

CANADA / JUDGMENT

Ryan v. Canada (Attorney General)

2024 FC 1977

COURT

Federal Court

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Decision Content

Date: 20241205

Docket: T-1006-23

Citation: 2024 FC 1977

Ottawa, Ontario, December 5, 2024

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

RICHARD RYAN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This matter concerns the refusal of the Appeal Division of the Parole Board of Canada [Appeal Division] to grant this applicant a 24-hour Unescorted Temporary Absence [UTA]. This is an application for judicial review, pursuant to section 18.1 of the Federal Courts Act, RSC 1985, c F-7, of a decision of the Appeal Division which affirmed the Parole Board of Canada's decision [the Board] to deny the applicant, Richard Ryan, an UTA at a halfway house, pursuant to section 116 of the Corrections and Conditional Release Act, SC 1992, c 20 [CCRA]. The applicant is a designated dangerous offender with a criminal history of violence, serving an indeterminate sentence since 2001.

[2] The facts in this case are lengthy, but are worth an overview in order to understand the full context of the decision under review.

I. Facts [3] The applicant's criminal history began with non-violent offences. In 1989, the applicant was convicted of impaired driving offences. In 1992, he was convicted of several fraud related charges. In 1993, the applicant was convicted of impaired driving, failing to attend Court, making harassing phone calls and fraudulently obtaining food and accommodation.

[4] In 1995, the applicant's criminal history took a violent turn. According to the Board's decision of November 2022, the applicant was convicted of assault against his spouse. In the same year, he received his first federal sentence [imprisonment for two years or more] for aggravated sexual assault, forcible confinement, failing to comply, fraud and impersonation with the intent to gain knowledge.

[5] In 1998, while on statutory release, the applicant committed a violent sexual assault against a university student that he lured to a hotel room. During this period, he also stole from a vulnerable widow by convincing her that he would invest her savings on her behalf.

[6] In 2000, while awaiting his sentence for the violent sexual assault committed in 1998, the applicant escaped custody while on an Escorted Temporary Absence [ETA] and was at large for several weeks.

[7] In 2001, the applicant was declared a dangerous offender and received an indeterminate sentence. The applicant maintains his innocence for the 1998 sexual assault charges and spent several years appealing both his convictions and his indeterminate sentence.

[8] In 2003, the applicant was convicted of escaping lawful custody for the time he was at large after his ETA and was sentenced to two years to be served concurrently with his indeterminate sentence.

[9] In 2005, the applicant was convicted of theft over \$5000 for having stolen the widow's savings and received an 18-month sentence to be served concurrently with his indeterminate sentence.

- [10] Between 2009 and 2013, the Board conducted three statutorily mandated reviews of the fitness of applicant's indeterminate sentence (Criminal Code, RSC 1985, c C-46, ss 761(1)). The applicant waived his right to a hearing for these reviews. In all three cases, the Board found that the sentence continued to be tailored to the applicant's circumstances.
- [11] In 2015, the applicant did not waive his right to a parole hearing and made written representations to the Board arguing that his sentence was no longer tailored to his circumstances. On August 20, 2015, the Board found his sentence continued to be tailored to his circumstances and denied him full and day parole.
- [12] On February 14, 2017, the Board denied the applicant's second request for parole, although the Board recognized that he had completed a specialized rehabilitation program and observed that there was a path forward for the applicant.
- [13] On May 22, 2019, the Board denied the applicant's next request for parole, finding that the sentence was still appropriate and had not become grossly disproportionate, while recognizing that the applicant continued to make some slow progress.
- [14] On May 3, 2021, the Board denied the applicant's further request for parole. While recognizing that the applicant's progress had generally followed a linear path of improvement, the Board found that the indeterminate sentence continued to be tailored to his circumstances.
- [15] Starting in July 2022, the two Board hearings led to the Appeal Division's decision which is the subject of the judicial review application before the Court. On July 13, 2022, the Board denied the applicant's request for day parole, finding that the sentence continued to be tailored to the applicant's circumstances, but noting that his progress had stagnated. The Board noted that Correctional Services Canada [CSC] had identified a path to reintegration for the applicant. This path includes the completion of a maintenance program, working on addressing rigidity and sexual deviance, working towards a security declassification [the applicant was detained in a medium security institution] and the applicant demonstrating that he is "able to work within a less structured setting for a certain period of time in order to benefit from progressively less structured environments" (Parole Board of Canada, July 13, 2022 decision, applicant's record, at p 86). The Board concluded its decision by inviting the applicant to make a request for a 24-hour UTA. The applicant subsequently made such a request.
- [16] The July decision was the trigger leading to the consideration of whether an UTA would be appropriate. On November 1, 2022, the Board held a hearing to consider the request for a 24-hour UTA. On November 7, 2022, the Board communicated its decision denying the applicant's request.
- [17] On January 10, 2023, the applicant appealed the Board's decision to the Appeal Division.

[18] On April 13, 2023, the Appeal Division affirmed the decision denying the applicant's request for a 24-hour UTA.

[19] On 11 May 2023, the applicant filed his notice of application for judicial review.

II. The Decisions under Review [20] Generally, an application for judicial review is limited to the review of a single administrative decision (Federal Courts Rules, SOR/98-106, s 302). This is based on the principle that "parties can proceed to the court system only after all adequate remedial recourses in the administrative process have been exhausted" (CB Powell Limited v Canada (Border Services Agency), 2010 FCA 61 (CanLII), [2011] 2 FCR 332, at para 30; Dugré v Canada (Attorney General), 2021 FCA 8 [Dugré]). It remains, however, that the decision appealed to the Appeal Division provides the context in which the appeal is heard. As the Federal Court of Appeal found in *Cartier v Canada (Attorney General)* (CA), 2002 FCA 384 [Cartier], "[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" (para 10). In other words, the judicial review of the appellate decision entails that, in the end, the Board's decision was itself lawful. I add that the conclusion reached in *Cartier* was not displaced in *Huruglica v Canada (Citizenship and Immigration)*, 2016 FCA 93, [2016] 4 FCR 157, at paras 50 and 61.

[21] Accordingly, I reviewed both decisions, that of the Board and that of the Appeal Division which is directly before this Court. In addition, it will be necessary in order to understand more fully the argument offered by Mr. Ryan to refer to the Board's decision of July 2022, which is at the origin of the applicant's contention.

[22] It remains that it is the Appeal Division's decision which is owed significant deference: *Rowe v Canada (Attorney General)*, 2023 FC 1282, at para 25. The other two decisions provide the needed context.

A. The Board's July 13, 2022 decision (applicant's record, pp 77 to 87) [23] Following numerous decisions from the Board (February 8, 2013; August 20, 2015; February 14, 2017; May 22, 2019; April 30, 2021), a panel of the Board conducted another review "to make a decision about day parole" in the case of Mr. Ryan. The decision came on July 13, 2022.

[24] As we shall see, Mr. Ryan argues that the Board, in November 2022, ignored the July 22 decision, which had found that the indeterminate sentence imposed on him was becoming grossly disproportionate. Thus, it is necessary to understand what was effectively decided on July 13, 2022.

[25] The July 2022 decision constitutes an extensive report about the criminal history of the applicant, and the various interventions and assessments conducted in the years preceding. The Board denied day parole, having assessed that "you will, by reoffending, present an undue risk to society before the expiration according to law of the sentence you are serving and that your release will not contribute to the protection of society by facilitating your reintegration into society as a law-abiding citizen" (p 8/10). The Board notes the very violent

offences against women committed by the applicant and a history of not respecting his conditions and obligations in the community in support of its conclusion that the applicant is not ready for day parole.

[26] The psychological assessments are taken into account by the panel and the case management team working with Mr. Ryan was not supporting of day parole. Indeed, the Board notes that “[d]uring the hearing, the Board was also able to witness elements of control and rigidity” (p 9/11). The conclusion is expressed in the following terms:

In conclusion, the Board is of the opinion that little progress was made since the last Board hearing. Specific interventions were made available to you and you did not take full advantage of them. You participated in a psychocriminological follow-up but did not show intrinsic motivation. You also refused to participate in the maintenance program. You did present interesting release plans, started to open up by sharing your journals and remained compliant and motivated. However, The [sic] Board is of the opinion that since the last decision from the Board, your motivation was more focused on preparing your release and get services from CSC than working genuinely on your risk factors. As such, a return in the community on day parole is not realistic notably because of your criminality, your risk levels and the little time you have had in the community over the last several years. The Board still considers that your plan does not contain the elements of a gradual return in the community, which is needed in your case, given your high level of institutionalization and your credibility, which has to be rebuilt.

(p 10/11)

[27] That was about day parole. Nonetheless Mr. Ryan had been incarcerated for a significant period of time. Even though he had successfully followed various programs in the institution over the years, his progress towards release in the community was seen as stagnating. That was a concern expressed by this Board panel. The applicant focused on the last paragraph of the July 2022 decision which reads as follows:

However, the Board is of the opinion that you are getting closer to a standstill and close attention is required to ensure that your sentence remains tailored to fit the circumstances of your case and that your continued incarceration does not rapidly become grossly disproportionate to your case. As such, the Board asks you to make a request for an unescorted temporary absence for personal development, for you to be granted an overnight stay at a halfway house, and to work closely with CSC to prepare a plan, targeting possibly a halfway house where you have already been accepted for day parole. The Board also asks CSC to provide its recommendation on such a request. The Board will review your request at a hearing to be held in October 2022.

(p 11/11)

As a matter of fact, not only did the Board conclude that the applicant was not ready for day parole, but it did conclude that the sentence continued to be “tailored to fit the circumstances of your case and ensure that your continued incarceration does not become grossly disproportionate to your case”.

[28] Two paragraphs before, the panel had made observations that inform the last paragraph of the decision and provide further context:

Finally, in reviewing if your indeterminate sentence is tailored to meet the circumstances of your case, ensuring that your specific needs have been identified, and that all attempts have been made through case planning to prepare you for release, the Board has considered the information in your file as well as the information provided by yourself, your assistant and your parole officer during the hearing and file information received after the adjournment. The Board notes that since the Board's decision of 2019 and up to recently, little services were offered to you. You put yourself in a vicious circle by being rigid to intervention and for CSC to offering little possibilities until you work on your rigidity to be able to benefit from their intervention. However, in the last year, you participated in a psychological follow-up which was terminated as you did not show intrinsic motivation. Furthermore, you were offered to participate in the maintenance program but you declined. The Board also takes into consideration of the fact that the COVID-19 pandemic public-health measures had an impact on CSC's ability to provide continuity in the services offered.

[Emphasis added.]

(p 11/11)

[29] In effect, Mr. Ryan has been incarcerated for more than 20 years as he is serving an indeterminate sentence after having been declared a dangerous offender. Progress towards release from incarceration in an institution is stagnating. In the words of the panel, “Mr. Ryan is getting closer to a standstill”. Accordingly, the panel asks that Mr. Ryan request an UTA. While ETAs are authorized by CSC, pursuant to section 17 of the CCRA, through the institutional head as defined in section 2 of the CCRA. UTAs are the jurisdiction of the Parole Board of Canada (section 116 of the CCRA).

[30] The Panel wants for the applicant to work with CSC to prepare a plan, but it also asks that CSC provide its recommendation on such request. Obviously, no promises are made. On the possibility that an UTA be granted, it will be for the Board to make a decision following a hearing to take place less than three months later. The panel on July 13, 2022 does not go any further. It merely triggers the hearing to take place later. Mr. Ryan is to make a request, CSC will make its recommendation and the Board will decide. That is precisely what happened. There was no finding that the sentence had become grossly disproportionate. Rather an inquiry as to whether an UTA was appropriate was warranted.

B. The Board's November 1, 2022 decision (applicant's record, pp 33 to 42) [31] A different panel than the one which considered day parole held a hearing on November 1, 2022. It heard witnesses including Mr. Ryan's Parole Officer who conveyed the recommendation that an UTA not be granted. Counsel for Mr. Ryan argued for an UTA to be granted. Fundamentally, he made the same argument before the Board as he made before this Court. Hence, the only issue to be decided was the granting of an UTA following the decision of July 2022 which asked that the matter be addressed.

- [32] I have read the transcript of the hearing held on November 1. There is no doubt that Mr. Ryan, through the same counsel who appeared before this Court, was arguing with vigour, on the basis of the last paragraph of the July decision, that there was a legal requirement to grant an UTA in view of the indeterminate sentence which was becoming grossly disproportionate according to the July 2022 panel. His contention was that “Mr. Ryan’s sentence has become – or at this moment – and this is my suggestion, that it is at the moment now becoming unconstitutional because nothing has happened” (respondent’s record, p 97).
- [33] The Board began its decision in November 2022 with an overview of the applicant’s file. It reviewed the plan put together by Mr. Ryan as well as the views expressed by the case management team and a psychological report of March 2022. The case management team concluded that it was necessary to follow some steps before accessing an UTA. Basically, a gradual reintegration has not yet happened and consideration of an UTA is premature. The Board denied the applicant’s 24-hour UTA request, finding that he would “present an undue risk to society during the absence”. That criterion is one of the four criteria provided by section 116 of the CCRA for an authorization to be granted by the Board. As the applicant failed on this criterion, and the criteria for an UTA are cumulative and must be all met, the Board did not assess any other criterion in its decision. In coming to its conclusion the Board took into consideration the seriousness of the applicant’s offenses, his history of disrespecting release conditions and his psychological profile, which includes a “possibility of unspecified paraphilia” and manipulative nature (Board decision, applicant’s record, at p 8/10). The Board found that the applicant had failed to adequately consider and address risk factors and triggers present in his proposed release plan. These, says the Board, “are likely to be the missing pieces to your progress and the factors that are currently holding you at a stalemate” (p 9/10).
- [34] While acknowledging the applicant’s institutional stability and improvements since 2017, the Board found that it would be necessary for the applicant’s social integration to be undertaken gradually, and thus “that it would be more appropriate to first consider a security declassification to minimum (the applicant had been in a medium security institution for ten years), ETA and after UTA to promote [the Applicant’s] gradual adjustment to a less structured environment after years of institutionalization” (p 9/10).
- [35] The Board additionally concluded that, when considering whether to grant an UTA, it did not have an obligation to consider whether the applicant’s sentence continued to be tailored to his circumstances.

C. The Appeal Division’s April 13, 2023 decision (applicant’s record, pp 98 to 102) [36] Strictly speaking, the only decision before the Court is that of the Appeal Division of the Board. This is indeed readily acknowledged by the applicant in his notice of application.

- [37] The Appeal Division's role is to ensure that the law and the Board policies are respected. It seeks to ensure also that the decisions are based on relevant, reliable and persuasive information. Thus, it has jurisdiction to assess the risk posed by an inmate to reoffend and to substitute its own discretion as long as it finds that the Board's decision is unfounded and unsupported by the information that was available when the decision was made. Mr. Ryan did not challenge this basic framework spelled out in the decision under review itself.
- [38] The Appeal Division concluded that the Board's decision to reject the applicant's UTA request did not raise any grounds requiring an intervention on its part. It found that the Board's assessment of the risk posed by the applicant was fair and adequate, being done in accordance with the legislative criteria for UTAs.
- [39] The Appeal Division reviewed carefully the arguments put forth on behalf of Mr. Ryan. It referred to the contention that the July 2022 decision was not consistent with that of November 2022, Mr. Ryan wondering whether the decision would have been the same had one panel decided both cases. He submitted "that the Board erred by intentionally bypassing any consideration that, by not authorizing your UTA, your sentence was no longer fit and had become grossly disproportionate" (p 3/6). The Appeal Division goes on to describe, fairly in my view, the central complaint made by the applicant:

You deem that the November 2022 panel ignored the alarm raised by the July 2022 panel, whereby there was imminent danger for the law to be violated. You argue that the lack of coherence and consistency with the two Board decisions is striking, and by ignoring its previous decision, the Board demonstrated a lack of fairness.

(p 3/6)

Moreover, Mr. Ryan invoked an absence of inherent dignity even though the Supreme Court of Canada has recognized its importance in the sentencing context (*R v Bissonnette*, 2022 SCC 23).

- [40] On the fact that two different panels considered the issues in July and November 2022, the Appeal Division notes that, not only there is no requirement for the same panel to deal with one inmate, as actually acknowledged by the applicant, but the November hearing considered a new review of the case and the panel's discretion cannot be fettered by previous reviews and hearings.
- [41] The applicant is reminded that the hearing of November 1 was suffused with references to the July decision. One followed in the footsteps of the other. The two decisions are not inconsistent contrary to Mr. Ryan's submission.
- [42] The Appeal Division found that, contrary to the applicant's assertion, the Board did consider its July 13, 2022 decision but concluded that the applicant had not fulfilled the identified steps towards progressive reintegration. Moreover, the Appeal Division found that the Board's discretion could not be limited by its earlier decision, as subparagraph 107(e)(ii) of the CCRA gives it "exclusive jurisdiction and absolute discretion to authorize the UTA" (p 4/6). As will be recalled, the July 22 decision did not address the granting of the UTA. It dealt

with day parole.

- [43] The contention according to which by not authorizing an UTA, the sentence would no longer be a fit one and would become grossly disproportionate was addressed squarely by the Appeal Division. It refers to the two Supreme Court of Canada controlling cases and concludes that UTAs are part of the parole review process and that, by following the statutory criteria for the granting of these temporary absences, the Board ensures that the sentence is a fit one. In the end, the Appeal Division finds that the decision made in November 2022 constituted a fair and adequate assessment. I quote the last two paragraphs of the Appeal Division's decision:

The Appeal Division considers that UTAs are part of the "parole review process" discussed in *R. v. Lyons*, [1987] 2 S.C.R. 309 [Lyons] and in *Steele v. Mountain Institution*, [1990] 2 S.C.R. 1385 [Steele]. In *Lyons*, the SCC found at para. 49, "the parole process saves the legislation from being successfully challenged under s. 12 [of the Charter], for it ensures that incarceration is imposed for only as long as the circumstances of the individual case require." In *Steele*, the SCC concluded that "[i]t is only by a careful consideration and application of these criteria [for parole] that the indeterminate sentence can be made to fit the circumstances of the individual offender." Although the Board in *Lyons* and *Steele* reviewed the criteria for parole, temporary absences are also part of the gradual release process for dangerous offenders who are serving an indeterminate sentence and rarely will a dangerous offender be released on parole before successfully completing some form of temporary absences. Although UTAs are a form of liberty that is of "a more limited nature" than parole, "it is of similar character" to parole and the liberty interest of the offender is similarly affected (*Cadieux v. Mountain Institution*, [1985] 1 FC 378). In your case, UTAs are part of the gradual social reintegration needed "to build your credibility, your autonomy, your self confidence and your capacity to manage your risk factors in a gradually more open environment" (Board's decision). UTAs are part of the parole review process to ensure that your incarceration is imposed for only as long as your circumstances require. In this context, the Board's duty was to carefully consider and apply the legislative criteria for UTAs.

The Appeal Division finds that the Board did carefully consider and apply the legislative criteria for UTAs and by doing so, ensured that your sentence was tailored to fit your circumstances ... The Appeal Division finds that the Board conducted a fair and adequate risk assessment in accordance with the legislative criteria for UT As and rendered a reasonable decision.

- [44] Finally, contrary to the applicant's assertion that the Board provides a check on CSC's power, the Appeal Division highlighted that "[the] Board and CSC have different mandates and responsibilities under the CCRA" and that, in coming to its decision, the Board adequately considered information provided by CSC pertaining to stagnation in the applicant's institutional progress (p 5/6).

III. New evidence before the Court [45] As part of his record, the applicant included a sworn affidavit prepared ex post facto the impugned decisions, to which were attached four supporting exhibits (affidavit of Richard Ryan sworn June 27, 2023, including exhibits A, B, C and D, applicant's record, at pp 8-22). These four exhibits are:

a report from a CSC program manager dated November 15, 2016;

a short note from a psychologist at the Centre fédéral de formation dated June 5, 2019;

a letter from the Executive Director of Circles of Support and Accountability [COSA] of August 29, 2022, confirming their intention to meet with Mr. Ryan during his UTA;

a letter dated August 3, 2022 from Mr. Ryan's sister and brother-in-law pledging to ensure his transportation from the institution and the UTA location.

[46] This matter of the admissibility of the ex post facto evidence should be dealt with immediately. Counsel for the respondent is right. Going back to at least *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, 428 FTR 297, the law has been clear that, on judicial review, the Court is limited to the record as it was before the tribunal whose decision is challenged.

[47] It is perhaps in *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 [Bernard], that one finds one of the better explanation for the rule. It stems from the very nature of judicial review. That recourse is not an appeal from the decision under review, let alone a de novo appeal or hearing. Paragraphs 17 and 18 taken from Bernard articulate the rationale for the rule:

[17] Applications for judicial review are proceedings where a reviewing court is invited to overturn decisions Parliament has entrusted to an administrative decision-maker. In this context, the administrative decision-maker and the reviewing court have differing roles that must not be confused:

In determining the admissibility of the...affidavit, the differing roles played by this Court and the [administrative decision-maker] must be kept front of mind. Parliament gave the [administrative decision-maker] – not this Court – the jurisdiction to determine certain matters on the merits, such as whether to make an interim tariff, what its content should be, and any permissible terms associated with it. As part of that task, it is for [the administrative decision-maker] – not this Court – to make findings of fact, ascertain the applicable law, consider whether there are any issues of policy that should be brought to bear on the matter, apply the law and policy to the facts it has found, make conclusions and, where relevant, consider the issue of remedy. In this case, the [administrative decision-maker] has already discharged its role, deciding on the merits to make an interim tariff and to refuse to amend it.

Now before the Court is an application for judicial review from this decision on the merits. In such proceedings, this Court has only limited powers under the Federal Courts Act to review the [administrative decision-maker's] decision. This Court can only review the overall legality of what the [administrative decision-maker] has done, not delve into or re-decide the merits of what the [administrative decision-maker] has done.

Because of this demarcation of roles between this Court and the [administrative decision-maker], this Court cannot allow itself to become a forum for fact-finding on the merits of the matter. Accordingly, as a general rule, the evidentiary record before this Court on judicial review is restricted to the evidentiary record that was before the [administrative decision-maker]. In other words, evidence that was not before the [administrative decision-maker] and that goes to the merits of the matter before the Board is not admissible in an application for judicial review in this Court. As was said by this Court in *Gitxsan Treaty Society v. Hospital Employees' Union*, [2000] 1 F.C. 135 at pages 144-45 (C.A.), “[t]he essential purpose of judicial review is the review of decisions, not the determination, by trial de novo, of questions that were not adequately canvassed in evidence at the tribunal or trial court.” See also *Kallies v. Canada*, 2001 FCA 376 at paragraph 3; *Bekker v. Canada*, 2004 FCA 186 at paragraph 11.

(Access Copyright, above at paragraphs 17-19, adopted in *Connolly*, above at paragraph 7; see also *Delios v. Canada* (Attorney General), 2015 FCA 117 at paragraphs 41-42.)

[18] This rationale—the need to recognize the differing roles of administrative decision-makers and reviewing courts—is rooted in larger values that continually manifest themselves in the administrative law cases. These values—the rule of law, good administration, democracy and the separation of powers—animate all of administrative law. See generally Paul Daly, “Administrative Law: A Values-Based Approach” in John Bell, Mark Elliott, Jason Varuhas and Philip Murray eds., *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart, Oxford, 2015).

[Emphasis added.]

In essence, the court of review is not a court of first view.

[48] That case law has been followed since then. The respondent cites *Henri v Canada*, 2016 FCA 38 [Henri], also from the Court of Appeal. Even more recently, the Court of Appeal asserted again the state of the law (*Andrews v Public Service Alliance of Canada*, 2022 FCA 159; *Pinkerton v Canada* (Attorney General), 2022 FCA 203).

[49] The respondent asks for this affidavit and its exhibits to be struck out. The respondent submits that it is “settled case law that judicial review must be based on the evidence available to the initial decision-maker” (respondent’s memorandum of fact and law, at para 86, citing *Henri*, at paras 36-42). In the respondent’s view, the applicant’s affidavit “goes to the merits of the UTA application with the Board” (respondent’s memorandum, at para 87). In addition, exhibits A and B do not make up part of the certified tribunal record. The respondent further highlights that the applicant has not argued that the affidavit fits into one

of recognized exceptions to the general rule on new evidence in a judicial review application, and that the applicant does not even refer to his affidavit or its supporting exhibits in his factum.

[50] The recognized exceptions to the rule, fully articulated at paragraphs 20 to 27 of Bernard, do not find application in this case. It follows that the new evidence must be struck from the record.

[51] In fairness, the applicant did not rely on that new evidence in support of his argument. Indeed, the new evidence was not relevant at any rate.

IV. Issues [52] This application for judicial review raises one issue: should the only decision validly before the Court on judicial review be quashed and remitted for reconsideration to the Appeal Division either because it fails the correctness or the reasonableness standard.

[53] The applicant briefly raises the issue of procedural fairness in his factum. However, this argument is not developed in the factum or during the hearing. In fact, it is raised in relation to the adequacy of Board's reasons. However, while the existence of reasons may present a procedural fairness issue, the adequacy of reasons falls squarely in reasonableness analysis (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653 [Vavilov], at paras 76-77, 83).

[54] It is equally important to state what is not before the Court. The applicant has sought to present his case as having a "constitutional law element". That was true before the Board at the hearing of November 1, 2022 and the same kind of argument came before this Court. It is not clear what the constitutional law argument is as the applicant never challenged the underlying legislation applicable to UTAs. He did not invoke either the "Charter values" (*Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395 [Doré]; *Commission scolaire francophone des Territoires du Nord-Ouest v Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31 [Commission scolaire francophone des Territoires du Nord-Ouest]).

[55] That has of course its importance because, originally, the applicant argued that the correctness standard of review was the standard against which the Appeal Division decision had to be measured. He was presumably relying on Vavilov, at paragraphs 55 to 57. As I will try to explain later, the standard of review must be that of reasonableness given that the applicant does not challenge the legislative scheme under which the administrative decision maker is operating.

V. Legislative Framework [56] Subparagraph 107(1)(e)(i) of the CCRA grants the Board the "exclusive jurisdiction and absolute discretion" to authorize or cancel an UTA for an offender serving an indeterminate sentence. In assessing whether to grant an UTA request, the Board must consider whether the applicant has met the criteria set out in subsection 116(1) of the CCRA. Of particular importance in the present application for judicial review is the criterion set out in paragraph 116(1)(a) of the CCRA which requires that the Board be of the opinion that "the

offender will not, by reoffending, present an undue risk to society during the absence”. As the criteria set out in subsection 116(1) are cumulative, the Board may reject an UTA request if of the opinion that one of the criteria has not been met. I reproduce subsection 116(1) in its entirety:

116 (1) The Board may authorize the unescorted temporary absence of an offender referred to in paragraph 107(1)(e) where, in the opinion of the Board,

116 (1) La Commission peut autoriser le délinquant visé à l’alinéa 107(1)e) à sortir sans escorte lorsque, à son avis, les conditions suivantes sont remplies :

- (a) the offender will not, by reoffending, present an undue risk to society during the absence;
- a) une récidive du délinquant pendant la sortie ne présentera pas un risque inacceptable pour la société;
- (b) it is desirable for the offender to be absent from the penitentiary for medical, administrative, community service, family contact, including parental responsibilities, personal development for rehabilitative purposes or compassionate reasons;
- b) elle l’estime souhaitable pour des raisons médicales, administratives, de compassion ou en vue d’un service à la collectivité, ou du perfectionnement personnel lié à la réadaptation du délinquant, ou pour lui permettre d’établir ou d’entretenir des rapports familiaux notamment en ce qui touche ses responsabilités parentales;
- (c) the offender’s behaviour while under sentence does not preclude authorizing the absence; and
- c) sa conduite pendant la détention ne justifie pas un refus;
- (d) a structured plan for the absence has been prepared.
- d) un projet de sortie structuré a été établi.

The CCRA makes the protection of society the paramount consideration for the Parole Board of Canada (s 100.1).

[57] An offender who disagrees with the outcome of the Board’s decision has the right, pursuant to section 147 of the CCRA, to appeal this decision to the Appeal Division. However, while the CCRA refers to this as a right of appeal, the Appeal Division is a “hybrid” tribunal which combines elements of the powers associated with appeals and with judicial reviews (*Cartier v Canada (Attorney General)* (CA), 2002 FCA 384 (CanLII), [2003] 2 FC 317, at para 6). The Appeal Division has the power, pursuant to paragraph 147(4)(d), to “reverse, cancel or vary the decision” of the Board, which “is a power associated with an appeal” (*Cartier*, at para 6). The Appeal Division assesses Board decisions and “only intervenes if the error of law or fact is unreasonable” (*Cartier*, at para 8). This more circumscribed jurisdiction underlies the rationale that, when assessing a decision of the Appeal Division, the legality of the underlying Board decision must also be assessed (*Cartier* at para 10).

VI. Standard of Review [58] In his factum, the applicant argued originally that the correctness standard should apply due to the “constitutional nature” of the issues at hand (applicant’s memorandum, at para 25, citing Vavilov, at paras 16-17). The “constitutional nature” of a question, whatever that may be, will not be adequate justification for the use of the correctness standard of review. At the hearing of the application for judicial review, the applicant conceded that reasonableness is likely the standard that applies in this case. The respondent submits that the applicable standard of review is reasonableness. I agree.

- [59] As set out by the Supreme Court of Canada in *Doré* and reaffirmed in *Vavilov*, “cases in which it is alleged that the effect of the administrative decision being reviewed is to unjustifiably limit rights under the [Charter]” are reviewed on a standard of reasonableness (*Vavilov*, at para 57). In *Vavilov*, the Court declined to reconsider the standard of review as found in *Doré* as it was not germane to the issues in this case. The “Charter issues” matter was again before the Supreme Court of Canada in the *Commission scolaire francophone des Territoires du Nord-Ouest* and the Court applied the reasonableness standard of review. Under the *Doré* framework, a reviewing court must first determine if “the impugned administrative decision infringes Charter rights or limits the values underlying them” and then “determine whether the decision is reasonable through an analysis of its proportionality” (*Commission scolaire francophone des Territoires du Nord-Ouest*, at para 67). It goes without saying that where someone comes to Court and does not raise a constitutional issue, or an argument that Charter values are in place such that the *Doré* framework is argued to be in play, the standard of review must be that of reasonableness because the presumption to that effect has not been displaced (*Vavilov*, at paras 23 et al).
- [60] When assessing the reasonableness of an administrative decision, a reviewing court is assessing whether a decision “is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker” (*Vavilov*, at para 85). A reviewing court must look at both the rationale of the decision maker, and the outcome of the decision (*Vavilov*, at para 83).
- [61] The reasonableness standard of review carries obviously its own inherent limitations. The reviewing court does not substitute its own view of the matter. In *Vavilov*, the Court found:
- [83] It follows that the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker’s reasoning process and the outcome. The role of courts in these circumstances is to review, and they are, at least as a general rule, to refrain from deciding the issue themselves. Accordingly, a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the “range” of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the “correct” solution to the problem. The Federal Court of Appeal noted in *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171, that, “as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did”: para. 28; see also *Ryan*, at paras. 50-51. Instead, the reviewing court

must consider only whether the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led — was unreasonable.

The reviewing court is instructed to start from the principle of restraint and adopt an appropriate posture of respect (Vavilov, at paras 13-14). It is “developing an understanding of the reasoning that led to the administrative decision”, which “enables a reviewing court to assess whether the decision as a whole is reasonable” (Vavilov, at para 85). If the decision is internally coherent and follows a rational chain of analysis, with a justification that accounts for the facts and the law that constrain the decision maker, then the administrative decision is owed deference on the part of the reviewing court.

- [62] It follows of course that the burden to show that a decision is not reasonable is on an applicant’s shoulders. The hallmarks of reasonableness are said to be “justification, transparency and intelligibility -- and whether the decision is justified in relation to the relevant factual and legal constraints that bear on the decision” (Vavilov, at para 99). As Heckman, J.A. put it recently in *Givogue v Canada (Attorney General)*, 2024 FCA 186:
- [6] In conducting reasonableness review, a reviewing court must take a “reasons first” approach that evaluates the administrative decision maker’s justification for its decision: *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21, 485 D.L.R. (4th) 583 at para. 8 [Mason]. A reasonable decision is based on an internally coherent reasoning and is justified in light of the relevant legal and factual constraints that bear on the decision: Vavilov at para. 99. The party challenging a decision bears the burden to show that it is unreasonable. Mr. Givogue must satisfy this Court that there are sufficiently serious shortcomings in the Decision, such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. These flaws or shortcomings must be sufficiently central or significant to the merits of the Decision to render it unreasonable: Vavilov at para. 100.
- [63] Hence, the applicant had to satisfy the reviewing court that there are sufficiently serious shortcomings leading to the conclusion that the decision of the Appeal Division lacks justification, transparency and intelligibility, as opposed to the reviewing court being of a different view.

VII. Arguments of the parties A. Applicant’s arguments [64] As previously observed, the applicant did not challenge the constitutionality of the legislation and the legal framework. He did not invoke either the Charter values and the Doré framework. Instead, he argues that both the Board and the Appeal Division erred in law. As is clear in Vavilov, errors of law are reviewed on the reasonableness standard. Only questions of law of central importance to the legal system as a whole are controlled on a correctness standard (*Mason v Minister of Citizenship and Immigration*, 2019 FC 1251).

- [65] Firstly, the applicant argues that the Board refused to exercise its “constitutionally mandated” jurisdiction to consider whether the applicant’s sentence had become grossly disproportionate in assessing the UTA request (applicant’s memorandum, at para 31). He

argues that his UTA request should not have been treated “like any other review of an UTA application” due to the added context of the July 13, 2022 decision which had connected the possibility of an UTA to the objective of ensuring that the applicant’s sentence would not become grossly disproportionate (applicant’s memorandum, at para 49). Thus, the failure to address the proportionality of the sentence led, in his view, to a “lack of coherence” between the two Board decisions (applicant’s memorandum, at para 55). As such, the applicant puts forward that the Board’s November 7, 2022 decision failed to adequately justify the decision to refuse the UTA request (applicant’s memorandum, at paras 50, 59). The applicant submits that this lack of justification was an “affront to [his] human dignity” (applicant’s memorandum, at para 59).

- [66] Secondly, the applicant argues that the Appeal Division contradicted itself by both citing a section of the Board’s decision in which they declined to consider the continued fitness of the applicant’s sentence, while later concluding that the Board had considered this factor by applying the statutory criteria for granting an UTA. The applicant submits that section 12 of the Canadian Charter of Rights and Freedoms being Part 1 of the Constitution Act, 1982 [Charter] requires a separate analysis of the fitness of the indeterminate sentence, which goes beyond the consideration of the UTA criteria (applicant’s memorandum, at paras 37-38, 47). Moreover, the applicant submits that his failure to complete the other steps identified in the July 13, 2022 decision is of no importance, because the Board in July asked the applicant to make an UTA request “notwithstanding the lack of completion of identified steps” (applicant’s memorandum, at para 54).
- [67] In effect, the case for the applicant is based on the last paragraph of the Board’s decision of July 2022. He insists that this panel stated concerns about the standstill in the progress made by Mr. Ryan. The panel was evidently preoccupied by a continued detention that could rapidly become grossly disproportionate. Close attention must be paid to that situation, says that panel. The applicant then moves on to the November 2022 where the conclusion was reached that the applicant was not ready for an UTA. He shows dissatisfaction that his request for an UTA was denied, claiming a lack of coherence between panels, a lack of consideration of a sentence becoming grossly disproportionate, as well as the Appeal Division contradicting itself. The applicant goes so far as suggesting, without any authority in tow, that because of the indeterminate sentence, the UTA criteria may not be sufficient (applicant’s memorandum, at para 40).
- [68] Finally, the applicant argues that the inadequacy of the Board’s reasons constitutes a breach of procedural fairness (applicant’s memorandum, at para 62). Again, no authority was offered in support of that bold proposition. Faced with a decision which denies him an UTA, the applicant claims that his basic legal rights have been ignored, the decisions are inconsistent and incoherent, which leads to inadequate reasons.

B. Respondent's arguments [69] The respondent starts off by stating that the dangerous offenders regime has been found to be constitutional 37 years ago in Lyons. The existence of the parole process saved the legislation from a successful challenge:

In my opinion, if the sentence imposed under Part XXI was indeterminate, simpliciter, it would be certain, at least occasionally, to result in sentences grossly disproportionate to what individual offenders deserved. However, I believe that the parole process saves the legislation from being successfully challenged under s. 12, for it ensures that incarceration is imposed for only as long as the circumstances of the individual case require.

(p 341)

What would make a sentence run a-foul of the Charter? The Court decides that the sentence must have become grossly disproportionate:

In imposing a sentence of imprisonment, the judge will assess the circumstances of the case in order to arrive at an appropriate sentence. The test for review under s. 12 of the Charter is one of gross disproportionality, because it is aimed at punishments that are more than merely excessive. We should be careful not to stigmatize every disproportionate or excessive sentence as being a constitutional violation, and should leave to the usual sentencing appeal process the task of reviewing the fitness of a sentence. Section 12 will only be infringed where the sentence is so unfit as to be grossly disproportionate.

[Emphasis added.]

(p 336)

[70] The respondent asserts that, contrary to the applicant's arguments, it is the consideration and careful application of the UTA criteria, pursuant to subsection 116(1) of the CCRA that adequately protects the applicant's section 12 Charter rights (respondent's memorandum, at para 49). The respondent argues that this is consistent both with the Supreme Court's decision in *Steele v Mountain Institute*, (1990) 2 SCR 1385 [Steele], which pertained to the granting of parole under the previous Parole Act, as well as subsequent case law decided under the CCRA's current parole scheme (respondent's memorandum, at paras 53-59, citing *Ouellette v Canada*, 2013 FCA 54, at para 45; *Fournier v Canada*, 2004 FC 1124, at para 32; *Eakin v Canada* 2017 FC 394, at paras 19-22).

[71] The Supreme Court in *Steele* starts from the finding that "an indeterminate term as a dangerous sexual offender did not contravene s. 12 of the Charter [treatment or punishment] and that the sentence imposed upon him was valid" (p 1410). At the time of the *Steele* case, the legislation in place (the Parole Act) provided at its section 16 for three conditions to be met for release to be granted. The most relevant for our current purpose was the third one: "the release of the inmate on parole would not constitute an undue risk to society". The undue risk to society is also the criterion considered in the case at hand in accordance with subsection 116(1) of the CCRA. In *Steele*, the Court had this to say about the importance of the criterion:

There remains then the third and most important criterion, namely whether the offender constitutes an undue risk to society. If an inmate's release continues to constitute an undue risk to the public, then his or her detention can be justifiably maintained for a lifetime. There can be no doubt that in the ordinary course of events the assessment as to whether or not an inmate's release would pose an undue risk to the community is best left in the discretion of the experts who participate in the Parole Board review decisions. However, in light of the inordinate length of Steele's period of incarceration, it is appropriate to consider whether the Board erred in its evaluation that Steele did in fact constitute a danger to the community.

[Emphasis added.]

(p 1414)

The length of time spent in an institution is not, in and of itself, a reason to find the sentence grossly disproportionate. But it will be a consideration as it was the case here.

[72] Consequently, the Board must review the detention of a dangerous offender with a view to tailoring the indeterminate sentence to the particular circumstances of an offender.

[73] The respondent insists that the protection of society is the paramount consideration for the Parole Board (s 100.1 of the CCRA). This is replicated in the statutory guiding principles for parole boards at paragraph 101(c): "parole boards make the least restrictive determination that are consistent with the protection of society." As indicated earlier, one of the criteria statutorily mandated in subsection 116(1) for the granting of an UTA is the "undue risk to society during the absence". Thus, claims the respondent, to the extent that the denial is based on risk to society, the sentence cannot be disproportionate.

[74] The respondent highlights that the applicant is not challenging the constitutionality of section 116 of the CCRA. Therefore, the only possible breach of section 12 of the Charter would be the Board's misapplication of the UTA criteria. However, the respondent asserts that the Board did not err in its application of the criteria. The respondent argues that the Board reasonably concluded, with consideration of the record before it, that the applicant in the current state of affair presents an undue risk to society if the UTA request were granted.

[75] The respondent asserts that the July 13, 2022 and the November 7, 2022 Board decisions are not contradictory, as the applicant failed to complete the steps to incremental reintegration, which were highlighted in the July 13, 2022 decision, prior to requesting a 24-hour UTA. Moreover, the respondent asserts that the Board cannot be held to a previous Board decision, as this would be fettering of its absolute discretion to authorize an UTA according to the criteria set out at section 116 of the CCRA (respondent's memorandum, at paras 79-80, citing *Ma v Canada*, 2016 FC 1245, at para 14).

[76] Finally, it is asserted that the Appeal Division's decision is reasonable. While it corrected the Board by explaining that UTAs are part of the overall parole review process, the respondent argues that this correction was "immaterial to the Board's decision" (respondent's memorandum, at para 82). The Appeal Division found that the careful consideration and

application of the UTA criteria ensures that the sentence continues to be tailored to the applicant's circumstances. Thus, according to the respondent, since the Board did carefully consider and apply the legislative criteria for UTAs, the Appeal Division reasonably concluded that the Board's decision did not contain a reviewable error.

VIII. Analysis [77] In my view, the applicant was not successful in establishing that the Appeal Division's decision, the one before this Court on judicial review, was not reasonable. The reasonableness review from *Vavilov* is said to be robust in *Auer v Auer*, 2024 CC 36 (at paras 4-26-27-35-47). But an applicant must establish that the decision under review misses the hallmarks of reasonableness (*Vavilov*, at para 99). The shortcomings identified must be serious to the point of the decision not exhibiting the requisite degree of justification, intelligibility and transparency. Is there a failure of rationality internal to the reasoning process of the decision under review? None had been shown. Has it been shown that the decision is untenable in view of legal or factual constraints? None has been even attempted, let alone demonstrated. A reviewing court does not consider the merits of a decision made, but rather its legality. The reasonableness review is not an examination of the merits of the decision.

[78] Here, Mr. Ryan attaches himself to the last paragraph of the July 2022 decision (reproduced at para 27 of these reasons). As we have seen, that panel was concerned with the stagnation of the progress made by Mr. Ryan towards release in the community. When considering the decision as a whole, we note that the matter before the panel was the granting of day parole to the applicant. The panel denied day parole. It also found that the sentence was not grossly disproportionate. But it was in its view "getting close to a standstill". Thus, close attention was required to ensure that the sentence remains fit to Mr. Ryan's circumstances. What kind of close attention may be given? The panel requests that Mr. Ryan ask for an UTA for personal development. Counsel for Mr. Ryan suggested throughout that the panel was supportive of the granting of an UTA. That is not how the Court reads the last paragraph of the July 2022 decision. It is even less so when the paragraph is read in the context of the whole decision. Indeed, the July 2022 panel goes on to ask CSC to provide its recommendation and for the Board to review the request at an upcoming hearing to be held in October. That was done.

[79] A different panel of the Board held a rather long hearing on November 1, 2022. CSC was allowed to present its recommendation and Mr. Ryan's counsel was allowed to address the panel at length. He made his argument which covers many pages in the transcript. The November 2022 panel considered the criteria under the CCRA for granting an UTA. It focused on the first of the four criteria in section 116 of the CCRA and concluded as follows:

As you are highly institutionalized the Board still remains of the opinion that a gradual social reintegration is needed in your case, in order to build your credibility, your autonomy, your self confidence and your capacity to manage your risk factors in a gradually more open environment.

The Board does acknowledge the progress you have made during your incarceration and your stability in a very structured setting, but also takes into consideration the work that remains to make the risk you represent acceptable in the community, most notably addressing your sexual deviance and risk factors associated with this problematic. The Board assessed and maintains that it would be more appropriate to first consider a security declassification to minimum, ETA and after UTA to promote your gradual adjustment to a less structured environment after years of institutionalization. Your release plan on UTA is not integrated into a process that would contain control measures and parameters addressing your triggers and preventing you from any relapse. It may be very risky to place yourself too quickly in situations that may increase your stress level and lead you to failure of any kind. The Board wants to protect society, but also to protect you from failure by wanting to go too fast and without any safety net. The nature of your case and the risks associated with your past behaviors dictate caution and a slow and gradual path to maintain the risk at an acceptable level.

[Emphasis added.]

(p 9/10)

[80] The November panel explained in the preceding paragraphs why the applicant was refused his request in view of the progress accomplished in institution and the history of not respecting conditions:

You also have a history of not respecting your conditions and obligations in the community. You have gone UAL on more than one occasion, more specifically, while on day parole and ETA, during which you were under strict supervision. You have committed the offences for which you are currently serving a sentence while on statutory release.

The Board also took into account that psychologist considers that your good functioning in the correctional environment is not a guarantee of your behaviour in society. Your manipulative potential demonstrated during your life, including the pleasure you seem to have taken in cheating people, also calls for caution when the time comes to consider a release in the light of your progress and the risk you pose for the community.

In other words, the Board considered that there had not been sufficient progress in terms of living in a less structured and restrictive environment before the applicant is allowed to operate in a freer environment such as an UTA. There would be steps that would need to be attained before an unescorted temporary absence could be granted.

[81] The Appeal Division did not disagree. I have already reproduced at paragraph 43 passages from the Appeal Division's decision which carry most of the weight of its decision on the merits of the appeal. The summary of the considerations taken into account is found in the last few lines of the decision:

The management of your case, the interventions offered, and transfers are within the authority of CSC. By asking these questions, the Board was carefully reviewing your circumstances. Furthermore, the Board considered the serious nature of your offending, your history of not

respecting your conditions and obligations in the community, and your manipulative potential. The Board also considered that you still require to work in "addressing your sexual deviance and risk factors associated with this problematic." A determinative factor in the Board's assessment of risk was concerns about your ability to recognize triggers and manage your risk factors within the parameters of your release plan and your underestimation of the potential to be exposed to destabilizing situations during the absence. The Appeal Division finds that the Board conducted a fair and adequate risk assessment in accordance with the legislative criteria for UT As and rendered a reasonable decision.

- [82] A reviewing court does not conduct a de novo hearing with a view to considering the merits of the decision under review. It seeks to ascertain whether the decision is reasonable. The applicant argued that the Board was incoherent in its decision, that is between the July and November 2022 decisions.
- [83] There are at least three reasons why that contention must be rejected. First, according to Vavilov, it is the internal incoherence of a decision, the "failure of rationality internal to the reasoning" (Vavilov, at para 101), that would be suspect and make a review court conclude that the reasoning does not "add up". We do not have such defect in circumstances described at paragraph 104 of Vavilov:
- [104] Similarly, the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise. This is not an invitation to hold administrative decision makers to the formalistic constraints and standards of academic logicians. However, a reviewing court must ultimately be satisfied that the decision maker's reasoning "adds up".

There is no such defect shown in the decision of the Appeal Division, or, for that matter, none of the three decisions exhibits an incoherent internal reasoning. The decisions are each internally coherent. There is no circular reasoning, false dilemmas, unfounded generalization or absurd premise. The November 2022 Board decision and the Appeal Division both find that the applicant is not yet ready to go on an UTA. They give reasons.

- [84] In fact, the applicant seems to see incoherence between decisions. There is none. The first decision, that of July 2022 was concerned with day parole. The panel expressed a concern with the continued incarceration of Mr. Ryan and requested that he make an UTA for the matter to be made the subject of a hearing, and for the Board to consider the matter specifically. The hearing took place and the Board, having considered the evidence and the recommendation of the CSC concludes that Mr. Ryan was not yet ready for an UTA. I see nothing incoherent between the two decisions. Then, the Appeal Division agrees with the specific finding on the granting of an UTA as made by the panel tasked to make the determination.

- [85] Thirdly, administrative tribunals “are not bound by their previous decisions in the same sense that courts are bound by stare decisis. As this Court noted in *Domtar*, “a lack of unanimity is the price to pay for the decision-making freedom and independence” given to administrative decision makers, and the mere fact that some conflict exists among an administrative body’s decisions does not threaten the rule of law: p. 800.” (*Vavilov*, at para 129). The Court even declined to create one more exception to the presumption that reasonableness is the review standard concerning one category of questions: “legal questions regarding which there is persistent discord or internal disagreement within an administrative body leading to legal incoherence.” (*Vavilov*, at para 71).
- [86] Of course, there continues to be concerns with the general consistency of administrative decisions. The expectation is that like cases are generally treated alike. The *Vavilov* Court found aiming at consistency “does not mean administrative decision makers are bound by internal precedent in the same manner as courts. Rather, it means that a decision that departs from longstanding practices or established internal decisions will be reasonable if that departure is justified, thereby reducing the risk of arbitrariness, which would undermine public confidence in administrative decision makers and in the justice system as a whole.” (*Vavilov*, at para 131).
- [87] As we have seen, there is consistency in this case, with the July 2022 panel asking Mr. Ryan to request an UTA, but with the understanding that CSC would provide its recommendation and the Board deciding whether an UTA was appropriate. A different panel found, after reviewing the specific matter carefully, that an UTA was not appropriate in the circumstances and the Appeal Division agreed. The decision was justified, transparent and intelligible, the justification being in relation to the relevant factual and legal constraints applicable. No demonstration to the contrary was made.
- [88] There is no doubt that the November panel of the Board and the Appeal Division were perfectly aware of the connection made by the applicant to his circumstances and his indeterminate sentence becoming grossly disproportionate. Still, it concluded that Mr. Ryan did not satisfy yet the first criterion of section 116 of the CCRA.
- [89] Mr. Ryan did not challenge the constitutionality of the CCRA scheme for granting UTAs. He did not resort either to the *Doré* framework in an attempt to argue that Charter values were somewhat undermined. No Charter remedy was sought. Indeed, the decision maker was perfectly aware of the argument advanced by the applicant concerning his sentence being grossly disproportionate: that was the very reason for the hearing taking place in November 2022. He argued his case fundamentally on the basis of administrative law principles, which call for the review to be conducted on the basis of the reasonableness standard of review.
- [90] The reasons given by the Appeal Division met in my estimation the hallmarks of reasonableness, that is justification, transparency and intelligibility, and whether the decision is justified in relation to factual and legal constraints. We know why the Appeal Division found as it did. He who disagrees with the conclusion reached by an administrative

decision maker will often find the reasons inadequate. On the contrary, the reasons are given and they articulate clearly why an UTA is not appropriate at this stage. In the words of Vavilov, at paragraph 79, “reasons explain how and why a decision is made”. Here, it is not difficult to understand the reasoning process followed by the decision maker. Once it is found that the decision is internally coherent and that the decision maker has followed a rational chain of analysis, the reviewing court defers to such a decision. The applicant has not shown how the decision under review can be said to be unreasonable. That was his burden and it was not met.

IX. Conclusion [91] The judicial review application must accordingly be dismissed. The respondent did not seek his costs. There will not be costs granted.

JUDGMENT in T-1006-23

THIS COURT’S JUDGMENT is that:

1. This judicial review application is dismissed.
2. No costs are granted.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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t-1006-23

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