Federal Court  Cour fédérale

Date: 20181023

Docket: T-1293-17

Citation: 2018 FC 1065

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, October 23, 2018

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

JONATHAN ST-PIERRE

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Jonathan St-Pierre is seeking judicial review of a decision of the Parole Board of Canada [PBC], an agency created under the *Corrections and Conditional Release Act* (S.C. 1992, c. 20) [CCRA or the Act]. This decision was rendered on August 4, 2017, and it appears that the application for judicial review was brought under section 18.1 of the *Federal Courts Act* (R.S.C. (1985), c. F-7).

I. The facts

[2] Mr. St-Pierre is now 31 years old. On June 2, 2017, he admitted that he was guilty of offences relating to child pornography. He distributed, made, possessed and accessed child pornography, offences under the *Criminal Code* (R.S.C. (1985), c. C-46). The making and distribution of pornography are offences that may result in a sentence of imprisonment for a term of 14 years, with a mandatory minimum sentence of imprisonment for a term of one year. For possession of child pornography, the maximum sentence is 10 years, with a minimum sentence of one year if the offence is an indictable offence. Where the Crown proceeds by summary conviction, the maximum sentence would be two years less a day, with a mandatory minimum sentence of six months. The same regime applies if the person is convicted of access to child pornography.

[3] In this case, the parties agreed that the appropriate sentence was the equivalent of two years of imprisonment because Mr. St-Pierre had already been detained since January 27, 2016. Given that the Court of Québec credited his days of pre-trial detention at a ratio of 1.5:1, the period of two years was reached on May 27, 2017. Therefore, the Court gave Mr. St-Pierre an additional sentence of one day in detention, on June 2, 2017.

[4] Moreover, an order was issued under section 161 of the *Criminal Code* (a prohibition against attending certain places, obtaining certain types of employment, having contact with children and using the Internet or any other digital network). He was also prohibited from

possessing firearms, ammunition and other explosive devices. Finally, the applicant had to be registered in the Sex Offender Registry (sections 490.012 and 490.013 of the *Criminal Code*).

[5] Of particular relevance to this matter, it appears that Mr. St-Pierre and the prosecution have suggested that he be declared a long-term offender. The following is an excerpt from the transcript of June 2, 2017:

> [TRANSLATION]
>
> . . . The sole dispute involves the period in which you will be restricted as a long-term offender. I have had the opportunity to read all of the reports, which have been filed with the Court, including the pre-sentence report by Dany Tétrault, Dr. Bergeron's report and finally the report by Dr. Morissette. Regarding the reports by Drs. Bergeron and Morissette, they both agree that you do need help. This help will be provided through therapy, therapy sessions.
>
> . . .
>
> All of the reports lead us all to the same conclusion. Obviously, you, on your own admission, and with your diagnoses, have talked about primary pedophilia, that you have a substantial risk of reoffending and that your situation requires intervention.
>
> All of the elements point to a high score indicating pedophilia for and deviant interests and Dr. Morissette notes that, clinically, your risk of reoffending is substantial.
>
> (pp. 9 and 10)

The Court therefore set the period during which the applicant would be subject to long-term supervision at seven years.

[6] Given the Court's findings in the course of sentencing, it is not really necessary to review at length the details of the facts giving rise to Mr. St-Pierre's assessment reports. For our

purposes it will suffice to note that these reports indicate the abuse of children as young as nine years old. These contacts took place with his half-brothers and half-sisters. He was placed in a rehabilitation centre for one year before being placed in foster care. At that time he received treatment from a psychologist. It appears that his consumption of child pornography began after he returned to live with his family, before he turned 17. Other charges were brought against him, and at the age of 17, he served six months of community supervision and two years of probation. After receiving therapy through the Programme d'évaluation et de traitement des abus sexuels [PÉTAS, a sexual abuse assessment and treatment program], it appears that the applicant was again charged with various sexual offences together with an accomplice he had met during the therapy.

[7] A total sentence of imprisonment of eight and a half years less a period of 13 months to take into account six and a half months of pre-trial detention was imposed for offences of distribution of child pornography, possession for the purpose of transmission of child pornography and conspiracy with an accomplice to touch a person under the age of 14 for sexual purposes and to make child pornography. This sentence was reduced to 42 months by the Court of Appeal of Québec, and further reduced by 13 months for the pre-trial detention.

[8] Dr. Bergeron's report, prepared after Mr. St-Pierre's most recent arrest, notes that the applicant stated that he [TRANSLATION] "now regrets having stopped attending therapy at the end of his sentence" (psychosexual assessment report, February 16, 2017, p. 9 of 24). The following excerpt can be found at page 10 of 24:

> [TRANSLATION]
>
> Questioned about his aspiration to be the martin (sic) Luther King of pedophiles, the subject was somewhat embarrassed by the evocation of this ambition and stated that he had simply wanted to write a book to help people understand pedophilia. He claims to have been successful in changing the mentality of some of his family members.

[9] As for the recidivism to which the applicant has pleaded guilty and for which a long-term supervision order was imposed on June 2, 2017, the arrest resulted from a 2016 investigation into a pedophile ring. As with the first arrest, which resulted in a sentence of eight and a half years' imprisonment, a search of the applicant's home revealed objects and electronic files relating to child pornography, some of which he had filmed himself.

[10] Psychiatrist Louis Morissette produced a report on April 19, 2017, entitled *Expertise sur les délinquants dangereux ou à contrôler* [expert report on dangerous or long-term offenders]. Like Dr. Bergeron, a psychologist, his concluded that the applicant's risk of reoffending is substantial. He also considers that the substantial risk that the applicant will reoffend is [TRANSLATION] "manageable, acceptable, controllable in the community". He added that measures had to be implemented. The applicant [TRANSLATION] "understands his issues. He is aware that his fantasies are deviant. He is aware that his fantasies are wrong and not socially acceptable. He has a positive attitude toward treatment and a potential follow-up" (page 9 of 9). Dr. Morissette also stated that the applicant [TRANSLATION] "could also most likely benefit from medication to diminish his sexual impulses".

[11] The Court also noted the report by psychiatrist Benoît Dassylva, dated December 10, 2008, and prepared at Correctional Service Canada's La Macaza Institution. The report followed

the first adult conviction and the decision of the Court of Appeal of Québec reducing the sentence to a total of 29 months' imprisonment. The following is an excerpt from the report:

> [TRANSLATION]
>
> Mr. St-Pierre has never been hospitalized in the psychiatric ward. When he was 19 years old, he received outpatient care in Shawinigan for a few months from Dr. Allard, a psychiatrist. The purpose of this was apparently to determine whether pharmacological treatment would be appropriate in light of his history of sexual interference with minors. According to Mr. St-Pierre, Dr. Allard had concluded that medication was not necessary. Mr. St-Pierre admitted, however, that he had not told Dr. Allard about his deviant fantasies or his consumption of child pornography. Mr. St-Pierre therefore never received any psychotropic medication. Nor has he ever received hormone therapy for the purpose of lowering his testosterone levels. He has never attempted suicide. As an adolescent, he followed a program administered by PÉTAS for his sexual problems.
>
> (p. 2 of 6)

Dr. Dassylva, the psychiatrist, did touch briefly on the possibility of medication. At page 4 of 6 of his report, he wrote that the applicant had never requested medication. He added that the applicant [TRANSLATION] "stated that his position had not changed and that he was very reluctant to take medication. He is worried about unwanted side effects. He added somewhat dramatically that he knew people who had become vegetables after taking medication prescribed by psychiatrists. He then qualified his statements somewhat, adding that these people were instead affected mentally, and that it was true that they were also taking drugs that could affect them mentally." Dr. Dassylva also noted that the therapy the applicant had already tried had not been able to prevent him from reoffending, [TRANSLATION] "despite positive reports". He therefore concluded as follows:

[TRANSLATION]

> If he were to return to society, Mr. St-Pierre would benefit, in my view, from residential supervision to avoid situations of risk. He could then receive supervision and support for his professional and relationship goals. Therapy specifically designed for sex offenders is clearly called for. In my view, he would also benefit from hormone therapy with a view to reducing his sexual impulses upon his return to society in order to lower the risk that he will reoffend. Mr. St-Pierre should therefore be informed of the potential advantages and disadvantages of such medication to make an informed decision as to whether or not to consent to this type of treatment.

As we are aware, Mr. St-Pierre reoffended.

II. Long-term offender

[12] The decision to declare that an offender is a long-term offender is governed by section 753.1 of the *Criminal Code*. The conditions are as follows:

Application for finding that an offender is a long-term offender	**Demande de déclaration - délinquant à contrôler**
753.1 (1) The court may, on application made under this Part following the filing of an assessment report under subsection 752.1(2), find an offender to be a long-term offender if it is satisfied that	**753.1 (1)** Sur demande faite, en vertu de la présente partie, postérieurement au dépôt du rapport d'évaluation visé au paragraphe 752.1(2), le tribunal peut déclarer que le délinquant est un délinquant à contrôler, s'il est convaincu que les conditions suivantes sont réunies :
(a) it would be appropriate to impose a sentence of imprisonment of two years or more for the offence for which the offender has been convicted;	**a)** il y a lieu d'imposer au délinquant une peine minimale d'emprisonnement de deux ans pour l'infraction dont il a été déclaré coupable
(b) there is a substantial risk	**b)** celui-ci présente un risque

that the offender will reoffend; and	élevé de récidive;
(c) there is a reasonable possibility of eventual control of the risk in the community.	**c)** il existe une possibilité réelle que ce risque puisse être maîtrisé au sein de la collectivité.

[13] The part at issue here is Part XXIV of the *Criminal Code*, entitled *Dangerous Offenders and Long-Term Offenders*. A person who is declared to be a dangerous offender faces three possibilities under subsection 753(4) of the *Criminal Code*, which reads as follows:

Sentence for dangerous offender	**Peine pour délinquant dangereux**
753 (4) If the court finds an offender to be a dangerous offender, it shall	**753 (4)** S'il déclare que le délinquant est un délinquant dangereux, le tribunal :
(a) impose a sentence of detention in a penitentiary for an indeterminate period;	**a)** soit lui inflige une peine de détention dans un pénitencier pour une période indéterminée;
(b) impose a sentence for the offence for which the offender has been convicted - which must be a minimum punishment of imprisonment for a term of two years - and order that the offender be subject to long-term supervision for a period that does not exceed 10 years; or	**b)** soit lui inflige une peine minimale d'emprisonnement de deux ans pour l'infraction dont il a été déclaré coupable et ordonne qu'il soit soumis, pour une période maximale de dix ans, à une surveillance de longue durée;
(c) impose a sentence for the offence for which the offender has been convicted.	**c)** soit lui inflige une peine pour l'infraction dont il a été déclaré coupable.

[14] In Mr. St-Pierre's case, the Court will have been satisfied that this offender may be supervised given its finding that there is a reasonable possibility of eventual control of the risk in the community.

[15] Now I will turn to the substantial risk that the offender will reoffend. The *Criminal Code* states in subsection 753.1(2) the factors to consider to determine whether there is a substantial risk that the offender will reoffend. First, certain offences appearing in the legislation must have been committed (distribution of, making, possession of and accessing child pornography) and, second, the offender has shown a pattern of repetitive behaviour that shows a likelihood of the offender's causing death or injury to other persons or inflicting severe psychological damage on other persons, or, by conduct in any sexual matter, has shown a likelihood of causing injury, pain or other evil to other persons in the future through similar offence.

[16] As its name clearly indicates, the Act must provide for the supervision of long-term offenders. This is authorized by subsection 753.2(1) of the *Criminal Code*, which reads as follows:

Long-term supervision	**Surveillance de longue durée**
753.2 (1) Subject to subsection (2), an offender who is subject to long-term supervision shall be supervised in the community in accordance with the Corrections and Conditional Release Act when the offender has finished serving **(a)** the sentence for the offence for which the offender has been convicted; and **(b)** all other sentences for offences for which the offender is convicted and for which sentence of a term of imprisonment is imposed on the offender, either before or after the conviction for the offence referred to in paragraph (a).	**753.2 (1)** Sous réserve du paragraphe (2), le délinquant soumis à une surveillance de longue durée est surveillé au sein de la collectivité en conformité avec la Loi sur le système correctionnel et la mise en liberté sous condition lorsqu'il a terminé de purger : **a)** d'une part, la peine imposée pour l'infraction dont il a été déclaré coupable; **b)** d'autre part, toutes autres peines d'emprisonnement imposées pour des infractions dont il est déclaré coupable avant ou après la déclaration de culpabilité pour l'infraction visée à l'alinéa a).

Thus, the Parole Board's jurisdiction to act in this case is grounded in this subsection.

III. Decision of the Parole Board of Canada

[17] The decision for which judicial review is sought was rendered on August 4, 2017. In that decision, the conditions for long-term supervision are established. Reproduced below are subsections 134.1(1) and (2), which authorize the Board to establish conditions:

Conditions for long-term supervision	**Conditions**
134.1 (1) Subject to subsection (4), every offender who is required to be supervised by a long-term supervision order is subject to the conditions prescribed by subsection 161(1) of the *Corrections and Conditional Release Regulations*, with such modifications as the circumstances require.	**134.1 (1)** Sous réserve du paragraphe (4), les conditions prévues par le paragraphe 161(1) du *Règlement sur le système correctionnel et la mise en liberté sous condition* s'appliquent, avec les adaptations nécessaires, au délinquant surveillé aux termes d'une ordonnance de surveillance de longue durée.
Conditions set by Board	**Conditions imposées par la Commission**
134.1 (2) The Board may establish conditions for the long-term supervision of the offender that it considers reasonable and necessary in order to protect society and to facilitate the successful reintegration into society of the offender.	**134.1 (2)** La Commission peut imposer au délinquant les conditions de surveillance qu'elle juge raisonnables et nécessaires pour protéger la société et favoriser la réinsertion sociale du délinquant.

Conditions were established relating to access to pornographic material. Also, all of the offender's various contacts must be disclosed to his parole supervisor. He must remain in a community correctional centre and avoid certain individuals with a criminal record. The use of a computer enabling access to the Internet is prohibited. However, it is the condition relating to psychiatric treatment that is the subject of this judicial review. The condition is worded as follows:

> [TRANSLATION]
>
> Follow psychiatric treatment for sex offenders to be arranged by your parole supervisor, and follow any treatment recommendations.
>
> (p. 4 of 8)

[18] The decision includes a brief overview of the applicant's history but makes specific reference to the reports of Drs. Dassylva, Bergeron and Morissette (p. 6 of 8). The decision explains the reasons for each of the conditions established. The relevant explanation is the one relating to the psychiatric treatment, which reads as follows:

> [TRANSLATION]
>
> . . . You must also continue to work on your problems with sexual offending. You must follow the psychiatric treatment for sex offenders to be arranged by your parole supervisor, and follow any treatment recommendations.
>
> (pp. 7-8 of 8)

[19] Finally, the decision repeatedly noted that the applicant had had the opportunity to analyze the information in his record, which the Board considered reliable and persuasive, and the applicant, through his counsel, submitted his personal observations. The Board was therefore of the view that it had before it all the reliable information necessary for an informed decision.

[20] The applicant argued at the hearing before this Court that the difficulty raised by this particular condition was that it allowed for the establishment of a requirement to take medication. At the time, I noted that no such requirement appeared in the condition as worded. Rather, this condition, as worded, has a particular context that is worth noting. It appears that the applicant, through his counsel, was invited on June 21, 2017, to make representations on the elements and conditions that had been proposed. On June 23, 2017, and on July 4, 2017, counsel made representations on each and every one of the conditions being considered. The communication of June 23 included the representations regarding what had been presented at that point by the Board as the condition of following psychiatric treatment and taking medication. I will reproduce the representations made on this point in their entirety:

> [TRANSLATION]
>
> Mr. St-Pierre acknowledges the need for a condition to follow psychiatric treatment. However, we object vigorously to the condition to take any medication prescribed. This condition may not be established without an assessment of the offender's particular situation and requires a hearing rather than a paper review.
>
> While the Federal Court of Appeal did recognize in *Deacon v. Canada (Attorney General)* . . . the Board's authority to establish a condition to take medication, it also imposed certain limits on this authority:
>
> - The Board must ask itself whether "another form of medical or other treatment would be more effective or less injurious" (*Deacon v. AGC*, para. 45).
>
> - The medication prescribed "must also be 'reasonable and necessary' . . ." (*Deacon v. AGC*, para. 66).
>
> - The Board must order a hearing for the offender (*Deacon v. AGC*, para. 66) to respect the principles of procedural safeguards, particularly the principles set out in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1992] 2 SCR 817, 1999 CanLII 699 (SCC).

> In this case, the Board has no information about the nature of the prescribed treatment, the responsibility for the proposed medical treatment, its effectiveness versus its adverse effects or the availability of other forms of treatment. The record is therefore clearly incomplete in this respect.
>
> Moreover, the Board must order a hearing to respect the *Deacon* and *Baker* principles.
>
> Accordingly, we ask that the Board strike the portion of the condition relating to the taking of medication and order only a condition to follow psychiatric treatment. [Emphasis added.]

This intervention of June 23 was a reaction to the condition proposed by the Board, which read as follows:

> [TRANSLATION]
>
> Follow psychiatric treatment for sex offenders to be arranged by your parole supervisor, and follow any treatment recommendations, including taking any medication prescribed to you. [Emphasis added.]

[21] It appears that the applicant expressly agreed in his representations about psychiatric treatment and the use of medication that it would be appropriate for him to follow psychiatric treatment. His objection related to the requirement that he take medication. This opposition was apparent as early as December 10, 2008, in the psychiatric assessment report prepared by Dr. Dassylva.

[22] In addition, when the applicant was sentenced on June 2, 2017, the Court took note of his expressions of remorse and his admission regarding his pedophilia. Based on this and on the reports of Drs. Bergeron and Morissette, the Court of Québec stated that [TRANSLATION] "both agree that you do need help. This help will be provided through therapy, therapy sessions". This

is certainly consistent with the Parole Board's position that psychiatric treatment is appropriate. As a result of the representations, only psychiatric treatment was ordered as a condition, since the phrase about medication appearing in the draft regarding which representations had been sought was dropped from the final decision about the conditions established.

IV. The arguments

[23] The notice of application for judicial review of the Board's decision challenged each of the conditions established for Mr. St-Pierre. However, the *Criminal Code* clearly establishes that the long-term offender designation can only be ordered if there exists a reasonable possibility of eventual control of the substantial risk in the community. It is very likely that in the absence of special conditions, the designation will cease to be an option, leaving only prolonged incarceration or a dangerous offender designation. The latter case would involve indefinite detention, while the former case would involve a term of imprisonment much longer than two years, given that this is a case of recidivism after an initial period of 42 months of adult incarceration.

[24] It is worth recalling that "[a]lmost every offender who satisfies the dangerous offender criteria will satisfy the first two criteria in the long-term offender provisions" (*R. v Johnson*, 2003 SCC 46 [2003] 2 SCR 357, para 31 [*Johnson*]). However, conditions for long-term supervision are also required, including any conditions considered "reasonable and necessary in order to protect society and to facilitate the successful reintegration into society" (s 134.1(2) CCRA). These help to satisfy the third criterion allowing for long-term supervision to be imposed rather than a measure representing a greater infringement on freedom (s 753.1(1)

Cr. C.), that of being satisfied that the substantial risk may be controlled. As the Court noted in *Johnson*, "[t]he very purpose of a long-term supervision order, then, is to protect society from the threat that the offender currently poses — and to do so without resort to the blunt instrument of indeterminate detention" (para 32).

[25] Fortunately, the applicant later opted to contest only the condition that he follow psychiatric treatment. However, the applicant chose to incorporate elements of administrative law into his arguments. It was alleged that the conditions that could be established under the CCRA were not "reasonable and necessary in order to protect society and to facilitate the successful reintegration into society" (s 134.1(2)). The condition was not based on reliable and persuasive information, and there is no information regarding what kind of treatment could be [TRANSLATION] "imposed" by a psychiatrist against his will.

[26] In his Memorandum of Fact and Law, the applicant also attempts to incorporate arguments based on section 7 of the *Charter* (*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11) [*Charter*]. The respondent has not formally objected to this tactic. This in itself is problematic. The *Federal Courts Rules* (SOR/98-106) [Rules] expressly set out the content of the notice of application. Rule 301(e) requires "a complete and concise statement of the grounds intended to be argued, including a reference to any statutory provision or rule to be relied on". The notice of application contains no mention whatever of any constitutional issues or references to the *Charter*.

[27] Very recently, the Federal Court of Appeal reiterated the importance of these requirements (*Fabrikant v Canada*, 2018 FCA 171, para 18). The resulting framework may be subject, for example, to a motion to strike the notice of application of judicial review, as in *Canada (National Review) v JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, [2014] 2 FCR 557 [*JP Morgan*]. This is because the notice of application establishes the parameters of the judicial proceedings.

[28] In *JP Morgan*, the Court of Appeal declared that a "'complete' statement of grounds means all the legal bases and material facts that, if taken as true, will support granting the relief sought" (para 39). This is not optional. Further below, the following is stated:

> [44] The statement of grounds in a notice of application for judicial review is not a list of categories of evidence the applicant hopes to find during the evidentiary stages of the application. Before a party can state a ground, the party must have some evidence to support it.
>
> [45] It is an abuse of process to start proceedings and make entirely unsupported allegations in the hope that something will later turn up. See generally *Merchant Law Group v. Canada (Revenue Agency)*, 2010 FCA 184 at paragraph 34; *AstraZeneca Canada Inc. v. Novopharm Ltd.*, 2010 FCA 112 at paragraph 5. Abuses of process can be redressed in many ways, such as adverse cost awards against parties, their counsel or both: Rules 401 and 404.

[29] Authors Letarte et al., in their book *Recours et procédure devant les Cours fédérales* (Lexis Nexis, 2013), provide a good explanation for the rationale behind the rule: the respondent is not caught off guard and the Court can identify the issues. Section 5.16 reads as follows:

> [TRANSLATION]
>
> The requirement set out in paragraph (e) of Rule 301 allows the Court to correctly identify the issue or issues before it. The

> applicant must therefore raise all the grounds intended to be argued in support of the claim.
>
> Normally, the Court will refuse to consider a ground of review that is not raised in the notice of application. Therefore, it is not appropriate for the applicant to raise a new ground of review in its memorandum of fact and law.[46]

[30] Naturally, I share the view of de Montigny J., then of this Court, which he expressed as follows:

> In the present case, the applicants submitted in their notices of application that the Commissioner had erred in fact and in law, and had breached a principle of natural justice or procedural fairness. This is no doubt a cryptic way to set out the grounds of review. It reflects, unfortunately, a practice that is becoming more and more common - to simply paraphrase the text of s. 18.1 of the *Federal Courts Act* as the grounds for the application. Such a practice must definitely be discouraged, and counsel should strive to particularize the grounds they intend to argue to conform to the spirit of the Rules. This would certainly help both parties frame their arguments more precisely from the outset and eventually focus the debate.
>
> *(Kinsey v Canada (Attorney General)*, 2007 FC 543, at para 33)

[31] Therefore, a ground not raised in the notice of application should not be considered at all. If the notice is vague, rather than simply silent, as, for example, when the notice of application merely raises principles of natural justice, a motion under Rule 58 would force an applicant to make a complete and concise statement of the grounds raised, including the relevant legislative provisions.

[32] In this case, the Attorney General chose not to challenge the very vague framework created by the notice of application, preferring to deal with the arguments presented in the Applicant’s Memorandum of Fact and Law.

[33] However, other difficulties were created by factual deficiencies in the record.

A. *The applicant*

[34] The record does not provide any details about the psychological treatment, beyond the fact that the Board established as a condition psychiatric treatment only—without the medication that seemed to be an option, but to which the applicant had been objecting for a long time. An order issued by this Court on November 2, 2017, involved a request for a stay given that Mr. St-Pierre had an appointment with a psychiatrist on November 3. No allegation of irreparable harm was made, as the purpose of this appointment was unknown: no treatment had been selected. The Court noted that a new request for a stay could be made if the three well-known conditions were met, including irreparable harm. No such request for a stay was subsequently made, because one year later, the nature of the psychiatric treatment to which he was to object was still unknown. The result is an argument that is disconnected from any concrete facts, an argument in the abstract, and one that now seeks to include section 7 of the *Charter*.

[35] The standard of correctness applies to questions of procedural fairness. The applicant also claims that the same standard applies to questions of law. As we shall see, that is not the state of the law, but this may not be particularly relevant as the applicant frames his argument as a question of procedural fairness.

[36] As we have seen, the *Criminal Code* specifically provides that long-term supervision is administered by the Board. The CCRA contains a regime governing its administration. Subsection 134.1(1) requires the application of the mandatory conditions if subsection 161(1) of

the *Corrections and Conditional Release Regulations* (SOR/92-620). However, additional conditions are authorized by subsection 134.1(2) if the Board considers them "reasonable and necessary in order to protect society and to facilitate the successful reintegration into society of the offender". This is a prelude to an administrative law argument, involving conditions established in a manner that is ultra vires or in violation of procedural fairness.

[37] Probably in an attempt to counteract *Deacon v Canada (Attorney General)*, [2007] 2 FCR 607, [*Deacon*] which states that section 134.1 of the Act allows for the imposition of a medical treatment (in that case, "chemical castration"), and that imposing a medical treatment does not violate section 7, the applicant is now raising *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331[*Carter*] on the subject of physician-assisted dying. According to the applicant, the discretion exercised by the Board under section 134.1 must be consistent with *Charter* values (*Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395 [*Doré*]).

[38] Noting that the Attorney General had conceded in *Deacon* that there had been a violation of liberty and security of the person, the applicant focuses on principles of fundamental justice. *Mooring v Canada (National Parole Board)*, [1996] 1 SCR 75 [*Mooring*], establishes that the Board is subject to section 7 of the *Charter* and that the duty to act fairly implies ensuring that "the information upon which it acts is reliable and persuasive" (para 36). I will add the rest of paragraph 36, however, to provide a more complete understanding:

> . . . To take an extreme example, information extracted by torture could not be considered reliable by the Board. It would be manifestly unfair for the Board to act on this kind of information. As a result, the Board would be under a duty to exclude such information, whether or not the information was relevant to the decision. Wherever information or "evidence" is presented to the

> Board, the Board must make a determination concerning the source of that information, and decide whether or not it would be fair to allow the information to affect the Board's decision.

[39] The applicant then refers to the five criteria set out in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 1999 [*Baker*] to determine the content of the duty of procedural fairness in a given situation. There is a confusion of concepts here.

[40] The applicant submits that the establishment of a requirement to follow psychiatric treatment is not based on reliable and persuasive information (*Mooring*) because the information is allegedly [TRANSLATION] "quite limited and utterly vague" (Applicant's Memorandum of Fact and Law, para 36). The type or nature of the psychiatric treatment, with its advantages and disadvantages, is unknown. If I have properly understood the argument, this lack of information would have prevented the Board from considering the *Charter* values relating to the protection of society. The applicant submits that the *Charter* values applicable to this case are those discussed in *Carter*: the arbitrariness of a law, the lack of a rational connection between the object of the law and the limit it imposes on life, liberty or security of the person, its overbreadth and its gross disproportionality. To try to put some flesh on an argument that was sketched out in the vaguest terms, because the information available to the Board was insufficient, the proportionality exercise was impossible.

[41] Relying generally on the factors from *Baker*, an oral hearing should have been held. The applicant has said little about the weight that should have been given to the *Baker* factors and why the opportunity afforded to the applicant to make written representations, of which he had

already taken advantage twice, was insufficient. He simply insisted on the intrusiveness of psychiatric treatment.

[42] Finally, the applicant seeks to draw a parallel with the regime under the *Civil Code of Québec*, in cases where care is required by the state of health of a minor or a person of full age who is incapable of giving consent (a. 16).

B. *The respondent*

[43] Correctness is the standard of review applicable to questions of procedural fairness. The standard of reasonableness is applicable to the decision to impose mandatory psychiatric treatment and to the balancing of *Charter* values with the statutory objectives (*Doré*, paras 57 and 58).

[44] The respondent describes the legislative context and noted in particular that the Act indicates in which cases an in-person hearing in mandatory (s 140(1)). The other cases are left to the Board's discretion (s 140(2)).

[45] As for whether the Board had the necessary information in the record to establish psychiatric treatment as a condition, the Attorney General argues that the file contains plenty of information supporting the view that it was reasonable and necessary in order to protect society and to facilitate Mr. St-Pierre's successful reintegration into society. It was submitted that *Deacon* confirmed the Board's authority to establish even such conditions as related to medical

treatment and that this respects section 7 of the *Charter* because the purpose of the condition is community protection.

[46] The respondent also insists that Mr. St-Pierre is now challenging a condition to which he had previously expressly agreed. Indeed, the written representations of June 23, 2017, very clearly show his acceptance of the need for psychiatric treatment but his opposition to a condition requiring him to take medication (see para 21 where this passage is reproduced). It will be helpful to recall here that the condition established reads as follows:

> [TRANSLATION]
>
> Follow psychiatric treatment for sex offenders to be arranged by your parole supervisor, and follow any treatment recommendations.

[47] This means that the Board relied on reliable and persuasive information from professionals who examined Mr. St-Pierre over time. This reliable and persuasive information includes the recognition of the applicant himself of the need for psychiatric treatment to be established as a condition.

[48] As for procedural fairness as described in *Mooring*, for the Board it means ensuring that the information on which it acts is reliable and persuasive (para 36). By ensuring that an offender receives the relevant information, the reliability of that information can be refuted. Despite having received the information, the applicant did not challenge its reliability or credibility. He even consented in his written representations to psychiatric treatment, making it difficult now to claim that the information before the Board was silent on his willingness to participate in psychiatric treatment. Clearly the Board had information before it regarding his consent.

[49] The paper hearing was also appropriate. As admitted by the applicant, the Act only requires an in-person hearing in the situations set out in subsection 140(1) of the Act. Furthermore, this Court has already found in *Sychuk v Canada (Attorney General)*, 2009 FC 105 and *Laferrière v Canada (Attorney General)*, 2015 FC 612 [*Laferrière*] that a hearing is not required to establish or modify conditions for a long-term offender, as the written representations were an adequate substitute. I would add that the Court, in *Laferrière*, notes that the Superior Court of Québec has already rejected this argument twice. Moreover, the Court of Appeal of Québec expressed its agreement in the following terms:

> [TRANSLATION]
>
> As held by the judge, nothing in the circumstances of this case required the Board to hold a hearing, and the appellant has not demonstrated any error that would warrant this Court's intervention.
>
> (*Laferrière c Commission des libérations conditionnelles du Canada*, 2013 QCCA 1081).

[50] The respondent argues that it is surprising that the applicant is raising the potential repercussions of the condition to which he himself has expressly consented. No evidence has been filed in support of potential side effects. Furthermore, no treatment is imposed on him because, according to *Deacon* (para 74), it is open to the applicant to refuse the treatment, which would have certain consequences.

V. Preliminary issue

[51] The Court had on its own initiative raised the issue of its jurisdiction in a direction issued September 26, 2018. The CCRA provides for a right to appeal a decision of the Board to an

Appeal Division constituted under section 146 of the same statute. I reproduce subsections 147(1) and (2):

Right of appeal	**Droit d'appel**
147 (1) An offender may appeal a decision of the Board to the Appeal Division on the ground that the Board, in making its decision,	**147 (1)** Le délinquant visé par une décision de la Commission peut interjeter appel auprès de la Section d'appel pour l'un ou plusieurs des motifs suivants :
(a) failed to observe a principle of fundamental justice;	**a)** la Commission a violé un principe de justice fondamentale;
(b) made an error of law;	**b)** elle a commis une erreur de droit en rendant sa décision;
(c) breached or failed to apply a policy adopted pursuant to subsection 151(2);	**c)** elle a contrevenu aux directives établies aux termes du paragraphe 151(2) ou ne les a pas appliquées;
(d) based its decision on erroneous or incomplete information; or	**d**) elle a fondé sa décision sur des renseignements erronés ou incomplets;
(e) acted without jurisdiction or beyond its jurisdiction, or failed to exercise its jurisdiction.	**e)** elle a agi sans compétence, outrepassé celle-ci ou omis de l'exercer.
Decision of Vice-Chairperson	**Décision du vice-président**
147 (2) The Vice-Chairperson, Appeal Division, may refuse to hear an appeal, without causing a full review of the case to be undertaken, where, in the opinion of the Vice-Chairperson,	**147 (2)** Le vice-président de la Section d'appel peut refuser d'entendre un appel sans qu'il y ait réexamen complet du dossier dans les cas suivants lorsque, à son avis :
(a) the appeal is frivolous or vexatious;	**a)** l'appel est mal fondé et vexatoire;
(b) the relief sought is beyond the jurisdiction of the Board;	**b**) le recours envisagé ou la décision demandée ne relève pas de la compétence de la Commission;
(c) the appeal is based on	**c)** l'appel est fondé sur des

information or on a new parole or statutory release plan that was not before the Board when it rendered the decision appealed from; or	renseignements ou sur un nouveau projet de libération conditionnelle ou d'office qui n'existaient pas au moment où la décision visée par l'appel a été rendue;
(d) at the time the notice of appeal is received by the Appeal Division, the offender has ninety days or less to serve before being released from imprisonment.	**d)** lors de la réception de l'avis d'appel par la Section d'appel, le délinquant a quatre-vingt-dix jours ou moins à purger.

The issue was therefore why no appeal had been presented to the Appeal Division.

[52] At the hearing, the parties relied exclusively on *McMurray v National Parole Board*, 2004 FC 462 [*McMurray*] to argue that no appeal is granted to long-term offenders. In that case, the Court held that the fact that section 99.1 of the CCRA specifically listed the sections that apply to long-term offenders, with no reference to sections 146 and 147, was sufficient to determine that it was Parliament's intent to exclude long-term offenders from appealing.

[53] A similar argument of implied exclusion was raised in *Normandin v Canada (Attorney General)*, 2005 FCA 345; [2006] 2 FCR 112 [*Normandin*], but in respect of different provisions that were also not found in section 99.1. The Court of Appeal rejected the absolutist interpretation of this rule of exclusion (which would have had the effect of preventing an appeal before the Appeal Division in the present case), without, however, rejecting *McMurray*, and accepted the residency condition even though it could have held that such a condition was excluded for long-term offenders because under the Act it is applicable to offenders to be released on parole rather than to long-term offenders. The Court of Appeal stated as follows:

> [30] In *McMurray*, Russell J., construing section 99.1, cited in support by the appellant, and looking to the context, the general scheme and purpose of the Act and the ordinary meaning of the words, concludes that section 99.1 refers to some specific provisions, the application of which to long-term offenders is not obvious, in order to express Parliament's intention that they apply. But this does not preclude, and I would add limit, the application to long-term offenders of other statutory provisions that are not mentioned in section 99.1 when those provisions clearly indicate that they apply to these offenders. It is then unnecessary to mention them in section 99.1 since their application is obvious. That, in my opinion, is beyond the shadow of a doubt the case with section 134.1 and the general power to impose conditions that is found in subsection 134.1(2). I do not really see how the failure to include a reference to subsection 133(4.1) in section 99.1 would preclude or limit the general scope of the power that is expressly contained in subsection 134.1(2) to impose conditions on a long-term offender. [Emphasis added.]

[54] In my view, reconciling the Court of Appeal's statement with *McMurray* remains an open question. It is considered obvious that a residency condition must implicitly be allowed for a long-term offender, despite the fact that this condition is expressly permitted for other types of offenders under the Board's jurisdiction. However, in *McMurray*, the Court held that section 147, which grants jurisdiction to the Appeal Division, is not applicable to long-term offenders because it is not specifically enumerated in section 99.1. One would have thought it would be equally obvious in both cases that an appeal could help resolve certain problems without the need for a judicial review each time.

[55] This difficulty is that the parties have agreed that no appeal is possible because of the decision in *McMurray*, in which the Crown argued against the possibility of an appeal in cases of long-term supervision. The applicant did not attempt to bring an appeal and subsequently challenge a refusal by the Appeal Division to hear him.

[56] Furthermore, jurisdiction cannot be granted by consent (*Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157, [2018] 2 FCR 344, para 39). The rule is that ". . . absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course" (*Canada (Border Services Agency) v C.B. Powell Limited*, 2010 FCA 61, [2011] 2 FCR 332, para 31). I believe these are exceptional circumstances that weigh in favour of hearing the case regardless of any doubts as to whether the applicant should have first exhausted all of his remedies.

[57] In *Aird v Canada (National Parole Board)*, T-2969-93, Sept. 19, 1994, (1994) 85 FTR 290 [*Aird*], Rothstein J., then of this Court, exercised his discretion to decide the issue before him because the objection based on the failure to appeal the matter was raised after the judicial review had been heard on the merits. The jurisdictional issue had not been raised in the parties' memoranda (para 22). That is clearly the case here as well.

[58] The situation is even more exceptional in this case, as it is open to the parties to raise the *McMurray* decision, which supports their point of view. The fact that it may be appropriate to revisit this issue, perhaps in light of *Normandin*, does not change the fact that the question of re-examination has not been raised. As in *Aird*, the issue was not raised by the parties and the application for judicial review was heard; moreover, some case law supports the position of the parties, who do not wish to revisit the issue. In such circumstances, judicial discretion (*Harelkin v University of Regina*, [1979] 2 SCR 561) should be exercised in favour of deciding the matter on its merits (*Reda v Canada (Attorney General)*, 2012 FC 79). At this stage, the cost and inconvenience militate in favour of a decision on the merits.

VI. Analysis

A. *Standard of review*

[59] The standard of review applied by the Court to violations of procedural fairness is the standard of correctness (*Mission Institution v Khela*, 2014 SCC 24, [2014] 1 SCR 502, para 79; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69, para 34). There is no room for deference. For the other issues, including an argument potentially involving *Charter* values, the standard of reasonableness applies. In *Doré*, the Court explained the difference between a constitutional challenge and the review of an administrative decision: "When Charter values are applied to an individual administrative decision, they are being applied in relation to a particular set of facts" (para 36). Therefore, the standard of review for an administrative tribunal determining the constitutionality of a law is correctness (*Doré*, para 43). However, the standard of reasonableness applies in assessing whether the administrative decision maker took sufficient account of *Charter* values (*Doré*, para 45). Deference is justified (*Doré*, para 54). The judicial review exercise will therefore be as described in paragraph 57:

> [57] On judicial review, the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play. As LeBel J. noted in Multani, when a court is faced with reviewing an administrative decision that implicates *Charter* rights, "[t]he issue becomes one of proportionality" (para. 155), and calls for integrating the spirit of s. 1 into judicial review. Though this judicial review is conducted within the administrative framework, there is nonetheless conceptual harmony between a reasonableness review and the Oakes framework, since both contemplate giving a "margin of appreciation", or deference, to administrative and legislative bodies in balancing *Charter* values against broader objectives. [Emphasis added.]

[60] The law as described in *Doré* is still applicable. A majority of the Supreme Court in *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 [*Trinity Western University*] considered itself bound by *Doré* and *Loyola v Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 SCR 613 [*Loyola*].

[61] For questions of law, aside from those indicated in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*], a presumption exists that they will be subject to a standard of reasonableness if they relate to the administrative tribunal's enabling statute or a rule or statute closely connected with it. In *Dunsmuir* itself, the Court set out the principle (para 54); in *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654 [*Alberta Teachers'*], the presumption, which had not been challenged in the meantime, was established in turn:

> [34] The direction that the category of true questions of jurisdiction should be interpreted narrowly takes on particular importance when the tribunal is interpreting its home statute. In one sense, anything a tribunal does that involves the interpretation of its home statute involves the determination of whether it has the authority or jurisdiction to do what is being challenged on judicial review. However, since Dunsmuir, this Court has departed from that definition of jurisdiction. Indeed, in view of recent jurisprudence, it may be that the time has come to reconsider whether, for purposes of judicial review, the category of true questions of jurisdiction exists and is necessary to identifying the appropriate standard of review. However, in the absence of argument on the point in this case, it is sufficient in these reasons to say that, unless the situation is exceptional, and we have not seen such a situation since Dunsmuir, the interpretation by the tribunal of "its own statute or statutes closely connected to its function, with which it will have particular familiarity" should be presumed to be a question of statutory interpretation subject to deference on judicial review. [Emphasis added.]

[62] The presumption can certainly be rebutted (*McLean v British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 SCR 895) but that was not done in this case.

B. *The merits*

[63] The seminal decision binding this Court is *Deacon*, which the applicant barely mentions. Nevertheless, it seems to be particularly relevant to this case.

[64] Mr. Deacon was a long-term offender, like Mr. St-Pierre. At issue was whether to establish, without his consent, a condition that he take the medication prescribed by a physician; the drugs in question were anti-androgens, commonly known as "chemical castration". In our case, we are dealing instead with psychiatric treatment to which the applicant consented even before it was established as a condition. I note that Mr. Deacon was also required to participate in a program for sexual offenders and psychological counselling.

[65] The Court of Appeal started by holding that a requirement to take medication could be included among the conditions considered necessary and reasonable that may be established by the Board under subsection 134.1 of the Act. I note that the Court of Appeal applied the standard of correctness (this was prior to *Dunsmuir* and *Alberta Teachers'*), a stricter standard than reasonableness, to its decision (para 27). For the Court of Appeal, the interpretation of subsection 134.1(2) to allow such conditions is grounded in the purpose of the long-term offender regime. As we saw in *Johnson* (cited above) there is little difference between a dangerous offender and a long-term offender. For an offender whose conduct is not "pathologically intractable", the purpose of the conditions is to protect society and facilitate

successful reintegration into society. Referring to *Normandin*, the Court in *Deacon* held that "[t]he authority given to the Board by subsection 134.1(2) is a broad and flexible discretionary authority" (*Normandin*, para 44), designed to allow the Board to meet the objectives of the long-term offender provisions (para 37).

[66] The broad interpretation of the authority to establish conditions including a requirement to take medication is beneficial to offenders because if they are not long-term offenders, they would probably be subject to more intrusive regimes. In fact, there is no forcible administration of medication, because it is open to the offender to refuse.

> [40] The Board is not in this case ordering the forcible administration of medication to the appellant. The common law right concerning non-consensual medical treatment (*Fleming v. Reid* (1991), 4 O.R. (3d) 74 at 84; *Starson v. Swayze*, [2003] 1 S.C.R. 722 at para. 75) is therefore not being violated in this case. The appellant is at liberty to refuse to take the prescribed medication. However, if he does, there will be consequences for such a refusal: the appellant will be in breach of his long-term supervision order and therefore liable to commitment under section 135.1 of the CCRA or imprisonment pursuant to section 753.3 of the *Criminal Code*. The basis and authority for these consequences is the appellant's status as a long-term offender, which status in turn was predicated on the Court's finding that the appellant satisfied the criteria prescribed by subsection 753.1(1).

I see no reason that it would not be equally open to Mr. St-Pierre to refuse the psychiatric treatment. However, there would be consequences associated with such a refusal.

[67] It is all about managing the offender's risk of reoffending by taking reasonable and necessary means to render manageable his risk in the community. In *Deacon*, the Court held that "[i]f the appellant does not want to take this medication, he may choose to refuse, but he thereby

chooses also to face the consequences flowing from that decision, given his status as a long-term offender" (para 41). This is why the applicant's attempt to draw an analogy with article 16 of the *Civil Code of Québec* regarding care is of very questionable relevance. Such people are by definition in completely different situations from long-term offenders for whom psychiatric treatment has been prescribed and who may refuse to follow it, but with the consequences provided for in the Act.

[68] What is surprising in this case is that the Board's decision that is now being impugned had been consented to. While *Deacon* states that a condition may be established without consent, this is not even the situation here. When the Board established psychiatric treatment as a condition (that the applicant may refuse to follow, subject to the consequences described by the Court of Appeal), it was on the basis of a record in which psychiatric treatment was recommended by qualified experts and in which consent had already been given. Mr. St-Pierre's opposition to the medication was clear. The opposite is true for the psychiatric treatment.

[69] *Deacon* also states that the condition requiring medication does not violate section 7 of the *Charter*. The deprivation of life, liberty and security of the person was conceded (para 49). It was on the subject of the principles of fundamental justice that Mr. Deacon was unable to satisfy the Court. To succeed under section 7 of the *Charter*, an applicant has the dual burden of establishing a deprivation of life, liberty or security of the person and that the deprivation is inconsistent with the principles of fundamental justice.

[70] First, the principles of fundamental justice do not require express authorization from Parliament to establish such a condition because a "general authorization by way of a reasonable law is, in my view, sufficient to conform to the principles of fundamental justice" (para 58). The authority to establish conditions is itself limited to those that are reasonable and necessary in order to protect society and facilitate the successful reintegration into society of the offender. A condition that does not meet these criteria may be found to be *ultra vires* or lacking the necessary proportionality to be reasonable according to *Doré*, *Loyola* and *Trinity Western University*.

[71] It was also argued in *Deacon* that the right to refuse medical treatment is a principle of fundamental justice. The Court of Appeal held that to establish an absolute right to refuse unwanted medical treatment in every situation as a principle of fundamental justice, significant societal consensus is required. The right to refuse has its limitations. The Court dealt with the argument as follows:

> [74] In the case at bar, in contrast with both *Fleming v. Reid* and *Starson v. Swayze*, the appellant poses a danger to others: he is a long-term offender who by definition is likely to re-offend, and has a lengthy history of offences against children, including while on probation and long-term supervision. Moreover, the medical condition at issue in the current case has been imposed *for the purpose* of rendering this risk manageable in the community, thereby granting the appellant release under the least restrictive conditions consistent with the protection of the public. In further contrast to *Fleming v. Reid* and *Starson v. Swayze*, the case at bar does not involve the forcible administration of medication: as explained above, the appellant may choose not to take the medication prescribed to him, although he thereby also chooses to face the consequences of his decision. These contextual factors are critical, and are properly considered within the process of determining the content and scope of a particular principle of fundamental justice (*Winko*, supra at para. 66; *Malmo-Levine*, *supra* at paras. 98-99; *R. v. Demers*, [2004] 2 S.C.R. 489 at para. 45). Given this context, which includes both the long-term offender statutory regime and the particular history and risk profile

> of the appellant, I conclude that the condition of the appellant's long-term supervision order requiring him to take medication as prescribed by a physician, imposed by the Board without the appellant's consent, does not violate the principles of fundamental justice under section 7 of the *Charter*.

[72] The applicant has tried to limit the scope of *Deacon* by referring to paragraph 45, reproduced below:

> [45] I note that the appellant is not in this appeal challenging the specific medication prescribed by his physicians, or arguing that another form of medical or other treatment would be more effective or less injurious. He is also not contesting the Board's determination concerning the reasonableness or necessity of a medical treatment condition in his particular case. If these issues had been raised in this case, the analysis might have proceeded differently, and according to a more deferential standard of review. However, the appellant's sole assertion in this appeal is that a medical treatment condition is, in all cases of long-term supervision, outside the statutory jurisdiction of the Board. The particularities of the appellant's circumstances – his history and risk profile, the medical regimen prescribed to him, its effectiveness and side effects – have not been raised here and are therefore largely irrelevant to this appeal as it has been argued.

[73] The applicant does not explain how this paragraph changes the outcome of this case. Read in context, it does not suggest anything more than what is written. The Court of Appeal was considering whether section 134.1 of the Act allowed for the establishment of a condition requiring that medication be taken and whether this would constitute a violation of section 7 of the *Charter*. The details of the treatment prescribed were not relevant to the decision. According to the Court of Appeal, if that had been the case, and assuming that the record contained enough information to deal with such an issue, the standard of review would have been lower than the standard used (the standard of correctness). Because it predated *Dunsmuir*, the decision could have been decided on a standard of reasonableness *simpliciter* or patent unreasonableness,

two standards of review that existed prior to *Dunsmuir*. Both of those standards are less stringent than the standard of correctness.

[74] In other words, the Court did not exclude the possibility of reviewing the prescribed treatment. However, this cannot be done in the absence of a relevant factual record. As the Court noted, the specifics of a long-term offender's situation may trigger a judicial review on the basis of reasonableness. However, in this case, that evidence is no more present than it was in *Deacon*. The Board had been considering establishing a condition to follow psychiatric treatment and to take medication, but ultimately established only the condition to follow psychiatric treatment, the need for which had been accepted even by the applicant. It was confirmed at the hearing before this Court that no additional evidence had been filed by the applicant regarding the psychiatric treatment. Put simply, we know nothing about the treatment that Mr. St-Pierre would follow other than the fact that it would be psychiatric treatment. Like in *Deacon*, we know nothing about the treatment, which means that paragraph 45 of that case does not help Mr. St-Pierre given the state of his application for judicial review and the factual record.

[75] I recall that this Court indicated in its order of November 2, 2017, that Mr. St-Pierre was to meet with his psychiatrist on November 3. We do not currently know what was prescribed or whether Mr. St-Pierre is following this therapy. It is therefore impossible for the Court to assess the reasonableness of something for which it lacks even the most basic information. There was extensive documentary evidence indicating that the psychiatric treatment was appropriate and that the applicant accepted the need for it. How such a decision might be considered unreasonable remains to be confirmed.

[76] The applicant also attempted to distinguish *Deacon* by referring to the principles of fundamental justice set out in *Carter*. But *Carter* dealt with the constitutionality of a law, paragraph 241(1)(b) of the *Criminal Code*, prohibiting the aiding of suicide. The issue resolved by the Supreme Court was the incompatibility of that provision with section 7 of the *Charter*, and therefore that the prohibition constituted a violation of the principles of fundamental justice. The three principles of fundamental justice set out in *Carter* in the context of a constitutional challenge rather than a challenge to an administrative decision are the following:

(a) arbitrariness: a law is arbitrary if there is no rational connection between its object and the limit it imposes on the three section 7 interests (life, liberty, security of the person). If the public good is not furthered because the law is not capable of fulfilling its objectives, the law is arbitrary. In the case of physician-assisted dying, a total ban helps achieve the objective of protecting the vulnerable: it is not arbitrary.

(b) overbreadth: a law is overbroad when it infringes life, liberty or security of the person "in a way that bears no relation to the object" (para 85). To protect the vulnerable, the legislature has captured within its total ban the conduct of persons who are not vulnerable, which bears no relation to the objective of protecting the vulnerable.

(c) gross disproportionality: the Court calls this a high standard. "The inquiry . . . compares the law's purpose, 'taken at face value', with its negative effects on the rights of the claimant, and asks if this impact is completely out of sync with the object of the law" (para 89).

[77] In *Carter*, the Court found that the principle of overbreadth had been violated. The law was not arbitrary, and it was not necessary to deal with the gross disproportionality argument to hold that it was unconstitutional.

[78] I have expanded the argument to put *Carter* into context: that case appears to me to deal only with principles relating to a law's constitutionality. The applicant is not challenging the constitutionality of any provision whatsoever. I agree that the principles of fundamental justice

can invalidate a law or an action taken under a law. However, in this case, it has not been specified how one of the *Carter* principles could be used to invalidate the Board's action of establishing a condition it was authorized to establish (*Deacon*). It seems appropriate here to remember the scope of the idea of a principle of fundamental justice as the Federal Court of Appeal did in *Erasmo v Canada (Attorney General)*, 2015 FCA 129 [*Erasmo*]:

> [45] The principles of fundamental justice are not collections of principles of unfairness or "vague generalizations about what our society considers to be ethical or moral": *R. v. Malmo-Levine*; *R. v. Caine*, 2003 SCC 74, [2003] 3 S.C.R. 571 at paragraphs 112 (*per* Gonthier and Binnie JJ., for the majority) and 224 (*per* Arbour J., dissenting). They do not lie in the realm of general public policy: *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at page 503, 24 D.L.R. (4th) 536. Nor are they "empty vessel[s] to be filled with whatever meaning we might wish from time to time": *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at page 394, 38 D.L.R. (4th) 161 (*per* McIntyre J.).
>
> [46] Instead, the principles of fundamental justice "are to be found in the basic tenets of our legal system": *Re B.C. Motor Vehicle Act*, above at page 503, cited with approval in *Mooring v. Canada (National Parole Board)*, [1996] 1 S.C.R. 75, 132 D.L.R. (4th) 56 at paragraph 39; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44 at paragraph 23; *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, 17 C.R. (7th) 87 at paragraph 89; and many others. They are "principles upon which there is some consensus that they are vital or fundamental to our societal notion of justice": *R. v. D.B.*, above at paragraphs 46, 61, 67-68, 125, 131 and 138; *R. v. Malmo-Levine*; *R. v. Caine*, above at paragraphs 112-13; *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 S.C.R. 176 at paragraph 139. They are "the shared assumptions upon which our system of justice is grounded" that "find their meaning in the cases and traditions that have long detailed the basic norms for how the state deals with its citizens": *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76 at paragraph 8. [Emphasis added.]

In other words, one must do more than invoke the principles of fundamental justice set out in *Carter*. They need to be given content.

[79] It may be possible to make an argument using the principles of fundamental justice set out in *Carter* to invalidate an action taken under a law. In that case, the analytical framework would be that of *Doré*, *Loyola* and *Trinity Western University* and would be governed by the standard of reasonableness. However, this argument was not even raised in the notice of application and was not included in the Applicant's Memorandum of Fact and Law, or even at the hearing. This will require a delicate balancing, as this matter cannot be considered on the basis of individual interests only. It is necessary to look at the entire content. In *Erasmo* (para 48), the Court of Appeal cites all but the last sentence of paragraph 53 of *Deacon*. I will do the same:

. . .

> We cannot deal with long-term offenders as if there are no constitutional Charter rights; equally, we cannot consider Charter rights as if there are no long-term offenders. "Where the regime involves a comprehensive administrative and adjudicatory structure. . . it is appropriate to look at the regime as a whole. One must consider the special problem to which the scheme is directed" (*Winko v. British Columbia (Forensic Psychiatric Institute)*, 1999 CanLII 694 (SCC), [1999] 2 S.C.R. 625, at paragraph 65). The principles of fundamental justice may be affected by this context, for it is recognized that "the requirements of fundamental justice are not immutable; rather, they vary according to the context in which they are invoked" (*R. v. Lyons*, 1987 CanLII 25 (SCC), [1987] 2 S.C.R. 309, at page 361; see also *Winko*, at paragraph 66). In particular, context is important to the balancing of individual and societal interests within section 7, a consideration comprising a recognized part of the process of elucidating the content and scope of a particular principle of fundamental justice (*Winko*, at paragraph 66; *Malmo-Levine*, at paragraphs 98−99; *R. v. Demers*, 2004 SCC 46 (CanLII), [2004] 2 S.C.R. 489 at paragraph 45).

Absent an articulated argument, which would have enabled the respondent to respond, there is no basis for the Court to pursue this further.

[80] At most, there is a brief mention that [TRANSLATION] "the Board had to ensure that the condition was not arbitrary, overbroad or grossly disproportionate in the circumstances" (Memorandum of Fact and Law, para 41). Absent evidence regarding the psychiatric treatment, it is impossible to further consider the condition that was established. I would add that even if the *Carter* principles could be applied within the *Doré* framework, the Supreme Court did specify that the law had to have no connection with the mischief contemplated by the legislature (overbreadth) and its impact had to be completely out of sync with the object of the law (gross disproportionality).

[81] Finally, I will turn to the arguments relating to procedural fairness. The applicant submits that the information relied on by the Board in establishing certain conditions, including the one at issue before this Court, was not reliable and persuasive (*Mooring*, para 36). I note that the Supreme Court referred to reliable and persuasive information in the sense that "the Board must make a determination concerning the source of [the information or evidence], and decide whether or not it would be fair to allow the information to affect the Board's decision" (para 36).

[82] It is difficult to see how the information regarding the need for psychiatric treatment could not be reliable and persuasive given that the applicant himself has admitted that it is necessary. Once the condition has been established, it may still be open to the applicant to

challenge the treatment selected. This is the meaning, I believe, of paragraph 45 of *Deacon*. But this must be done on the basis of facts, facts that are non-existent in this case.

[83] It must also be recalled that the record includes Dr. Bergeron's report of February 16, 2017. He had noted that supervision would be appropriate upon the applicant's return to society because of the risk of reoffending, while [TRANSLATION] "vigorously [discouraging] an aversion therapy approach". Similarly, Dr. Morissette noted in his report of April 18, 2017, "a positive attitude toward treatment and a potential follow-up", being aware of his issues and his deviance. The information obtained by the psychiatrists and psychologist was given freely and was obtained in order to determine whether Mr. St-Pierre was eligible for community supervision. It has not been found that establishing a condition to follow psychiatric treatment was unreasonable; on the contrary, both the expert reports and the applicant himself at the time the condition was ordered saw the need for it and nothing suggests, one year later, than the appointments with the psychiatrist, the first of which was scheduled for November 3, 2017, failed to lead to the identification of an appropriate psychiatric treatment. In any case, we know nothing about the proposed therapy.

[84] The applicant also submitted that he should have been heard in person to satisfy procedural fairness requirements. If I have understood correctly, it might be the *Baker* factors that point to this result, but the applicant has only raised one: the invasiveness of psychiatric treatment.

[85] The *Laferrière* decisions in this Court and in the Québec courts, affirmed by the Court of Appeal of Québec, answer this argument fully. In *Laferrière* before this Court, Mr. Laferrière complained that he had not received a hearing when changes to his conditions needed to be considered: like Mr. St-Pierre, he was an offender under a long-term supervision order, Like Mr. St-Pierre, he was given the opportunity to make written representations. Of the seven conditions in place, two were removed (including submitting to a treatment prescribed by a psychiatrist).

[86] I can do no better than reproduce paragraphs 8, 10 and 11 of this Court's decision, which appear entirely relevant to this case.

> [8] The respondent submits that according to the factors set out in *Baker*, in the matter at bar, a hearing was not required because the proceeding before the PBC is neither judicial nor quasi-judicial, because the applicant did not have a legitimate expectation to a hearing, and because the PBC may elect to review a case by way of a hearing and has the expertise to choose its own procedure. This is the conclusion reached by this Court in *Sychuk v Canada (Attorney General)*, 2009 FC 105 at para 48 [*Sychuk*]. In addition, the applicant has already challenged the PBC's decision not to grant him a hearing on two occasions, by making applications for *habeas corpus* before the Québec Superior Court; in both cases (and on appeal), the Superior Court found that the PBC had not breached procedural fairness (*Laferrière c Centre correctionnel communautaire Marcel-Caron*, 2010 QCCS 1677; *Laferrière c Commission des libérations conditionnelles du Canada*, 2013 QCCS 4228; *Laferrière c Commission des libérations conditionnelles du Canada*, 2013 QCCA 1081).
>
> [10] I agree with the respondent. In accordance with the factors set out in *Baker*, this is not a situation where the PBC had to hold a hearing to respect procedural fairness. This was a review of the applicant's parole conditions the outcome of which does not have as great an impact as a detention order or the suspension of parole (see *Arlène Gallone c Le procureur général du Canada*, 2015 CF 608). As noted by the Supreme Court in *Baker*, "[t]he more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more

> stringent the procedural protections that will be mandated" (at para 25). In the matter at bar, the written representations were an adequate substitute for a hearing since no particular reason or no serious issue of credibility was raised by the applicant, either of which could have shed a different light on the PBC's decision.
>
> [11] Moreover, the applicant had no legitimate expectation that the PBC hold a hearing, and because the holding of a hearing is discretionary, the PBC was not obliged to hold a hearing at regular intervals. Also, the absence of reasons for the refusal to hold a hearing is not fatal to the decision in the particular circumstances of this case since the applicant did not raise any specific reason why a hearing should have been held and the PBC had all the required information before it. In accordance with *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, and *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, the Court may consider that the PBC could have given the fact that there was nothing to justify the holding of a hearing as a reason for its refusal. Consequently, the PBC did not breach procedural fairness by not holding a hearing.

[87] The Québec Court of Appeal has dealt with this even more expediently (see above, para 49).

[88] This Court does not question the soundness of the statement in *Bilodeau-Massé v Canada (Attorney General)*, 2017 FC 604 that the Board must "ensure that the reliable and convincing nature of information in the file enables it to make an informed decision" (para 180). However, that is not the issue. The applicant needed instead to explain why it was inappropriate for the Board to hold that the information was reliable and persuasive when it included consent to the treatment and several expert reports recommending the treatment. The applicant has wholly failed to discharge this burden.

VII. Conclusion and costs

[89] Accordingly, the application for judicial review must be dismissed. The respondent is seeking its costs and has submitted a bill of costs in the amount of $3,230, including $2,100 in fees under Tariff B, Column III.

[90] In my view, costs are appropriate. The awarding of costs is discretionary (Rule 400 of the Rules). Here, the applicant has greatly exceeded the framework he set for himself in his notice of application and raised incomplete arguments. Of course it is possible, in an attempt to further the law or make new law, for an argument to appear incongruous. But that is not the situation here. The case law is well known, but no attempt was made to discuss it in order to distinguish it. A fact as central as the consent to the psychiatric treatment was not even raised, let alone explained by the applicant. The case law presented by the respondent regarding the need to hold an in-person hearing when determining what conditions to establish for a long-term offender was well known to the applicant, who should have addressed it.

[91] However, costs of $3,230 seem too high, while the applicant has not claimed any costs. His arguments are based on the criminal nature of the matter and the importance of the issues raised. If costs are to be awarded against him, he submits that they should be limited to $500.

[92] All things considered, I am awarding $1,000, including taxes. This will serve to cover a large part of the expenses incurred by this application for judicial review.

JUDGMENT in docket T-1293-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. Costs in the amount of $1,000, including any taxes, are awarded in favour of the respondent.

"Yvan Roy"
Judge

Certified true translation
This 19th day of November, 2018.

Francie Gow, BCL, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1293-17
STYLE OF CAUSE:	JONATHAN ST-PIERRE v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	MONTRÉAL, QUÉBEC
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APPEARANCES:

Rita Magloé Francis	FOR THE APPLICANT
Marilyn Ménard	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Surprenant Magloé Avocats Montréal, Quebec	FOR THE APPLICANT
Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT