T-1701-23

Court File No. ~~23-T-59~~

FEDERAL COURT

KENNETH ALLEN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

NOTICE OF APPLICATION FOR **JUDICIAL REVIEW** PURSUANT TO SECTION 18.1 OF THE *FEDERAL COURTS ACT*

NOTICE OF APPLICATION TO FEDERAL COURT FOR JUDICIAL REVIEW

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the Applicant. The relief claimed by the Applicant appears below.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the Applicant. The Applicant requests that this application be heard at Vancouver, British Columbia.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must file a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the Applicant's solicitor or, if the Applicant is self-represented, on the Applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court, and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date August 14, 2023 Issued by _____
(*Registry Officer*)

Address of local office: 701 West Georgia Street,
Vancouver, British Columbia
V7Y 1B6

TO: **ATTORNEY GENERAL OF CANADA**
Office of the Deputy Attorney General of Canada
284 Wellington Street
Ottawa ON K1A 0H8

APPLICATION

This is an application for judicial review in respect of a decision of the Parole Board of Canada, Appeal Division, communicated to the Applicant on June 10, 2023, affirming the January 20, 2023 decision of the Parole Board of Canada ("Parole Board") revoking the Applicant's statutory release ("Decision").

The applicant makes the application for the following relief:

(a) an order in the nature of *certiorari* quashing the decision that revoked the Applicant's statutory release, and

(b) an order of *mandamus* to require the Parole Board of Canada to cancel the suspension of his statutory release, or in the alternative, for the matter to be sent back for re-hearing before the Parole Board of Canada; and

(c) such other relief as the court deems just.

The grounds for the application are:

1. In confirming the Parole Board of Canada's decision revoking the Applicant's statutory release, the Parole Board of Canada, Appeal Division's decision was unreasonable for three reasons. First, the Board failed to consider statutorily required factors that suggested the Applicant's risk could be managed without re-incarceration. Second, even if the Board did consider the required factors, the conclusion ultimately drawn is not justifiable or transparent from the reasons, as defined by the Supreme Court in *Vavilov* and in the Parole Board's own mandatory policy. Third, the Board committed material misapprehensions of fact that impacted the ultimate conclusion to revoke the Applicant's statutory release.

A. The Decision is unreasonable because the Parole Board failed to consider statutorily mandated factors

2. The Parole Board failed to consider statutorily required factors under the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 ("*CCRA*") that tended to mitigate the Applicant's risk and suggested that his risk could be controlled by less restrictive measures.

3. In assessing whether an offender's risk has changed since release or re-incarceration, as the case may be, the *CCRA* requires the Parole Board to consider all relevant factors (s. 132). The Board is also statutorily required to consider "the availability of supervision programs that would offer adequate protection to the public from the risk the offender might otherwise present until the expiration of the offender's sentence according to law" (s. 132(1)(d)).
4. The *CCRA* further provides that the Board must "adopt" and be "guide[d] by appropriate policies", and provide their members "with the necessary training to implement those policies" (s. 101(d)).The *Decision-Making Policy Manual for Parole Board Members* ("*PBC Policy*"), is the embodiment of s. 101(d) of the *CCRA.* Pursuant to the *CCRA,* the *PBC Policy* "must" guide decision-making (s. 101(d)).
5. The *PBC Policy* outlines additional factors the Board must consider, including professional opinions regarding the individual's behaviour, alternative measures implemented or proposed to manage the behaviour, the release plan and community supervision strategies, systemic and background factors that may have contributed to the offender's involvement in the criminal justice system, information from victims, and the representations made by the offender at the hearing (s. 7.1).
6. The notion that the Parole Board must impose the least restrictive means to control the offender's risk is ultimately grounded in the statement of purpose and the accompanying set of principles set out in Part II of the *CCRA*. Statutory release is intended to "contribute to the maintenance of a just, peaceful and safe society by means of decisions on the timing and conditions of release that will best facilitate the rehabilitation of offenders and their integration into the community as law-abiding citizens". To achieve these ends, while the Parole Board must give paramount consideration to the protection of society, it must also use the "least restrictive" means to control the risk presented by the offender. In doing so, the Board must adopt and follow appropriate policies, including the *PBC Policy*, and take into account all available, relevant information.

CCRA, ss. 100, 100.1, 101, 132

7. In a revocation hearing, where the Parole Board is tasked with determining whether the offender's risk can be managed in the community, key evidence will almost certainly include the offender's release plan, expert and institutional opinions regarding the offender's risk, support letters, the offender's own submissions, and any proposed alternative measures to revocation. Indeed, such evidence is precisely the kind of evidence the offender must adduce to establish that their risk can be managed without re-incarceration.
8. The Board made no meaningful assessment of the Applicant's release plan and entirely failed to weigh the evidence adduced by the Applicant that suggested his statutory release should not be revoked, as his risk could be adequately managed. The Parole Board failed to consider issues raised by the Applicant and evidence adduced in support of his position. Specifically, the Board member failed to address, as required by the *PBC Policy* and the *CCRA*, the evidence suggesting the Applicant's risk could be managed with less restrictive measures, including:
    a. the evidence provided by the Applicant's
        i. registered psychiatric nurse at Kent Institution,
        ii. institutional parole officer,
        iii. social worker, who had worked with the Applicant for a period of nine months, and
        iv. community parole officer;
    b. the Applicant and his advocates' representations to the Board during the hearing; and
    c. the Applicant's release plan and proposed alternative measures to re-incarceration.

    ("Evidence Favouring Release")

9. Given the clear requirement in both the *PBC Policy* and the *CCRA*, it was unreasonable for the Parole Board to fail to meaningfully engage with the Evidence Favouring Release adduced on behalf of the Applicant. Despite the decision-maker stating that he had

"read and considered" the "last minute"[1] Evidence Favouring Release, and affirmatively answering the Applicant's question whether he had read the letter from his registered psychiatric nurse, the Board's decision conducts no analysis, makes no mention of, and does not account for any of the evidence of his mitigated risk and how it could be managed, the very questions at issue in the revocation hearing.

10. In the Applicant's case, the Parole Board's decision was unreasonable. It failed to consider mandatory factors under the *PBC Policy* and the *CCRA*. The Board's error is not superficial or periphery to the decision. Reading the reasons as a whole, it is the primary reason why the Applicant's statutory release was revoked, despite the Evidence Favouring Release bein directly relevant to the conclusion ultimately drawn. The decision should be quashed on this basis alone

Vavilov v. Canada (Minister of Citizenship and Immigration), 2019 SCC 55 at para. 15

PBC Policy, 7.1 (6), (19), (20), (29)(d)—(g)

Decision, pp. 6–7

11. If the Board was of the view that it needed formal confirmation of the Applicant's release plan, which had been informally confirmed the morning of the hearing, it ought to have adjourned the hearing to allow it to gain confirmation. It was unreasonable not to adjourn the proceeding to allow this to be accomplished.

PBC Policy, 7.1(12)

12. Consequently, the Parole Board's decision to revoke the Applicant's statutory release was unreasonable. Intervention by this Court is necessary to safeguard the legality, rationality, and fairness of the Parole Board's administrative process.

[1] The Applicant's advocate at the Parole Board hearing was only able to secure a spot in a Community Residential Facility ("CRF") on January 18, 2023 (two days before the hearing): Szeto Affidavit #1 at Exhibit C. Therefore, the Parole Board of Canada, Appeals Division concluded that the release plan was "unofficial" and therefore there was sufficient information before the Board that the Applicant "did not have a confirmed and viable release plan". Further, the Appeals Division concluded that it was reasonable for the Board not to adjourn the hearing in order to confirm the release plan.

B. If the Parole Board did consider the Relevant Factors, the decision is unreasonable because it is not justified, intelligible and transparent

13. Section 101(e) of the *CCRA* provides that the Parole Board members are required to provide reasons for their decisions that "summarize relevant information, their overall findings and assessment of the offender's risk to re-offend and the rationale for their decision" (see also *PBC Policy*, s. 7.1(28)). The *PBC Policy* defines what is required for a Parole Board decision to reasonable and transparent, per the Supreme Court of Canada in *Vavilov*. At s. 7.1, paragraph 29, the *PBC Policy* states that "a reasonable decision is transparent, explains how the decision was reached and provides a clear rationale". At paragraph 30, the *PBC Policy* explains that to be considered transparent (and therefore reasonable), decisions of the Parole Board must include the following information *in order to be transparent.*

    a. an analysis of the release plan and community supervision strategies to manage the offender's risk during any remaining period of supervision;
    b. an analysis of the offender's representations;
    c. an overview of the victim statements; and
    d. an analysis of all relevant aspects of the case, including aggravating and mitigating factors related to the risk to re-offeend and discordant information of importance. (Relevant Factors)

14. Therefore, in the Applicant's case, even if the Relevant Factors and Evidence Favouring Release were, in fact, properly considered by the Parole Board, the decision is nevertheless unreasonable because it is not transparent, as defined by the Parole Board itself. The Decision does not meaningfully account for the concerns raised by the Applicant, the relevant evidence he presented regarding the ability to manage his risk in the community, or justify the conclusion to revoke his statutory release. Even assuming the Board properly considered the Relevant Factors and concluded that the risk the Applicant presented was too great to be managed outside the carceral setting, its reasons do not justify that conclusion and the decision is therefore unreasonable.

Vavilov at paras. 15, 127–128

15. The reasons give the Applicant no insight into why his release plan was determined to be insufficient, because it was simply not discussed other than to say that it was insufficiently detailed. The Board's decision does nothing to "demonstrate that they have actually *listened* to" the Applicant (emphasis original). It is not simply that the Board did not mention the Relevant Factors and Evidence Favouring Release[2], but failed to engage with this key evidence at all, even where it contradicted other evidence or inferences drawn by the Board. For example, the event that ultimately initiated the suspension was described in the Decision as the Applicant having a medical issue and becoming "combative with staff", where he "punched, kicked, and bit staff who tried to help". In fact, the staff who were allegedly punched, kicked, and bit gave statements at the hearing and to police that the Applicant's actions were involuntary: he did not know what he was doing. Indeed, he was having a medical emergency.

Vavilov at para. 127

Decision at p. 7

16. The Supreme Court in *Vavilov* noted that the reviewing court must read the decision-maker's reasons in light of the context, including the submissions of the parties, publicly available policies or guidelines, and past decisions. In this case, these contextual factors likewise suggest the decision was unreasonable: the Parole Board ignored the submissions of the Applicant on the key issue, and made a decision that is contrary to its own policy requirements.

Vavilov at para. 94

17. Ultimately, the reasons fail to display a rational chain of analysis such that this Court can be satisfied that the Board considered the Relevant Factors, including the Applicant's release plan. It is not justified by the facts, given the lack of consideration of evidence presented regarding the Applicant's mitigated risk. Specifically, contrary to the guidance in *Vavilov,* that the decision be "justified, intelligible and transparent, not in the abstract,

[2] While the Parole Board of Canada, Appeal Division's decision notes that the decision-maker is presumed to have weighed all the evidence presented to it unless the contrary is shown, citing *Barr v. Canada (Attorney General)*, 2018 FC 217, this decision was overtaken by the Supreme Court of Canada's decision in *Vavilov*, *supra*.

but to the individuals subject to it." This Court need not defer to such a decision, and ought to quash the decision on the basis of unreasonableness.

Vavilov at para. 95

C. The Decision was unreasonable because the Board materially misapprehended the evidence

18. The Board made several material errors of fact, each to the detriment of the Applicant, which, in combination, renders the Decision unreasonable.

19. First, the Decision states that the Applicant did not complete high school, and has a limited employment history. In fact, the evidence before the Board in the Applicant's Correctional Plan was that:

> [P]rior to incarceration, Mr. Allen had limited employment experience. He had not completed high school education. To his credit, Mr. Allen completed his education and has now been working on university courses, demonstrating motivation to complete his schooling….Mr. Allen has held a number of different employment positions throughout incarceration including canteen, Inmate Welfare Committee, Elder's helper, Chairman of the NA/AA…he has also achieved numerous vocational certificates.

Affidavit #1 of Roni Szeto, affirmed July 17, 2023 ("Szeto Affidavit"), Exhibit A (Correctional Plan)

20. Second, the Decision refers to a condition being added to the Applicant's statutory release to attend counselling to "ensure [the Applicant's] participation". In fact, the Applicant requested counselling to be included as a condition because he wanted to receive the service. It was the Applicant's institutional parole officer who expressed concern that the Correctional Service of Canada may not have the resources to fulfil the condition.

Szeto Affidavit, at Exhibit B (Support Letter of Leita McInnis, RSW, MSW), Exhibit D (Applicant's Written Submissions)

21. Third, the Decision states that the Applicant made no progress toward his release plan.[3] In his written statement, however, the Applicant described numerous pro-social actions that he had taken during his release. He pursued employment and volunteer

[3] Presumably this is the case because the Applicant's dynamic factor assessment did not change, although it is not entirely clear from the Decision.

opportunities and spent time with pro-social community supports, including his brother, and other actions that were specifically identified by the Applicant's Community Parole Officer stated she needed to see in order to change his community functioning scores.

22. This significant misapprehension of evidence, alone or in combination with the other errors, renders the decision unreasonable.

Rijhwani v. Canada (Citizenship and Immigration), 2022 FC 549 at para. 15

This application will be supported by the following material: (*List the supporting affidavits, including documentary exhibits, and the portions of transcripts to be used.*)

1. Affidavit #1 of Roni Szeto, affirmed July 17, 2023; and
2. Such further and other material as counsel may advise and as this Honourable Court may permit.

The applicant requests the Parole Board of Canada to send a certified copy of the following material that is not in the possession of the Applicant but is in the possession of the Parole Board of Canada to the Applicant and to the Registry: all materials before the Parole Board regarding its decision to revoke the Applicant's statutory release, including but not limited to: all support letters (save for that of Leita McInnis), and the letter from Applicant.

July 17, 2023

Carly Peddle

MacKay Boyar Law Corporation
645- 375 Water Street
Vancouver, BC, V6B 5C6

Tel: 604-659-6060
Email: carly@mackayboyar.com