Federal Court  Cour fédérale

Date: 20100318

Docket: T-964-09

Citation: 2010 FC 317

Ottawa, Ontario, March 18, 2010

PRESENT: The Honourable Mr. Justice Crampton

BETWEEN:

DOUGLAS BERNARD MILLER

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the National Parole Board Appeal Division, which upheld a decision of the National Parole Board (the "Board") revoking the day parole of the Applicant, Mr. Douglas Bernard Miller.

[2] Mr. Miller alleges that the Board committed several reviewable errors in the course of reaching its decision and that, by affirming the Board's decision, the Appeal Division's decision is unreasonable.

[3] Specifically, Mr. Miller alleges that the Board:

A. reached an unreasonable decision by ignoring all of the positive factors which he submits indicate that his risk to re-offend is manageable;

B. made multiple errors of law by failing to obtain and consider all relevant information that he alleges was available to the Board; and

C. made multiple errors of law by failing to disclose certain information to him prior to its hearing.

[4] For the reasons that follow, the Court concludes that the decisions of both the Appeal Division and the Board were reasonable and that neither the Appeal Division nor the Board erred in law in the course of reaching their respective decisions.

I. Background

[5] Mr. Miller was sentenced to two consecutive life sentences on May 29, 1979 for the violent rape and attempted murder of a woman, and to lesser sentences for theft, attempted theft, assault causing bodily harm and escape from lawful custody.

[6] He was released on day parole on September 19, 2007. While on day parole, he lived at the Portsmouth Community Correctional Centre ("PCCC").

[7] On September 15, 2008 a Warrant of Apprehension and Suspension was executed and Mr. Miller was returned to custody.

[8] Mr. Miller's day parole was suspended after information was received from four unnamed sources, who reported that they had heard him threaten to harm female staff members of the PCCC, that they had heard him refer to the female programs instructor as a "filthy Irish Bitch," and that he had stated that he would "rape it and kill that bitch" while referring to a female Employment Coordinator. Further information from the same sources apparently indicated that Mr. Miller had made similar disturbing comments about a female personal support worker who had been hired to provide services to another resident at the PCCC. Those same sources further alleged that Mr. Miller sometimes watched "soft pornography" involving simulated rape scenes on the television at the PCCC, with his hands down his pants, while other residents of the PCCC were present. Those sources added that Mr. Miller referred to the actresses as the three ladies who worked at the PCCC and stated that "if it were me, I would rape it and kill it." The increasing frequency of these types of statements reportedly led the unnamed sources to be concerned that the female staff members at the PCCC could be at risk.

[9] On September 18, 2008, three days after the suspension of Mr. Miller's day parole, Mr. R. Corcoran, one of the Commissionaires at the PCCC, submitted a short, one-paragraph report (the "Corcoran Report") that stated, among other things:

> During the months of July and August while the writer was on duty in the Annex I was sitting in the common area of the annex watching television (TV) with [several residents of the PCCC] on several occasions. Resident Miller stated to me and for no apparent reason that I should grab my wife by the hair when I get home and drag her to the bedroom and handcuff her to the bed and give it to her. That is the way women should be treated.

[10] The Corcoran Report added that these types of remarks by Mr. Miller were becoming more frequent when he was watching television at the PCCC.

[11] All of the foregoing information was disclosed to Mr. Miller in an Assessment For Decision ("AFD") dated September 24, 2008, which was provided to him on October 8, 2008 and which recommended the revocation of his day parole. However, the full contents of the Corcoran Report were not provided to him. Among other things, that report also stated that Mr. Corcoran had brought Mr. Miller's remarks to the attention of Mr. Perry Grey, a parole officer, and Ms. Sharon Hogan, a program instructor. Unfortunately, contrary to Mr. Miller's submission, it was not clear when Mr. Corcoran communicated with Mr. Grey and Ms. Hogan in this regard. The Corcoran Report also identified three other residents of the PCCC who allegedly were present during the episodes reported on by Mr. Corcoran. (The excerpt disclosed in the AFD substituted the term "several" for the three names that appeared in the original text of the Corcoran Report.)

[12] The AFD also noted that Mr. Miller had violated the terms of a weekend pass by (i) not being where he was supposed to be when the authorities initially attempted to execute the Warrant of Apprehension and Suspension; and (ii) working at an unauthorized location when he was in receipt of an allowance for being unemployed. Mr. Miller provided an explanation for these violations of his weekend pass and they were not significant issues in the written and oral submissions made to this Court.

[13] There was no mention of any of the contents of the Corcoran Report in Mr. Miller's Casework Record, which summarizes his activities, problems, progress and interactions with staff of the Correctional Service of Canada ("CSC") while on day parole, and which apparently is supposed to include information concerning all contacts with the offender in question, his progress with regard to his correctional plan, information from collateral contacts, and notes of the case conferences that are held from time to time between parole officers and their supervisors.

[14] Moreover, Mr. Miller alleged that Mr. Grey told him that he knew nothing about any allegations of threats or sexual comments, when Mr. Grey visited him in prison shortly after the suspension of his conditional release.

[15] The Board did not request Mr. Miller's Casework Record from the CSC, and therefore did not consider it when making its decision to revoke his day parole.

[16] At a post-suspension interview and during the Board's hearing, Mr. Miller denied making the various statements alleged to have been made by him and could not explain why the unnamed sources (who were fellow residents of the PCCC) had made such allegations. As for Mr. Corcoran, Mr. Miller denied watching television in his presence and speculated that he had received negative attention from Mr. Corcoran because he (Mr. Miller) wore nice clothing and sometimes was transported to the PCCC in nice cars. This denial was contradicted by a community parole officer who stated that he had personally watched television at the PCCC with Mr. Miller and several other residents of the PCCC.

II. Relevant Legislation

[17] Sections 101, 141 and 147 of the *Corrections and Conditional Release Act* ("CCRA"), S.C. 1992, c. 20 state:

Principles guiding parole boards	**Principes**
101. The principles that shall guide the Board and the provincial parole boards in achieving the purpose of conditional release are	**101.** La Commission et les commissions provinciales sont guidées dans l'exécution de leur mandat par les principes qui suivent :
(a) that the protection of society be the paramount consideration in the determination of any case;	a) la protection de la société est le critère déterminant dans tous les cas;
(b) that parole boards take into consideration all available information that is relevant to a case, including the stated reasons and recommendations of the sentencing judge, any other information from the trial or the sentencing hearing, information and assessments provided by correctional authorities, and information obtained from victims and the offender;	b) elles doivent tenir compte de toute l'information pertinente disponible, notamment les motifs et les recommandations du juge qui a infligé la peine, les renseignements disponibles lors du procès ou de la détermination de la peine, ceux qui ont été obtenus des victimes et des délinquants, ainsi que les renseignements et évaluations fournis par les autorités correctionnelles;
(c) that parole boards enhance their effectiveness and openness through the timely exchange of relevant information with other components of the criminal justice system and through	c) elles accroissent leur efficacité et leur transparence par l'échange de renseignements utiles au moment opportun avec les autres éléments du système de

communication of their policies and programs to offenders, victims and the general public;

justice pénale d'une part, et par la communication de leurs directives d'orientation générale et programmes tant aux délinquants et aux victimes qu'au public, d'autre part;

(d) that parole boards make the least restrictive determination consistent with the protection of society;

d) le règlement des cas doit, compte tenu de la protection de la société, être le moins restrictif possible;

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

e) elles s'inspirent des directives d'orientation générale qui leur sont remises et leurs membres doivent recevoir la formation nécessaire à la mise en oeuvre de ces directives;

(f) that offenders be provided with relevant information, reasons for decisions and access to the review of decisions in order to ensure a fair and understandable conditional release process.

f) de manière à assurer l'équité et la clarté du processus, les autorités doivent donner aux délinquants les motifs des décisions, ainsi que tous autres renseignements pertinents, et la possibilité de les faire réviser.

Disclosure to offender

Délai de communication

141. (1) At least fifteen days before the day set for the review of the case of an offender, the Board shall provide or cause to be provided to the offender, in writing, in whichever of the two official languages of Canada is requested by the offender, the information that is to be considered in the review of the case or a summary of that information.

141. (1) Au moins quinze jours avant la date fixée pour l'examen de son cas, la Commission fait parvenir au délinquant, dans la langue officielle de son choix, les documents contenant l'information pertinente, ou un résumé de celle-ci.

Idem

(2) Where information referred to in subsection (1) comes into the possession of the Board after the time prescribed in that subsection, that information or a summary of it shall be provided to the offender as soon as is practicable thereafter.

Idem

(2) La Commission fait parvenir le plus rapidement possible au délinquant l'information visée au paragraphe (1) qu'elle obtient dans les quinze jours qui précèdent l'examen, ou un résumé de celle-ci.

Waiver

(3) An offender may waive the right to be provided with the information or summary referred to in subsection (1) or to have it provided within the period referred to, but where an offender has waived that period and any information is received by the offender, or by the Board, so late that the offender or the Board is unable to sufficiently prepare for the review, the offender is entitled to, or the Board may order, a postponement of the review for such reasonable period as the Board determines.

Renonciation

(3) Le délinquant peut renoncer à son droit à l'information ou à un résumé de celle-ci ou renoncer au délai de transmission; toutefois, le délinquant qui a renoncé au délai a le droit de demander le report de l'examen à une date ultérieure, que fixe la Commission, s'il reçoit des renseignements à un moment tellement proche de la date de l'examen qu'il lui serait impossible de s'y préparer; la Commission peut aussi décider de reporter l'examen lorsque des renseignements lui sont communiqués en pareil cas.

Exceptions

(4) Where the Board has reasonable grounds to believe

(a) that any information should not be disclosed on the grounds of public interest, or

(b) that its disclosure would jeopardize

Exceptions

(4) La Commission peut, dans la mesure jugée strictement nécessaire toutefois, refuser la communication de renseignements au délinquant si elle a des motifs raisonnables de croire que cette communication irait à l'encontre de l'intérêt public, mettrait en danger la sécurité

(i) the safety of any person,

(ii) the security of a correctional institution, or

(iii) the conduct of any lawful investigation,

the Board may withhold from the offender as much information as is strictly necessary in order to protect the interest identified in paragraph (a) or (b).

d'une personne ou du pénitencier ou compromettrait la tenue d'une enquête licite.

Right of appeal

147. (1) An offender may appeal a decision of the Board to the Appeal Division on the ground that the Board, in making its decision,
(a) failed to observe a principle of fundamental justice;

(b) made an error of law;

(c) breached or failed to apply a policy adopted pursuant to subsection 151(2);

(d) based its decision on erroneous or incomplete information; or
(e) acted without jurisdiction or beyond its jurisdiction, or failed to exercise its jurisdiction.

Droit d'appel

147. (1) Le délinquant visé par une décision de la Commission peut interjeter appel auprès de la Section d'appel pour l'un ou plusieurs des motifs suivants :
a) la Commission a violé un principe de justice fondamentale;
b) elle a commis une erreur de droit en rendant sa décision;
c) elle a contrevenu aux directives établies aux termes du paragraphe 151(2) ou ne les a pas appliquées;
d) elle a fondé sa décision sur des renseignements erronés ou incomplets;
e) elle a agi sans compétence, outrepassé celle-ci ou omis de l'exercer.

Decision of Vice-Chairperson

(2) The Vice-Chairperson, Appeal Division, may refuse to hear an appeal, without causing a full review of the case to be

Décision du vice-président

(2) Le vice-président de la Section d'appel peut refuser d'entendre un appel sans qu'il y ait réexamen complet du

undertaken, where, in the opinion of the Vice-Chairperson,

dossier dans les cas suivants lorsque, à son avis :

(a) the appeal is frivolous or vexatious;

a) l'appel est mal fondé et vexatoire;

(b) the relief sought is beyond the jurisdiction of the Board;

b) le recours envisagé ou la décision demandée ne relève pas de la compétence de la Commission;

(c) the appeal is based on information or on a new parole or statutory release plan that was not before the Board when it rendered the decision appealed from; or

c) l'appel est fondé sur des renseignements ou sur un nouveau projet de libération conditionnelle ou d'office qui n'existaient pas au moment où la décision visée par l'appel a été rendue;

(d) at the time the notice of appeal is received by the Appeal Division, the offender has ninety days or less to serve before being released from imprisonment.

d) lors de la réception de l'avis d'appel par la Section d'appel, le délinquant a quatre-vingt-dix jours ou moins à purger.

Time and manner of appeal

(3) The time within which and the manner in which a decision of the Board may be appealed shall be as prescribed by the regulations.

Délais et modalités

(3) Les délais et les modalités d'appel sont fixés par règlement.

Decision on appeal

(4) The Appeal Division, on the completion of a review of a decision appealed from, may

Décision

(4) Au terme de la révision, la Section d'appel peut rendre l'une des décisions suivantes :

(a) affirm the decision;

a) confirmer la décision visée par l'appel;

(b) affirm the decision but order a further review of the case by the Board on a date earlier than the date otherwise provided for

b) confirmer la décision visée par l'appel, mais ordonner un réexamen du cas avant la date normalement prévue pour le

the next review; (c) order a new review of the case by the Board and order the continuation of the decision pending the review; or (d) reverse, cancel or vary the decision.	prochain examen; c) ordonner un réexamen du cas et ordonner que la décision reste en vigueur malgré la tenue du nouvel examen; d) infirmer ou modifier la décision visée par l'appel.
Conditions of immediate release	**Mise en liberté immédiate**
(5) The Appeal Division shall not render a decision under subsection (4) that results in the immediate release of an offender from imprisonment unless it is satisfied that	**(5)** Si sa décision entraîne la libération immédiate du délinquant, la Section d'appel doit être convaincue, à la fois, que :
(a) the decision appealed from cannot reasonably be supported in law, under the applicable policies of the Board, or on the basis of the information available to the Board in its review of the case; and (b) a delay in releasing the offender from imprisonment would be unfair.	a) la décision visée par l'appel ne pouvait raisonnablement être fondée en droit, en vertu d'une politique de la Commission ou sur les renseignements dont celle-ci disposait au moment de l'examen du cas; b) le retard apporté à la libération du délinquant serait inéquitable.

[18] Section 7 of the *Canadian Charter of Rights and Freedoms* (the "Charter") states:

Life, liberty and security of person	**Vie, liberté et sécurité**
7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.	**7.** Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

III. Decisions Under Review

[19] Mr. Miller seeks judicial review of the Appeal Division's decision dated May 8, 2009. However, all but one of the issues raised in Mr. Miller's submissions pertain to the Board's decision dated December 3, 2008. By contrast, the Attorney General's submissions in response focused on the Appeal Division's decision.

[20] In *Cartier v. Canada (Attorney General)*, 2002 FCA 384, [2002] F.C.J. No. 1386 at paragraphs 8 and 9, it was noted that the Appeal Division's jurisdiction is significantly limited by the express terms of s. 147 of the CCRA. In short, the Appeal Division can intervene only if the Board committed an error described in paragraphs 147(1)(a) – (e), and only if that error was unreasonable.

[21] In these circumstances, on a further application to this Court, "[t]he judge in theory has an application for judicial review from the Appeal Division's decision before him, but when the latter has affirmed the Board's decision he is actually required ultimately to ensure that the Board's decision is lawful." (*Cartier*, above, at paragraph 10. See also *Aney v. Canada (Attorney General)*, 2005 FC 182, [2005] F.C.J. No. 228 at paragraph 29; and *Ngo v. Canada (Attorney General)*, 2005 FC 49, [2005] F.C.J. No. 71 at paragraph 8.)

A. *The Board's Decision*

[22] The Board's decision began with two detailed paragraphs that discussed a significant number of positive factors which indicated that, until shortly before his suspension, Mr. Miller had

been viewed by his supervisors as having done quite well during the period in which he was on day parole, from September 2007 to September 2008.

[23] After summarizing the facts discussed at paragraphs 6 to 10 and 12 above, the Board noted that Mr. Miller's explanations for why he had been improperly absent from his sign-out location were inconsistent.

[24] The Board then noted that, in assessing credibility, it "has to be mindful of the dangers of accepting information from unnamed informants." It further noted that "it is of limited additional value that the information came from separate sources, apparently independently." However, it found that the information provided by those informants was consistent with the distinctive and disturbing language reported upon by Mr. Corcoran and used by Mr. Miller with reference to the victim of his index offence and during the course of the hearing, in describing advances allegedly made towards him at the PCCC by a transgendered offender. Although Mr. Miller had alleged that Mr. Corcoran was motivated to harm him, the Board dismissed this allegation as being unpersuasive.

[25] In addition, as a result of conflicting information provided by Mr. Miller and inconsistencies in his testimony, the Board found that his credibility was "not impressive" and that his explanation for using the pronoun "it" when discussing certain females was "entirely unreliable." Under all of the circumstances, the Board stated that it was satisfied that there was reliable and persuasive

information to support the conclusion that Mr. Miller did make the remarks which led to his suspension.

[26] The Board further found that the circumstances of Mr. Miller's suspension were "extremely serious due to [his] prior involvement in a violent, brutal rape during the course of which [he] threatened and attempted to kill the female victim." In addition, the Board observed that Mr. Miller's most recent psychological report notes that he continues to declare his innocence regarding his index offences, that his risk for reoffending is assessed as being in the high end of the moderate range and that his risk for violent recidivism is rated as moderate. The Board also found it to be significant that Mr. Miller's most recent psychiatric report on file (i) remarked on his psychopathy and poor record of compliance with correctional officials, and (ii) commented that "even the slightest deviation from an agreed program will require further evaluation."

[27] Moreover, the Board noted that Mr. Miller's request and plan for return into the community did not satisfactorily address the behaviour which led to his suspension.

[28] Based on all of the foregoing, the Board concluded that Mr. Miller's risk for reoffending was undue, particularly given his history of violence and stance of denial, and that revocation of his day parole was the least restrictive option consistent with the protection of society.

B. *The Appeal Division's Decision*

[29] Mr. Miller appealed the Board's decision to the Appeal Division on the basis that (i) the Board failed to obtain and consider all available relevant and reliable information, namely his Casework Record, contrary to paragraph 101(b) of the CCRA and its duty of fairness to him; and (ii) the Board's decision was unreasonable.

(1) The Alleged Failure to Obtain Mr. Miller's Casework Record

[30] After carefully reviewing the file and listening to the recording of the Board's post-suspension hearing, the Appeal Division concluded that the Board had sufficient available relevant information about Mr. Miller's behaviour in the community to assess his risk of reoffending.

[31] With respect to his Casework Record, the Appeal Division noted that this information generally is not part of an offender's file before the Board. Relying on the Federal Court of Appeal's decision in *Zarzour v. Canada* (2000), 196 F.T.R. 320, [2000] F.C.J. No. 2070, it noted that (i) the Board has the discretion to determine the appropriate manner in which to ascertain the reliability and persuasive value of information it receives; and (ii) providing an offender with an opportunity to respond to and refute allegations made against him constitutes a significant way of verifying the reliability and persuasive value of information received by the Board.

[32] Accordingly, the Appeal Division found that the Board was not obliged to obtain Mr. Miller's Casework Record in order to discharge its obligation to ensure that the information set forth in the Corcoran Report was reliable and persuasive. Moreover, it found that there was no

information in the Corcoran Report or in the AFD that would have caused the Board to seek clarification and request further documentation, such as Mr. Miller's Casework Record.

[33] Contrary to Mr. Miller's claim, the Appeal Division found that it was not apparent from the way in which the Corcoran Report was written that Mr. Corcoran had reported Mr. Miller's remarks to Mr. Grey and Ms. Hogan in July and August of 2008.

(2) The Reasonableness of the Board's Decision

[34] After reviewing all of the relevant information available to the Board, in Mr. Miller's file and presented at his post-suspension hearing, the Appeal Board concluded that the Board's decision to revoke Mr. Miller's day parole was reasonable, well-founded and supported by sufficient relevant, reliable and persuasive information.

[35] In particular, the Appeal Division noted that the Board Members provided Mr. Miller with a full opportunity to respond to the Board's concerns and to rebut the allegations made against him by Mr. Corcoran and the four unnamed sources who had been deemed credible and reliable by the CSC. In addition, the Board provided Mr. Miller with an opportunity to explain why he had not properly signed out of the halfway house and why he had not reported his employment and its location to his parole officer.

[36] In addition, the Appeal Division found that the Board's determinations regarding Mr. Miller's credibility were reasonable, given (i) his inconsistent responses at the hearing (which

conflicted with the file information or were persuasively contradicted by his parole officer), and (ii) his denial of any wrongdoing, despite the different sources who reported similar information and serious concerns about Mr. Miller's behaviour on different occasions. The Appeal Division further noted that the Board could not ignore the fact that the alleged disturbing comments involving threats to harm, rape and kill women were similar in nature to his index offences, which involved the violent rape and attempted murder of a woman.

[37] The Appeal Division also found that the Board had considered and weighed all available information, both positive and negative, in arriving at its conclusion that Mr. Miller's risk to re-offend had become undue and no longer manageable on day parole. The Appeal Division further found that Board's written reasons clearly set out the basis for the Board's decision and were well supported.

IV. Standard of Review

[38] The questions of fact, mixed fact and law, and statutory interpretation that Mr. Miller has raised before this Court are reviewable on a standard of reasonableness; (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9at paragraphs 53-54; and *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] S.C.J. No. 12, at paragraph 53, see also *Sychuk v. Canada (Attorney General)*, 2009 FC 105, [2009] F.C.J. No. 136 at paragraph 45; *Bouchard v. Canada (National Parole Board)*, 2008 FC 248, [2008] F.C.J. No. 307 at paragraph 37; *Tozzi c. Canada (Procureur general)*, 2007 CF 825 at paragraph 32; and *Strachan v. Canada (Attorney General)*, 2006 FC 155, [2006] F.C.J. No. 216 at paragraph 15.)

[39] However, the alleged violations of procedural fairness, s. 7 of the Charter and the principles of natural justice that Mr. Miller has raised are reviewable on a standard of correctness. (*Dunsmuir*, above, at paragraphs. 55, 79 and 87; and *Khosa*, above, at paragraph 43.)

[40] The various specific issues that have been raised by Mr. Miller all relate to the Board's decision. The only separate issue that he has raised with respect to the Appeal Division's decision is that it was not reasonable for the Appeal Division to have confirmed the Board's decision, given the errors alleged to have been made by the Board.

[41] It follows that, if this Court is satisfied that the Board's decision was not procedurally unfair, did not contravene s. 7 of the Charter, and can otherwise reasonably be supported in fact and in law, the Appeal Division's affirmation of the Board's decision also should be found to be reasonable, unless the Appeal Division committed a separate error which rendered its decision unreasonable, such as failing to provide adequate reasons for its decision.

[42] In *Khosa*, above, at para. 59, reasonableness was articulated by Justice Ian Binnie as follows:

> Where the reasonableness standard applies, it requires deference. Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47). There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not

> open to a reviewing court to substitute its own view of a preferable outcome.

V. Issues

[43] In his application to this Court for judicial review of the Appeal Board's decision, Mr. Miller has raised the following issues:

A. Did the Board reach an unreasonable decision by ignoring all of the positive factors which allegedly indicate that his risk to re-offend is manageable?

B. Did the Board's failure to obtain and consider Mr. Miller's Casework Record contravene paragraph 101(b) of the CCRA, s. 7 of the Charter or the general duty of fairness owed to Mr. Miller by the Board; and did that failure lead the Board to base its decision on erroneous or incomplete information?

C. Did the Board's failure to disclose the full contents of the Corcoran Report to Mr. Miller contravene s. 141 of the CCRA or the principles of natural justice?

D. Did the Appeal Division reach an unreasonable decision in affirming the Board's decision?

VI. Analysis

A. *Did the Board Reach an Unreasonable Decision by Ignoring the Various Positive Factors Which Allegedly Indicate that Mr. Miller's Risk to Re-Offend is Manageable?*

[44] Contrary to Mr. Miller's claim, the Board did not ignore the various positive factors in his file which Mr. Miller believes indicate that his risk to re-offend is manageable.

[45] As noted in Part III. A. above, the Board's decision began with two detailed paragraphs that discussed a significant number of positive factors which indicated that until shortly before his suspension, Mr. Miller had been viewed by his supervisors as "having done quite well" during the period in which he was on day parole, from September 2007 to September 2008. Given that Mr. Miller did not elaborate on this point in his written and oral submissions to this Court, it is not

apparent what additional information he believes ought to have been considered, apart from his Casework Record, discussed immediately below.

[46] In view of the fact that the positive factors reflected in the various materials filed with the Court all appear to have been appropriately addressed by the Board, I cannot conclude that the Board reached an unreasonable decision on the basis alleged by Mr. Miller.

B. *Did the Board's Failure to Obtain and Consider Mr. Miller's Casework Record Contravene Paragraph 101(b) of the CCRA, s. 7 of the Charter or the General Duty of Fairness Owed to Mr. Miller by the Board; and Did that Failure Lead the Board to Base its Decision on Erroneous or Incomplete Information?*

[47] Mr. Miller submits that paragraph 101(b) of the CCRA, s. 7 of the *Charter* and the Board's general duty of fairness each imposed an obligation on the Board to actively obtain his Casework Record. In short, given that Mr. Corcoran stated in his report that he disclosed to Mr. Grey and Ms. Hogan the disturbing remarks that were set forth in that report, allegedly sometime in July or August of 2008, Mr. Miller submitted that the Board should have known that the Casework Report was an "available" source of "information that is relevant to [his] case", within the meaning of paragraph 101(b). In his view, the absence of any reference in his Casework Report to the remarks that Mr. Corcoran claims to have heard him make raises a serious question as to the credibility of Mr. Corcoran's allegation, because the CSC's internal policies require Parole Officers to maintain clear, detailed and up-to-date Casework Records, including information from collateral contacts and notes of all case conferences.

[48] As to the alleged violations of s. 7 of the *Charter* and the duty of fairness owed to him by the Board, Mr. Miller submitted that it is contrary to the principles of fundamental justice for the Board to have failed to obtain relevant information such as his Casework Record, especially when crucial facts such as those set forth in the Corcoran Report demand corroboration.

[49] In support of this submission, Mr. Miller cited *Mooring v. Canada (National Parole Board)*, [1996] 1 S.C.R. 75, [1996] S.C.J. No. 10 and *Zarzour*, above. In *Mooring*, at paragraph 34, the Supreme Court observed that "statutory tribunals such as the Parole Board are bound by a duty of fairness in deciding upon the rights or privileges of individuals." The Court then proceeded, at paragraph 36, to state that the Board "must ensure that the information upon which it acts is reliable and persuasive." This latter statement was made in the context of the Court's discussion of paragraphs 4(g), 101(f) and 147(1)(a) of the CCRA. The remainder of the Court's discussion of this point focused on the circumstances in which the Board might be under a duty to exclude information that could be relevant to its decision, pursuant to s. 24(2) of the *Charter*.

[50] In *Zarzour*, above, at paragraph 27, the Federal Court of Appeal followed the *Mooring* decision and reiterated that paragraph 101(f) of the CCRA requires the Board to "act in accordance with the principles of fairness." It added that "insofar as [the Board] wishes to use information that is relevant to the matter at hand, it must satisfy itself of its accuracy and its persuasive value, or it will fail in its duty to act fairly." At paragraph 29, it further recognized that this duty is also imposed

"under the procedural fairness principle" of common law. However, speaking on behalf of the Court, Justice Gilles Létourneau then stated the following at paragraph 38 of the Court's decision:

> I do not think, as the respondent appears to be arguing, that it is always necessary to conduct an inquiry to verify information that the Board receives. Given its needs, resources and expertise, the Board must be given some latitude, obviously within some legal parameters, as to the appropriate methods for guaranteeing the reliability of information that is supplied to it. It may be appropriate to do so by an investigation or by merely inquiry further. But confronting the person primarily affected with the allegations made in his regard, and enabling him to comment on them and rebut them, is also a significant method of verification which is generally done unless there is some security problem: see section 141 of the Act and the National Parole Board Policy Manual. Furthermore, in terms of fairness, the confrontation ensures compliance with those principles and, in terms of the release objective, is a way of gauging the inmate's reaction and his sincerity in the face of those allegations.

[51] In the case at hand, and consistent with the approach described in the passage quoted immediately above, the Board confronted Mr. Miller with the allegations that had been made against him by the four unnamed sources and in the Corcoran Report. The Board then gave Mr. Miller an opportunity to comment on those allegations and to rebut them. The Board was under no obligation to go further and actively seek to obtain Mr. Miller's Casework Record.

[52] Contrary to Mr. Miller's submission, it was not apparent from the Corcoran Report that Mr. Corcoran had brought Mr. Miller's alleged remarks to the attention of Mr. Grey and Ms Hogan in July or August of 2008. Moreover, Mr. Miller's counsel acknowledged at the hearing before this Court that Casework Records do not always include records of all conversations between CSC authorities and an offender. He also acknowledged that there is often some delay before records of such conversations are reflected in Casework Records. Therefore, it would not have been

immediately apparent to the Board, as Mr. Miller suggests, that his Casework Record might contain information that was relevant to his case, as contemplated by paragraph 101(b) of the CCRA.

[53] In any event, there was another method of testing the reliability and persuasiveness of Mr. Corcoran's allegations available to the Board, which the Board chose to pursue. It was not unreasonable for the Board to exercise its discretion in this way.

[54] I do not agree with Mr. Miller's contention that paragraph 101(b) imposed an obligation on the Board to actively seek to obtain information that had not been placed before it and that might or might not contain information that was relevant to his case. In my view, the words "all available information that is relevant to a case" and "information and assessments *provided by* correction authorities" do not contemplate that the Board has an open-ended duty to actively seek potentially relevant information from the CSC. Rather, insofar as the CSC is concerned, those words simply require the Board to take into consideration all information *received from* the CSC that is relevant to a case. Paragraph 101(f) of the CCRA and the common law duty of fairness then require the Board to ensure that any such information upon which it may act is reliable and persuasive. As stated in *Zarzour*, above, the Board then has some latitude with respect to the manner in which it satisfies this latter obligation. (See also *Strachan*, above, at paragraph 28.)

[55] Finally, given that the Board provided Mr. Miller with an opportunity to comment on and to rebut the allegations made by Mr. Corcoran and the four unnamed sources, the Board did not

contravene s. 7 of the *Charter* or the principles of natural justice by failing to seek Mr. Miller's Casework Record.

C. *Did the Board's Failure to Disclose the Full Contents of the Corcoran Report to Mr. Miller Contravene s. 141 of the CCRA or the Principles of Natural Justice?*

[56] The full Corcoran Report was one paragraph in length. The information from that report that was included in the AFD, which was provided to Mr. Miller almost two months before the Board's hearing, contained the essence of the report. In short, that was the information from the report that was relied upon by the Board in making its decision. No important information contained in the Corcoran Report was omitted from the AFD.

[57] I am satisfied that this information was a sufficient "summary" of the Corcoran Report to meet the requirements of subsection 141(1) of the CCRA, which requires the Board to provide to an offender, in writing, "the information that is to be considered in the review of the case or a summary of that information."

[58] In his written submissions to the Court, Mr. Miller stated that the Board's failure to disclose the full contents of the Corcoran Report to him resulted in a denial of natural justice. He did not elaborate upon this bald assertion, did not provide any supporting analysis or authorities, and his counsel did not raise the point in his oral submissions.

[59] Given that a good summary of the Corcoran Report was provided to Mr. Miller and given that the undisclosed information in the Corcoran Report did not include any information that was

apparently relied upon by the Board or necessary to allow Mr. Miller to answer the case against him, I do not agree with the contention that the failure of the Board to disclose the full contents of the Corcoran Report resulted in a denial of natural justice. As Justice James K. Hugessen stated in *Demaria v. Regional Classification Board*, [1987] 1 F.C. 74, [1986] F.C.J. No. 493 at paragraph 10: "[…] In the final analysis, the test must be not whether there exist good grounds for withholding information but rather whether enough information has been revealed to allow the person concerned to answer the case against him." In my view, the information from the Corcoran Report that was disclosed to Mr. Miller met that test.

D. *Did the Appeal Division Reach an Unreasonable Decision in Affirming the Board's Decision?*

[60] Mr. Miller's final submission is that the Appeal Division's decision affirming the Board's decision was unreasonable because the Board's decision was unreasonable and because the Board committed the various alleged errors that have been dealt with above.

[61] As noted at paragraph 20 above, the Appeal Division can intervene only if the Board committed an error described in paragraphs 147(1)(a) – (e), and only if that error was unreasonable.

[62] Given my conclusions that the Board's decision was not unreasonable and that the Board did not commit the various errors alleged by Mr. Miller, it follows that the Appeal Division's decision was not unreasonable, unless the Appeal Division committed a separate error that rendered its decision unreasonable, such as failing to provide adequate reasons for its decision.

[63] As discussed in Part III. B. above, the Appeal Division carefully reviewed Mr. Miller's file and listened to the recording of the Board's post-suspension hearing. It then gave Mr. Miller a full opportunity to present his submissions and it addressed each of those submissions in detailed reasons that explained the basis for its specific conclusions as well as its general conclusion that the Board's decision to revoke his day parole was reasonable, well-founded and supported by sufficient relevant, reliable and persuasive information.

[64] In short, the Appeal Division's decision was appropriately justified, transparent and intelligible.

[65] I therefore conclude that the Appeal Division's decision was reasonable

VII. Conclusion

[66] Mr. Miller's application for judicial review is dismissed with costs.

JUDGMENT

THIS COURT ORDERS that this application for judicial review is dismissed with costs to the Respondent.

"Paul S. Crampton"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	Douglas Bernard Millar v. Attorney General of Canada
PLACE OF HEARING:	Kingston, Ontario
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