en liberté sous condition (L.C. 1992, ch. 20)

Critère preponderant

100.1 Dans tous les cas, la protection de la société est le critère prépondérant appliqué par la Commission et les commissions provinciales.

[…]

16. (1) La Commission peut:

a) accorder la libération conditionnelle à un détenu, aux conditions qu'elle juge raisonnables, si elle estime que les conditions suivantes sont réunies:

(i) sauf en ce qui concerne l'octroi d'un régime de semi-liberté, l'effet positif maximal de l'emprisonnement a été atteint par le détenu,

(ii) la libération conditionnelle facilitera son amendement et sa réadaptation,

(iii) sa mise en liberté ne constitue pas un risque trop grand pour la société;

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.

[110] It seems to me that this comparison reveals the main differences to be as follows:

- The addition of an explicit reference to the protection of society as the "paramount consideration" for parole boards in all cases;

- The element of whether "the inmate has derived the maximum benefit from imprisonment" is not present in the new law;

- The element of rehabilitation, and whether it will be advanced by release, is still arguably still present in this new law (though the words reform and rehabilitation are absent), but the focus has shifted from an individual interest to a societal one: rather than considering whether "the reform and rehabilitation of the inmate will be aided" through parole (which focuses on benefit to the individual offender), the PBC is to consider whether society's interest (the protection of society) will be advanced through the reintegration of the offender into society; and

- The element of undue risk to society remains, but has been given further specificity through the addition of the words "by reoffending" and "before the expiration according to law of the sentence the offender is serving".

[111] It also seems to me that the former test was a conjunctive test (all three elements had to be met), not a balancing test, as indicated by the word "and" at the end of subsection 16(1)(a)(ii). In other words, the absence of undue risk to society was not a "factor to be considered" alongside reform and rehabilitation, but rather a criterion that had to be met. Certainly this was the view of

Justice La Forest in *Lyons*, above, where he observed that the inclusion of additional criteria beyond undue risk made it harder to satisfy the test for parole, not easier (paragraph 54).

[112] It is also notable that in *Steele*, above, the Supreme Court of Canada observed that undue risk to society was the "most important factor," and stated that "[i]f an inmate's release continues to constitute an undue risk to the public, then his or her detention can be justifiably maintained for a lifetime" (paragraph 71). This is relevant here because the Applicant has argued that section 100.1 of the CCRA raises the bar for parole, and "effectively operates as an override clause allowing the [PBC] to legally disregard an inmate's otherwise protected rights in terms of the sanctity of the person or the liberty interests derived from both sections 7 and 12 [of the *Charter*]." In light of the above observations in *Steele*, above, it is arguable that the language of section 100.1, which makes the "protection of society" the "paramount consideration for the Board," is in line with prior judicial doctrine applying the *Parole Act* and does not amount to an increase in the threshold for parole.

[113] It could be argued that the criterion set out in subsection 102(b) raises the bar for parole. It means that the release must not merely provide a benefit to the offender (by furthering their reform and rehabilitation as required under the old law), but rather must provide a positive benefit to society in the form of contributing to "the protection of society by facilitating the reintegration of the offender… as a law-abiding citizen." Depending on how it is interpreted and applied, this provision has the potential to raise the bar significantly beyond the threshold of avoiding undue risk: the release must arguably be seen as a net positive for public safety, which will be a difficult threshold for a dangerous offender with an indeterminate sentence to meet.

[114] In the case of offenders with determinate sentences, the logic of this provision is readily apparent: a gradual release under the supervision of a parole supervisor is likely to lead to better reintegration and better long-term outcomes for the protection of society than an unconditional release at the end of a prison term, with no supervision. However, this same logic seems to have no application in the case of indeterminate offenders: there will likely always be some level of risk involved in their release (even if it does not rise to the level of "undue risk"), such that it is difficult to see how such a release can present a net positive for public safety.

[115] Even if it could be said that Parliament has raised the bar for parole determinations by enacting subsection 102(b) of the Act, the Court must be mindful that the standard is not perfection. Rather, the standard set by the Supreme Court of Canada in preventing cruel and unusual punishment under section 12 of the *Charter* is whether the application of the provision may lead to punishment that is grossly disproportionate to the circumstances of any given case (*Lyons* at paragraph 56). It seems to me that, given the guidance of the Supreme Court of Canada in *Steele*, above, in particular, and given the record before the PBC and the Appeal Board and the risk that the Applicant continues to pose, I cannot say that the punishment of the Applicant has reached the level of being grossly disproportionate to the circumstances of this case.

[116] The determination of whether such a result could occur through the application of subsection 102(b) should be deferred to a proper case. There is authority to the effect that the Court should decline to decide a constitutional question if it is not necessary to the disposition of the case. As Justice Mosley observed in *Benitez v Canada (Minister of Citizenship and Immigration)*, [2007] 1 FCR 107:

> 57 As a general rule, the courts should endeavour to avoid expressing an opinion on a question of law where it is not necessary to do so in order to dispose of a case, especially when the question of law that need not be decided is a constitutional question: *Attorney General (Que.) and Glassco v. Cumming*, [1978] 2 S.C.R. 605, at page 611; *Phillips v. Nova Scotia (Commission of Inquiry in the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97, at paragraph 9; *Tremblay v. Daigle*, [1989] 2 S.C.R. 530.

Did the Board Lose Jurisdiction By Misreading the CCRA?

[117] The Applicant also argues that the Appeal Board lost jurisdiction when it said "… consistent with section 223 of the CCRA, an offender who began his sentence under the former Act will be dealt with as if he had begun his sentence under the Act." This is not, in my view, a deliberate misreading of section 223, as the Applicant alleges. As *Roxborough*, above confirms, the Appeal Board is simply explaining to the Applicant the implications of section 223 for the law that is applicable in his case.

[118] The Applicant argues that, even if no error occurred over the Appeal Board's interpretation of section 223 of the CCRA and its application of that statute to his parole hearing, there are other reviewable errors that require that the decisions of the PBC and the Appeal Division be set aside. I deal with these further allegations below.

The Sentencing Judge's Intentions

[119] The Applicant says that the PBC and the Appeal Board failed to take into consideration the intent of the sentencing judge that was made known at the time of sentencing on May 4, 1990,

which intent "provided an effective means of gauging the duration of time the applicant should have spent in custody under the parole regime under the *Parole Act* and the *Parole Regulations* that were in force at that time which is of great significance in determining whether the test is met to demonstrate that the applicant has resultantly suffered cruel and unusual treatment with the of [*sic*] section 12 of the *Charter* as described above in *Steele*". I have already referred to this matter above, but I think a few further points need to be made.

[120] The Applicant says it was the sentencing judge's "intention" that the Applicant spend "5 to 7 years" in custody, and he has already spent 24.5 years. The record shows the Applicant told Dr. Zanatta, the psychologist who prepared the report, "seven to nine" years. See Respondent's Record, page 35.

[121] As I have already indicated, I do not think the PBC or the Appeal Division were in error in not applying the *Parole Act* to the Applicant's request for parole.

[122] Subsection 101*(a)* (subsection 101*(b)* at the time of the Applicant's hearing) of the CCRA says that:

101. *(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	101. *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

components of the criminal justice system, including assessments provided by correctional authorities;	victimes, des délinquants ou d'autres éléments du système de justice pénale, y compris les évaluations fournies par les autorités correctionnelles;

[123] In the present case, there is nothing to suggest that the PBC did not take into account the sentencing judge's stated reasons and recommendations, and there is a presumption in law that the PBC did so, which presumption the Applicant has not rebutted. See *Florea,* above. The PBC says at page 80 of its Decision that "your sentence has been tailored to meet the circumstances of your case."

[124] The sentencing judge imposed an indeterminate sentence in order to allow the Applicant to deal with serious problems and render himself ready for parole. I have no evidence before me that the sentencing judge recommended that any length of time would be appropriate. If he had, he would, presumably, not have imposed an indeterminate sentence.

[125] As he explained the situation to me at the hearing of this application (and there is no evidence before me to support this), the Applicant says that the sentencing judge gave some indication that a certain length of time might be expected. But even if there were such an expectation expressed, this is not a recommendation and would have to be contingent upon whatever progress the Applicant could achieve as reviewed by the PBC. The Applicant has not established that anything was overlooked in this regard. The Applicant has certainly served a long sentence, but the justification for, and reasonableness of, this sentence have been assessed in the Decisions of the PBC and the Appeal Division, and reasons provided for his continued incarceration

and unreadiness for parole. It is noteworthy that the Applicant did not even raise with the Appeal Division the PBC's failure to take into account the intentions of the sentencing judge.

ICPM Program

[126] The Applicant also says that the PBC and the Appeal Board did not address the programming he has taken, and disregarded what he calls a "contractual" undertaking that his failure to admit guilt with regard to his index sexual offences would not count against him when he applied for parole. He points out that he got the highest marks possible for the ICPM programming he has taken ("good") and that he cannot take the same program again. Hence, he argues that he will remain incarcerated for life because he will never be able to establish that he is not a danger to the public. In essence, he says that if his treatment was insufficient to mitigate his risk because he maintained his innocence, and he cannot take the treatment again, the risk will never be considered mitigated.

[127] This argument centres on the fact that the Applicant did eventually take the ICPM Program which he passed with a "good" mark and which he says means he cannot now be seen as likely to re-offend. The PBC deals with this issue in its Decision in the following way:

> You then spoke to the Board about the programming that you had taken since your last hearing. You said that you enjoyed the programs and that you learned a lot. You said that you were motivated to gain maximum benefit from the program and were able to identify and speak about the skills that you had acquired and also to give examples of how you had used the skills. For example you said that you had learned the importance of "consequential thinking" and learned how to apply these lessons to your own life. You had learned that your need for acceptance by negative associates while in the community had led you to adopt a criminal lifestyle. You spoke

about the harm that you had caused to others during this time in your life. You were able to identify your risk factors and how you would manage them in the community.

You said that you gained insight into "consent issues" that were present in some of your prior relationships and how you had been focused on "Personal Immediate Gratification".

In reply to the concern expressed by your CMT and in the most recent psychological report that given your ongoing denial of the index offences, you had been unable to address the sexual offences for which you have been convicted, you said while the gains that you made although programming were in the context of your criminal lifestyle at the time, the skills that you acquired were transferable. You maintained that although you did not commit the offences for which you were convicted you remain prepared to discuss the matter at any time. In response to concerns that your gains were recent you said that you have been working on these issues for many years.

You said that if granted release you hoped to go to a CRF which would ensure that you obtained the slow gradual structured release that you require. You spoke about the community support that you enjoy, including the support of close family members in the community. The Board notes with great concern that when the proposed special conditions were reviewed with you, you indicated that you did not think it reasonable or necessary to impose a special condition "not to associate with any females 18 years and under unless supervised by a responsible adult approved by your parole supervisor". Although you later qualified your response, the fact remains that you displayed a concerning resistance to the merits of the condition.

You provided the Board with a number of documents; a detailed rebuttal of the most psychological report that draws attention to numerous factual errors which you say gives rise your concern that the psychologist "blended" your file with that of another offender, your "Pocket Relapse Prevention Plan and an outline of the program that you have taken.

Your assistant who is a close family member, told the board that you have the support of your family and that they miss you.

Having read your file, considered the documents you provided and listened to you today the Board notes the following: your institutional behaviour has been appropriate and you have made gains though your recent participation in your correctional plan. However the

> Board can not ignore that you remain a moderate-high risk to re-offend generally, violently and sexually even after having completed programming. The offences for which you were convicted were serious and brutal in nature and if you were to reoffend again you would likely cause great harm to your victim. The gains that you have made are recent and you have not had the opportunity to internalize these gains. Recent psychological opinion that you have not addressed your risk factors in the context of the criminal offences for which you were convicted remains a concern for the Board. The Board does not agree with your suggestion made during the hearing that because you refuse to admit your guilt you must remain in prison for the rest of your life because you will never be seen to have addressed your risk factors. Although you have made some gains, the Board does not believe that you have sufficiently mitigated your risk at this point. You do not have the support of your CMT and you have not been accepted at any CRFs. In conclusion the Board has determined that you risk is undue and therefore denies both day and full parole.
>
> Given the progress that you have made in your correctional plan and your CMTs ongoing efforts to accommodate your other needs, the Board also concludes that you sentence is being tailored to meet the circumstances of your case and does not offend Section 12 of the *Charter*.

[128] The Applicant appears to be of the view that because he has successfully taken the available ICPM programming, and there is no other course he can take, the PBC was obliged to accept that he did not remain at a moderate-high risk to re-offend violently and sexually.

[129] Dr. Zanatta's report of December 22, 2011 indicates why this cannot be the case:

> Summary and Recommendations
>
> Mr. Van Boeyen is a designated Dangerous Offender serving an indeterminate sentence after being convicted of the brazen attacks of four unknown young females. In spite of some initial admissions, he has never accepted culpability for these sexual offences and has maintained his innocence despite the evidence and convictions. He remains incarcerated after being in prison for some twenty-three years and, in my opinion, will never admit to the crimes that the Courts have indicated that he is guilty of. Mr. Van Boeyen has

maintained his innocence, provided various exculpatory accounts, and is now well entrenched in his denial. It is unlikely that any further intervention will alter or successfully challenge his defences and denial. Of concern, Mr. Van Boeyen has and is convinced of his views suggesting that comprise may be at times difficult to achieve particularly when he has holds negative attitudes towards the justice system and CSC.

Prior to his incarceration Mr. Van Boeyen essentially lived a self-indulgent hedonistic lifestyle with no regard for others or consequences but has matured and grown up somewhat over the years. However the core features of his personality or personality disorder including antisocial and narcissistic traits remain quite pronounced.

One of the purposes of an indeterminate sentence is to shift the responsibility of predicting dangerousness or risk and decisions regarding community reintegration to the Parole Board particularly when the Courts have difficulty anticipating rehabilitative outcomes. For the sexual crimes that Mr. Van Boeyen has been convicted of, it is unlikely that the Courts would have given a determinate sentence totaling the amount of time that Mr. Van Boeyen has already served. Mr. Van Boeyen's case has been reviewed by the Parole Board on several occasions and any release decisions would have considered his non participation in CSC programs and his denial of culpability. To this credit, Mr. Van Boeyen has now successfully completed the recommended sex offender program and demonstrated that he has learned the material albeit treating his prior lifestyle as a crime cycle and not any of the sexual offences that he was convicted of. More focus however needs to be devoted to internalizing and expanding the risk factors he needs to monitor as well as possible relapse prevention strategies.

Predictive measures place Mr. Van Boeyen at a moderate to high risk for further sexual violence. Given the severity of the sexual violence in the crimes he was convicted for, the uncertainties regarding his past (i.e., nature and or extent of his sexual deviance) and his dismissiveness and or unwillingness to be forthright with respect to any wrongdoing leading to his convictions; his potential for further harm must be considered as remaining, at least, in the moderate range of risk despite his advancing age and apparent physical difficulties. His index offences are predatory and required some degree of physical exertion and control of the victims. At this juncture, it appears with some of his physical limitations, the probability of predatory sexual crimes of the same magnitude has abated to some extent. This cannot be said when one considers

> younger or more vulnerable victims (e.g., elderly, impaired or intoxicated, physically or mentally challenged females). Clearly, very strict monitoring and supervision will be required for quite some time if released on a day parole or to a Community Resource Facility (CRF) with particular attention paid to circumstances that would place Mr. Van Boeyen in the company of potentially vulnerable females.
>
> Should the Board feel that a community release is premature at this time; Mr. Van Boeyen should continue to solidify the concepts that he has learned in the program that he taken by participating in the sex offender maintenance program. He also needs to establish clearer plans for residing in the community whether with his family or not and resources for his care in the event, or eventuality, of his failing physical health. Apparently, due to medical considerations Mr. Van Boeyen is being supported for a transfer to the 'rehab' unit at RTC where more adequate resources can be devoted to his care.
> […]

[130] Clearly, the PBC and the Appeal Board are not in a position to disregard the assessment of Dr. Zanatta, and had to take it into account when assessing the Applicant's parole eligibility. The Applicant complains that he is being designated and is being dealt with as an "untreated sex offender," when there is no evidence to support this designation. A reading of the PBC and the Appeal Board decisions reveals that this is not the case. The PBC noted his completion of treatment and his progress and did not adopt or endorse the view that he was "untreated". Rather, the PBC concluded, reasonably in my view, that despite his recent progress he had yet to mitigate his risk. The Applicant sees "untreated sex offender" and "unmitigated risk" as equivalent phrases, but I do not agree with this characterization.

[131] The Applicant claims that he was told he could participate in the ICPM program and that he was promised (he alleges a contract) that if he successfully completed it, his failure to admit guilt for his index sexual offences would not be a factor when it came to assessing his eligibility for

parole. He said this "contract" was not honoured after he took and successfully completed the ICPM program.

[132] The documentation submitted to support this position (e-mail of Mr. Wise dated June 23, 2010 and the letter from Mr. Brian Lim and Mr. John Kay of November 4, 2010) simply assures the Applicant that he can take the program without admitting guilt and without negative consequences. The letter from Mr. Lim and Mr. Kay reads, in relevant part, as follows:

> We do agree that it is possible to participate in the ICPM program and successful complete while maintaining your innocence and further believe that you will not suffer any negative consequences from maintaining your innocence.

[133] A statement of belief is not a contractual commitment. Nor does successful completion of the program mean that the Applicant is ready for parole. The Applicant's successful completion of the ICPM program was fully acknowledged and discussed by the PBC which came to the conclusion that more time was needed to assess whether the Applicant had internalized the gains obtained through programming as recommended by the Applicant's CMT and his psychologist.

[134] The Applicant is obviously of the view that his successful completion of the ICPM program means that he has addressed all aspects of his sexual index offences. The PBC and the Appeal Board cannot, however, be held to a "belief" expressed by Correctional Program officers who were never asked by the Applicant whether taking the program would mean that his failure to admit guilt regarding the index sexual offences would cease to be a factor for consideration at his parole hearing. And, even if they had been asked that question, whatever they said could have no impact on the parole assessment because they have no qualifications to assess whether the Applicant is

ready for parole. The documents and words relied upon by the Applicant are simply referring to the ICPM program; they are not meant to refer to what will happen later when the Applicant is assessed for parole.

The "Untreated Sex Offender" Label

[135] In connection with this point, the Applicant objects to the label of "untreated sex offender" and says that the PBC and the Appeal Board were wrong to assess him in accordance with this label and that it is based upon incorrect information. The phrase occurs in the Applicant's A4D and Dr. Zanatta's psychological report. A reading of both Decisions reveals that the Applicant is not assessed in accordance with any such label. The PBC simply concludes, on the basis of reports from the psychologist and the Applicant's PO and CMT that, notwithstanding recent gains, the Applicant has not yet "addressed your risk factors in the context of the criminal offences for which you were convicted" so that the "Board does not believe that you have sufficiently mitigated your risk at this point." The Appeal Board's conclusions on this issue are entirely reasonable. As pointed out by the Appeal Board, if the Applicant believes that "untreated sex offender" in the A4D and the psychological report are in error, he has internal recourse he can turn to and use. I appreciate the Applicant's point that this takes time but, for purposes of this review, I just do not think that any such label played a material role in the overall assessment of the Applicant's readiness for parole.

Not Allowed to Question Parole Officer

[136] The Applicant raises a procedural fairness argument to the effect that he was not given an opportunity to question his PO at his hearing before the PBC.

[137] In the present case, the Appeal Board dealt with this issue and found that the Applicant was

> not unduly refused the opportunity to question your parole officer. The Federal Court of Canada in *Attorney General of Canada v MacInnis* [1997] 1 FC 115 established that the Board applied its statute properly by not allowing cross-examination. This decision, along with the Supreme Court of Canada decision in *Mooring v Canada (NPB)* [1996] 1 SCR 75, reinforces that the Board is not a judicial or quasi-judicial body.

[138] There can be no doubt in the present case that a substantial liberty interest of the Applicant was involved in his PBC hearing. The obligation of the PBC is to take into account "all available information that is relevant to the case," but it must also ensure that the information obtained is accurate and reliable.

[139] Brown and Evans state that the right to cross-examine "has long been regarded as fundamental to parties' ability to present their positions and to answer the case against them": Donald J M Brown & John M Evans, *Judicial Review of Administrative Action in Canada*, 2d ed (looseleaf), (Toronto: Canvasback Publishing, 2009) at 10-81, citing *Toronto Newspaper Guild Local 87 v Globe Printing Co (sub nom Re Ontario (Labour Relations Board)*, [1953] 2 SCR 18 and *Gilbert v Ontario (Provincial Police)*, 193 DLR (4th) 151 (Ont CA). They note that it is not an absolute right (see *Attorney General of Canada v MacInnis*, [1997] 1 FC 115 (FCA), rev'ing [1995] 2 FC 215 (FCTD) [*MacInnis*] and *Gerle Gold Ltd. v Golden Rule Resources Ltd.*, [2001] 1 FC 647

(FCA)), but "will be especially important if the facts are complex, if credibility is an issue, or if there is a conflict in the evidence": Brown and Evans, above, at 10-80.

[140] As with any common law procedural fairness right, the right to cross-examine may be limited by statute, provided there is no resulting violation of a party's rights under the *Charter: I.R. v Canada (Minister of Citizenship and Immigration)*, 2013 FC 973 at paragraph 19. Conversely, where a right under s. 7 of the *Charter* is at stake (which is undoubtedly the case here), the principles of fundamental justice may require expanded procedural protections: *Howard v Stony Mountain Institution*, [1984] 2 FC 642 (FCA), 1985 CarswellNat 2 at paras 12, 34-35 (per Chief Justice Thurlow (as he was then), Justice Pratte concurring) and paras 86, 89-90 (per Justice MacGuigan) [*Howard*]. A statute that restricts procedural rights in a manner that is inconsistent with the principles of fundamental justice is unconstitutional (see *Currie v Alberta (Edmonton Remand Centre)*, 2006 ABQB 858 [*Currie*], *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 SCR 350 [*Charkaoui #1*]), as is an exercise of discretion that fails to provide the required level of procedural protection where a section 7 right is at stake: *Suresh v Canada (Minister of Citizenship and Immigration)*, [2002] 1 SCR 3 [*Suresh*].

[141] Since the Applicant's liberty is at stake in the parole review process, section 7 of the *Charter* is implicated: *Cunningham v Canada*, [1993] 2 SCR 143; *Lyons*, above. As a consequence, the process which results in the continued deprivation of the Applicant's liberty must accord with the principles of fundamental justice. These principles include, at a minimum, the rules of procedural fairness and natural justice: *Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177 at 212-13; *Re B.C. Motor Vehicle Act*, [1985] 2 SCR 486; *Lyons*, above, at paragraph 85.

[142] The Supreme Court confirmed in *Suresh*, above, that the factors from *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*] are used to define the content of procedural protections required by section 7 of the *Charter* as well as the common law duty of procedural fairness:

> 113 This appeal requires us to determine the procedural protections to which an individual is entitled under s. 7 of the *Charter*… The principles of fundamental justice of which s. 7 speaks, though not identical to the duty of fairness elucidated in *Baker*, are the same principles underlying that duty. As Professor Hogg has said, 'The common law rules [of procedural fairness] are in fact basic tenets of the legal system, and they have evolved in response to the same values and objectives as s. 7": see P. W. Hogg, Constitutional Law of Canada (loose-leaf ed.) vol. 2, at para. 44.20. In *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, at pp. 212-13, Wilson J. recognized that the principles of fundamental justice demand, at a minimum, compliance with the common law requirements of procedural fairness. Section 7 protects substantive as well as procedural rights: *Re B.C. Motor Vehicle Act*, supra. Insofar as procedural rights are concerned, the common law doctrine summarized in *Baker*, supra, properly recognizes the ingredients of fundamental justice.
>
> 114 We therefore find it appropriate to look to the factors discussed in *Baker* in determining not only whether the common law duty of fairness has been met, but also in deciding whether the safeguards provided satisfy the demands of s. 7. In saying this, we emphasize that, as is the case for the substantive [page 62] aspects of s. 7 in connection with deportation to torture, we look to the common law factors not as an end in themselves, but to inform the s. 7 procedural analysis. At the end of the day, the common law is not constitutionalized; it is used to inform the constitutional principles that apply to this case.
>
> 115 What is required by the duty of fairness – and therefore the principles of fundamental justice – is that the issue at hand be decided in the context of the statute involved and the rights affected: *Baker*, supra, at para. 21; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, per Sopinka J. More specifically, deciding what procedural protections must be provided

> involves consideration of the following factors: (1) the nature of the decision made and the procedures followed in making it, that is, "the closeness of the administrative process to the judicial process"; (2) the role of the particular decision within the statutory scheme; (3) the importance of the decision to the individual affected; (4) the legitimate expectations of the person challenging the decision where undertakings were made concerning the procedure to be followed; and (5) the choice of procedure made by the agency itself: Baker, supra, at paras. 23-27. This is not to say that other factors or considerations may not be involved. This list of factors is non-exhaustive in determining the common law duty of fairness: *Baker*, supra, at para. 28. It must necessarily be so in determining the procedures demanded by the principles of fundamental justice.
>
> [Emphasis added]

[143] While procedural protections guaranteed by section 7 are similar to those arising from the common law rules of procedural fairness in that their specific content varies according to the context (see *Lyons*, above, at paragraph 85), there is at least one crucial distinction: where the principles of fundamental justice require a particular procedural protection, Parliament can modify that protection only in accordance with section 1 of the *Charter*: *Gallant v Canada (Deputy Commissioner, Correctional Service Canada)*, [1989] 3 FC 329 (FCA) at paragraphs 14 – 20. That is, a law that deprives an applicant of the required level of procedural protection will be unconstitutional: see *Charkaoui #1*, above, and *Currie*, above. Similarly, where discretion is exercised without the required level of procedural protection, that exercise of discretion will be unconstitutional: see *Suresh*, above.

[144] However, while fundamental justice requires a fair process, it does not entitle an applicant to "the most favourable procedures that could possibly be imagined": *Lyons*, above at paragraph 88; *Ruby v Canada (Solicitor General)*, [2002] 4 SCR 3 at paragraph 46.

[145] *Charkaoui #1*, above, describes the procedural protections that must apply in the case of a substantial (initial) deprivation of liberty:

> 28 The overarching principle of fundamental justice that applies here is this: before the state can detain people for significant periods of time, it must accord them a fair judicial process: *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46. "It is an ancient and venerable principle that no person shall lose his or her liberty without due process according to the law, which must involve a meaningful judicial process": Ferras, at para. 19. This principle emerged in the era of feudal monarchy, in the form of the right to be brought before a judge on a motion of habeas corpus. It remains as fundamental to our modern conception of liberty as it was in the days of King John.
>
> 29 This basic principle has a number of facets. It comprises the right to a hearing. It requires that the hearing be before an independent and impartial magistrate. It demands a decision by the magistrate on the facts and the law. And it entails the right to know the case put against one, and the right to answer that case. Precisely how these requirements are met will vary with the context. But for s. 7 to be satisfied, each of them must be met in substance.

[146] The view expressed in *Howard*, above, that the *Charter* had "enhanced" or expanded the procedural protections provided by common law rules of procedural fairness (see *Howard* at paragraphs 12, 90, 98) may seem to sit uncomfortably with the observation in *Suresh* that the *Baker* factors govern in the s. 7 context as well as in the common law context. However, this tension may be more apparent than real, because the fact that a *Charter* right is at stake will normally weigh heavily in the contextual analysis. As the Supreme Court observed in *Charkoui I*, above:

> 25 …The seriousness of the individual interests at stake forms part of the contextual analysis. As this Court stated in Suresh, "[t]he greater the effect on the life of the individual by the decision, the greater the need for procedural protections to meet the common law duty of fairness and the requirements of fundamental justice under s. 7 of the *Charter*" (para. 118). Thus, "factual situations which are closer or analogous to criminal proceedings will merit greater vigilance by the courts": *Dehghani v. Canada (Minister of*

> *Employment and Immigration)*, [1993] 1 S.C.R. 1053, at p. 1077, per Iacobucci J.
>
> [Emphasis added]

[147] The Court also made it clear in *Charkoui I* that there is very limited scope in the section 7 analysis for any balancing of individual *Charter* rights against broader societal interests, or for taking into account administrative convenience. In essence, beyond factors amounting to "necessity", such balancing of societal interests is to be left for the section 1 analysis:

> 21 Unlike s. 1, s. 7 is not concerned with whether a limit on life, liberty or security of the person is justified, but with whether the limit has been imposed in a way that respects the principles of fundamental justice. Hence, it has been held that s. 7 does not permit "a free-standing inquiry ... into whether a particular legislative measure 'strikes the right balance' between individual and societal interests in general" (Malmo-Levine, at para. 96). Nor is "achieving the right balance ... itself an overarching principle of fundamental justice" (para. 96). As the majority in Malmo-Levine noted, to hold otherwise "would entirely collapse the s. 1 inquiry into s. 7" (para. 96). This in turn would relieve the state from its burden of justifying intrusive measures, and require the *Charter* complainant to show that the measures are not justified.
>
> 22 The question at the s. 7 stage is whether the principles of fundamental justice relevant to the case have been observed in substance, having regard to the context and the seriousness of the violation. The issue is whether the process is fundamentally unfair to the affected person. If so, the deprivation of life, liberty or security of the person simply does not conform to the requirements of s. 7. The inquiry then shifts to s. 1 of the *Charter*, at which point the government has an opportunity to establish that the flawed process is nevertheless justified having regard, notably, to the public interest.
>
> 23 It follows that while administrative constraints associated with the context of national security may inform the analysis on whether a particular process is fundamentally unfair, security concerns cannot be used to excuse procedures that do not conform to fundamental justice at the s. 7 stage of the analysis. If the context makes it impossible to adhere to the principles of fundamental justice in their usual form, adequate substitutes may be found. But the

> principles must be respected to pass the hurdle of s. 7. That is the bottom line.

[148] All of this appears to set the bar very high in terms of restricting procedural rights on the basis of administrative constraints or administrative convenience: where it is "impossible" to apply procedural protections required by the principles of fundamental justice in their usual form, "adequate substitutes" may be used. I do not read this as stating that matters of administrative efficiency and effectiveness can never factor into the contextual analysis of what the duty of fairness requires, but Court clearly seems to be emphasizing that this is not to be the focal point where section 7 rights are at stake.

Case law regarding requests to cross examine in a parole hearing

[149] In *Lyons*, above, while finding that the dangerous offender provisions of the *Criminal Code* were saved from constitutional invalidity by the availability of regular review of individual cases through the parole process, the Supreme Court observed that an indeterminate sentence gives rise to special concerns with respect to procedural fairness. The relevant parts of Justice La Forest's judgment for the majority are as follows:

> 57 I would, therefore, conclude that Part XXI [now Part XXIV] does not violate s. 12 of the *Charter*.
>
> 58 Before leaving this issue, however, I would make one further comment. The conclusion that the liberty interest of a dangerous offender that is at stake in any parole hearing is, as a practical matter, different from that of "ordinary" offenders serving determinate sentences might affect the way in which the procedural adequacy of the review procedure might be viewed….
>
> […]

> 76 In the context of s. 7, it seems to me that the nature and quality of the procedural protections to be accorded the individual cannot depend on sterile logic or formalistic classifications of the type of proceeding in issue. Rather, the focus must be on the functional nature of the proceeding and on its potential impact on the liberty of the individual.
>
> […]
>
> 90 Furthermore, it is clear from my earlier comments that the fairness of the process by which the deprivation of liberty is occasioned cannot, in the case of a dangerous offender, be considered in isolation from the process by which that deprivation of liberty is reviewed. Given the severity of the [page363] impact of such review on a dangerous offender's liberty interests, at least as opposed to those of an "ordinary" offender, it seems to me that considerations of fundamental justice might require correspondingly enhanced procedural protections at such a review. In this regard, I note that the Ouimet Commission recommended that dangerous offenders be given a right to judicial review of their status every three years, with the court having the power to release the offender (Report of the Canadian Committee on Corrections (1969), at pp. 262-63). I agree that this would afford the convict greater safeguards, but I do not view it to be constitutionally required. Indeed, as was pointed out by the court in both Moore and Langevin, supra, the Parole Board is supposedly more expert in determining whether release is warranted, and its decisions are subject to judicial review, including review on *Charter* grounds. However, the fairness of certain procedural aspects of a parole hearing may well be the subject of constitutional challenge, at least when the review is of the continued incarceration of a dangerous offender. The fairness of the review procedure, however, is not an issue in the present case.
>
> [Emphasis added]

[150] Justice La Forest drew specific attention to the "unreliability of psychiatric evidence" in assessing future risk of violent behaviour, and the associated risk of "false positives." He observed that this problem served to "fortify the conclusion that the procedural protections accorded to the offender, especially on review, ought to be very rigorous" (at paragraphs 99-100).

[151] The application judge in *MacInnis*, above, gave significant weight to these observations in concluding that the principles of fundamental justice required that a prisoner serving an indeterminate sentence be permitted to appear by counsel at their statutory review hearing before the Parole Board, and be permitted to cross-examine the authors of clinical reports provided to the Board:

> 26 … For an applicant who is in jail on an indeterminate sentence, the stakes in a parole hearing could not be higher. He has an obvious concern in assuring that his case is at least presented as fully and effectively as possible.
>
> […]
>
> 28 It is apparent that psychiatric and psychological reports are important components of the evidence weighed by the Board. In this case, there are conflicting reports describing the condition of the applicant. Should the Board have the benefit of the examination of these experts in order to assess the basis for their clinical opinions? While this would increase the administrative burden on the Board, it would likely, in the Court's opinion, result in a more informed decision. An informed decision does not mean that the decision will be positive or negative, it will simply mean that it will be more informed: *R. v. Lyons*, supra, at page 368.
>
> 29 Parliament has determined that the National Parole Board proceedings are not to be adversarial in nature. On the other hand, Parliament has not legislated any alternative procedures for dangerous offenders. This is so despite the recognition by the Supreme Court that, from the perspective of the deprivation of liberty, there is a difference between inmates serving a determinate versus an indeterminate sentence: *R. v. Lyons*, supra, pages 345 and 362. In my opinion, hearings before the Board must reflect the differences associated with such status. The question is not whether the legislation is to be impugned but rather whether the Board should adopt procedures that are fully consistent with the requirements of section 7 of the *Charter* for this inmate who is serving an indeterminate sentence. The Court is not advocating the full menu of procedural rights associated with a trial-like proceeding. This would be unwise. Counsel are now permitted to be present only as an assistant within the meaning of subsection 140(8) of the Act. It is the Court's opinion that, given the liberty issues at stake, when reviewing the status of a dangerous offender, counsel can be of assistance to the

> Board, as well as the inmate, in ensuring that important factual matters are not overlooked or that the Board does not adopt procedures which are basically unfair to the inmate…. The Court is of the same opinion regarding the right to examine the experts on their clinical reports.
>
> […]
>
> 33 In summary, fairness under section 7 must be fundamental to justice: *R. v. S. (R.J.)*, supra, at page 45 [of L'Heureux-Dubé J.'s reasons]. With respect to this inmate, serving an indeterminate sentence, the principles of fundamental justice mandate both the right to appear by counsel as well as the right to examine the authors on the clinical reports.
>
> [Emphasis added]

[152] The Federal Court of Appeal, however, took a distinctly different view in *MacInnis*, above, emphasizing the importance of context in determining the procedural protections guaranteed by the principles of fundamental justice. The Court found that the procedures followed by the PBC were consistent with the section 7 rights of offenders sentenced to indeterminate sentences, and that introducing the enhanced procedural protections requested by Mr. MacInnis would damage the established parole review system:

> 19 What exactly the "principles of fundamental justice" are has been the subject of much discussion since the advent of the *Charter*… The procedures employed by the Board must ensure that the offender is treated fairly. The respondent believes that additional procedures beyond those provided in the CCRA are necessary in order for him to receive a fair hearing. These procedures, an increased role for counsel and the right to cross-examination of witnesses, are concepts identifiable with the adversarial process. While these elements may be integral to ensuring fairness in a criminal proceeding, they are not always required before administrative tribunals […]
>
> 20 Whether or not an inmate should be granted parole is a decision to be made by the Board in keeping with the provisions of the CCRA. The parole system is unique and separate from the courts and different considerations apply. The importance of the context in

which the hearing takes place was emphasized by Sopinka J. in [*Mooring v Canada (National Parole Board)*, [1996] 1 SCR 75 at 98]:

> It is a basic tenet of our legal system that the rules of natural justice and procedural fairness are adjusted by reference to the context in which they are administered. This is one of the basic tenets of our legal system to which Lamer J. referred in *Re B.C. Motor Vehicle Act* as the source of the principles of fundamental justice. In my opinion, adherence by the Board to the practice and procedures outlined above constitutes full compliance with the principles of fundamental justice and therefore, with s. 7 of the *Charter*. [Emphasis added.]

21 In addition to the common law rules of natural justice and fairness, the "practice and procedures" referred to and affirmed by Sopinka J. are those established by the CCRA. These include the paragraph 4(g) requirement that correctional decisions be made in a forthright and fair manner, with access by the offender to an effective grievance procedure; the paragraph 101(f) requirement that the conditional release process be fair and understandable; and the paragraph 101(a) requirement that the protection of society be the paramount consideration in the determination of any case before the Board.

22 The Court in *Mooring* also emphasized that Board hearings are different from judicial proceedings. The Parole Board does not act in either a judicial or a quasi-judicial capacity. Its members may have no legal training. Although counsel is present at the hearing, it is an inquisitorial not an adversarial process. The state's interests are not represented by counsel. The traditional rules of evidence do not apply. The Board does not have the power to issue subpoenas and evidence is not given under oath. The introduction of the adversarial elements the respondent desires do not fit into this model. If the prisoner has the right to cross-examine, the next logical step would be to give the state the right to counsel and to cross-examine witnesses also. The use of cross-examination techniques and enhanced roles for counsel would inevitably lead to an increasingly formal process, one which a "lay bench" would have difficulty presiding over. The Board would have to be given the power to subpoena. On a practical point, the increased cost of requiring the authors of clinical reports to be available for cross- examination would be an enormous strain to introduce on an already cash strapped system. The respondent argues that such requirements

would only be granted to offenders serving indeterminate sentences. I have difficulty imagining how such a distinction could be maintained. If the right to cross-examine and the power of subpoena is made available to one category of offender, it would inevitably have to be granted to all.

23 I do not agree with the respondent's contention that the Board's procedural rulings fail to address the differences associated with serving an indeterminate sentence. The respondent relies extensively on the following obiter statements of La Forest J. in *Lyons* [quoted above]:

[…]

24 I am unable to read as much into these statements as counsel for the respondent advocates. La Forest J. suggests that "enhanced procedural protections" might be required, and speculates that the fairness of "certain procedural aspects" of review hearings for dangerous offenders may be the subject of a future constitutional challenge. He does not identify either the "procedural aspects" referred to, nor does he suggest what "enhanced procedural protections" might be required.

25 One would assume that Parliament realized that Parole Board hearings have an increased significance for those serving indeterminate sentences. Subsection 761(1) of the Criminal Code stipulates that the respondent's "condition, history and circumstances" are to be reviewed every two years by the Board. The section does not provide for a new trial or some form of judicial review every two years. The composition and mandate of the Board reflect its primary purpose, the protection of society. Absent a decision by Parliament that a dangerous offender should be reevaluated by a trial judge in a judicial proceeding, I am not prepared to create a hybrid process to meet the respondent's perceived needs.

26 The procedures advocated by the Board allow the respondent to make his argument for parole fully and are in keeping with the rules of fairness. Indeed the procedures requested by the respondent would do little in my opinion to enhance the procedural fairness of his parole hearing. He is entitled to the help of an assistant during the review process. The reports concerning the respondent were provided ahead of time and he was given ample opportunity to submit a written response. Given that the respondent had an ample opportunity to challenge these reports, cross-examination of the authors was not necessary to ensure fairness. [footnote: See *Irvine v.*

> *Canada (Restrictive Trade Practices Commission)*, [1987] 1 S.C.R. 181; and *County of Strathcona No. 20 and Chemcell Ltd. v. Maclab Enterprises Ltd., Provincial Planning Board and City of Edmonton*, [1971] 3 W.W.R. 461 (Alta. C.A.)]
>
> 27 The Boards' procedural rulings sufficiently address the dual requirements of ensuring that society is protected and the respondent has a fair hearing. The respondent must be reminded that his freedom is not the paramount issue before the Board. The Board must first and foremost protect the Canadian public. Dangerous offenders are not so designated lightly. The proceedings under which the respondent was declared a dangerous offender and sentenced to an indeterminate period of incarceration are among the most serious undertaken in Canadian court rooms. The respondent was found to be a great danger to Canadian society, so much so that his indeterminate incarceration was felt to be necessary. As such, all Canadians have a vital stake in ensuring that the Board comes to a fully informed and appropriate decision. It is in the best interests of all concerned that the procedure be fair, and in my opinion the administrative process currently in place meets that requirement. The introduction of piecemeal elements of the adversarial system would do little to increase the fairness of the respondent's hearing, but much to damage the fundamental nature of Board hearings. Accordingly, I find that the Board's refusal to grant the enhanced procedures requested by the respondent did not violate his right to liberty under section 7 of the *Charter*.
>
> [Emphasis added]

[153] Based upon prior case law cited above, I have some doubts that refusal to allow some form of questioning or cross examination in the present context was procedurally fair. However, the Court of Appeal in *MacInnis*, above, clearly found that the PBC's procedures were adequate to address the unique circumstances of those serving indeterminate sentences, that they "allow the respondent to make his argument for parole fully and are in keeping with the rules of fairness," and that "the procedures requested by the respondent would do little… to enhance the procedural fairness of his parole hearing." The Federal Court of Appeal did not say that it was balancing the respondent's procedural fairness rights against competing societal concerns; rather, it referred to the

"dual requirements of ensuring that society is protected and the respondent has a fair hearing," and found that the applicant's procedural rights were adequately protected. In that context, the fact that the requested procedures would, in the Court's opinion, "do… much to damage the fundamental nature of Board hearings" seems like a valid consideration. I think I must follow the Court of Appeal's guidance on this issue as did the Appeal Board. Irrespective of my concerns, I am bound by *MacInnis*.

Failure to Provide Copy of Decision

[154] The Applicant also complains that the PBC did not provide a copy of its Decision to him within the statutory timeframe stipulated in subsection 166(2)*(b)* of the CCRA, and this cut into the time available for him to prepare his appeal and to do the research he wanted to do. The Applicant was informed of the PBC's Decision at the conclusion of the parole hearing on January 24, 2012. As the transcript shows, the PBC provided the Applicant with its Decision and basic reasons at that time, so the Applicant knew what he had to work on immediately. While there was an administrative delay of nine days in delivering the formal reasons to him, in these circumstances, I cannot accept that the Applicant was materially prejudiced by this delay. At the hearing before me on this judicial review, the Applicant first said that the delay "did not overly prejudice" him, but then went on to try and suggest otherwise. A review of the record does not suggest to me that this particular timing issue caused the Applicant any real prejudice. His submissions to the Appeal Board were thorough and fulsome: see *Yu*, above, at paragraphs 28-30, and *Uniboard Surfaces*, above, at paragraph 48.

Other Issues

[155] The Applicant also raises a number of other issues and makes general assertions that the Appeal Board failed to respond accurately or adequately to the grounds of appeal which he raised. He also argues that the Appeal Board changed the grounds he submitted and then based its assessment on its own version of what it thought he was saying. He says the Appeal Board was non-responsive and simply supported the position of the PBC. My review of the record before me leads me to conclude that this is not an accurate assessment of what occurred. The Applicant is refusing to confront the real and material basis of the Decision as articulated by the PBC and the Appeal Board.

[156] The Applicant's primary concern, and this is quite understandable, is that he has now been incarcerated for over 24 years and he feels there is nothing further he can do in order to earn parole. It is not, of course, the role of the Court to assess why the Applicant has spent so much time in prison. However, he did receive an indeterminate sentence, and there are indications on the file of a lack of willingness and cooperation on his part in addressing and alleviating the risks he poses to the public. Given the information and materials adduced, it was also reasonable for the PBC and the Appeal Board to conclude that he remains a dangerous offender with "a moderate-high risk to re-offend generally, violently and sexually, even after having completed programming."

[157] This assessment, however, is not without some acknowledgement that the Applicant has made some progress and needs to internalize and consolidate his gains. He has maintenance programming available to him to help him do this. The PBC summarized the position as follows:

> Having read your file, considered the documents you provided and listened to you today the board notes the following: your institutional

> behaviour has been appropriate and you have made gains though your recent participation in your correctional plan. However the Board can not ignore that you remain a moderate-high risk to re-offend generally, violently and sexually even after having completed programming. The offences for which you were convicted were serious and brutal in nature and if you were to reoffend again you would likely cause great harm to your victim. The gains that you have made are recent and you have not had the opportunity to internalize these gains. Recent psychological opinion that you have not addressed your risk factors in the context of the criminal offences for which you were convicted remains a concern for the Board. The Board does not agree with your suggestion made during the hearing that because you refuse to admit your guilt you must remain in prison for the rest of your life because you will never be seen to have addressed your risk factors. Although you have made some gains, the Board does not believe that you have sufficiently mitigated your risk at this point. You do not have the support of your CMT and you have not been accepted at any CRFs. In conclusion the Board has determined that you risk is undue and therefore denies both day and full parole.
>
> Given the progress that you have made in your correctional plan and your CMTs ongoing efforts to accommodate your other needs, the Board also concludes that you sentence is being tailored to meet the circumstances of your case and does not offend Section 12 of the *Charter*.

[158] Having reviewed the record before me, I cannot say that this conclusion lacks justification, transparency and intelligibility, or that it falls outside the range of possible, acceptable outcomes which are defensible in respect of the facts and law. The Applicant's frustrations are understandable, but given the record before the PBC and the Appeal Board and the governing jurisprudence, I can find no procedural, legal or jurisdictional error and nothing that, materially speaking, could be said to render either Decision unreasonable.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed with costs to the Respondent.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1720-12
STYLE OF CAUSE:	NEIL VAN BOEYEN v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	JULY 15, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	RUSSELL J.
DATED:	NOVEMBER 19, 2013

APPEARANCES:

Neil Van Boeyen	FOR THE APPLICANT (ON HIS OWN BEHALF)
Charmaine de los Reyes	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Neil Van Boeyen Agassiz, British Columbia	FOR THE APPLICANT (ON HIS OWN BEHALF)
William F. Pentney Deputy Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT