Federal Court  Cour fédérale

Date: 20211109

Docket: T-1052-20

Citation: 2021 FC 1217

Ottawa, Ontario, November 9, 2021

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

TYLER NIELSEN

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Tyler Nielsen, seeks judicial review of a July 28, 2020 decision of the Appeal Division of the Parole Board of Canada (the Board) affirming the Board's decision to deny the applicant day parole (the Decision).

[2] The applicant seeks to have the Decision quashed and a new hearing ordered before the Board, or alternatively, have the Decision referred back to the Appeal Division for redetermination with directions.

[3] The applicant also seeks a declaration that his rights under section 7 of the *Charter* were breached due to procedural unfairness by allowing victims to orally present irrelevant, prejudicial and inflammatory information to the Board and then failing to disabuse themselves of that information.

[4] The respondent seeks to have the application for judicial review dismissed without costs.

[5] For the reasons that follow, this application is dismissed.

II. **Relevant Facts**

[6] The applicant is currently serving a 5 year sentence for causing death by criminal negligence. On November 12, 2017, while under the influence of Lorazepam, Temaxzepam, marijuana and alcohol, the applicant, without permission, took his father-in-law's car for a drive. At that time he was on probation with terms that he not operate a motor vehicle, not possess any non-medically prescribed drugs, and be of good behaviour.

[7] At some point after 6:00 a.m., the applicant was travelling northbound in the wrong lane of a highway, at a speed subsequently found to be between 200 and 227 km/h. When he crested a slope, the applicant collided with a car driven by a person on their way to work. The resulting

impact, which left parts of both vehicles all over the road, was described by a witness as "devastating". The person on their way to work died at the scene of the collision. The applicant suffered serious injuries and was taken to intensive care in Toronto.

[8] The applicant was found to have had a blood alcohol concentration of between 45mg and 99mg of alcohol per 100ml of blood. When the drugs, the speed of the vehicle, and it being on the wrong side of the road, were factored in by the trial judge the applicant was convicted of criminal negligence causing death.

[9] On May 19, 2019, the applicant was sentenced to five years imprisonment and prohibited from driving for 8 years after his sentence is completed. He was also required to provide a DNA sample for registration in the national databank.

[10] On May 19, 2020, The applicant became eligible and applied for day parole in order to attend an intensive substance abuse treatment programme.

[11] Day parole was denied by the Board on May 22, 2020.

III. **The Decision**

[12] The Appeal Division reviewed the applicant's file, listened to the audio-recording of the Board hearing, and reviewed the applicant's submissions. The underlying record contains a number of Victim Impact Statements that were before the Board. These statements are at issue and will be discussed in more detail later.

[13] The Appeal Division found the applicant had not raised any grounds that would cause it to intervene in the Board's decision to deny the applicant's day parole.

[14] The Appeal Division concluded that the Board had conducted an adequate and fair risk assessment, and made reasonable determinations with respect to the risk associated with granting the applicant's request for day parole.

[15] The Appeal Division outlined that the applicant had not made enough progress in addressing the contributing factors of his offence such as his substance abuse, associates, and attitudes. It found that the Board's determination that these risk factors still needed to be addressed by institutional programming rather than intensive programming in the community was reasonable.

[16] The Appeal Division also found that the issue of COVID-19, which was first raised on appeal by the applicant, was not before the Board and therefore could not have been considered in the Board's risk assessment.

IV. **Preliminary Matter: COVID-19 and Remedy Sought**

[17] As part of this application, the applicant seeks a declaration that his section 7 *Charter* rights were breached.

[18] The respondent argues that the Court should not entertain any of the applicant's claims of alleged breaches of his section 7 rights because he failed to provide any analysis or

particularization of the alleged *Charter* breaches and the applicant did not raise COVID-19 as an issue at the parole hearing.

[19] I agree. The applicant's lack of particularization and their failure to raise COVID-19 are each fatal to his assertion that his section 7 *Charter* rights were breached.

[20] The applicant cites *Latham v Canada*, 2020 FC 670 (*Latham*) for the proposition that decision-makers must comply with section 7 of the *Charter*. The applicant also asserted that in light of COVID-19, the Board's exercise of discretion must conform to the *Charter*.

[21] *Latham* does not help the applicant, rather it supports the rejection of their *Charter* claim. Factually, *Latham*, is the same in all the facts that are important to the applicant's *Charter* claim. The inmate in *Latham* was similarly fearful of contracting COVID-19 but had not done so. There was no evidence put forward by that inmate of any breach of their *Charter* rights by CSC or anyone else at the institution where the inmate was incarcerated. Nor has the applicant put forward any such evidence in this matter.

[22] In *Latham,* Mr. Justice Pamel concluded that the applicant had failed to establish a breach of the *Charter* as the mere fact that the inmate was being held within a correctional facility during the COVID-19 pandemic, and may be vulnerable to exposure, was insufficient, in itself, to constitute a *Charter* breach. It was found that the inmate provided insufficient evidence as to health and safety measures of the institution, administrative initiatives, his living arrangements,

or his medical records and behavioural history to support the claim that the inmate was at risk of contracting COVID-19.

[23] The applicant cited *R v Morgan*, 2020 ONCA 279 (*Morgan*) for the principle that COVID-19 is relevant to parole-decision-making generally. In *Morgan*, the issue of COVID-19 was squarely put before the Court for consideration as a factor to reduce the inmate's existing sentence. In this application, it is clear that the issue of COVID-19 was not raised by the applicant at the Board hearing although the Board did consider it by asking the applicant whether they had any medical issues putting them at risk if they contracted COVID-19 and the applicant indicated that there were no existing medical conditions.

[24] In this application, the applicant has similarly failed to provide any evidence to particularize the broad claims made in their memorandum of fact and law. Nor did the applicant provide any analysis of how the Board decision or the Decision breached their *Charter* rights. As a result, there is nothing of substance for the Court to consider in respect of the applicant's *Charter* breach assertions and I find it is not proven.

V. **Legislative overview**

[25] The FCA has confirmed, as set out in the *Corrections and Conditional Release Act*, SC 1992, c 20 [*CCRA*], that "[t]he criteria the Board must apply when granting parole are set out in section 102 of the Act, namely (a) the offender will not, by reoffending, present an undue risk to society before the expiration according to law of the sentence the offender is serving; and (b) the release of the offender will contribute to the protection of society by facilitating the reintegration

of the offender into society as a law-abiding citizen.": *Ouellette v Canada (Attorney General)*, 2013 FCA 54, (*Ouellette*) at para 27.

[26] The purpose of conditional release is found in section 100 of the *CCRA*. That purpose is "to contribute to the maintenance of a just, peaceful and safe society by means of decisions on the timing and conditions of release that will best facilitate the rehabilitation of offenders and their reintegration into the community as law-abiding citizens."

[27] Notwithstanding the foregoing, section 100.1 states that "[t]he protection of society is the paramount consideration for the Board . . . in the determination of all cases."

[28] A number of principles that guide the Board to achieve the purpose of conditional release are set out in section 101 of the *CCRA*.

[29] Those principles which are most relevant to this matter are that the Board is to:

- take into account all relevant available information which is said to include reasons and recommendations of the sentencing judge, the nature and gravity of the offence, the degree of responsibility of the offender, information from the trial or sentencing process and information obtained from victims, offenders and other components of the criminal justice system, including assessments provided by correctional authorities: 101(a);
- engage in a timely exchange relevant information with victims, offenders and other components of the criminal justice system to enhance their effectiveness and openness: 101(b);
- make the least restrictive determinations that are consistent with the protection of society: 101(c);
- provide offenders with relevant information, reasons for decisions and access to the review of decisions in order to ensure a fair and understandable conditional release process: 101(e).

[30] Section 102 of the *CCRA* provides the criteria for granting parole to an offender by providing that the Board may grant parole to an offender if, in its opinion:

> a) the offender will not, by reoffending, present an undue risk to society before the expiration according to law of the sentence the offender is serving; and
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> b) the release of the offender will contribute to the protection of society by facilitating the reintegration of the offender into society as a law-abiding citizen.

[31] The *CCRA* provides in paragraph 107(1)(a) that the Board has exclusive jurisdiction and absolute discretion to grant parole to an offender. In other words, this Court does not have the power to grant parole to the applicant.

VI. **Issues and Standard of Review**

[32] The applicant submits there are four issues for consideration:

1. Whether the Appeal Division erred by concluding that the Board's decision was justified, intelligible and transparent.
2. Whether the Appeal Division erred by finding the information standard had been met.
3. Whether the Appeal Division erred by not granting an adjournment for a psychological assessment.
4. Whether the Appeal Division erred by finding that irrelevant information in the victim statements did not render the hearing procedurally unfair.

[33] The respondent submits that every issue raised by the applicant is subject to a reasonableness standard and that no issue of procedural unfairness has been shown on the facts.

[34] Although that is largely the case, the applicant has raised a question concerning whether an adjournment should have been granted by the Board. Such an issue is a matter of procedural fairness.

[35] I find that these issues raise the questions of whether the Board's decision was: (1) reasonable and (2) procedurally fair.

[36] The standard of review for each of the decisions is presumptively reasonableness, subject to certain limited exceptions, none of which apply in this instance: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (*Vavilov*) at paras 16 and 17.

[37] In this instance, the jurisprudence establishes that when a parole decision is the subject of judicial review, and the Appeal Division confirms the Board's decision, then unless there is a separate error made by the Appeal Division, the reviewing court is to examine the legality of the Board's decision: *Cartier v Canada (Attorney General)*, 2002 FCA 384 at para 10; *Smith v Canada (Attorney General)*, 2019 FC 1658, at para 37 and cases cited therein.

[38] In *Coon v Canada (Attorney General)*, 2016 FC 340, Mr. Justice LeBlanc, a member of this Court at the time, confirmed that it has been found that Parliament appears to have given priority to the Board's decision. As a result, if it is found to be reasonable, the Appeal Division's decision affirming it will also be reasonable, absent any separate error on its part.

[39] While parole is granted at the Board's discretion, the Board must follow the requirements of procedural fairness when deciding whether or not to grant parole. The information upon which the Board bases its decision must be "reliable and persuasive". This obligation acts as a counterbalance to the fact that the Board has the power to consider information that would not otherwise be admissible as evidence before a court of law: *Ouellette* at para 68.

[40] The standard of review for issues of procedural fairness has historically been stated as being correctness review. The Federal Court of Appeal (FCA) has recently revisited procedural fairness and confirmed that "even though there is awkwardness in the use of the terminology, this reviewing exercise is "best reflected in the correctness standard" even though, strictly speaking, no standard of review is being applied". In doing so the FCA stated that "the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond": *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69, at paras 54 and 56.

[41] For the Court to intervene in a case of procedural fairness, the alleged breach also needs to have had a major impact on the outcome of the dispute: *Abraham v Canada (Attorney General)*, 2016 FC 390, at para 18.

[42] Other than the issue of procedural fairness related to a possible adjournment, the standard of review for the Board's decision and the Decision is reasonableness.

VII. **Review of the Board's decision**

[43] The applicant argues that the Decision and the Board's decision were not justified, intelligible and transparent therefore they are unreasonable.

[44] Specifically, the applicant submits that the Board placed greater weight on the aggravating factors rather than the positive factors in the applicant's life.

[45] The applicant also submitted that it is not clear that the Board considered the 15 months that the applicant spent on bail nor that there was little the applicant could do to lower his dynamic factors until he is released into the community. The applicant says that discordant information from the Case Management Team (CMT) was not addressed by the Board.

[46] It is clear that the Board did consider the applicant's 15 months on bail.

[47] The Board addressed the fact that the applicant was released on bail and "remained in the community for approximately 15 months without incident." It also noted that during that time the applicant met with a psychiatrist and a social worker at the local hospital once a week for approximately 11 months.

[48] The Board noted that the applicant attended group therapy with a psychiatrist to address his substance abuse and mental health issues. The Board also noted that the applicant was also

able to secure employment as a plumbing apprentice and the employer confirmed that the applicant would be able to return to that job upon release.

[49] The applicant says the reasons of the Board do not provide an understanding of how it reached the conclusion that the applicant's successful time on bail, and the recommendation of the CMT that any risk was manageable on day parole, were outweighed by the aggravating factors.

[50] However, the CMT recommendation is only that. It is not binding upon the Board. It has long been held that the Board plays an inquisitorial role and acts on information that is reliable and persuasive. It does not hear and assess evidence. The Board is an independent tribunal which is not bound by the CSC or the recommendations of an offender's CMT: *Twins v Canada (Attorney General)*, 2016 FC 537 at para 41 (internal citations omitted).

[51] While the applicant agrees that their compliance during bail was not determinative, they argue it is still significantly probative.

[52] In that respect, after considering the psychiatric assessment produced at the criminal trial, the Board found that CSC had underestimated the risk in light of that assessment. The Board stated that the applicant had a "long and troubled history of substance abuse linked to considerable mental health challenges" and the assessment "suggested that your risk is linked to taking appropriate treatment."

[53] The Board clearly and reasonably explained at the end of their decision how and why they arrived at the conclusion that the aggravating factors outweighed the positive factors:

> To summarize, you have a limited but extremely serious criminal record that includes causing the death of the victim and the continued trauma of his family. While you accept responsibility, you also tend to deflect responsibility citing your established mental health issues. Unfortunately, a psychological risk assessment was not requested at intake. However, a psychiatric assessment at trial documents a long and troubled history of substance abuse linked to considerable mental health challenges and suggested that your risk is linked to taking appropriate treatment. Despite these observations, you were deemed ineligible for correctional programming. Actuarial risk, estimated by the SIR scale, indicates low risk, however, the Board views this as an underestimate of risk in light of the trial psychiatric assessment. The Board notes that you continue to experience mental health challenges on a daily basis and while you are compliant with your prescribed medication, you also have a history of short-term gains. To your credit your institutional conduct improved in recent months, you have maintained employment and completed an educational credit. Further, you secured the support of a highly respected substance abuse program in the community, the support of your CMT, and family .
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> Taken collectively, the Board places greater weight on aggravating factors such as the impact of your criminal actions, and the risk associated with your long-term substance abuse issues, which remain unaddressed, and your continued mental health difficulties that are impacted by substance abuse. In the Board's view, neither of these contributing factors have been adequately addressed to mitigate your risk in the community.
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> Accordingly, the Board denies day parole. It is the Board's opinion that you will present an undue risk to society if released. Further, your release will not contribute to the protection of society by facilitating your reintegration into society as a law-abiding citizen.

[54] The applicant also states that the Board did not explain whether they accepted the evidence regarding the applicant’s institutional conduct, and they did not indicate the relevance and weight they attached to each allegation.

[55] This argument overlooks the applicant's own evidence given to the Board. The Appeal Division confirmed that "during the Board hearing there had been a discussion concerning the applicant's behaviour in the institution and the Board decision indicated that the applicant had agreed that they were not able to use their skills or tools acquired during treatment while on bail to make better decisions." This statement by the applicant also speaks to their ability to handle their substance abuse issues in the community. That in turn supports the finding by the Board that CSC had underestimated the applicant's risk to society if placed on day parole.

[56] The applicant also overlooks the fact that an administrative decision-maker is not required to outline the precise weight attributed to every piece of evidence in order to justify its conclusion:

> Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, 1973 CanLII 191 (SCC), [1975] 1 S.C.R. 382, at p. 391). In other words, 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.
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> Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board), 2011 SCC 62 at para 16.

[57] Turning to *Vavilov* again, the Supreme Court sets out at paragraph 102 what makes a decision reasonable:

> To be reasonable, a decision must be based on reasoning that is both rational and logical. It follows that a failure in this respect

> may lead a reviewing court to conclude that a decision must be set aside. Reasonableness review is not a "line-by-line treasure hunt for error": *Irving Pulp & Paper*, at para. 54, citing *Newfoundland Nurses*, at para. 14. However, the reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that "there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived."

[58] Having reviewed the Board reasons carefully, I find that the Board reasonably explained why it found the aggravating factors outweighed the positive factors. These factors were the impact of the applicant's criminal actions, the risk associated with unaddressed long-term substance abuse issues, and the applicant's continued mental health difficulties that are impacted by substance abuse.

[59] The Board was required by section 102 of the *CCRA* to consider whether the applicant would present an undue risk to society if they were released on day parole and whether the applicant's release would contribute to the protection of society by facilitating their reintegration into society as a law-abiding citizen. The Board clearly stated that the applicant would present such a risk and release would not facilitate reintegration as a law abiding citizen because neither the mental health issues or the substance abuse issues have been adequately addressed by the applicant.

[60] The Board's concerns are well supported by the underlying record.

[61] The audio recording of the Board hearing was included with the CTR as was the very detailed updated 19 page Correctional Plan. A review of the recording shows that Dr. Gojer's

report indicated the applicant said that prior to the offence he was having command hallucinations, being told to swerve his car. This caused the Board to comment that the applicant didn't take his probation requirements seriously, to which the applicant confirmed that he did not take his prohibitions seriously.

[62] The audio also contains the discussion about the institutional incidents, his grandmother being sick, his smoking tobacco against the rules, having a play station and bag of sage in his cell and that he says another offender stole his power bar. The applicant shortly after this discussion states that he is trying to control his problematic behaviour and urges.

[63] The Correctional Plan outlined, under the heading Mental Health Information, that "Mr. Nielsen has been suffering from a chronic anxiety disorder with features of social anxiety and panic attacks. Associated with this anxiety has been a long history of depression with suicidal ideation." The summary also stated, amongst many positive and critical comments, that "Mr. Nielsen does not have a history of aggression or violence to others. His offending appears to be negligent behaviour stemming from his inability to cope with stress and anxiety and resorting to the inappropriate use of medication and alcohol to cope. His risk is predicated on him remaining free from drugs of abuse, taking appropriate treatment for his psychiatric problems, and learning better methods of dealing with stress and conflict. Until this is satisfactorily addressed, he should not drive."

[64] In conclusion, I find that the Board considered the evidence collectively, not piecemeal. It did not engage in a treasure hunt for errors nor were there any fatal flaws in the Board's logic.

There is a line of analysis in the reasons that leads from the evidence before the Board to the conclusion that day parole be denied.

[65] To the extent that the applicant's arguments are an invitation to the Court to re-weigh the evidence, it cannot be done on judicial review. The reviewing court will not interfere with the factual findings of a decision maker, absent exceptional circumstances. This is summarized in *Vavilov* at para 125:

> It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker". Indeed, many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review.
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> (Internal citations omitted)

[66] I find this to be particularly so in this case as the jurisprudence has established that the reviewing court owes the Board and the Appeal Division considerable deference in light of their expertise: *May v Canada (Attorney General)* 2020 FC 292 at para 23.

VIII. **The Psychological Assessment, Adjournment, Procedural Fairness**

[67] The applicant submits that the Board erred by denying parole in part on the lack of a psychological risk assessment. They say that requesting such an assessment indicated that the Board was not satisfied with the information it had before it.

[68] As a result, the applicant submits that the Board hearing ought to have been adjourned to await the psychological risk assessment.

[69] While the Board may adjourn a hearing where it requires further information, it is not obliged to do so: Decision-making Policy Manual for Board Members [Policy Manual], chapter 11, sections 5 and 7.

[70] It is further alleged by the applicant that by making a decision in the absence of the information that a psychological risk assessment would provide, the Board made a decision based on incomplete information.

[71] I disagree that obtaining a psychological risk assessment was an issue at the hearing or that the Board was not satisfied with the information it had before it.

[72] In making its decision, the Board relied on the 69-page very detailed psychiatric assessment completed for the applicant's trial.

[73] The Board did not deny parole in part because a psychological assessment was unavailable. The Board requested that prior to the next review a psychological assessment be conducted to establish the impact of the applicant's mental health history on their risk to re-offend.

[74] The applicant states that the Board could and should have adjourned the hearing to get such an assessment pursuant to Policy Manual section 2.2.

[75] Section 2.2.7 of the Policy Manual states that a psychological risk assessment is considered valid for a period of two years. The psychiatric assessment was dated January 1, 2019 and was therefore valid when the Board issued its decision on May 22, 2020.

[76] Based on the foregoing, I find that no breach of procedural fairness arose from the Board's decision not to adjourn the hearing.

[77] The applicant also says that as the CMT did not recommend that a psychological assessment take place, it was procedurally unfair because the applicant had no way of knowing it would be an issue at the hearing. As stated above, such an assessment was not an issue at the hearing.

[78] In any event, *Twins,* referred to earlier, established that the Board is not bound by the CSC or the recommendations of an offender's CMT. For these reasons it was not procedurally unfair for the Board not to adjourn the hearing but instead to rely on the psychiatric report completed for trial.

IX. **Victim Impact Statements**

[79] The applicant says that the Appeal Division erred in concluding that the admission of irrelevant comments in the victim statements did not render the hearing procedurally unfair.

[80] In general terms, the respondent submits that the applicant received the victim statements and had the opportunity to respond to them, thereby satisfying the test for procedural fairness.

[81] The irrelevant information is said to be information that was not to be considered, as directed in subsection 140(10.1) of the *CCRA*, which cross-references to paragraphs 140(10)(a) and (b):

Presentation of statements	**Déclaration par la personne à l'audience**
(10) If they are attending a hearing as an observer,	(10) Lors de l'audience à laquelle elles assistent à titre d'observateur :
(a) a victim may present a statement describing the harm, property damage or loss suffered by them as the result of the commission of the offence and its continuing impact on them — including any safety concerns — and commenting on the possible release of the offender; and	a) d'une part, la victime peut présenter une déclaration à l'égard des dommages ou des pertes qu'elle a subis par suite de la perpétration de l'infraction et des répercussions que celle-ci a encore sur elle, notamment les préoccupations qu'elle a quant à sa sécurité, et à l'égard de l'éventuelle libération du délinquant;
(b) a person referred to in subsection 142(3) may present a statement describing the harm, property damage or loss suffered by them as the result of any act of the offender in respect of which a complaint was made to the police or Crown attorney or an information laid under the Criminal Code, and its continuing impact on them — including any safety concerns — and commenting on the possible release of the offender.	b) d'autre part, la personne visée au paragraphe 142(3) peut présenter une déclaration à l'égard des dommages ou des pertes qu'elle a subis par suite de la conduite du délinquant — laquelle a donné lieu au dépôt d'une plainte auprès de la police ou du procureur de la Couronne ou a fait l'objet d'une dénonciation conformément au Code criminel — et des répercussions que cette conduite a encore sur elle, notamment les préoccupations
Consideration of statement	
(10.1) The Board shall, in deciding whether an offender	

should be released and what conditions might be applicable to the release, take into consideration any statement that has been presented in accordance with paragraph (10)(a) or (b).	qu'elle a quant à sa sécurité, et à l'égard de l'éventuelle libération du délinquant. **Prise en considération de la déclaration** (10.1) Lorsqu'elle détermine si le délinquant devrait bénéficier d'une libération et, le cas échéant, fixe les conditions de celle-ci, la Commission prend en considération la déclaration présentée en conformité avec les alinéas 10a) ou b)

[82] Section 101 of the *CCRA* provides principles that are to guide the Board in considering conditional release. Paragraph 101(a) provides that the Board take into account all relevant and available information, including the stated reasons and recommendations of the sentencing judge, the nature and gravity of the offence, the degree of responsibility of the offender, information from the trial or sentencing process and information obtained from victims, offenders and other components of the criminal justice system, including assessments provided by correctional authorities are all to be considered.

[83] Section 141(1) of the *CCRA* states that the Board is to provide the offender with the information that is to be considered. As noted by the respondent, the CTR indicates that the victim statements to be presented at the hearing were submitted to the Parole Board and shared with the applicant.

[84] The principles of fundamental justice require the Board to provide the offender with the information upon which the Board will base its decision. The offender must receive sufficient

information, in sufficient detail, to allow them to answer the case against them and to make informed representations in support of their position: *Ewonde v Canada (Attorney General)*, 2020 FC 829 (*Ewonde*) at para 33. (internal citations omitted)

[85] The applicant has not identified any material gaps or errors in the information provided to him that would have undermined his ability to answer the case against him.

[86] I disagree with the applicant's submission that the Parole Board ought to adopt a gatekeeping function in order to ensure victim statements contain only relevant information to be considered.

[87] The applicant has insisted that information in the victim statements should not have been considered by the Board because it runs contrary to the jurisprudence established under the *Criminal Code* regarding what is acceptable or not acceptable in a victim impact statement.

[88] The Parole Board however does not act in a judicial or quasi-judicial manner. It is *not required to hear and assess evidence or be bound by strict rules of evidence that would apply to victim impact statements in criminal proceedings*. The Board is required to ensure that the information it acts upon is "reliable and persuasive": *Mooring v Canada (National Parole Board)*, [1996] 1 SCR 75 at paras 29 and 36. (My emphasis) See also *Ouellette* at para 68.

[89] The Policy Manual at section 1.2.5 states that the Board will consider relevant information from victims in order to assess:

Information from Victims

5. The Board will consider relevant information from victims, including victim statements, in order to assess:

a. the nature and extent of harm done to the victim or the loss suffered by the victim and the continuing impact of the commission of the offence;

b. the risk of re-offending the offender may pose if released, including any safety concerns expressed by the victim;

c. the offender's potential to commit a violent crime, for example information about threatening or previous violent or abusive behaviour;

d. the offender's understanding of the impact of the offence;

e. the conditions necessary to manage the risk which might be presented by the offender; and

f. the offender's release plans. Possible repercussions should be carefully assessed when the victim is a family member or was closely associated with the offender, and/or when the release plan will place the offender in close proximity to the victim.

Renseignements provenant des victimes

5. La Commission tient compte des renseignements pertinents fournis par les victimes, y compris les déclarations de la victime, afin d'évaluer :

a. la nature et l'étendue des pertes ou des dommages causés à la victime et des effets que la perpétration de l'infraction a encore sur elle;

b. le risque de récidive que le délinquant peut présenter s'il est mis en liberté, y compris les préoccupations exprimées par la victime quant à sa sécurité;

c. la propension du délinquant à commettre une infraction accompagnée de violence, par exemple les renseignements fournis prouvent que le délinquant s'est montré menaçant ou a eu un comportement violent ou abusif par le passé;

d. la compréhension des conséquences de l'infraction par le délinquant;

e. les conditions à imposer pour contrôler le risque que pourrait présenter le délinquant;

f. le plan de libération du délinquant. Si la victime est un membre de la famille ou qu'elle était étroitement liée avec le délinquant, et/ou que le plan de libération amènera le délinquant à proximité de la victime, les répercussions

possibles devraient être
soigneusement évaluées.

[90] As can be seen, there is a broad range of information that is to be considered by the Board.

[91] The Appeal Division acknowledged that additional information had been submitted that was not to be considered by the Board pursuant to s.140(10.1) of the *CCRA*. The Appeal Division concluded that the Board's decision did not indicate that their decision improperly relied on the additional information. A review of the Board's decision confirms this finding.

[92] The applicant alleges that the Board was not capable of disabusing itself of any irrelevant information.

[93] I disagree. The Board and the Appeal Division are both experts in their field. As such, a simple statement by the applicant that the Board is not able to disabuse itself of irrelevant information requires evidence from the decision or statements made at the hearing that the Board could not discern the difference between relevant and irrelevant statements.

[94] The Appel Division was satisfied that the Board "gave no indication that it considered the additional information from the victims". It also found that "the Board asked you questions relevant to the risk assessment and you were given the opportunity to answer and provide information to the Board."

[95] The Appeal Division found that the Board considered the information from the victims in accordance with subsection 140(10.1).

[96] I agree. I also can discern no separate error on the part of the Appeal Division.

X. **Conclusion**

[97] In a case where parole is involved, the Board's "decision must not be interfered with by this Court failing clear and unequivocal evidence that the decision is quite unfair and works a serious injustice on the inmate. …" *Korn v Canada (Attorney General)*, 2014 FC 590 (*Korn*) at para 14.

[98] I find for all the above reasons that the Decision and the Board decision were reasonable and there was no breach of procedural fairness in this matter. Therefore, as per *Korn* I will not interfere with the Decision or the Board's decision.

[99] The application is dismissed, without costs.

JUDGMENT in T-1052-20

THIS COURT'S JUDGMENT is that this application is dismissed, without costs.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1052-20
STYLE OF CAUSE:	TYLER NIELSEN v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HELD BY WAY OF VIDEO CONFERFENCE
DATE OF HEARING:	MARCH 30, 2021
JUDGMENT AND REASONS:	ELLIOTT J.
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APPEARANCES:

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