Federal Court Cour fédérale

Date: 20141223

Docket: T-370-14

Citation: 2014 FC 1253

Toronto, Ontario, December 23, 2014

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

DONALD JOLY

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is a judicial review [JR] of an October 8, 2013 decision of the Appeal Division of the Parole Board of Canada [PBAD], which affirmed a Parole Board of Canada [PBC, Board] decision of February 1, 2013 to revoke the Applicant's statutory release.

[2] The Applicant, Donald Joly, is a 41 year old Aboriginal offender who was out on parole, having received statutory release while serving a 23 year sentence for robbery and armed

robbery. After largely turning his life around, being successfully employed and starting a family life, several incidents led to his parole being revoked.

[3] Mr. Joly was sent back to a Federal penitentiary for a period of 2 years and nine months, without the opportunity to provide his side of the story orally to the PBC, which opportunity he both requested and expected based on his prior experience with the Board.

[4] At issue in this Application is whether the PBC made its decision based on the proper application of legal principles to the record before it, and whether the decision was unlawful due to a duty of the PBC to hold an oral hearing pursuant to either (i) the legislation in place at the time, and/or (ii) the requirements of procedural fairness.

[5] This Court finds that the Board had a requirement to provide an oral hearing under the legislation, given the course of events that took place leading up to the revocation decision and in light of the transitional provisions of the relevant legislation. For the reasons that follow, this application is therefore granted and the matter is remitted to the Board for reconsideration in accordance with these reasons.

II. Facts

[6] While Mr. Joly had problems adjusting to prison life early in his sentence, in the latter years of his institutionalization, and upon release, he had rehabilitated himself by reconnecting with his aboriginal culture, working with community elders, completing a correctional plan, finishing high school, and finding gainful employment.

[7] The Applicant was released on statutory release on December 30, 2010. The release was subject to several conditions, including: abstaining from drugs, alcohol and going to bars; following a treatment plan; avoiding criminal peers; and reporting changes in his relationship.

[8] The Applicant, however, had certain difficulties with the strict terms of his statutory release. Various incidents reported by his parole officer, and later highlighted by the PBC in its decision include:

- In early May 2011, the Applicant's statutory release was suspended by the Correctional Service of Canada [CSC] for non-compliance because the Applicant was found in possession of a cellular telephone with photographic capabilities. CSC cancelled the suspension of his statutory release on May 18, 2011 giving the Applicant a warning that non-compliance with his parole conditions would not be tolerated.
- On July 15, 2011, Mr. Joly breached the terms of his Residential Facility by leaving it without obtaining the permission of his parole officer. CSC suspended the Applicant's release and referred the case to the PBC. The Board cancelled the suspension of his statutory release, but delayed his release for 30 days to highlight the seriousness of breaching his condition of parole in its October 13, 2011 decision.

[9] Following these two events, Mr. Joly was arrested by Sudbury Police officers conducting community supervision compliance checks on November 9, 2012. The police reported a strong smell of alcohol on the Applicant's breath and bloodshot eyes. The police also found a knife in his possession, which they alleged was (i) designed to be opened by centrifugal force and (ii)

prohibited under the *Criminal Code*, RSC 1985, c C-46. Mr. Joly was charged, and released to a halfway house the following day.

[10] The next day, on November 10, 2012, the Applicant's statutory release was once again suspended.

[11] The CSC parole officer held a post-suspension interview with the Applicant on November 14, 2012. The parole officer thereafter wrote a comprehensive report dated December 4, 2012 [Revocation Recommendation Report], which was submitted to the PBC, in which the parole officer recommended a revocation of the Applicant's parole (Respondent's Record [RR], Vol 1, p 8).

[12] On December 28, 2012 (i.e. subsequent to the submission of the Revocation Recommendation Report to the Board), the Crown withdrew the prohibited weapon charges against Mr. Joly. After the parole officer received notice of this withdrawal, he reconsidered the Revocation Recommendation Report, but maintained the recommendation to revoke parole. He sent a letter to the Board advising it of both the withdrawal of the charges and his decision to maintain the recommendation, on January 7, 2013 (RR, Vol 1, p 18). The Revocation Recommendation Report was then considered by the PBC in its decision, described below, which was affirmed by the PBAD.

III. The Decisions Under Review

[13] The immediate decision under review is that of the PBAD rendered October 8, 2013. Equally critical in this JR, however, is the underlying decision of the PBC of February 1, 2013, which reviewed the CSC parole officer's Revocation Recommendation Report, and ordered the revocation of Mr. Joly's statutory release. Since the Feb. 1, 2013 PBC decision was affirmed by the PBAD, the Court must also consider the underlying PBC decision (*Collins v Canada (Attorney General)*, 2014 FC 439 at para 36).

[14] The February 1, 2013 PBC Decision was largely based on the November 9, 2012 encounter with the Sudbury Police. The Respondent characterized this encounter, during the hearing before this Court, as "the last straw" with respect to excusing parole violations.

[15] The PBC wrote in its decision:

> …with respect to the current suspension, including the urine canister found in your room at the CRF and the police comments suspicious of alcohol, the board finds it likely that you had returned to the use of substances. The CRF and police information is more reliable and persuasive in this regard than the explanation that you have provided. **The possession of the flip knife is also a concern and contrary to the standard conditions of release.**
>
> [Emphasis added] (Applicant's Record [AR], p 30)

[16] The PBC's decision followed the parole officer's recommendation and revoked the Applicant's statutory release.

[17] The PBAD found in its October 8, 2013 decision (RR, Vo1 1, p 58) that the PBC properly took into account the reasons for Mr. Joly's suspension and his behaviour during his release in finding that his return to the community would constitute an undue risk to society. The PBAD upheld the earlier decision, in which the PBC cited concerns about various breaches of parole conditions, including:

- the Applicant attending a tavern on 2 occasions;
- a urine canister being found in the Applicant's room (and by implication, an intention to manipulate drug testing);
- the possession of a flip knife;
- a likelihood of a return to substance abuse; and
- the other incidents that had transpired since his release from prison as listed above in the Facts section of these Reasons.

[18] Regarding the November 9, 2012 incident, the PBAD wrote:

> …it was also not unreasonable for the Board to assess your recent behaviour as non-compliant, in view of the specific file information pertaining to your attendance at a party and your possession of a prohibited weapon, and for the Board to conclude that you likely returned to substance use, given the police report indicating a strong smell of alcohol and bloodshot eyes.
>
> (PBAD Decision, AR, p..43)

IV. Issues

[19] The issues raised in this application are:

1. Did the PBC breach its duty of procedural fairness by denying the Applicant an oral hearing?
2. Was the PBC's decision unreasonable because of a misapprehension of the facts?
3. Was the PBC's decision unreasonable in light of the Applicant's Aboriginal status and the PBC's failure to explicitly consider the *Gladue* factors?

