Federal Court of Appeal

Cour d'appel fédérale

Date: 20130305

Docket: A-105-12

Citation: 2013 FCA 54

CORAM: **NOËL J.A.**
PELLETIER J.A.
MAINVILLE J.A.

BETWEEN:

GILLES OUELLETTE

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Montréal, Quebec, on January 16, 2013.

Judgment delivered at Ottawa, Ontario, on March 5, 2013.

REASONS FOR JUDGMENT BY: MAINVILLE J.A.

CONCURRED IN BY: NOËL J.A.
PELLETIER J.A.

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REASONS FOR JUDGMENT

MAINVILLE J.A.

[1] This is an appeal from a decision of Justice Bédard of the Federal Court (the Federal Court judge) dated March 1, 2012, citation number 2012 FC 284 (the Decision), in which she dismissed the appellant's application for judicial review of a decision by the Appeal Division of the National Parole Board (the Appeal Division) dated February 16, 2011. The Appeal Division had confirmed a decision of the National Parole Board (the Board) dated June 16, 2011, in which the Board denied the appellant day parole and parole under the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (the Act).

[2] The appellant raised several grounds of appeal regarding the errors allegedly made by the Federal Court Judge, the Appeal Division and the Board in relation to (a) a breach of procedural fairness with regard to his right to be heard, (b) the assessment of his file and the evidence it included, and (c) the application of the correct legal tests for reviewing applications for conditional release, specifically the principles that can be derived from *Steele v. Mountain Institution*, [1990] 2 S.C.R. 1385 (*Steele*), *Pinet v. St. Thomas Psychiatric Hospital*, 2004 SCC 21, [2004] 1 S.C.R. 428 (*Pinet*), and *Mooring v. Canada (National Parole Board)*, [1996] 1 S.C.R. 75 (*Mooring*).

[3] At the beginning of the hearing of the present appeal, the Attorney General of Canada argued that the appeal was moot, given that the Board and the Appeal Division had rendered new decisions since and had again denied the appellant parole. In the light of these circumstances, counsel for the appellant conceded that the grounds of appeal involving the breach of procedural fairness and the assessment of the evidence on file were moot. He maintained, however, that the appeal should be heard with regard to the correct legal tests for assessing applications for parole given the systemic nature of this issue.

[4] After briefly deliberating the matter, and applying the guidelines set out in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, this Court decided to exercise its discretion and to rule on the appeal despite its mootness, but solely in respect of the correct legal tests for assessing applications for parole in the light of *Steele*, *Pinet* and *Mooring*.

BACKGROUND

[5] The appellant has a criminal record that dates back to 1974, and which includes convictions for conspiracy to commit robbery, armed robbery and possession of a restricted weapon. He was arrested in January 1983 and found guilty of violently murdering an elderly couple in the course of a home invasion and robbery. The victims were found prone on the floor with their hands tied behind their backs. They had been stabbed in the back and fatally shot. In accordance with the *Criminal Code*, R.S.C. 1985, c. C-46, the appellant was sentenced to two concurrent life sentences for the two murders.

[6] Under the Act, the appellant's eligibility for parole is subject to the appellant serving at least 25 years of imprisonment. According to his correctional record, he has been eligible for day parole since January 2005 and full parole since January 2008. To date, however, the Board has denied all his applications for parole.

[7] On December 16, 2009, the Board again denied the appellant parole. It noted that various professionals had diagnosed the appellant with narcissistic personality disorder with paranoid features and antisocial traits: Appeal Book (AB) at pp 309-310. It also noted that, in the opinion of the appellant's case management team at the Correctional Service of Canada, the appellant's potential for reintegration into society was low and there was still a high risk that he would commit further criminal offences, in part because he still denies that he committed the murders of which he was convicted: AB, p. 310. It also noted the appellant's clear resistance to treatment given that he had not followed any prison programs to counter the factors contributing to his criminal behaviour: AB, p. 310.

[8] The Board did, however, point out that the appellant seemed to have recently begun reflecting on his criminal past by undergoing psychological treatment, working with a support worker from Option-Vie on a regular basis and pursuing his studies: AB, p. 311.

[9] While denying the appellant parole in its decision dated December 16, 2009, the Board nonetheless set an early date to review his case in six months' time. In that time, it expected him to (a) work closely with his parole officer to identify goals to meet in order to lower his security classification; (b) to continue the psychological treatment he had begun; (c) to pursue his work with Option-Vie in order to develop greater flexibility and openness; and (d) to work on developing a release plan (AB at pp. 311-312).

[10] Such was the context in which the Board held a new review six months later, on June 16, 2010. Following this review, the Board again refused to grant the appellant parole. It is this decision, dated June 16, 2010, that the appellant challenged before the Appeal Division and the Federal Court judge, and is now challenging before this Court.

PREVIOUS DECISIONS

(a) Board's decision dated June 16, 2010

[11] The Board concluded that the appellant had not fully realized the expectations it had set in its previous decision, dated December 16, 2010. These are its findings (AB at pp. 683-685):

i. the appellant is not cooperating fully with his parole officer;
ii. he is a demanding, self-rationalizing and self-centred individual, who is constantly in conflict with his case management team;

iii. he has not completed any correctional programs regarding his criminal past and has not shown any interest in doing so;

iv. although the appellant completed his psychological follow-up, he has still not revealed his inner world, and the psychologist is still not able to conclude that the risk of his reoffending has been lowered;

v. the appellant has good relations with the Option-Vie representative, who is helping him loosen his defence mechanisms, but he nonetheless fails to demonstrate openness, cooperation and transparency towards Correctional Service of Canada workers;

vi. even though the appellant has been working on a release plan, the plan is premature, and his case management team continues to be of the opinion that he presents an undue risk to society.

[12] The Board therefore refused to grant parole because it was of the opinion that the appellant's likelihood of reoffending still presented an unacceptable risk to society.

(b) Decision of the Appeal Division dated February 16, 2011

[13] For the purpose of his appeal before the Appeal Division, the appellant's first ground of appeal was that the Board had not acted fairly: he submitted that he had been unable to provide a complete testimony on account of interruptions and interventions from the board members. After listening to the recording of the hearing before the Board, the Appeal Division rejected this argument. It concluded rather that, even though the board members had asked several relevant

questions, they had also allowed the appellant to express himself, had listed closely to what he said and had conducted the hearing fairly and equitably.

[14] As a second ground of appeal, the appellant submitted that the Board had not applied the correct criteria for examining his application for parole. The Appeal Division was of the opinion that the Board had applied the correct legal test, namely the "risk to re-offend, which is assessed as unacceptable for society": AB at p. 862.

[15] As to his third ground of appeal, the appellant submitted that the Board had based its decision on erroneous and incomplete facts. In the Appeal Division's view, the evidence before the Board had allowed it to reasonably conclude that paroling the appellant still presented an unacceptable risk to society.

(c) Decision of the Federal Court judge dated March 1, 2012

[16] The issues raised in the judicial review hearing before the Federal Court were the same as those raised in the appeal before the Appeal Division: Decision at para. 24.

[17] With regard to the alleged breach of procedural fairness, the Federal Court judge reread the full transcript of the hearing before the Board, and like the Appeal Division, she concluded that the appellant had the opportunity to participate fully in the process and to express himself on all of the relevant aspects of the decision to be made by the Board: Decision at para. 32.

[18] With regard to the legal tests that are applicable to parole, the Federal Court judge was of the view that “although it wishes to facilitate the applicant’s reintegration into society, the Board had to determine whether the applicant’s release would result in an unacceptable risk for society, the protection of society being the paramount consideration . . .”: Decision at para. 36.

[19] With regard to the assessment of the facts, the Federal Court judge found that the Board’s decision was sufficiently detailed and addressed elements that were relevant to assessing the appellant’s risk of reoffending: Decision at para. 37. She was also of the opinion that, given the evidence in the record, it was reasonable for the Board to conclude that the appellant’s progress over the six months preceding its decision had not reduced his risk of reoffending: Decision at paras. 38 and 39.

ISSUE

[20] The only issue is whether, in the light of *Steele*, *Pinet* and *Mooring*, the Federal Court judge erred in deciding that the Board had applied the correct legal tests to dispose of the appellant’s application for parole.

PARTIES’ RESPECTIVE POSITIONS

[21] According to the appellant, the Board erred in law in (a) not considering the length of his imprisonment when assessing his risk to society (*Steele*); (b) not applying the least restrictive measure possible in order to protect society (*Pinet*); and (c) not agreeing to consider all the relevant information the appellant wished to submit in support of his application for parole

(*Mooring*). The Federal Court judge neither identified nor corrected these errors and therefore also made errors in law.

[22] According to the respondent, the Board was only required to examine whether the appellant's release into the community would present an unacceptable risk to society in the light of the principles and criteria set out at sections 100 to 102 of the Act. The Board considered these principles and criteria. Consequently, the Appeal Division and the Federal Court judge did not err in refusing to intervene.

PERTINENT LEGISLATION

[23] Part II of the Act deals with conditional release, detention and long-term supervision. For the purposes of this appeal, the following definitions from Part II are relevant:

99. (1) In this Part,	**99.** (1) Les définitions qui suivent s'appliquent à la présente partie.
"parole" means full parole or day parole;	« libération conditionnelle » Libération conditionnelle totale ou semi-liberté.
"full parole" means the authority granted to an offender by the Board or a provincial parole board to be at large during the offender's sentence;	« libération conditionnelle totale » Régime accordé sous l'autorité de la Commission ou d'une commission provinciale et permettant au délinquant qui en bénéficie d'être en liberté pendant qu'il purge sa peine.
"day parole" means the authority granted to an offender by the Board or a provincial parole board to be at large during the offender's sentence in order to prepare the offender for full parole or statutory release, the conditions of which require the offender to return to a penitentiary, community-based residential facility, provincial	« semi-liberté » Régime de libération conditionnelle limitée accordé au délinquant, pendant qu'il purge sa peine, sous l'autorité de la Commission ou d'une commission provinciale en vue de le préparer à la libération conditionnelle totale ou à la libération d'office et dans le cadre

correctional facility or other location each night or at another specified interval;	duquel le délinquant réintègre chaque soir — ou à tout autre intervalle précisé — l'établissement résidentiel communautaire, le pénitencier, l'établissement correctionnel provincial ou tout autre lieu précisé.

[24] Under paragraph 107(1)(*a*) of the Act, the Board has exclusive jurisdiction and absolute discretion to grant parole to an offender, subject to certain statutes, specifically the *Criminal Code* provisions specifying or providing for a minimum period of imprisonment before an offender becomes eligible for parole.

[25] Section 100 of the Act describes the purpose of conditional release.

100. The purpose of conditional release is to contribute to the maintenance of a just, peaceful and safe society by means of decisions on the timing and conditions of release that will best facilitate the rehabilitation of offenders and their reintegration into the community as law-abiding citizens.	**100.** La mise en liberté sous condition vise à contribuer au maintien d'une société juste, paisible et sûre en favorisant, par la prise de décisions appropriées quant au moment et aux conditions de leur mise en liberté, la réadaptation et la réinsertion sociale des délinquants en tant que citoyens respectueux des lois.

[26] In that regard, subsection 128(1) expressly provides that an offender who is released on parole nonetheless continues to serve his or her sentence until its expiration according to law:

128. (1) An offender who is released on parole, statutory release or unescorted temporary absence continues, while entitled to be at large, to serve the sentence until its expiration according to law.	**128.** (1) Le délinquant qui bénéficie d'une libération conditionnelle ou d'office ou d'une permission de sortir sans escorte continue, tant qu'il a le droit d'être en liberté, de purger sa peine d'emprisonnement jusqu'à l'expiration légale de celle-ci.

[27] The 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:

102. The Board or a provincial parole board may grant parole to an offender if, in its opinion, (*a*) the offender will not, by reoffending, present an undue risk to society before the expiration according to law of the sentence the offender is serving; and (*b*) the release of the offender will contribute to the protection of society by facilitating the reintegration of the offender into society as a law-abiding citizen.	**102.** La Commission et les commissions provinciales peuvent autoriser la libération conditionnelle si elles sont d'avis qu'une récidive du délinquant avant l'expiration légale de la peine qu'il purge ne présentera pas un risque inacceptable pour la société et que cette libération contribuera à la protection de celle-ci en favorisant sa réinsertion sociale en tant que citoyen respectueux des lois.

[28] The principles that guided the Board in achieving the purpose of conditional release in its decision regarding the appellant dated June 16, 2010, were set out as follows in section 101 of the Act as it then read.

101. The principles that shall guide the Board and the provincial parole boards in achieving the purpose of conditional release are	**101.** La Commission et les commissions provinciales sont guidées dans l'exécution de leur mandat par les principes qui suivent :
(*a*) that the protection of society be the paramount consideration in the determination of any case;	*a*) la protection de la société est le critère déterminant dans tous les cas;
(*b*) that parole boards take into consideration all available information	*b*) elles doivent tenir compte de toute l'information pertinente

that is relevant to a case, including the stated reasons and recommendations of the sentencing judge, any other information from the trial or the sentencing hearing, information and assessments provided by correctional authorities, and information obtained from victims and the offender;	disponible, notamment les motifs et les recommandations du juge qui a infligé la peine, les renseignements disponibles lors du procès ou de la détermination de la peine, ceux qui ont été obtenus des victimes et des délinquants, ainsi que les renseignements et évaluations fournis par les autorités correctionnelles;
(*c*) that parole boards enhance their effectiveness and openness through the timely exchange of relevant information with other components of the criminal justice system and through communication of their policies and programs to offenders, victims and the general public;	*c*) elles accroissent leur efficacité et leur transparence par l'échange de renseignements utiles au moment opportun avec les autres éléments du système de justice pénale d'une part, et par la communication de leurs directives d'orientation générale et programmes tant aux délinquants et aux victimes qu'au public, d'autre part;
(*d*) that parole boards make the least restrictive determination consistent with the protection of society;	*d*) le règlement des cas doit, compte tenu de la protection de la société, être le moins restrictif possible;
(*e*) that parole boards adopt and be guided by appropriate policies and that their members be provided with the training necessary to implement those policies; and	*e*) elles s'inspirent des directives d'orientation générale qui leur sont remises et leurs membres doivent recevoir la formation nécessaire à la mise en oeuvre de ces directives;
(*f*) that offenders be provided with relevant information, reasons for decisions and access to the review of decisions in order to ensure a fair and understandable conditional release process.	*f*) de manière à assurer l'équité et la clarté du processus, les autorités doivent donner aux délinquants les motifs des décisions, ainsi que tous autres renseignements pertinents, et la possibilité de les faire réviser.

[29] These principles were slightly amended by the recent *Safe Streets and Communities Act*, mainly to provide for an increased role for victims, and to replace the principle of the least

restrictive determination by that of decisions "that are limited to only what is necessary and proportionate to the purpose of conditional release". In their latest version, sections 100.1 and 101 of the Act thus read as follows:

100.1 The protection of society is the paramount consideration for the Board and the provincial parole boards in the determination of all cases	**100.1** Dans tous les cas, la protection de la société est le critère prépondérant appliqué par la Commission et les commissions provinciales.
101. The principles that guide the Board and the provincial parole boards in achieving the purpose of conditional release are as follows:	**101.** La Commission et les commissions provinciales sont guidées dans l'exécution de leur mandat par les principes suivants :
(*a*) parole boards take into consideration all relevant available information, including the stated reasons and recommendations of the sentencing judge, the nature and gravity of the offence, the degree of responsibility of the offender, information from the trial or sentencing process and information obtained from victims, offenders and other components of the criminal justice system, including assessments provided by correctional authorities;	*a*) elles doivent tenir compte de toute l'information pertinente dont elles disposent, notamment les motifs et les recommandations du juge qui a infligé la peine, la nature et la gravité de l'infraction, le degré de responsabilité du délinquant, les renseignements obtenus au cours du procès ou de la détermination de la peine et ceux qui ont été obtenus des victimes, des délinquants ou d'autres éléments du système de justice pénale, y compris les évaluations fournies par les autorités correctionnelles;
(*b*) parole boards enhance their effectiveness and openness through the timely exchange of relevant information with victims, offenders and other components of the criminal justice system and through communication about their policies and programs to victims, offenders and the general public;	*b*) elles accroissent leur efficacité et leur transparence par l'échange, au moment opportun, de renseignements utiles avec les victimes, les délinquants et les autres éléments du système de justice pénale et par la communication de leurs directives d'orientation générale et programmes tant aux victimes et aux délinquants qu'au grand public;
(*c*) parole boards make decisions that are consistent with the protection of society and that are limited to only what is necessary and	*c*) elles prennent les décisions qui, compte tenu de la protection de la société, ne vont pas au-delà de ce qui est nécessaire et proportionnel aux

proportionate to the purpose of conditional release;

objectifs de la mise en liberté sous condition;

(*d*) parole boards adopt and are guided by appropriate policies and their members are provided with the training necessary to implement those policies; and

d) elles s'inspirent des directives d'orientation générale qui leur sont remises et leurs membres doivent recevoir la formation nécessaire à la mise en oeuvre de ces directives;

(*e*) offenders are provided with relevant information, reasons for decisions and access to the review of decisions in order to ensure a fair and understandable conditional release process.

e) de manière à assurer l'équité et la clarté du processus, les autorités doivent donner aux délinquants les motifs des décisions, ainsi que tous autres renseignements pertinents, et la possibilité de les faire réviser.

ANALYSIS

Guiding principles

[30] The Supreme Court of Canada clarified the Board's role in matters of parole in *R. v. Shropshire*, [1995] 4 S.C.R. 227; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500; and *R. v. Zinck*, [2003] 1 S.C.R. 41. Six guiding principles emerge:

a. parole is a condition of the sentence;

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

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

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

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

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

[31] The underpinnings of the parole system have been commented on by Chief Justice Lamer in *R. v. M. (C.A.)*, above. After a careful review of the origins of our current system (at paras. 58 to 61), he concluded that the Act provides for a system that enforces sentences rather than one that reduces them: see paras. 62 and 64 of the decision. He wrote the following at paragraph 62:

> In short, the history, structure and existing practice of the conditional release system collectively indicate that a grant of parole represents a change in the conditions under which a judicial sentence must be served, rather than a reduction of the judicial sentence itself. . . . But even though the conditions of incarceration are subject to change through a grant of parole to the offender's benefit, the offender's sentence continues in full effect. The offender remains under the strict control of the parole system, and the offender's liberty remains significantly curtailed for the full duration of the offender's numerical or life sentence. The deterrent and denunciatory purposes which animated the original sentence remain in force, notwithstanding the fact that the conditions of sentence have been modified. . . .
> (Emphasis added)

[32] *R. v. Shropshire*, above, dealt with the criteria and principles that should guide the trial judge asked to determine whether there is reason to extend the period of parole ineligibility beyond the statutory minimum in the case of a conviction for second-degree murder. Justice Iacobucci, writing for the Supreme Court of Canada, noted that parole is not guaranteed, that it is only possible when a statute provides for it and that it is granted only when the Board is of the opinion that the criteria set out in the Act are met:

> On another note, I do not find that permitting trial judges to extend the period of parole ineligibility usurps or impinges upon the function of the parole board. I am cognizant of the fact that, upon the expiry of the period of parole ineligibility, there is no guarantee of release into the public. At that point, it is incumbent upon the parole board to assess the suitability of such release, and in so doing it is guided by the legislative objectives of the parole system: see ss. 101 and 102 of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20.
> (*R. v. Shropshire*, above, at para. 34. Emphasis added.)

[33] Moreover, "the actual granting of full parole remains within the discretion of the National Parole Board": *R. v. M. (C.A.)*, above, at para. 69. In exercising this discretion, the Board must, of course, take into account factors defined by Parliament and principles of fundamental justice.

[34] Justice LeBel reiterated these principles in *R. v. Zinck*, above, at paras. 19 and 20. He adds that the sentencing process is quite different from the parole process, the latter process being based mainly on the observation and assessment of the personality and behaviour of the offender, focusing on dangerousness and the offender's ability to re-enter the community.

> [19] Determining the date and conditions of parole eligibility is usually the prerogative of an administrative body, the Parole Board, in the discharge of its supervisory functions over the execution of sentences. Over time, however, the focus of legislation has shifted. The *Corrections and Conditional Release Act* (the "Act") now puts more emphasis than before on the protection of the public and less on pure rehabilitation objectives and concerns. . . . Nevertheless, the decision-making process under the Act remains much different from the judicial determination of a fit sentence. It is largely based on the ongoing observation and assessment of the personality and behaviour of the offender during his or her incarceration, which focuses on dangerousness and the offender's ability to re-enter the community . . . Such a process may extend over several years and lead to decisions that are highly attentive to context and based, at least in part, on what actually happened during the incarceration of the offender.
>
> (Emphasis added)

[35] Having established these guiding principles, it is now time to examine one by one the cases referred to by the appellant in support of his appeal, namely *Steele*, *Pinet* and *Mooring*.

<u>*Steele*</u>

[36] *Steele* deals with the case of an individual who was declared a dangerous offender and had passed almost 37 years of his life in prison. The case concerned the manner in which the provisions of the *Criminal Code* dealing with dangerous offenders had been applied to the offender in question. It was argued that the offender's lengthy incarceration was cruel and unusual under section 12 of the *Canadian Charter of Rights and Freedoms*, Part I of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the Charter).

[37] In *R. v. Lyons*, [1987] 2 S.C.R. 309, Justice La Forest, writing on this issue on behalf of the Supreme Court of Canada, determined that an indeterminate sentence, without any other safeguards, could violate section 12 of the Charter. However, he found that since, under the Act, the Board is required to regularly review the continued incarceration of dangerous offenders, sentences can be tailored to fit the circumstances. He concluded, therefore, that section 12 had not been violated.

[38] In the light of this decision, Justice Cory concluded that Mr. Steele's sentence to an indeterminate term as a dangerous sexual offender was not in itself contrary to section 12 of the Charter and that the sentence imposed upon him was therefore lawful: *Steele* at p. 1410.

[39] Mr. Steele, whose position had been accepted by both the trial judge and the British Columbia Court of Appeal, submitted, however, that continued incarceration of a dangerous offender could become cruel and unusual punishment contrary to the Charter in spite of the Board's responsible and careful application of the parole review process in the case of dangerous offenders. Justice Cory rejected this position as being contrary to the doctrine of *R. v. Lyons*: *Steele* at pp. 1410-1411. In Justice Cory's opinion, Mr. Steele's unlawful incarceration could not have been caused by a flaw in the dangerous offender provisions, but rather by errors made by the Board in the consideration and application of the statutory criteria for granting parole. At p. 1412 of *Steele*, he wrote as follows:

> It is only by a careful consideration and application of these [statutory] criteria that the indeterminate sentence can be made to fit the circumstances of the individual offender. Doing this will ensure that the dangerous offender sentencing provisions do not violate s. 12 of the Charter. If it is clear on the face of the record that the Board has misapplied or disregarded those criteria over a period of years with the result that an offender remains incarcerated far beyond the time he or she should have been properly paroled, then the Board's decision to keep the offender incarcerated may well violate s. 12. In my opinion, this is such a case.

[40] One of the criteria examined in *Steele* was whether the inmate had derived the maximum benefit from imprisonment. According to the appellant, the Board should have considered this criterion to comply with *Steele* and thus avoid a flaw in its decision that could lead to the conclusion that his continued incarceration for over 25 years is contrary to section 12 of the Charter.

[41] The appellant misunderstands the scope of *Steele*, for two reasons.

[42] First, *Steele* is not necessarily relevant in the present matter. Indeed, important distinctions must be drawn between offenders sentenced to imprisonment for life, such as the appellant, and dangerous offenders sentenced to imprisonment for an indeterminate period, such as in the case of Mr. Steele.

[43] Indeed, the appellant was sentenced to two concurrent life sentences, and under the Act, he is eligible for parole only after serving at least 25 years of his sentence. It is worth recalling that, in *R. v. Luxton*, [1990] 2 S.C.R. 711, the Supreme Court of Canada decided that Parliament's decision to punish first-degree murder with life imprisonment without eligibility for parole for 25 years does not violate the rights guaranteed by sections 7 (right to life, liberty and security of the person), 9 (right not to be arbitrarily detained or imprisoned) and 12 (right not to be subjected to any cruel and unusual treatment or punishment) of the Charter.

[44] At the time, Chief Justice Lamer made the following comments:

> These sections provide for punishment of the most serious crime in our criminal law, that of first degree murder. This is a crime that carries with it the most serious level of moral blameworthiness, namely subjective foresight of death. The penalty is severe and deservedly so. The minimum 25 years to be served before eligibility for parole reflects society's condemnation of a person who has exploited a position of power and dominance to the gravest extent possible by murdering the person that he or she is forcibly confining. The punishment is not excessive and clearly does not outrage our standards of decency. In my view, it is within the purview of Parliament, in order to meet the objectives of a rational system of sentencing, to treat our most serious crime with an appropriate degree of certainty and severity. I reiterate that even in the case of first degree murder, Parliament has been sensitive to the particular circumstances of each offender through various provisions allowing for the royal prerogative of mercy, the availability of escorted absences from custody for humanitarian and rehabilitative purposes and for early parole: . . .
> (*R. v. Luxton*, above, at pp. 724-725)

[45] *Steele* is concerned with an indeterminate sentence and is therefore not necessarily relevant to sentences for imprisonment for life, certainly not for the first 25 years of imprisonment following such a conviction. Moreover, as will be discussed later, even assuming that *Steele* was of some relevance to someone who has served at least 25 years of a life sentence, the refusal to grant parole after this period does not in itself constitute cruel and unusual punishment under section 12 of the Charter as long as Parliament's criteria for determining whether or not to grant parole were considered and applied by the Board.

[46] <u>Second</u>, while it is true that, in *Steele*, Justice Cory identified the criterion of whether the inmate has derived the maximum benefit from imprisonment, this criterion was one of the criteria set out in the *Parole Act*, R.S.C. (1985), c. P-2, as it stood at the time. Subsection 16(1) of the Act, reproduced at page 1409 of Steele, then provided as follows:

> 16. (1) The Board may
>
> (*a*) grant parole to an inmate, subject to any terms or conditions it considers desirable, if the Board considers that
>
> (i) in the case of a grant of parole other than day parole, <u>the inmate has derived the maximum benefit from imprisonment</u>,
>
> (ii) the reform and rehabilitation of the inmate will be aided by the grant of parole, and
>
> (iii) the release of the inmate on parole would not constitute an undue risk to society;
>
> (Emphasis added)

[47] Justice Cory was thus commenting on the criteria set out in the version of the *Parole Act* that was then in effect. He did not identify the criterion of whether the inmate has derived the maximum benefit from imprisonment as a condition of the constitutional validity of the

assessment made by the Board of applications for parole. He simply reiterated the statutory criteria applicable at the time.

[48] The criteria have evolved considerably over time. They are now set out in section 102 of the Act: (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. The paramount consideration is the protection of society. The criterion "the inmate has derived the maximum benefit from imprisonment" is no longer expressly stated in the Act.

[49] *Steele* did not limit the criteria Parliament may select to guide the Board as it exercises its discretion to grant parole. Parliament may still amend these criteria and establish new ones, as long as they comply with the Charter.

[50] Consequently, since, in the appellant's case, the Board considered the criteria set out in the Act, and absent a constitutional challenge of the provisions of the Act setting out these criteria, the Court cannot conclude that the Board's decision regarding the appellant violates section 12 of the Charter or the teachings of *Steele* in any way.

Pinet

[51] The *Pinet* case involved an individual charged with murder and found not criminally responsible on account of mental disorder. First, it is useful to describe the context of this decision.

[52] In *R. v. Swain*, [1991] 1 S.C.R. 933, the Supreme Court of Canada ruled that the prior provisions of the *Criminal Code* providing that an accused who is "insane" should be kept in strict custody "until the pleasure of the lieutenant governor of the province is known" were contrary to section 7 of the Charter since they did not provide for a periodic review, investigation or other form of procedural safeguard whatsoever.

[53] In response to this decision, Parliament enacted Part XX.1 of the *Criminal Code*, entitled "Mental Disorder". Under this part of the *Criminal Code*, a review board must make the least onerous and least restrictive disposition to the accused where a verdict of not criminally responsible on account of mental disorder has been rendered in respect of the accused. Section 672.54 of the *Criminal Code* provides as follows:

672.54 Where a court or Review Board makes a disposition under subsection 672.45(2) or section 672.47 or 672.83, it shall, taking into consideration the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused, <u>make one of the following dispositions that is the least onerous and least restrictive to the accused</u>:	**672.54** Pour l'application du paragraphe 672.45(2) ou des articles 672.47 ou 672.83, le tribunal ou la commission d'examen <u>rend la décision la moins sévère et la moins privative de liberté parmi celles qui suivent</u>, compte tenu de la nécessité de protéger le public face aux personnes dangereuses, de l'état mental de l'accusé et de ses besoins, notamment de la nécessité de sa réinsertion sociale :
(*a*) where a verdict of not criminally responsible on account of mental disorder has been rendered in respect of the accused and, in the opinion of the court or Review Board, the accused is not a significant threat to the safety of the public, by order, direct that the accused be discharged absolutely;	*a*) lorsqu'un verdict de non-responsabilité criminelle pour cause de troubles mentaux a été rendu à l'égard de l'accusé, une décision portant libération inconditionnelle de celui-ci si le tribunal ou la commission est d'avis qu'il ne représente pas un risque important pour la sécurité du public;

(*b*) by order, direct that the accused be discharged subject to such conditions as the court or Review Board considers appropriate; or	*b*) une décision portant libération de l'accusé sous réserve des modalités que le tribunal ou la commission juge indiquées;
(*c*) by order, direct that the accused be detained in custody in a hospital, subject to such conditions as the court or Review Board considers appropriate. [Emphasis added]	*c*) une décision portant détention de l'accusé dans un hôpital sous réserve des modalités que le tribunal ou la commission juge indiquées. (Je souligne)

[54] In *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625 (*Winko*), the Supreme Court of Canada held that this provision did not infringe the Charter rights to liberty, security of the person and equality given that an accused who is found not criminally responsible on account of mental disorder must be granted "an absolute discharge . . . unless the court or Review Board is able to conclude that they pose a significant risk to the safety of the public": *Winko* at para. 3. In the same decision, Justice McLachlin made the following comment at paragraph 42:

> By creating an assessment-treatment alternative for the mentally ill offender to supplant the traditional criminal law conviction-acquittal dichotomy, Parliament has signalled that the NCR [not criminally responsible] accused is to be treated with the utmost dignity and afforded the utmost liberty compatible with his or her situation. The NCR accused is not to be punished. Nor is the NCR accused to languish in custody at the pleasure of the Lieutenant Governor, as was once the case. Instead, having regard to the twin goals of protecting the safety of the public and treating the offender fairly, the NCR accused is to receive the disposition "that is the least onerous and least restrictive" one compatible with his or her situation, be it an absolute discharge, a conditional discharge or detention: s. 672.54.
> (Emphasis added)

[55] In *Penetanguishene Mental Health Centre v. Ontario (Attorney General)*, 2004 SCC 20, [2004] 1 S.C.R. 498, rendered concurrently with *Pinet*, the Supreme Court of Canada added that

even if a review board concludes that an accused who has been found not criminally responsible on account of mental disorder poses a significant threat to the safety of the public and can therefore not be discharged, it must nonetheless make the order that is the least onerous and least restrictive to the accused in terms of his or her detention in a psychiatric hospital.

[56] In *Pinet*, the review board had reasonably concluded that Mr. Pinet was not a suitable candidate for an absolute discharge or a conditional release. His continued detention in a hospital was therefore imperative. The Supreme Court of Canada was asked to determine whether the Board had considered the least onerous and least restrictive requirement when it found that Mr. Pinet should be detained in a maximum security hospital rather than a hospital with a lower security level. Justice Binnie, writing for the Court, concluded that the review board had not considered the requirement when determining the conditions of the detention. This error in law led to the review board's neglecting to consider important factors that could have weighed in favour of detention in a less restrictive hospital environment.

[57] The appellant submits that in its decision regarding him, the Board did not refer to the principle of making the least restrictive determination under paragraph 101(*d*) of the Act as it read at the time of this decision dated June 16, 2010, and that, in this case, the Federal Court judge should have intervened given that the absence of any consideration of this requirement is an error in law: *Pinet* at para. 49.

[58] To begin with, I note that there are few similarities between the provisions of the *Criminal Code* regarding an accused found not criminally responsible on account of mental

disorder and those of the Act regarding the conditional release of an offender. The former deal with the freedom of individuals who should not be punished and who require frequent medical care, and the latter are simply concerned with managing offenders' sentences after they have been found criminally responsible. The decision to deprive an accused who has been found not criminally responsible on account of mental disorder of his or her liberty is based on the accused's mental disorder and not his or her guilt. This is not the case of an offender who is deprived of his or her liberty in order to be punished for the offences he or she has committed. These are two clearly distinct situations that hardly lend themselves to comparison.

[59] Indeed, these distinctions are reflected in the statutory provisions at issue.

[60] In the case of an accused who is found not criminally responsible on account of a mental disorder, the *Criminal Code* provides for the "least onerous and least restrictive requirement" for dispositions. Moreover, when a review board is of the opinion that an accused cannot be released given the risk he or she poses to the safety of the public, it must nonetheless establish conditions of the accused's detention in a hospital while taking into consideration the least onerous and least restrictive requirement.

[61] In the case of an offender, the Act provides quite clearly that "the protection of society [is] the paramount consideration in the determination of any case": para. 101(*a*) of the Act as it read at the time of the Board's decision and s. 100.1 of the Act as it reads now. This <u>paramount</u> consideration will always trump the principle of the least restrictive determination. In addition, if

the Board concludes that it cannot grant the offender parole, in contrast to a review board, it cannot establish conditions for continued incarceration.

[62] Since the Board concluded that paroling the appellant posed an unacceptable risk to society, it did not have to question this conclusion in the light of the principle of the least restrictive determination. Indeed, in the offender's case, the paramount consideration under the Act, in all circumstances, remains the protection of society, and the principle of the least restrictive determination is contingent upon this paramount consideration and cannot under any circumstances replace it.

[63] In the present case, given that the appellant's parole poses an unacceptable risk to society, the Board did not have to examine the principle of the least restrictive determination. It therefore did not err in law by not discussing this principle in its decision.

[64] I note that the principle of the least restrictive determination was recently replaced by the principle of the decision that is "limited to only what is necessary and proportionate to the purpose of conditional release": para. 101(*c*) of the Act as it reads now.

Mooring

[65] The *Mooring* decision concerns a decision in which the Board revoked an offender's parole. This decision was made partly on the basis of evidence gathered in a manner that may have violated the offender's constitutional rights.

[66] At paragraphs 25 and 26 of *Mooring*, Justice Sopinka noted that the Board was not exercising a judicial or quasi-judicial function and that it did not hear and assess evidence, but instead acted on information gathered in the course of an investigation rather than an adversarial proceeding. He therefore concluded that neither the Board itself nor the proceedings in which it engages were designed to engage in the balancing of factors required by subsection 24(2) of the Charter, which provides for the exclusion of evidence that would bring the administration of justice into disrepute.

[67] The Board must nonetheless act fairly and respect the principles of fundamental justice: *Mooring*, at paras. 34 and 38. In accordance with these principles, it must therefore ensure that the information on the basis of which it decides whether or not to grant parole is "reliable and persuasive": *Mooring*, at para. 36. In that respect, the paramount consideration of the protection of society under the Act is the guiding principle where the Board is required to rule on the admissibility of a particular piece of information: *Mooring* at para. 37.

[68] The appellant submits that *Mooring* imposes on the Board the duty to accept all the information that an inmate deems relevant and that the inmate may submit in support of his or her application for parole. *Mooring* is not as far-reaching as the appellant argues. That case allows the Board to consider information that would not otherwise be admissible in a criminal trial, as long as it is "reliable and persuasive". *Mooring* does not oblige the Board to consider all the factors before it, but instead allows it to consider information that would perhaps not be otherwise admissible.

[69] The Board's duty to take into account all available information that is relevant does not arise from *Mooring*, but rather from the provisions of the Act and the duty to respect the principles of fundamental justice. Paragraph 101(*a*) of the Act, as it stands now (echoing paragraph 101(*b*) of the Act as it was when the Board issued its decision) provides expressly that the Board must take into consideration all relevant available information, including information obtained from the offender.

[70] This statutory obligation, which flows from the principles of fundamental justice, does not mean that the Board must accept and take into account all the information an inmate wishes to produce. Only the "relevant" information must be considered, that is, any information relating to the criteria that should guide the Board's decision. Relevant information is information that can establish whether the offender will, by reoffending, present an unacceptable risk to society if the offender is granted parole, or whether the offender's release will contribute to the protection of society by fostering the offender's reintegration into the community as a law-abiding citizen.

[71] It is the Board's role to determine which information is relevant for that purpose. The Board's decision in this matter therefore calls for considerable deference.

[72] The appellant nonetheless submits that the Board refused to take into account the adversarial atmosphere between him and the Correctional Service of Canada and that this refusal was unreasonable. According to the appellant, this information was relevant for the purposes of assessing the risk he poses to society and his reintegration into society.

[73] Indeed, the appellant refuses to recognize his responsibility for the murders of which he was convicted and for which he was given a harsh sentence. He denies committing these crimes. According to the appellant, his refusal to acknowledge his guilt is one of the main causes of his difficulties with Correctional Services, and, in turn, these difficulties undermine his efforts to be granted parole by the Board.

[74] Offenders who maintain their innocence of the crimes of which they were convicted often refuse to take appropriate action to correct their criminal behaviour. They can also have trouble obtaining a reduced security rating, which can have an effect on their applications for parole. How should the Board conduct investigations in the cases of such offenders? This is an issue on which the Canadian case law seems silent, but that the courts in the United Kingdom have examined on a few occasions.

[75] I have gleaned the following principles from the U.K. case law:

a. It is clear that when the Board reviews an application for parole, it must assume that the offender is guilty of the offence of which he or she was convicted. It is not the Board's role to investigate the offender's guilt or to question the offender's conviction or sentence: *R. v. The Parole Board and the Home Secretary, ex parte Oyston* (2000), [2000] All E.R. (D) 274 (CA Civ.), *The Independent*, 17 April 2000.

b. In contrast, parole cannot be denied solely on the ground that the offender denies his or her guilt: *R. v. Home Secretary, ex. p. Zulfikar*, [1996] COD 256; *The Times*, 26 July 1995.

c. However, a denial of guilty accompanied by the offender's refusal to correct his or her criminal behaviour is a factor the Board must take into account when assessing the offender's risk to society: *R. v. Home Secretary, ex parte Lillycorp*, *The Times*, 13 December 1996.

d. Indeed, when denial of guilt also translates into the offender's refusal to take action to correct his or her criminal behaviour, it is often difficult for the Board to properly assess the risk to society. The Board must therefore proceed on a case-by-case basis. When, in such circumstances, the Board can still not properly assess the risk, the protection of society criterion must prevail.

[76] Lord Bingham made the following comments about this issue in *R. v. Parole Board and the Home Secretary, ex parte Oyston*, above:

> Convicted prisoners who persistently deny the commission of the offence or offences of which they have been convicted present the Parole Board with potentially very difficult decisions. Such prisoners will probably not express contrition or remorse or sympathy for any victim. They will probably not engage in programmes designed to address the causes of their offending behaviour. Since they do not admit having offended they will only undertake not to do in the future what they do not accept having done in the past. Where there is no admission of guilt, it may be feared that a prisoner will lack any motivation to obey the law in the future. Even in such cases, however, the task of the Parole Board is the same as in any other case: to assess the risk that the particular prisoner if released on parole, will offend again. It can give no credence to the prisoner's denial. Such denial will always be a factor and may be a significant factor in the Board's assessment of risk, but it will only be one factor and must be considered in the light of all other relevant factors. In almost any case the Board would be quite wrong to treat the prisoner's denial as irrelevant, but also quite wrong to treat a prisoner's denial as necessarily conclusive against the grant of parole.

[77] This is the approach that was followed by the Board in the case at bar.

[78] In its decision dated December 16, 2009, the Board defined its expectations of the appellant despite his denials of guilt for his crimes. During its review on June 16, 2010, the Board gave the appellant ample opportunity to argue that his denials of guilt were the root of his trouble in following correctional programs: AB at pp. 713 to 727, 788, 791. The Board also gave the appellant ample opportunity to describe his difficult relationship with the officers of the Correctional Service of Canada: AB at pp. 737, 746-747, 751 to 753, 755 to 762.

[79] At the review, and in its decision dated June 16, 2010, the Board stated that it had not considered the appellant's denials of guilt when denying him parole: AB at pp. 685 and 727. Instead, the Board made its decision on the basis of the criteria set out in the Act and followed them by taking into account the information before it, including the information provided by the appellant during the review. I can see no overriding error in the Board's decision in that regard.

CONCLUSION

[80] For these reasons, I would dismiss the appeal.

"Robert M. Mainville"
J.A.

"I agree.
Marc Noël J.A."

"I agree.
J.D. Denis Pelletier J.A."

Certified true translation
François Brunet, Revisor

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-105-12

APPEAL FROM A JUDGMENT OF THE HONOURABLE MADAM JUSTICE BÉDARD DATED MARCH 1, 2012, DOCKET NO. T-493-11.

STYLE OF CAUSE:	Gilles Ouellette v. Attorney General of Canada
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	January 16, 2013
REASONS FOR JUDGMENT BY:	MAINVILLE J.A.
CONCURRED IN BY:	NOËL J.A. PELLETIER J.A.
DATED:	March 5, 2013

APPEARANCES:

Maxime Hébert Lafontaine	FOR THE APPELLANT
Nicholas R. Banks	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Latour, Lafontaine, Blouin & Associés Montréal, Quebec	FOR THE APPELLANT
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT