Federal Court  Cour fédérale

Date: 20250117

Docket: T-1035-24

Citation: 2025 FC 99

Toronto, Ontario, January 17, 2025

PRESENT: Madam Justice Whyte Nowak

BETWEEN:

BRANDIN BRICK

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Brandin Brick [Applicant], is an inmate serving an aggregate sentence on multiple separate convictions at the Saskatchewan Penitentiary. On September 14, 2023, the Court of Appeal for Saskatchewan [Court of Appeal] overturned his conviction for second-degree murder and ordered a new trial. The Commissioner of Corrections [Commissioner] made

a referral to the Parole Board of Canada [Board] under section 129 of the *Corrections and Conditional Release Act*, SC 1992, c 20 [*CCRA*] to consider the Applicant's continued detention.

[2] The Board ordered that the Applicant be detained through his period of statutory release pursuant to paragraph 130(3)(c) of the *CCRA* [the Board Decision]. By decision dated April 5, 2024 [the Appeal Division Decision], the Parole Board of Canada Appeal Division [Appeal Division] confirmed the Board Decision.

[3] The Applicant brings this application for judicial review of the Appeal Division Decision raising issues regarding the statutory interpretation of subsection 129(3.1) of the *CCRA*, the disclosure obligations of the Board and Correctional Service of Canada's [CSC] in connection with detention hearings and the reasonableness of the Appeal Division Decision.

[4] For the reasons that follow, I find that the Applicant has not satisfied his onus of showing that the Appeal Division Decision is unreasonable or that he was denied procedural fairness in connection with his detention hearing. Accordingly, this application is dismissed.

II. Legislative Scheme

[5] Under subsection 127(1) of the *CCRA*, inmates have a statutory right to release upon completion of two-thirds of their sentence. However, in exceptional cases the Board may withdraw this right under subsection 129(3) of the *CCRA*, which provides:

Referral of cases to Chairperson of Board	**Renvoi du dossier par le commissaire au président de la Commission**

(3) If the Commissioner believes on reasonable grounds that an offender is likely, before the expiration of the sentence according to law, to commit an offence causing death or serious harm to another person, a sexual offence involving a child or a serious drug offence, the Commissioner shall refer the case to the Chairperson of the Board together with all the information in the possession of the Service that, in the Commissioner's opinion, is relevant to the case, as soon as practicable after forming that belief. The referral must be made more than six months before the offender's statutory release date unless

(a) the Commissioner formed that belief on the basis of the offender's behaviour or information obtained during those six months; or

(b) as a result of a change in the statutory release date due to a recalculation, the statutory release date has passed or the offender is entitled to be released on statutory release during those six months.

[Emphasis added]

(3) S'il a des motifs raisonnables de croire qu'un délinquant commettra, s'il est mis en liberté avant l'expiration légale de sa peine, soit une infraction causant la mort ou un dommage grave à une autre personne, soit une infraction d'ordre sexuel à l'égard d'un enfant, soit une infraction grave en matière de drogue, le commissaire renvoie le dossier au président de la Commission — et lui transmet tous les renseignements qui sont en la possession du Service qui, à son avis, sont pertinents — le plus tôt possible après en être arrivé à cette conclusion et plus de six mois avant la date prévue pour la libération d'office; il peut cependant le faire six mois ou moins de six mois avant cette date dans les cas suivants :

a) sa conclusion se fonde sur la conduite du délinquant ou sur des renseignements obtenus pendant ces six mois;

b) en raison de tout changement résultant d'un nouveau calcul, la date prévue pour la libération d'office du délinquant est déjà passée ou tombe dans cette période de six mois.

[Je souligne]

[6] In cases where paragraph 129(3)(b) of the *CCRA* applies because the statutory release date has passed upon recalculation, the Commissioner is required under subsection 129(3.1) of the *CCRA* to determine whether a referral is to be made to the Chairperson of the Board. Subsection 129(3.1) requires the Commissioner to make a referral within two working days after the recalculation.

