Federal Court Cour fédérale

Date: 20171110

Docket: T-1863-16

Citation: 2017 FC 1030

Ottawa, Ontario, November 10, 2017

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

CHRESTOPHER BARRETT

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS AND THE ATTORNEY GENERAL OF CANADA

Respondents

JUDGMENT AND REASONS

I. OVERVIEW

[1] Mr. Barrett brings this application for judicial review pursuant to sections 18 and 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7, and sections 24 and 52 of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. He seeks review of a decision of the

Parole Board of Canada, Appeal Division [the AD], dated October 4, 2016, affirming the Parole Board of Canada [PBC] decision to deny him day parole.

[2] Mr. Barrett is currently serving an eight-year sentence at Beaver Creek Institution, a medium-level security facility. He was sentenced in October 2014 after pleading guilty to possession of proceeds of crime exceeding $5000 contrary to section 354(1) of the *Criminal Code*, RSC 1985, c C-46, exporting cocaine out of Canada contrary to section 6(1) of the *Controlled Drugs and Substances Act*, SC 1996, c 19, and conspiracy to commit an indictable offence contrary to section 465(1)(c) of the *Criminal Code*.

[3] Mr. Barrett argues that the AD decision: (1) violated his right to the presumption of innocence as guaranteed by section 11(d) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982 c 11 [*Charter*] and his section 7 liberty interests; (2) was procedurally unfair; and (3) was unreasonable, as was the underlying PBC decision. Although the application indicates reliance upon section 52 of the *Constitution Act*, 1982 Mr. Barrett has not challenged the constitutional validity of any of the provisions of the *Corrections and Conditional Release Act*, SC 1992, c 20 [CCRA]. His counsel confirmed in oral submissions that he was not taking the position that the CCRA or any of its provisions are inconsistent with the Constitution.

[4] For the reasons set out below I am unable to conclude that the decision was unreasonable, that there was a breach of procedural fairness or that Mr. Barrett's *Charter* rights were violated. The application is dismissed.

II. Background

[5] The Certified Tribunal Record indicates that Mr. Barrett was placed under surveillance by the RCMP as the result of an arrest in the United Kingdom involving the importation from Toronto of a large quantity of cocaine in October 2011. In November 2013, in the course of that surveillance, Mr. Barrett was observed placing an object in his vehicle and then meeting a Ms. Simone. He took a picture of Ms. Simone and then drove to the international airport. He carried luggage into the airport and after Ms. Simone checked-in he handed the luggage to her. She checked the luggage and went through security. The luggage was seized by police and was found to contain nine kilograms of cocaine valued at approximately $350,000. As a result a search warrant was executed at Mr. Barrett's home where a number of items were seized and he was arrested.

[6] Mr. Barrett pled guilty to possession of proceeds of crime exceeding $5000, the unlawful exporting of cocaine and conspiring to export cocaine.

[7] The sentencing transcript indicates that the RCMP investigation determined that Mr. Barrett had purchased travel tickets for different individuals, including Ms. Simone, on a number of occasions over a two-year period. The sentencing transcript further indicates that Mr. Barrett was not in the business of cocaine exportation on his own behalf but was acting on behalf of another person and was paid approximately $3000 each exportation. He was involved in about five such transactions. He believed the suitcases contained drugs.

[8] On October 27, 2014 an eight-year sentence for the exporting and conspiracy charges and a one-year sentence for the possession of proceeds of crime charge were imposed. The sentences were to be served concurrently.

[9] Mr. Barrett became eligible for day parole on June 26, 2016. In seeking day parole Mr. Barrett had requested to reside at the Cornerstone Community Residential Facility [Cornerstone], a halfway house in Oshawa. His case was presented to the Toronto East Parole Office Community Assessment Team [CAT]. The CAT was comprised of parole supervisors, parole officers, Cornerstone staff members, community members and representatives of the regional police force. After reviewing the case the CAT did not support the request for day parole release to Cornerstone.

[10] The Correctional Service of Canada [CSC] did not recommend Mr. Barrett for day parole before the PBC, citing concerns with his attitude, unwillingness to take ownership for the offences he had been convicted of and his failure to secure a spot at Cornerstone.

[11] A hearing was held before the PBC on May 3, 2016 and Mr. Barrett was denied day parole. That decision was appealed to the AD. On October 4, 2016 the AD affirmed the PBC decision.

III. Parole Board of Canada's Decision

[12] In denying day parole, the PBC noted that it may grant parole if, in its opinion, the offender will not, by reoffending, "present an undue risk to society before the end of the

sentence" and if early release "will contribute to the protection of society by facilitating reintegration into society as a law abiding citizen."

[13] The PBC noted that there were a number of positive factors to consider including Mr. Barrett's limited criminal record, his low risk of reoffending, his good institutional behaviour, and his support in the community. The PBC indicated that his expressions of remorse were sincere and identified his pro-social contact with his wife and low SIR score (which indicate a low risk to reoffend) as positive factors.

[14] Despite these positive elements, the PBC found that in the hearing Mr. Barrett denied or minimized the extent of his involvement in the drug smuggling operation. The PBC concluded that his release plan was inadequate after finding that he lacked credibility and insight into his crime, and that his Criminal Profile Report only rated his reintegration potential, accountability and motivation as medium.

[15] The Board balanced the positive aspects of the applicant's file with the ongoing concerns and concluded his risk to reoffend was unacceptably high. Day parole was denied.

IV. Appeal Board Decision

[16] Before the AD, Mr. Barrett argued that the PBC had committed numerous errors. Specifically he argued that the PBC:

A. erred in law by considering allegations and incidents for which he was neither charged nor convicted or where charges had been withdrawn;

B. erred in finding that he had minimized his offence and did not take responsibility for his actions. On this ground, he argued further that it was unreasonable for the Board to make conclusions regarding his finances, travel, failure to file income tax returns in respect of his business and his denial of criminal charges;

C. did not give sufficient weight to the positive factors in his file and unreasonably overrode the determination of the applicant's psychologist; and

D. did not weigh his release plan when it considered the gains made during his sentence.

[17] The AD found that in assessing an offender's risk of reoffending the PBC was required to take into account all relevant information, including criminal charges that did not lead to a conviction. The AD noted that in conducting this assessment the PBC was not bound by the presumption of innocence or the burden of proof beyond a reasonable doubt and that the incidents that did not result in convictions were properly considered because they were indicative of the applicant's lifestyle and associations. The AD further found that it was not unreasonable for the PBC to refer to the fact that Mr. Barrett's company owed back taxes.

[18] The AD held that: (1) the PBC appropriately weighed the identified positive and negative factors; (2) it was appropriate for the PBC to have considered Mr. Barrett's involvement in a large sophisticated drug smuggling operation that caused significant harm to the community; (3)

the PBC did not unreasonably conclude that Mr. Barrett's explanations indicated he had minimized his involvement in the crime; and (4) the PBC provided detailed reasons as to why it did not agree with the psychological assessment's conclusions regarding minimized involvement and insight.

[19] In affirming the PBC decision the AD noted that it is not the AD's role to substitute its discretion for that of the PBC unless the PBC decision was unreasonable or unfounded. In this case, the AD found that the decision was reasonable and consistent with the decision-making criteria set out in law and Board policy.

V. Relief Sought

[20] Mr. Barrett seeks the following relief:

A. A declaration that:

i. it is contrary to section 7 of the *Charter* for the PBC, the AD, or CSC to rely on charges against the applicant which were dismissed in assessing risks to public safety or otherwise in respect of parole or correctional decisions;

ii. it is contrary to section 7 of the *Charter* for the PBC, the AD or the CSC to rely on charges against the applicant which were withdrawn, absent reliable and persuasive information, which must be more than allegations based on a police synopsis or summary of allegations in assessing risks to public safety or otherwise in respect of parole or correctional decisions;

iii. it is contrary to section 7 of the *Charter* for the PBC, the AD or the CSC to rely on any summary of an investigation without charges being laid, absent reliable and persuasive information which must be more than a summary of portions of an investigation in assessing risks to public safety or otherwise in respect of parole or correctional decisions;

iv. the CSC, PBC and/or AD demonstrated bias or a reasonable apprehension of bias contrary to the principles of natural justice and fundamental justice under section 7 of the *Charter*; and

v. the CSC, PBC and/or AD acted perversely, unlawfully and unconstitutionally, contrary to section 7 of the *Charter* in relying on risk assessment tests such as the SIR (which disqualified the applicant from correctional programming) while at the same time using the applicant's lack of participation in rehabilitative programs or activities to conclude that the applicant presents too great a risk of reoffending to be released on parole.

B. An order:

i. quashing the CSC decision not to support/approve a halfway house and refusing day parole;

ii. quashing the PBC and/or AD decision(s) refusing day parole; and

iii. granting Mr. Barrett day parole or, in the alternative, directing the PBC to conduct a new hearing in accordance with any direction of this Court;

C. Costs on a party/party basis.

VI. Issues

[21] The applicant raises a number of issues which I have framed as follows:

1. Was the process procedurally unfair?
2. Was the AD decision denying the appeal and affirming the decision to deny day parole reasonable?
3. Were Mr. Barrett's Charter rights violated?

VII. Standard of Review

[22] The Supreme Court of Canada has held that a standard of review analysis need not be performed where the applicable standard is well-established by previous case law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 51, 53, 57, 62 [*Dunsmuir*]; *Khosa v Canada (Citizenship and Immigration)*, 2009 SCC 12 at para 53).

[23] This is a judicial review of the AD's decision to affirm a PBC decision; in such cases this Court is required to ensure that the PBC's decision is lawful (*Cartier v Canada (Attorney General)*, 2002 FCA 384 at para 10; *Aney v Canada (Attorney General)*, 2005 FC 182 at para 29 [*Aney*]).

[24] PBC decisions that engage questions of fact, mixed fact and law, and of law falling within the PBC's specialized expertise are reviewable on a standard of reasonableness (*Ngo v Canada (Attorney General)*, 2005 FC 49 at para 8; *Ye v Canada (Attorney General)*, 2016 FC 35 at para 9; *Aney* at para 31). When applying the standard of reasonableness, the reviewing Court will give deference to the decision under review and will only intervene where the decision fails to demonstrate the existence of justification, transparency and intelligibility in the decision-making process or where the outcome falls outside the range of possible, acceptable outcomes based on the facts and the law (*Dunsmuir* at paras 47 and 50).

[25] An alleged breach of procedural fairness is to be considered within the specific context of the matter before the Court (*Moreau-Bérubé v Nouveau Brunswick (Judicial Council)*, 2002 SCC 11 at paras 74-75) and will be reviewed against a standard of correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79).

VIII. Analysis

A. *The legislative framework*

[26] The Parole Board of Canada is provided for at section 103 of the *Corrections and Conditional Release Act*, SC 1992, c 20 [CCRA] and includes the Appeal Division (CCRA s 146(1)).

[27] The purpose of conditional release is to contribute to the maintenance of a just, peaceful and safe society by deciding on the timing and conditions of release that "best facilitate the

rehabilitation of offenders and their reintegration into the community of law-abiding citizens" (CCRA section 100). The "protection of society is the paramount consideration for the Board and the provincial parole boards in the determination of all cases" (CCRA section 100.1).

[28] The CCRA identifies the principles that guide the PBC in achieving the purpose of conditional release (section 101) and outlines the conditions under which the PBC may grant parole (section 102), stating:

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 protection de celle-ci en favorisant sa réinsertion sociale en tant que citoyen respectueux des lois.

[29] Subsection 107(1) provides the PBC with "exclusive jurisdiction and absolute discretion" to grant parole to an offender; section 147 provides a right of appeal to the AD on prescribed grounds.

B. *Issue 1: Was the process procedurally unfair?*

[30] Mr. Barrett argues that the manner in which the PBC assessed and weighed the evidence before it suggests bias or a reasonable apprehension of bias. He specifically takes issue with the PBC's reliance in its risk assessment on (1) past criminal charges that were in one instance dismissed and in another instance withdrawn, and (2) a Canada Border Services Agency [CBSA] investigation which did not result in the laying of a charge. He argues the PBC placed greater weight on this information than it did on the fact that he had pled guilty to the index offences and that a psychologist report indicated he accepted responsibility for his offences.

[31] Mr. Barrett further notes that bias is demonstrated in the manner in which the SIR score was considered. He submits that his favourable SIR score, which indicated a low public safety risk and resulted in him being screened out of programming to address identified risk factors, was given insufficient weight by the PBC. He also argues that his failure to participate in any programming to address the PBC's identified risks was held against him despite the fact that he was screened out of programming due to the favourable SIR score. He argues that the reliance on the SIR score to exclude him from rehabilitation programming and then to rely on the failure to complete programming was perverse and reflects bias that amounts to a jurisdictional error.

[32] I am unpersuaded by Mr. Barrett's arguments. What he has characterized as bias is more properly framed as a dispute over whether the information about past criminal charges, the CBSA investigation, and the SIR were properly before the PRB, and if so, whether they were weighed appropriately by the PRB and subsequently the AD.

[33] The information relating to the CBSA investigation, the dismissed and withdrawn charges, and the SIR assessment was all properly before the PBC. The PBC was required to consider this information in rendering its decision. The weight given to individual pieces of evidence and inferences drawn are not a basis upon which to argue a reasonable apprehension of bias (*Fernandez v Canada (Attorney General)*, 2011 FC 275 at para 42).

[34] Mr. Barrett takes issue with the manner in which CSC uses the SIR. CSC's policies and practices are not within the control of the Board and are not a proper subject of review in the context of this application.

[35] Mr. Barrett has not submitted, nor does the record indicate, that he was denied the right to be heard. He does not submit that he was not given notice of or that he was unaware of the evidence that was before the PBC. The SIR assessment, information relating to the CBSA investigation, and the information relating to withdrawn and dismissed charges were all before the PBC with Mr. Barrett's knowledge and he had the opportunity to make representations in respect of this information.

[36] Mr. Barrett has also not argued that this information was irrelevant to the PBC's paramount consideration, the protection of society. The PBC was required to consider "all relevant information" (CCRA sections 100.1 and 101).

[37] Mr. Barrett's submissions in relation to how the evidence was weighed do not raise issues of bias.

[38] Similarly, Mr. Barrett's disagreement with the SIR and its use as a tool within the correctional system is not an issue within the Board's control and does not raise the issue of bias. The SIR is information provided to the Board. It is for the Board to consider and weigh that information, not to assess the appropriateness of, or alleged shortfalls with, the tool itself. The Board's treatment of the SIR information is addressed in the reasonableness analysis below.

[39] While I am not convinced the issue of bias arises on these facts, I would also note that this issue was not raised before the AD. An objection to the jurisdiction of a decision-maker or tribunal based upon a reasonable apprehension of bias is to be raised at the earliest practicable opportunity, failing which a party is deemed to have waived the right to object (*Canada (Human Rights Commission) v Taylor*, [1990] 3 SCR 892, 75 DLR (4th) 577; *Zündel v Canada (Canadian Human Rights Commission)*, [2000] 4 FCR 255, 195 DLR (4th) 399 (FCA)).

C. *Issue 2: Was the AD decision denying the appeal and affirming the decision to deny day parole reasonable?*

[40] The role and function of the AD is described in *Beaupre v Canada (Attorney General)*, 2002 FCT 463 at para 19:

> In *Costiuc*, *supra*, Tremblay-Lamer J. set out the legal framework within which this court may judicially review a decision by the NPB Appeal Division. Tremblay-Lamer J., said at para 6:
>
>> The Appeal Division's function is to ensure that the NPB has complied with the Act and its policies and has observed the rules of natural justice and that its decisions are based on relevant and reliable information. It is only where its findings are manifestly unreasonable that the intervention of this Court is warranted.

[41] Mr. Barrett argues that the decision to deny parole was unreasonable for a number of reasons. In challenging the reasonableness of the decision, the core argument advanced is disagreement with the Board's assessment and weighing of the positive and negative factors in reaching a decision on day parole.

[42] Mr. Barrett submits that the PBC and in turn the AD failed to reasonably consider the fact that he had pled guilty to the index offences, that he had not been convicted of a violent crime, there was no victim and that the index offences were Mr. Barrett's first convictions. He further argues that the PBC failed to consider his prior compliance with bail conditions and unreasonably rejected a favourable psychologist's report. These factors he submits all weighed in favour of granting day parole. Instead, the PBC unreasonably and unlawfully relied on withdrawn and dismissed charges, a CBSA investigation that did not result in any charges being laid, and unpaid taxes as a basis for refusing day parole. I am not convinced by Mr. Barrett's arguments.

[43] As set out above the Board is required to take into account all relevant and available information (CCRA section 101, *Mooring v Canada (National Parole Board)*, [1996] 1 SCR 75 at para 29, 132 DLR (4th) 56 [*Mooring*]). The Board does not act in either a judicial or quasi-judicial manner; it does not hear evidence but rather acts on information in an inquisitorial capacity (*Mooring* at paras 25 and 26).

[44] In this case, the facts and circumstances as they related to the offences for which Mr. Barrett was convicted were reviewed. The PBC acknowledged that Mr. Barrett had no previous

criminal convictions but did note previous charges that had been dismissed or withdrawn and information relating to the CBSA investigation. With respect to the impact of the crime, the PBC noted that the drug smuggling operation caused significant harm to the community over a long period of time.

[45] The PBC's consideration of information relating to the dismissed and withdrawn charges, and the AD's conclusion that PBC did not err in doing so is consistent with both the jurisprudence and the Board's paramount consideration, the protection of society. The AD cited the decision of this Court in *Prasad v Canada (National Parole Board)* (1991), [1992] 51 FTR 300, 5 Admin LR (2d) 251 (TD) [*Prasad*] which held that such information was relevant as it was indicative of an individual's lifestyle and associations (*Prasad* at para 15). The AD reasonably concluded that the information was relied on for this purpose. The AD further found that this information was not a determining factor in the Board's decision.

[46] I would also note that considering charges for which no conviction has been entered in an administrative proceeding, such as that before the PBC, is not inconsistent with the right to be presumed innocent (*Giroux v Canada (National Parole Board)* (1994), 89 FTR 307 at para 20, [1994] FCJ No 1750 (TD)).

[47] The AD also found it was not unreasonable for the PBC to have noted Mr. Barrett's back tax situation. Mr. Barrett submits that this information is of minimal relevance to safety concerns, and that it renders the decision unreasonable. It does not. The AD reasonably concluded that it was not unreasonable for the PBC to note this situation. The index offences

include a proceeds of a crime conviction. Financial considerations were therefore not irrelevant. I would also note that the information was not identified as a determinative factor in the Board's weighing of the positive and negative factors relevant to its decision.

[48] Mr. Barrett also argues that the PBC and in turn the AD unreasonably concluded that he had denied or minimized the extent of his involvement in the crime. He argues that in pleading guilty he acknowledged he was willfully blind to the contents of the suitcases and that this amounts to an admission in law of actual knowledge. As such there has been no minimization of involvement or responsibility.

[49] The AD's treatment of the PBC's conclusions on this issue is not unreasonable. In this case the Board reached its conclusion based on the content of Mr. Barrett's oral submissions: "[a]fter listening to you the Board concludes that you continue to minimize your involvement in the offences and to demonstrate a lack of insight into both the causes and consequences of your criminal behavior." In his submissions to the PBC Mr. Barrett reported that he suspected the suitcases contained either drugs or money, and he denied purchasing travel tickets for couriers on other occasions. These statements were at odds with other evidence on the record, including the sentencing transcript.

[50] On appeal, the AD addressed Mr. Barrett's issues with the PBC's minimization finding, and held that the finding was reasonably available to it. The AD determination was in turn reasonable and provides no basis for this Court's intervention.

[51] Mr. Barrett further submits that the PBC decision did not provide reasons for rejecting a psychologist's report stating he had admitted guilt, was genuinely remorseful, and understood the consequences of his actions. The AD directly addresses the PBC's consideration of the psychologist's report. In doing so the AD notes that the PBC provided a detailed analysis as to why it did not agree with the psychologist's conclusions and held it was reasonable for the PBC to also weigh the views expressed by the Case Management Team on the issues of minimized involvement and insight into the offences committed. In short the PBC and the AD did address the psychologist's report and Mr. Barrett's issue here is simply one of disagreement.

[52] Mr. Barrett also argues that the PBC engaged in unsubstantiated speculation in rejecting his assertion that he was unaware of the quantity of cocaine being exported and that the AD erred in failing to address the issue. Contrary to this submission the AD did address the findings of the PBC broadly noting that the conclusions reached were reasonable. While the AD did not embark on a detailed analysis of this argument, the failure to do so does not render the decision unreasonable.

[53] The PBC decision summarized Mr. Barrett's submissions, highlighted concerns the PBC had with those submissions, noted conflicts between the submissions and other information on the record, and stated that it preferred that information over Mr. Barrett's. The PBC then concluded that Mr. Barrett "did at times present as less than credible."

[54] While I would have preferred the AD to have directly addressed the submissions relating to unsubstantiated speculation, the failure to do so does not, as I note above, render the decision

unreasonable. The decision of the AD "must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, at para 14 [*Newfoundland Nurses*]). As Justice Abella stated at paragraph 16 of *Newfoundland Nurses*:

> 16. 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.,* [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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> [Emphasis added.]

[55] Finally Mr. Barrett submits that the Board's finding that his outstanding risks had not been addressed through programming was unreasonable. The PBC acknowledged that Mr. Barrett's SIR score precluded him from programming within the Integrated Correction Programming Model but the PBC noted that adequate voluntary steps to address risks had not been taken. The AD acknowledged this issue on appeal and held the PBC's conclusions to be reasonable on the facts. The AD finding is consistent with both the content of the PBC decision and the information on the record identifying the availability of a referral option for further education upgrading and skills development.

[56] The AD reasonably concluded that the PBC's findings were consistent with information in the record and the submissions made to it in the course of the hearing. I am satisfied that the decision reflects the *Dunsmuir* criteria of justification, transparency and intelligibility in the decision making process and reaches a result that falls within the range of acceptable outcomes based on the facts and the law.

D. *Issue 3: Were Mr. Barrett's Charter rights violated?*

[57] Mr. Barrett submits that the PBC's reliance on past criminal charges that were in one instance dismissed and in another instance withdrawn and a CBSA investigation which did not result in the laying of a charge was contrary to his section 7 liberty interests under the *Charter* and his section 11(d) right to the presumption of innocence.

[58] Mr. Barrett submits that although the PBC can rely on withdrawn charges or an investigation it can only do so where the information is persuasive and reliable. In advancing this argument Mr. Barrett relies on the Supreme Court of Canada decision in *Mooring*. In this case he submits that a police synopsis is not reliable and persuasive information and there was no reliable and persuasive information on the record in respect of the charges or the investigation.

[59] *Mooring* involved a situation where the respondent had been released on mandatory supervision and was subsequently arrested and charged with possession of housebreaking instruments. The charges were later stayed, apparently because the Crown believed that the search resulting in the seizure of the housebreaking instruments had been conducted in violation of the *Charter* and the evidence would be inadmissible at trial. The issue before the Supreme

Court of Canada was whether the National Parole Board was a court of competent jurisdiction for the purposes of section 24 of the *Charter*. Justice Sopinka, writing on behalf of the majority answered this question in the negative. He then addressed "what procedures the Board must follow when faced with evidence that has been gathered in a manner violating the rights of the parolee" (*Mooring* at para 33). In considering this question Justice Sopinka described the content of the Board's duty to act fairly (at paragraphs 36 and 37):

> 36. What is the content of the Board's "duty to act fairly"? The content of the duty of fairness varies according to the structure and the function of the board or tribunal in question. In the parole context, the Parole Board must ensure that the information upon which it acts is reliable and persuasive. To take an extreme example, information extracted by torture could not be considered reliable by the Board. It would be manifestly unfair for the Board to act on this kind of information. As a result, the Board would be under a duty to exclude such information, whether or not the information was relevant to the decision. Wherever information or "evidence" is presented to the Board, the Board must make a determination concerning the source of that information, and decide whether or not it would be fair to allow the information to affect the Board's decision.
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> 37. In determining whether or not it would be fair to consider a particular piece of information, the Board will often be guided by decisions of the courts regarding the exclusion of relevant evidence. For instance, where incriminating statements are obtained from the offender, the law of confessions based on an admixture of reliability and fairness will be pertinent although not binding. The Board may, in appropriate circumstances, conclude that reliance on a coerced confession is unfair. Decisions concerning s. 24(2) of the *Charter* will also be relevant to the Board's final decision. However, cases decided under s. 24(2) should not be determinative of the Board's decision to exclude relevant information based on the principles of fairness. Obviously, different considerations will often apply in the parole context. For example, s. 101 (a) of the *Corrections and Conditional Release Act* requires "that the protection of society be the paramount consideration in the determination of any case". This will accordingly be a guiding principle where the Board is required to rule on the admissibility of a particular piece of information. The Board's expertise and experience concerning the protection of society will aid the Board in arriving at a decision.

> Should the Board fail to abide by the principles of fairness in making those decisions, an appeal lies to the Appeal Division under s. 147(1) (a) of the *Corrections and Conditional Release Act.* The Board's decision is also subject to judicial review.
>
> [Emphasis added.]

[60] *Mooring* recognized that there may be extreme situations that would warrant the Board to exclude information in a proceeding. The example given being information obtained by torture or an otherwise coerced confession. The Supreme Court of Canada held that such an extreme circumstance calls into question the reliability of the information and it is in these circumstances that the Board may be under a duty to exclude it.

[61] The extreme circumstances envisaged in *Mooring* do not arise here. However as noted in *Mooring* the Board does have a general obligation to ensure that the information it relies on is reliable and persuasive. This general obligation exists in respect of all information before the Board. The Board satisfies this obligation to rely on reliable and persuasive information through the process of receiving, considering and ultimately weighing the relevant information the Board is required by law to consider. It is the weighing process that evidences the Board's determination of how reliable and persuasive the information before it is. Disagreement with the weighing process, the issue underlying the argument advanced here, does not render the process constitutionally deficient.

[62] Mr. Barrett's objection to the manner in which the Board weighed and relied on this information is an issue that relates to the decision's reasonableness, not its constitutionality. As I stated earlier in these reasons Mr. Barrett's notice of the information and the opportunity to

challenge its reliability and persuasiveness are not in issue here. In other words the Board applied the rules of fairness and natural justice and having done so it does not follow, as Justice Sopinka stated in paragraph 38 of *Mooring* that there was a failure to comply with section 7 of the *Charter*:

> 38. As a statutory tribunal, the Board is also subject to the dictates of s. 7 of the *Charter*. In this regard, it must comply with the principles of fundamental justice in respect to the conduct of its proceedings. This does not mean that it must possess or exercise a power to exclude evidence that has been obtained in a manner that contravenes the *Charter*. If this were so, it would tend to make the inclusion of s. 24(2) of the *Charter* superfluous. While the principles of fundamental justice are not limited to procedural justice, it does not follow that a tribunal that applies the rules of fairness and natural justice does not comply with s. 7. If the myriad of statutory tribunals that have traditionally been obliged to accord nothing more than procedural fairness were obliged to comply with the full gamut of principles of fundamental justice, the administrative landscape in the country would undergo a fundamental change. The statement in *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, to the effect that the principles of fundamental justice involve more than natural justice meant that the Court was empowered in appropriate circumstances to invalidate substantive law and was not limited to judicial review of the procedural practices of a statutory body.
>
> [Emphasis added.]

IX. Conclusion

[63] The application is denied.

[64] On the issue of costs, counsel for the respondent submitted a draft of bill costs in the amount of $2400. In oral submissions counsel for Mr. Barrett acknowledged that $2400 was a reasonable assessment of costs regardless of which of the parties were successful. Costs are therefore awarded to the respondent in the amount of $2400.

JUDGMENT IN T-1863-16

THIS COURT'S JUDGMENT is that:

1. The application is dismissed;

2. Costs to the respondents in the amount of $2400 inclusive of all disbursements.

"Patrick Gleeson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1863-16
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APPEARANCES:

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