The first issue was the focus of the hearing, and is determinative of the outcome.

V. Standard of Review

[20] Issues of procedural fairness are reviewed on a standard of correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79).

[21] Issues of fact and issues of mixed fact and law are reviewed on a standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 53-54).

[22] As a general statement, the PBC is owed a high degree of deference in its decisions (*Sychuk v Canada (Attorney General)*, 2009 FC 105 at para 45). For parole cases, the PBC's "decision must not be interfered with by this Court failing clear and unequivocal evidence that the decision is quite unfair and works a serious injustice on the inmate." (*Desjardins v Canada (National Parole Board)*, [1989] FCJ No 910; see also *Aney v Canada (Attorney General)*, 2005 FC 182).

[23] This Court has consistently recognized that the Board and the PBAD have expertise in matters related to the administration of the *Corrections and Conditional Release Act,* SC 1992, c 20 [*CCRA*]: *Fournier v Attorney General of Canada*, 2004 FC 1124.

[24] When reviewing a PBAD decision, it is incumbent on the reviewing judge to also review the underlying Board decision, as Justice Letourneau stated for the Court of Appeal at paragraph 10 of *Cartier v Attorney General of Canada*, 2002 FCA 384:

> The judge in theory has an application for judicial review from the Appeal Division's decision before him, but when the latter has affirmed the Board's decision he is actually required ultimately to ensure that the Board's decision is lawful.

It is for this reason that in reviewing the PBAD's decision, I will take into full consideration the decision of the PBC, including the reasonableness of its outcome and the procedural fairness accorded to the Applicant in the process of making that decision.

VI. Submissions & Analysis

A. *Applicant's Submissions*

[25] The Applicant contends that the lack of an oral hearing denied his right to procedural fairness. The revocation of statutory release revolved around issues of credibility – namely (a) whether the knife in his possession was indeed a "flip knife" and (b) whether the Applicant was intoxicated at the time. Neither of these was established through the criminal process since charges were withdrawn. Therefore, the parole officials who reviewed the file were left to decide whether these incidents occurred on the basis of Mr. Joly's credibility.

[26] In the view of the Applicant, credibility issues such as these, which ultimately result in a decision to revoke parole, elevate the fairness requirements for a parole hearing to that of an oral hearing, as opposed to simply a paper-based hearing such as the one Mr. Joly had before the PBC and PBAD. This requirement was heightened when the charges relating to the critical November 9, 2012 incident were withdrawn.

[27] The Applicant also contends that such procedural fairness would be in keeping with his expectations of an oral hearing. Mr. Joly was advised by his parole officer on December 3, 2012, that he no longer had the right to make oral submissions because of "the new system", referring to legislative amendments of two days prior (December 1, 2012). Mr. Joly had understood that he would be entitled to a circle (oral) hearing before the PBC, as had occurred in the past (Applicant's Affidavit, AR, p 4, para 12).

[28] Mr. Joly submits that an opportunity to make written submissions would not and did not adequately address his concerns regarding the impugned incidents, given the liberty interest at stake and the long period of incarceration that resulted. Rather, procedural fairness required an oral hearing. The Applicant also contends that he declined to make written representations precisely because he believed he would have an oral hearing, and communicated this expectation and desire to his parole officer.

[29] He submits that in any event, the amendment had not yet come into effect and the statute required that he receive an oral hearing.

[30] With respect to the second issue above, Mr. Joly submits that, quite apart from the breach of procedural fairness, the revocation of his statutory release was unreasonable, as the PBC decision was based on a misapprehension of the incidents that had occurred.

[31] The Applicant argues that it was unreasonable for the Board to find that he was carrying a "prohibited weapon", after the Crown withdrew its charges related to that incident. Furthermore, he argues that the Board should not have given weight to the allegations of intoxication arising out of the same incident, because they were untrue.

[32] As for the other incidents of concern to the Board – such as Mr. Joly's attendance at a party at a tavern and possession of a canister of urine in his room – the Applicant argues that he had explanations for these incidents, and that they should therefore not have resulted in the revocation of his statutory release. Regarding the tavern, the Applicant (and those who wrote supporting letters) state that the party was "dry". With respect to the canister of urine, the Applicant contends that he did not want to wake his roommate up in the middle of the night to go to the washroom, so he used the can.

[33] Ultimately, the Applicant argues that, given all the facts, it was unreasonable for the PBC to rely on these incidents to revoke his statutory release, which resulted in re-incarceration in a Federal penitentiary for approximately three years- a serious deprivation of his liberty interests.

[34] With respect to the final issue, the Applicant submits that the PBC ignored his Aboriginal status and the *Gladue* factors in reaching its decision. He argues that the *Gladue* principles

apply in the parole context and that by failing to take them into consideration, the Board erred in law.

B. *Respondent's submissions*

[35] On the issue of procedural fairness, the Respondent argues that there was no requirement for an oral hearing, based purely on the legislative scheme and, in particular, as a result of the 2012 legislative amendments to section 140 of the *CCRA*. Section 140 sets out the circumstances in which the Board is required to conduct its review by way of a hearing.

[36] Legislative amendments that came into force on December 1, 2012 removed the requirement to hold an oral hearing under section 140 of the *CCRA* in the circumstances. The Respondent maintains that by virtue of these amendments, the Applicant does not have the right to an oral hearing. Furthermore, the transitional provisions that brought these amendments into effect resulted in there being no requirement to hold an oral hearing in the Applicant's case. The Respondent states that the law changed before the Applicant's statutory release was revoked by the PBC (and remained as such when the PBAD reviewed the PBC's decision), and that the Applicant was told of the change in the law by the parole officer on December 3, 2012.

[37] The Respondent contends that the Applicant also waived his right to written representations in three separate instances. These opportunities for the Applicant to give his perspective constituted a sufficient hearing pursuant to the requirements of the amended legislation and, in any event, his post-suspension interview with the parole officer constituted an opportunity to make oral submissions.