[7] Where an inmate's case is referred to the Board pursuant to subsection 129(3.1) of the *CCRA*, paragraph 130(3)(c) of the *CCRA* provides that upon completion of the review of the case, the Board may order that the offender be detained through their period of statutory release where it is satisfied that if released, the offender is likely to commit an offence causing the death of or serious harm to another person, a sexual offence involving a child or a serious drug offence before the expiration of the offender's sentence.

III. Facts

[8] The Applicant has been an inmate at the Saskatchewan Penitentiary since August 28, 2019 where he is serving an aggregate sentence on multiple separate convictions. He was originally also serving a life sentence for his second-degree murder conviction, but on Thursday, September 14, 2023, the Court of Appeal overturned that conviction and ordered a new trial. The Court of Appeal ordered the Applicant to remain detained pursuant to subsection 516(1) of the *Criminal Code*, RSC 1985, c C-46 until otherwise ordered by the Court of King's Bench for Saskatchewan [the Remand Warrant].

A. *Recalculation of the Applicant's statutory release*

[9] A recalculation of the Applicant's statutory release date has determined the new aggregate sentence to be 5 years, 5 months and 20 days, which resulted in a statutory release date of April 22, 2023, a date which had already passed. CSC referred the Applicant's matter to the Board on Tuesday, September 19, 2023 to determine whether he should be detained through his period of statutory release.

[10] An interim hearing was held on September 22, 2023, where the Applicant was interviewed regarding his possible detention. The Board ordered a detention review which was originally scheduled for October 17, 2023.

[11] In accordance with subsection 129(3.1) of the *CCRA*, the Applicant's statutory release was barred until the matter was determined by the Board.

B. *Counsel's complaints about disclosure*

[12] The Applicant retained legal counsel for his detention matter. In advance of the hearing, the Applicant's counsel repeatedly sought disclosure from CSC of the materials before the Board, but CSC refused to provide disclosure directly to counsel. Instead, CSC informed the Applicant that he could personally review and select the disclosure materials he wanted and send them to his counsel at a cost of $1.00 per page for fax charges.

[13] On November 6, 2023, counsel wrote to the Board requesting that it direct CSC to provide the Applicant's counsel with disclosure. The Applicant's counsel submitted that he and the Applicant did not know the precise materials before the Board, and CSC's refusal to provide him with disclosure had prevented him from providing adequate legal advice to the Applicant in advance of his detention hearing. Counsel argued that this was a breach of the Applicant's rights to legal counsel and procedural fairness under section 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the *Charter*]. Counsel for the Applicant asked that the Board grant an adjournment and direct CSC to provide counsel with a copy of the material that it had put before the Board.

[14] The Board responded to the Applicant's counsel by letter dated November 8, 2023, stating that all relevant information considered by the Board for decision making, or a summary of such information, was being provided to the Applicant in accordance with subsection 141(1) of the *CCRA*. The Board explained that disclosure is CSC's responsibility, and encouraged counsel to reach out to CSC. The Board did not provide any directions to CSC.

[15] The Applicant filed a complaint against CSC relating to the fax charges in October 2023. By December 2023, CSC had provided a refund to the Applicant.

[16] The Applicant's request to postpone the hearing was granted and the hearing was re-scheduled for November 9, 2023. The Applicant subsequently made another postponement request, and the hearing was re-scheduled to take place on December 20, 2023.

C. *The Board Decision*

[17] On December 28, 2023, the Board ruled that the Applicant was likely to commit an offence causing death or serious harm to another person if he was released, thereby justifying his detention through his period of statutory release.

[18] The Board noted that the Applicant's counsel submitted that CSC was out of time to make the referral as the Commissioner exceeded the two working days to make the referral under subsection 129(3.1) of the *CCRA*. The Board considered that the recalculation date was Friday, September 15, 2023, and given that the referral was made on Tuesday, September 19, 2023, it was satisfied the referral met the legislative requirements.

[19] The Board also noted having received the submissions from the Applicant's counsel dated November 6, 2023, which raised issues related to the Applicant's right to counsel, procedural fairness and CSC's failure to provide disclosures to allow the Applicant to prepare his case. The Board did not address this submission other than to note it.

D. *The Appeal Division Decision*

[20] The Applicant appealed the Board decision to the Appeal Division. The Appeal Division denied the appeal and confirmed the Board's Decision, finding it to be reasonable. In addressing the grounds for appeal raised by the Applicant, the Appeal Division found that: the Board had jurisdiction to hear the Applicant's case; the Applicant's procedural fairness rights were not impeded; the Board applied the correct legal test to order the Applicant's detention; and the

Board did not unreasonably fail to consider the outstanding Remand Warrant against the Applicant.

IV. Issues and Standard of Review

[21] The following issues are raised on this application:

1. Did the Commissioner have jurisdiction to make a referral under subsection 129(3.1) of the *CCRA* when it was made?
2. Was the disclosure process procedurally fair?
3. Was the Appeal Division reasonable in ruling that the Applicant's outstanding Remand Warrant was irrelevant?

[22] While this judicial review is directed at the Appeal Division's decision confirming the Board Decision, the Court is ultimately required to ensure that the Board's Decision is lawful absent any separate error on the part of the Appeal Division (*Cartier v Canada (Attorney General) (CA)*, 2002 FCA 384 at para 10 and *Smith v Canada (Attorney General)*, 2019 FC 1658 at para 37).

V. Analysis

A. ***Issue 1: Did the Commissioner have jurisdiction when the referral was made?***

(1) Standard of review

[23] The Applicant argues that his rights under the *Charter* were necessarily breached when he was detained without statutory authority. The Applicant submits that the question of statutory compliance with subsection 129(3.1) of the *CCRA* is fundamentally a constitutional question

based on the authority of *York Region District School Board v Elementary Teachers' Federation of Ontario*, 2024 SCC 22 at paragraphs 62-71 [*York Region*], even if the issue was not previously raised as a constitutional issue. Based on *York Region*, the Applicant submits that correctness is therefore the appropriate standard of review.

[24] The Respondent submits that the standard to apply for the first issue is reasonableness, as true questions of jurisdiction are no longer treated as a ground for correctness review after the Supreme Court's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] (*Vavilov* at paras 65, 67).

[25] I agree with the Respondent and would add two additional reasons that dictate in favour of a standard of review of reasonableness.

[26] First, the issue is ultimately an issue regarding the proper interpretation of subsection 129(3.1) of the *CCRA*, which, according to *Vavilov*, is reviewed on a reasonableness standard (*Vavilov* at para 115).

[27] Second, no constitutional issue was raised by the Applicant either before the Board or the Appeal Division and such issues cannot be raised before the Court for the first time on judicial review (*Sullivan v Canada (Attorney General)*, 2024 FCA 7 at para 8 citing *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61). While the Applicant points out that the *Charter* was not raised by the parties in *York Region*, I consider the circumstances in this case to be different: the applicability of the *Charter* to school boards was

an open question in *York Region* for which a final and determinate answer was required, whereas the applicability of the *Charter* to the Board and its proceedings is not in question. It is already established that the Board is subject to section 7 of the *Charter* and its proceedings must comply with the principles of fundamental justice (*Mooring v Canada (National Parole Board)*, [1996] 1 S.C.R. 75 at para 38).

[28] Therefore, the first issue is subject to review based on a standard of reasonableness which starts with deference to the tribunal's expertise in interpreting its own statute (*May v Canada (Attorney General)*, 2020 FC 292 at para 23). According to *Vavilov*, a reviewing court may not undertake a *de novo* analysis nor can it "ask itself what the correct decision would have been" (*Vavilov* at para 116 citing *Law Society of New Brunswick v Ryan*, 2003 SCC 20 at para 50). Rather, a court must examine the administrative decision as a whole, including the reasons provided by the tribunal and the outcome that was reached.

(2) The Appeal Division Decision

[29] Both the Board and the Appeal Division based their interpretation of subsection 129(3.1) of the *CRRA* on the plain meaning of the following phrase:

> "the Commissioner shall, within two working days after the recalculation … make a determination whether a referral is to be made."

[30] The Appeal Division considered the terms "*after the recalculation*" and "*make a determination*" as "crucial" to understanding subsection 129(3.1) of the *CCRA* and its application in the context of the case, which the Appeal Division described as follows:

- The Court of Appeal decision dated September 14, 2023 quashed the Applicant's second-degree murder conviction and ordered that the Applicant be re-tried;

- The Court of Appeal's decision was transmitted to CSC on a date unknown but likely the same day; and

- CSC produced a document date/time stamped on September 15, 2023 at 09:44 entitled "Letter for Federal Offenders - Eligibility Dates" that shows its recalculation of the Applicant's "SR Eligibility date" (i.e., statutory release eligibility date) as being April 22, 2023, with a Warrant Expiry Date (WED) of February 16, 2025.

[31] The Appeal Division addressed the Applicant's argument that the Commissioner was out of time to make the referral as follows:

> A plain language reading of subsection 129(3.1) would lead a reader to understand that if a recalculation were made on September 15, 2023, the CSC Commissioner would then have two working days **after the recalculation date** to submit a referral. That means two working days **after** September 15, 2023. It would be a misinterpretation of the statute to suggest, as you do, that the recalculation somehow magically occurs the instant the Court of Appeal renders its decision. It is also an illogical stretch of the legislative language to suggest that the clock starts ticking the instant a document is date/time stamped. It is logical to expect that if a "recalculation" document is signed on September 15, 2023, the CSC Commissioner then has two working days, after that date, to forward its referral to the Board. [Emphasis in original]

[32] The Appeal Division therefore considered the Commissioner to have met the statutory obligation to make the referral within two working days of the recalculation of the Applicant's statutory release date.

(3) The parties' submissions

[33] The Applicant argues that the word *recalculation*, read in the context of section 129 of the *CCRA*, denotes a change in the sentence calculation resulting in a change in the offender's release date. The Applicant states that CSC cannot change statutory release dates, only courts can by changing the offender's sentence. Accordingly, the Applicant argues that his sentence was recalculated when the Court of Appeal rendered its decision to overturn his murder conviction and transmitted it to CSC on Thursday, September 14, 2023. Therefore, by the time the Commissioner made the referral on Tuesday, September 19, 2023, the Applicant claims that the Commissioner was outside of the two working days provided by subsection 129(3.1) of the *CCRA* and was without jurisdiction to make the referral.

[34] The Applicant submits that his interpretation of subsection 129(3.1) is the only reasonable interpretation and the Appeal Board's Decision is untenable for upholding the Board's interpretation.

[35] The Respondent submits that the Appeal Division's analysis as to why the Board retained jurisdiction was justified on the facts and law that constrained it. The Respondent claims that the recalculation took place on Friday, September 15, 2023, when a CSC Sentence Manager completed the calculation of the Applicant's new eligibility dates. Since the Commissioner's referral on Tuesday, September 19, 2023, was within the two working days permitted under subsection 129(3.1) of the *CCRA*, the Respondent submits that the Commissioner met the legislative requirements.

(4) The statutory provision at issue

[36] The relevant statutory provision for this issue is subsection 129(3.1) of the *CCRA*, which reads:

Detention pending referral	**Détention**
(3.1) Where paragraph (3)(b) applies and the statutory release date has passed, the Commissioner shall, within two working days after the recalculation under that paragraph, make a determination whether a referral is to be made to the Chairperson of the Board pursuant to subsection (3) and, where appropriate, shall make a referral, and the offender is not entitled to be released on statutory release pending the determination.	**(3.1)** Dans le cas visé à l'alinéa (3)b) et où la date de libération d'office est déjà passée, le commissaire en arrive à une conclusion — et, le cas échéant, défère le cas — dans les deux jours ouvrables suivant le nouveau calcul et le délinquant en cause ne peut être libéré d'office tant que le commissaire n'en est pas arrivé à une conclusion.
[Emphasis added]	[Je souligne]

(5) Analysis

[37] The Appeal Division interpreted subsection 129(3.1) of the *CCRA* based on its determination of Parliament's intention considering a plain reading of the text and taking into account the context and scheme of the *CCRA*. There are four aspects to its analysis:

- first, there is no definition of the term *recalculation* in the *CCRA*;
- second, the Appeal Division considered the Court's decision not to be a recalculation since it construed the word

> *recalculation* to have a meaning that it is distinct from *court decision* and *sentence*;
>
> - third, recalculation is a separate administrative act undertaken by CSC; and
>
> - fourth, it follows that the time to make a referral does not get triggered by the Court's decision or its transmission to CSC, but only after CSC performs the recalculation.

[38] Admittedly, neither the Board nor the Appeal Division considered the text of subsection 129(3.1) of the *CCRA* in connection with the purpose of the provision within the legislative scheme, nor did they consider the object of the *CCRA* in keeping with the modern approach to statutory interpretation (*Vavilov* at paras 117-18). However, I do not find this lack of perfection detracts from the reasonableness of the Appeal Division Decision.

[39] Administrative decision makers are not required to engage in a formalistic statutory interpretation exercise in every case, and where the words used in the statute are "precise and unequivocal," their ordinary meaning can play a dominant role in the interpretive exercise (*Vavilov* at paras 119-20 citing *Canada Trustco Mortgage Co. v Canada*, 2005 SCC 54 at para 10). That was the case here as can be seen in the Appeal Division's emphasis on the words that it highlighted. I consider the Appeal Division to have focused on the most salient aspects of the text and context of subsection 129(3.1) of the *CCRA* (*Vavilov* at para 122), and it was open to the Appeal Division to simply apply what it considered to be the clear and unambiguous words of the text (*Roofmart Ontario Inc v Canada (National Revenue)*, 2020 FCA 85 at para 20 citing *Shell Canada Ltd v Canada*, [1999] 3 SCR 622 at para 40).

[40] Additionally, while an administrative tribunal is not required to examine "all possible shades of meaning" of a provision (*Vavilov* at para 122), the Appeal Division nevertheless also addressed the Applicant's alternative interpretation that was also based largely on the text of subsection 129(3.1). The Appeal Division rejected this interpretation by reason that it: failed to give meaning to key words of the text; required an "illogical stretch of the legislative language"; and failed to account for the scheme of the *CCRA* which provides CSC and the Board with distinct roles from the court in matters relating to statutory release and detention.

[41] Accordingly, I find the Board and the Appeal Division Decisions to be reasonable in respect of their interpretation of subsection 129(3.1) of the *CCRA* and their conclusion that the Commissioner had not lost jurisdiction when the referral was made.

B. ***Issue 2: Did the Board meet its disclosure obligations?***

(1) Standard of review

[42] At the oral hearing, the Applicant agreed to the standard of review of correctness as articulated by the Respondent at paragraph 25 of its memorandum of fact and law, which refers to the following principles:

(i) The Court must consider whether the processes followed were fair and just, paying attention to the nature of the rights at stake and consequences for the affected individuals (*Mayers v Canada (Attorney General)*, 2024 FC 776 at para 10);

(ii) No standard of review is applicable to the question of procedural fairness. Instead, the evaluation of procedural fairness requires the Court to assess the procedures and safeguards required in a particular situation (*Badial v*

> *Canada (Citizenship and Immigration)*, 2020 FC 108 at par 13); and
>
> (iii) The process followed by the Board attracts a high degree of procedural fairness as its decisions result in a person's continued detention (*Ewonde v Canada (Attorney General)*, 2020 FC 829 at para 24 [*Ewonde*]).

[43] I agree with these principles, but would add that the ultimate question to be answered by courts in dealing with an issue of procedural fairness is whether those affected by a decision understood the case they had to meet and had a chance to respond before an impartial decision maker (***Ewonde*** at para 23 and *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 41 [***Canadian Pacific***]).

[44] The Applicant argues that detention hearings ought to have an even higher degree of procedural rights than parole hearings. I agree with the Respondent that such a distinction is not warranted, given that no such distinction is made in sections 140 and 141 of the *CCRA*, which provide procedures for both types of hearings.

