Federal Court  Cour fédérale

Date: 20180221

Docket: T-640-17

Citation: 2018 FC 200

Ottawa, Ontario, February 21, 2018

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

WILTON A. SMITH

Applicant

and

THE ATTORNEY GENERAL OF CANADA
AND
THE NATIONAL PAROLE BOARD

Respondents

JUDGMENT AND REASONS

I. Overview

[1] This is an application by the Applicant, Wilton Anthony Smith, for judicial review of the March 22, 2017, decision of the Appeal Division [the Appeal Division] of the Parole Board of Canada [the Board], affirming the decision of the Board to deny his application for day or full parole.

[2] As explained in greater detail below, this application is allowed, because I have found that both the Board and the Appeal Division erred in their treatment of the Applicant's argument that an addendum prepared by his Case Management Team [CMT] at Correctional Service Canada [CSC] in anticipation of his parole hearing should not have been considered by the Board.

II. Background

A. *The Facts*

[3] Mr. Smith is in his early fifties and is serving a life sentence for first degree murder. He has been incarcerated since April 29, 1994, and is currently at Springhill Institution in New Brunswick, a medium security institution where he has been since 2003. Mr. Smith has appealed his conviction unsuccessfully to both the Court of Appeal for Ontario and the Supreme Court of Canada. He continues to maintain his innocence.

[4] Although Mr. Smith has been in Canada since his early twenties, he was born in Jamaica and is currently subject to a deportation order.

[5] According to the record before the Court, the events leading to the murder conviction were as follows. Mr. Smith was in a relationship with a woman named Patricia Innis from September to December 1991, when Mr. Smith assaulted her, threatened her with a knife, and stole a number of her possessions. He was charged with uttering threats, assault with a weapon, theft, and possession of property obtained by crime. Mr. Smith was released on bail, subject to a

no contact order regarding Ms. Innis. He disobeyed the order and continued to contact and visit Ms. Innis. Mr. Smith was due to stand trial on March 12, 1992, but on March 10, 1992, he gained entry to Ms. Innis' home and attacked her, striking her in the neck with a machete, thereby causing her death.

[6] Mr. Smith has a son with whom he is in contact and has had a number of romantic relationships of varying durations while incarcerated. He has participated in Personal Family Visits with these women and his son, with no reported issues in relation to family violence. Mr. Smith denies ever having been violent in any of his relationships. He has also completed all proposed rehabilitative programming and is reported to have conducted himself appropriately in, and gained from the content of, the programming. Mr. Smith's prison record discloses a conviction for carrying a concealed weapon, based on an incident in 2001 where he was discovered with a shiv. Other than this incident and a conflict in 2016 with a member of the prison's kitchen staff, Mr. Smith appears to have conducted himself in a pro-social manner during his incarceration. He has maintained employment and advocates for himself and others in the prison.

[7] Mr. Smith became eligible for day and full parole in March 2014 and March 2017, respectively. In the application leading to the decisions being considered in this application for judicial review, Mr. Smith sought either day parole for release in Nova Scotia or full parole with a view to returning to Jamaica.

[8] In anticipation of his parole hearing before the Board, Mr. Smith's CMT prepared an Assessment for Decision dated October 24, 2016 [the Assessment]. The Assessment recommended that parole be denied but contained dissenting views from some members of Mr. Smith's CMT and others who contributed to the Assessment.

[9] The Assessment was authored by Mr. Smith's Parole Officer, Diana Pettigrew, but was also signed by Carolanne Coon, Manager for Assessment and Intervention. Ms. Pettigrew stated that she was not supportive of Mr. Smith's day parole application, as he was not in full compliance with the recommendations of the two most recent psychological reports in his file. She noted the recommendations that Mr. Smith should be cascaded to minimum security before beginning to apply for gradual releases such as Unescorted Temporary Absences [UTAs] and that Mr. Smith had not yet demonstrated to the CMT that he was capable of being safely managed at a lower security institution. Ms. Pettigrew also referred to Mr. Smith's denial of his offence, lack of insight into the murder, and resulting inability to work through all the details of his crime process. Finally, she raised concerns that Mr. Smith's risk could not be monitored in a community setting due to his deportation order.

[10] However, as mentioned above, the Assessment also captured the fact that there were dissenting opinions in relation to Mr. Smith's application for parole. The Carleton Centre and Carleton Centre Annex Community Correctional Centres [CCCs] in Halifax, Nova Scotia, were prepared to accept Mr. Smith on a day parole basis pending bed space availability, and CSC Dartmouth was supportive of granting him day parole release to a CCC as long as certain special conditions were imposed. Ms. Coon and Ian Carr, Assistant Warden of Interventions, also

offered a dissenting opinion. They concluded that there was no particular benefit to transferring Mr. Smith to a lower security institution. Their opinion was that the plan proposed for day parole would adequately manage risk for Mr. Smith. They also supported full parole for deportation to Jamaica.

[11] Ms. Pettigrew subsequently authored an additional document on November 21, 2016, entitled Addendum to Assessment for Decision [the Addendum]. The Addendum was also signed by Ms. Susan Dunne as CSC Supervisor and is described as being prepared for the purpose of providing an update for the Board on Mr. Smith's case. While the Addendum did not change the recommendation of the Assessment (to deny Mr. Smith's request for day or full parole), it notes two new pieces of information to be shared with the Board.

[12] First, the Addendum states that the CMT received new information from the community via a Community Assessment dated November 16, 2016. According to the Addendum, the Institutional CMT was investigating a possible Escorted Temporary Absence [ETA] for Mr. Smith in order to tour the CCCs, as they had been supportive of his request for day parole. However, when the CCCs more closely examined his case, it raised some concerns and they no longer supported his release. Rather, the community was now recommending that Mr. Smith work towards cascading to a minimum security institution, leading to applying for a UTA to facilitate a gradual release.

[13] The second piece of information reflected in the Addendum related to the Canada Border Services Agency [CBSA]. The Addendum noted that on October 25, 2016, CBSA indicated that

if Mr. Smith was granted day parole they would pick him up from Springhill Institution immediately upon his release. An Immigration Judge would then decide if he would be released to the community or deported to Jamaica. CBSA stated that Mr. Smith did not have to wait until his full parole date to be deported.

[14] The positions raised by Mr. Smith before the Board, the Appeal Division, and now the Court include an argument that the Addendum should not have been considered. He notes that the Addendum resulted from his CMT investigating an ETA for him to visit the Halifax CCCs but submits that such investigation was unauthorized, as he did not submit an application for such an ETA.

B. *The Board's Decision*

[15] Following an oral hearing, the Board released its December 9, 2016 decision denying Mr. Smith's application for either day or full parole [the Board Decision].

[16] The Board noted the concerns raised by Mr. Smith in relation to the Addendum. It then proceeded to review the contents of the Addendum and the other evidence before it, including the divergent views expressed by different members of Mr. Smith's CMT. The Board was not satisfied that his release plans for day and full parole provided the structure and support necessary to facilitate his successful reintegration into society, considering the serious type of offence he had committed and could commit in the event of recidivism, as well as his assessed risk to society. Taking into account the above, as well as what the Board referred to as Mr. Smith's limited insight into his risk factors, difficulty in following conditions, and minimization

and denial of his offences, the Board believed that more structure and supervision was required than could be provided for in his current plans, even with the imposition of special conditions.

[17] The Board was therefore of the opinion that Mr. Smith would present an undue risk to society by reoffending on either day parole or full parole.

C. *The Appeal Division's Decision*

[18] On March 22, 2017, the Appeal Division affirmed the Board Decision [the Appeal Division Decision].

[19] The Appeal Division Decision summarizes Mr. Smith's arguments on appeal as raising three issues: (a) whether there was a breach of the Board's duty to act fairly as a result of inadequate sharing of information with Mr. Smith; (b) whether the Board relied on erroneous or incomplete information; and (c) whether the Board Decision was reasonable. The Appeal Division noted Mr. Smith's allegations that the application for an ETA to visit the CCCs was written fraudulently and that his parole officer had engaged in misconduct, but it concluded that it did not have jurisdiction to address those complaints. The Appeal Division stated that CSC's institutional complaint process was an option available to Mr. Smith, if he wished to pursue these matters.

[20] On the first issue raised by Mr. Smith's appeal, the Appeal Division found that there were records indicating that all the information that was to be considered by the Board had been shared with him with sufficient notice.

[21] On the second and third issues, the Appeal Division found that Mr. Smith hadn't raised any grounds which would cause it to intervene. It held that the Board had assessed and weighed in an equitable manner the factors in his favour against the elements of the case that concerned it. Those concerns included the nature and gravity of his index offense of first-degree murder, his denial of responsibility for the crime, his risk factors which still required a moderate need for improvement, his actuarial assessments which indicated a moderate risk for domestic violence, the need for gradual release given the seriousness of any reoffending and the length of time he has spent in an institutional setting, and his refusal and failure to demonstrate that his risk could be managed in a lower security environment. The Appeal Division found that the Board's conclusion that Mr. Smith presented an undue risk to society was not unreasonable and that it was based on relevant, reliable, and persuasive information.

III. Standard of Review

[22] The applicable jurisprudence establishes that, although it is the Appeal Division Decision that is the subject of the application for judicial review, the Court must examine the legality of the Board Decision, typically applying a standard of reasonableness, as well as considering any separate error on the part of the Appeal Division. As explained by Justice LeBlanc at paragraphs 18 to 19 of *Coon v Canada (Attorney General)*, 2016 FC 340:

> [18] Judicial review of parole decisions is distinctive in that although the Court is theoretically dealing with an application for judicial review of the Appeal Division's decision, the Court actually has to examine the legality of the Board's decision when, as in this case, the Appeal Division confirms the Board's decision. According to the Federal Court of Appeal, this is the case in *Cartier v. Canada (Attorney General)*, 2002 FCA 384, [2003] 2 FC 317, because the intention that emerges from the Act is to deny parole once the Board's decision is reasonably supported in law

> and fact, since the Appeal Division's role is limited to intervening only in cases where the Board has committed an error of law or fact and that error is unreasonable (*Cartier*, at paragraphs 6 to 10).
>
> [19] In other words, Parliament appears to have given priority to the Board's decision. As a result, if it is found to be reasonable, the Appeal Division's decision affirming it will also be reasonable, absent any separate error on its part (*Collins v. Canada (Attorney General)*, 2014 FC 439, at paragraph 36; *Scott v. Canada (Attorney General)*, 2010 FC 496, at paragraphs 19-20).

[23] When it is alleged that the Board erred in relation to procedural fairness, the applicable standard of review is correctness (see *Abraham v Canada (Attorney General)*, 2016 FC 390 at para 12; *Ye v Canada (Attorney General)*, 2016 FC 35 [*Ye*] at para 10).

IV. Issues

[24] In addition to the substantive issues raised by the parties, the Respondents raise an issue as to the evidence that is properly before the Court in this judicial review, as they argue that Mr. Smith's affidavit, upon which he relies in his Application Record, attaches documents that were not before the applicable decision-makers.

[25] Taking into account this evidentiary issue, and applying the above principles surrounding the standard of review, I consider the arguments presented by the parties to raise the following issues for the Court's consideration:

A. What evidence is properly before the Court?

B. Does reliance by the Board or the Appeal Division on Mr. Smith's Family Violence Risk Assessment make its decision procedurally unfair or unreasonable?

C. Does reliance by the Board or the Appeal Division on Mr. Smith's deportation order make its decision unreasonable?

D. Does reliance by the Board or the Appeal Division on Mr. Smith having failed to move to a minimum security institution make its decision unreasonable?

E. Does reliance by the Board or the Appeal Division on the Addendum make its decision procedurally unfair or unreasonable?

F. Is the Board Decision or the Appeal Decision otherwise unreasonable?

V. Analysis

A. *What evidence is properly before the Court?*

[26] The Respondents have identified in Mr. Smith's affidavit a number of exhibits or portions of exhibits that they submit are not properly before the Court because, comparing them to the contents of the Certified Tribunal Record, they do not form part of the record that was before the Appeal Division. The Respondents acknowledge that, as explained in *Alkoka v Canada (Attorney General)*, 2013 FC 1102 at para 27, there are exceptions to this general rule as to what materials are considered relevant for the purposes of judicial review. Such exceptions include documents relevant to allegations of procedural unfairness or bias on the part of the decision-maker.

However, the Respondents submit that such exceptions are not applicable to the documents they are challenging in the present case.

[27] I do not understand Mr. Smith to be taking issue with the Respondents' position that the documents they challenge were not before the Appeal Division. Rather, at the hearing of this application, Mr. Smith explained to the Court that he included such documents in his affidavit, because they relate to ongoing issues that were considered by the Board. For instance, Exhibit O2 to his affidavit is a Receipt for Perimeter Work Clearance dated March 30, 2017, which Mr. Smith argues is relevant to his ongoing and successful pursuit of opportunities to demonstrate that he does not present an undue risk to society. Mr. Smith is correct that the successful pursuit of opportunities of this sort was relevant to, and taken into account in, the decisions of the Board and the Appeal Division. However, I agree with the Respondents' position that, subject to the applicable exceptions, documents that are relevant to these opportunities are properly before the Court only if they relate to events that occurred prior to the decision and if such documents were actually before the decision-maker.

[28] Mr. Smith has not argued that any of the documents challenged by the Respondents fall within the applicable exceptions, such as being necessary in order to advance his procedural fairness arguments. Nor do I find any of the challenged documents to fall within this exception.

[29] I therefore agree with the Respondents that the following documents from Mr. Smith's affidavit should not be considered by the Court:

A. Exhibits "C", "C2", "D", "E2", "F2", "J1", "K", "M", "N", "O1", and "O2" ;

B. The document entitled “Receipt for Temporary Absence Application” dated June 30, 2016, in Exhibit “G2”;

C. Exhibit “D2” , except the document entitled “Referral Decision Sheet for Escorted Temporary Absence” dated June 14, 2016;

D. Exhibit “F” except the following document:

i. Memorandum Re: Mini Systemic Investigation: Review of the Rastafarian Diet, religious diet requirements and the CSC National Menu dated March 8, 2016;

ii. Inmate’s Request Re June 2, 2016 Supper (Process Meat) dated June 2, 2016;

iii. Affidavit of Claire Wilson dated June 14, 2016;

iv. Affidavit of Steven William Jones dated June 14, 2016;

E. Document entitled “Inmate’s Request” dated July 5, 2016 in Exhibit “H1”;

F. Document entitled “Can I? May I? Should I? Getting it Right in Corrections” in Exhibit “J”; and

G. Document entitled “Inmate’s Request” dated December 16, 2016 in Exhibit “N1”.

B. *Does reliance by the Board or the Appeal Division on Mr. Smith’s Family Violence Risk Assessment make its decision procedurally unfair or unreasonable?*

[30] Among the documents considered by the Board in arriving at its decisions is a Family Violence Risk Assessment dated February 25, 2008 [the FVRA], which assessed Mr. Smith as having a high risk for imminent violence towards a partner and low risk for imminent violence

towards others. Mr. Smith raises procedural fairness concerns and advances arguments as to the reasonableness of the Board Decision in relation to the Board's consideration of this document.

[31] Mr. Smith argues that it was unreasonable for the Board to take the FVRA into account, both because it is dated many years before the psychological reports that were before the Board and because it was prepared by a parole officer, not a psychiatrist or psychologist. The two psychological reports to which Mr. Smith refers were prepared on May 11, 2014, and September 28, 2016. Both reports assess Mr. Smith's risk for general violent recidivism as low and his risk for domestic violence as moderate.

[32] While the psychological reports are more favourable to Mr. Smith than the FVRA, I note that both reports were considered by the Board immediately following its reference to the FVRA. I appreciate Mr. Smith's arguments that the psychological reports are more recent than the FVRA and benefit from the qualifications of their authors. However, as argued by the Respondents, it is not the Court's role in judicial review to reweigh the evidence that was before the Board (see *Ye* at para 32). I cannot conclude that the Board Decision is unreasonable as a result of the Board having considered both the psychological assessments and the FVRA.

[33] Nor does the Appeal Division Decision demonstrate any independent error on its part in connection with this issue. Indeed, Mr. Smith's written submissions to the Appeal Division do not demonstrate that he raised this particular argument on appeal. Rather, his submissions in relation to the FVRA focused on procedural fairness, which I will address next.

[34] In addition to his arguments about the reasonableness of the Board's reliance on the FVRA, Mr. Smith submits that he was deprived of procedural fairness because of issues relating to the disclosure of the FVRA. Mr. Smith argued before the Appeal Division that the FVRA had not been disclosed to him. The Appeal Division rejected this ground of appeal because of evidence that the FVRA had been shared with Mr. Smith, and it concluded that the Board's consideration of the FVRA was consistent with its legal obligation to arrive at decisions which are based on all available information that is relevant, reliable, and persuasive.

[35] The Appeal Division's conclusion that the FVRA had been shared with Mr. Smith prior to the hearing is based on information sharing checklists found in the record. In the weeks leading to his hearing before the Board, CSC provided Mr. Smith with two Information Sharing Checklist Updates, dated October 27, 2016, and November 21, 2016. The FVRA was not included in either of these checklists, but it appears in a Primary Information Sharing Checklist dated May 20, 2015.

[36] Mr. Smith now argues that, even if he received the FVRA, the procedural fairness obligations owed to him were still breached because of when he received it. He submits that, as the disclosure of the FVRA took place over two years prior to the hearing before the Board, he did not have adequate notice that the Board would be considering the document. He argues that, as a result, he was deprived of the opportunity to adequately prepare and make arguments to the Board, of the sort canvassed above, as to whether it would be reasonable for it to rely on the FVRA.

[37] Because this is an issue of procedural fairness, it is reviewable on a standard of correctness. I appreciate that the disclosure of the FVRA took place more than two years prior to the hearing before the Board. I also note that the two Information Sharing Checklist Updates provided to Mr. Smith in October of November 2016 explicitly referenced an "anticipated date of panel/paper review" of December 1, 2016, which I take to be a reference to the hearing before the Board, even though it actually took place a few days later in December. In contrast, the Primary Information Sharing Checklist, which included the FVRA, referenced an "anticipated date of panel/paper review" of July 1, 2015. As such, the FVRA was not included in a disclosure package that was prepared specifically in anticipation of the December 2016 parole hearing. However, I do not consider these facts to represent a basis to conclude that Mr. Smith was deprived of procedural fairness.

[38] The Appeal Division correctly states that the Board has an obligation to arrive at decisions which are based on all relevant available information. Section 101(a) of the CCRA so provides. I also note that the checklists accompanying the two disclosure packages received by Mr. Smith in October and November 2016 are expressly named "updates" and that each such checklist is described as "further to" a checklist provided on a previous date. I therefore do not consider the method of disclosure to suggest that only the documents referenced in the two most recent updates would be considered at Mr. Smith's parole hearing. Nor do I find a basis to conclude that the Board is required, in anticipation of a hearing, to repeat disclosure that has previously been provided to an offender. The record before the Court demonstrates that, consistent with the Appeal Division's findings, the FVRA was disclosed to Mr. Smith. I find that

the timing and method of disclosure are consistent with the Board's procedural fairness obligations and that the Appeal Division's conclusion to that effect is correct.

C. *Does reliance by the Board or the Appeal Division on Mr. Smith's deportation order make its decision unreasonable?*

[39] Mr. Smith notes that his immigration status, specifically the fact that he is potentially subject to deportation to Jamaica if granted parole, was a factor leading to the Board's decision to deny his application. He takes issue with this and refers the Court to Board and CSC guidelines including section 4.4.8 of the Board's Decision-Making Policy Manual For Board Members, which provides as follows:

> Eligibility
>
> Foreign Offenders Sentenced Prior to June 28, 2002
>
> 8. Foreign offenders sentenced prior to June 28, 2002, with no additional sentence on or after that date, are eligible for unescorted temporary absences (UTA), day parole and full parole whether or not a detention order under section 105 of the *Immigration Act* or a removal order under the *Immigration and Refugee Protection Act* (IRPA) is issued. Standard parole eligibility dates apply to these offenders. After reaching full parole eligibility date, these offenders may be removed if authorized released on a UTA or granted parole.

[40] Mr. Smith's argues that the applicable policy supports his position that he is eligible for parole, notwithstanding that he is subject to deportation, and that the Board erred in denying his application for parole based in part on his immigration status.

[41] I find little merit to this argument. It is clear from the Board's Decision that it took Mr. Smith's immigration status into account because it affected the ability of his CMT to monitor him if he was released on parole and deported to Jamaica. This was of concern to the Board because of the assessment that Mr. Smith remained a moderate risk for domestic violence. The Board referred to his risk factors relating to his relationships and problem solving at times of heightened emotionality and how his CMT could not monitor these risk factors if he were deported. The guidelines to which Mr. Smith refers speak to eligibility for parole, not an entitlement to parole. The Board did not conclude that Mr. Smith was ineligible for parole; it simply exercised its discretion to refuse him parole. It did so because of particular risk factors specific to Mr. Smith, to which the possibility of deportation was relevant. This does not undermine the reasonableness of the Board's decision.

[42] Similarly, the Appeal Division reviewed the Board's analysis of this issue and found the Board Decision to be reasonable. The Appeal Division Decision demonstrates no reviewable error on this issue.

D. *Does reliance by the Board or the Appeal Division on Mr. Smith having failed to move to a minimum security institution make its decision unreasonable?*

[43] The Board Decision notes that Mr. Smith's psychological assessments recommend that he cascade to a lower security environment for a conditional release. However, the Board refers to file information indicating that Mr. Smith has refused a transfer to a minimum security institution, because he believes that this would require him to re-start his correctional plan and would subject him to discrimination. In reviewing the recommendations of Mr. Smith's CMT,

the Board also notes that the institutional CMT was not supportive of his parole application, in part because he was not in compliance with the recommendations in the psychological assessments.

[44] The Appeal Division Decision similarly references these recommendations, finding that a cautious, step-by-step approach to Mr. Smith's release is supported by assessment tools in the area of forensic risk assessment. In finding the Board Decision to be reasonable, the Appeal Division relied in part on what it described as Mr. Smith's refusal and failure to demonstrate that his risk can be managed in a lower security environment.

[45] In challenging this aspect of the decisions, Mr. Smith argues that he has applied for transfer to a minimum security environment at Dorchester Penitentiary. Documentation to which he refers in support of his position includes an April 16, 2015 Memo to File from Ms. Pettigrew. This Memo indicates that he applied for a transfer to Dorchester Penitentiary – Minimum Security on January 21, 2015, but that the CMT was not prepared to recommend such transfer at that time. Mr. Smith also refers to a document dated April 29, 2016, entitled Receipt for Transfer Application, which refers to an application for transfer received from Mr. Smith. While this document provided no details concerning the transfer application, Mr. Smith represented to the Court that it related to a potential transfer to Dorchester Penitentiary – Minimum Security. The thrust of Mr. Smith's submission is that, contrary to the analysis of the Board and the Appeal Division, he has been pursuing transfer to a minimum security environment and it is CSC which has resisted the transfer.

[46] However, in addition to the documents referenced by Mr. Smith, the record before the Board also included the Assessment. The Assessment states that Mr. Smith was reclassified as minimum security in May 2016 but that he refused to transfer to a minimum security facility, as he believed that he will be required to start his correctional plan all over again and that he will be discriminated against if transferred to minimum security at Dorchester. This document also refers to Mr. Smith indicating to Ms. Pettigrew, Ms. Coon, and the former warden of Springhill Institution that he was not interested in transferring to minimum security at Dorchester. It states that Mr. Smith reiterated this position at a case conference on August 22, 2016. It also refers to Mr. Smith being overly cautious, believing that his case will not be dealt with fairly if transferred to Dorchester Minimum, and often commenting on how he believes other offenders are treated unfairly at that facility, some due to their race.

[47] While it appears from the documents relied upon by Mr. Smith that there was a time in which he was pursuing transfer to a minimum security environment, perhaps as recently as April 2016, the information contained in the Assessment indicates that he subsequently changed his mind. The record does not demonstrate what led to this. However, given the information provided to the Board in the Assessment, it was reasonable for both the Board, and the Appeal Division sitting in review of the Board Decision, to base its analysis on an understanding that Mr. Smith was currently declining to transfer to a minimum security environment.

E. *Does reliance by the Board or the Appeal Division on the Addendum make its decision procedurally unfair or unreasonable?*

[48] As previously explained in the Background section of these Reasons, Mr. Smith argued before both the Board and the Appeal Division that the Addendum should not have been taken into account in the consideration of his application for parole. The thrust of Mr. Smith's position, as explained to the Court in the judicial review hearing, is that someone in his CMT improperly pursued investigation of an ETA to the CCCs, without Mr. Smith applying for such an ETA, with a view to influencing the CCCs to withdraw their support for his parole application. He provided written submissions to the Board on this issue in advance of his hearing, characterizing it as an issue of procedural fairness.

[49] While the Addendum captured information related both to community support for his application and the likelihood of him being detained by CBSA for possible deportation, it is the level of community support upon which his arguments focus. In brief, the Addendum refers to an updated Community Assessment dated November 16, 2017, reflecting that the Halifax CCCs had revised their position on his application. While the Assessment prepared earlier by CSC reflected that the CCCs were supportive, the Addendum identified that they had withdrawn this support, instead adopting a position comparable to that of the institutional CMT - that Mr. Smith should work towards cascading to a minimum security institution, from which he should apply for an ETA to the CCC for the purpose of a case conference and then for a UTA to facilitate a gradual release. The Addendum explains that the CCCs' reconsideration of their position occurred when Mr. Smith's CMT was investigating an ETA for him to visit the CCCs. As noted above, Mr. Smith submits that such investigation was unauthorized.

[50] The Board Decision refers to the concerns Mr. Smith raised, including his request that it not take the Addendum into account, but it doesn't address them. It notes the content of the Addendum, including that the CCCs had withdrawn their support for his day parole application based on closer examination of his case and simply states "In making this decision, the Board shall consider same, as well as file and hearing information." The Board Decision does not demonstrate any analysis of Mr. Smith's arguments or consideration of his request. It provides no reasons for rejecting Mr. Smith's position on the Addendum. In my view, the failure of the Board to provide any analysis in support of its rejection of Mr. Smith's concerns undermines the intelligibility and therefore the reasonableness of this component of the Board Decision.

[51] I note that Mr. Smith characterizes the Board's treatment of the Addendum as an issue of procedural fairness. While matters of procedural fairness are subject to the more exacting standard of correctness, I disagree that Mr. Smith was deprived of procedural fairness, particularly as it is clear that he had an opportunity to make submissions to the Board on the subject of the Addendum. Rather, my concerns relate to the intelligibility of this aspect of the Board's decision. These concerns are reviewable on the more deferential standard of reasonableness, which I nevertheless find lacking for the reasons described above.

[52] I therefore turn to consideration of the manner in which the Appeal Division addressed this particular issue. In Mr. Smith's written submissions in support of his appeal, he explained that he met with the Warden of Springhill Institution on December 2, 2016, to express his concerns surrounding the Addendum. He advised the Warden that he had not applied for an ETA to visit the CCCs. According to Mr. Smith's submissions to the Appeal Division, the Warden

made a decision on December 5, 2016, to instruct Ms. Coon to remove the Addendum from his file and to remove Ms. Pettigrew from the upcoming parole hearing, replacing her with Ms. Coon. It will be recalled that Ms. Coon was one of the members of the CMT who offered a dissenting opinion in the Assessment in support of Mr. Smith's application for parole.

[53] The Appeal Division addressed this aspect of Mr. Smith's submissions by concluding that it did not have the jurisdiction to address his concerns, expressing that CSC's institutional complaint process was one of the options available to him should he wish to pursue them. The Appeal Division then proceeded to expressly consider the contents of the Addendum, reflecting that Mr. Smith's day parole release was not supported by the CCCs, in arriving at the conclusion that the Board Decision was reasonable.

[54] The Court is not expressing a conclusion on the merits of Mr. Smith's position that someone in his CMT improperly influenced the CCCs to withdraw their support for his parole. Rather, the Court notes that, as he explained to the Appeal Division, Mr. Smith's concerns related to the Addendum appeared to have been addressed by the Warden in the days preceding the hearing before the Board. Mr. Smith's appeal submissions included reproduction of the language of an Inmate's Request dated December 14, 2016, from Mr. Smith to Ms. Coons. This Inmate's Request, a copy of which is also included in the Certified Tribunal Record in this matter and which therefore formed part of the record before the Appeal Division, shows the following request from Mr. Smith:

> As discussed on December 5th,/16 with the Warden, it had been instructed to remove the Addendum of the Community Strategy dated Nov 30/16 from my file. Do you know if this was done? Thank you

[55] I note that the Inmate's Request appears to refer to an incorrect date for the Addendum, which is actually dated November 21, 2016. However, neither party has suggested this is an error of any consequence. I also note that the same Inmate's Request contains the following response from Ms. Coon on December 21, 2016:

> Wilton – the Warden instructed that the Addendum to the A4 D for ETA and the attached decision be removed. This was completed. This was regarding the ETA to the CCC.

[56] As such, the record before the Appeal Division and now the Court appears to demonstrate that Mr. Smith's concerns about the Addendum and its genesis were addressed by the Warden, by instructing the Addendum be removed from his file, quite possibly as early as December 5, 2016, which was prior to the hearing before the Board. In my view, this undermines the reasonableness of the Appeal Decision's treatment of this issue.

[57] To explain this conclusion, I first note that I take no issue with the Appeal Division's statement that it has no jurisdiction to address allegations that an application for an ETA was fraudulently written or that a parole officer engaged in misconduct. As submitted by the Respondents, it is CSC, not the Board or its Appeal Division, which is responsible for resolving issues surrounding the correctness of information in an inmate's CSC files (see *Reid v Canada (National Parole Board)*, 2002 FCT 741 [*Reid*] at paras 19-21; *Eakin v Canada (Attorney General)*, 2017 FC 394 [*Eakin*] at para 29).

[58] As explained in *Reid* and *Eakin*, and consistent with the Appeal Division Decision, there is a mechanism available under s 24(1) of the CCRA which allows an offender to pursue

corrections to his or her file with CSC. The difficulty with the manner in which the Appeal Division addressed the issue raised by Mr. Smith arises from the fact that it referred him to CSC's institutional complaints process, when the record on appeal indicated that he had already pursued correction of his file with CSC and appeared to have obtained a favourable result, quite possibly in advance of the hearing before the Board. Again, I appreciate that correcting or updating an inmate's file is the responsibility of CSC, not the Board or the Appeal Division. However, the Appeal Division was presented with evidence and submissions that CSC had made or intended to make such a correction and had ordered the Addendum removed from Mr. Smith's file before the applicable Board hearing. In the particular circumstances of this case, I cannot conclude that it was reasonable for the Appeal Division, without further analysis, to proceed to take that document into account in conducting its review of the Board's decision.

[59] I find that the Appeal Division was required to engage with the evidence and argument advanced by Mr. Smith, to the effect that CSC had already corrected the file, before reaching its conclusion that the Board Decision was reasonable. Its failure to do so, particularly when the Board Decision itself is not intelligible as to the analysis underlying its rejection of Mr. Smith's concerns surrounding the Addendum, leads me to the conclusion that the Appeal Decision is also unreasonable.

[60] In so concluding, I note that I have considered the Respondents' argument that the Board Decision to deny parole was not based solely on the Addendum but rather on the totality of the information before the Board and its own independent assessment that Mr. Smith presents an undue risk to reoffend. In essence, the Respondents' position is that the decision of the Board

and the Appeal Division would be reasonable even if the Addendum had not been taken into account. The difficulty with this argument is that it asks the Court to substitute its own analysis of the evidence, and reasons for decision, for that of the tribunal, contrary to the role of a Court conducting judicial review (see, e.g., *Delta Air Lines Inc. v Lukács*, 2018 SCC 2 at para 24). It is clear that the Addendum figured in the analysis by the Board and the Appeal Division of the merits of Mr. Smith's parole application, and it is not the Court's role to speculate what the conclusion would have been had that evidence not been taken into account.

[61] As I have concluded that the Board erred, the appropriate remedy in these circumstances is to refer this matter back to a differently constituted panel of the Board for redetermination.

F. *Is the Board Decision or the Appeal Decision otherwise unreasonable?*

[62] In addition to the arguments canvassed above, Mr. Smith also submits that the decisions of the Board and Appeal Division were unreasonable because they are premised on a belief that it would be beneficial for him to cascade to a minimum security environment and seek UTA opportunities before being considered for parole. His position is that nothing new would be achieved through such steps, as he had demonstrated that he did not represent an undue risk to society through steps he had already taken, such as obtaining clearance to work unsupervised in the community.

[63] I decline to reach any conclusions on this particular argument. These submissions ask the Court to engage with the overall body of evidence that was before the Board which speaks to whether Mr. Smith would present an undue risk to society by reoffending if granted parole. My

decision to grant this application for judicial review is based on concerns about the manner in which the Board and Appeal Division addressed questions relating to a particular piece of the evidence that before them – the Addendum. The Board will now be reconsidering Mr. Smith's application, based on the overall body of evidence, after taking into account these Reasons. It would therefore not be appropriate or helpful for the Court to express conclusions on the same task in advance of this work by the Board.

VI. Costs

[64] As the successful party, Mr. Smith is entitled to costs. He seeks costs in the amount of $300.00. The Respondents advised at the hearing that they did not object to this quantification of costs in the event Mr. Smith was successful. My Judgment will order costs in this amount.

JUDGMENT IN T-640-17

THIS COURT'S JUDGMENT is that this application for judicial review is allowed and the matter is remitted to a differently constituted panel of the Board for redetermination in accordance with these Reasons. Costs are awarded to the Applicant in the all-inclusive amount of $300.00.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-640-17
STYLE OF CAUSE:	WILTON A. SMITH V THE ATTORNEY GENERAL OF CANADA AND THE NATIONAL PAROLE BOARD
PLACE OF HEARING:	HALIFAX, NOVA SCOTIA
DATE OF HEARING VIA VIDEOCONFERENCE:	JANUARY 30, 2018
JUDGMENT AND REASONS:	SOUTHCOTT J.
DATED:	FEBRUARY 21, 2018

APPEARANCES:

Wilton A. Smith (via videoconfence)	FOR THE APPLICANT (Self-represented)
Tokunbo C. Omisade	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Attorney General of Canada Halifax, Nova Scotia	FOR THE RESPONDENTS