Federal Court  Cour fédérale

Date: 20160111

Docket: T-261-15

Citation: 2016 FC 35

Ottawa, Ontario, January 11, 2016

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

YONG LONG YE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review by Yong Long Ye, challenging a decision of the Parole Board of Canada, Appeal Division [the Appeal Division], made on January 14, 2015, denying his application for day parole.

[2] Mr. Ye raises several issues in support of his application for relief. He contends that the Appeal Division acted unfairly by failing to disclose incriminating evidence in advance of the hearing upon which it then based its decision. He also argues that one of the members of the

Appeal Division was biased due to previous involvement with his parole file. Mr. Ye also argues that the Appeal Division applied the wrong standard to his application; instead of assessing whether he represented a risk to reoffend violently, the Appeal Division considered the risk to reoffend generally. Finally, Mr. Ye says the Appeal Division failed to fulfill its duty to act only on reliable and persuasive information and otherwise made unreasonable findings of fact on several material points.

I. Background

[3] Mr. Ye is a federal inmate presently serving a custodial sentence of 18 years for convictions related to the importation and trafficking in cocaine and methamphetamine. The length of Mr. Ye's sentence was based on his high level involvement in a significant and violent criminal operation spanning several years. Mr. Ye's various attempts to obtain parole have, to date, proven unsuccessful.

[4] The Appeal Division's decision upheld a Parole Board [Board] first level decision, which had denied day parole to Mr. Ye on the following basis:

> The Board took much more time than ordinarily in this case, to consider these points. And while there were factors that operate in your favour, such as your work record and what you have done on your own, the negative factors set out above remain predominant. The Board notes your participation and leadership in criminal organization that trafficked in illicit drugs globally. By all accounts you were the mastermind of this organization and the devastation that your actions caused families and individuals will never be fully known. The gravity and nature of the index offences is a serious concern because of the inherent violence associated with the drug trade – you have admitted that you ordered associates to use violence to collect on debts owed to you. The Board is very concerned that you minimized aspects of your criminal career.

> Your file indicates that although you have had no previous convictions you have demonstrated serious criminal behaviours that reflect entrenched criminal values. You are considered untreated in addressing your risk factors. You are assessed as a low risk for direct violent offending but a moderate risk for general reoffending. To your credit, you are considered engaged in your correctional plan.
>
> After weighing all the file information and listening to you today the Board concludes on balance, especially considering the factors noted earlier, that you currently present an undue risk to reoffend, and consequently your application for day parole is denied.

[5] The Appeal Division's assessment of the arguments Mr. Ye advanced on appeal and its conclusion are set out below:

> Mr. Ye, the Board's decision is supported by relevant, reliable and persuasive information. You are serving an aggregate sentence of 18 years for Conspire to Commit Indictable Offence-Import/Export Scheduled Substance, Conspire to Commit Indictable Offence-Laundering Proceeds of Crime, and Conspire to Commit Indictable Offence-Production of Scheduled Substance. You admitted to the Board that, as a leader of an international criminal organization, you ordered others to use violence to ensure repayment of drug debts, that you owned body armour, and that you would have used your weapon if needed. A review of the audio-recording indicates that when the Board asked you how you became a "*kingpin*" in such a short period of time, you referred to your "*luck*" and indicated that "*a successful person in Toronto gave you*" his drug business. These types of responses that led the Board [to] conclude that you were minimizing aspects of your criminal behaviour. In addition, you repeatedly claimed at the hearing that you were just "*an ordinary inmate*," leading the Board to note that you seemed unable to make the connection between your reputation in the community as "*a notorious crime boss*" and to how that reputation may carry over into the inmate population. Although the Board recognized that you had been screened out of correctional programs, relevant file information indicates that you had not otherwise addressed your dynamic risk factors of attitude and associates/social interaction. (Correctional Plan Update of June 18, 2014).
>
> The Appeal Division finds that the Board also accurately recorded information in the written reasons that your Case Management

Team (CMT) had concerns that you were associating with negative peers and that you denied any such associations (A4D). Further, it is clear from the concluding analytical paragraphs of the written reasons that the Board did not place weight on information suggesting that you associated with other high-profile offenders within the institution.

Contrary to your submission, the audio-recording and the written reasons indicate that the Board was fully aware that you had no prior criminal convictions. The Board can consider information with respect to charges that did not result in convictions as such information is indicative of a certain lifestyle and associations. A review of the audio-recording indicates that when the Board questioned you about the circumstances of your stayed and withdrawn charges, you described your associations with gang members and your path over a period of six years from your work in a stucco construction business to being the leader of an international organization involved in the production, distribution and sales of drugs. The Appeal Division finds that the Board's questions were appropriate and it was not unreasonable for the Board to conclude that you demonstrated entrenched criminal values prior to your index offences.

Concerning the Board's questions about your wife's role in your criminal activities, the Appeal Division finds that the Board's questions were based on information provided in the RCMP's Bail Report-Project E Paragon dated January 22, 2009. This Report was shared with you on November 6, 2012 (Information Sharing Checklist Update of November 6, 2012). Although you initially denied to the Board that your wife had a role in your criminal activities, when confronted with information in the Bail report, you subsequently acknowledged that she was aware of your negative associates and your involvement in the drug trade. Later in the hearing, after additional excerpts were read to you from the Bail Report, you acknowledged that your wife was very involved in your criminal activities. Therefore, the Appeal Division finds that the Board asked risk relevant about your wife's involvement in your criminal activities based on file information that was shared with you, and it was not unreasonable for the Board to express concerns about her reliability as a collateral contact if you were released to the community.

Concerning your submission about the unreliability of ion scanners, the written reasons refer to an incident in which your wife tested positive for heroin and another incident when your wife brought contraband into the institution. The Board stated that these incidents indicate that "*the world of drug abuse and law-breaking*

> *is not so far away*." The Appeal Division agrees with your submission that there are problems with the Board's finding in that there is no consideration of your assistant's opinion that the results of ion scanners are unreliable. However, the Appeal Division finds that the concluding analytical paragraphs put no weight on these particular details, and accordingly conclude that they were not determinative.
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> Finally, you raised a concern that the Board was unable to understand your responses to questions about your role in your criminal offending because of your limited English language skills and the quality of the interpretation. A review of the audio-recording indicates that the Board advised you at the beginning of your hearing that, if you were unable to understand the Board's questions or the comments made by the IPO, you were to inform the Board immediately. At an early stage in the hearing, you and the Board made the mutual decision to have sentence by sentence translation. At no point in the hearing did either you or your assistant raise concerns with the quality of the interpretation. Your assistant intervened at times to ensure that you understood the questions being asked of you, and the Board often followed up its questions or comments by asking you, "*Do you understand?*" Given these facts, the Appeal Division is satisfied that your submission does not have merit.
>
> Mr. Ye, the Appeal Division finds that the Board considered all available information that was relevant, reliable and persuasive. Although the Board was aware of the positive factors in your case, the Board decided to place weight on the serious nature of your index offences, your history of holding criminally entrenched values, your willingness to use violence to further your criminal goals, your minimization of aspects of your criminal behaviour, and the lack of a viable release plan. The Appeal Division is satisfied that the Board conducted a thorough and fair risk assessment, and that the Board's decision to deny your day parole was not unreasonable.

[6] It is from this decision that this application arises.

II. Analysis

[7] The role of this Court, when the Appeal Division has affirmed a decision of the Board, is to first analyze the Board's decision to determine its lawfulness. As the Federal Court of Appeal held in *Cartier c Canada (Procureur generale)* (2002), [2003] 2 FC 317, at para 10, 2002 FCA 384 (CanLII):

> The unaccustomed situation in which the Appeal Division finds itself means caution is necessary in applying the usual rules of administrative law. The judge, in theory, has an application for judicial review from the Appeal Division's decision before him, but when the latter has affirmed the Board's decision he is actually required ultimately to ensure that the Board's decision is lawful.

[8] If the Court believes that the Board's decision is lawful, there is no need to review the Appeal Division's decision. The Court's review of the Board's decision is not carried out under a higher standard of review than that of the Appeal Division (*Aney v Canada (AG),* 2005 FC 182 at para 29, 2005 FCJ No 228 (QL)).

[9] In *Aney, supra,* Justice Beaudry made the following comments with respect to the standard of review applying to decisions of the Appeal Division:

> 30 In *Cartier, supra*, at paragraph 9, the Federal Court of Appeal ruled that the Appeal Division needs, at all times, to be guided by the standard of reasonableness when deciding whether or not the Board's decision is lawful:
>
> > If the applicable standard of review is that of reasonableness when the Appeal Division reverses the Board's decision, it seems unlikely that Parliament intended the standard to be different when the Appeal Division affirms it. I feel that, though awkwardly, Parliament in paragraph 147(5)(a) was only ensuring that the Appeal

> Division would at all times be guided by the standard of reasonableness.
>
> 31 I do not believe that the Court's judicial review should be on a higher standard of review than the one of the Appeal Division. Therefore, I am of the opinion that the comments made in *Desjardins v. Canada (National Parole Board)*, [1989] F.C.J. No. 910 (Fed. T.D.), apply to the case at bar:
>
> > In the case at bar, where imprisonment and privilege of parole are involved, I am of the view that the administrative decision must not be interfered with by this Court failing clear and unequivocal evidence that the decision is quite unfair and works a serious injustice on the inmate. [emphasis added]

[10] The issues with respect to the reasonableness of the Board's decision and the factors to be applied by the Board in this matter are questions of fact, mixed fact and law, and interpretation of the Board's home statute, all of which are presumptively reviewable on a standard of reasonableness. Therefore, this Court must determine whether the decision to deny the Applicant's day parole falls within a range of possible, acceptable outcomes that are defensible in respect of fact and law. For issues of procedural fairness, the applicable standard is correctness.

[11] Mr. Ye complains that one of the members of the Appeal Division was disqualified for bias because of earlier involvement in his case (i.e. the APR decision from 2012). This argument was not advanced with much vigor and it has no merit.

[12] Section 146 of the CCRA stipulates the circumstances where the earlier involvement of a member of the Appeal Division will be disqualifying. Here, the member was not involved in the decision under appeal and was therefore not prohibited from sitting.

[13] It is implicit in the legislation that some degree of overlap in the roles of members is to be tolerated. According to *Mullan on Administrative Law*, "the courts have generally been prepared to sustain such multiplicity of roles" where it is permitted by statute. Indeed, in *Latham v Canada*, 2004 FC 1585, [2004] FCJ No 1911 (QL), Justice James O'Reilly held that previous involvement with an inmate's case for parole did not prevent a member from sitting on a subsequent and different appeal (see paras 17-18). That conclusion applies equally to Mr. Ye.

[14] Counsel for Mr. Ye argues that the Appeal Division erred by assessing the claim to day parole against the standard of simple risk to reoffend under s. 102 of the CCRA instead of the APR standard of "risk to reoffend violently".

[15] As interesting and forceful as Mr. Conroy's argument is, there is no foundation to advance it, effectively for the first time, before me. Indeed, Mr. Conroy concedes in his Memorandum of Fact and Law that the issue was overlooked when Mr. Ye's case was presented to the Appeal Division. He argues, nonetheless, that the point was raised in advance of the Board hearing and rejected in responding correspondence. Mr. Conroy submits that this is enough to support the argument on judicial review. There are, however, fundamental problems with this argument.

[16] First, the record does not disclose that the issue was clearly determined at first instance. Although a hearing officer to the Board indicated in advance of the hearing that the Board's APR jurisdiction was spent, there is nothing in the record to establish that this issue was pre-determined by the Board. At the hearing before the Board, counsel for Mr. Ye said only that he would not "belabour the point" and the decision does not address the issue. This is insufficient to support the argument that the Board even considered the issue, let alone decided it.

[17] It is a well-entrenched principle of administrative law that a court will generally decline to resolve an issue raised for the first time on judicial review: see *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras 22-26. The primary rationale for this reluctance is that deference is owed to the assigned decision-maker, at least on points of law arising under the home statute (e.g. CCRA). It is not the place of a reviewing court to usurp the authority of the primary decision-maker by deciding issues at first instance that lie at the heart of a tribunal's specialized knowledge or expertise.

[18] The issue of statutory interpretation Mr. Ye wishes to have the Court resolve was not appropriately argued to the Board and it was never put to the Appeal Division. In the result, the Court lacks the benefit of any analysis by either of those tribunals. It is also an issue falling squarely within the specialized knowledge of both decision-makers. This is decidedly not a situation where the Court ought to deviate from the usual approach and I decline to do so. I would add that, at the time the Court heard this application, Mr. Ye had an imminent parole hearing where this issue was expected to be fully briefed and answered. For the reasons

expressed above, the Court ought not attempt to influence that outcome by offering its own views ahead of those of the statutorily assigned decision-maker.

[19] Furthermore, it is apparent that the Appeal Division and the Board would have denied relief by whatever standard they applied. Among other findings, the Board noted Mr. Ye held "criminally entrenched values" and had "a positive attitude toward violence". It also found that Mr. Ye had been involved in violent activities and showed poor insight into his behaviour and minimal remorse.

[20] Although the risk for "direct violent offending" was considered low, the Board found Mr. Ye to be "untreated in addressing [his] risk factors". He was also found to represent a moderate risk to reoffend.

[21] The cumulative weight of the Board's negative findings was central to the Appeal Division's denial of relief. This is made quite apparent from the following passage:

> The written reasons indicate that the Board recognized the positive factors in your case including your plea of guilty to the charges related to your index offences, your charge-free institutional behaviour, your engagement in your correctional plan, and your excellent ratings from school and work. However, the Board found that the negative factors in your case were dominant. The Board considered that your index offences involved your participation and leadership in a criminal organization that trafficked drugs globally. The Board noted the nature and gravity of your index offences given the inherent violence of the drug trade, and your admissions that you ordered associates to use violence to collect debts owed to you. The Board determined that you had demonstrated entrenched criminal values in the past, and that you continue to minimize aspects of your criminal behaviour. The Board further found that you are assessed as a moderate risk for general reoffending and are considered untreated in addressing

> your risk factors. As for your release plans, the Board noted that you had not been accepted by any community residential facilities. In its final analysis, the Board concluded that you presented an undue risk to reoffend and denied your day parole.

[22] I am satisfied, that even if Mr. Ye was entitled to a less onerous risk assessment standard, this would not have altered the outcome of his appeal.

[23] Mr. Ye contends that the Appeal Division erred when it declined to correct the Board's failure to ensure Mr. Ye knew the case against him. This asserted breach of procedural fairness arose when the Board relied upon an allegedly undisclosed RCMP Bail Report implicating Mr. Ye's wife in his criminal activities.

[24] Mr. Ye also complains he was unfairly deprived of background evidence supporting the allegation that he continued to maintain undesirable associations and that he was considered to be a "heavy" within the institution. According to Mr. Ye, he is just an ordinary inmate.

[25] The Appeal Division examined these complaints and found them to be unjustified. In particular, it rejected Mr. Ye's assertion that a copy of the RCMP Bail Report had not been provided to him. There was ample evidence in the record to support that finding and there is no legal basis to set it aside.

[26] The Appeal Division also considered Mr. Ye's complaint that he lacked the details of the allegations concerning his institutional status and associations. The Appeal Division found that the Board had not placed undue weight on that part of the case and had merely described the

allegations as CMT "concerns" and fully consistent with CMT reports. That, too, was a reasonable finding. Indeed, the Board's description of Mr. Ye's institutional behaviour was throughout quite positive. The particular observation that Mr. Ye was considered to be a "heavy" was borne out by evidence that other inmates brought him meals and cleaned his cell. This evidence was not effectively challenged by Mr. Ye. In any event, the Board must consider the evidence before it. It is not required to look behind the evidence produced by correctional officials provided that the information is seen to be relevant and reliable: see *Reid v Canada (The National Parole Board)* 2002 FCT 741, 2002 FTR 81.

[27] Mr. Ye complains that he was wrongly and unfairly criticized for maintaining questionable associations while in custody. He says he was denied the factual details of the impugned behaviour. To the extent he was seen to be involved in this way, he claimed to have exculpatory explanations.

[28] These complaints are not borne out by the record. Mr. Ye's updated Correctional Plan includes the following observations that are clearly relevant to the Board's concerns:

> Police and file information indicate Mr. Ye was the head of a criminal organisation called "Ye et al." during the investigation of the index offence. During interviews with Mr. Ye (2013-05-15, 2013-06-13, 2013-08-02, 2013-12-06 and 2013-12-10) maintains he is not in a gang, rather he used members of a number of gangs to conduct his business then go his own way. Mr. Ye does however admit to being the head of, and operating mind, of a large-scale criminal organisation which was investigated with nationa1 and international connections. The Security Intelligence Department (SID) has previously commented Mr. Ye is a person of interest at Matsqui Institution. He is considered a 'heavy' within the institution due to his associations with inmates which are known to be members of Security Threat Groups (STG's). Previously Mr. Ye utilized an inmate and known associate of a STG to translate

for him. This writer, pointed out to Mr. Ye and the other inmate did not speak Cantonese; rather, conversations took place where this writer asked a question to Mr. Ye and the other inmate would ask the same question, word for word in English to Mr. Ye, wou1d reply in English. Most recently, 2013-09-30, Mr. Ye wrote a request to A/MAI Claire McKenzie to sit down with yet another non-Cantonese speaking inmate who is known to be criminally entrenched, who demonstrates a lack of pro-social values both inside and outside the institution to sit down with him and 'translate' the conversation. This request was denied, and an outside contractor facilitated the translations.

There are photographs of Mr. Ye at his wedding with him in a group photo with other's known to the SID and police departments as members/associates of gangs. During an interview on 2013-06-13 when asked why these people were at his wedding, he stated it was better to have a friend than an enemy so they were welcome. In these photo's Mr. Ye is happy and the photo is one of familiarity as he has his arms around a few of the people in the photo.

During an interview with this writer and A/MAI Claire McKenzie on 2013-12-06, the A/MAI reviewed Mr. Ye's application for parole. She asked if it was Mr. Ye's words. He stated it was written by non-Cantonese a speaking inmate who is known to be criminally entrenched who was previously part of the inmate committee, however was suspended due to behaviour concerns. Further, Mr. Ye has claimed that he utilized other offenders as he has trouble 'understanding' the parole application process, however has refused to access his Parole Officer or translation services for these applications. It was a1so during this interview where the A/MAI asked if Mr. Ye was 'paying' for these services, and Mr. Ye denied this, stating instead that was helped for nothing. This demonstrates a no insight into the value he places on criminal1y entrenched individuals. This writer has interviewed other inmates who reside on Mr. Ye's range who have described him as a multi-millionaire who 'polices' the range and does not like to have heat on his range. This demonstrates to this writer Mr. Ye yields authority over his fellow inmates not by directly threatening them, but the inmates are aware of his status in the population. During an interview on 2013-12-10, Mr. Ye was asked directly if he had power over the inmate population, which he answered no. He stated his offences are based from organised crime and he knows they linked to other organised crime groups and his knowledge of those in the groups. Mr. Ye stated although he ordered others to commit threats and violence, he does not want to be controlled and he does not control other people; although they are doing what he asks of them they do it on their own. Mr.

> Ye is unable verbalise his is·able [sic] to make the connection between his reputation when in the community and how that carries over into the inmate population.
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> At Mr. Ye's request there was a meeting held on 2014-04-15 with this writer, Security Inte1ligence Officers M. Grant and D. MacDonald and Mr. Ye. Also at this interview was another inmate known to police and the SID as the head of a Vancouver area gang. Again this other inmate did not speak Cantonese but was there as 'translator'. Mr. Ye requested additional comments from the SID as he stated the SID have 'all the power to get him out of prison'. The SID·reviewed his fi1e and on 2014-04-29 SIO M. Grant provided the following comments "As stated in the past Mr. Ye is a known member of the STG YE et Al. At this time he is an influential inmate in the population. However, he has remained quiet and has not come to the attention of the SID. We do not consider him a major player at this time".
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> Despite Mr. Ye having interviews with this writer and A/MAI Claire McKenzie, explaining his risk of Associates/Interaction, Mr. Ye brought another criminally entrenched gang member to a meeting with the SID and this writer. This demonstrates Mr. Ye's lack of understanding of his risk factor in this area.

[29] There is ample evidence in the record to support the Board's concerns about Mr. Ye's institutional associations but in any event, this evidence was not a significant factor in either decision.

[30] Mr. Conroy took issue with a number of other factual findings or observations referenced by the Board. He contends that the evidence the Board used to make these findings was unreliable or patently wrong.

[31] In other instances, he says the Board overlooked relevant evidence or failed to probe its reliability. Examples are said to include unreliable allegations concerning Mr. Ye's "negative attitude and his criminal associations", the reasons given for his reduced attendance in

educational programming, a mistake concerning his institutional savings account, and misinformation about an offer of potential employment and about his ability to speak English.

[32] It seems to me that these are matters that concern the Board's assessment of evidence. It is up to the Board to assign weight to the evidence before it. It is not the role of a reviewing court to substitute its views for those of the assigned decision-maker. But even if Mr. Ye's complaints are valid, they pertain to issues that are at the periphery of the Board's and the Appeal Division's determinative concerns. The Appeal Division dismissed Mr. Ye's appeal because of the seriousness of the index offences, his entrenched criminal values, his use of violence, his minimization of the seriousness of his conduct and because of the lack of a viable release plan. Although Mr. Ye maintained that these were not valid concerns, the contents of the Record suggest otherwise. I note, in particular, the following information contained in Mr. Ye's Correctional Plan:

> Mr. YE operated his criminal organisation for years prior to his arrest. He demonstrated his ability to conceal his illegal activities from the authorities for many years. There was a great deal of effort from many police organisations from all around the world, with interpreters in several languages and evidence gathered for a long period of time in order to infiltrate and bring down Mr. YE's criminal organisation. Mr. YE appears to be intelligent, highly organised and forward thinking in his approach to his criminal business. It would also appear his family is also supportive, if not involved, in his illegal activities as they allowed Mr. YE to purchase properties in their names with the proceeds of his criminal activities.
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> Mr. YE has criminally entrenched values and has a positive attitude toward violence. In his Accelerated Parole hearing conducted on 2012-11-30, Mr. YE clearly admitted to the Parole Board of Canada (PBC) he had participated in and had directed others in, violence in relation to drug debt collection. Mr. YE clearly acknowledged he has ordered associates to harm, threaten to harm or kill and/or intimidate others as evidenced by police phone intercepts. Such intercepts where Mr. YE had ordered to

> have debtor's knee caps broken. Mr. YE stated in an interview on 2013-06-13 he does not see himself as a violent individual. He stated he threatened people or sent other's to threaten them. He stated he knows threatening works because people know he means it. He stated he is not violent because he sent associates to collect for him. Mr. YE also stated he had to use threats of violence in order to get his money back. Mr. YE is not able to make the connection when he sends someone to collect money on his behalf and someone gets hurt he is linked to that harm. Mr. YE stated people may get hurt, but it is not him physically inflicting the harm. He stated the criminal subculture knows the unwritten rules and regulations, so it is not his fault when they do not follow the rules and there are repercussions.
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> Mr. YE feels he has atoned for his activities as he has 'karma'. He stated when he was engaged in criminal activities he gave money to foster children and charity.
>
> When asked about what he would do should someone deal drugs to his children, Mr. YE stated it would never happen as his children were innocent and his family was good in the community. When it was mentioned to Mr. YE the victims of his drug dealing were innocent at some point and some of them were children of upstanding community members like lawyers, doctors and police officers, Mr. YE was not able to see the connection. He sees his 'nice' children and 'other's' which he profited from to make a nice life for his family. Mr. YE has little understanding of the harm he has caused to society. He thought little of those he harmed when he was buying nice cars and homes for his family. When asked what harm he thought he has caused, Mr. YE immediately deflected to the harm his incarceration has caused him as he is not able to be with his family in the community.

[33] The record before the Board and the Appeal Division is more than adequate to support their decisions and there is no basis for the Court to intervene. For these reasons, the application is dismissed with costs payable to the Respondent in the amount of $500.00.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is dismissed with costs payable to the Respondent in the amount of $500.00.

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-261-15
STYLE OF CAUSE:	YONG LONG YE v ATTORNEY GENERAL OF CANADA
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