(2) The Appeal Division Decision

[45] The Appeal Division noted the Applicant's position that the Board failed to address his concern that CSC's disclosure process impeded his right to counsel by requiring him, without the assistance of counsel, to determine what documents to request and share with his counsel at a fee of $1.00 per page. The Appeal Division responded to the Applicant's submission as follows:

> The Board is responsible for putting in place procedures that ensure that the offender is treated fairly and that fulfill the Board's mandate in accordance with the *CCRA*. As part of the Board's procedures, the offender is informed of their rights under the

> *CCRA* prior to the hearing (Procedural Safeguard Declaration form and panel notification letter) and at the beginning of the hearing, and as needed during the hearing.
>
> The Board's responsibility is to ensure that the information it will consider in the review of your case has been disclosed to you in accordance with section 141 of the *CCRA*. The management of file information and of the disclosure of documents that will be considered by the Board during a review or hearing is the responsibility of CSC, pursuant to its statutory authority for the "care and custody of inmates" (*CCRA*, subsections 5(a)) and "the preparation of inmates for release" (*CCRA*, subsection 5(c)). The Board has no role in the procedures and the processes established by CSC for the management of the disclosure of documents to offenders prior to a review or hearing, and it also has no statutory authority to order or direct CSC on how it should manage the disclosure of documentation to offenders.

[46] On the issue of whether CSC's disclosure policy obstructed the Applicant's right to counsel, the Appeal Division held:

> The Board is an administrative tribunal who makes conditional release decisions within the legal framework set out in the *CCRA*. Pursuant to subsection 140(7) of the *CCRA*, an offender has the right to be assisted by a person of their choice at the hearing and that person may be a lawyer. As confirmed by the Federal Court in *MacInnis v. Canada, (Attorney General)*, [1997] 1 FC 115, it is apparent from the language used in the *CCRA*, that "parliament did not intend for the assistant's role before the Board to be the equivalent of counsel's role before a judge or jury".

(3) The parties' submissions

[47] The Applicant does not deny that the Board fulfilled its obligations under subsection 141(1) of the *CCRA*. However, the Applicant submits that the right to legal counsel includes the right for his legal counsel to obtain and review disclosure so that it may provide him with legal advice in advance of the detention hearing. He argues that CSC's disclosure process impedes an

inmate's access to counsel. The Applicant argues that the Appeal Division's holding that the Board had no authority to direct CSC to provide that disclosure is an abdication of its responsibility to ensure procedural fairness associated with detention hearings.

[48] The Respondent submits that CSC's disclosure process does not amount to a breach of the Applicant's procedural fairness rights, which in the context of the Applicant's detention hearing, are the limited rights afforded under subsections 141(1) and 140(7)-(8) of the *CCRA*.

(4) The statutory provisions at issue

[49] The Board's disclosure obligation in connection with a detention hearing is provided in subsection 141(1) of the *CCRA*, which reads:

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.

[50] The right to counsel in connection with a detention hearing is prescribed by subsections 140(7) and 140(8) of the *CCRA*, which state:

Assistance to offender	**Assistant du délinquant**

(7) Where a review by the Board includes a hearing at which the offender is present, the Board shall permit the offender to be assisted by a person of the offender's choice unless the Board would not permit the presence of that person as an observer pursuant to subsection (4).	**(7)** Dans le cas d'une audience à laquelle assiste le délinquant, la Commission lui permet d'être assisté d'une personne de son choix, sauf si cette personne n'est pas admissible à titre d'observateur en raison de l'application du paragraphe (4).
Role of assistant	**Droits de l'assistant**
(8) A person referred to in subsection (7) is entitled	**(8)** La personne qui assiste le délinquant a le droit :
(a) to be present at the hearing at all times when the offender is present;	**a)** d'être présente à l'audience lorsque le délinquant l'est lui-même;
(b) to advise the offender throughout the hearing; and	**b)** de conseiller le délinquant au cours de l'audience;
(c) to address, on behalf of the offender, the members of the Board conducting the hearing at times they adjudge to be conducive to the effective conduct of the hearing.	**c)** de s'adresser aux commissaires au moment que ceux-ci choisissent en vue du bon déroulement de l'audience.

(5) Analysis

[51] I am of the view that the Board met its disclosure obligations and the Applicant's right to procedural fairness was not impeded by CSC's disclosure process for four reasons.

[52] First, the Board's disclosure obligations are governed solely by subsection 141(1) of the *CCRA*, and fulfillment of the obligations in this provision, which is not disputed in this case,

satisfies the principles of fundamental justice (*Strachan v Canada (Attorney General)*, 2006 FC 155 at para 20).

[53] Secondly, I am not convinced that the Applicant's right to counsel was obstructed by CSC's disclosure process given that the right to counsel in the context of Board hearings is not absolute. Prior jurisprudence has held that the rule of law does not include a general right to legal counsel whether before or during a Board hearing (*British Columbia (Attorney General) v Christie*, 2007 SCC 21 at para 23) and the Supreme Court held in *New Brunswick (Minister of Health and Community Services) v G (J)*, [1999] 3 SCR 46 at para 86 [*New Brunswick*]) that a right to a fair hearing will not always require an individual to be represented by counsel even when a decision affecting that individual's right to liberty is at stake.

[54] The Applicant points out that in *New Brunswick*, the Supreme Court left open the contexts in which the right to counsel as a component of the right to a fair hearing could arise (*New Brunswick* at para 86). That may be so, but in the context of the *CCRA*, the assistant's role before the Board is not to be equated with that of counsel's role before a judge or jury (*MacInnis* at 123). I agree that typically, legal counsel reviews disclosure and informs their client which documents are relevant to the matter at hand and not the other way around, but the Federal Court of Appeal has warned against the introduction of "piece-meal elements of the adversarial system" into the Board setting which could damage the fundamental nature of these proceedings which are intended to be inquisitorial and not adversarial in nature (*MacInnis* at 126, 129). Considering that the Applicant does not have a right to legal counsel in the context of a detention

hearing, the fact that CSC's disclosure process did not match typical legal processes does not amount to an impairment of the Applicant's procedural rights before the Board.

[55] Third, the issue of whether the Board's disclosure obligation under subsection 141(1) of the *CCRA* extends beyond an offender to an assistant as a matter of procedural fairness was considered by the Federal Court and rejected in *Lowe v Canada (Attorney General)*, 2021 FC 1049 [*Lowe*]. The Applicant points out that *Lowe* left open the possibility that "there could be particular circumstances in which common law principles of procedural fairness may require further steps to facilitate the provision of documentation to an offender's counsel or other assistant" (*Lowe* at para 35).

[56] The "further steps" advocated by the Applicant relate to the Board's oversight of CSC to facilitate disclosure to counsel in advance of a detention hearing. Despite the Applicant's submission that the Applicant is not trying to expand the provisions of the *CCRA*, I find that the Applicant's request for "further steps" amounts to exactly that. The Applicant's request would effectively expand subsection 141(1) to include a duty to provide disclosure to an assistant and expand the right to disclosure outside of the 15 days before the hearing. It would also expand paragraph 140(8)(b) to provide for the right to an assistant's advice before the Board hearing, and not merely during the hearing as currently provided. The Federal Court of Appeal has held that the denial of enhanced procedures for the role of an assistant, like those advocated for by the Applicant which go beyond those established in the *CCRA*, does not offend the principles of fundamental justice under section 7 of the *Charter* (*MacInnis v Canada (Attorney General) (CA)* (1996), [1997] 1 FC 115 at 126, 129 [*MacInnis*]).

[57] Finally, the ultimate question for the Court is whether the Applicant was denied the ability to know the case he had to meet at the detention hearing and had a chance to respond to that case (*Canadian Pacific* at para 41). I find that the Applicant knew the case he had to meet and had a chance to respond to it and that the Board's process was procedurally fair, given that: (i) the Board granted the Applicant's requests for an adjournment of his hearing in order for him to change his assistant, receive disclosure and prepare for his case; (ii) both he and his counsel received the required information in advance of the detention hearing; (iii) he was refunded the fees for copies of the documents; and (iv) at the outset of the hearing, the Board confirmed that the Applicant had received disclosure and that he was ready to proceed. The Applicant has failed to point to a concrete way in which the disclosure process impeded his access to counsel and adversely affected his hearing, and that is fatal to his argument since the Court must find that the alleged breach had a major impact on the outcome of the dispute in order to intervene in a case of procedural fairness (*Abraham v Canada (Attorney General)*, 2016 FC 390 at para 18).

[58] Accordingly, I find that the Applicant was not denied procedural fairness.

C. ***Issue 3: Was it unreasonable to fail to consider the Remand Warrant?***

(1) Standard of review

[59] The parties agree that the third issue is subject to a reasonableness standard of review as articulated in *Vavliov*. Reasonableness review in this context asks whether the decision was "one that 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). It is a

deferential standard of review, therefore a reviewing court must intervene only if "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100).

(2) The Board Decision

[60] The Board Decision did not address this issue other than to note:

> A second issue relates to the Board's inability to make a decision to release you because you are being held on federal remand warrant and if your release is not on the table, how could the Board make the risk assessment of your release into the community.

(3) The Appeal Division Decision

[61] The Appeal Division Decision states in part:

> You appear to have incorrectly muddled the incarceration obligations that flow from your Index Offenses with the Remand Obligations that flow from the Court of Appeal decision in your own case, that sets up a re-trial for Second Degree Murder.
>
> …
>
> The Remand Warrant, which relates to your upcoming trial for Second Degree Murder, does not relieve CSC's already existing statutory obligations towards you as a sentenced federal offender serving a sentence according to law. The details of the Remand Warrant would only come into play upon the extinguishment of CSC's jurisdiction over you (i.e., at your WED), or, if the Board, upon receiving a referral for detention from CSC, decided that your case did not meet the meet the legal criteria for detention. In the latter case, it could be surmised that if you were released on SR, having not been ordered for detention by the Board, you would either be federally or provincially remanded. This issue, however, is only hypothetical, as it would only come to pass if the Board decided to not order your detention. You remain under federal jurisdiction until your WED and the Remand Warrant does not

> relieve the Board of its obligation to review your case in accordance with the *CCRA*.

(4) The parties' submissions

[62] The Applicant notes that he is subject to the Remand Warrant issued by the Court of Appeal and that this fact is relevant to the Board's consideration of his likelihood to commit an offence if released. He argues that the Remand Warrant was a factual constraint on the Board that it failed to grapple with. It follows that the Appeal Division's Decision was unreasonable for finding the Remand Warrant to be irrelevant to the Board's Decision.

[63] The Respondent argues that the Appeal Division's reasoning is internally coherent, presents a rational chain of analysis and justification and that there is no logical flaw that renders its analysis unreasonable.

(5) Analysis

[64] I agree with the Respondent that the Appeal Division Decision provided a rational explanation as to why the Remand Warrant was not relevant to the Board's deliberations. The Appeal Division reasoned that the Remand Warrant is irrelevant to the Board's considerations since the Remand Warrant does not relieve CSC's statutory obligation to review his case in accordance with the *CCRA* while the offender is under its "care and custody." The Appeal Division was of the view that the Remand Warrant would only come into effect had the Board decided to not order the Applicant's detention, as that would have extinguished CSC's jurisdiction over the Applicant, leaving only the issue of the Remand Warrant.

[65] I find that the Appeal Division's reasons demonstrate the requisite intelligibility, justification and transparency and its explanation is reasonable.

VI. Conclusion

[66] For the above reasons, I consider the Appeal Division Decision to be reasonable and I find that the Applicant was not denied procedural fairness. Accordingly, this application is dismissed.

JUDGMENT in T-1035-24

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed; and

2. There is no order as to costs.

"Allyson Whyte Nowak"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1035-24
STYLE OF CAUSE:	BRANDIN BRICK v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HELD BY WAY OF ZOOM VIDEOCONFERENCE
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APPEARANCES:

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