Federal Court of Appeal | Cour d'appel fédérale

Date: 20230727

Docket: A-251-21

Citation: 2023 FCA 166

CORAM: **PELLETIER J.A.**
WEBB J.A.
RIVOALEN J.A.

BETWEEN:

CANADIAN BROADCASTING CORPORATION

Appellant

and

PAROLE BOARD OF CANADA

Respondent

Heard at Toronto, Ontario, on January 23 and 24, 2023.

Judgment delivered at Ottawa, Ontario, on July 27, 2023.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: WEBB J.A.
RIVOALEN J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

I. Introduction

[1] This is an appeal from a decision of the Federal Court dismissing an application for judicial review of a decision of the Parole Board of Canada (the Board) refusing to provide the Canadian Broadcasting Corporation (the CBC) with "a complete copy of the audio recordings of

parole hearings of Paul Bernardo, held on October 17, 2018; Ethan Simon Templar MacLeod, formerly known as William Shrubsall, held on or about November 7, 2018; and Craig Munro, held on February 26, 2009, March 16, 2010, March 30, 2011, and July 29, 2015": Appeal Book (AB) at p. 351. I will refer to the individuals involved as the "Offenders".

[2] The Board declined to provide the requested audio recordings on the grounds that the open court principle invoked by the CBC did not apply since the Parole Board is not a quasi-judicial body and that the public interest in the hearings did not outweigh the privacy interests of the Offenders.

[3] The CBC's application was heard together with the applications of the families of the victims of Mr. Bernardo and Mr. Munro, and others, seeking disclosure, under the *Access to Information Act*, R.S.C. 1985, c. A-1 (the AIA), to a mass of documents, including the documents put before the Board at the parole hearings of the Offenders as well as copies of audio recordings of certain Board hearings in relation to the Offenders. These reasons deal only with the CBC's application. The families' applications for records held by Corrections Canada and the Board will be dealt with in separate reasons.

[4] For the reasons that follow, I would allow the CBC's appeal; however, I would not grant the CBC all of the remedies it seeks.

II. Facts and Procedural History

[5] Each of the Offenders is notorious. Mr. Bernardo is a violent sexual offender who was convicted of the horrific murder of two young women, Leslie Mahaffy and Kristen French. Mr. Munro was convicted of the murder of Michael Sweet, a Toronto police constable, who bled to death while being held hostage by Mr. Munro in the course of a botched robbery. Mr. MacLeod was convicted of crimes of violence and sexual offences in 1998 and was subsequently paroled on the basis that he would be deported to the United States to serve the balance of his lengthy sentence. It turned out that he will be eligible for release in the United States far sooner than he would have been in Canada.

[6] The CBC is able to attend parole hearings and to report on them without being restrained by the Board as to what it can report. To state the obvious, this case is not about the CBC's access to Board hearings. The CBC's request is that it be given the same rights to the recordings as it enjoys with respect to exhibits filed in open court. Thus, while the CBC's memorandum of fact and law refers to access to or disclosure of the audio recordings, its request to the Board was that it be given a physical copy of the recordings.

A. *The Board's Decision*

[7] The Board's decision is found in a letter from its Executive Director General dated October 21, 2019 to the CBC's legal counsel. This letter, found at pages 351 to 355 of the Appeal Book, was in response to an email from the CBC's legal counsel dated June 4, 2019, found at pages 5574 to 5575 of the Appeal Book. In that email, the CBC argued that the open

court principle applied to the Board as an administrative tribunal exercising judicial or quasi-judicial functions. In the CBC's view, the Board was required to produce the audio recordings of past hearings, which it characterized as adjudicative records, by virtue of the open court principle and consistent with the fact that Board hearings are presumptively open to the public.

[8] The CBC went on to argue that the Board was bound to act consistently with the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [Charter] in exercising its statutory functions. To the extent that the Board sought to limit the provision of copies of audio recordings, it could only do so in a manner consistent with section 2(*b*) of the Charter and the test articulated by the Supreme Court in *Dagenais v. Canadian Broadcasting Corp*., [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12 and in *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442 (the *Dagenais/Mentuck* test).

[9] The CBC also argued that subsection 140(13) of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (the Act), which allows victims and members of their families to listen to audio tapes of hearings, did not preclude providing copies of audio recordings to the press and to members of the public who were entitled to such access, subject only to the *Dagenais/Mentuck* test. Further, if subsection 140(13) was interpreted in such a way as to preclude providing copies of audio recordings to the press, this would be a violation of section 2(*b*) of the Charter, which guarantees both freedom of expression and freedom of the press, and would not be saved by section 1 of the Charter.

[10] Finally, the CBC argued that the *Privacy Act*, R.S.C. 1985, c. P-21 did not prohibit providing copies of the audio recordings since the information in the recordings was available to the public as a result of the open court principle and as a result of having been disclosed in a hearing which was presumptively open to the public.

[11] The Board rejected the CBC's request for copies of the audio recordings.

[12] The Board began its analysis by addressing the open court principle which, in its view, applied only to bodies that act in a quasi-judicial capacity. The Board pointed out that it did not function like a court: hearings were not adversarial, counsel, if present, had a very limited role, and it did not determine rights but rather assessed risk based on statutory criteria. The Board added that while observers could apply to attend, its hearings were not open to the public.

[13] The Board relied on the Supreme Court's decision in *Mooring v. Canada (National Parole Board)*, [1996] 1 S.C.R. 75, 132 D.L.R. (4th) 56 [*Mooring*], which held that the Board did not act in a judicial or quasi-judicial capacity. Instead, the Supreme Court described the Board's proceedings as inquisitorial. While recognizing that the open court principle favours accountability, the Board listed the accountability measures to which it is subject and, in the end, concluded that "scrutiny can be achieved by other means than [the open court principle]": AB at p. 352.

[14] After noting that individuals could apply to attend Board hearings and receive copies of its decisions, the Board concluded that "allowing access to the audio recordings of the offender's

parole hearings is not necessary to ensure accountability and transparency in the decision making process of the Board": AB at p. 353.

[15] The Board then addressed the issue of the *Privacy Act*. It reasoned that, in light of its conclusion that it was not subject to the open court principle, the CBC's request was, in effect, an invocation of section 2(*b*) of the Charter to access information in the hands of a government entity. The Board noted that the Supreme Court had recently decided that the Charter does not guarantee access to all government documents. Access is provided only when it is shown to be necessary to permit meaningful discussion on a matter of public importance. The Board noted that the CBC did not provide any evidence to demonstrate that access to the recordings was necessary to ensure meaningful public discussion, which militated against its position, especially when one considered that the media had received copies of the decisions, attended some of the hearings and were able to report on them afterwards.

[16] The Board addressed the CBC's argument about subsection 140(13) of the Act which, in the Board's view, is not only specific to victims but, even then, access to specific information can be limited when certain safety or privacy considerations apply.

[17] Finally, the Board addressed the weighing of interests mandated by subparagraph 8(2)(*m*)(i) of the *Privacy Act*, which permits the release of personal information where the head of the institution is satisfied that the public interest in disclosure outweighs the invasion of privacy. The Board pointed out that, by virtue of subsection 140(14) of the Act, the exception to sections 7 and 8 of the *Privacy Act* – found at subsection 69(2) of the *Privacy Act* – does not

apply to Board hearings. This is so because information disclosed in a Board hearing at which observers are present is deemed not to be publicly available for that reason alone.

[18] The Board indicated that its decisions must be "consistent with the protection of society and are limited to only what is necessary and proportionate to the purpose of conditional release, which is to facilitate the rehabilitation of offenders and their reintegration into the community as law-abiding citizens": AB at p. 354. The Board's decisions are made on the basis of ongoing observation and assessment of the offender and focus on the risk involved in the offender's re-entry into the community. According to the Board:

> An appropriate balance must be maintained between the offender's right to privacy, which in turn contributes to the quality of information used for decision-making, and the public's right to know. The [*Corrections and Conditional Release Act*] achieves this balance by providing for the attendance of observers at hearings, and for access to the Board's reasons for decision, both in accordance with established criteria.
>
> AB at p. 354

[19] In the end, the Board determined that the public interest in disclosure had not been sufficiently demonstrated and that, in any event, it would not outweigh the offender's privacy interests. The Board believed that it was not possible to overlook the adverse consequences of disclosure to an offender, including the risk of the derailment of their reintegration potential, even if the public interest had been demonstrated in this case.

[20] In the result, the Board declined to provide copies of the audio recordings to the CBC.

B. *The Federal Court Decision*

[21] Since these reasons deal only with the CBC's request for the provision of copies of audio recordings, I will limit my review of the Federal Court's reasons to the issues that are relevant to that request.

[22] The Federal Court found that the Board was not a quasi-judicial tribunal. The proceedings before it were not adversarial but rather were inquisitorial in nature. As a result, the Court found that the Board was not bound to produce copies of audio recordings under the open court principle. In addition, the Court found that the principle enunciated in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815 [*Criminal Lawyers' Association*] was not applicable. That principle allows the press and the public access to documents in the government's hands "only where it is shown to be a necessary precondition of meaningful expression, does not encroach on protected privileges, and is compatible with the function of the institution concerned": *Criminal Lawyers' Association* at para. 5. The Federal Court found that disclosure was not a precondition to meaningful expression given that the public and the press could attend Board hearings.

[23] The CBC argued before the Federal Court that the Board erred in failing to adopt a contextual analysis of privacy, instead relying on "a blanket assertion" that disclosing the recordings would constitute an invasion of privacy. The Federal Court disagreed and found that the Board had considered the privacy interests of the Offenders. It noted that the Board

considered that the Offenders expected that their personal information would be protected from public disclosure.

[24] The Federal Court found that the Board's decision did not engage the framework established in the cases of *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395 [*Doré*] and *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613 [*Loyola*], collectively the *Doré/Loyola* framework. In particular, the Court found that the CBC's Charter rights had not been limited. The Court also found that the Board's decision was reasonable.

[25] In the result, the Federal Court dismissed the CBC's application for judicial review.

III. Statement of Issues

[26] The CBC based its demand for copies of the audio recordings of parole hearings on the open court principle, which is nourished by the Charter's section 2(*b*) protection of "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication". The CBC based its position that the open court principle is fortified by section 2(*b*) on *Canadian Broadcasting Corp. v. Ferrier*, 2019 ONCA 1025, 441 D.L.R. (4th) 632 [*Ferrier*]: see paragraphs 43, 62. In the end, the CBC relied upon both the open court principle and section 2(*b*) to support its demand for copies of the audio recordings. The CBC also relied on the limits on a court's ability to withhold information from the public, as set out in the *Dagenais/Mentuck* framework.

[27] In the event that its primary argument was unsuccessful, the CBC invoked the balancing provision found at subparagraph 8(2)(*m*)(i) of the *Privacy Act* which provides as follows:

8 (2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed	8 (2) Sous réserve d'autres lois fédérales, la communication des renseignements personnels qui relèvent d'une institution fédérale est autorisée dans les cas suivants :
…	…
(m) for any purpose where, in the opinion of the head of the institution,	m) communication à toute autre fin dans les cas où, de l'avis du responsable de l'institution :
(i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure, or	(i) des raisons d'intérêt public justifieraient nettement une éventuelle violation de la vie privée,
(ii) disclosure would clearly benefit the individual to whom the information relates.	(ii) l'individu concerné en tirerait un avantage certain.

[28] In the result, the following issues arise in this appeal:

A. What is the standard of review?

B. Is the Board subject to the open court principle?

C. Is the CBC otherwise entitled to audio recordings of Board hearings?

IV. Analysis

A. *Standard of Review*

[29] The Supreme Court's jurisprudence teaches that an appellate court sitting on appeal from a trial court sitting in judicial review must first decide if the latter properly identified the standard

of review and then assess whether the standard of review was properly applied: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at para. 45 [*Agraira*]. In practice, this means that the appellate court steps into the shoes of the court of revision and focuses on the administrative decision: *Agraira* at para. 46, *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23 at para. 247.

[30] The standard of review for questions of law, fact, or mixed fact and law is to be decided in the light of *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 [*Vavilov*] according to which the presumptive standard of review of an administrative decision is reasonableness: *Vavilov* at para. 10. The presumption may be rebutted in certain circumstances, one of which is when the rule of law requires that the correctness standard be applied, such as when dealing with constitutional questions: *Vavilov* at para. 17.

[31] The correctness standard in relation to constitutional questions is limited to "[q]uestions regarding the division of powers between Parliament and the provinces, the relationship between the legislature and the other branches of the state, the scope of Aboriginal and treaty rights under s. 35 of the *Constitution Act, 1982*, and other constitutional matters [that] require a final and determinate answer from the courts": *Vavilov* at para. 55. In other words, not every question involving the Constitution, including the Charter, is to be reviewed on the correctness standard. Charter questions that arise in the course of administrative decisions stand on a different footing:

> When *Charter* values are applied to an individual administrative decision, they are being applied in relation to a particular set of facts. *Dunsmuir* tells us this should attract deference (para. 53; see also *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at para. 39).
>
> *Doré* at para. 36

[32] The first issue before the Board was whether the open court principle, fortified by section 2(*b*) of the Charter, applied to it. This brings the case within the principle set out in *Ferrier*, reproduced below:

> The issue before the decision maker was *whether* the *Dagenais/Mentuck* test had a bearing on the discretionary decision he had to make. That is not the same as the issue presented in *Doré* and *Episcopal* of *how* the s. 2(b) *Charter* right impacted or affected the discretionary decision he had to make. The decision maker did not reach the point of factoring the *Dagenais/Mentuck* test into his discretionary decision because he decided that it did not apply. A reasonableness standard assumes a range of possible outcomes all of which are defensible in law: see *Vavilov*, at para. 83. That standard is inappropriate here. The *Dagenais/Mentuck* test either applied or it did not.
>
> *Ferrier* at para. 37 (emphasis in original)

[33] In the present case, the Board resolved the question of the CBC's access to copies of the audio recordings by deciding that the open court principle did not apply to the Board. As in *Ferrier*, either the open court principle applied or it did not. As a result, the correctness standard applies to that question.

[34] The second question in this appeal, that is, whether the CBC was otherwise entitled to production of the audio recordings, is to be reviewed on the reasonableness standard.

B. *Is the Board subject to the open court principle?*

[35] As indicated earlier in these reasons, the CBC framed its argument about access to copies of the audio recordings of Board hearings in terms of the open court principle:

> The open court principle, including the presumption of open access to adjudicative records, applies to administrative tribunals as well as to courts. This presumption extends to providing access to audio recordings of past hearings to members of the public and the media, similar to those available in the courts. This

> is also in line with the fact that Parole Board hearings are presumptively open to the public.
>
> AB at p. 5574

[36] As can be seen from this passage, the CBC alleges that the open court principle applies to Board hearings, which is confirmed by the fact that Board hearings are presumptively open to the public. The CBC then posits that the open court principle, as applied to tribunals, includes the right of access to adjudicative records, which includes audio recordings: CBC's memorandum of fact and law at para. 26.

[37] An examination of subsection 140(4) of the Act shows that Board hearings are presumptively open to the public, subject to appropriate restrictions arising from the subject matter of the hearing and the locations at which Board hearings are held. Subsection 140(4) of the Act provides as follows (underline added):

140 (4) Subject to subsections (5) and (5.1), the Board or a person designated, by name or by position, by the Chairperson of the Board <u>shall</u>, subject to such conditions as the Board or person considers appropriate and after taking into account the offender's views, permit a person who applies in writing therefor to attend as an observer at a hearing relating to an offender, unless the Board or person is satisfied that	140 (4) Sous réserve des paragraphes (5) et (5.1), la Commission, ou la personne que le président désigne nommément ou par indication de son poste, <u>doit</u>, aux conditions qu'elle estime indiquées et après avoir pris en compte les observations du délinquant, autoriser la personne qui en fait la demande écrite à être présente, à titre d'observateur, lors d'une audience, sauf si elle est convaincue que, selon le cas :
(a) the hearing is likely to be disrupted or the ability of the Board to consider the matter before it is likely to be adversely affected by the presence of that person or of that person in conjunction with other	a) la présence de cette personne, seule ou en compagnie d'autres personnes qui ont demandé d'assister à la même audience, nuira au déroulement de l'audience ou

persons who have applied to attend the hearing;	l'empêchera de bien évaluer la question dont elle est saisie;
(b) the person's presence is likely to adversely affect those who have provided information to the Board, including victims, members of a victim's family or members of the offender's family;	b) sa présence incommodera ceux qui ont fourni des renseignements à la Commission, notamment la victime, la famille de la victime ou celle du délinquant;
(c) the person's presence is likely to adversely affect an appropriate balance between that person's or the public's interest in knowing and the public's interest in the effective reintegration of the offender into society; or	c) sa présence compromettra vraisemblablement l'équilibre souhaitable entre l'intérêt de l'observateur ou du public à la communication de l'information et l'intérêt du public à la réinsertion sociale du délinquant;
(d) the security and good order of the institution in which the hearing is to be held is likely to be adversely affected by the person's presence. (my emphasis)	d) sa présence nuira à la sécurité ou au maintien de l'ordre de l'établissement où l'audience doit se tenir.

[38] The wording of the subsection is clear that a person who applies in writing to attend a hearing as an observer shall be permitted to attend unless the Board or its designate is satisfied the admission of that person will give rise to one or more of the circumstances set out in paragraphs (*a*) to (*d*). While the courts do not have a pre-screening process like the Board has, limits can be placed on attendance at a court hearing. For example, in Ontario, subsections 135(1) and (2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 provide:

135 (1) Subject to subsection (2) and rules of court, all court hearings shall be open to the public.	135 (1) Sous réserve du paragraphe (2) et des règles de pratique, les audiences des tribunaux sont publiques.

(2) The court may order the public to be excluded from a hearing where the possibility of serious harm or injustice to any person justifies a departure from the general principle that court hearings should be open to the public.	(2) Le tribunal peut ordonner le huis clos si la possibilité qu'une personne subisse un préjudice important ou une injustice grave justifie une dérogation au principe général de la publicité des audiences des tribunaux.

[39] There is a similar provision in the *Criminal Code*, R.S.C. 1985, c. C-46 at subsections 486(1) and (2):

486 (1) Any proceedings against an accused shall be held in open court, but the presiding judge or justice may, on application of the prosecutor or a witness or on his or her own motion, order the exclusion of all or any members of the public from the court room for all or part of the proceedings, or order that the witness testify behind a screen or other device that would allow the witness not to be seen by members of the public, if the judge or justice is of the opinion that such an order is in the interest of public morals, the maintenance of order or the proper administration of justice or is necessary to prevent injury to international relations or national defence or national security.	486 (1) Les procédures dirigées contre l'accusé ont lieu en audience publique, mais si le juge ou le juge de paix qui préside est d'avis qu'il est dans l'intérêt de la moralité publique, du maintien de l'ordre ou de la bonne administration de la justice ou que cela est nécessaire pour éviter toute atteinte aux relations internationales ou à la défense ou à la sécurité nationales, il peut, sur demande du poursuivant ou d'un témoin ou de sa propre initiative, ordonner que soit exclu de la salle d'audience l'ensemble ou tout membre du public, pour tout ou partie de l'audience, ou que le témoin témoigne derrière un écran ou un dispositif lui permettant de ne pas être vu du public.
…	…
(2) In determining whether the order is in the interest of the proper administration of justice, the judge or justice shall consider	(2) Pour décider si l'ordonnance est dans l'intérêt de la bonne administration de la justice, le juge ou le juge de paix prend en considération les facteurs suivants :
(a) society's interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process;	a) l'intérêt de la société à encourager la dénonciation des infractions et la participation des victimes et des

	témoins au processus de justice pénale;
(b) the safeguarding of the interests of witnesses under the age of 18 years in all proceedings;	b) la sauvegarde de l'intérêt des témoins âgés de moins de dix-huit ans dans toute procédure;
(c) the ability of the witness to give a full and candid account of the acts complained of if the order were not made;	c) la capacité d'un témoin, si l'ordonnance n'est pas rendue, de fournir un récit complet et franc des faits sur lesquels est fondée l'accusation;
(d) whether the witness needs the order for their security or to protect them from intimidation or retaliation;	d) la nécessité de l'ordonnance pour assurer la sécurité d'un témoin ou le protéger contre l'intimidation et les représailles;
(e) the protection of justice system participants who are involved in the proceedings;	e) la protection des personnes associées au système judiciaire qui prennent part à la procédure;
(f) whether effective alternatives to the making of the proposed order are available in the circumstances;	f) l'existence dans les circonstances d'autres moyens efficaces que celui de rendre l'ordonnance;
(g) the salutary and deleterious effects of the proposed order; and	g) les effets bénéfiques et préjudiciables de l'ordonnance demandée;
(h) any other factor that the judge or justice considers relevant.	h) tout autre facteur qu'il estime pertinent.

[40] The point of drawing attention to these statutory provisions is simply to show that, even before the courts where it is applied most rigorously, the open court principle is not absolute. As a result, the conditions set out at paragraphs 140(4)(*a*) to (*d*) of the Act do not, in and of themselves, mean that Board hearings are not presumptively open to the public.

[41] But the fact that Board hearings are open to the public, while relevant, does not resolve the issue of the application of the open court principle. The following paragraph sets out the core of the Board's reasoning on the open court principle:

> It is also important to note that the function of the Board is significantly different from a court in a number of ways. A parole hearing is inquisitorial in nature, not adversarial and although counsel may be present at a hearing, they have a very limited function. Put another way, the state's interests are not represented and there are no contending parties. The Board does not have powers to summons, examine witnesses or to apply traditional rules of evidence. There is no determination of rights, but rather, an assessment of risk predicated on criteria set out in law. The information reviewed is highly personal, involving third parties, and is often medical or psychological in nature. Although observers can apply to attend, hearings are not open to the public. This also makes sense when one considers the correctional environment within which parole hearings are conducted.
>
> AB at p. 352

[42] The key point in the Board's reasoning is that its proceedings are inquisitorial, not adversarial in nature, as evidenced by the fact that the state's interests are not represented and there are no contending parties: AB at p. 352. The conclusion that the Board does not act quasi-judicially flows from the Supreme Court's decision in *Mooring*, which was relied upon by the Federal Court as well. The balance of the Board's justification rests on the fact that the proceedings are not adversarial.

[43] The debate before the Federal Court on the open court principle turned on whether the Board is a quasi-judicial body. In *Mooring*, the issue was whether the Board was a court of competent jurisdiction so as to have jurisdiction to award remedies under subsection 24(2) of the Charter. In the course of its reasoning, the Supreme Court noted that the Board did not act in a judicial or quasi-judicial manner. This conclusion was founded, in part, on the fact that the Board

did not hear evidence but, instead, proceeded on the basis of the information available to it: *Mooring* at paras. 25-26. The Supreme Court went on to observe that:

> The language of the *Corrections and Conditional Release Act* confers on the Board a broad inclusionary mandate. Not only is it not bound to apply the traditional rules of evidence, but it is required to take into account "all available information that is relevant to a case". No mention is made of any power to apply exclusionary rules of evidence. Indeed, such a provision would conflict with its duty to consider "all available information that is relevant".
>
> *Mooring* at para. 29 (emphasis in original)

[44] The Supreme Court concluded that:

> I conclude from the foregoing that the Board does not have jurisdiction over the remedy sought [the exclusion of evidence]. It is not, therefore, a court of competent jurisdiction within the meaning of s. 24 of the *Charter*.
>
> *Mooring* at para. 30

[45] The Supreme Court found that the Board was not a court of competent jurisdiction in that it did not have the power to reject evidence, given that it was required to take into account "all available information that is relevant" to a case. The characterization of the Board's proceedings as neither judicial nor quasi-judicial, while a consideration, was not determinative of the Supreme Court's conclusion as to whether the Board was a court of competent jurisdiction for the purposes of section 24 of the Charter. The only link between *Mooring* and the application of the open court principle to the Board is its determination that the Board was not a quasi-judicial tribunal.

[46] While this Court's focus is on the Board's decision, it is worth noting that in the course of its analysis of *Mooring*'s relevance, the Federal Court held that the Supreme Court's decision in

Minister of National Revenue v. Coopers and Lybrand, [1979] 1 S.C.R. 495, 92 D.L.R. (3d) 1 [*Coopers and Lybrand*] was of no assistance. That case dealt with this Court's jurisdiction in judicial review which, at the time, applied only to a "… decision or order other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis …": *Coopers and Lybrand* at p. 499.

[47] Notwithstanding the fact that the Supreme Court changed its position in *R. v. Bird*, 2019 SCC 7, [2019] 1 S.C.R. 409 [*Bird*] and found that the Board was a court of competent jurisdiction for the purpose of subsection 24(2) of the Charter, the Federal Court considered that *Bird* served only to distinguish *Mooring* on that issue. The Federal Court held that *Bird* did not overrule or displace *Mooring* on the issue of whether the Board is a quasi-judicial tribunal: Decision at para. 88.

[48] With all due respect, the judicial/quasi-judicial distinction has outlived its usefulness in its application to the open court principle. The difficulty with relying on the characterization of a tribunal as quasi-judicial is that it focuses on the Board's processes and formal characteristics rather than its function. The public interest in court proceedings does not arise from a court's procedural characteristics but from the fact that it decides questions of rights and duties as between citizens and as between citizens and the state.

[49] Much of the jurisprudence on the open court principle and administrative tribunals is based on the decision of the Federal Court of Canada in *Southam Inc. v. Canada Minister of*

Employment and Immigration, [1987] 3 F.C. 329, 13 F.T.R. 138 (T.D.) [*Southam*], where the following appears at page 336:

> That decision [*Re Southam Inc. and The Queen (No. 1)* (1983), 1 O.R. (2d) 113, 146 D.L.R. (3d) 408 (C.A.)] arose in the context of a court proceeding. The detention review hearing in this case involves a statutory body exercising its functions and it is to be determined if they are judicial or quasi-judicial in nature and by implication subject to accessibility; does the openness rule apply to their proceedings. Mr. Justice Dickson, as he then was, in *Minister of National Revenue v. Coopers and Lybrand*, [1979] 1 S.C.R. 495 determined that a proceeding can be found to be judicial or quasi-judicial if it met certain tests. …
>
> (emphasis added)

[50] The rationale for focusing on judicial or quasi-judicial tribunals was laid out in *Travers v. Canada (Chief of Defence Staff)*, [1993] 3 F.C. 528, 18 C.R.R. (2d) 135 (T.D.) [*Travers*]:

> Since the adoption of the Charter, it is true that the open door doctrine [the open court principle] has been applied to certain administrative tribunals. While the bulk of precedents have been in the context of court proceedings, there has been an extension in the application of the doctrine to those proceedings where tribunals exercise quasi-judicial functions, which is to say that, by statute, they have the jurisdiction to determine the rights and duties of the parties before them.
>
> This more extensive doctrine would appear to be entirely consistent with its original purpose. If justice is to be patently and evidently done in the courts, there is no reason why it should not also be done when a tribunal exercises substantially the same judicial functions.
>
> *Travers* at p. 532

[51] There are two threads in this explanation. The first follows from the observation in *Southam*, quoted above, that the tribunal in that case was "a statutory body exercising its functions". *Travers* completes this by noting that tribunals to whom the open court principle had been extended were tribunals where "by statute, they have the jurisdiction to determine the rights and duties of the parties before them". The second is that the legitimacy of tribunals whose

function closely resembles that of the courts rests on the same public oversight of their work by the media. This is consistent with the conclusion reached by the Court in *Southam*:

> After all, statutory tribunals exercising judicial or quasi-judicial functions involving adversarial-type processes which result in decisions affecting rights truly constitute part of the "administration of justice". The legitimacy of such tribunals' authority requires that confidence in their integrity and understanding of their operations be maintained, and this can be effected only if their proceedings are open to the public.
>
> *Southam* at p. 336 (emphasis added)

[52] As these passages demonstrate, the application of the open court principle, while linked to a tribunal's quasi-judicial status, rests on a broader footing. If the quasi-judicial distinction has outlived its usefulness, the question that arises is what will replace it as an indicator of the applicability of the open court principle.

[53] It appears that, whatever other distinctions may exist between different kinds of administrative tribunals, the fact that a tribunal presides over adversarial proceedings as an adjudicative body is a reliable indicator that the tribunal is subject to the open court principle. It is the fact of adjudicating competing interests that imposes the duty of fairness and impartiality which gave rise to the description of some tribunals as quasi-judicial. In *Toronto Star Newspapers Ltd. v. Ontario (Attorney General)*, 2018 ONSC 2586, 142 O.R. (3d) 266, such tribunals were described as adjudicative tribunals. The characteristic that gives rise to the application of the open court principle to an administrative tribunal is the presence of an adversarial process, as opposed to the formalities by which that adversarial process is conducted. In short, the open court principle applies to adjudicative tribunals.

[54] Is the Board an adjudicative tribunal? The Board says that it is not because its proceedings are inquisitorial – not adversarial – in that the Board is engaged in a risk assessment process in the course of which it receives information from Corrections Canada and submissions from the offender and victims. The offender is not opposed by a representative of the state, as is the case, for example, in a sentencing hearing. Similarly, the offender's counsel, if they have one, has a limited role in Board hearings.

[55] The CBC argues that the open court principle applies (or should apply) because of the public interest in the subject matter of a hearing. At paragraph 32 of its memorandum of fact and law, the CBC argues that the open court principle, as recognized in section 2(*b*) of the Charter, arises from "the public's right to express ideas about public institutions and obtain information about their functioning", sentiments that are expressed in *Southam* and *Travers* quoted earlier in these reasons. This casts a wider net than does the categorization of a tribunal as "quasi-judicial" or "adjudicative". While the public has an interest in knowing about the functioning of all public bodies, the open court principle has to date been limited to those public bodies whose resemblance to courts invites the same degree of public oversight represented by the open court principle. It may be that, at some point, a broader foundation for the "openness" will be articulated, but the facts of this case do not justify that change.

[56] In the result, the Board and the Federal Court did not err in concluding that the open court principle does not apply to the Board's proceedings. This creates the anomalous situation in which a tribunal whose hearings are presumptively open to the public is not subject to the open court principle. There are many public agencies whose meetings are open to the public but that

are not subject to the open court principle. This is not to say that section 2(*b*) of the Charter does not apply to them, simply that openness is more nuanced and may not be as fulsome as it is in relation to adjudicative tribunals that are subject to the open court principle. The fact that an administrative body opens its doors to the public is not sufficient, in and of itself, to trigger the application of the open court principle.

[57] While I have differed somewhat from the Board's analysis, I come to the same conclusion on the question of the applicability of the open court principle. As a result, it cannot be said that the Board's decision was in error.

[58] With that in mind, I now turn to the question of whether the CBC is otherwise entitled to copies of the audio recordings.

C. *Access to the audio recordings*

[59] The CBC couched its alternative arguments for disclosure in constitutional terms and so the debate that ensued was largely framed in constitutional terms. But it is worth pausing for a moment to take stock of the more mundane issues in this debate.

[60] In the first place, this is not a debate about whether the CBC can report on Board hearings. As noted earlier, Board hearings are presumptively open to the public, so the CBC and other members of the press are able to attend and to report on what takes place at those hearings. In fact, the Board noted that the CBC has attended hearings in at least one of the cases for which it has requested copies of the audio recordings. At this stage of the argument, the debate is about

whether the CBC should be able to access audio recordings of Board hearings on the same basis as it attends the hearings themselves.

[61] This would permit the CBC and other media organizations to cover hearings that they could not attend in person, either because they were not advised of their scheduling or because of resource constraints. Disclosure of the audio recordings would also allow the media to ensure that their reporting is accurate.

[62] The first potential hurdle the CBC identified that might stand in its way was subsection 140(13) of the Act which provides as follows:

140 (13) Subject to any conditions specified by the Board, a victim, or a person referred to in subsection 142(3), is entitled, on request, after a hearing in respect of a review referred to in paragraph (1)(a) or (b), to listen to an audio recording of the hearing, other than portions of the hearing that the Board considers	140 (13) La victime ou la personne visée au paragraphe 142(3) a le droit, sur demande et sous réserve des conditions imposées par la Commission, une fois l'audience relative à l'examen visé aux alinéas (1)a) ou b) terminée, d'écouter l'enregistrement sonore de celle-ci, à l'exception de toute partie de l'enregistrement qui, de l'avis de la Commission :
(a) could reasonably be expected to jeopardize the safety of any person or reveal a source of information obtained in confidence; or	a) risquerait vraisemblablement de mettre en danger la sécurité d'une personne ou de permettre de remonter à une source de renseignements obtenus de façon confidentielle;
(b) should not be heard by the victim or a person referred to in subsection 142(3) because the privacy interests of any person clearly outweighs the interest of the victim or person referred to in that subsection.	b) ne devrait pas être entendue par la victime ou la personne visée au paragraphe 142(3) parce que l'intérêt de la victime ou de la personne ne justifierait nettement pas une éventuelle violation de la vie privée d'une personne.

[63] The CBC argued that subsection 140(13) did not mean that audio recordings could not be provided to the public.

[64] The Board responded to the CBC's argument by conceding that the CBC was correct that the provision did not bar the Board from providing the CBC with copies of audio recordings. However, the Board was silent on whether the provision required the Board to do so. Judging from its refusal to provide the copies, the Board concluded that subsection 140(13) did not compel production.

[65] The restrictions on disclosing personal information in the *Privacy Act* and subsection 140(14) of the Act are another obstacle in the CBC's way. While the CBC did not make its request under the AIA, it is nonetheless relevant that section 19 of the AIA prohibits government institutions from disclosing personal information unless certain conditions are met, one of which is that the information is publicly available. Subsection 8(1) of the *Privacy Act* restates the prohibition on disclosure of personal information by stipulating that personal information under the control of a government institution cannot be disclosed by the institution except with the consent of the individual concerned or in accordance with the provisions of subsection 8(2). There is exemption from section 8 in subsection 69(2) of the *Privacy Act*, which concisely provides that section 8 does not apply to information that is publicly available.

[66] The difficulty, from the CBC's point of view, is subsection 140(14) of the Act which is reproduced below:

140 (14) If an observer has been present during a hearing or a victim	140 (14) Si un observateur est présent lors d'une audience ou si la victime

or a person has exercised their right under subsection (13), any information or documents discussed or referred to during the hearing shall not for that reason alone be considered to be publicly available for purposes of the *Access to Information Act* or the *Privacy Act*.	ou la personne visée au paragraphe 142(3) a exercé ses droits au titre du paragraphe (13), les renseignements et documents qui y sont étudiés ou communiqués ne sont pas réputés être des documents accessibles au public aux fins de la *Loi sur la protection des renseignements personnels* et de la *Loi sur l'accès à l'information*.

[67] Subsection 140(14) creates a legal fiction by stipulating that information and documents discussed in a Board hearing which – it will be recalled, is presumptively open to the public – are not publicly available solely by reason of the fact that observers are present at the hearing. The purpose of allowing observers at a hearing is to make the information discussed at the hearing available for different public views. Given the right of media representatives to attend Board hearings and the absence of restriction on what they can report, it is difficult to see the logic of subsection 140(14).

[68] The objective of allowing observers to attend, as stated by the Board in its letter to the CBC, is to address the public's right to know. Allowing the press to access audio recordings of Board hearings on the same basis as the press' access to the hearings themselves would serve exactly the same goal as that now served by the attendance of observers.

[69] As the Supreme Court explained in *R. v. Vice Media Canada Inc.*, 2018 SCC 53, [2018] 3 S.C.R. 374 [*Vice Media*] at paragraph 125 of its decision:

> Section 2(*b*) sets out generous protections designed to facilitate the healthy functioning of our democracy. But they are incomplete if s. 2(*b*) is viewed only as an individual right to freedom of expression, reading out protection of "freedom of the press". A vigorous, rigorous, and independent press holds people and institutions to account, uncovers the truth, and informs the public. It provides the

> public with the information it needs to engage in informed debate. In other words, it is the public's "right to know" that explains and animates the distinct constitutional protection for freedom of the press [citations omitted].

[70] Subsection 140(14) is unambiguous in its terms. It specifically addresses the fact that "information" disclosed or discussed at a Board hearing is not publicly available for the purposes of the *Privacy Act* solely because an observer was present. Given the Supreme Court's comments in *Vice Media*, the temptation to plead the unconstitutionality of subsection 140(14) arises. But that temptation should be resisted unless it is shown that there is no other way for the CBC to obtain the information it seeks.

[71] Provision does exist for the disclosure of personal information in certain circumstances, notably under paragraph 8(2)(*m*) of the *Privacy Act*, which I reproduce once more for the sake of convenience:

8 (2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed	8 (2) Sous réserve d'autres lois fédérales, la communication des renseignements personnels qui relèvent d'une institution fédérale est autorisée dans les cas suivants :
…	…
(m) for any purpose where, in the opinion of the head of the institution,	m) communication à toute autre fin dans les cas où, de l'avis du responsable de l'institution :
(i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure, or	(i) des raisons d'intérêt public justifieraient nettement une éventuelle violation de la vie privée,
(ii) disclosure would clearly benefit the individual to whom the information relates.	(ii) l'individu concerné en tirerait un avantage certain.

[72] The CBC invoked subsection 8(2) in its email requesting the audio recordings and the Board addressed this provision in its decision.

[73] The Board began by observing that, "under the [*Privacy Act*], there is a presumption of non-disclosure unless the individual consents or it is authorized under subsection 8(2) of the [*Privacy Act*]": AB at p. 354. Much umbrage was taken at this suggestion of a presumption of non-disclosure, resulting in arguments that unless disclosure is prioritized, the scheme is unconstitutional. With respect, there is no presumption of non-disclosure. There is qualified prohibition on disclosure of personal information in section 19 of the AIA, and a framework is provided for the release of that information in defined circumstances. Such a scheme is not unconstitutional in and of itself.

[74] The protection of privacy has been recognized as a protected interest, even in a constitutional context:

> First, this Court has often observed that privacy is a fundamental value necessary to the preservation of a free and democratic society (*Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773, at para. 25; *Dagg v. Canada (Minister of Finance)*, 1997 CanLII 358 (SCC), [1997] 2 S.C.R. 403, at paras. 65-66, per La Forest J. (dissenting but not on this point);[*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 SCR 480, 139 D.L.R. (4th) 385], at para. 40). Courts have invoked privacy, in some instances, as the basis for an exception to openness under the *Sierra Club* test (see, e.g., *R. v. Henry*, 2009 BCCA 86, 270 B.C.A.C. 5, at paras. 11 and 17).
>
> *Sherman Estate v. Donovan*, 2021 SCC 25, 458 D.L.R. (4th) 361 at para. 31

[75] The fact that personal information is protected in courtrooms under certain circumstances is a clear indication that interference with the public disclosure of personal information is not, in and of itself, unconstitutional.

[76] After discussing the mandate of the Board and how it differs from the sentencing process, the Board wrote:

> Thus the nature of the process itself, calls on the offender to divulge highly sensitive and personal information which, if disclosed to the public, would undermine the effectiveness of the legislative scheme and the ability to assess risk to public safety. …
>
> An appropriate balance must be maintained between the offender's right to privacy, which in turn contributes to the quality of information used for decision-making, and the public's right to know. The [*Corrections Act*] achieves this balance by providing for the attendance of observers at hearings, and for access to the Board's reasons for decision, both in accordance with established criteria.
>
> AB at p. 354

[77] This leaves the impression that the measures that the Board identified are the full extent of the Board's obligation to recognize the public's and the press' right to disclosure of personal information. That impression is confirmed in the following paragraph:

> In this case, I have determined that the public interest has not been sufficiently demonstrated. Furthermore, I am not satisfied that the public interest in disclosure of the information would clearly outweigh the privacy interests of the individuals involved. Conversely, the invasion of privacy is clear. It is not possible to overlook the consequences that would likely result from a discretionary release of personal information if public interest were to have been demonstrated in this case. Where there is a possible invasion of privacy balanced against a public interest, consideration may be given to who would be receiving the information and whether any controls can be placed on further use or release. In my informed opinion, any offender in such a circumstance would be at very real risk of having his reintegration potential as a law-abiding citizen compromised or derailed by the high degree of media and/or public scrutiny that could reasonably be anticipated.
>
> AB at p. 354

[78] It is striking that the Board reacted to the request for the audio recordings of Board hearings as though it were a request for the Offenders' complete files. The personal information on the audio recordings has already been disclosed, even though it is deemed not to be publicly available, though it may well be so if media representatives have attended the hearing and reported on it. The threats and dangers arising from "a discretionary release of personal information" are significantly overstated in that the personal information has already been disclosed.

[79] The other striking feature of the Board's response is its apparently closed mind to the possibility of public disclosure beyond the presence of observers at hearings and the making available of Board decisions. This is no doubt a response to the overstated risks and danger of disclosure. But it does not require a prolonged stay on a Tibetan mountaintop to realize that whatever risk attaches to the discretionary release of an audio recording has already arisen when the information was disclosed to the public, including members of the media, in the hearing itself.

[80] It may be that reasonable limits can be imposed on who can receive audio recordings and what they can do with them. For example, it may not be disproportionate to require that applicants for audio recordings comply with the same requirements imposed on those who seek to attend Board hearings in person. In the same vein, it may well be that those who would be disqualified from attending Board hearings in person pursuant to paragraphs (*a*) to (*d*) of subsection 140(4) of the Act would also be ineligible to receive audio recordings. As for the

trustworthiness of media organizations, the Supreme Court noted in *Vice Media*, in relation to the confidence to be placed in media organizations, that:

> Not every [journalistic] activity should or will be protected under s. 2(*b*), but the more the activity accords with standards of professional journalistic ethics, such as those referred to in the Chamberland Commission Report, the more likely it will be found to attract constitutional protection (Quebec, *Commission d'enquête sur la protection de la confidentialité des sources journalistiques* — Rapport (2017), at p. 38). … On the other hand, as Binnie J. cautioned in *National Post*, vigorous protection for freedom of the press does not require unwavering support for tabloid espionage or "[c]hequebook journalism" (para. 38).
>
> *Vice Media* at para. 130

[81] Similarly, one can appreciate the necessity of preventing inappropriate storage or widespread dissemination of the recordings or the unchecked reproduction, broadcast, cyber-diffusion of the audio recordings. One of the issues in that area may well be the possibility of verifying the compliance with the measures imposed. But until the contrary is shown, these are practical issues that cannot justify an outright refusal to disclose audio recordings of Board hearings.

[82] Returning to the Board's response to the CBC's request, the focus on the risk to the derailment of offenders' reintegration as law-abiding members of society, while laudable, sounds hollow in the context of the Offenders in question whose chances of parole are remote at best. The assessment of this risk must necessarily be individualized. No doubt this risk is more apparent in the case of offenders whose likelihood of parole being granted in the near term is high.

[83] As for the issue of the public interest in disclosure, the CBC's request assumed that it was obvious, hence the observation that it had not been demonstrated. Nonetheless, the Board was bound to consider the public interest in broader context than an identifiable group of persons who might have an interest. In this context, it must be kept in mind that the press has a particular role in the dissemination of information in which members of the public have an interest. As the Supreme Court noted in *Vice Media*, quoted above:

> It provides the public with the information it needs to engage in informed debate. In other words, it is the public's "right to know" that explains and animates the distinct constitutional protection for freedom of the press [citations omitted].
>
> *Vice Media* at para. 125

[84] There may be various ways for the Board to approach this issue, but the common factor should be whether the disclosure of the recordings furthers the public's understanding of the functioning of the Board and its ability to engage in informed debate.

[85] For all of these reasons, the reasons supporting the Board's refusal to provide the requested audio recordings were unreasonable. In many instances, they were incoherent, relying on risks that had already materialized affecting opportunities that were unlikely to arise in a foreseeable future. The Board's decision should be set aside and the matter returned to it for reconsideration.

V. Conclusion

[86] The remaining question is the relief to which the CBC is entitled. In its application for judicial review before the Federal Court, the CBC requested the following relief:

> 1. An Order setting aside or granting *certiorari* in respect of the Decision denying CBC access to complete copies of the Audio Recordings;
>
> 2. An Order of *mandamus* directing the Parole Board to provide complete copies of the Audio Recordings to CBC;
>
> 3. A declaration that the open court principle entrenched under s. 2(b) of the *Canadian Charter of Rights and Freedoms* ("*Charter*") applies to the Parole Board, that its proceedings are presumptively open to the public, and that records from its proceedings, including audio recordings of hearings, are public in the same way that court records are public;
>
> 4. A declaration that the *Privacy Act* is not a bar to accessing audio recordings of Parole Board hearings;
>
> 5. A declaration that restrictions on access to records from Parole Board proceedings, including copies of audio recordings of Parole Board hearings, should only be permitted in accordance with the Supreme Court of Canada's "Dagenais/Mentuck" test, originating from *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 SCR 835 and *R v. Mentuck*, [2001] 3 SCR 442;
>
> 6. Further, a declaration that public access to audio recordings of Parole Board hearings is presumptively required under s. 2(b) of the *Charter* and s.140(4) of the *Corrections and Conditional Release Act* ("CCRA"), and that to the extent s. 140(13) of the *CCRA* circumscribes or limits that presumptive right to public access to audio recordings of Parole Board hearings, s. 140(13) violates s. 2(b) of the *Charter* and is not saved by s. 1, and is therefore of no force and effect;
>
> …

[87] I would not grant any of the declaratory relief requested by the CBC because the basis of these reasons is much narrower than the declaratory relief sought.

[88] As for the writs of *certiorari* and *mandamus* that are sought, there was no discussion in this case of the conditions governing the availability of these remedies. The CBC can be given an appropriate remedy without recourse to these specific writs.

[89] As a result, I would allow the appeal from the Federal Court, set aside the Federal Court's judgment, and allow the CBC's application for judicial review and set aside the Board's decision. Making the order that the Federal Court should have made, I would order:

1) That the matter be returned to the Parole Board of Canada for reconsideration on the basis that the weighing of interests contemplated in subparagraph 8(2)(*m*)(i) of the *Privacy Act* must be undertaken with respect to each request on the basis of the considerations set out in paragraphs 77 to 84 of these reasons; and

2) That there will be no order as to costs since none were requested.

"J.D. Denis Pelletier"
J.A.

"I agree.
Wyman W. Webb J.A."

"I agree.
Marianne Rivoalen J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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