

Federal Court



Cour fédérale

**Date: 20170406**

**Docket: T-2036-15**

**Citation: 2017 FC 346**

**Ottawa, Ontario, April 6, 2017**

**PRESENT: The Honourable Madam Justice Kane**

**BETWEEN:**

**VITTO BUFFONE**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**JUDGMENT AND REASONS**

[1] The Applicant, Vito Buffone, seeks judicial review of the October 27, 2015 decision by the Parole Board of Canada (the Board) made pursuant to the *Criminal Records Act*, RSC 1985, c C-47 [CRA] to revoke the pardon he was previously granted in 2008.

[2] In November 2014, the Board received information from the Intelligence Unit of the Niagara Regional Police Service that Mr. Buffone had been charged with offences pursuant to

the *Controlled Drugs and Substances Act*, SC 1996, c 19 [CDSA] and the *Criminal Code*, RSC 1985, c C-46. The Board subsequently revoked his pardon pursuant to section 7 of the CRA.

[3] For the reasons below, the application for judicial review is dismissed. The Board's decision is reasonable. The Board was not required to conduct a balancing of the *Charter* interests or values implicated in the revocation of the pardon with the statutory objectives of the CRA in the absence of any such submissions to the Board from Mr. Buffone. The Board was not, in the circumstances of this case, required to proactively conduct such a balancing exercise. The Board did not err in applying the statutory provisions and exercising its discretion to revoke Mr. Buffone's pardon based on the information it relied on to determine that Mr. Buffone no longer met the good conduct criteria.

I. Background

[4] On January 11, 2008, Mr. Buffone was granted a pardon by the National Parole Board, as it was formerly known, with respect to his two prior criminal convictions: a) the February 24, 1986 conviction for possession of a narcotic and, b) the June 7, 1994 conviction for possession of property obtained by crime over \$1000.

[5] On September 25, 2014, Mr. Buffone was charged with 12 offences under the CDSA and the *Criminal Code*:

- 1) Possession of cocaine for the purpose of trafficking – CDSA subsection 5(2);
- 2) Trafficking cocaine – CDSA subsection 5(1);

- 3) Conspiracy to commit an indictable offence, namely importation of a controlled substance (cocaine) – *Criminal Code* paragraph 465(1)(c);
- 4) Conspiracy to commit an indictable offence, namely possession for the purposes of trafficking (cocaine) – *Criminal Code* paragraph 465(1)(c);
- 5) Conspiracy to commit an indictable offence, namely possession for the purposes of trafficking (cocaine) – *Criminal Code* paragraph 465(1)(c);
- 6) Possession of property obtained by crime exceeding \$5,000 – *Criminal Code* paragraph 354(1)(a);
- 7) Laundering the proceeds of crime – *Criminal Code* paragraph 462.31(1)(a);
- 8) Possession (cocaine) for the purposes of trafficking and/or trafficking for a criminal organization – *Criminal Code* section 467.12;
- 9) Conspiracy to commit an indictable offence, namely importation of a controlled substance for a criminal organization – *Criminal Code* section 467.12;
- 10) Importation and/or possession for the purposes of trafficking a controlled substance (cocaine) for a criminal organization – *Criminal Code* section 467.12;
- 11) Possession of a prohibited weapon (stun gun) without a licence – *Criminal Code* subsection 91(2); and
- 12) Possession of property obtained by crime not exceeding \$5,000 – *Criminal Code* paragraph 354(1)(a).

[6] In November 2014, the Niagara Regional Police Service Intelligence Unit sent a copy of the Information setting out the charges against Mr. Buffone to the Board.

[7] On December 10, 2014, the Board sent Mr. Buffone a notice advising him that the Board had received reliable information that he had been charged with several offences and that his

pardon was under review. The Board enclosed a proposal for the possible revocation of his pardon.

[8] The Parole Board invited Mr. Buffone to make written representations in response to the notice but none were received. The Parole Board issued a decision revoking Mr. Buffone's pardon on May 15, 2015, finding that it was satisfied that Mr. Buffone no longer met the criteria for good conduct.

[9] In June 2015, Mr. Buffone informed the Board that he had not received the notice sent in December 2014 advising him that a review of his pardon was underway. The Board agreed to reconsider its decision and to accept Mr. Buffone's written representations. Mr. Buffone submitted his written representations by way of a letter on October 23, 2015, along with nine letters of support from various acquaintances.

[10] On October 27, 2015, the Board rendered its decision and revoked Mr. Buffone's pardon.

## II. The Parole Board's Decision Under Review

[11] The Board first noted that Mr. Buffone had been granted a pardon in 2008 for two prior convictions on the basis that he had met the legal criteria, including good conduct since his last conviction.

[12] The Board then described the criteria for granting a pardon, now known as a record suspension.

[13] The Board then addressed the circumstances related to the revocation of Mr. Buffone's pardon. The Board noted that it was informed that Mr. Buffone was charged with several offences in August 2014, which included two offences under the CDSA and 10 *Criminal Code* offences. The Board noted the details of the charges, including that 13 co-accused were involved, some of whom were facing additional charges. The Board acknowledged that there was no indication whether the charges against Mr. Buffone would proceed.

[14] The Board stated that it had considered all the information on file: the information received from law enforcement and Mr. Buffone's written representations, including his nine letters of reference. The Board explained that its authority to grant or deny a pardon (or as now known, a record suspension) is set out in the CRA. The Board further explained that the presumption of innocence has no application in the context of an application for a pardon, citing *Conille v Canada (Attorney General)*, 2003 FCT 613 [*Conille*].

[15] The Board noted that the charges against Mr. Buffone were for the exact type of offence for which he was previously convicted (involvement with illicit drugs); that drug addiction is a serious problem for Canadian society; that the scale of undertaking and number of persons involved suggest a sophisticated scheme to deal in illicit drugs; and, that the charges reflect a disregard for Canadian law and public safety. The Board added that the involvement of the police raises doubts about whether Mr. Buffone continues to satisfy the good conduct criteria of the pardon.

[16] The Board found that Mr. Buffone's written representations did not provide sufficient justification for altering its initial decision. As a result, the Board revoked Mr. Buffone's 2008 pardon pursuant to section 7 of the CRA.

### III. The Issues

[17] The key issue is whether the decision of the Board is reasonable.

[18] Mr. Buffone argues that the Board's decision is not reasonable because: the Board failed to consider his *Charter* protected rights and interests and balance these with the statutory objectives; the Board's decision is not intelligible because it confused the test for granting a pardon with that of revoking a pardon; and, the Board based its decision on insufficient evidence and failed to make additional inquiries to satisfy itself whether he no longer met the good conduct criteria.

### IV. The Standard of Review

[19] The Parole Board's decision is discretionary and is based on an assessment of the facts and the application of the law. The parties agree that the standard of reasonableness applies.

[20] To determine whether a decision is reasonable, the Court looks for "the existence of justification, transparency and intelligibility within the decision-making process" and considers "whether the decision falls within a range of possible, acceptable outcomes which are defensible

in respect of the facts and law” (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190 [*Dunsmuir*]).

[21] In *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 [*Newfoundland Nurses*], the Supreme Court of Canada elaborated on the requirements of *Dunsmuir*, noting that the reasons are to “be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes” (at para 14). In addition, where necessary, courts may look to the record “for the purpose of assessing the reasonableness of the outcome” (at para 15). The key principle is summed up at para 16 that, “if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.”

#### V. The Statutory Provisions

[22] Excerpts of the relevant provisions of the CRA and the Decision-Making Policy Manual for Board Members [the Policy Manual], which provides guidance to Board members, are set out in Annex A.

#### VI. The Applicant's Submissions

[23] Mr. Buffone submits that the Parole Board erred in three ways and, as a result, the decision is not reasonable.

*The Board failed to proportionately balance Mr. Buffone's Charter rights, interests and values with the statutory objectives of the CRA*

[24] Mr. Buffone submits that the Board is required to exercise its discretion in a manner consistent with a balancing of the *Charter* rights, interests and values at stake as directed by the Supreme Court of Canada in *Doré v Barreau du Québec*, 2012 SCC 12 at para 24, [2012] 1 SCR 395 [*Doré*]. A reasonable decision is one that reflects a proportionate balancing of the *Charter* interests and values at play (*Doré* at para 58).

[25] He submits that the revocation of his pardon affected his right to liberty and security of the person in accordance with section 7 of the *Charter* without regard to the principles of fundamental justice, specifically the presumption of innocence. He acknowledges that paragraph 11(d) of the *Charter*, the right to be presumed innocent, applies only in the criminal proceedings and does not apply in revocation decisions *per se*, but argues that the presumption of innocence remains a principle of fundamental justice and, as such, must be part of the balancing of *Charter* rights, interests and values.

[26] Mr. Buffone submits that the revocation of his pardon would make his prior convictions potentially available as evidence at trial and will have a significant impact on how he conducts his defence to the criminal charges, thereby implicating his *Charter* rights under section 7.

[27] He submits that the Board was required to conduct the *Doré* analysis, even though he only asserted the presumption of innocence and did not make submissions on the balancing of *Charter* rights and interests. He points, as an example, to *Trinity Western University v The Law*



*Society of Upper Canada*, 2016 ONCA 518 [*Trinity Western*], where the Law Society, as the first level decision-maker, proactively assessed the *Charter* rights and values in the context of its administrative decision.

[28] Mr. Buffone submits that the overall objective of the statutory provisions is to provide a benefit to persons with criminal records who have been of good conduct and points to *Therrien (Re)*, 2001 SCC 35 at para 120, [2001] 2 SCR 3, where the Supreme Court of Canada stated that “the purpose of all these sections is to eliminate the potential future effects of the conviction”.

[29] Mr. Buffone elaborates that the statutory objectives are also derived from section 4.1 of the CRA. These objectives include: to provide a measurable benefit to an individual with a criminal history; to sustain that person’s rehabilitation; and, to not bring the administration of justice into disrepute (paragraph 4.1(1)(b)).

[30] He submits that the objectives of section 7 of the CRA, which permits the revocation of a pardon, can also be derived from section 4.1, but from the opposite perspective. According to Mr. Buffone, the objectives of revocation are that the pardon is no longer a measurable benefit to the person or is no longer necessary to sustain their rehabilitation.

[31] He submits that the Board could not conclude that his conduct reflects a disregard for Canadian law and public safety unless it equated the charges against him with his guilt, which ignores the presumption of innocence. He argues that revoking his pardon based only on the

outstanding charges does not strike a proportionate balancing between his *Charter* rights and interests and the statutory objectives of the CRA that he proposes.

[32] Mr. Buffone also submits that a proportionate balancing requires consideration of alternatives to ensure that his *Charter* rights are limited as little as possible. A more proportionate balancing would result from awaiting the outcome of his criminal trial. If he is convicted of an indictable offence, his pardon would be revoked automatically pursuant to section 7.2. If he is acquitted, the Board would have more information from his trial upon which to assess whether he is no longer of good conduct. Mr. Buffone submits that the Board erred by not considering such an alternative.

*The Board identified and applied the incorrect legal test*

[33] Mr. Buffone argues that the Board confused the tests for granting and revoking a pardon, and also confused who bears the onus of establishing good conduct in the revocation context. He notes that the Board set out the test for granting — as opposed to revoking — a pardon, and did not explain how the presumption of innocence is considered in the context of revocation.

[34] Mr. Buffone submits that when the Board considers whether to revoke a pardon, there is no onus on the person pardoned; the Board must satisfy itself that the person is no longer of good conduct. He argues that the Board erred by reversing the burden of proof by stating that it had “doubts about whether or not you continue to satisfy the good conduct criteria”. He submits that if the Board had doubts about his good conduct, the doubts should be resolved in his favour. He

submits that he should not have to prove to the Board that he remains of good conduct, although his submissions and letters of reference support such a conclusion.

[35] Mr. Buffone relies on *MY v Canada (Attorney General)*, 2016 FCA 170 [MY], where the Court of Appeal found that there was no burden on the applicant in the revocation process (para 23). He also submits that in *MY* the Court of Appeal found that the act of being convicted of an offence was not sufficient to support the Board's finding that the applicant was no longer of good conduct.

*There was insufficient evidence to establish that Mr. Buffone was no longer of good conduct*

[36] Mr. Buffone submits that the only evidence before the Board that called into question his good conduct was the Information from the Niagara Police Service listing the outstanding charges. He submits that the outstanding charges say nothing about the extent of his involvement or his disregard for Canadian law or public safety and are not sufficient to support the revocation of his pardon.

[37] He acknowledges that the Policy Manual allows the Board to consider non-law-abiding behaviour that does not result in a charge when assessing good conduct, but notes that it does not refer to outstanding charges for criminal offences. He adds that if serious charges alone were sufficient to revoke a pardon, Parliament would have specifically provided for this in the CRA.

[38] Mr. Buffone again points to *MY* where the Court of Appeal found that the Board erred by relying only on the “mere fact” of conviction rather than focusing on the applicant’s conduct. He submits that the Board erred in the same way because it relied on the mere fact of the charges he faced.

[39] He argues that this Court’s jurisprudence (*Conille and Jaser v Canada (Attorney General)*, 2015 FC 4 [*Jaser*]), which found that reliance on outstanding charges is sufficient to support the revocation of a pardon, is inconsistent with the Federal Court of Appeal’s more recent and binding decision in *MY*.

[40] Mr. Buffone further argues that the Board should have made inquiries of justice system participants to gather more information in order to ensure that it met its onus to be satisfied that he was no longer of good conduct. In *MY*, the Federal Court of Appeal found that the Board should have made inquiries about M.Y.’s conviction.

[41] Mr. Buffone submits that the evidence relied on by the Board was insufficient for it to conclude he was no longer of good conduct. The Board chose not to make the inquiries it was required to make in order to gather sufficient evidence. Therefore, the Board should have waited for the outcome of his criminal trial, which would provide additional information.

## VII. The Respondent’s Submissions

[42] The Respondent submits that the Board’s decision is reasonable: the Board was not required to engage in a *Charter* analysis in the absence of submissions from Mr. Buffone; the

Board did not err by confusing the test for granting and revoking the pardon, rather, it clearly applied the test for revocation and set out several reasons; and, the Board had sufficient evidence to find that Mr. Buffone was no longer of good conduct. The Respondent adds that a pardon is a discretionary privilege and not a right.

*The Board was not required to proportionately balance Charter rights and values; the Charter issues were not raised by Mr. Buffone*

[43] The Respondent notes that Mr. Buffone had the opportunity to make submissions to the Board and had the benefit of counsel in doing so. Mr. Buffone's brief reference to his presumption of innocence was not a submission to the Board that it should consider and apply the *Doré* framework to balance the *Charter* interests or values that may be implicated in the context of its decision whether to revoke a pardon.

[44] The Respondent submits that the Court has the discretion not to consider an issue that is raised for the first time on judicial review (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras 22-23). In addition, the Court should be reluctant to engage in an analysis of whether the decision reflects a proportionate balancing of *Charter* values without the benefit of an evidentiary record.

[45] The Respondent further submits that, in any case, the Board's decision is not unreasonable for not engaging in a *Doré*-type analysis in making its determination, since *Charter* values were not engaged in the circumstances of this case. In order to engage section 7, an individual must demonstrate with non-speculative evidence that there is a sufficient causal

connection between the impugned state actions—in this case the revocation of the pardon—and the deprivation of a protected interest—in this case the allegation that the presumption of innocence as a principle of fundamental justice is at stake.

[46] The Respondent notes that Mr. Buffone did not raise with the Board his intention to testify at his criminal trial or how the revocation of his pardon could or would impact his defence strategy. The Respondent acknowledges that the revocation of the pardon, and consequently Mr. Buffone's criminal record, could have implications for the conduct of his defence, but submits that the implications remain speculative.

[47] The Respondent notes that in *Jaser* the Court found that Mr. Jaser's section 7 interests were not engaged by a revocation of his pardon based on outstanding criminal charges. The same argument—that a revocation would make prior convictions available for use as evidence at trial—was rejected by the Court in *Jaser* as speculative (at para 39).

*The Board did not apply the wrong test*

[48] The Respondent notes that a pardon does not erase a conviction; rather, a pardon (now called a record suspension) is an indication that the Board is of the view that an individual's record should no longer reflect adversely on his or her character.

[49] The Respondent acknowledges that the Board began its decision by setting out the test for *granting* a pardon. The Respondent suggests that the Board may have intended to begin with the criteria for granting the pardon and then to assess whether that pardon should be revoked.

However, if the Board included a statement about the criteria for granting a pardon in error, it is immaterial. The decision is clearly based on the Board's application of the criteria for revoking a pardon pursuant to section 7. The ongoing entitlement to a pardon is contingent on remaining of good conduct. The sole issue for the Board's consideration was whether there was evidence establishing to the satisfaction of the Board that Mr. Buffone no longer met the good conduct criteria.

[50] The Respondent notes that the Policy Manual provides that the Board may consider a range of information to assess good conduct, including police information even if no charges are outstanding or there is no finding of guilt. In *Jaser*, the Court found that the fact of the charges was sufficient to conclude that Mr. Jaser was no longer of good conduct (para 50). In *Conille*, the Board relied on information that Mr. Conille was suspected of a serious offence and this was sufficient to find that he was no longer of good conduct.

[51] The Respondent submits that the Board considered more than simply the fact that charges were laid. The decision must be read as a whole and should not be picked apart with a focus on one line to suggest that the Board put an onus on Mr. Buffone or that the Board did not satisfy itself as required by the CRA.

[52] The Respondent also distinguishes the present case from *MY*. In *MY*, the Federal Court of Appeal found that the Board conflated the considerations for revocation of a pardon pursuant to paragraph 7(b) (evidence establishing to the satisfaction of the Board that the person is no longer of good conduct) with paragraph 7(a) (that the person was subsequently convicted of a summary

conviction offence). In the present case, the Board based its decision only on paragraph 7(b) to find that Mr. Buffone was no longer of good conduct. The Board considered the sworn Information which outlined 12 charges, including details on the nature of the offences charged, the number of persons involved, the affiliation with organized crime, and that a weapon was involved. Unlike in *MY*, the Board had considerable information about the nature of the charges against Mr. Buffone.

#### VIII. The Decision is Reasonable

*The Board did not err by failing to conduct an assessment and proportionate balancing of the Charter interests or values implicated with the statutory objectives*

[53] In *Doré*, the Supreme Court established that reviewing courts should apply the reasonableness standard to administrative decisions challenged on *Charter* grounds but, in doing so, the reviewing court must assess whether the decision reflects a proportionate balancing of the *Charter* protections at stake and the relevant statutory mandate or objectives.

[54] According to Mr. Buffone, the Board's failure to assess and proportionately balance his *Charter* protected rights, interests or values with the statutory objectives of the relevant provisions of the CRA renders the decision unreasonable.

[55] As the Federal Court of Appeal noted recently in *Taman v Attorney General of Canada*, 2017 FCA 1 [*Taman*], such arguments should not be raised before the Court on judicial review unless the initial decision-maker has had the opportunity to consider them. In *Taman*, the Court of Appeal found that the applicant had raised the need to balance her *Charter* rights and interests



in her written submissions to the Public Service Commission, but had not fully pursued the argument before the decision-maker. The Court of Appeal noted at paragraph 18:

...This Court is reluctant to embark upon *Charter* reviews where the parties have not pursued their *Charter* remedies before the initial decision maker: see *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2014 FCA 245, [2015] 4 F.C.R. 75 at para. 37. This reluctance is grounded in the need to allow the federal board, commission or tribunal an opportunity to lead evidence to support a “reasonable limitation” argument, which is best done before the trier of fact. It is grounded as well as in our recognition that the initial decision maker’s analysis will provide valuable insights into the proper balancing of the various factors at play.

[Emphasis added]

[56] It is apparent from the record that Mr. Buffone’s did not raise, in his submissions to the Board, any of the arguments he now makes regarding the need for the Board, as an administrative decision maker, to consider a proportionate balancing of *Charter* rights and interests.

[57] Mr. Buffone’s submissions to the Board were set out in a short letter which describes his lifestyle and his focus on family, work and community and includes the brief statement, “I know that I am presumed innocent but the reality is that the vast majority of people presume guilt”. This brief reference to the presumption of innocence is a far cry from the arguments he now makes regarding how his *Charter* rights, interests or values should be balanced with the statutory objectives in considering the revocation of his pardon. He did not make submissions with respect to the statutory objectives of the pardon and revocation provisions of the CRA. He did not raise the potential implications of a revocation of his pardon on the manner in which he may conduct his defence to the criminal charges. He did not advance the argument that the presumption of

innocence should be considered as a principle of fundamental justice or that the potential deprivation of his liberty should be limited by this principle.

[58] Mr. Buffone points to *Trinity Western* as an example of the initial decision-maker proactively seeking submissions on the *Charter* rights at play and conducting the appropriate balancing of those rights. However, in *Trinity Western*, the key issue was how to address the competing *Charter* rights implicated and the initial decision-maker engaged in the analysis.

[59] Although Counsel for Mr. Buffone explained to the Court how such an analysis *could* have been conducted by the Board in its consideration of whether to revoke a pardon, the proposed approach is based on several assumptions or theories, without any opportunity for the Board to consider these assumptions or theories or for the Board to apply its expertise. The Court is without any evidentiary record to inform its assessment of the statutory objectives of the pardon and revocation provisions and whether the decision reflects a proportionate balancing of the rights or values implicated with those objectives. Heeding the guidance of the Court of Appeal in *Taman*, the Court will not engage in the detailed *Doré* type analysis. The Board's decision cannot be found to be unreasonable because it did not conduct a balancing of the *Charter* interests or values that may be at play—which were not raised before it—against the statutory objectives of the CRA.

[60] In any event, even if the Court were to embark on a review in the absence of an evidentiary record, and determine whether the decision reflects a proportionate balancing of the

*Charter* protections or values now raised by Mr. Buffone, the Court would find the decision to be reasonable.

[61] A few observations are in order. I do not share Mr. Buffone's view that the statutory objectives of the pardon (now record suspension) regime are found in section 4.1 or that the objectives of revocation are the mirror image of the objectives of granting a pardon. In my view, section 4.1 sets out criteria for granting a pardon, not the statutory objectives. Section 7 sets out the criteria for revocation. In the present case, the Board is relying only on paragraph 7(b), which requires evidence establishing to the satisfaction of the Board that the person to whom it relates is no longer of good conduct. In addition, section 7.2 provides that a pardon is automatically revoked upon conviction for an indictable offence and for the majority of hybrid offences.

[62] In the present case, the revocation of the pardon may impact a person's section 7 *Charter* interests to some extent, but that is the nature of the revocation. Revocation removes the privilege of having the criminal record suspended and kept separate from other criminal records and, thereby, avoids the usual consequences of a criminal record. A pardon is a privilege contingent on, among other things, remaining of good conduct.

[63] The jurisprudence has established that the presumption of innocence does not apply in the context of an application for a pardon (*Conille*) or in the revocation of a pardon (*Jaser*). I do not agree that *MY* has cast doubt on this jurisprudence.

[64] In *Conille*, Justice Blanchard noted (at para 30):

In my opinion, the "presumption of innocence" principle is not applicable in the context of an application for pardon. This principle and the rights pertaining thereto apply in the context of a criminal proceeding and not, in my opinion, in the case of an administrative proceeding such as the one involved in this case. The grant of a pardon is discretionary. It is not an entitlement and is done only when the Board is satisfied that the applicant is of good conduct and that he has not been convicted of an offence during the five-year period (subsection 4.1(1) of the Act).

[65] Mr. Buffone now suggests that the presumption of innocence must be taken into account as a principle of fundamental justice, along with his right to security of the person, and be balanced against the statutory objectives of the CRA.

[66] In my view, the presumption of innocence cannot take on a new role as a principle of fundamental justice to put persons facing revocation of a pardon due to subsequent charges for new offences in a different position than those who are not charged with offences, but whose good conduct is otherwise in question. The CRA provides that the Board may revoke the pardon in several circumstances, including where it is satisfied that the person is no longer of good conduct. It would be illogical and would undermine the intent of the CRA to prohibit revocation in the face of outstanding criminal charges due to the presumption of innocence, yet permit the Board to rely on conduct that falls short of criminal charges (for example that shows an association with persons involved in criminal activity) or on charges that are stayed or withdrawn. The provisions of the Policy Manual which guide the assessment of good conduct, and which this Court (*Jaser*) and the Court of Appeal (*MY*) have found apply to the assessment of good conduct for both granting and revoking a pardon, refer to, among other things, information from the police about non-law-abiding behaviour that did not result in a charge;

information about charges that were withdrawn, stayed, or dismissed; and, information exchanged with justice system participants about suspected or alleged criminal behaviour.

[67] Finally, Mr. Buffone's suggestion that if Parliament had intended to have pardons revoked based on outstanding charges, it could have specifically provided for this in the CRA, overlooks that Parliament did provide for this in paragraph 7(b), which permits the Board to consider a range of conduct and information to determine whether the person is no longer of good conduct. Similarly, the approach proposed by Mr. Buffone to await the outcome of the criminal process before determining whether to revoke his pardon ignores this provision of the CRA.

*The Board did not apply the wrong test for revoking a pardon*

[68] I agree with the Respondent that the Board's decision can be read in two ways. Regardless, even if the first paragraph, which refers to the criteria for granting a pardon, was included in error, it does not result in any error in the decision.

[69] As the Supreme Court of Canada held in *Newfoundland Nurses*, the reasons are to "be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes" (at para 14). The reasons and the record demonstrate that the Board was considering a proposal to revoke Mr. Buffone's pardon. The notice sent, the first decision, the agreement to reconsider the revocation proposal and to accept submissions, and the submissions provided by Mr. Buffone were all focussed on the issue of whether his pardon

should be revoked. The Board clearly considered whether Mr. Buffone's pardon should be revoked.

[70] With respect to Mr. Buffone's reliance on *MY* at para 23, in support of his submission that there is no onus on the applicant to establish their good conduct, rather that there is an onus on the Board, I do not agree that *MY* established such a general proposition. In *MY*, the Court of Appeal stated (at para 23):

I also note that the requirement to obtain representations from M.Y. under the Act does not imply that it is M. Y. who has the burden of establishing his good conduct; rather, it reflects the Board's duty of procedural fairness (see also subsections 4.2(2) and (3) of the Act).

[71] In my view, this addresses a specific argument and clarifies the duty of procedural fairness under section 7.1, as well as subsections 4.2(2) and (3).

[72] The only references in the CRA to any onus are with respect to an application for a pardon. Subsection 4.1(2) applies to an applicant who seeks a pardon or record suspension in respect of an indictable offence and provides that "the applicant has the onus of satisfying the Board that the record suspension would provide a measurable benefit to the applicant and would sustain his or her rehabilitation in society as a law-abiding citizen". Subsection 4(4) places an onus on an applicant who was convicted of sexual offences against a young person to satisfy the Board of certain things; for example, that there was no violence used or that the applicant was not in a position of trust or authority in relation to the victim of the offence.

[73] Both the granting and revocation of a pardon require that the Board be satisfied of the applicable criteria. Section 7 specifically provides that the Board *may* revoke a pardon “on evidence establishing to the satisfaction of the Board that the person...is no longer of good conduct” (emphasis added).

[74] I do not agree that the Board reversed any onus of proof by stating that “the involvement of the police raises doubts about whether or not you continue to satisfy the good conduct criteria”. This does not reflect the Board’s view on the applicable standard to be met in accordance with Section 7. This sentence followed from the Board’s reference to several factors arising from the nature and scope of the outstanding charges all of which pointed to the overall conclusion that the Board was satisfied that Mr. Buffone no longer met the good conduct criteria.

*The Board had sufficient information, and reasonably found that it was satisfied that Mr. Buffone was no longer of good conduct*

[75] Justice Boswell noted in *Jaser* (at para 48):

The Board decided that the applicant was no longer of good conduct based only on the information supplied by the RCMP that he had been charged with some serious crimes. The applicant claims that this finding of fact was made perversely and capriciously, since a charge is merely an allegation and the Board had no knowledge of any facts that might support the charges. In my view, the applicant’s arguments in this regard miss the mark, since it was not the veracity of the allegations underlying the charges which the Board found reliable and credible but, rather, the very fact of the information itself setting out the charges. Even if these allegations may subsequently be proven to be unfounded, it was reasonable for the Board to determine that the applicant was no longer of good conduct in the face of the charges as alleged.

[Emphasis added.]

[76] Justice Boswell considered the Policy Manual which provides that in assessing good conduct, the Board may consider a range of information, including information about non-law-abiding conduct that did not result in any charges and information about conduct that resulted in a charge that was withdrawn, stayed, dismissed or which resulted in an acquittal. Justice Boswell noted at paragraph 50, that these references in the Policy Manual “both suggest that the Board can and should consider police information about the applicant’s conduct even if it did not result in a charge or a guilty verdict.”

[77] Justice Boswell concluded at paragraph 53:

In my view, it was reasonable for the Board to infer that the applicant was no longer of good conduct from the mere fact that he was charged with the alleged offences. Although the Board did not look behind the information it received from the RCMP, it is difficult to see what more it needed to do since the mere fact of the information being laid speaks for itself irrespective of whether the allegations contained in the information are true or not. In these circumstances, I do not think the Board erred by relying on the information.

[78] I do not agree that *Jaser* needs to be reconsidered in light of *MY*. The Court of Appeal clearly stated in *MY* that its “conclusion is essentially grounded in the very specific facts of the case” (at para 16).

[79] The Board was clearly satisfied that Mr. Buffone was no longer of good conduct based on its consideration of the information received and Mr. Buffone’s own submissions. The Board relied on more than the involvement of police or the mere fact that charges were laid. The Board noted the nature of the charges, which were the same type of offences as the offences for which he was previously convicted; the large scale of the overall operation alleged, including the



number of persons involved, which suggested a sophisticated scheme to deal in drugs; and that the charges reflected a disregard for public safety, referring to the impact of drugs on society.

[80] With respect to Mr. Buffone's reliance on *MY* in support of his submissions that the Board should have alerted him to the nature of the representations he should make regarding his good conduct and that the Board should have conducted more "fact finding", I note that the Board sent a detailed letter to him in December 2014 clearly indicating that the representations "must" address the reasons proposed to revoke the pardon and explaining the good conduct criteria.

[81] Although Mr. Buffone did not receive the first letter sent to him in December 2014, the subsequent letter that advised him that his pardon had been revoked set out similar information, including that the information from the police had informed its determination to revoke his pardon. Mr. Buffone was given an opportunity to make submissions for the reconsideration of the revocation and his counsel also liaised with the Board. Unlike in *MY*, it cannot be said that Mr. Buffone was not aware of the type of information the Board would find useful.

[82] Mr. Buffone also notes that in *MY*, the Court of Appeal found, at paragraph 20, that the Board did not conduct any investigation or seek details from the police about the circumstances of the offence for which M. Y. had been convicted to determine whether his conduct had placed others in danger. He argues that there was a duty on the Board to seek out information in order to satisfy itself that he no longer met the good conduct criteria and that the Board failed to use its "fact finding" powers.

[83] I do not agree that *MY* established, as a general proposition, that the Board must seek out additional information or do more “fact finding” to ensure it has everything possible to assess the good conduct at issue.

[84] In *MY*, the Court of Appeal stated (at para 20):

The Board did not conduct any investigation or seek to obtain any details from police regarding the circumstances surrounding the commission of the offence to determine if M. Y.'s conduct could truly have placed the lives of others in danger (see section 16 of the Decision-Marking Policy Manual for Board Members which pertains to the conduct of independent inquiries to evaluate good conduct).

[85] This statement must be read in the context of the facts of *MY*, which can be distinguished from the present facts. In *MY*, the Board relied on M.Y.'s subsequent conviction for impaired driving without any details about that offence, for which he had pleaded guilty, to find that he no longer met the good conduct criteria. In my view, the Court of Appeal's point is that more information was needed to determine how the fact of the conviction supported the Board's finding that he placed the lives of others in danger, given that the Board proposed to revoke the pardon based on M.Y. no longer being of good conduct pursuant to paragraph 7(b), rather than relying on paragraph 7(a) which addresses convictions for specific offences, including the offence for which M.Y. was convicted.

[86] Similarly, the Court of Appeal's reference to section 16 (now section 14) of the Policy Manual must be considered in the context of the particular facts in *MY*. Section 14 refers to what the Board *may* do, when considering whether to *grant* a pardon. It guides the Board by providing

that in assessing an applicant's good conduct, the Board may gather information about the conviction for which the pardon is sought. Section 14 states:

14. In addition, the Board may make independent inquiries with justice system participants, as defined in section 2 of the *Criminal Code*.

14. En outre, la Commission peut mener des enquêtes indépendantes auprès de personnes associées au système judiciaire, au sens de l'article 2 du *Code criminel*.

[87] Although the Court of Appeal referred to section 14 in the context of *revoking* M.Y.'s pardon, which was based on a subsequent conviction to inform whether he was of good conduct, section 14 of the Policy Manual is primarily intended to apply to a determination whether to *grant* a pardon. Section 14 guides the application of section 4.2 of the CRA. Section 4.2 of the CRA applies only to applications for a pardon (now a record suspension) and provides that the Board "shall" make inquiries regarding eligibility and good conduct and "may" make inquiries, in the case of an indictable offence, regarding whether granting the pardon/record suspension would bring the administration of justice into disrepute. The CRA does not include these "fact finding" provisions with respect to *revocation* of a pardon.

[88] I acknowledge that the Court of Appeal noted in *MY* that the provisions of the Policy Manual regarding the definition and assessment of good conduct to grant a pardon "seems to apply to the Act in its entirety" and, therefore, would apply to the assessment of revocation based on good conduct. I agree that good conduct should be assessed in the same way for both purposes. However, I do not agree that the Court of Appeal signalled that all of the provisions in the Policy Manual regarding granting a pardon also apply to revoking a pardon. If that were intended, several modifications would be necessary.

[89] The Court of Appeal does not seem to have been called upon to consider the distinction between gathering information about the conviction for which a pardon is sought, and gathering information about a subsequent conviction that may result in the revocation of a pardon in circumstances other than those presented in *MY*.

[90] In the context of considering whether to revoke a pardon on the basis of information that the person has been charged with one or more subsequent offences, I do not agree that the Board has an obligation to seek information from justice system participants about the outstanding charges or that, even if it wanted to, that it could do so. It is not likely that the police or the Crown would provide additional information, not yet public, to the Board about outstanding charges for which a person has not yet been tried. Moreover, the accused person would not want details that would otherwise only be disclosed to him or her shared with others. If the accused person has information that they believe would support a finding that they remained of good conduct, they are best placed to provide the information and to make the call whether this information should be provided to the Board or used only in their defence to the criminal charges.

[91] It is a very different context to gather information from justice system participants about the offences for which a person has been convicted and seeks a pardon, than to gather information about outstanding charges that underlie a proposal to revoke a pardon.

[92] There was no obligation on the Board in the circumstances to seek out more information to make the determination whether to revoke his pardon. Moreover, the Board's decision reflects

that it was satisfied, based on all the information it had, which described the nature and scope of the offences charged, that Mr. Buffone was no longer of good conduct.

[93] In conclusion, the Board's decision to revoke the pardon of Mr. Buffone is reasonable; the decision is transparent, intelligible and justified and it falls well within the range of acceptable outcomes, reflecting the application of the law to the facts.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that**

1. The Application for Judicial Review is dismissed.
2. As agreed by the parties, there is no order with respect to costs.

"Catherine M. Kane"

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Judge

## ANNEX A

### The Relevant Provisions of the *Criminal Records Act*

#### **Record suspension**

**4.1 (1)** The Board may order that an applicant's record in respect of an offence be suspended if the Board is satisfied that

**(a)** the applicant, during the applicable period referred to in subsection 4(1), has been of good conduct and has not been convicted of an offence under an Act of Parliament; and

**(b)** in the case of an offence referred to in paragraph 4(1)(a), ordering the record suspension at that time would provide a measurable benefit to the applicant, would sustain his or her rehabilitation in society as a law-abiding citizen and would not bring the administration of justice into disrepute.

#### **Onus on applicant**

**(2)** In the case of an offence referred to in paragraph 4(1)(a), the applicant has the onus of satisfying the Board that the record suspension would provide a measurable benefit to the applicant and would sustain his or her rehabilitation in society as a law-abiding citizen.

#### **Suspension du casier**

**4.1 (1)** La Commission peut ordonner que le casier judiciaire du demandeur soit suspendu à l'égard d'une infraction lorsqu'elle est convaincue :

**a)** que le demandeur s'est bien conduit pendant la période applicable mentionnée au paragraphe 4(1) et qu'aucune condamnation, au titre d'une loi du Parlement, n'est intervenue pendant cette période;

**b)** dans le cas d'une infraction visée à l'alinéa 4(1)a), que le fait d'ordonner à ce moment la suspension du casier apporterait au demandeur un bénéfice mesurable, soutiendrait sa réadaptation en tant que citoyen respectueux des lois au sein de la société et ne serait pas susceptible de déconsidérer l'administration de la justice.

#### **Fardeau du demandeur**

**(2)** Dans le cas d'une infraction visée à l'alinéa 4(1)a), le demandeur a le fardeau de convaincre la Commission que la suspension du casier lui apporterait un bénéfice mesurable et soutiendrait sa réadaptation en tant que citoyen respectueux des lois au sein de la société.

## **Factors**

**(3)** In determining whether ordering the record suspension would bring the administration of justice into disrepute, the Board may consider

**(a)** the nature, gravity and duration of the offence;

**(b)** the circumstances surrounding the commission of the offence;

**(c)** information relating to the applicant's criminal history and, in the case of a service offence, to any service offence history of the applicant that is relevant to the application; and

**(d)** any factor that is prescribed by regulation.

## **Inquiries**

**4.2 (1)** On receipt of an application for a record suspension, the Board

**(a)** shall cause inquiries to be made to ascertain whether the applicant is eligible to make the application;

**(b)** if the applicant is eligible, shall cause inquiries to be made to ascertain the applicant's conduct since the date of the conviction; and

## **Critères**

**(3)** Afin de déterminer si le fait d'ordonner la suspension du casier serait susceptible de déconsidérer l'administration de la justice, la Commission peut tenir compte des critères suivants :

**a)** la nature et la gravité de l'infraction ainsi que la durée de sa perpétration;

**b)** les circonstances entourant la perpétration de l'infraction;

**c)** les renseignements concernant les antécédents criminels du demandeur et, dans le cas d'une infraction d'ordre militaire, concernant ses antécédents à l'égard d'infractions d'ordre militaire qui sont pertinents au regard de la demande;

**d)** tout critère prévu par règlement.

## **Enquêtes**

**4.2 (1)** Sur réception d'une demande de suspension du casier, la Commission :

**a)** fait procéder à des enquêtes en vue de déterminer si le demandeur est admissible à présenter la demande;

**b)** si le demandeur est admissible, fait procéder aux enquêtes pour connaître sa conduite, depuis la date de sa condamnation;



(c) may, in the case of an offence referred to in paragraph 4(1)(a), cause inquiries to be made with respect to any factors that it may consider in determining whether ordering the record suspension would bring the administration of justice into disrepute.

**Entitlement to make representations**

(2) If the Board proposes to refuse to order a record suspension, it shall notify in writing the applicant of its proposal and advise the applicant that he or she is entitled to make, or have made on his or her behalf, any representations to the Board that he or she believes relevant either in writing or, with the Board's authorization, orally at a hearing held for that purpose.

**Board to consider representations**

(3) The Board shall, before making its decision, consider any representations made to it within a reasonable time after the notification is given to the applicant pursuant to subsection (2).

**Waiting period**

(4) An applicant may not re-apply for a record suspension until the expiration of one year after the day on which the Board refuses to order a record

c) peut, dans le cas d'une infraction visée à l'alinéa 4(1)a), faire procéder à des enquêtes au sujet des critères sur lesquels elle peut se fonder pour déterminer si le fait d'ordonner la suspension du casier serait susceptible de déconsidérer l'administration de la justice.

**Droit de présenter des observations**

(2) Si elle se propose de refuser la suspension du casier, elle en avise par écrit le demandeur et lui fait part de son droit de présenter ou de faire présenter pour son compte les observations qu'il estime utiles soit par écrit soit, dans le cas où elle l'y autorise, oralement dans le cadre d'une audience tenue à cette fin.

**Examen des observations**

(3) Avant de rendre sa décision, elle examine les observations qui lui sont présentées dans un délai raisonnable suivant l'avis.

**Délai en cas de refus**

(4) Aucune autre demande ne peut être présentée avant l'expiration d'un an à compter de la date du refus de la suspension du casier.

suspension.

[...]

### **Revocation of record suspension**

7 A record suspension may be revoked by the Board

(a) if the person to whom it relates is subsequently convicted of an offence referred to in paragraph 4(1)(b), other than an offence referred to in subparagraph 7.2(a)(ii);

(b) on evidence establishing to the satisfaction of the Board that the person to whom it relates is no longer of good conduct; or

(c) on evidence establishing to the satisfaction of the Board that the person to whom it relates knowingly made a false or deceptive statement in relation to the application for the record suspension, or knowingly concealed some material particular in relation to that application.

### **Entitlement to make representations**

7.1 (1) If the Board proposes to revoke a record suspension, it shall notify in writing the person to whom it relates of its proposal and advise that person that he or she is entitled to make, or have made on his or her behalf, any

...

### **Cas de révocation**

7 La Commission peut révoquer la suspension du casier dans l'un ou l'autre des cas suivants :

a) la personne dont le casier a été suspendu est condamnée pour une infraction visée à l'alinéa 4(1)b), à l'exception de toute infraction visée au sous-alinéa 7.2a)(ii);

b) il existe des preuves convaincantes, selon elle, du fait que l'intéressé a cessé de bien se conduire;

c) il existe des preuves convaincantes, selon elle, que l'intéressé avait délibérément, à l'occasion de sa demande de suspension du casier, fait une déclaration inexacte ou trompeuse, ou dissimulé un point important.

### **Droit de présenter des observations**

7.1 (1) Si elle se propose de révoquer la suspension du casier, la Commission en avise par écrit l'intéressé et lui fait part de son droit de présenter ou de faire présenter pour son compte les observations qu'il estime utiles soit par écrit soit,

representations to the Board that he or she believes relevant either in writing or, with the Board's authorization, orally at a hearing held for that purpose.

### **Board to consider representations**

(2) The Board shall, before making its decision, consider any representations made to it within a reasonable time after the notification is given to a person under subsection (1).

### **Cessation of effect of record suspension**

**7.2** A record suspension ceases to have effect if

(a) the person to whom it relates is subsequently convicted of

(i) an offence referred to in paragraph 4(1)(a), or

(ii) any other offence under the *Criminal Code*, except subsection 255(1), or under the *Controlled Drugs and Substances Act*, the *Firearms Act*, Part III or IV of the *Food and Drugs Act* or the *Narcotic Control Act*, chapter N-1 of the Revised Statutes of Canada, 1985, that is punishable either on conviction on indictment or on summary conviction; or

(b) the Board is convinced by new information that the

dans le cas où elle l'y autorise, oralement dans le cadre d'une audience tenue à cette fin.

### **Examen des observations — décision**

(2) Avant de rendre sa décision, la Commission examine les observations qui lui sont présentées dans un délai raisonnable suivant l'avis.

### **Nullité de la suspension du casier**

**7.2** Les faits ci-après entraînent la nullité de la suspension du casier :

a) la personne dont le casier a été suspendu est condamnée :

(i) soit pour une infraction visée à l'alinéa 4(1)a),

(ii) soit pour toute autre infraction — punissable par voie de mise en accusation ou par procédure sommaire — au *Code criminel*, à l'exception de l'infraction prévue au paragraphe 255(1) de cette loi, à la *Loi réglementant certaines drogues et autres substances*, à la *Loi sur les armes à feu*, aux parties III ou IV de la *Loi sur les aliments et drogues* ou à la *Loi sur les stupéfiants*, chapitre N-1 des Lois révisées du Canada (1985);

b) la Commission est convaincue, à la lumière de

person was not eligible for the record suspension when it was ordered.

renseignements nouveaux, que l'intéressé n'était pas admissible à la suspension du casier à la date à laquelle elle a été ordonnée.

## Decision-Making Policy Manual for Board Members

### 13. Pardons/Record Suspensions, Royal Prerogative of Mercy (Clemency) and Prohibition from Driving

#### 13.1 Pardons/Record Suspensions

#### Legislative References

1. *Criminal Records Act* (CRA), sections Section 2, Section 2.2, Section 4 Paragraph (1) to Section 4 Paragraph (4), Section 4.01, Section 4.1, Section 4.2, 6.1, Section 7, Section 7.1, and Section 7.2, *Criminal Records Regulations* (CRR), section Section 1.1 and *Criminal Code*, section Section 2.

#### Purpose

2. To provide guidance to Board members in making decisions related to pardons and record suspensions.

#### Terminology

3. Applications received on or after June 29, 2010 and before March 13, 2012 are referred to as pardon applications.

4. Applications received on or after March 13, 2012 are

### 13. Réhabilitation (pardon)/suspension du casier, prérogative royale de clémence et interdiction de conduire

#### 13.1 Réhabilitation (pardon)/suspension du casier

#### Références législatives

1. *Loi sur le casier judiciaire* (LCJ), articles 2, 2.2, 4(1) à (4), 4.01, 4.1, 4.2, 7, 7.1 et 7.2, *Règlement sur le casier judiciaire* (RCJ), article 1.1 et *Code criminel*, article 2.

#### Objet

2. Guider les commissaires dans la prise de décisions relatives au pardon et à la suspension du casier.

#### Terminologie

3. Les demandes reçues le 29 juin 2010 ou par la suite, mais avant le 13 mars 2012, sont appelées demandes de pardon.

4. Les demandes reçues depuis le 13 mars 2012 sont appelées

referred to as record suspension applications

5. In this policy, the word "pardon" as noted in the CRA is referred to as "pardon" in French.

### **Eligibilities**

6. For pardon or record suspension applications, a period of time must elapse after the expiration of any sentence, including a sentence of imprisonment, a period of probation and the payment of any fine, victim fine surcharge, restitution and compensation orders imposed for an offence. The specified periods of time, or ineligibility periods correspond to specific types of offences as defined in the CRA.

7. In accordance with subsection Section 4 subsection (2) of the CRA, certain applicants are ineligible to apply for a record suspension. Exceptions may be made if the Board is satisfied that the applicant:

**a.** was not in a position of trust or authority towards the victim and the victim was not in a relationship of dependency with the applicant;

**b.** did not use, threaten to use or attempt to use violence,

demandes de suspension du casier.

5. Dans la présente politique, le terme « pardon » est employé à la place du terme « réhabilitation » qui figure dans la LCJ.

### **Admissibilité**

6. Pour qu'une demande de pardon ou de suspension du casier puisse être présentée, il faut qu'une certaine période se soit écoulée après l'expiration de la peine, qu'il s'agisse d'une peine d'emprisonnement, d'une période de probation ou du paiement d'une amende, d'une suramende compensatoire ou du montant prévu par une ordonnance de restitution ou de dédommagement. Les périodes d'attente déterminées, ou périodes d'inadmissibilité, correspondent à un type d'infraction, tel que défini dans la LCJ.

7. Conformément au paragraphe 4(2) de la LCJ, certaines personnes ne sont pas admissibles à présenter une demande de suspension du casier. Une exception peut être faite si la Commission est convaincue que le demandeur :

**a.** n'était pas en situation d'autorité ou de confiance vis-à-vis de la victime et que la victime n'était pas en situation de dépendance vis-à-vis de lui;

**b.** n'a pas usé de violence, d'intimidation ou de contrainte

intimidation or coercion in relation to the victim; and

envers la victime, ni tenté ou menacé de le faire;

c. was less than five years older than the victim.

c. était de moins de cinq ans l'aîné de la victime.

**8.** Board members will review the information provided by the applicant to determine whether they meet the exceptions to the ineligibility.

**8.** Les commissaires examinent les renseignements fournis par le demandeur afin de déterminer s'il satisfait aux critères à remplir pour pouvoir bénéficier de l'exception relative à l'inadmissibilité.

**9.** Refer to annexes B (Eligibilities Table for Pardon Applications Received on or after June 29, 2010 and before March 13, 2012) and C (Eligibilities Table for Record Suspension Applications Received on or after March 13, 2012) for additional guidance related to the eligibilities for pardons/record suspensions.

**9.** Voir les annexes B (Tableau d'admissibilité pour les demandes de pardon reçues le ou après le 29 juin 2010 et avant le 13 mars 2012) et C (Tableau d'admissibilité pour les demandes de suspension du casier reçues depuis le 13 mars 2012) pour avoir des indications additionnelles au sujet de l'admissibilité au pardon ou à la suspension du casier.

### **Decision-Making Criteria and Process**

### **Critères et processus décisionnels**

**10.** When making a decision on a pardon or a record suspension application, Board members will assess whether the applicant has been of good conduct. For applications that involve offences that fall under paragraph Section 4 Paragraph (a) of the CRA as it read on or after June 29, 2010 and before March 13, 2012, or under paragraph Section 4 subsection (1)(a) of the current CRA, Board members will also assess whether the pardon or record suspension would

**10.** Lorsque les commissaires ont à rendre une décision concernant une demande de pardon ou de suspension du casier, ils déterminent si le demandeur s'est bien conduit. Pour les demandes qui concernent des infractions relevant de l'alinéa 4a) de la LCJ telle qu'elle était libellée à partir du 29 juin 2010 mais avant le 13 mars 2012, ou de l'alinéa 4(1)a) de la LCJ actuelle, les commissaires déterminent également si le pardon ou la suspension du

provide a measurable benefit to the applicant, would sustain the applicant's rehabilitation into society, and would not bring the administration of justice into disrepute.

### ***Conduct***

**11.** For the purpose of the CRA as it read on or after June 29, 2010 and before March 13, 2012, as well as the current CRA, good conduct is considered behaviour that is consistent with and demonstrates a law-abiding lifestyle.

**12.** In assessing conduct, the Board is not subject to the same standards as a criminal court. The presumption of innocence and the relating rights are not applicable in the context of a pardon or a record suspension application.

**13.** The type of information and documentation that may be considered includes:

**a.** information from the police about a non-law abiding behaviour that did not result in a charge;

**b.** information about an incident that resulted in a charge that was subsequently withdrawn, stayed, or

casier apporterait un bénéfice mesurable au demandeur, soutiendrait sa réadaptation au sein de la société et ne serait pas susceptible de déconsidérer l'administration de la justice.

### ***Conduite***

**11.** Aux fins de l'application de la LCJ, telle qu'elle était libellée à partir du 29 juin 2010 mais avant le 13 mars 2012, et telle qu'elle est libellée actuellement, la bonne conduite consiste en des comportements qui sont compatibles avec un style de vie respectueux des lois.

**12.** Lorsque la Commission évalue la conduite, elle ne peut être tenue de respecter les mêmes normes qu'un tribunal pénal. Le principe de la présomption d'innocence et les droits qui s'y rattachent ne s'appliquent pas dans le contexte d'une demande de pardon ou de suspension du casier.

**13.** Voici les types de renseignements et de documents qui peuvent être pris en considération :

**a.** les renseignements fournis par la police concernant un comportement non respectueux des lois qui n'a pas fait l'objet d'une accusation;

**b.** l'information au sujet d'un incident ayant donné lieu à une accusation qui a été par la suite retirée, suspendue ou rejetée,

dismissed, or that resulted in a peace bond or acquittal, especially where the charge or charges are of a serious nature, and/or are related to convictions on the record for which the pardon or the record suspension is requested;

**c.** with regards to a peace bond or the use of alternative measures (e.g. community service work), information on the adherence to the conditions, the date on which the conditions were imposed and the date of the originating incident;

**d.** a record of a discharge, if less than one year has elapsed in the case of an absolute discharge or less than three years have elapsed in the case of a conditional discharge;

**e.** information about convictions under federal, territorial and provincial statutes and municipal by-laws, taking into consideration the nature, the number and the date of the infraction, and/or whether or not it is similar to the past criminal activity of the individual;

**f.** relevant personal information exchanged with justice system participants as defined in the *Criminal Code* about suspected or alleged

ou ayant abouti à un engagement de ne pas troubler l'ordre public ou à un acquittement, surtout si l'accusation ou les accusations sont graves et/ou si elles sont liées aux condamnations pour lesquelles le pardon ou la suspension du casier est demandé;

**c.** lorsqu'il y a eu un engagement de ne pas troubler l'ordre public ou qu'on a utilisé des mesures de rechange (p. e.g. service communautaire), l'information sur le respect des conditions, la date à laquelle les conditions ont été imposées et la date de l'incident en cause;

**d.** l'information sur une absolution, si moins d'un an s'est écoulé dans le cas d'une absolution inconditionnelle ou moins de trois ans se sont écoulés dans le cas d'une absolution conditionnelle;

**e.** l'information sur toute condamnation en vertu de lois fédérales, provinciales ou territoriales ou de règlements municipaux, compte tenu de la nature de l'infraction, du nombre d'infractions et de la date de l'infraction, et/ou selon qu'il y a ou non similarité avec les activités criminelles antérieures de la personne;

**f.** tout renseignement personnel pertinent fourni par des personnes associées au système judiciaire, au sens du Code criminel, à propos



criminal behaviour;	d'allégations ou de soupçons d'activités criminelles;
<b>g.</b> representations provided by, or on behalf of, the applicant; and	<b>g.</b> les observations présentées par le demandeur ou en son nom;
<b>h.</b> any information submitted to the Board by others with knowledge of the case, such as victims.	<b>h.</b> tout renseignement soumis à la Commission par d'autres personnes connaissant le cas, telles que les victimes.
<b>14.</b> In addition, the Board may make independent inquiries with justice system participants, as defined in section Section 2 of the <i>Criminal Code</i> .	<b>14.</b> En outre, la Commission peut mener des enquêtes indépendantes auprès de personnes associées au système judiciaire, au sens de l'article 2 du Code criminel.
<b>15.</b> The Board may also require that the applicant submit official documents relating to the commission, the investigation, and/or the prosecution of the offence.	<b>15.</b> La Commission peut aussi exiger que le demandeur soumette des documents officiels liés à la perpétration de l'infraction, à l'enquête et/ou à la poursuite à laquelle elle a donné lieu.
<b>16.</b> Where the applicant did not reside in Canada, the Board may consider international documents (e.g. an attestation of their good conduct from law enforcement where they resided).	<b>16.</b> Si le demandeur ne résidait pas au Canada, la Commission peut prendre en considération des documents de l'étranger (p. ex. une attestation de bonne conduite délivrée par un organisme d'application de la loi du pays où il résidait).
<b>17.</b> Where information from another jurisdiction has been submitted by the applicant, Board members will consider factors such as:	<b>17.</b> Lorsque le demandeur a soumis des renseignements provenant d'une autre administration, les commissaires tiennent compte de facteurs tels que :
<b>a.</b> the reliability and persuasiveness of the information; and	<b>a.</b> la fiabilité et le caractère convaincant de l'information;
<b>b.</b> the integrity of the source	<b>b.</b> l'intégrité des documents ou

documents or information.

***Measurable Benefit***

**18.** When assessing the measurable benefit of a pardon or a record suspension, Board members may consider whether the pardon or record suspension will assist the applicant in:

- a.** obtaining employment;
- b.** obtaining residence/improving their living conditions;
- c.** obtaining an education;
- d.** removing stigma/changing others perceptions;
- e.** social and/or personal improvement; and
- f.** obtaining financial stability.

***Sustainable Rehabilitation in Society***

**19.** When assessing the applicant's sustainable rehabilitation in society, Board members may consider whether the applicant:

- a.** has made a positive contribution to society;
- b.** has a lifestyle that is no longer associated with criminal behaviour;

des informations d'origine.

***Bénéfice mesurable***

**18.** Lorsque les commissaires évaluent le bénéfice mesurable d'un pardon ou d'une suspension du casier, ils peuvent se demander si le pardon ou la suspension du casier aidera le demandeur relativement à :

- a.** l'obtention d'un emploi;
- b.** l'obtention d'une résidence/amélioration des conditions de vie;
- c.** la poursuite des études;
- d.** l'élimination de la réprobation/la modification des perceptions d'autrui;
- e.** une amélioration sur le plan social et/ou personnel;
- f.** l'acquisition d'une stabilité financière.

***Soutien de la réadaptation au sein de la société***

**19.** Lorsque les commissaires évaluent si le pardon ou la suspension du casier soutiendrait la réadaptation du demandeur au sein de la société ils peuvent se demander si celui-ci :

- a.** apporté une contribution positive à la société;
- b.** a un mode de vie qui n'est plus associé au comportement criminel;

**c.** has taken responsibility for the offence; and

**c.** a accepté la responsabilité des infractions commises;

**d.** has taken steps to address the risk of recidivism, including developing pro-social relationships and social networks or identifying a support system.

**d.** a pris des mesures pour gérer le risque de récidive, notamment l'établissement de relations prosociales et de réseaux sociaux ou d'un système de soutien.

***Bringing the Administration of Justice into Disrepute***

***Déconsidération de l'administration de la justice***

**20.** When determining whether the granting of a pardon or ordering a record suspension would bring the administration of justice into disrepute, Board members may consider the following:

20. Lorsque les commissaires déterminent si le fait d'octroyer le pardon ou d'ordonner la suspension du casier serait susceptible de déconsidérer l'administration de la justice, ils peuvent prendre en considération ce qui suit :

**a.** the nature, gravity and duration of the offence;

**a.** la nature et la gravité de l'infraction ainsi que la durée de sa perpétration;

**b.** the circumstances surrounding the commission of the offence;

**b.** les circonstances entourant la perpétration de l'infraction;

**c.** information relating to the applicant's criminal history;

**c.** les renseignements concernant les antécédents criminels du demandeur;

**d.** in the case of a service offence, any service offence history of the applicant that is relevant to the application; and

**d.** dans le cas d'une infraction d'ordre militaire, les renseignements concernant les antécédents du demandeur à l'égard d'infractions d'ordre militaire qui sont pertinents au regard de la demande;

**e.** the factors listed under section SectionParagraph1.1 of the *CRR*.

**e.** les critères supplémentaires énoncés à l'article 1.1 du *RCJ*.

**Revocation of a Pardon or a Record Suspension**

**Révocation du pardon ou de la suspension du casier**

21. When determining whether to revoke a pardon or a record suspension where the individual is subsequently convicted of an offence punishable on summary conviction under a federal act or its regulations, other than an offence referred to in subparagraph Section 7.2 Paragraph (a) subparagraph (ii) of the CRA, Board members will consider all relevant information, including:

a. information that suggests a significant disregard for public safety and order and/or laws and regulations, given the offender's criminal history;

b. whether the offence is similar in nature to the offence for which the pardon or the record suspension was received; and

c. the time period since satisfaction of all sentences.

### **Cessation of a Pardon or a Record Suspension**

22. A pardon or a record suspension automatically ceases to have effect when the applicant is convicted of offences referred to in paragraph Section 7.2 Paragraph (a) of the CRA.

23. When proposing to cease a

21. Pour déterminer s'il y a lieu de révoquer le pardon ou la suspension du casier d'une personne qui a été condamnée pour une nouvelle infraction à une loi fédérale ou à ses règlements, punissable sur déclaration de culpabilité par procédure sommaire, à l'exception de toute infraction visée au sous-alinéa 7.2a)(ii) de la LCJ, les commissaires prennent en considération tous les renseignements pertinents, y compris :

a. les renseignements qui laissent penser que la personne fait preuve d'un mépris marqué à l'égard de la sécurité publique, de l'ordre public et/ou des lois et règlements, étant donné ses antécédents criminels;

b. la similarité de l'infraction commise avec l'infraction pour laquelle le pardon ou la suspension du casier a été obtenu;

c. la période qui s'est écoulée depuis que la personne a fini de purger toutes ses peines.

### **Nullité du pardon ou de la suspension du casier**

22. Un pardon ou une suspension du casier est automatiquement annulé quand le demandeur est condamné pour une infraction visée à l'alinéa 7.2a) de la LCJ.

23. Lorsque les commissaires

pardon or a record suspension in accordance with paragraph Section 7.2 Paragraph (b) of the CRA, Board members may consider new information such as a sentence not satisfied or a conviction.

envisagent qu'un pardon ou une suspension du casier soit annulé en vertu de l'alinéa 7.2b) de la LCJ, ils peuvent tenir compte de renseignements nouveaux, comme une peine qui n'a pas été purgée ou une condamnation qui est intervenue.

### **Voting Requirements**

**24.** The review of a pardon/record suspension application will be conducted by a panel of one Board member, except where the applicant has been convicted of a sexual offence or when deciding whether to revoke or cease a pardon or a record suspension for sexual offences, in which case the review will be conducted by a panel of two Board members.

**25.** If representations are received following a proposal to refuse to grant a pardon or order a record suspension, or to revoke a pardon or a record suspension, the final decision will be made by a panel of two different Board members for cases concerning sexual offences and by a panel of one different Board member for all other cases.

### **Representations**

**26.** The individual affected

### **Exigences en matière de vote**

**24.** L'examen d'une demande de pardon ou de suspension du casier est effectué par un comité constitué d'un seul commissaire, excepté lorsque le demandeur a été condamné pour une infraction d'ordre sexuel ou qu'il s'agit de déterminer s'il y a lieu de révoquer ou d'annuler le pardon ou la suspension du casier obtenu relativement à des infractions sexuelles, auquel cas l'examen est fait par un comité composé de deux commissaires.

**25.** Si des observations sont reçues après que la Commission a fait connaître son intention de refuser, ou de révoquer, le pardon ou la suspension du casier, la décision finale est prise par un comité composé de deux autres commissaires dans les cas d'infractions sexuelles et par un comité composé d'un autre commissaire dans tous les autres cas.

### **Observations**

**26.** La personne en cause peut

may make written representations, or with the Board's authorization, oral representations, if the Board proposes to:

**a.** refuse to grant a pardon or order a record suspension, pursuant to subsection Section 4.2 subsection (2) of the CRA;

**b.** revoke a pardon or a record suspension, pursuant to subsection Section 7.1 subsection (1) of the CRA; or

**c.** cease a pardon or a record suspension in cases which fall under paragraph Section 7.2 Paragraph (b) of the CRA.

**27.** Unless representations are received at an earlier date, the review will not proceed for at least 90 days following notification to the individual affected of their right to provide representation.

### **Hearings**

**28.** Refer to Policy 13.3 (Hearings for Pardons/Record Suspensions, Royal Prerogative of Mercy (Clemency) and Prohibition from Driving) for guidance related to hearings.

### **Decision and Reasons**

**29.** In their reasons for

présenter des observations par écrit ou, dans les cas où la Commission l'y autorise, oralement si la Commission se propose de prendre l'une des mesures suivantes :

**a.** refuser le pardon ou la suspension du casier, en vertu du paragraphe 4.2(2) de la LCJ;

**b.** révoquer le pardon ou la suspension du casier, en vertu du paragraphe 7.1(1) de la LCJ;

**c.** annuler le pardon ou la suspension du casier dans les cas visés à l'alinéa 7.2b) de la LCJ.

**27.** Avant de procéder à l'examen, la Commission attend au moins 90 jours après que la personne en cause a été informée de son droit de présenter des observations, sauf si elle reçoit les observations plus tôt.

### **Audiences**

**28.** Voir la politique 13.3 (Audiences concernant la réhabilitation (le pardon)/la suspension du casier, la prérogative royale de clémence et l'interdiction de conduire) pour avoir des indications au sujet des audiences.

### **Décision et motifs**

**29.** Dans les motifs de leur

decision, Board members will summarize their overall findings and assessment of the application, and the rationale for their decision.

décision, les commissaires résument leurs constatations générales et leur évaluation globale de la demande, et la justification de leur décision.

### **Cross-References**

### **Renvois**

**30.** Decision-Making Policy Manual:

**30.** Manuel des politiques décisionnelles :

**13.3** – Hearings for Pardons/Record Suspensions, Royal Prerogative of Mercy (Clemency) and Prohibition from Driving

**13.3** – Audiences concernant la réhabilitation (le pardon)/la suspension du casier, la prérogative royale de clémence et l'interdiction de conduire

**Annex B** – Eligibilities Table for Pardon Applications Received on or after June 29, 2010 and before March 13, 2012

**Annexe B** – Tableau d'admissibilité pour les demandes de pardon reçues le ou après le 29 juin 2010 et avant le 13 mars 2012

**Annex C** – Eligibilities Table for Record Suspension Applications Received on or after March 13, 2012

**Annexe C** – Tableau d'admissibilité pour les demandes de suspension du casier reçues depuis le 13 mars 2012

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**APPEARANCES:**

Mark Halfyard  
Colleen McKeown

FOR THE APPLICANT

Shain Widdifield

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Daniel Brown Law PC  
Barristers and Solicitors  
Toronto, Ontario

FOR THE APPLICANT

William F. Pentney  
Deputy Attorney General of  
Canada  
Toronto, Ontario

FOR THE RESPONDENT