Federal Court  Cour fédérale

Date: 20160504

Docket: T-2296-14

Citation: 2016 FC 495

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, May 4, 2016

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

ANDRÉ ROBILLARD

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The applicant, André Robillard, will be 70 years old in a few weeks. His lengthy criminal record and many years' imprisonment in penitentiaries in this country were the result of significant maladjustment. Nonetheless, over the last few years, the applicant has made an effort to equip himself with tools that have helped him adopt more social behaviour. However, he is still stuck with an unfortunate label. In fact, he has had it since the 70s. At age 25, he became the youngest "habitual criminal" in Canada. The legal designation of "fugitive from justice," as used

by Molière, is certainly more neutral than a literal translation of the English expression "habitual criminal." However, for most people, the applicant will always be viewed as the latter. This is a hard label to live with, especially for an ageing man who says he is rehabilitated and represents no danger to society. Like many other offenders, he is also an alcoholic. He agrees that he is a criminal, but says he is not a dangerous offender. He certainly committed some violent crimes, but that was during a different period of time. In 1987, he killed a man who assaulted him in a bar, but he served his sentence for that manslaughter conviction. He paid his "debt" to society and says that he has since conquered his worst enemy: himself. The applicant's sobriety and alcohol avoidance have released him and given him back his freedom. However, this freedom that was regained through considerable effort remains very precarious because the applicant is still subject to the preventive detention sentence resulting from his habitual criminal designation in 1972. For this reason, in 2005, he asked the Governor General to grant him remission of this indeterminate sentence that was causing him much upheaval and harm. Nine years later, the Honourable Steven Blaney, Minister of Public Safety and Emergency Preparedness (the Minister), denied his request. This is the decision currently under review.

[2] In a letter dated September 9, 2014, addressed to the applicant's current counsel, Pierre Tabah, a Parole Board of Canada (PBC) representative, Pierre Richard Fidelia, explained the Minister's reasons for denying the request:

> [TRANSLATION]
>
> This is a response to Mr. Robillard's application for remission of his sentence under the Royal Prerogative of Mercy and his request that he be informed of the recommendation of the Parole Board of Canada (PBC).
>
> As you know, in accordance with the principle of an independent judiciary, remission of a sentence may only be granted when it is

> shown that there was an error of law, a great injustice for example, a change to a law that would have unintentional and unexpected consequences for a person found guilty, who received a sentence or punishment that was too severe and disproportionate to the nature and severity of the offences committed, but that was also more severe than that which others in a similar situation would have received.
>
> The Minister of Public Safety and Emergency Preparedness ordered the PBC to inform you that Mr. Robillard does not meet the criteria for clemency and therefore no investigation will be initiated in his case. He has not provided evidence that he suffered an injustice or a punishment that was too severe or disproportionate to the nature and severity of the offences committed. The Minister also ordered that you be advised that he does not sanction disclosure of the recommendation concerning the merit of the application to exercise the Royal Prerogative of Mercy in this case.

[3] The applicant simply does not accept this categorical refusal, because he claims the PBC and the Minister did not act fairly and did not seriously review his clemency application. The Minister's refusal was unreasonable, and the PBC's recommendation was not communicated to him beforehand. The Attorney General of Canada (the respondent) maintains that the contested ministerial decision is legal and reasonable, and that the PBC review process is also legal.

[4] The standard of review applicable to the examination of the merit of the contested decision is that of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 47 [*Dunsmuir*]; *Bilodeau v Canada (Department of Justice)*, 2011 FC 886 at paragraph 64 [*Bilodeau*]; *McArthur v Ontario (Attorney General)*, 2012 ONSC 5773 at paragraph 22; *Walchuk v Canada (Minister of Justice)*, 2013 FC 958 at paragraph 21). In terms of verifying whether the duty to act fairly has been met, the correctness standard of review applies (*Bilodeau* at paragraph 63), bearing in mind that the scope of the obligation of procedural fairness is

variable and to be decided in the particular context of each case (*Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC) at paragraph 21 [*Baker*]).

[5] However, whether the issue is procedural fairness or the reasonableness of the Minister's refusal, the judicial review cannot take place in a vacuum. Fortunately, rule 317 of the *Federal Courts Rules*, SOR/98-106 (Rules) allows any party involved in a judicial review to request relevant documents or materials that are in the possession of a tribunal whose order is the subject of the application. Moreover, rule 318 states that where the tribunal or a party objects to a request under rule 317, the Court may give directions on how to proceed and order that all or some of the requested documents be provided.

[6] On December 2, 2014, following the applicant's request by way of his Notice of Application, the PBC provided a copy of its recommendation, this time with no objection from the Minister to its disclosure. On March 9, 2015, subsequent to the respondent's parallel request, the PBC also produced, with the exception of documents subject to solicitor/client privilege, the entire PBC file relating to the clemency application, including the decision rendered by the Minister on August 29, 2014 and shared with the PBC on September 9, 2014, the PBC's recommendation, the applicant's criminal record, as well as the decisions and other extraneous material not provided with the clemency application that the PBC consulted for the purposes of the recommendation.

[7] In this case, the Minister's refusal followed a negative recommendation from the PBC on March 18, 2014, which was not shared with the applicant or his counsel before the contested

decision was made. This failure to disclose raises two separate questions. First, was there a material breach of procedural fairness? Secondly, should the review of the reasonableness of the Minister's decision be limited to the reasons given in Mr. Fidelia's letter of September 9, 2014, or could it also include a review of the recommendation in question and other extraneous material that was not previously shared with the applicant or his counsel?

[8] This application for judicial review should be allowed. On the one hand, there were serious material breaches of procedural fairness. On the other hand, the respondent cannot rely on the PBC's recommendation to justify the reasonableness of the Minister's refusal. For a better understanding of the final result, I will consider the parties' submissions after providing a general description of this case, as well as the complex legal framework on which it is built.

"HABITUAL CRIMINAL": A DESIGNATION THAT IS FALLING INTO DISUSE

[9] This issue has been raised before. First of all, there is the idea that the "habitual criminal" is a particular breed of offender who, either through social determinism or voluntary life choices, has become an incorrigible repeat offender, who society is forced to quarantine, as if to protect itself from a sick and contagious body. Let us first review the criteria for and legal effects of designating an individual as a "habitual criminal." First adopted in 1947 (SC 1947, c 55, section 18), and subsequently modified several times (SC 1953-54, c 51, section 660; SC 1960-61, c 43, section 33; 1968-69, c 38, section 77), the former section 688 of the *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*] allowed the Superior Court of criminal jurisdiction, upon application, to designate an accused as a "habitual criminal" and sentence the individual to preventive detention in the interest of protecting the public (former section 687). After reaching

the age of 18, the accused must have been convicted of three or more separate indictable offences resulting in a sentence of imprisonment for five years or more and be persistently leading a criminal life.

[10] However, the Darwinian theory of criminal phenomena, which justified shutting away habitual criminals, gave way long ago to a sociological understanding. Crime is most often the result of an individual's failed social adaptation; therefore, deviant behaviour can be corrected by a reassessment of values. However, even if opportunity makes thieves, a good number of these asocial individuals who are considered a "public nuisance" can still be rehabilitated. The "habitual criminal" category was done away with in Canada (SC 1976–77, c 53, section 14). However, there is no question that a minority of dangerous individuals will never be rehabilitated. The risk is too great to release these individuals, even on parole, hence the need for preventive detention in a penitentiary, even after they have served their initial sentence. In Canada, since 1977, only "dangerous offenders" can be sentenced to preventive detention, the ultimate indeterminate sentence.

[11] Obviously, we must now refer to the provisions of section 687 of the *Criminal Code*. As pointed out by the Supreme Court in *R v Lyons*, 1987 CanLII 25 (SCC) at paragraph 43 [*Lyons*]:

> First, the legislation applies only to persons convicted of a "serious personal injury offence" as defined in s. 687. These offences all relate to conduct tending to cause severe physical danger or severe psychological injury to other persons. Significantly, the maximum penalty for all these offences must be at least ten years' imprisonment. Secondly, it must be established to the satisfaction of the court that the offence for which the person has been convicted is not an isolated occurrence, but part of a pattern of behaviour which has involved violence, aggressive or brutal conduct, or a failure to control sexual impulses. Thirdly, it must be

> established that the pattern of conduct is very likely to continue and to result in the kind of suffering against which the section seeks to protect, namely, conduct endangering the life, safety or physical well-being of others or, in the case of sexual offences, conduct causing injury, pain or other evil to other persons. Also explicit in one form or another in each subparagraph of s. 687 is the requirement that the court must be satisfied that the pattern of conduct is substantially or pathologically intractable.
>
> [Emphasis added]

[12] This frame of reference can stand on its own. But then what became of the "former" habitual criminals? Were they automatically converted into "dangerous offenders?"

[13] Obviously, the answer is no. Because that would have required the retroactive application of the law. However, as we have seen, the conditions for designating an individual as a dangerous offender are more stringent than those for designating a habitual criminal could have been. Nonetheless, despite the repeal of the former section 688 of the *Criminal Code*, a habitual criminal, today, is still subject to the legal and human consequences of this designation, which are, in effect, of a permanent and inescapable nature. In other words, the applicant's preventive detention sentence in 1972, almost 45 years ago, will follow him for the rest of his life.

[14] The applicant is one of the last habitual criminals in Canada, but in the early 80s, they numbered a little more than 90. However, a separate event fundamentally changed the parameters of the debate: the entry into force in 1982 of the *Canadian Charter of Rights and Freedoms*, part I of the *Constitution Act, 1982*, schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. In the past, in the name of parliamentary sovereignty, elected officials could enact laws to eradicate or avoid an increase in the social scourge of criminal behaviour,

without the possibility of review by the courts. Now, however, the system of protection for the individual provided for by the *Charter* must be taken into account. The *Charter* guarantees the rights and freedoms set out therein, subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society (section 1 of the *Charter*).

[15] It was therefore not long before we asked ourselves whether the continuation, without any legal framework, of a system of preventive detention for habitual criminals was consistent with the *Charter*, and would be able to survive a constitutional challenge. Thus, in December 1982, in a report of some 200 pages, (Michael Jackson, *Sentences That Never End: The Report on the Habitual Criminal Study*, Vancouver, University of British Columbia, 1982), Professor Michael Jackson of the University of British Columbia noted that Parliament, by amending section 678 of the *Criminal Code* in 1977, "had clearly indicated that henceforth only those persons who were dangerous should be sentenced to preventive detention," and that after 1977, "the fact that a person had committed a number of non-dangerous offences and was leading persistently a life of crime, whilst relevant to fixing the sentence for any further offence such a person committed, would not be sufficient for the indeterminate life sentence of preventive detention" (pages 21-22). This echoed the fact that, in 1969, the committee chaired by Justice Ouimet had concluded that "the habitual criminal legislation had been misdirected in Canada against serious social nuisances rather than the dangerous criminal." Professor Jackson noted regarding the 18 habitual criminals he met in 1980 that "thirteen of the 18 habitual criminals or 72% have been identified by the Parole authorities as nuisance offenders rather than dangerous offenders" (pages 27-28). Note that the applicant's case was not studied by Professor Jackson, who concluded that "none of the men in the study can properly be viewed as dangerous

offenders and that some of them present a low risk of criminal recidivism, there are some men who may well commit further offences" (page 50). After analysis of the case law, he concluded that "the continued application of preventive detention to the men in the study is a violation of section 12 of the Charter of Rights and Freedoms" (page 63). But what do the courts themselves say?

[16] In July 1983, in *Re Mitchell and the Queen* (1983), 6 CCC (3d) 183 (Ont H Ct J) [*Mitchell*], the following, now famous, ruling was handed down by the Ontario High Court of Justice. Mr. Justice Allen Linden flatly stated that the continued preventive detention of habitual criminals could, in certain specific cases, constitute "cruel and unusual treatment or punishment" within the meaning of section 12 of the *Charter*: "I find that the continued detention of the applicant, if in fact he is no more than a social nuisance and not a danger to the public, satisfies the disproportionality test. . . [and] I find that the applicant may be entitled to relief pursuant to s. 24(1) of the Charter. . ." (page 219). In this case, Linden J. adjourned the application for *habeas corpus* and informed the parties that the Superior Court of Justice in Ontario would be obliged to order the release of the applicant Mitchell if the Crown was unable to satisfy the Court, on the merits, that he still represented a danger to the public within the meaning of the new provisions of the *Criminal Code* concerning dangerous offenders.

[17] In October 1983, Linden J. ordered the immediate release of applicant Mitchell, who would no longer be subject to the sentence of preventive detention that had been imposed in 1970. This first legal analysis obviously compelled the government to reflect on the matter. Shortly thereafter, the Inquiry into Habitual Criminals in Canada, chaired by the Honourable

Mr. Justice Stewart M. Legatt (Leggatt Commission), was mandated by the Solicitor General and the Minister of Justice to review the habitual criminal files to determine whether each of those individuals represented a danger to the safety of others in light of the new criteria and the general philosophy set forth in Part XXI of the *Criminal Code* concerning dangerous offenders. The Leggatt Commission report was published in 1984 (Canada, Inquiry into Habitual Criminals in Canada, *Report of the Inquiry into Habitual Criminals in Canada*, Ottawa, Government of Canada, 1984, the Honourable Mr. Justice Stuart M. Leggatt [Leggatt report; Commission report]).

[18] Leggatt J. sorted the habitual criminals into three categories:

a) Those who were not candidates for dangerousness proceedings and did not present a danger to the personal safety of others having regard for the philosophy of Part XXI of the *Criminal Code*. This involved 73 individuals.

b) Those who did not present themselves as candidates for dangerousness proceedings based on their records, but who did present a danger to the personal safety of others. There were nine individuals in this category.

c) Those who presented themselves as candidates for dangerousness proceedings and represented a danger to the personal safety of others. There were five individuals in this category.

[19] The possibility of rehabilitation and the offender's level of dangerousness were central to justifying a continued sentence of preventive detention. But how can dangerousness be assessed? The Leggatt Commission found that "too much emphasis in the past has been placed on the capacity of psychiatrists and psychologists to predict future dangerous behaviour in both the Court system and the parole system" (page 82). More objective elements should be considered,

such as the offender's past behaviour and age, and other external factors, such as alcohol and drugs, which increase the risk of recidivism.

[20] Leggatt J. also noted the following on this subject on pages 82-84 of the Commission report:

> My own approach to assessing these cases has been determined not only by the criteria set forth in Part XXI of the **Criminal Code** but also by common sense. I believe the best indicator of a person's potential for dangerousness is what he has done in the past. In this context considerable emphasis has been placed by the Inquiry in ascertaining the specifics of the past behaviour of each of the habitual criminals with a view to ascertaining the potential danger which is evidenced by such conduct.
>
> The experts also acknowledge the decrease in dangerousness and criminality as persons age or "burn-out". My examination of each of these individuals has focused considerably upon the attitudinal and behavioural changes that have occurred as they grew older. A third factor upon which I have placed emphasis in my consideration of these cases is to identify those external influences on behaviour (drugs, alcohol, mental disorder) and attempt to discern the extent to which the habitual criminal has overcome his problems in these areas.
>
> I should like to make this comment with respect to alcohol abuse. Many of the habitual criminals are alcoholics. This disease has been a significant factor in the "revolving-door syndrome" of these individuals. When released on parole a condition to abstain from alcohol is frequently included as a condition to such release. While some of the habitual criminals have been able to abide by this condition and successfully complete parole, many others have not. Those who have failed to abide by such conditions have found themselves, sooner or later, re-incarcerated as a result of the revocation of their parole.
>
> If the purpose of conditions on parole for habitual criminals is to ensure behaviour in the community that will limit the danger to the public, then an abstinence clause is an appropriate condition if the habitual criminal has a history of committing dangerous or potentially dangerous acts while under the influence of alcohol.
>
> [Emphasis in the original.]

[21] According to the Commission report, "alcohol and/or drug abuse played a major role in the criminal activities of at least 53 of the subjects reviewed" (pages 8-9). In this case, "the best predictor of dangerousness lies in the past conduct and record of the subject," whereas "the age of the subject is generally a positive consideration in most of the cases; the time elapsed since the last criminal offence having any element of violence or potential for violence was also a very serious consideration" (page 12). For a small number of these offenders, Leggatt J. recommended that clemency not be granted before the expiry of the period he specified. This was the case for the applicant. We will return to this later. Leggatt J. recommended automatic and immediate release for the majority of the habitual criminals.

[22] But herein lies the problem: What is to be done with sentences of preventive detention that were legally imposed by the courts? Should each and every habitual criminal who Leggatt J. recommended be released do as applicant Mitchell did and apply for a writ of *habeas corpus* to review the legality of a continued sentence of preventive detention? The Leggatt Commission proposed a practical, more economical and less risky solution than introducing a bill in Parliament. It found that "pardon power provides the most appropriate mechanism for providing relief to those habitual criminals deserving of such relief." The report explained that pardon "provides for appropriate flexibility in dealing with the different levels of achievements in the community that the various habitual criminals have attained" (pages 122-123). For Leggatt J., it is obvious that the exercise of the prerogative of mercy is not restricted by the Letters Patent constituting the office of Governor General of Canada (page 110), whereas, in Canada, "the power to pardon has been utilized. . . to grant relief to persons convicted of the most serious offence alleged in the **Criminal Code** – murder" (page 122). [Emphasis in the original]

[23] What is the royal mercy?

ROYAL PREROGATIVE AND APPLICATION FOR PARDON

[24] The terms "pardon" and "royal mercy" are often linked, but beware: there is "Pardon" and "pardon." It is important not to confuse the exercise of the royal mercy with the statutory power conferred on the PBC under the *Criminal Records Act*, RSC, 1985, c. C-47 to order that an applicant's criminal record be suspended, and that is conditional on the expiration according to law of the sentence in question. This would mean 10 years for an offence that was prosecuted by indictment, or five years for an offence that was punishable on summary conviction. The PBC can revoke this record suspension, formerly called a "pardon," if the individual is subsequently convicted of a prescribed offence or is no longer of good conduct.

[25] In contrast, the royal mercy is Her Majesty's exceptional power to remit the sentence of anyone sentenced by a court, while the sentence is still in full effect, regardless of the ignominy or severity of the crime committed. It is a holdover from the absolute power to pardon their subjects that British monarchs used to hold. When a sentence is thus remitted in Her Majesty's name—this is what distinguishes the royal mercy from a regular pardon—the offender's criminal record is not suspended. The previous sentence remains. However, the offender is completely and permanently freed from the consequences of the conviction. In this sense, the remission of sentence sought by the applicant will be permanent. It will not be a conditional pardon. Obviously, this type of solution is exceptional.

[26] To summarize: In a modern parliamentary monarchy, the Royal Prerogative of Mercy is exercised by the government that was democratically elected by the people. Historically, the royal mercy has had two strands and two objectives: to show compassion by relieving an individual of the full weight of his or her sentence, and to correct miscarriages of justice such as wrongful convictions (*Hinse v Canada (Attorney General)*, 2015 SCC 35 at paragraph 28 [*Hinse*]). These two strands were maintained in Canada.

[27] In terms of correcting miscarriages of justice, Parliament has since adopted legislation, the former section 690 of the *Criminal Code*, and, since 2002, the new subsections 696.1 to 696.6 of the *Criminal Code*, authorizing the Minister of Justice to order a new trial or refer the matter to a court of appeal. This review mechanism is available to anyone who has been convicted of an offence under an Act of Parliament or a regulation made under an Act of Parliament or has been found to be a dangerous offender or a long-term offender under Part XXIV and whose rights of judicial review or appeal with respect to the conviction or finding have been exhausted. However, a habitual criminal cannot avail himself or herself of these provisions, which do not include any transitional measures. Before 1994, the Department of Justice "took a more or less ad hoc approach" to section 690 applications (*Hinse* at paragraph 62). Now, the Minister of Justice must review subsection 696.1 clemency applications in accordance with the *Regulations Respecting Applications for Ministerial Review — Miscarriages of Justice* (SOR/2002-416) (subsection 696.2 of the *Criminal Code*).

[28] However, it is primarily the first, broader and less well-defined strand of the exercise of the Royal Prerogative of Mercy that is at issue in this file because it was already accepted that

the applicant's judicial designation as a habitual criminal in 1972 was perfectly legal at that time and supported by the evidence on record. Therefore, today, we speak of granting the applicant a "remission of sentence," which is explicitly allowed by subsection 748(1) of the *Criminal Code*, which states that "Her Majesty may extend the royal mercy to a person who is sentenced to imprisonment under the authority of an Act of Parliament, even if the person is imprisoned for failure to pay money to another person." That said, nothing in the *Criminal Code* "in any manner limits or affects Her Majesty's royal prerogative of mercy" (section 749 of the *Criminal Code*).

[29] As stated above, an individual's prior status as a "habitual criminal" does not automatically make this individual a "dangerous offender" today within the meaning of section 687 of the *Criminal Code*. Furthermore, according to the evidence on record, in the past, the Court remitted the sentences of several habitual criminals who did not represent a danger to public safety. Therefore, the Minister cannot pretend to be unaware of the favourable aspect of Leggatt J.'s comments in 1984 regarding the importance of the absence of dangerousness factor for a habitual criminal applying to Her Majesty for clemency. Legally speaking, it is the Governor in Council who grants a remission of sentence on behalf of Her Majesty. However, in practice, the Governor in Council will only act after receiving approval from the Minister or, at least, from another minister, such that all positive recommendations for royal mercy are directed to the Cabinet.

[30] In the 1980s, the royal prerogative was exercised through an internal ministerial review mechanism. In an internal note dated March 21, 1988, that was considered by the PBC and filed in the Court record in accordance with rule 318, the deputy minister, John C. Tait, summarized

the procedure to be followed in such cases for the benefit of the attorney general at the time, the Honourable Mr. Justice James Kelleher. It involved focusing on the danger to public safety that the habitual criminal could still represent:

> If it is your view that any of the cases should not be recommended for relief from the status of habitual offender, the inmates in question will continue to be eligible for parole release, and of course may challenge their continued incarceration/supervision by way of legal action or may apply for the Royal Prerogative of Mercy at any time.
>
> I believe it is important to bear in mind that in formulating your recommendation, the test is not whether any of these offenders might offend again, but rather whether they constitute a danger to the personal safety of the public. Continuing their status as habitual offender means that they are subject to lifetime parole (or custody). For those of this last group who have been out on parole now for several years, removal of habitual status essentially removes that "safety net." On the other hand, in the absence of proof of dangerousness, it can be said that that safety net is unnecessary and is cruel and unusual punishment. Should any of the pardoned habituals violate the law now, it can be argued that they can be dealt with under the normal process of the law.
>
> [Emphasis added]

[31] The Attorney General of Canada was responsible for administering the penitentiary system and the PBC. That function was abolished in 2005. Clemency applications under the royal prerogative are now handled by the Minister (formerly the Minister of Public Safety). Section 110 of the *Corrections and Conditional Release Act*, SC 1992, c 20 [*Corrections Act*] specifies that "the Board shall, when so directed by the Minister, make or cause to be made any investigation or inquiry desired by the Minister in connection with any request made to the Minister for the exercise of the royal prerogative of mercy." This explains the PBC's involvement in the current case. In theory, the Minister, whose expertise in this area is not being challenged, could have performed a [TRANSLATION] "preliminary review" of the applicant's

clemency application, but, instead, he chose to refer it to the PBC. As we will see further on, this application returned to the Minister nine years later. The PBC concluded that the applicant [TRANSLATION] "did not submit evidence that would justify proceeding further." If the Minister agreed with the PBC's recommendation, he only needed to sign the memo dated March 18, 2014 [TRANSLATION] "to indicate that an investigation regarding exercise of the [Royal Prerogative of Mercy] would not be initiated in this case."

[32] Since 1958, it has been the responsibility of the PBC to conduct this type of investigation regarding the exercise of the royal prerogative when ordered to do so by the Minister. Thus, the PBC took over from the former Remission Service that was responsible for investigating clemency applications on behalf of the Minister before the *Parole Act*, SC 1958, c 38 was adopted, which was replaced by the *Corrections Act* in 1992. According to the Fauteux Report completed in 1956 (Canada, Committee Appointed to Inquire into the Principles and Procedures Followed in the Remission Service of the Department of Justice of Canada, *Report of a Committee Appointed to Inquire into the Principles and Procedures Followed in the Remission Service of the Department of Justice of Canada*, Ottawa, Department of Justice of Canada, 1956), the Remission Service used to regularly investigate remission of sentence applications under the royal prerogative, particularly on the grounds that the punishment inflicted was excessively severe. This practice ended in 1925 (page 36).

[33] Today, the *Royal Prerogative of Mercy Ministerial Guidelines*, which were published and posted on the PBC website (http://pbc-clcc.gc.ca/prdons/rpmm-eng.shtml) [*Guidelines*] are intended to help the PBC evaluate the merits of clemency applications and determine whether or

not it should recommend to the Minister that the royal prerogative be exercised. On the subject of formulating a recommendation regarding a remission of sentence, in an internal note dated March 18, 2014, produced under rule 318, the executive vice-chairperson of the PBC, Marie-France Pelletier, advised the Minister as follows:

> [TRANSLATION]
>
> A set test used by the PBC stipulates that in accordance with the principle that the independence of the judiciary must be respected, remission of a sentence may only be granted when it is shown that there was an error of law, a great injustice, for example, a change in a law that would have unintentional and unexpected consequences for a person recognized as guilty who received a sentence or punishment that was too severe and disproportionate to the nature and severity of the offences committed, but also, that was more severe than that which others in a similar situation would have received.

[34] However, in the recommendation under review, the vice-chairperson specified that [TRANSLATION] "the [PBC] finds that other factors should be taken into consideration when formulating a recommendation in Mr. Robillard's case." [Emphasis added] Although it was not explicitly stated in the recommendation, the Court understands the "other factors" to be the applicant's dangerousness, his alcohol-related criminal behaviour, parole possibilities, and the fact that the applicant must now live with the consequences of his past actions and the inconveniences caused by the fact that he was designated as a habitual criminal in 1972 (see paragraph 53 of the present reasons). Thus, the exceptional nature of a pardon should take into account the applicant's particular situation. Obviously the Minister is not bound by a recommendation from the PBC, whether positive or negative. The essence of the royal prerogative is that its exercise not be limited (section 749 of the *Criminal Code*).

APPLICANT'S CRIMINAL HISTORY AND PROCESSING OF THE REMISSION OF SENTENCE APPLICATION

[35] General description: Since he was first charged in 1962 when he was only 16 years old until today, the applicant has had 59 convictions, including manslaughter in 1988. If the past was any indication of what was to come, young Mr. Robillard's future was plain to see. During the 10 years following his designation as a habitual criminal in 1972, he amassed convictions for bodily harm, weapons possession, escape attempt, forcible confinement, armed robbery and escape. In July 1979, the applicant was sentenced to 16 years' imprisonment in the United States for theft while he was unlawfully at large. This was significant because, although the applicant had not yet killed anyone—(this would come in 1987)—he was a dangerous man, who was respected by his peers and feared by society because they knew he could kill. Did this, however, make him an incorrigible repeat offender, who should be kept in preventive detention for the rest of his life?

[36] That is what Justice Rhéal Brunet, the learned magistrate of the Court of Sessions of the Peace, believed when, on March 7, 1972, following the applicant's previous convictions, he designated him a "habitual criminal" and sentenced him to preventive detention (indeterminate sentence). The applicant was only 25 years old. The magistrate was of the opinion that the applicant [TRANSLATION] "is an incorrigible repeat offender, who represents a constant threat to society, hence the current danger in leaving him at large."

[37] As was mentioned before, 12 years later, in February 1984, the applicant's case was reviewed by the Leggatt Commission. The applicant was in his prime. He was 37 years old. In an

appendix to the Commission report, on pages 520-530, Leggatt J. found that the applicant's continued preventive detention was justified because of his dangerousness (past or potential):

> DANGEROUSNESS
>
> Mr. Robillard has participated in active and serious crime since 1962. His period of reform and rehabilitation has only been since 1982 but too little time has gone by to be certain whether this change is permanent.
>
> I believe that he would have been a candidate for dangerousness proceedings at the time he was found to be an habitual criminal and I believe he continues to be a candidate for such proceedings.
>
> RELIEF
>
> I do not believe that Mr. Robillard is an appropriate candidate for relief at this time but if his progress continues he should be reviewed after a further 4 years. This recommendation should not in any way inhibit his progress towards parole.

[38] Therefore, more than 30 years ago, Leggatt J. considered that remission of sentence was not justified in the applicant's case. Nonetheless, he did not consider him an offender damaged beyond repair. Time alone would tell what progress the applicant would make in his rehabilitation. An administrative review of the applicant's file was to be conducted after four years, to allow departmental officials to evaluate the possibility of granting a remission of his sentence.

[39] However, on October 2, 1987, while the applicant was on parole, he was arrested and charged with murder. On August 4, 1988, the applicant was convicted of manslaughter and sentenced to 10 years 4 months in prison. This was his last serious personal injury offence. At that time, the applicant was 42 years old. Today, he emphatically states that he has learned his lesson—the hard way. Should we believe him? In this case, everyone involved acknowledges

that the applicant's criminal behaviour, including the manslaughter, is directly related to his uncontrolled alcohol consumption. As a result, while he was on parole, the applicant was convicted of various alcohol-related offences (1995, 2003 and 2010). Can an alcoholic offender who has already committed serious personal injury offences really escape that life one day?

[40] That is what the applicant thought 10 years ago, as did several experts who had followed his progress. So too did the PBC, which has already granted the applicant parole several times after he had served various sentences of imprisonment, so that he could change his ways. In August 2005, the applicant, with the help of his former counsel, Jacinthe Lanctôt, applied to the Governor General for remission of his sentence of preventive detention in accordance with the Royal Prerogative of Mercy. At that time, the applicant was 59 years old. In addition to a copy of the applicant's criminal record, the following was attached to the clemency application:

a) A document from the research section of the Department of Justice Canada concerning the applicant's hearing before the Leggatt Commission on February 8, 2014 (appendix 2)

b) Nine psychological counselling and treatment reports related to the applicant's drinking problem (1976 to 2003) (appendix 3)

c) Ten psychiatric and psychological assessments (1981 to 2002) (appendix 4)

d) Two psychological assessment reports, one psychiatric assessment report, and one psychiatric assessment report requested by counsel for the applicant (2004 and 2005) (appendix 5)

e) The complete Leggatt Commission report, including the *Mitchell* judgment (appendix 6)

f) An excerpt from the PBC's decision-making policies regarding offenders serving an indeterminate sentence (dangerous offenders and dangerous sexual offenders (appendix 7)

g) *R v Smith*, [1987] 1 SCR 1054 [*Smith*] judgment (appendix 8)

h) Professor Michael Jackson's study, *Sentences That Never End: The Report on the Habitual Criminal Study*, Vancouver, University of British Columbia, 1982 (appendix 9)

i) A sentence calculation by Suzanne Godin, Regional Chief, Sentence Management for Quebec (appendix 10)

j) Justice Rhéal Brunet's judgment in *R v Robillard* (March 7, 1972), Montréal 1453-70 (QCCSP), regarding the applicant's preventive detention application (appendix 11)

k) Court of Appeal of Quebec judgment in *Robillard v R*, [1985] CA 691 [*Robillard* 1985] (appendix 12)

[41] In essence, in his clemency application, the applicant is not claiming that his status as a habitual criminal is the result of a miscarriage of justice. He acknowledges that imposing an indeterminate sentence, in and of itself, does not violate section 12 of the *Charter*. Instead, he is asking those in charge of reviewing his clemency application to determine whether the continued sentence of preventive detention, which the PBC continues to use as a basis for limiting his freedom, is still justified today, since his degree of dangerousness has dropped drastically since the period during which he was convicted of manslaughter. Since preventive detention is now imposed on a specific group of "dangerous offenders," in which he is not legally included, the continuation of this sentence should be qualified as "cruel and unusual punishment" (*Mitchell* at pages 8 and 11; *R v Milne*, [1987] 2 SCR 512 at paragraphs 16–19; *Smith* at paragraph 56). This is one of those exceptional cases where the Royal Prerogative of Mercy should be exercised, in light of the disproportionate nature of the preventive detention sentence and the fact that, objectively, the applicant now represents no danger to the public.

[42] However, the remission of sentence application also emphasizes the personal and human aspects, and seeks Her Majesty's compassion. The perpetuation of the repulsive "habitual criminal" label is an affront to human dignity and is causing him serious moral harm. The applicant also wants his age and rehabilitation, which has included many treatments for his alcoholism, to be taken into consideration. In their reports supporting the clemency application, the psychologists and the psychiatrist consulted unanimously agree: [TRANSLATION] "The fact that [the applicant] was designated as a habitual criminal has affected him for a long time and led to various types of oppositional behaviour, including his escapes (never involving violence)" (Gilles Gadoua, psychologist, October 25, 2004); [TRANSLATION] "The early years of his release were difficult for him because he had to distance himself from the underworld (into which he had undoubtedly integrated), he felt constantly judged by society, he had little self-confidence" (Johanne Bergeron, psychologist, October 6, 2004); [TRANSLATION] "Mr. Robillard has a hard time accepting his status as a habitual criminal and finds that it is affecting his physical and psychological health" (Dr. Renée Fugère, psychiatrist, January 10, 2005); [TRANSLATION] "This emotional and physical exhaustion, and his major bouts of depression served as motivation and a strong reminder for him to stop drinking and, more importantly, to take care of himself" (Gilles Gadoua, psychologist, October 25, 2004).

[43] The applicant's "habitual criminal" status means that, although he has served his other sentences, he is practically on parole for life. In this context, if the preventive detention sentence is withdrawn, how much time will he have to serve? In 1985, the Court of Appeal of Quebec ruled that the applicant's previous sentences could be served consecutively among themselves, but concurrent to the indeterminate sentence (*Robillard* 1985). In 2005, the applicant speculated

that if he were released from his preventive detention sentence, in five or six years, he could envisage an end to the remaining federal sentence. [TRANSLATION] "This light at the end of the tunnel will only encourage [the applicant] to continue on his current rehabilitation path and to remain a law-abiding citizen." This optimism was based on the psychological and psychiatric evaluations that indicate the applicant's low level of dangerousness and the low risk to reoffend. [TRANSLATION] "The risk of reoffending with offences against the person seems low in the short and long term" (Daniel Henroteaux, psychologist, January 17, 2002); [TRANSLATION] "The subject was able to distance himself from the violent criminal behaviour that characterized him 15 years ago. . . Realistically, the potential for hostile acting out remains low" (Johanne Bergeron, psychologist, September 30, 2004); [TRANSLATION] "Since 1988, although, due to a few setbacks, this social adaptation has not been without stumbles, he has been able to avoid serious illegal acts that could have endangered the health and safety of others, as evidenced by the fact that he has not committed any further criminal offences, other than impaired driving" (Dr. Renée Fugère, psychiatrist, January 10, 2005).

[44] Mr. Fidelia, of the Clemency and Pardons Division, was the contact between the PBC and Ms. Lanctôt. On November 8, 2005, Mr. Fidelia requested a local police records check form and indicated that [TRANSLATION] "when we receive the document in question, the request will be reviewed to determine if an investigation should be initiated." Mr. Fidelia also indicated [TRANSLATION] "that it is <u>imperative</u> that you respond within two months. If we do not hear from you, we will assume that you no longer intend to pursue your request [on behalf of André Robillard] and we will close the file." [Emphasis added]

[45] The PBC received the requested police document on November 28, 2005. However, that did not move things along. Almost two and a half years later, on March 27, 2008, Ms. Lanctôt took over again and once more requested that [TRANSLATION] "the file review be completed as quickly as possible" since the applicant [TRANSLATION] "could foreseeably finish serving his sentence sometime in 2009/2010." Ms. Lanctôt also requested a hearing before the PBC.

[46] On April 23, 2008, Mr. Fidelia informed Ms. Lanctôt that a hearing is [TRANSLATION] "part of the process for a remission of sentence application, but does not apply to the preliminary assessment stage"; however, [TRANSLATION] "during the preliminary assessment, the [PBC] will accept any additional documents you consider useful for your client's application." At the same time, Mr. Fidelia informed Ms. Lanctôt that the PBC [TRANSLATION] "is in the process of completing the preliminary assessment for your client's clemency application to determine whether an investigation should be initiated." He specified that [TRANSLATION] "if, following the preliminary assessment, the Minister of Public Safety decides that the [PBC] should conduct an investigation and following the investigation the [Board] recommends that clemency be denied, your client will be invited to make oral or written submissions with or without assistance." [Emphasis added]

[47] The only element that appeared to be delaying the completion of the preliminary assessment was the exact calculation of the remaining federal sentence if the indeterminate sentence were remitted. In a letter dated April 23, 2008, Mr. Fidelia explained to Ms. Lanctôt that the PBC was waiting for a reply from Suzanne Godin of Correctional Services Canada: [TRANSLATION] "We hope to receive this information shortly, which will allow us to complete

the preliminary assessment of the application." In July 2008, the PBC received a first calculation: the sentence would end on April 24, 2031, when the applicant had reached the venerable age of 84! However, Ms. Godin was mistaken and clearly did not take into account the Court of Appeal *Robillard* decision, about which Ms. Lanctôt hastened to remind the PBC. The PBC had known about this decision since, at least, 2005 (appendix 12 of the clemency application). A new calculation was therefore prepared in October 2008: the sentence would instead be finished on July 31, 2011. Except that . . .

[48] On October 17, 2009, the applicant was arrested for drunk driving. And yes, he was on parole. He was charged with impaired driving and refusing to provide a breath sample. On January 19, 2010, he was sentenced to concurrent 12-month prison terms for each charge and, in the meantime, his parole was revoked and he had to return to the penitentiary. Those were the applicant's last convictions. He has not reoffended since then.

[49] On September 29, 2011, the applicant was granted day parole. At that time, according to the information provided to Ms. Lanctôt, a recommendation regarding the clemency application was (again, it seems) in the process of being finalized by Mr. Fidelia, who was supposed to forward it to Marie-France Pelletier, Executive Vice-Chairperson of the PBC. On October 11, 2011, Ms. Lanctôt wrote to the executive vice-chairperson to obtain a copy of the analysis and recommendation prepared by Mr. Fidelia, and the recommendation that she would submit to the Minister, if necessary: [TRANSLATION] "Given the complexity of the file, in the interest of procedural fairness, we must be able to make our submissions at all stages of the process." At the same time, Ms. Lanctôt said [TRANSLATION] "that a hearing before the [PBC]

would allow her to better demonstrate how a remission of sentence under the Royal Prerogative of Mercy would be the most appropriate measure under the circumstances."

[50] However, Ms. Lanctôt's request for a copy of the recommendation and a hearing, once again, received no response. Almost two years went by. On July 1, 2013, Ms. Lanctôt asked the executive vice-chairperson how things were progressing and reminded her that during a conversation with Mr. Fidelia in August 2012, she was told that [TRANSLATION] "the preliminary assessment had been sent to upper management for a recommendation to be made to the Minister of Public Safety and the Governor General." At the same time, Ms. Lanctôt repeated her written request of October 11, 2011 [TRANSLATION] "requesting access to the recommendation in the file, so that we can make submissions, if necessary," and again requested a hearing, saying that [TRANSLATION] "the time frame for reviewing [the applicant's file] was completely unreasonable and highly unfair, considering that [the applicant] should have been released since July 31, 2011." Once again, there was no response from the PBC.

[51] On March 14, 2014, Pierre Tabah, the applicant's new counsel sent a demand letter to the PBC, reminding them that almost nine years had passed since the clemency application was filed.

[52] On March 18, 2014, the executive vice-chairperson sent the Minister a seven-page PROTECTED B internal memo (document 36) with the following recommendation:

> [TRANSLATION]
>
> I reviewed the application and the information submitted by Mr. Robillard through his counsel in connection with the criteria and taking into consideration the above-mentioned circumstances.

> Based on this review, it is my opinion that he did not submit evidence that would justify proceeding further. If you agree, please sign the attached memo to indicate that an investigation in connection with the exercise of the RPM will not be initiated in this case.
>
> [Emphasis added]

[53] We are omitting the general comments about the history, the type of application and the summary of facts and reasons for clemency contained in the executive vice-chairperson's memo dated March 18, 2014. The PBC's reason for recommending that the Minister not conduct an investigation and refuse the clemency application is set out in the three following paragraphs:

> [TRANSLATION]
>
> Since the Leggatt Commission in 1984, Mr. Robillard has been sentenced for manslaughter, theft under $1,000 and for five driving offences involving alcohol. His criminal record comprises robbery, impaired driving, narcotics offences, uttering threats of death or bodily injury, obstruction of justice and possession of a weapon for dangerous purpose, which have resulted in releases, stays of proceedings or acquittal.
>
> Although it has been suggested that the preventive detention sentence subjected Mr. Robillard to cruel and unusual treatment or to punishment that was contrary to sentencing principles, the [PBC] took into account the fact that individuals serving a preventive detention sentence were offered many opportunities for review. Although a favourable decision was not rendered in Mr. Robillard's case, the [PBC] also considers that he has experienced and continues to experience the normal consequences of his actions and convictions. The documentation produced in support of the clemency application specifies that Mr. Robillard's habitual offender status has affected his physical and mental health. However, the [PBC] finds that he has not suffered an injustice or a punishment that was too severe or disproportionate to the nature and severity of the offences committed.
>
> Given the nature of the offences Mr. Robillard committed, the confirmed absence of a prosocial lifestyle, as well as the fact that alcohol played a significant role in his criminal history, we recommend, in the interest of public safety, that no investigation be

> initiated in connection with this application for remission of sentence.
>
> [Emphasis added]

[54] The PBC's analysis and recommendation were not conveyed to the applicant, but, at that time, his counsel was advised that the PBC recommendation (no indication of whether it was positive or negative) had been sent to the Minister. Moreover, in a separate two-page PROTECTED B memo, also dated March 18, 2014, the executive vice-chairperson reminded the Minister that [TRANSLATION] "there is a minimal duty of procedural fairness towards clemency applicants," noting that the PBC [TRANSLATION] "recommends full disclosure of the file," and adding that [TRANSLATION] "if you order disclosure, a possible consequence is that the recommendation may become a public document." [Emphasis added]

[55] On June 26, 2014, Mr. Tabah sent a demand letter to the Minister. It read as follows:

> [TRANSLATION]
>
> **Although we were assured that the file had been forwarded for review by the Minister of Justice, we still have not received a confirmation of receipt, news about the upcoming proceedings, information about the current status of the file, or information about the identity of the individuals currently handling the file.** The status of the file has therefore remained unchanged for nine years now and **Mr. Robillard still has not received a clear response regarding his application**. We are unable to inform our client about the progress in his file because we too are in the dark.
>
> Since Mr. Robillard's file indicates that his original sentence is now disproportionate to the dangerousness he represents, it is normal that he would expect a positive response or, at the very least, a response.
>
> We thought the file was on its way to finally being processed during our communication at the beginning of the year, but it is now obvious that the situation is unchanged and we are still going

> nowhere. Up to now, the actions of the various individuals involved in this file have been unfathomable and contrary to all our fundamental principles of justice. The harm our client has experienced is real, but the current situation seems unreal to us. **This therefore is a demand letter asking you to provide us with a formal response to our questions** within seven days of receipt of this letter. This short deadline is due to the lack of cooperation shown in this file since the request was filed in 2005.
>
> If you do not respond or are unable to respond within the required time frame, we will promptly present this file before a court of competent jurisdiction to have the case heard.
>
> Please act accordingly.
>
> [Emphasis in the original.]

[56] On August 29, 2014, the Minister made a final decision regarding the merits of the clemency application. His decision did not include reasons and, in the certified record that the PBC filed with the Court in accordance with rule 318, the memo dated March 18, 2014 (analysis and recommendation) was not signed by the Minister and returned to the PBC. However, the Minister sent the PBC a letter dated August 29, 2014 ("PROTECTED B"), addressed to the executive vice-chairperson, signed by the Minister himself, advising the following: [TRANSLATION] "I DO NOT AGREE with initiating an investigation in this case with a view to exercising the Royal Prerogative of Mercy" (document 43).

[57] At the same time, the Minister sent the PBC a second letter addressed to the executive vice-chairperson, also dated August 29, 2014 ("PROTECTED B"), signed by the Minister himself, indicating the following: [TRANSLATION] "I DO NOT AGREE with redacting and disclosing the recommendation concerning the merits of the request to exercise the Royal Prerogative of Mercy" (document 44).

[58] No official letter of refusal from the Minister was sent directly to the applicant or his counsel. The letter from the PBC dated September 9, 2014, was later sent to counsel for the applicant. In it, Mr. Fidelia indicated the Minister's refusal. The complete letter has been reproduced at the beginning of these reasons (see paragraph 2).

LIMITED SCOPE OF THIS JUDICIAL REVIEW

[59] Knowing that a sentence that is "grossly disproportionate," "so excessive as to outrage standards of decency," as well as "abhorrent or intolerable" to society is contrary to section 12 of the *Charter* (*Smith*)—the Supreme Court of Canada again made reference to this in *R v Lloyd*, 2016 SCC 13 at paragraph 24—the applicant wants an end to the suffering he is still experiencing today due to his "habitual criminal" status. Specifically, through this application for judicial review, the applicant requests a judgment from the Court setting aside and declaring illegal the Minister's refusal and the negative recommendation. He is seeking an order to compel the Minister to review his clemency application and the PBC to initiate an investigation in accordance with the relevant statutes and regulations.

[60] Note that the jurisdiction of the Federal Court in terms of extraordinary remedies against a federal board or the Attorney General of Canada is legally circumscribed by paragraphs (*a*) and (*b*) of subsection 1 of section 18 of the *Federal Courts Act*, c F-7 [FCA]. Although it has exclusive jurisdiction to review the legality of the final decision rendered by the Minister on August 29, 2014, this Court is not required to rule on the legality or reasonableness of the special conditions for parole imposed on the applicant by the PBC in the past. Nor is this Court required to decide if the applicant, who was never officially declared a "dangerous

offender" by a court of competent jurisdiction, remained in prison for a significant period beyond the time when he could have been granted parole, when the Supreme Court of Canada had already decided, in a similar case, that the PBC's decision to keep the offender in prison could very well violate section 12 of the *Charter* (*Steele v Mountain Institution*, [1990] 2 SCR 1385 at page 1412).

[61] Furthermore, even if we agree that "indeterminate detention under the dangerous offender regime is warranted only insofar as it actually serves the purpose of protecting the public" (*R v Johnson*, 2003 SCC 46 at paragraph 20), and we wish to apply the same reasoning to habitual criminals who have not been granted a remission of sentence (*Mitchell*), the issue here is not to rule on the legality of the application of the preventive detention sentence. Note that Parliament deliberately did not mention *habeas corpus* in subsection 18(1) of the FCA, although subsection 18(2) of the FCA explicitly states that the Court has exclusive jurisdiction to grant a writ of *habeas corpus* in relation to a member of the Canadian Forces serving outside of Canada. Although some Federal Court colleagues may have voiced some doubts on this matter (*Warssama v Canada (Citizenship and Immigration)*, 2015 FC 1311 (CanLII), at paragraphs 35-36), it now seems accepted that the provincial superior courts not only have general jurisdiction to grant a writ of *habeas corpus*, but that they also have concurrent jurisdiction with the Federal Court to verify the legality of any decision from a penitentiary official affecting the "residual liberty" of an inmate: *R v Miller*, [1985] 2 SCR 613; *Mission Institution v Khela*, 2014 SCC 24 at paragraphs 31-50). See also the recent decision from the Ontario Court of Appeal, to similar effect, but in the context of immigration: *Chaudhary v Canada (Public Safety and Emergency and Preparedness*, 2015 ONCA 700).

[62] Also, as we well know, although the jurisdictions of the Federal Court and superior courts overlap to a certain point, there are fundamental differences in handling an application for judicial review and an application for *habeas corpus*. Firstly, in the context of an application for judicial review, it is incumbent on the applicant to prove that the federal decision-maker made a reviewable error, whereas in the context of an application for *habeas corpus*, this responsibility falls to the prison authorities, once the prisoner has established deprivation of liberty and raised a valid doubt concerning the legality of this deprivation. Secondly, during judicial review, the Federal Court must limit its review to only the evidence that was before the decision-maker, whereas, for *habeas corpus*, extrinsic evidence may be considered. Thirdly, during judicial review, the Federal Court will show deference with respect to issues within the decision-maker's field of expertise, whereas, the superior courts hearing a *habeas corpus* application will examine the merits of the detention without regard to any conflicting interpretation from the decision-maker. Fourthly, while judicial review constitutes an intrinsically discretionary recourse (the Court can refuse to hear the case or to grant the remedy requested), superior courts automatically grant the writ of *habeas corpus* when the detainee has shown deprivation of liberty and raised a valid doubt regarding the legality of the detention.

[63] Thus, the *Mitchell* judgment and the Leggatt Commission report, rather than being isolated incidents, have had extensive follow-up, such that a habitual criminal who was unable to obtain a remission of sentence through the Royal Prerogative of Mercy is not without judicial recourse today to have the legality of the continuance of the preventive detention sentence reviewed. Specifically, the approach adopted by Linden J., under which continued detention can be considered cruel or unusual treatment or punishment under the terms of section 12 of the

Charter, has never been rejected by the Courts. The Supreme Court of Canada affirmed this in *Steele v Mountain Institution*, [1990] 2 SCR 1385, at pages 1405-1406. It also seems to have been affirmed in subsequent decisions with a legal framework similar to the one in this case.

[64] In this regard, the first assessment criterion seems to be that of the dangerousness of the offender with respect to public safety. For example, in 1995, the Ontario Court of Appeal allowed the appeal of a habitual criminal who posed no danger and granted a writ of *habeas corpus* ordering his release although he was no longer incarcerated and was on parole (*Gallichon v Commission of Corrections and Attorney General for Ontario*), [1995] OJ No 2744 (CA Ont)). However, this case involves assessing the legality and reasonableness of a decision rendered by the Minister in connection with the exercise of the royal prerogative. As we have seen, the Minister has the discretion to consider several factors although, in the past, dangerousness could be a determining factor in the cases of habitual criminals who obtained a remission of sentence based on recommendations from the Leggatt Commission.

REVIEWABILITY OF THE CONTESTED DECISION

[65] First, the applicant pointed out that his clemency application had not been processed within a reasonable time frame, which is inconsistent with procedural fairness and the fundamental principles of justice recognized under section 7 of the *Charter*. Nine years went by before a decision was rendered regarding the contested decision. In the absence of reasonable explanations, this much of a delay is "equivalent to an implied refusal to perform the duty to act" (*Ben-Musa v Canada (Minister of Citizenship and Immigration)*, 2005 FC 764 (CanLII) at paragraph 21).

[66] The respondent claims that the applicant cannot obtain royal mercy solely on the basis of time elapsed and the Court cannot intervene even if the long delay in assessing the clemency application is unjustified and unreasonable in this case. The Court's only recourse is to set aside the Minister's decision and refer the file back to the Minister, if it finds that there has been a breach of procedural fairness or that the Minister's refusal was unreasonable, which the respondent is not prepared to concede today.

[67] Let us be clear. In the case of the clemency application filed in 2005, the Minister never ordered a formal investigation in connection with exercising the Royal Prerogative of Mercy. The delay in this file was entirely for what the PBC described as the "preliminary assessment." Nine years simply to render a decision, summarily and without an investigation, on the merits of the clemency application is inconceivable, even shocking. The PBC and the Minister have no legitimate excuse to offer the Court for this excessive and unreasonable delay. For this reason, if the application for judicial review is denied, the respondent indicated today that no costs would be claimed from the applicant.

[68] If we accept the respondent's reasoning based on section 110 of the *Corrections Act*, the applicant should have requested that a writ of *mandamus* be issued to compel the PBC to make its recommendation in a more timely manner (*Conille v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 9097 (FC)). However, as the respondent pointed out, it is too late because the Minister rendered a final decision in 2014. Also, the Court has no legal authority to order the Governor in Council, who acts on the advice of the Minister, to grant the applicant

royal mercy. The respondent is right regarding this last point, but I do not find that this is sufficient grounds to close the assessment of this application for judicial review.

[69] However, the applicant also pointed out to the Court that there was a reasonable fear of bias because the PBC was involved in the applicant's parole applications. The applicant also maintained that the process of referring the clemency application back to the PBC for review and a recommendation was not consistent with the fundamental principles of justice guaranteed in section 7 of the *Charter*. The fact that it is the same agency providing a recommendation to the Minister regarding an official investigation in connection with the remission of sentence application therefore raises reasonable doubt about the impartiality of the PBC and the thoroughness of its assessment of the remission of sentence application.

[70] The respondent replied that the Minister has the legal authority to ask the PBC to investigate clemency applications and that nothing in the evidence on record showed or gave the Court reason to infer that the Minister and the PBC did not have an open mind. As well, the applicant knew from the outset that the PBC would make a recommendation to the Minister. This has never been a problem before. Therefore, the applicant has now forfeited the right to bring before the Court the existence of a reasonable fear of bias (*Bilodeau* at paragraph 117).

[71] A distinction should be made between the apprehension of decision-maker bias on an institutional level and on an individual level (i.e. in a specific file). I do not find the argument of institutional bias in connection with the PBC convincing. Section 110 of the *Corrections Act* explicitly allows the Minister to ask the PBC to investigate clemency applications. I understand

that the applicant is claiming that such a system of delegation of investigation powers, which must necessarily include the authority to proceed with a preliminary assessment of the clemency application, violates section 7 of the *Charter*. However, before the Federal Court can declare a statutory provision inoperative under section 52 of the *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (UK), a notice of constitutional question must be served and filed in accordance with section 57 of the FCA. This is not the case here. I might add that the single fact that the PBC is responsible for supervising the applicant is not sufficient to lead someone who is well apprised of the situation to conclude that a reasonable fear of bias exists in this case. Moreover, the Minister is independent of the PBC and is not obliged to follow its recommendation. The applicant has known since the start of the assessment process that the PBC would assess his file and make a recommendation to the Minister. The applicant's silence on this matter constitutes tacit agreement.

[72] The behaviour adopted by the PBC or the Minister in this file could give the appearance of bias against the applicant, but he allowed the PBC this administrative freedom. It is therefore, at the very least, worrisome and shocking that the PBC took nine years to complete its "preliminary assessment" and make its recommendation to the Minister. Bad faith? Bias? Implicit refusal? Administrative carelessness?

[73] The respondent has not submitted an affidavit for any of the parties involved. The absence of explanations and the PBC's and Minister's silence give the Court reason to draw negative inferences. Furthermore, in his communications with Ms. Lanctôt, Mr. Fidelia succeeded in feeding the applicant's legitimate doubts about the integrity and neutrality of the

clemency application assessment process. Had the PBC already reached a decision? Appearance is everything. . . The PBC already knew the applicant, and his previous appearances when applying for parole seem to have played a significant role in the assessment of the merits of his clemency application. In her analysis dated March 18, 2014, the executive vice-chairperson referred to some important facts that were not mentioned by Ms. Lanctôt in her application for remission of sentence: [TRANSLATION] "In connection with his manslaughter conviction in 1988, Mr. Robillard explained that, after he was assaulted in a bar, he left the premises and returned with a firearm. The argument continued and he fired a shot. He said he only wanted to intimidate his assailant and that he had no intention shooting." Then, the executive vice-chairperson explained that she [TRANSLATION] "tried in vain to obtain a transcript from the Montréal Court of Sessions of the Peace to discover the *ratio decidendi* in this case; however, the file had been destroyed" (at page 503).

[74] Nowhere in her analysis did the executive vice-president mention trying to obtain clarification from the applicant or from Ms. Lanctôt, but she concluded that [TRANSLATION] "the transcript, which described the mitigating and aggravating circumstances that were taken into consideration to reach this sentence, could have provided additional information." Who knows whether the applicant or one of his previous attorneys had the transcript in question or useful explanations for the executive vice-chairperson. As the Court recalled in *Bilodeau* at paragraph 90, "certain omissions may be compensated for by the simple fact that the applicant was given the opportunity to rectify the situation by bringing such omissions to the attention of the decision-maker (*Slattery v Canada (Human Rights Commission)*, 1994 CanLII 3463 (FC), [1994] 2 FC 574, at paras 56-57)."

[75] Therefore, if the Minister's contested decision to summarily dismiss the clemency application without ordering an investigation is to be set aside, it is also due to the obfuscation and total lack of transparency surrounding the entire process since the clemency application was filed in 2005. In 2014, without valid justification and contrary to the principles of procedural fairness, they refused to share the PBC's negative recommendation with the main party, the applicant. The Court has a hard time understanding why the PBC and the Minister refused to be transparent throughout the process in spite of the letters or demand letters sent by counsel for the applicant. All of this gives the impression of bad faith and bias. Did the fact that the recommendation and the PBC file were finally filed with the Court in 2015 following this application for judicial review make up for this?

[76] I think not. The applicant also pointed out that the Minister has not provided any reasons to support the refusal to initiate an investigation in connection with the application for remission of sentence, which constitutes a violation of procedural fairness, while the respondent is using the recommendation and the PBC file to support the reasonableness of the Minister's final decision. The Supreme Court has taught us that the absence of reasons or lack of sufficient reasons should no longer be considered through the lens of procedural fairness (*Baker* at paragraphs 40-43), but rather through that of the reasonableness of the contested decision (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, at paragraphs 9, 12 and 20 [*Newfoundland*]).

[77] The ministerial decision dated August 29, 2014 contained no reasons. Due to its generic nature, the letter from the PBC dated September 9, 2014, is clearly insufficient. All that is left is

the executive vice-chairperson's analysis dated March 18, 2014. However, this is not a question of assessing the reasonableness of the PBC's decision by completing the reasons provided by the decision-maker with the notes that he himself may have left on file after various communications with a party (*Baker*, for example). The Minister and the PBC are both independent. The Minister cannot act at the dictates of a third party. The PBC's authority is exclusively one of investigation and recommendation. There is nothing in the Court record to indicate that the Minister personally reviewed the clemency application and the documentation submitted by the applicant. The basic problem, which was never addressed in *Newfoundland*, is that the Minister is trying to base a decision on a negative recommendation from the PBC that was never communicated to the applicant. To do so, the administrative process that led to the PBC's recommendation and the Minister's decision needed to be fair.

[78] This is not the case here, even if the element of procedural fairness may be minimal. Although no specific assessment (or investigation) procedure is provided for in an act or regulation, the *Guidelines*, nonetheless, state that "the Royal Prerogative of Mercy is exercised according to general principles which are meant to provide for a <u>fair and equitable process,</u>" and that "in reviewing clemency applications, conducting investigations and making recommendations, the [Board] <u>shall be guided by the principles</u> [outlined in the *Guidelines*]." [Emphasis added] According to the evidence on record, the practices surrounding the clemency application have varied from one period of time to another, but one thing has not changed: the PBC and the Minister must act fairly.

[79] Even if royal mercy is not a right, an applicant can, at least, expect a considered review of his or her application by an open-minded decision-maker. The clemency application review should be neutral and thorough, and the Court should consider all the steps taken, even after the PBC recommendation, to ensure that all relevant information is gathered and assessed before the Minister makes the final decision. The respondent never stated before this Court that the clemency application review or investigation process must be kept secret and that the PBC could base its recommendation on extrinsic elements that were never shared with the applicant in the context of this process. To be more specific, when the Minister makes a final decision on a clemency application based simply on review of the file, an applicant must be able to explain or refute any unfavourable element that the PBC failed to disclose to him or her. Obviously, the applicant must also be able to comment on any negative recommendation from the PBC.

[80] This option is available to an applicant in the context of a complaint under the *Canadian Human Rights Act*, RSQ 1985, c H-6. The general procedure governing the process is similar to that at issue in this case: when an applicant files a claim, the Canadian Human Rights Commission (CHRC) reviews it to determine whether it should be heard by the Canadian Human Rights Tribunal. However, before making such a decision, the CHRC prepares a report and allows the parties to comment on it. According to this Court's (and the Federal Court of Appeal's) jurisprudence, not allowing the parties to comment constitutes a lack of procedural fairness (*Mercier v Canada (Human Rights Commission)*, [1994] 3 FCR 3 (FCA); see also *Syndicat des employés de production du Québec et de l'Acadie v Canada (Canadian Human Rights Commission)*, [1989] 2 SCR 879 at pages 902-903).

[81] Thus, I conclude without reservation that this file involved serious breaches of procedural fairness. The Minister decided not to conduct an investigation and not to inform the applicant of the PBC's negative recommendation. The Minister's refusal was primarily based on questionable or contested reasons that were not shared with the applicant in a timely manner. The blatant laxity and lack of interest shown by the PBC and the Minister throughout the nine years spanned by the clemency application review justify legal redress. Allowing the respondent to use the PBC's recommendation and elements of a file that was kept secret to justify the reasonableness of the Minister's refusal would make a mockery of the system.

[82] In the event that the Court concludes that there was a breach of procedural fairness, the respondent alternatively submitted that the clemency application should not be referred back to the Minister for redetermination because the result is likely to be the same (*Mobil Oil Canada Ltd v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202, 1994 CanLII 114 (SCC) at pages 228–229). Obviously the applicant objects to this dialectic. He submits that he has already suffered a substantial injustice, as a neutral and thorough investigation was not conducted by the PBC or the Minister in connection with his clemency application, in accordance with the law and his constitutional rights.

[83] I agree with the applicant. He has suffered flagrant and substantial injustice. The applicant suffered significant material injury due to the failure to observe procedural fairness. It is therefore appropriate to refer the clemency application back to the Minister for redetermination after the applicant has had the opportunity to complete his clemency application (almost 11 years have gone by) and give the Minister his written submissions regarding the PBC

recommendation that an investigation not be conducted and that his clemency application be summarily dismissed.

[84] At the risk of repeating myself, the question today is not whether the Minister's decision represents an acceptable outcome, but whether the applicant really had the opportunity to make his case before a neutral and impartial decision-maker. There is a reasonable doubt in this case. I also exercised my discretion and took into consideration the fact that, without informing the applicant and giving him the opportunity to comment, the PBC added other criteria to the list of criteria in the *Guidelines*, including some that were potentially questionable. For example, in the event that the applicant's habitual criminal status was withdrawn, in its analysis, the PBC suggested that the applicant remain ineligible to apply for a pardon under the *Criminal Records Act*, as he had been convicted of more than three offences that were prosecuted by indictment with a sentence of two years' imprisonment or more. During the oral arguments, counsel for the respondent repeated the same statements. However, this is not the point: there is "Pardon" and "pardon" (see paragraphs 24 and 25 above). The applicant is not seeking a suspension of the two convictions on his criminal record from 2010 related to his alcohol consumption. He is asking for a remission of sentence because he does not want to serve the preventive detention sentence (indeterminate sentence) that was imposed on him in 1972 (almost 45 years ago) until his death.

[85] I also exercised my discretion and took into account the fact that the applicant presented serious arguments to the Court concerning the lack of analysis or gaps in the PBC's reasoning. It is reasonable to wonder whether the PBC could, without any real discussion of the evidence on file, simply summarily dismiss the contemporaneous and objective evidence concerning the non-

dangerousness of the applicant, including the absence of convictions or prosecutions for serious personal injury offences since 1988, to rely solely on a general comment in a psychiatric report dated January 1989: [TRANSLATION] "It is necessary to look beyond the assessment of facts, because the fact that he is not involved in a negative activity does not automatically mean that he will represent a good risk on the outside." It is clear to me that the many experts who provided previous opinions about his non-dangerousness (2002 to 2005) would certainly have been able to add to or clarify this last comment from psychiatrist Alfred Thibault.

[86] At the same time, the applicant is contesting the facts on which the PBC's recommendation is based and which rely primarily on the following terse reasoning:

> [TRANSLATION]
>
> Given the nature of the offences Mr. Robillard committed, the confirmed absence of a prosocial lifestyle, as well as the fact that alcohol played a significant role in his criminal history, we recommend, in the interest of public safety, that no investigation be initiated in connection with this application for remission of sentence.

[87] However, according to the applicant, this analysis is biased and incomplete. The executive vice-chairperson obviously did not take into account all the evidence on file because, for several years now, the applicant has demonstrated his ability to adopt a prosocial lifestyle. If this were not the case, he would not have been granted parole on several occasions. If alcohol is a risk factor for public safety, this risk was handled through conditions of parole following his impaired driving convictions (including automatic suspension of his licence, if necessary). Moreover, the applicant pointed out that he is sober and participating in Alcoholics Anonymous. According to the applicant, the executive vice-chairperson's ambiguous reasoning and

conclusions regarding the interest of public safety are not sound. An investigation into the applicant's clemency application is essential for justice to be done.

[88] The respondent maintains that the Minister's decision not to order an investigation is reasonable and can be supported by the reasons found in the PBC's analysis. Moreover, the guiding principles found in the *Guidelines* were evidently considered by the PBC, even though they were not analyzed separately and the analysis of the evidence on record and of the applicant's personal situation is very brief. The respondent reminded the Court that there had been no miscarriage of justice and that the preventive detention sentence imposed on the applicant in 1972 was, at that time, not disproportionate to the nature and severity of the offences that led to the "habitual criminal" designation. The respondent submits that, even if the applicant was never declared a "dangerous offender" by a court of competent jurisdiction, his case is still comparable to that of a dangerous offender who committed serious personal injury offences. Furthermore, Leggatt J. was of the opinion that, at the time, the applicant met the dangerousness criteria to be designated a dangerous offender. Although he had made progress, the applicant was convicted of manslaughter in 1988. As for the concern about the offender's "dangerousness" being a constant element, the respondent submits that the current parole process sufficiently guarantees that the applicant's indeterminate-length preventive detention sentence will adapt to his personal situation over time. Proof of this is that the applicant has been granted parole several times since he was declared a habitual criminal.

[89] At the risk of repeating myself, the Court's fundamental problem with the respondent's argument is that it first of all assumes that the applicant was able to make submissions on all

relevant aspects of the PBC's preliminary analysis. The Minister is the final decision-maker and he needed to examine the merits of the clemency application with an open mind in light of the entire file. It would be legitimate to ask if, given the current level of dangerousness, continuation of the preventive detention sentence imposed in 1972 constitutes cruel punishment or a disproportionate sentence that could justify having the PBC conduct an investigation with a view to the possible exercise of the Royal Prerogative of Mercy (*R v Konechny* (1983), 10 CCC (3d) 233 at paragraph 12; *R v Gamble*, [1988] 2 SCR 595 at paragraph 42). The respondent is also relying on *Doré v Barreau du Québec*, [2012] 1 SCR 395 [*Doré*], to suggest that there was no need to refer the file back to the Minister. In *Doré*, the Supreme Court of Canada established a framework for analysis that allowed a court sitting in review to decide whether a decision-maker exercised discretionary power in accordance with the relevant provisions of the *Charter*. The result in *Doré* was to eschew a literal section 1 approach in favour of a "*robust* proportionality analysis consistent with administrative law principles," as the Supreme Court recently recalled in *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 at paragraph 3. However, given that the applicant did not have the opportunity to make submissions to the Minister regarding the PBC's analysis in a timely manner, I cannot be satisfied today that the contested ministerial decision is the result of [TRANSLATION] "proportional balancing" of the right to a sentence that is not cruel or unusual within the meaning of section 12 of the *Charter* against the objectives of public protection underlying the preventive detention sentence imposed on the applicant in 1972.

[90] At the same time, I reject any suggestion from the applicant that the Minister be compelled to order an investigation into the exercise of the Royal Prerogative of Mercy. The Minister is solely responsible for determining whether the applicant is a candidate for royal

mercy and whether an investigation is justified. This is not one of those exceptional cases in which the Court should issue a mandatory order to compel the Minister to act in a certain way (*Lebon v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 1500, affirmed by 2013 FCA 55). Good faith must be assumed and there is nothing to indicate that the new examination of the clemency application will not be neutral and thorough. The Minister will be granted 90 days after this judgment to decide whether the applicant meets the criteria for exercising the Royal Prerogative of Mercy and whether a review by the PBC is required under the circumstances. Given the amount of time that has passed (almost 11 years since the clemency application was filed) this time frame seems reasonable to me in this case.

CONCLUSION

[91] For the above reasons, the application for judicial review is allowed. The decision rendered by the Minister on August 29, 2014 is set aside. The clemency application is referred back to the Minister for review and redetermination within 90 days of the judgment in accordance with the law and the present reasons. The Minister shall allow the applicant to complete his application and make written submissions regarding the PBC's recommendation not to order an investigation.

JUDGMENT

THE COURT'S JUDGMENT is that the application for judicial review is granted. The decision rendered on August 29, 2014 by the Minister of Public Safety and Emergency Preparedness is set aside. The clemency application is returned to the Minister for review and redetermination within 90 days of this judgment in accordance with the law and the Court's reasons for judgment. The Minister shall allow the applicant to complete his application and make written submission regarding the Parole Board of Canada's recommendation to not order an investigation.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Pierre Tabah	FOR THE APPLICANT
Dominique Guimond	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Labelle, Côté, Tabah et Associés St-Jérome, Quebec	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT