Federal Court  Cour fédérale

Date: 20160321

Docket: T-117-15

Citation: 2016 FC 340

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, March 21, 2016

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

DAVID COON

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Under Section 18.1 of the *Federal Courts Act*, R.S.C. (1985), c. F-7, the applicant is challenging a decision by the Parole Board of Canada's Appeal Division (the Appeal Division), dated December 3, 2014, confirming the Parole Board of Canada's (the Board) refusal to grant

him day parole or full parole under the *Corrections and Conditional Release Act*, S.C, c. 20 (the Act).

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

II. Background

[3] The applicant is currently serving a life sentence for the first-degree murder of two teenagers committed on February 28, 1992 when he was 17 years of age. He was convicted on June 1, 1992. Tried in adult court due to the serious nature of the crime, his parole eligibility was set at 10 years, the maximum period allowed under the *Criminal Code* when the author of the offence is under the age of eighteen at the time of the commission of the offence.

[4] On December 10, 2013, the applicant submitted an application for parole to the Board. On April 29, 2014, the Board held a hearing in which the applicant and his counsel participated. At the end of the hearing, the Board dismissed the application.

[5] In its decision, the Board first noted the circumstances surrounding the double murder committed by the applicant and what could have incited him to commit the crimes. It described these circumstances as follows:

> The victims were 15 and 17 year-old adolescents. The youngest victim was the brother of your ex-girlfriend and the other victim was one of his friends. On February 28, 1989, you entered the residence of the youngest victim and hid in the basement with a loaded rifle. When the two boys arrived after school, you shot both of them in the head. Each victim was shot twice. They were murdered in cold blood, with planning and deliberation.
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> […]
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> According to your file, those violent crimes were committed in a spirit of vengeance and domination following the end of your romantic relationship with one of the victims' sister.
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> […]
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> You are of Aboriginal descent, a third-generation Metis from the Atikamekw nation. You were raised in a dysfunctional family environment where violence was unpredictable. During adolescence, you apparently presented behavioural disorders marked by rage, rebellion and vengeance. The specialists noted that through your behaviour, you wanted, consciously or not, to hurt your own parents totally distraught. At the age of 13 and 15, you had to be seen by a child psychiatrist.
>
> A major problem with uncontrolled anger and aggression, a problematic family situation, inability to manage negative emotions (jealousy, rejection, humiliation) and marital and family relations constitute the main contributing factors related to your criminality.

[6] The Board noted that the record contained letters in which friends and family of the victims expressed how they had suffered from the death of the two victims and how the prospect of the applicant's release worried and frightened them.

[7] The Board then reviewed the clinical evaluations performed on the applicant from 2000 to the most recent assessment in February 2014. It noted that, for all intents and purposes, the psychological assessments performed in 2006, 2008 and 2009 all identified a "moderate" risk of

violent recidivism. The Board's understanding of the February 2014 psychological assessment, which explored the potential link between the crimes committed and the applicant's possible pattern of spousal violence, is as follows:

> After the assessment made in February 2014, the psychologist concludes that spousal violence is not the centre of your criminal dynamic and that you pose a low risk of violence against a partner and a moderate risk to other individuals when a relationship could cause feelings of humiliation through their involvement. She expresses the opinion that the murders were committed in a sort of I-can't-take-it-any-more type of rage and was not necessarily the result of what could be called a spousal or family violence dynamic. Thus, many events seems to have built up your anger. In terms of clinical impressions, the psychologist indicates a borderline personality with narcissistic and antisocial traits.

[8] It noted that based on this assessment, the applicant's Case Management Team (CMT) at the Correctional Service of Canada maintains the applicant's general risk of recidivism and risk of violent recidivism at "moderate to high" and still believes that he has a low reintegration potential and low accountability .

[9] With respect to his incarceration history, the Board observed that in 2001, the applicant was transferred from a minimum-security facility to a medium-security facility because he posed a threat to some fellow inmates. The Board noted that in 2004, when the applicant was denied access to the Temporary Absence Program, he made an escape plan, which involved kidnapping a pilot and using a helicopter and weapons. As a result, he was transferred to a maximum-security facility. In 2006, the applicant was sent back to a medium-security facility after his security classification was lowered. The Board found that since 2011, the applicant had generally complied with prison rules, was no longer a person of interest to the Correctional

Service's Preventive Security department, and was recognized as a hard worker in his position as a cleaner.

[10] The Board also recognized that the applicant had participated in many correctional programs but noted the various reports on his participation indicated that the applicant was still stubborn and distrustful. It noted that the applicant had recently discovered his indigenous roots and started a healing process with an Elder. However, the sessions had to be interrupted because of the applicant's lack of commitment. It also pointed out that the applicant quit a psychological counselling program after two sessions because he could not establish a therapeutic goal.

[11] Finally, the Board noted the CMT's negative parole recommendation for the applicant who, according to the CMT, poses moderate to high risks of recidivism and violent recidivism and continues to blame others for his relationship problems. He also has a hostile relationship with the team, all of which suggests that he will have adaptation and risk management problems when he is back in the community.

[12] The Board believes that it should endorse the findings and recommendations of the February 2014 psychological assessment and those of the Case Management Team. It describes its decision as follows:

> After studying your file and listening to you, the Board endorses the opinion of the psychologist, who assessed you in February 2014, and your CMT. The Board believes that you must learn to establish a trusting and long lasting relationship with a professional. However, having grown-up in prison and because of your personality disorder, you don't trust anyone and have a tendency to interpret people's intentions as malevolent and you consequently distrust others.. Also you perceive that letting down your guards would be humiliating which, in turn, would make you raise your defenses. Your problem is at an interpersonal level. Unfortunately, because you could not identify an objective to work on, the counseling ended after two sessions.
>
> The Board agrees that committed the murders as a result of feeling humiliated and until you realize that there are people around you that only want to help you, you will remain in a catch-22 situation. If you don't make significant changes, your chances of being recommended will not increase. You adopted a rigid position and both the psychologist and the Elder had to put an end to your meetings. As the Elder said, as long as you are not able to be in touch with your emotions, you will not be able to engage in serious introspection and, without introspection, there can be no changes in your way of thinking.
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> Therefore, given the severity of your offenses, the fact that it was premeditated and gratuitous, given that you took away, in a very brutal manner and for no apparent reasons, the lives of two innocent boys, the Board needs to be very prudent in your case.

[13] While recognizing that the applicant's release plan has some merit, the Board believes it is premature and ill-suited to his immediate needs, which are to work with a psychologist on the factors contributing to his risk of recidivism and develop a relationship of trust with this professional to achieve this objective. It concludes that there are grounds for denying his application for parole:

> Consequently, the Board denies day and full parole as it is of the opinion that you present an undue risk to society and that your release will not contribute to the protection of society by facilitating your reintegration into society as a law-abiding citizen.

[14] On December 3, 2014, the Appeal Division dismissed the applicant's appeal against the Board's decision. The Board notes that the protection of society is the factor that predominates in any assessment of an application for parole. Contrary to what the applicant claims, the Board believes that, in light of the evidentiary record, it was reasonable for the Board to conclude the applicant had a personality disorder and was finding it difficult to develop a relationship of trust with his CMT and work on his problems.

[15] The Appeal Division also determined that the Board did not err in ruling that the risk of recidivism and violent recidivism was in the moderate range, and failing to consider the fact that the parole eligibility period in this case was 10 years, not 25 years.

[16] The Appeal Division concluded as follows:

> Mr. Coon, given the facts of your case the Appeal Division finds that it was not unreasonable for the Board to assess your risk as undue if released into the community on day or full parole. In our view, the Board's written reasons are well-supported by the information contained in your file and provided at the hearing. It was not unreasonable for the Board to consider the various professional assessments in your file and to note that your personality disorder was a risk factor in your case. Considering the recent termination of your psychological follow-up, Pathways with your Elder and your criminological follow-up, it was not unreasonable for the Board to weigh in its analysis your distrust of others, including the members of your CMT, and the negative impact this had in preventing you from reducing your risk factors. We have reviewed the audio-recording of your hearing and noted that you told one of the Board members that one of his questions was ignorant which confirmed your rigid and arrogant attitude, which was also present at other points during the hearing. Considering the severity and brutality of your offences, that your risk of violent reoffending was assessed as being moderate and moderate to high, and that you were not considered to be engaged in your correctional plan, it was not unreasonable for the Board to deem that caution was warranted. In light of the above, the Appeal

> Division finds that it was not unreasonable for the Board to deem that your risk was undue and to deny your day and full parole.

[17] The applicant maintains that the Board rendered an unreasonable decision by (i) basing it on incomplete information; (ii) failing to consider and weigh determining recidivism risk factors; and (iii) failing to explain how its decision was limited to only what is necessary and proportionate to attain the release objectives. He also argues that these failures, in particular the Board's alleged failure to take into consideration all relevant available information as required under subsection 101(a) of the Act, constitute a breach of the principles of procedural fairness.

III. Issues in dispute and standard of review

[18] Judicial review of parole decisions is distinctive in that although the Court is theoretically dealing with an application for judicial review of the Appeal Division's decision, the Court actually has to examine the legality of the Board's decision when, as in this case, the Appeal Division confirms the Board's decision. According to the Federal Court of Appeal, this is the case in *Cartier v. Canada (Attorney General)*, 2002 FCA 384, [2003] 2 FC 317, because the intention that emerges from the Act is to deny parole once the Board's decision is reasonably supported in law and fact, since the Appeal Division's role is limited to intervening only in cases where the Board has committed an error of law or fact and that error is unreasonable (*Cartier*, at paragraphs 6 to 10).

[19] In other words, Parliament appears to have given priority to the Board's decision. As a result, if it is found to be reasonable, the Appeal Division's decision affirming it will also be

reasonable, absent any separate error on its part (*Collins v. Canada (Attorney General)*, 2014 FC 439, at paragraph 36; *Scott v. Canada (Attorney General)*, 2010 FC 496, at paragraphs 19-20).

[20] In this context, the Court is of the opinion that this case raises the following questions:

a. Is the Board's decision to refuse to grant the applicant day parole or full parole reasonable and procedurally fair?

b. If so, in confirming the Board's decision, has the Appeal Division committed a separate error justifying the intervention of the Court?

[21] It is well established, and the parties agree, that the reasonableness standard applies to parole decisions because they involve examining questions of mixed fact and law, an area in which the Board possesses particular expertise (*Fernandez v. Canada (Attorney General)*, 2011 FC 275, at paragraph 20; *Latham v. Canada*, 2006 FC 284, 288 FTR 37, at paragraphs 6 to 8; *Collins*, supra at paragraph 37). The Court should therefore show deference to the conclusions drawn by the Board and consequently intervene only where these conclusions do not show the existence of justification, transparency and intelligibility or do not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (Dunsmuir v. New Brunswick, 2008 SCC 9, [2008] 1 SCR 190, at paragraph 47).

[22] When the complaint against the Board involves compliance with the rules of procedural fairness, the applicable standard of review is correctness (*Mission Institution v. Khela*, [2014] 1 SCR 502, 2014 SCC 24, at paragraph 79; *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 SCR 339, 2009 SCC 12, at paragraph 43; *Prévost v. Canada (Attorney General)*, 2015 FC 702, at paragraph 37).

IV. Analysis

A. *The Board's decision*

(1) The applicable law

[23] The Board's powers are set forth in section 107 of the Act, which states that the Board "has exclusive jurisdiction and absolute discretion," in particular, "to grant parole to an offender." Under section 100 of the Act, the purpose of any such parole "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."

[24] In executing its mandate, the Board is guided by a number of principles set out in Section 101 of the Act. Some of these principles are relevant in this case. According to these principles, when executing its duties, the Board:

a. Takes into consideration all relevant available information, provided it has not been obtained improperly, including the stated reasons and recommendations of the sentencing judge, the nature and gravity of the offence, the degree of responsibility of the offender, and the information provided by the offender and correctional authorities; and

b. Makes decisions that are consistent with the protection of society and that are limited to only what is necessary and proportionate to the purpose of conditional release.

[25] Section 102 of the Act sets out the Board's criteria for granting parole. This provision reads as follows:

Criteria for granting parole	Critères
102. The Board or a provincial parole board may grant parole to an offender if, in its opinion, (a) the offender will not, by reoffending, present an undue risk to society before the expiration according to law of the sentence the offender is serving; and (b) the release of the offender will contribute to the protection of society by facilitating the reintegration of the offender into society as a law-abiding citizen.	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.

[26] However, under section 100.1 of the Act, the protection of society remains the paramount consideration in any parole decisions: *Mooring v. Canada (National Parole Board)*, [1996] 1 SCR 75, at paragraph 27; *Cartier*, supra at paragraph 19; *Fernandez*, supra at paragraph 15; *Korn v. Canada (Attorney General)*, 2014 FC 590, at paragraph 16).

[27] In *Ouellette* v. *Canada (Attorney General)*, 2013 FCA 54, at paragraph 30, the Federal Court of Appeal highlighted six guiding principles that clarify the Board's role:

a. Parole is a condition of the sentence;

b. Parole is possible only insofar as the legislation permits it;

c. When it is possible, parole is within the discretion of the Board;

d. The Board must, however, adhere to the principles of fundamental justice when it decides whether or not to grant parole to an offender;

e. In that respect, the Board is also governed by the legal framework established by Parliament, which may establish appropriate criteria for that purpose, including taking into account the protection of society as the paramount consideration;

f. In this context, the factors considered by the Board are not those that apply during sentencing. Rather, it is a matter of observing the personality and behaviour of the offender during the offender's imprisonment in order to assess the danger he or she presents to society and his or her ability to re-enter the community.

[28] It also noted that the "Act provides for a system that enforces sentences rather than one that reduces them," pursuant to subsection 128(1) of the Act, which continues in full effect even if parole has been granted (*Ouellette*, at paragraph 31).

[29] In concluding this brief overview, it is important to note, as the Supreme Court of Canada emphasized in *Mooring*, supra, that the Board acts in neither a judicial nor a quasi-judicial manner. It does not hear and assess evidence, but instead acts on information. The Board acts in an inquisitorial capacity without contending parties (*Mooring*, at paragraph 26). In particular, the Board lacks "the ability or jurisdiction to exclude relevant evidence." The Act confers on the Board a "broad inclusionary mandate"(*Mooring*, at paragraph 29). Nevertheless, in order to act fairly, the Board must ensure that the information upon which it acts is "reliable and persuasive" (*Mooring*, at paragraph 36).

(2) The Board's decision is reasonable and complies with the rules of procedural fairness

[30] It is with these rules and principles in mind that we should examine the reasonableness of the Board's decision and its compliance with the rules of procedural fairness with respect to the applicant's recriminations.

[31] On the one hand, the applicant maintains that, in basing its decision at least in part on the finding that he had a personality disorder and difficulty trusting others, the Board had failed to take into consideration all relevant available information. In this regard, he believes that there is no clear diagnosis of personality disorder in his record and that the idea that he is unable to trust anyone, which originated from the CMT, is not accurate because it does not take into consideration the assessments he underwent in relation to his participation in several correctional programs. This leads him to the conclusion that the Board therefore breached the rules of procedural fairness, neglected to weigh all of the psychological assessments, which do not provide a basis for either of the findings made by the Board, and thus fails to take into consideration reliable information crucial to the fairness of its decision, all of which runs counter to the teachings of *Mooring v. Canada (National Parole Board)*, [1996] 1 SCR 75.

[32] I cannot agree with this point of view. It is true, as the applicant points out, that he was not diagnosed with any signs of major psychiatric disorder. However, all the psychological assessments from 1997 to 2104 note the applicant's stubborn and distrustful character, which prevents any real possibility or effort in terms of sincere introspection on his part, on his own or with the help of counsellors in the correctional system. In my opinion, this is how we should

understand the term "personality disorder," which is used in certain instances in the various reports on the record. In other words, we need to avoid linking this term to a pathological disorder, as the applicant seems to do when he argues that he was never "clearly diagnosed with a personality disorder" and that the finding of a personality disorder, which is mentioned on several occasions in his psychological assessments, are therefore not supported by the evidence.

[33] According to my understanding of the evidence on the record, this has more to do with a "personality trait", an expression also used the various psychological assessment reports. The 1997 psychological assessment notes the following:

> Mr. Coon impressed as being somewhat rigid in his thinking style. He was egocentric, had difficulties accepting alterative points of view and did not recognize cues that may lead to interpersonal problems. Coping skills appeared to be a particularly weak area. […] He displayed a condescending attitude towards others and an exaggerated regard for his won abilities. Generally, he tended to attribute his family, legal or social problems to external factors rather than to himself. […] Overall, he exhibited no insight into his past behavior.
>
> (Applicant's file, vol 1, p. 137-138 and 140)

and concludes as follows:

> When estimating Mr. Coon's risk of reoffending, actuarial and psychometric tests suggest that it is a low to moderate risk for general recidivism but a moderate risk for violent recidivism. Clinical impression are not consistent with a low risk rating for general offending. Mr. Coon does not present as a typical first time offender with which a low risk rating is statistically associated. (..] Thus, an estimate of risk in the moderate range of general recidivism seems more approriate.
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> […]
>
> The Cognitive Skills Training Program is considered a necessary first step in addressing the cognitive deficits evident in Mr. Coon such as rigid thinking, egocentricity, and lack of social

> perspective-taking skills. Mr. Coon also needs to undergo treatment specifically targeting his cognitions that : support the use of aggression, attribute hostile intention to otherwise innocuous stimuli, and misinterpret the social cues of others.
>
> […]
>
> Another key area for M Coon are his coping strategies. He has shown a pattern of dealing ineffectively with stress and making poor decisions when faced with adversity. In addition, he responds to change poorly and fails to seek assistance in time of need.
>
> (Applicant's file, vol. 1, p. 140).

[34] A program assessment report prepared in 1998 noted that the applicant had successfully completed the Cognitive Skills Training Program by attending the 36 program sessions but stressed that "continued improvement is needed in many deficit areas" (Applicant's file, vol. 1, p. 159). Later the same year, this report was followed by another psychological assessment, which found that the applicant "continued to impress as a cynical individual who operates under a rigid and fatalistic thinking style" and that his behaviour "was still aggressive while his conversational style was at time [sic] condescending and suspicious." As in the previous year's assessment, this evaluation concluded that there was a moderate risk of general and violent recidivism. The authors recommended that individual counselling be the cornerstone of his rehabilitation process:

> Individual counseling should be the cornerstone of M Coon' s rehabilitative process. Motivational training and cognitive skill deficit such as rigid thinking, egocentricity and lack of social perspective-taking should be targeted in these sessions.
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> (Applicant's file, vol. 1, p. 165).

[35] In 2003, the applicant underwent a psychiatric assessment, which found no evidence that the murders were committed in the context of an "Axis I mental disorder" but nevertheless noted that the applicant "presents personality traits characterized by very rigid thinking," which makes it "difficult for him to consider alternative points of view and incorporate them into his value system." In his conclusion, the author of this report nevertheless notes a positive change in the applicant's attitude resulting from the psychological assistance he is receiving and believes that he does not pose "such a risk that he would not benefit from accompanied releases or a transfer to a lower security facility" (Applicant's file, vol. 1, p. 175-176).

[36] The applicant underwent another psychological assessment in 2006. The author of the report notes that although the applicant has made progress in perceiving his offence and its consequences, he still finds it very difficult to see himself as the cause of the problems he is having in regaining his freedom. More specifically, he notes that the applicant "clearly sees himself as the victim of injustices and undue pressure from various stakeholders" and that he cannot readily accept "that his rigid, distrustful and irritable attitude is his main problem." In this regard, the author notes that the applicant shows "signs of paranoid personality disorder" (Applicant's file, vol. 1, p. 193). Although his recent participation in correctional programs is considered excellent, he notes more specifically that he "resists treatment" and has "difficulty creating a working relationship with the doctor during psychological treatment sessions" and therefore does not benefit from them. He also finds that the applicant has difficulty "creating a favourable and positive relationship" with his CMT and tends to feel under attack, which according to the author, greatly limits his progress and puts him at risk of seeking redress. The medium-term risk of violent recidivism is still rated "moderate." The author of the assessment

recommends that the applicant spend some time at a minimum security facility before day parole is considered (Applicant's file, vol. 1, at p. 196).

[37] The next psychological assessment in the file was performed in 2009 and the findings were the same. The author first notes that the previous psychological assessments revealed "a severe personality disorder with borderline schizoid features" and a "borderline personality disorder with narcissistic traits" (Applicant's file, vol. 1, p. 211). In terms of clinical impressions, he believes that the applicant "still seems to view the world around him as threatening," which puts him on the defensive and generates feelings of hostility and irritability. He also notes that the applicant is still distrustful in his relationships with his CMT, which "also seems to interfere with his desire to work with another counsellor to deal with his dynamic risk factors." This author, too, finds that the applicant's short- and long-term risk of recidivism is moderate and suggests that this risk could be assumed, subject to an additional observation period in a medium-security penitentiary (Applicant's file, vol. 1, p. 217).

[38] Finally, the last psychological assessment in the file was performed in February 2014. The probation officer responsible for the applicant's file suggested he be assessed to determine whether a pattern of spousal violence could also have contributed to the crime he had committed and thus be included in the list of recidivism risk factors already identified in the previous psychological assessments. The assessment was negative. However, in terms of risk management, the authors recommended that the applicant be transferred to a specialized facility, such as the Correctional Service of Canada's Regional Mental Health Centre, and subsequently, when the applicant is deemed not to pose an escape risk or a threat to public safety, he should be

transferred to a minimum-security facility, all the foregoing being subject to the proviso that he "agree to give it a try and to not cut the relationship if he feels betrayed or humiliated, but rather accepts to discuss it for as long as it takes to make the relationship bearable again for him" [sic] (Applicant's file, vol. 1, p. 235). Finally, the authors believe it is important to note that nothing in the applicant's file provides a basis for updating the previously established level of risk of reoffending (Applicant's file, vol. 1, p. 224).

[39] In short, it seems clear to me that the Board had enough information to reasonably reach the conclusion it did. This information supports the idea that the applicant has personality traits that hinder the introspection effort required to understand the factors that contributed to his committing the murders, and therefore the ability to manage his risk of reoffending. The information also supports the closely related idea that he still finds it difficult to trust anyone and therefore develop meaningful relationships with prison staff and specialists, as demonstrated by his relatively recent failure to complete the healing process undertaken with an Elder and the psychological counselling program, which he abandoned after two weeks.

[40] The applicant complains that the Board did not take into consideration the assessments he underwent in relation with his participation in several correctional programs. This complaint seems to me unfounded, since the Board acknowledged his positive participation in several correctional programs. The Commissioner adjudicating the hearing had this to say when she informed the applicant of her decision at the end of the hearing:

> You, although you participated in all sort of programs and you did well in the program, you don't seem to have integrated what you've learned and until there's a change, you will stay the same, the recommendation will always be the same. You're (sic)

> abilities are uncontested, your…some progress has been made – […] You have to work on yourself and ask the help from your case management team or psychologist, build a trusting relationship and try to work on your responsibility disorder.
>
> (Applicant's file, vol. 1, p. 94).

[41] In its written decision, the Board notes that although the applicant participated in these programs, he "persisted in a mode of functioning characterized by 'strained interaction,' marked by distrust and arrogance."

[42] Ultimately, the applicant's argument amounts to saying that the Board did not give sufficient weight to the reports on his participation in correctional programs. However, it is not open to the Court to reassess the evidence and substitute is own conclusions to that of the Board, which is in a better position to determine whether the release of an inmate on parole does not constitute an undue risk to society (*Steele v. Mountain Institution*, [1990] 1 SCR 1385, p. 1414; *Fernandez*, supra at paragraph 20). I belief that overall, in terms of the standard of reasonableness, the evidence supports the Board's finding in this regard.

[43] This first ground must therefore fail.

[44] The applicant also argues that while the Board was required to render a decision that was limited to only what is necessary and proportionate to attain the conditional release objectives, it did not take his particular situation into consideration, including the following facts: he had now been detained more than 25 years; he was a minor when he committed his crime; he was from a family environment where his development was compromised; his period of eligibility for

conditional release had been set at 10 years; he had not committed any violent acts since he had been in detention, and over the years, several stakeholders had recommended that he be transferred to a minimum security penitentiary. He believes that, based on a reading of the decision under study, it is therefore impossible to determine whether the Board has considered the proportionality factor in reviewing his application. Given this importance of this factor and based on the Supreme Court of Canada's decision in *Steele*, supra, he considers this omission fatal to the Board's decision.

[45] This ground must also fail. On the one hand, he proposes an analytical approach based on the principle of proportionality, enshrined in Section 718.1 of the *Criminal Code*, which applies to sentencing. However, as indicated above, in *Ouellette*, the Federal Court of Appeal noted that the factors that must be considered by the Board in determining whether release is indicated in a given case are not those that apply during sentencing. Rather, the Board is responsible for "observing the personality and behaviour of the offender during the offender's imprisonment in order to assess the danger he or she presents to society and his or her ability to re-enter" society (*Ouellette*, at paragraph 30(f)), which it has clearly done in this case.

[46] The Federal Court of Appeal also noted in *Ouellette* that the Act clearly states that the protection of society is the paramount consideration in all circumstances, and the principle of the least restrictive determination is contingent upon this paramount consideration and cannot under any circumstances replace it (*Ouellette*, at paragraphs 62-63). Therefore, since the Board concluded that paroling the appellant posed an unacceptable risk to society, it did not have to question this conclusion in the light of the principle of proportionality (*Ouellette*, at

paragraph 62). Although the wording of this principle has been amended since the *Ouellette* decision, nothing in the Act indicates that this principle is no longer subordinate to the paramount consideration of the protection of society and can therefore replace it.

[47] Finally, in my opinion, *Steele* is of no assistance to the applicant. First, *Steele* is not necessarily relevant to the matter of an offender who, like the applicant in this case, is sentenced to imprisonment for life (*Ouellette*, at paragraphs 42 to 45). Also, supposing that it were relevant, if it were true that the length of the sentence can provide an indication that the inmate no longer presents a danger to society, that by itself does not justify parole. As the Supreme Court noted in this case, when an inmate's release constitutes an undue risk to society, continued incarceration may be justified (*Steele*, p. 1414). It is the conclusion to which the Board came in this case, and which, as I mentioned above, is supported by the evidentiary record.

[48] It is worthwhile noting in this regard that in *Steele*, the Board had before it the reports of sixteen psychologists and psychiatrists, fourteen of whom recommended that Mr. Steele should be released on supervised parole (*Steele*, p. 1414). In this case, the most lenient reports only go so far as to recommend that the applicant be transferred to a lower security facility. None of the reports in the file recommend parole.

[49] The applicant maintains that the Board could not ignore the fact that he was a minor at the time he committed the two murders and that his parole eligibility was then set at only 10 years. However, as the respondent notes, these factors were pointed out by the Board (Applicant's file, vol. 1, p. 94), but the fact remains that an application for parole must be

assessed based on the current risk the inmate presents (*Boeyen v. Canada (Attorney General)*, 2013 FC 1175). At the time the Board rendered its decision, the risk of recidivism with violence was still considered "moderate." Given the nature of the crimes committed, according to me, it was open to the Board to conclude that the applicant continues to present an undue risk to society despite the fact that he committed his crimes at 17 years of age and that his parole eligibility was, by law, limited to 10 years, given that he was a minor at the time. I reiterate that the Board's task is to observe the personality and behaviour of the offender during the offender's imprisonment in order to assess the danger he or she presents to society and his or her ability to re-enter society. Here again, I am satisfied that the Board discharged its duty in a reasonable manner in this case.

[50] As a final argument, the applicant submits that in assessing the risk of recidivism and opining that the applicant presents an undue risk to society, the Board applied an incorrect legal test. In this regard, he maintains that the test is too general. Rather, the applicable standard of review is personalized risk, i.e. the risk that he will reoffend. Furthermore, he believes that the facts do not support the conclusion drawn by the Board because the psychological and psychiatric assessments in his file are consistent: he does not show any signs of being a psychopath, and the risk of his committing a non-violent offence is low to moderate, while the risk of his committing a spousal violence offence or a violent offence is low in the first case and moderate in the second. He maintains that the Board therefore erred in concluding that there was a risk of recidivism based solely on an unsubstantiated personality disorder and clinical work to be done on his interpersonal relationships.

[51] I have already addressed the issue of whether the applicant has a personality disorder and it need not be revisited here. Also, the applicant's complaint that the Board, in ruling that the applicant continued to present an undue risk to society, erred in law, cannot be accepted.

[52] Under Section 102 of the Act, the Board may grant parole only if it is ultimately convinced that 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. This criterion is therefore at the heart of the Board's mandate and I find it difficult to see how the Board would have committed an error of law in this case by asking this question. Furthermore, the Board's decision seems to me to apply very specifically to the applicant's case. I can only understand it to mean that the applicant continues to present a risk of recidivism unacceptable to society if he were granted the release he is requesting.

[53] I am satisfied that this conclusion was based on relevant information within the meaning of subsection 101(a) of the Act, i.e., primarily, the prison officials' various assessments and reports regarding the applicant. The applicant does not claim that this information was obtained improperly or that it is neither reliable nor persuasive within the meaning of *Mooring*, supra (see also: *Ouellette*, supra at paragraph 68). Rather, as I have already said, he argues that the Board incorrectly assessed the evidence before it. This claim, I reiterate, cannot succeed.

[54] The procedural fairness argument cannot succeed either. Keep in mind that the Board acts in an inquisitorial capacity without contending parties. It does not hear and assess evidence, but instead acts on information (*Mooring*, supra at paragraph 26). To this end, the Act confers

on the Board a "broad inclusionary mandate" (*Mooring*, at paragraph 29). Nevertheless, in order to act fairly, the Board must ensure that the information upon which it acts and that would not otherwise be admissible as evidence in a criminal trial is "reliable and persuasive" (*Mooring*, at paragraph 36). *Ouellette*, supra at paragraph 68). It must ensure that this information is provided to the offender for commentary and rebuttal.

[55] In this case, the transcript of the hearing before the Board reveals that, in the weeks preceding the hearing, the applicant received the documentation containing the relevant information that the Board intended at the time to examine in the presence of the applicant (Applicant's file, vol. 1, p. 23). The probation officer also confirmed to the Board that he did not have any additional information to submit other than the information already sent to the applicant (Applicant's file, vol. 1, p. 23-24). The applicant and his counsel were both given the opportunity to address the Commissioner. Both of them took advantage of this opportunity. The Board cannot be faulted for failing to follow proper procedure.

[56] Moreover, I saw no indication that the Board did not take all the relevant information into consideration. Rather, the applicant's recriminations are ultimately about the weight that the Board gave to the various pieces of evidence. As previously indicated, given the Board's institutional expertise, the Court must show deference in dealing with the information it considers when reviewing an application for parole. For the foregoing reasons, this deference is appropriate under the circumstances of this case.

B. ***Decision of the Appeal Division***

[57] Since the applicant did not allege any separate error on the part of the Appeal Division, I see no reason to amend its decision given that I found the Board's decision to be reasonable (*Collins*, supra at paragraph 36; *Scott*, supra at paragraphs 19-20).

[58] The respondent claims costs. However, exercising the discretionary power conferred upon me by Rule 400 of the *Federal Courts Rules*, SOR/98-106, I believe that this is a case where each party must pay its own costs.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed with costs.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-117-15
STYLE OF CAUSE:	DAVID COON v. THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	OCTOBER 7, 2015
JUDGMENT AND REASONS:	LEBLANC J.
DATED:	MARCH 21, 2016

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