[38] On the second issue, the Respondent asserts that the PBC and PBAD decisions were entirely reasonable under a *Dunsmuir* analysis. There were several other factors, aside from the November 2012 incident, which provided more than sufficient justification for both the PBC and PBAD decisions. The conclusion reached by the PBC regarding the Applicant's risk to reoffend prior to his Warrant Expiry Date was reasonable and based on persuasive information, including a history of non-compliance and a negative recommendation from the Applicant's case management team. Even the incidents of November 9, 2012, while not resulting in criminal prosecution, were nonetheless prohibited under the Applicant's parole terms. The PBAD's affirmation of the PBC's assessment was also reasonable.

[39] On the final issue, the Respondent contends that the *Gladue* principles are incorporated into section 8.1.4 of the PBC's policy manual and that there is therefore no need to refer to them explicitly in the decision. In any event, the principles outlined in the policy manual focus primarily on the offender's behaviour during conditional release and the protection of society, and these principles were considered in the decisions under review.

VII. Analysis

A. *Issue #1: Entitlement to an oral hearing*

[40] The key issue in this JR is whether Mr. Joly should have been given an oral hearing before the decision to revoke his statutory release was made. This was the issue on which the vast majority of time was spent at the hearing before me, in addition to submissions received from both parties since that time.

(1) Procedural fairness requirement under the statute

[41] In order to provide the context surrounding the amendments to the statutory regime in place during the time in which the Applicant's revocation was being considered, I will begin with a short review of the relevant statute and its amending legislation.

(a) *Section 140 of the CCRA and the Amending Act*

[42] The operative provision is section 140 of the *CCRA*. That section refers to the circumstances in which the Board must conduct an oral hearing. A legislative amendment came into effect on December 1, 2012, that removed the requirement in section 140 that the PBC hold an oral hearing in certain cases.

[43] Prior to December 1, 2012, every parolee had the right to an oral hearing before the PBC prior to a decision to revoke parole being made. The pre-amendment provision of the *CCRA* used to read:

Mandatory hearings	**Audiences obligatoires**
140. (1) The Board shall conduct the review of the case of an offender by way of a hearing, conducted in whichever of the two official languages of Canada is requested by the offender, unless the offender waives the right to a hearing in writing or refuses to attend the hearing, in the following classes of cases:	**140.** (1) La Commission tient une audience, dans la langue officielle du Canada que choisit le délinquant, dans les cas suivants, sauf si le délinquant a renoncé par écrit à son droit à une audience ou refuse d'être présent :
[…]	[…]

(d) a review following a suspension, cancellation, termination or revocation of parole or following a suspension, termination or revocation of statutory release;[…]

[Emphasis added]

d) les examens qui suivent, le cas échéant, la suspension, l'annulation, la cessation ou la révocation de la libération conditionnelle ou d'office;

[Accentuation ajoutée]

[44] The *Jobs, Growth and Long-term Prosperity Act*, SC 2012, c 19 [Amending Act] amended paragraph 140(1)(d) of the *CCRA* as follows:

> 527. Paragraph 140(1)(*d*) of the Act is replaced by the following:
> (*d*) a review following a cancellation of parole.

Accordingly, the amended paragraph 140(1)(d) now reads:

Mandatory hearings

140. (1) The Board shall conduct the review of the case of an offender by way of a hearing, conducted in whichever of the two official languages of Canada is requested by the offender, unless the offender waives the right to a hearing in writing or refuses to attend the hearing, in the following classes of cases:
…

(d) a review following a cancellation of parole; …
Discretionary hearing

(2) The Board may elect to conduct a review of the case of an offender by way of a hearing in any case not referred to in subsection (1).

[Emphasis added]

Audiences obligatoires

140. (1) La Commission tient une audience, dans la langue officielle du Canada que choisit le délinquant, dans les cas suivants, sauf si le délinquant a renoncé par écrit à son droit à une audience ou refuse d'être présent :
…

d) les examens qui suivent l'annulation de la libération conditionnelle; …
Audiences discrétionnaires

(2) La Commission peut décider de tenir une audience dans les autres cas non visés au paragraphe (1).

[Accentuation ajoutée]

[45] Thus, following the December 1, 2012 amendment, the legislation gave the Board sole discretion as to whether to hold an oral hearing following the suspension of an offender's statutory release.

(b) *Interpretation of the Transitional Provisions*

[46] The basis of my decision to allow this JR is that I am of the opinion that the legislative amendment contained in the Amending Act's transitional provisions provides that the Applicant in this case was statutorily entitled to an oral hearing and was improperly denied that opportunity. Key to the analysis is the interpretation of the term "review" in section 528 of the Amending Act.

[47] Section 528 of the *Amending Act* guided the transitional period as follows:

528. Paragraph 140(1)(d) of the Corrections and Conditional Release Act, as enacted by section 527, applies only in respect of a review of the case of an offender begun on or after the day on which this section comes into force.	**528.** L'alinéa 140(1)d) de la Loi sur le système correctionnel et la mise en liberté sous condition, édicté par l'article 527, ne s'applique qu'à l'examen de cas de délinquants commencé à la date d'entrée en vigueur du présent article ou après cette date.

[48] For the following reasons, I interpret "a review of the case of an offender" in section 528 to include the review of the parole officer, and I find therefore that the Applicant's "review" began before the amended paragraph 140(1)(d) came into force, such that the previous version of paragraph 140(1)(d), which required an oral hearing, applied in his case.

[49] In the modern approach to statutory interpretation, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense, and harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament: *Canadian National Railway Co v Canada (Attorney General)*, 2014 SCC 40 at para 36.

[50] The term "review" is not defined in the *CCRA* or the *Corrections and Conditional Release Regulations*, SOR/92-620 [the Regulations].

[51] The Respondent submits that the "review" did not begin until December 4, 2012, when the matter was referred to the Board. The Respondent argues that since section 527 of the Amending Act modified section 140 of the *CCRA*, which deals with oral hearings in front of the Board, the "review" mentioned in section 528 for the purposes of the transitional period refers only to proceedings in front of the Board.

[52] While I agree that a "review" for the purposes of section 140 includes a proceeding in front of the Board, in my view the term is not as limited as the Respondent suggests.

[53] To provide some context for this conclusion, it is helpful to look at proximate and related provisions of the *CCRA* in which the term "review" is used.

[54] Subsection 135(1) of the *CCRA* provides that a Board member or designated person may suspend statutory release when an offender breaches a condition of his or her release, to prevent a breach of a condition of the release, or to protect society. Indeed, it was this section of the

CCRA through which the Applicant's statutory release was suspended after his arrest on November 9, 2012. This subsection reads as follows:

135. (1) A member of the Board or a person, designated by name or by position, by the Chairperson of the Board or by the Commissioner, when an offender breaches a condition of parole or statutory release or when the member or person is satisfied that it is necessary and reasonable to suspend the parole or statutory release in order to prevent a breach of any condition thereof or to protect society, may, by warrant, (a) suspend the parole or statutory release; (b) authorize the apprehension of the offender; and (c) authorize the recommitment of the offender to custody until the suspension is cancelled, the parole or statutory release is terminated or revoked or the sentence of the offender has expired according to law.	**135.** (1) En cas d'inobservation des conditions de la libération conditionnelle ou d'office ou lorsqu'il est convaincu qu'il est raisonnable et nécessaire de prendre cette mesure pour empêcher la violation de ces conditions ou pour protéger la société, un membre de la Commission ou la personne que le président ou le commissaire désigne nommément ou par indication de son poste peut, par mandat : a) suspendre la libération conditionnelle ou d'office; b) autoriser l'arrestation du délinquant; c) ordonner la réincarcération du délinquant jusqu'à ce que la suspension soit annulée ou que la libération soit révoquée ou qu'il y soit mis fin, ou encore jusqu'à l'expiration légale de la peine.

[55] Subsection 135(3) then mandates that after the recommitment of the offender, the person signing the warrant under subsection (1) or a designated person review the offender's case and either cancel the suspension or refer the case to the Board with an assessment of the case:

135. (3) Subject to subsection (3.1), the person who signs a warrant under subsection (1) or any other person designated under that subsection shall, immediately after the recommitment of the offender, <u>review</u> the offender's case and (a) where the offender is serving a sentence of less than two years, cancel the suspension or refer the case to the Board together with an assessment of the case, within fourteen days after the recommitment or such shorter period as the Board directs; or (b) in any other case, within thirty days after the recommitment or such shorter period as the Board directs, cancel the suspension or refer the case to the Board together with an assessment of the case stating the conditions, if any, under which the offender could in that person's opinion reasonably be returned to parole or statutory release. [Emphasis added]	**135.** (3) Sous réserve du paragraphe (3.1), la personne qui a signé le mandat visé au paragraphe (1), ou toute autre personne désignée aux termes de ce paragraphe, doit, dès que le délinquant mentionné dans le mandat est réincarcéré, <u>examiner</u> son dossier et : a) dans le cas d'un délinquant qui purge une peine d'emprisonnement de moins de deux ans, dans les quatorze jours qui suivent si la Commission ne décide pas d'un délai plus court, annuler la suspension ou renvoyer le dossier devant la Commission, le renvoi étant accompagné d'une évaluation du cas; b) dans les autres cas, dans les trente jours qui suivent, si la Commission ne décide pas d'un délai plus court, annuler la suspension ou renvoyer le dossier devant la Commission, le renvoi étant accompagné d'une évaluation du cas et, s'il y a lieu, d'une liste des conditions qui, à son avis, permettraient au délinquant de bénéficier de nouveau de la libération conditionnelle ou d'office. [Accentuation ajoutée]

[56] In the Applicant's case, the December 4, 2012 Revocation Recommendation Report of the parole officer constituted this review, referral to the Board, and assessment. In conducting the review, the parole officer held a post-suspension interview with Mr. Joly.

[57] Upon a referral initiated by subsection 135(3), subsection 135(5) requires the Board to review the case within the period prescribed in the Regulations and determine whether the statutory release is to be terminated or revoked, or the suspension cancelled:

135. (5) The Board shall, on the referral to it of the case of an offender who is serving a sentence of two years or more, review the case and — within the period prescribed by the regulations unless, at the offender's request, the review is adjourned by the Board or is postponed by a member of the Board or by a person designated by the Chairperson by name or position — (a) if the Board is satisfied that the offender will, by reoffending before the expiration of their sentence according to law, present an undue risk to society, (i) terminate the parole or statutory release if the undue risk is due to circumstances beyond the offender's control, and (ii) revoke it in any other case; (b) if the Board is not satisfied as in paragraph (a), cancel the suspension; and (c) if the offender is no longer eligible for parole or entitled to be released on statutory release, cancel the suspension or terminate or revoke the parole or statutory release.	**135.** (5) Une fois saisie du dossier du délinquant qui purge une peine de deux ans ou plus, la Commission examine le dossier et, au cours de la période prévue par règlement, sauf si, à la demande du délinquant, elle lui accorde un ajournement ou un membre de la Commission ou la personne que le président désigne nommément ou par indication de son poste reporte l'examen : a) si elle est convaincue qu'une récidive de la part du délinquant avant l'expiration légale de la peine qu'il purge présentera un risque inacceptable pour la société : (i) elle met fin à la libération lorsque le risque dépend de facteurs qui sont indépendants de la volonté du délinquant, (ii) elle la révoque dans le cas contraire; b) si elle n'a pas cette conviction, elle annule la suspension; c) si le délinquant n'est plus admissible à la libération conditionnelle ou n'a plus droit à la libération d'office, elle annule la suspension ou révoque la libération ou y met fin.

[58] As mentioned above, Mr. Joly's referral to the Board pursuant to subsection 135(3) occurred on December 4, 2012. However, Mr. Joly's "review" for the purposes of the

application of the transitional provision in section 528 of the *Amending Act*, encompassed the decision to recommit him on November 10, 2012, at which time a review of his case by the person signing the 135(1) warrant or designated person was to be conducted immediately, pursuant to subsection 135(3). Since the date that Mr. Joly was recommitted was prior to the date the amended paragraph 140(1)(d) came into effect, it is my view that Mr. Joly was legally entitled to an oral hearing in accordance with the transitional provisions of the *Amending Act*.

[59] According to the presumption of consistent expression, the legislature is presumed to choose its language carefully and consistently within a statute and the same word is taken to have the same meaning: R Sullivan, *Sullivan on the Construction of Statutes* (5th ed 2008) at 214. I interpret the term "review" in section 528 of the *Amending Act*, in the context of both subsections 135(3) and 135(5), such that it includes the review of a particular offender's case by the various decision-makers after the triggering event in subsection 135(1) takes place.

[60] The context and language of the provisions support this view. The statutory revocation of a statutory release is part of a chain of decisions, which starts from the decision to recommit as outlined in subsection 135(1), to the review by the parole officer and decision to refer the matter to the Board as per subsection 135(3), to the review and decision of the Board itself in subsection 135(5).

[61] In accordance with the presumption of consistent expression described above, I conclude that if the legislature had intended that section 528 refer to the Board's "review" in subsection 135(5) alone and not to the "review" described in subsection 135(3), which is also part of the

process of statutory revocation, Parliament would have used more specific language than "a review", which term is used in both of the aforementioned subsections. For example, the legislature could have specified in the transitional provision that it was referring to a review "by the Board" or a review "pursuant to subsection 135(5)" if it had intended to restrict the meaning of the term in that manner despite its use in other relevant, proximate provisions of the statute.

[62] Given that Parliament did not specify that section 528 referred exclusively to a review under subsection 135(5), and in light of the scheme of the *CCRA* and the principles of statutory interpretation as discussed above, I find that the "review" of Mr. Joly's statutory revocation for the purposes of section 528 of the *Amending Act* began on November 10, 2012, when he was recommitted and the duty to immediately review his case pursuant to subsection 135(3) was triggered. This means that the prior section 140(1)(d) was still in effect in Mr. Joly's case, and the *CCRA* entitled Mr. Joly to an oral hearing. Denying him this opportunity was a violation of his procedural fairness rights under the statute.

[63] I have considered the fact that section 140 is the only section of the CCRA that directs the Board on the conduct of oral hearings. Given that section 140 and its related provisions (i.e. s. 135) are a self-contained regime for the review of non-statutory release (parole) decisions, one might posit that it is precisely for this reason, that the legislators did not to set out specifically that "review" pertained only to the Board's review, if that is what they intended.

[64] However, I think it more appropriate to apply the presumption against retrospective effect of legislation. The legislation took effect after the revocation review by the parole officer had

already begun. I view the transitional provisions as intending to protect those in the Applicant's situation, i.e. individuals whose parole revocation procedures had already commenced. The key events in this case all took place in November 2012, i.e. the arrest, incarceration, and bulk of the parole officer review, including the oral interview.

[65] In short, my interpretation of "review" also protects the Applicant from a retrospective effect of the new law. This is consistent with the approach articulated by the Supreme Court of Canada in *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49 [*Imperial Tobacco*], at paragraphs 69-71:

> 69. Except for criminal law, the retrospectivity and retroactivity of which is limited by s. 11 (g) of the Charter, there is no requirement of legislative prospectivity embodied in the rule of law or in any provision of our Constitution. Professor P. W. Hogg sets out the state of the law accurately (in Constitutional Law of Canada (loose-leaf ed.), vol. 2, at p. 48-29):
>
>> Apart from s. 11 (g), Canadian constitutional law contains no prohibition of retroactive (or ex post facto) laws. There is a presumption of statutory interpretation that a statute should not be given retroactive effect, but, if the retroactive effect is clearly expressed, then there is no room for interpretation and the statute is effective according to its terms. Retroactive statutes are in fact common.

[66] Justice Major went on to state for the Supreme Court in *Imperial Tobacco*:

> 71. The absence of a general requirement of legislative prospectivity exists despite the fact that retrospective and retroactive legislation can overturn settled expectations and is sometimes perceived as unjust: see E. Edinger, "Retrospectivity in Law" (1995), 29 U.B.C. L. Rev. 5, at p. 13. Those who perceive

> it as such can perhaps take comfort in the rules of statutory interpretation that require the legislature to indicate clearly any desired retroactive or retrospective effects. Such rules ensure that the legislature has turned its mind to such effects and "determined that the benefits of retroactivity [or retrospectivity] outweigh the potential for disruption or unfairness": Landgraf v. USI Film Products, 511 U.S. 244 (1994), at p. 268.

[67] In sum, I interpret Parliament's intention was to protect those already under the review process, rather than the opposite, which would result in a retrospective effect of the new legislation. In Mr. Joly's context, he should have been provided an oral hearing because his review was ongoing at the time the new law was implemented in December, 2012.

(2) Oral Hearings and Procedural Fairness under the Common Law

[68] In addition to the rights that Mr. Joly had under the *CCRA*, I find that Mr. Joly's common law procedural fairness rights were also breached when he did not receive an oral hearing. I begin with a review of the relevant jurisprudence and follow with its application to this case, which is supported by similar recent case law.

(a) *Jurisprudence*

[69] The seminal case on the variable requirement for oral hearings in the post-Charter era is *Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177 [*Singh*], which asked whether Canada's refugee framework required an oral hearing. Justice Wilson decided that decision makers are not required to hold oral hearings in every case. However, she also noted that when a hearing touches on the rights mentioned in section 7 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*], there is a presumption that an oral hearing will be provided, in accordance with the principles of fundamental justice. In that instance and context, oral hearings were required, and refugee claimants in Canada have benefited from that protection since *Singh*. Comparing the refugee proceeding to a parole hearing, Justice Wilson wrote:

> It seems to me that the appellants in this case have an even stronger argument to make than the appellant in *Mitchell*. At most Mr. Mitchell was entitled to a hearing from the Parole Board concerning the revocation of his parole and a decision from the Board based on proper considerations as to whether to continue his parole or not. He had no statutory right to the parole itself; rather he had a right to proper consideration of whether he was entitled to remain on parole.
>
> (*Singh* at 210)

[70] Justice Wilson went on in *Singh* to explain that while not every situation requires an oral hearing, oral hearings are particularly important when credibility is disputed:

> I should note, however, that even if hearings based on written submissions are consistent with the principles of fundamental justice for some purposes, they will not be satisfactory for all purposes. In particular, I am of the view that where a serious issue of credibility is involved, fundamental justice requires that credibility be determined on the basis of an oral hearing. Appellate courts are well aware of the inherent weakness of written transcripts where questions of credibility are at stake and thus are extremely loath to review the findings of tribunals which have had the benefit of hearing the testimony of witnesses in person: see *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802, at pp. 806-08 (*per* Ritchie J.) I find it difficult to conceive of a situation in which compliance with fundamental justice could be achieved by a tribunal making significant findings of credibility solely on the basis of written submissions.
>
> (*Singh* at 213-214)

[71] *Suresh v Canada (Minister of Citizenship and Immigration),* [2002] 1 SCR 3 [*Suresh*] and *Charkaoui v Canada (Citizenship and Immigration)*, [2007] 1 SCR 350 [*Charkaoui*] are two additional cases where section 7 rights were central to the Court's analysis. While these cases involved national security and immigration considerations, as opposed to criminal law and/or the incarceration of Canadian citizens, the principles are nonetheless relevant for our purposes. Both *Suresh* and *Charkaoui* found section 7 interests are engaged where liberty interests are at stake, as summarized in the following passage of Chief Justice McLachlin, writing for the Court in *Charkaoui*:

> 25. At the same time, it is a context that may have important, indeed chilling, consequences for the detainee. The seriousness of the individual interests at stake forms part of the contextual analysis. As this Court stated in *Suresh*, "[t]he greater the effect on the life of the individual by the decision, the greater the need for procedural protections to meet the common law duty of fairness and the requirements of fundamental justice under s. 7 of the *Charter*" (para. 118). Thus, "factual situations which are closer or analogous to criminal proceedings will merit greater vigilance by the courts": *Dehghani v. Canada (Minister of Employment and Immigration)*, [1993] 1 S.C.R. 1053, at p. 1077, *per* Iacobucci J.
>
> (*Charkaoui* at para 25)

[72] The Chief Justice also analyzed the meaning of the principles of fundamental justice in *Charkaoui*:

> [29] This basic principle [overarching principle of fundamental justice] has a number of facets. It comprises the right to a *hearing*. It requires that the hearing be *before an independent and impartial magistrate*. It demands a *decision by the magistrate on the facts and the law*. And it entails the *right to know the case put against one*, and the *right to answer that case*. Precisely how these requirements are met will vary with the context. But for s.7 to be satisfied, each of them must be met in substance.
>
> [Emphasis in original] (*Charkaoui* at para 29)

[73] Finally, one other leading case from the Supreme Court of Canada bears mentioning in this analysis, regarding the form of hearing required to meet the requirements of procedural fairness and natural justice. In *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, the Supreme Court set out five factors that must be considered in determining the content of the duty of fairness: (1) the nature of the decision being made and the process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance of the decision to the individual affected; (4) the legitimate expectations of the said person; and (5) the choices of procedure made. These factors would apply to the PBC in the present case.

(b) *Application to this Case*

[74] For the PBC, the November 9, 2012 incident was a central factor in its decision to follow the revocation recommendation of the Parole officer. In its decision, the PBC stated:

> Despite some positives during your recent release including the gaining of employment, you again have shown a disregard for the conditions imposed to benefit your return to the community… The CRF and police information is more reliable and persuasive in this regard than the explanations you have provided. The possession of the flip knife is also a concern and contrary to the standard conditions of release.
>
> [Emphasis added] (PBC's decision, RR, p 28)

The PBC's decision, from which the above excerpt is drawn, was made in February 2013, after the Board knew that charges against the Applicant had been withdrawn.

[75] Likewise, the PBAD in its October 2013 appeal affirmed the PBAD decision despite the absence of an oral hearing. The PBAD's conclusion reads as follows:

> The Board expressed concern about your possession of a flip knife, which was deemed contrary to the standard conditions of release. The Board determined that the police and CRF reports regarding your behaviour were reliable and persuasive, as opposed to your explanations. The Board concluded that, given your past offense cycle, your recent non-compliant behavior caused your risk to become undue, if you were to be re-released into the community. Consequently, the Board decided to revoke you [sic] statutory release.
>
> Mr. Joly, the Appeal Division finds that it was not unreasonable for the Board to conclude that your risk had become undue, considering the well-documented circumstances surrounding your suspension, and the fact that the file information reveals an offense cycle involving a high number of robberies and history of non-compliance. It was also not unreasonable for the Board to assess your recent behavior as non-compliant, in view of the specific file information pertaining to your attendance at a party and your possession of a prohibited weapon, and for the Board to conclude that you likely returned to substance abuse, given the police report indicating a strong smell of alcohol and bloodshot eyes.
>
> [Emphasis added] (PBAD's decision, AR, p 43)

[76] The decision being made in this case has great impact on the Applicant, as well as those around him. In *Baker*, the Court stated, "The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated" (para 25).

[77] As discussed above, a unique feature of this decision is that the precipitating events leading to the revocation were allegations stemming directly from criminal charges that were later withdrawn. The Board chose to place more weight on the authorities' description of the incident with the "flip knife", rather than the explanations provided by the Applicant. The crucial problem with the decision is that the PBC believed the police version of the incident, rather than the Applicant's, despite the fact that:

i. it had not provided the Applicant with an opportunity to put forward his explanation orally to the Board; and

ii. the Crown had dropped the charges for possessing a prohibited weapon (the Parole officer wrote, in its January 7, 2013 addendum to its Revocation Recommendation Report, that the Crown had indicated that "in their view, it would have been difficult to successfully proceed with this matter" (RR, Vol 1, p 18)).

[78] Based on a review of the case law, it is my opinion that in these circumstances, procedural fairness required that the Applicant be given an opportunity to have an oral hearing. This conclusion is reached in light of the entirety of the record, including the withdrawal of the charges that led to the revocation. In short, given the nearly three-year deprivation of the Applicant's liberty that ensued with a direct causal link to withdrawn criminal charges, I find the Applicant had a justifiable expectation that he would be given the opportunity to explain himself to the Board. Indeed, while one does not know the reasons for which the Crown withdrew the charges, the withdrawal certainly raises doubts about whether Mr. Joly committed the alleged acts for which he was charged in the first place.

[79] When credibility is at issue, as it is here, and a negative determination carries the consequence of a significant period of re-incarceration, procedural fairness should, at the very least, provide the Applicant with an opportunity to relay his side of the story. The parole officer made it clear that this was what Mr. Joly wanted, and the fact that he believed he would get a hearing before the PBC, as he had in the past, helps to explain why he declined to make written representations to the Board.

[80] It is my view that the Board erred by denying the Applicant the opportunity to have an oral hearing, for all the reasons enumerated above.

[81] This analysis is also supported by the recent decision of the Quebec Superior Court in *Way c Commission des libérations conditionnelles du Canada,* 2014 QCCS 4193 [*Way*], which considered the amendments to section 140 of the *CCRA* and the removal of the right to an oral hearing in some circumstances. It found the legislative amendments unconstitutional.

[82] In *Way*, the two applicants, Messrs Way and Gariépy had both been serving life sentences for second-degree murder. Like Mr. Joly, counsel in *Way* argued that there must be a post-suspension hearing for the Board to assess the credibility of the offender, given the potential consequences to the applicants' freedom. While the consequences were more severe for these two gentlemen, due to their murder convictions, than for Mr. Joly with his past convictions, there is no distinction in the case at hand from the reasons given by the Court in *Way* for the requirement of an oral hearing before the Board.

[83] With respect to Mr. Joly, I was neither asked to consider striking down the legislation nor could I arrive at that outcome, as occurred in *Way*. Applicant's counsel confirmed that he was not seeking such an outcome, and in any event, counsel has not provided the requisite constitutional notice to the Attorneys General. The reasoning in *Way* regarding the need for an oral hearing, however, is still applicable to the matter before me.

[84] In *Way*, Justice St-Gelais of the Quebec Superior Court found the amendment to section 140(1)(d) of the *CCRA* to be unconstitutional. Relying on much of the section 7 case law cited above, the Court found that removing an oral hearing for revocation of parole was a deprivation of liberty not in accordance with the principles of fundamental justice and procedural fairness required due to the core section 7 liberty rights at stake. Justice St-Gelais ruled that the section 7 breach could not be saved by section 1, as per the test set out in *R v Oakes*, [1986] 1 SCR 103, considering the justifications provided by the Respondent, namely the expenditure of time and resources to provide an oral hearing.

[85] Justice St-Gelais in *Way* also referenced *Conroy v R,* [1983] OJ No 3089 [*Conroy*], where Justice Craig of the Ontario High Court of Justice held that where the Parole Board relied on a waiver from the applicant to forego an oral hearing, the onus was on the Board to establish that the waiver was informed:

> There is no evidence that the Applicant gave any waiver or consent in writing. The hearing was to decide whether his suspension should be cancelled or parole revoked… The Board has failed to satisfy that onus. On the contrary the circumstances herein indicate that any waiver or consent in relation to a hearing was not an informed waiver or consent… If the Applicant declined a hearing with full knowledge of his procedural rights and what issues would be decided, then in my opinion he would have no right to complain later. In other words if it was an informed consent there would be no basis for finding any lack of procedural fairness, denial of natural justice or fundamental justice; and therefore no entitlement to a later in-person hearing on a re-examination.
>
> (*Conroy* at paras 21-23)

[86] Likewise, in the present case, the evidence points to the fact that when Mr. Joly signed three forms waiving written representations, he believed that he would have an oral hearing. It

was, therefore, not an informed waiver. He had indicated this belief that he would be given a hearing to the parole officer in his post-suspension interview, and confirmed it by way of affidavit for this JR:

> Later, while in custody, a parole officer came to see me. That parole officer advised me that my release had been revoked. I explained that I did not have an opportunity to say anything to the parole board about the allegations against me. I advised her [the parole officer] that I believed I would be entitled to a circle hearing before the Parole Board of Canada. That parole officer told me it was the new system.
>
> (Applicant's Affidavit, AR, p 11, para 12)

[87] The parole officer confirmed the above in the Revocation Recommendation Report, so it is not in dispute:

> A post-suspension interview occurred on November 14, 2012 at the Sudbury District Jail with JOLY and the undersigned… JOLY indicated that at this time he intends to meet with the Parole Board of Canada regarding his suspension once he has dealt with his outstanding charges.
>
> (Revocation Recommendation Report, AR, p 22)

[88] *Way* also cites other superior court cases for the proposition that the right to an oral hearing upon revocation of parole is a principle of fundamental justice. For instance, in *R v Cadeddu*; *R v Nunery*, (1982) 146 DLR (3d) 629 [*Cadeddu*], Justice Potts wrote:

> **36** Considering that the rights protected by s. 7 are the most important of all those enumerated in the Charter, that deprivation of those rights has the most severe consequences upon an individual, and that the Charter establishes a constitutionally mandated enclave for protection of rights, into which government intrudes at its peril, I am of the view that the Applicant could not be lawfully deprived of his liberty without being given the opportunity for an in-person hearing before his parole was revoked. It was conceded, by Mr. Cole, that there might be

> circumstances in which parole could be revoked without a hearing, but the Crown, for its part did not suggest this was such an instance.
>
> **37** Although nothing in the common law or in federal or provincial legislation required the Board to grant a hearing -- or, for that matter, forbade the Board to do so -- I am of the opinion that the Charter dictates that such an opportunity be given. The Board, having revoked the Applicant's parole without affording him the opportunity for a hearing, therefore exceeded any jurisdiction it could possess.

[89] *Conroy* and *Cadeddu* were both decided in a different time and regime. The *Charter* was nascent, and there was predecessor legislation, *The Parole Act,* RSC 1970, c P-2. However, as discussed below, more recent provincial jurisprudence also arrives at similar conclusions to those early *Charter* cases.

[90] In both *Illes v Kent Institution,* 2001 BCSC 1465 [*Illes*] and *Jones v Mission Institution,* 2002 BCSC 12 [*Jones*], the Supreme Court of British Columbia found that a provision of the *CCRA*, which revoked statutory release without a hearing, resulted in the improper deprivation of the petitioner's liberty that violated his section 7 rights. These cases were based on different sections of the *CCRA*, which had a different effect, namely a provision which, at the time, provided an automatic revocation of parole without any sort of hearing whatsoever (written or oral). The Court held in *Illes*:

> **16** I can see no sound reason why, in order to protect the public, all offenders who have been sentenced to some term of imprisonment for offences committed during statutory release must be deprived of a hearing to determine whether they should be imprisoned for what can be at least a year regardless of their circumstances. And I certainly do not see why only those who are sentenced to a term of imprisonment, as opposed to those having some other form of sentence imposed, should not be heard in the

> same way that all other offenders who breach the conditions of statutory release are heard before their release is revoked.
>
> **17** It is said that the rights protected by s. 7 are the most important of all those enumerated in the Charter, and that the deprivation of those rights has the most severe consequences on the individual: Cadeddu at p. 109. It seems to me that the s. 1 justification must then be most compelling if the deprivation is to be sanctioned. Here, in my view, it is not.
>
> **18** Certainly there are instances of re-offending where the immediate revocation of a statutory release would not be at all difficult to defend. Indeed, in the case of a violent offender, or in a case where the protection of the public is otherwise threatened, revocation may be clearly justified. But this case would appear to illustrate rather well why the statutory release of all offenders who re-offend should not be revoked without a hearing. It is not necessary for the proper protection of the public.

[91] The BC Supreme Court struck down the legislation, and ordered an oral hearing for Mr. Illes. The next year, the BC Supreme Court followed this decision in *Jones*, a case with similar facts, again arriving at the same outcome.

[92] The Quebec Superior Court in *Way* also applied this Court's jurisprudence, including *Hewitt v Canada (National Parole Board)*, [1984] 2 FC 357 at paras 15-17, where the Federal Court found that the Applicant's right not to be deprived of his liberty, except in accordance with the principles of fundamental justice, was infringed because he and his lawyer were partly excluded from the post-suspension hearing.

[93] The *Way* decision held that such a situation amounts to a miscarriage of justice and infringes section 7 of the *Charter*, except where this is justified by confidentiality or security concerns (and such exception was neither the case in *Way,* nor is it here).

[94] Another Supreme Court case bears mention on this point. The Supreme Court in *Canada (Attorney General) v Whaling,* 2014 SCC 20 applied section 11(h) of the *Charter* to retroactive legislation denying parole eligibility. Although the case was decided on different facts and different *Charter* provisions than *Way* and the case at bar, Justice Wagner's observations about procedural protections in the parole context are nonetheless instructive:

> [63] Whether less drastic retrospective changes to parole constitute double punishment will depend on the circumstances of the particular case. Generally speaking, a retrospective change to the conditions of a sentence will not be considered punitive if it does not substantially increase the risk of additional incarceration. Indicators of a lower risk of additional incarceration include a process in which individualized decision making focused on the offender's circumstances continues to prevail and procedural rights continue to be guaranteed in the determination of parole eligibility.
>
> [Emphasis added]

[95] The jurisprudence referenced above supports my conclusion that Mr. Joly's rights to procedural fairness were breached when he was denied an oral hearing in this case, given the fact that, like in *Way*, his credibility was in question and the consequences of a negative determination would have a serious impact on his liberty interests.

[96] The Respondent's argued that the review process did in fact include an oral hearing when the parole officer held the post-suspension interview with Mr. Joly. On this point, while the Applicant may have provided his version of events to the parole officer, the parole officer was not the one who made the final decision revoking his release. I am of the opinion that the post-suspension interview, which was part of a recommendation process, did not satisfy the requirement for a hearing in this case.

[97] Where substantial liberty interests are at stake, the *audi alteram partem* principle, or the importance of hearing the other side, governs (*Way,* at para 64), and when credibility is squarely at issue, the decision-maker must hear the testimony of the applicant and decide on all the evidence.

[98] The Respondent's alternate argument was that the lack of a formal oral hearing for Mr. Joly was justified due to the short statutory timelines (90 days) under which the Board must operate pursuant to the *CCRA* regime. This would be the kind of justification which properly belongs under a section 1 *Charter* analysis, whether there are reasonable limits prescribed by law as can be demonstratively justified in a free and democratic society. The Applicant did not ask as a remedy that this Court strike down the impugned provision of the *CCRA*, and there were no arguments specifically made with respect to a section 1 justification (although the parties were aware of the *Way* decision and both made written submissions on this case).

[99] I am nonetheless mindful of the Respondent's arguments in response to *Way*, i.e. that efficiency, and short statutory timelines, justify any breach of the Applicant's section 7 *Charter* rights. In this regard, I rely on the analysis in *Way* at paragraphs 100-107 where the Court determined that the breach was not justifiable under section 1 of the *Charter*. These arguments are also subject to the Supreme Court's holding that such rationales rarely justify section 7 infringement. As Justice McIntyre stated for the Supreme Court in *Reference re s. 94(2) of Motor Vehicle Act (British Columbia)*, [1985] 2 SCR 486 (SCC), at paragraph 93, "Section 1 may, for reasons of administrative expediency, successfully come to the rescue of an otherwise

violation of s. 7, but only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like."

[100] In this case, as in *Way*, there are no exceptional circumstances that would warrant such section 1 justifications. The 90 day timeline is not sufficient justification to overcome the requirement for an oral hearing in this matter.

[101] I will add two final thoughts on the application of *Way* and my conclusions on procedural fairness with respect to the Respondent's position. The Respondent argued in supplementary submissions that *Way* is distinguishable from this case because the judicial review in *Way,* before the Quebec Superior Court, was of a PBC decision as opposed to a PBAD decision, as in the case herein.

[102] I do not find the distinction between the PBC and PBAD to make any difference to the analysis, since the standard of review for procedural fairness is correctness. The case law confirms that I must ensure that the PBC's decision is lawful, even though this is a review of the PBAD decision: *Korn v Canada (Attorney General)*, 2014 FC 590 at para 13.

[103] Finally, the Respondent relied on the Supreme Court of Canada's decision in *Mooring v Canada (National Parole Board)*, [1996] 1 SCR 75 for the following propositions from that case:

> 25 The [PBC] acts in neither a judicial nor a quasi-judicial manner
> ...

> 26 ... [It] does not hear and assess evidence, but instead acts on information. [It] acts in an inquisitorial capacity without contending parties. ...
>
> 27 In the risk assessment function of the [PBC], the factors which predominate are those which concern the protection of society. ...
>
> 36 In the parole context, the [PBC] must ensure that the information upon which it acts is reliable and persuasive. ...

I have arrived at my conclusions on fairness with all of the above in mind.

B. *Issues 2 and 3: Reasonability of the Decisions, and the Gladue Factors*

[104] With respect to the second issue of whether the PBC's decision was unreasonable because of a misapprehension of the facts, this does not need to be addressed in light of my conclusions on the first issue. There is likewise no need to analyze the third issue of the application of the *Gladue* principles.

VIII. Conclusion

[105] The case law is clear that this Court must not interfere with decisions of Canada's parole authorities, the PBC and PBAD, unless there is clear evidence that the decision is unfair and creates a serious injustice for the inmate. In my view, this is one of those cases, as the denial of an opportunity to have an oral hearing, where the Applicant's liberty was at stake, was a breach of the procedural fairness owed by the PBC both under the common law and the statute. The PBAD therefore erred when it found that the Board had properly considered all available

information. I do not find it necessary to deal with the second and third issues raised in this matter, given the outcome of the first.

[106] The Applicant has requested an order in the nature of *certiorari* quashing the revocation of the Applicant's statutory release. Given that I have not made a finding as to whether revocation should result or not, I am not prepared to grant this remedy. However, since I am of the opinion that the Applicant was entitled to an oral hearing, this matter will be sent back for reconsideration by the PBC, taking into account these reasons, and given that the Applicant is incarcerated, providing an oral hearing within 30 days of this decision or within such further time as the Applicant requests.

[107] Costs are awarded to the Applicant.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The matter will be sent back to the PBC for reconsideration, providing the Applicant with an oral hearing.

2. Costs are to be awarded to the Applicant.

"Alan Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-370-14
STYLE OF CAUSE:	DONALD JOLY v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	AUGUST 26, 2014
JUDGMENT AND REASONS:	DINER J.
DATED:	DECEMBER 23, 2014

APPEARANCES:

John Dillon	FOR THE APPLICANT
Peter Nostbakken	FOR THE RESPONDENT

SOLICITORS OF RECORD:

John Dillon Barrister and Solicitor Kingston, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT