Federal Court Cour fédérale

Date: 20200224

Docket: T-819-19

Citation: 2020 FC 292

Ottawa, Ontario, February 24, 2020

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

ROBERT MAY

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of the decision of the Parole Board of Canada [PBC] Appeal Division [Appeal Division] affirming the PBC's decision to refuse to grant the Applicant either day parole or full parole under section 102 of the *Corrections and Conditional Release Act*, SC 1992, c 20 [*CCRA*].

II. Facts

[2] The Applicant is a 56 year-old federal inmate serving an indeterminate sentence as a Dangerous Offender. His current incarceration relates to the following 8 offences: two counts of assault, disobeying a court order, criminal harassment, attempt to obstruct justice, fail to comply with recognizance, breaking, entering and committing assault, and forcible confinement [the Index Offences]. He has shown, among other things, a consistent pattern of domestic violence involving three women including the victim of the Index Offences.

[3] The Index Offences concerned a domestic relationship that ended in 2005. The particulars of the offences are summarized in PBC's decision to refuse day parole and full parole dated November 14, 2018 [PBC Decision]:

> According to the Agreed Statement of Facts, in May 2005, after drinking at a pool hall, you became verbally abusive toward your then girlfriend (the victim) and struck her in the face after returning home. On July 16, 2005, the victim ended the relationship escorted you from the home. You returned to the home later that day and broke into the home, where you stole jewellery and money and cut the phone lines while waiting for the victim to return. You held the victim hostage for approximately two and a half hours, while you physically assaulted and restrained her, threatened to kill her and others, and made possessive statements toward her, stating, "you are mine, you will not be with another man again". You threatened to physically harm her so significantly that her own mother would not recognize her and that you would chop up her body. The victim was able to escape and you were arrested. While in provincial custody you made over 100 phone calls to the victim in an effort to threaten and intimidate her from testifying against you in court.

[4] The Applicant has a lengthy criminal record in addition to the Index Offences. His first conviction was in 1981, when he was approximately 18 years-old. Since then he accrued an additional 23 criminal convictions (excluding the 8 Index Offences). These convictions include, but are not limited to, break and enter, theft, fraud, assault, possession of property obtained by crime, criminal harassment, driving while impaired and forcible confinement. He has received fines, terms of probation and three separate provincial custody sentences for these offences.

[5] The Applicant has demonstrated a consistent pattern of domestic violence, including incidents with two other former girlfriends. In one instance, he threatened to abduct and kill another former girlfriend who tried to leave him. In another, he grabbed a third former girlfriend by the shoulders and threatened to harm her with bear spray, and to drive into a transport truck with her in the vehicle. As noted, the Applicant is designated a Dangerous Offender.

[6] The Applicant's most recent incarceration began on July 21, 2005. He became eligible for parole on July 21, 2009. His parole status was reviewed unsuccessfully on four previous occasions during which he was in medium security. He was transferred to minimum security in Agust 2018; the hearing in this parole review took place three months later, in November.

[7] On the PBC review the subject of this judicial review, the Applicant sought either day or full parole. His application was opposed by Correctional Services Canada [CSC] on the ground it was premature because the Applicant had just recently moved from medium to minimum security. CSC officials recommended the Applicant follow a more gradual and structured release pattern. It recommended that he demonstrate a period of stability in minimum security, together

with progress toward escorted temporary absences, unescorted temporary absences and possibly work releases, before full parole.

[8] On November 14, 2018, the PBC conducted a hearing to determine if the Applicant should be granted day or full parole. The PBC refused to allow day or full parole. The PBC concluded the Applicant would present an undue risk to society if released, and that his release would not contribute to true protection of society by facilitating his reintegration into society as a law-abiding citizen. The PBC Decision concludes:

> In discussing the above at today's hearing you acknowledged the benefits associated with a gradual arid structured approach to conditional release. You also indicated that both of the above CRFs have communicated to you a willingness to consider support but will require the appropriate CA request from CSC. Again, you appeared to understand.
>
> CSC opines that day and full parole are premature at this juncture and believe that you need to demonstrate a period of stability at minimum security and progress toward temporary absences. Consequently, CSC recommends that day and full parole be denied.
>
> In summary, you have a significant history of domestic violence and as a result have been declared a Dangerous Offender. This decision was later endorsed by the Court of Appeal for Ontario. You appear to now accept this verdict and presented as willing to engage services, demonstrate progress, and follow a gradual and structured plan for conditional release. Actuarial estimates of risk originally identified you as preserving a high probability for violence both generally and specifically in the context of domestic relationships. More recent evaluations, using different instruments with a focus on dynamic factors, have suggested estimates are in the low to moderate range. These estimates place considerable weight on the progress you have realized while incarcerated. However, the clinician maintains that a cautious approach to conditional release beginning with temporary absences is the recommended strategy. You have engaged in appropriate programming with positive progress being noted; however, refresher programming/counselling may be indicated in light of gap since these interventions and the lack of opportunity to use

> many of the skills. Finally, you have not presented the Board with an approved and viable release plan that is capable of managing your risk and provide you the structure and support necessary given your history of violent behavior.
>
> Accordingly, based on all of the foregoing, the Board denies day parole and full parole. It is the Board's opinion that you will present an undue risk to society if released and that your release will not contribute to true protection of society by facilitating your reintegration into society as a law-abiding citizen.
>
> The Board has determined that that your sentence has been tailored to meet the circumstances of your case and that your continued incarceration does not violate Section 12 of the *Canadian Charter of Rights and Freedoms* as you have been offered programming, counselling, and you were recently transferred to minimum security. However, in the Board's view continued progress towards addressing risk factors, positive institutional behaviour and engagement in your Correctional Plan should result in further opportunities for you to demonstrate compliance with a gradual reintegration plan as developed by your CMT.

[9] The Applicant appealed the PBC Decision to the Appeal Division.

[10] On April 4, 2019, the Appeal Division affirmed the PBC Decision [Appeal Decision]. The Appeal Division found the Applicant had not raised any ground warrranting its intervention, that the PBC had considered both positive and negative information, that the PBC Decision was consistent with policy and the law, and that the PBC Decision was based on relevant, reliable and persuasive information.

III. Issues

[11] The Applicant submits the following issues for determination:

1) Did the Appeal Division’s denial of the Applicant’s appeal meet the standard of reasonableness?

2) Is it necessary to assess the reasonableness of the PBC Decision denying the Applicant's day parole in order to /answer the issue above?

[12] The Applicant and Respondent agree that given the Appeal Division affirmed the PBC Decision, it is necessary to assess the reasonableness of the underlying PBC Decision. As stated by Justice McVeigh in *Maldonado v Canada (Attorney General)*, 2019 FC 1393 at para 18 [*Maldonado*]:

> [18] Since the Appeal Division affirmed the Board's decision to detain, I am judicially reviewing the Appeal Division's decision but I should also look to the reasonableness of the Board's underlying decision in this context *(Cartier v Canada (Attorney General)*, 2002 FCA 384 at para 10). The Board and the Appeal Division are to receive "considerable deference" in their conclusions related to release from custody *(Fernandez v Canada (Attorney General), 2011 FC 275 at para 20 [Fernandez]).*

[13] Therefore, at issue is whether the PBC Decision and the Appeal Decision are reasonable.

IV. Standard of review, statutory framework and jurisprudence

A. *Standard of review*

[14] This application for judicial review was heard shortly after the Supreme Court of Canada decisions in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, majority reasons by Chief Justice Wagner [*Vavilov*], and *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, majority reasons by Justice Rowe [*Canada Post*]. The parties made their original submissions under the *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] framework.

[15] I invited the parties to make submissions regarding the application of the standard of review analysis in *Vavilov*. The Court will apply the standard of review framework set out in *Vavilov* and *Canada Post*.

[16] As to the standard of review, in *Canada Post* Justice Rowe said that *Vavilov* sets out a revised framework for determining the applicable standard of review for administrative decisions. The starting point is a presumption that a standard of reasonableness applies. This presumption may be rebutted in certain situations, none of which apply here. Therefore, the PBC Decision and Appeal Decision are reviewable on a standard of reasonableness.

[17] Reasonableness review is both robust and responsive to context: *Vavilov* at para 67. The required reasonableness review must look with respectful attention at both the decision-maker's reasoning process and the outcome: *Vavilov* at paras 83 and 84. The reviewing court must put the reasons first: *Vavilov* at para 84. A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker: *Vavilov* at para 85. Reasonableness review also requires the court to consider whether the decision as a whole is reasonable in light of the constraints imposed by the legal and factual context: *Vavilov* at para. 90. These elements of a reasonable decision are summarized by Justice Rowe in *Canada Post*:

> [31] A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the]

> conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
>
> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
>
> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on . . . are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100). […]
>
> [34] The analysis that follows is directed first to the internal coherence of the reasons, and then to the justification of the decision in light of the relevant facts and law. However, as *Vavilov* emphasizes, courts need not structure their analysis through these two lenses or in this order (para. 101). As *Vavilov* states, at para. 106, the framework is not intended as an invariable "checklist for conducting reasonableness review". […]

[18] The burden is on the party challenging the decision to show that it is unreasonable. Reasons must not be assessed against a standard of perfection, and, as before *Vavilov*, a reasonableness review is not a "line-by-line treasure hunt for error". To be reasonable, a decision must be based on reasoning that is both rational and logical: *Vavilov* at para 102. Before a decision can be set aside on this basis, the reviewing court must be satisfied there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. *Vavilov* instructs:

[91] A reviewing court must bear in mind that the written reasons given by an administrative body must not be assessed against a standard of perfection. That the reasons given for a decision do “not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred” is not on its own a basis to set the decision aside: *Newfoundland Nurses*, at para. 16. The review of an administrative decision can be divorced neither from the institutional context in which the decision was made nor from the history of the proceedings.

…

[100] The burden is on the party challenging the decision to show that it is unreasonable. Before a decision can be set aside on this basis, the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision. It would be improper for a reviewing court to overturn an administrative decision simply because its reasoning exhibits a minor misstep. Instead, the court must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable.

…

[102] To be reasonable, a decision must be based on reasoning that is both rational and logical. It follows that a failure in this respect may lead a reviewing court to conclude that a decision must be set aside. Reasonableness review is not a “line-by-line treasure hunt for error”: *Irving Pulp & Paper*, at para. 54, citing *Newfoundland Nurses*, at para. 14. However, the reviewing court must be able to trace the decision maker’s reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that “there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived”: *Ryan*, at para. 55; *Southam*, at para. 56.

B. *Statutory framework*

[19] The guiding principles for conditional release are set out in sections 100, 100.1 and 101 of the *CCRA*. The protection of society is the paramount consideration for the PBC in the determination of all cases, according to section 100.1:

Purpose of conditional release	**Objet**
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.
Paramount consideration	**Critère prépondérant**
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.
Principles guiding parole boards	**Principes**
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,	**a)** elles doivent tenir compte de toute l'information pertinente

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;

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 the least restrictive determinations that are consistent with the protection of society;

c) elles prennent les décisions qui, compte tenu de la protection de la société, sont les moins privatives de liberté;

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

d) elles s'inspirent des directives d'orientation générale qui leur sont remises et leurs membres doivent recevoir la formation nécessaire à la

and	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.

[20] Paragraph 107(1)(a) of the *CCRA* gives the PBC "exclusive jurisdiction and absolute discretion" to grant parole to an offender such as the Applicant:

Jurisdiction of Board	**Compétence**
107 (1) Subject to this Act, the Prisons and Reformatories Act, the International Transfer of Offenders Act, the National Defence Act, the Crimes Against Humanity and War Crimes Act and the Criminal Code, the Board has exclusive jurisdiction and absolute discretion	**107 (1)** Sous réserve de la présente loi, de la Loi sur les prisons et les maisons de correction, de la Loi sur le transfèrement international des délinquants, de la Loi sur la défense nationale, de la Loi sur les crimes contre l'humanité et les crimes de guerre et du Code criminel, la Commission a toute compétence et latitude pour:
(a) to grant parole to an offender;	**a)** accorder une libération conditionnelle;
…	…

[21] Section 102 of the *CCRA* outlines the criteria the PBC must consider in granting parole. Subsections 102(a) and 102(b) collectively require the PBC to decide if an inmate will by reoffending present an undue risk to society before the expiration of his or her sentence, and

whether the offender's release will contribute to true protection of society by facilitating his or her reintegration into society as a law-abiding citizen:

Criteria for granting parole	**Critères**
102 The Board or a provincial parole board may grant parole to an offender if, in its opinion,	**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.
(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.	

C. *Prior jurisprudence on the role of the PBC*

[22] The Supreme Court in *Vavilov* instructs that "cases that dictated how to conduct reasonableness review…will often continue to provide insight, but should be used carefully to ensure that their application is aligned in principle with these reasons" (para 43). Jurisprudence prior to *Vavilov* required this Court to give considerable deference to the PBC: *Ouellette v*

Canada (Attorney General), 2013 FCA 54, reasons for judgment by Mainville JA at paras 69-71; *Maldonado* at para 18.

[23] In my respectful view, the call for considerable deference is "aligned in principle" with the proposition in *Vavilov* that reasonable review requires the reviewing court to give respectful attention to a decision-maker's demonstrated expertise:

> [93] An administrative decision maker may demonstrate through its reasons that a given decision was made by bringing that institutional expertise and experience to bear: see *Dunsmuir*, at para. 49. In conducting reasonableness review, judges should be attentive to the application by decision makers of specialized knowledge, as demonstrated by their reasons. Respectful attention to a decision maker's demonstrated expertise may reveal to a reviewing court that an outcome that might be puzzling or counterintuitive on its face nevertheless accords with the purposes and practical realities of the relevant administrative regime and represents a reasonable approach given the consequences and the operational impact of the decision. This demonstrated experience and expertise may also explain why a given issue is treated in less detail.

[24] The Supreme Court of Canada explains in *Mooring v Canada (National Parole Board)*, [1996] 1 SCR 75 at para 26, that the PBC plays an inquisitorial role and all reliable information is to be considered by the PBC provided it has not been obtained improperly. Given its needs, resources and expertise, the PBC must be given some latitude, within some legal parameters, as to how it guarantees the reliability of information; this may include by confronting the offender with allegations at the hearing: *R c Zarzour*, [2000] FCJ No 2070 (FCA), per Létourneau JA at para 38. This was done in the present case.

V. Analysis

[25] The Applicant submits the PBC Decision and Appeal Decision are unreasonable because the PBC and Appeal Division ignored all of the positive factors that indicated the Applicant's risk to re-offend was manageable. The Applicant submits the PBC conflated speculative considerations about further programing needs with actual risk-related factors.

[26] With respect, I disagree. Upon review of the record and the Decisions, there is no merit in the Applicant's submission that the PBC and Appeal Division ignored positive information in his file. In my view factors positive to the Applicant's submissions were appropriately summarized in the reasons of the PBC. It appears this argument was also made to the Appeal Division, which also rejected it, concluding the PBC Decision "demonstrates consideration of both the positive and negative information" in the Applicant's file. Moreover, and with respect, it is not this Court's duty on judicial review to reweigh the evidence examined by the decision-makers, and this cannot form the basis for the Court to intervene on a standard of reasonableness: *Vavilov* at para 125 and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 64 [*Khosa*].

[27] In my respectful view, the PBC's exercise of its considerable discretion to deny the Applicant day parole and full parole was reasonable and based on the weighing and assessment of information before it. In coming to its conclusion the PBC relied on persuasive and reliable information. The PBC's Decision is entitled to be respected both by *Vavilov*, and by this Court's previous jurisprudence giving such decisions "considerable deference."

[28] The PBC held that after only three months in his new minimum security environment, this application was premature. This is made clear from the following extract from the PBC's Decision which assesses the Applicant's submissions, including the progress he made in medium security, within the context of the information before it:

> In summary, you have a significant history of domestic violence and as a result have been declared a Dangerous Offender. This decision was later endorsed by the Court of Appeal for Ontario. You appear to now accept this verdict and presented as willing to engage services, demonstrate progress, and follow a gradual and structured plan for conditional release. Actuarial estimates of risk originally identified you as preserving a high probability for violence both generally and specifically in the context of domestic relationships. More recent evaluations, using different instruments with a focus on dynamic factors, have suggested estimates are in the low to moderate range. These estimates place considerable weight on the progress you have realized while incarcerated. However, the clinician maintains that a cautious approach to conditional release beginning with temporary absences is the recommended strategy. You have engaged in appropriate programming with positive progress being noted; however, refresher programming/counselling may be indicated in light of gap since these interventions and the lack of opportunity to use many of the skills. Finally, you have not presented the Board with an approved and viable release plan that is capable of managing your risk and provide you the structure and support necessary given your history of violent behavior.
>
> Accordingly, based on all of the foregoing, the Board denies day parole and full parole. It is the Board's opinion that you will present an undue risk to society if released and that your release will not contribute to true protection of society by facilitating your reintegration into society as a law-abiding citizen.
>
> The Board has determined that that your sentence has been tailored to meet the circumstances of your case and that your continued incarceration does not violate Section 12 of the *Canadian Charter of Rights and Freedoms* as you have been offered programming, counselling, and you were recently transferred to minimum security. However, in the Board's view continued progress towards addressing risk factors, positive institutional behaviour and engagement in your Correctional Plan should result in further opportunities for you to demonstrate compliance with a gradual reintegration plan as developed by your CMT.

[29] Contrary to the Applicant's request, the PBC concluded a period of stability at a minimum security followed by a cautious, gradual and structured approach to conditional release beginning with temporary absences, was better tailored to the circumstances than immediate full or day parole. In my respectful view, these were reasonable findings considering the legal and factual constraints in this case. As noted, these findings are also subject to the considerable deference the Court must give to the specialized experience of the PBC in matters of parole eligibility. I appreciate the Applicant disagrees with the outcome, but disagreement is not a basis for judicial review.

[30] The Applicant submits the PBC erred in saying that his opinion - that he did not require further programming - was "naïve." He submits his opinion was not naïve, and was consistent with a psychological assessment report prepared by David J Simourd, a psychologist, dated September 24, 2018 [Psychological Risk Assessment]. I agree the Psychological Risk Assessment suggested day parole, but it also started its recommendation with the statement that: "it would obviously be prudent to proceed judiciously in any conditional release":

> In summary, there is a convergence of clinical and psychometric testing evidence to indicate that Mr. May is a Low risk for criminal conduct both generally and violently. In actuarial terms, his risk for recidivism is in the 22% to 31% range, which is some of the lowest rates available using the actuarial measures. Clinically, Mr. May is emotionally and psychologically stable at the present time and does not suffer from a mental health problem. Most importantly, Mr. May's main risk factors relate to romantic relationships, emotion regulation, and alcohol: all of which are relatively easily monitored on an ongoing basis. Overall, he presents as an acceptable candidate for conditional release. It would obviously be prudent to proceed judiciously in any conditional release, beginning with a series of temporary absences (of which he is a suitable candidate) for a placement in a halfway house on day parole, and ultimately placement independent living on full parole.
>
> [Emphasis added]

[31] Set against this was the recommendation of CSC that full or day parole was premature. CSC called for a more gradual and structured plan for conditional release. As the PBC determined:

> Although no specific release plan was outlined in the Assessment for Decision, CSC has suggested that release planning is anticipated to be cautious, gradual and structured given the serious nature of your violent offending history. CSC further, suggests that the first step should be a transfer to lower security (this has now occurred) where you can participate in ETAs, unescorted temporary absences (UTAs) and possibly work releases. However, in your submission to the Board you indicate that on day parole you plan to reside at a community residential facility (CRF) in the Brantford or Peterborough area. On full parole you plan to live with your aunt in Toronto or your sister in Barrie.
>
> In discussing the above at today's hearing you acknowledged the benefits associated with a gradual arid structured approach to conditional release. You also indicated that both of the above CRFs have communicated to you a willingness to consider support but will require the appropriate CA request from CSC. Again, you appeared to understand.
>
> CSC opines that day and full parole are premature at this juncture and believe that you need to demonstrate a period of stability at minimum security and progress toward temporary absences. Consequently, CSC recommends that day and full parole be denied.

[32] In my respectful view, it was for the PBC and Appeal Division, and not this Court, to choose between the options presented due to its expertise and experience in such matters, together with the considerable deference owed to it by this Court. I am not persuaded that either the PBC or the Appeal Division acted unreasonably in considering and deciding as they did on the information before them.

[33] I should note that at the hearing on judicial review, the Applicant's counsel conceded the PBC's comment on the Applicant's "naïve overconfidence" was observational and not determinative. In my view, this observation was not unreasonable and was certainly not a fatal flaw in the reasons as contemplated by *Vavilov* at para 102.

[34] I do not agree with the Applicant's submission that the PBC was unreasonable in its concern that the Applicant did not have an "*approved* and viable release plan" [emphasis added]. While the Applicant may have had ideas about his release, his plan was not approved by CSC as capable of managing the Applicant's risk. While the Applicant submits the PBC was required to determine whether statutory risk-related criteria were met irrespective of the actions or inaction of the CSC, I am not persuaded the PBC acted unreasonably in considering the Applicant did not have an approved plan for release.

[35] The Applicant relies on *Steele v Mountain Institution*, 1990 CanLII 50 (SCC), [1990] 2 SCR 1385, judgment of the Court delivered by Cory J, where the Supreme Court of Canada noted that parole is intended to ensure that a sentence is tailored to fit the circumstances of the individual and the offence:

> The analysis must begin with a reference to *R. v. Lyons*, supra. In that case the provisions of the *Criminal Code* pertaining to the sentencing and continued detention of dangerous offenders were challenged on the grounds that they contravened s. 12 of the *Charter*. La Forest J., writing for the full Court on this point, held that the imposition of an indeterminate sentence, without other safeguards, would be certain, at least occasionally, to violate s. 12 of the *Charter*. However, he found that the requirements for regular parole review of an offender's continuing detention ensured that the sentence would be tailored to fit the circumstances of the individual and the offence. As a result he found that these sentencing provisions did not infringe s. 12 of the *Charter*.

[36] The Applicant submits the PBC did not fulfill its requirement under *Steele* to ensure the sentence is tailored to meet the Applicant's case, or its requirement under the Manual to make a thorough assessment of all relevant aspects of his case. These submissions have no merit given my conclusion that the PBC reasonably assessed the competing factors.

[37] The Applicant also refers to the PBC's *Decision-Making Policy Manual for Board Members*, Second Edition, no. 13, issued 2018-11-15 [Manual], which requires the PBC to "take into consideration all information and determine whether…the information provides an analysis with respect to the offender's change in behaviour and attitude while incarcerated or in the community…". With respect to Dangerous Offenders, the Manual requires the PBC to "give particular attention to whether the specific needs of the individual have been fully identified and addressed". In my view this is exactly what the PBC did in assessing the competing factors and concluding that day and full parole were premature.

[38] The Applicant submits the PBC and Appeal Division acted unreasonably by not considering the Applicant was entirely compliant and engaged in all correctional interventions for many years, and that it was he who sought minimum security classification to allow him to participate in more reintegration programs. The Applicant submits his needs regarding substance abuse, domestic violence, emotion management, community functioning and employment, have all been addressed by CSC interventions over the last 13 years of incarceration. In the Applicant's view, his continued incarceration amounts to a violation of his section 12 rights given his well-documented rehabilitation.

[39] There are two problems with this submission. First, it is apparent on reading the reasons that the PBC did consider the positive factors submitted by the Applicant. More fundamentally, however, the Applicant's submissions invite the Court to reweigh the information considered by the PBC. This cannot form the basis for judicial review on the standard of reasonableness: *Vavilov* at para 125 and *Khosa* at para 64.

[40] To emphasize and repeat, both this Court and the Appeal Division have concluded that the PBC Decision "demonstrates consideration of both the positive and negative information" in the Applicant's file. The Appeal Division also endorsed the PBC's conclusion "that a gradual release including temporary absences was necessary". I agree with the Respondent and have concluded that both findings are supported by the record and the PBC's reasoning.

[41] The PBC and the Appeal Division indicate a road map to follow which, in this case is based on CSC recommendations given risk considerations and progress to date. This roadmap entails a gradual and structured release plan coupled with demonstrated progress towards eventual release. The onus is on the Applicant to establish unreasonableness; with respect, the Court is not persuaded by the PBC's Decision or that of the Appeal Division should be disturbed.

[42] In many respects, the foregoing has proceeded on an analysis which looked at the *outcome* of the decision and the issues raised by the Applicant in terms of the factual and legal constraints facing the decision-maker. That said, another aspect of *Vavilov* speaks of reviewing the reasoning *process* as opposed to the *outcome*. As already noted, the required reasonableness review must respectfully look at *both* the decision-maker's reasoning process and the outcome:

Vavilov at para 83. The reviewing court must put the reasons first: *Vavilov* at para 84. Importantly, *Vavilov* at para 85 instructs that a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker.

[43] Thus, I now direct myself to the internal coherence of the reasons, which as *Canada Post* notes at para 34, the Court may do in the order appropriate in the circumstances. In this connection, I will keep in mind that the burden is on the party challenging the decision to show that it is unreasonable, and that reasons must not be assessed against a standard of perfection because reasonableness review is not a "line-by-line treasure hunt for error". To be reasonable, a decision must be based on reasoning that is both rational and logical: *Vavilov* at para 102. Before a decision can be set aside on this basis, the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it may not be said to exhibit the requisite degree of justification, intelligibility and transparency. In addition the reviewing court must be able to trace the decision-maker's reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that "there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived": *Vavilov* at para 102 citing *Law Society of New Brunswick v. Ryan*, 2003 SCC 20 at para 55.

[44] In my respectful view, under this reasons-first approach in *Vavilov*, the PBC reasoning process also meets the test of reasonableness. The tribunal sets out the required line of analysis that could reasonably lead it to the conclusion from the evidence before it. It starts with an

outline of the Index Offences, including multiple domestic violence, which together with the Applicant's history, totalling 31 criminal convictions, resulted in the Applicant being designated a Dangerous Offender. The reasons in my view fairly summarize both positive and negative factors in relation to the Applicant, and draw conclusions in relation thereto. The PBC was required to decide if full or day parole was premature, that is, was it timely. Information before it was assessed and weighed. Its conclusion was that neither full nor day parole was acceptable. The PBC considered the statute and determined that the information before it led to its conclusion that the Applicant would present an undue risk to society so soon after entering minimum security, and that such a premature release will not contribute to true protection of society by facilitating the Applicant's reintegration into society as a law-abiding citizen. In doing so it put its mind to Section 102 of the *CCRA* as required, and did so in the context of the record and its conclusionS.

[45] In my respectful view, the PBC and Appeal Division reasoning processes are both rational and logical as required by *Vavilov* at para 102. In summary, the reasons "add up" as required by *Vavilov* at para 104.

VI. Conclusion

[46] I am not persuaded the reasons of the PBC or Appeal Division are unreasonable either in terms of outcome or reasoning process. There are no fatal flaws or illogicality. With respect, the decisions are justified, transparent and intelligible in light of the factual and legal constraints imposed on these decision-makers. Therefore, judicial review will be dismissed.

JUDGMENT in T-819-19

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed without costs.

"Henry S. Brown"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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