Federal Court  Cour fédérale

**Date: 20170707**

**Docket: T-1456-16**

**Citation: 2017 FC 660**

**Ottawa, Ontario, July 7, 2017**

**PRESENT: The Honourable Mr. Justice LeBlanc**

**BETWEEN:**

**YONG LONG YE**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

# JUDGMENT AND REASONS

## I. Introduction

[1] The Applicant, a federal inmate, is seeking judicial review of a decision made by the Appeal Division of the Parole Board of Canada [the Appeal Division] on May 3, 2016, affirming the Parole Board [the Board]'s refusal to grant him full parole.

[2] He claims that, as a first time federal offender, he was entitled to have his full parole review determined under the now repealed accelerated parole review [APR] provisions of the *Corrections and Conditional Release Act*, SC 1992, c 20 (the Act), despite having been previously denied day parole under that regime. The Appeal Division, and the Board before it, decided otherwise and determined that the Applicant's full parole ought to be reviewed under the regular regime set out in the Act. Both regimes are governed by different criteria.

[3] The issue in this case is one of statutory interpretation. More particularly, the issue is whether the APR regime, intended for first time, non-violent and low risk offenders, is spent where an APR eligible offender has already had access to an APR and has not been directed for release. The Applicant says no. The Respondent says yes.

## II. Background

[4] The Applicant was convicted on December 19, 2008 of illicit drugs trafficking related offenses and for conspiracy to launder money and the proceeds of crime. He was sentenced to an 18-year aggregate imprisonment term. As a first time offender, he was determined to be eligible for APR, which made him eligible for day parole review after having served one-sixth of his sentence. As such, his APR day parole eligibility date was calculated to be no earlier than December 19, 2011. Under the APR regime, day parole was available to the Applicant if the Board was satisfied that there were no reasonable grounds to believe that, if released, the Applicant was likely to commit an offence involving violence before the expiration of his sentence.

[5] On March 28, 2011, Parliament adopted the *Abolition of Early Parole Act*, SC 2011, c 11 [the *AEP Act*] which repealed the APR regime and did so retrospectively to offenders who were eligible for APR at the time of their sentencing but had not yet been reviewed when the *AEP Act* was adopted. As a result, the Applicant no longer benefited from APR and his day parole eligibility date was recalculated accordingly. Under the regular parole review regime established under the Act, the Applicant was not eligible for day parole until six months before he served one-third of his sentence and could be denied parole if the Board was satisfied that there was a risk that the Applicant, if released, commit an offence of any type.

[6] On June 26, 2012, the Supreme Court of British Columbia, in *Whaling v Canada (Attorney General)*, 2012 BCSC 944, found the retrospective repeal of the APR regime by the *AEP Act* to unjustifiably offend section 11(h) of the *Canadian Charter of Rights and Freedoms* and to be, as a result, of no force and effect. That decision was subsequently upheld by both the Court of Appeal of British Columbia (*Whaling v Canada (Attorney General)*, 2012 BCCA 435) and the Supreme Court of Canada (*Canada (Attorney General) v Whaling*, 2014 SCC 20, [2014] 1 SCR 392 [*Whaling 2014*]).

[7] As the Supreme Court of British Columbia refused to suspend its declaration of invalidity to allow Parliament time to amend the Act, the Applicant's eligibility to ARP was restored and on October 24, 2012, his case was referred to the Board for an APR day parole review under what was now the former APR regime. On November 8, 2012, the Board concluded that there were reasonable grounds to believe that, if released, the Applicant was likely to commit an offence involving violence before the expiration of his sentence. As provided for under the APR

regime, the Board's decision was reconsidered by a two-member Board panel on November 30, 2012. The panel did not direct the Applicant on day parole.

[8] The Board's decision was upheld on April 8, 2013 by the Appeal Division. The Applicant unsuccessfully sought an extension of time to commence judicial review proceedings of the Appeal Division decision.

[9] On December 4, 2013, the Applicant applied for day parole under the regular regime. His application was denied as the Board was satisfied that the Applicant, if released, presented an undue risk to re-offend. The Board's decision was confirmed by the Appeal Division on January 14, 2015. Then, the Applicant filed for judicial review of the Appeal Division decision and claimed that both the Board and the Appeal Division had committed a reviewable error by failing to consider his application using the former APR regime criteria. The Applicant's judicial review application was dismissed on January 11, 2016 (*Ye v Canada (Attorney General)*, 2016 FC 35 [*Ye 2016*]). On the APR criteria issue, the Court (per Justice Barnes) ruled that the Applicant could not raise arguments on judicial review that were not raised before the Board or the Appeal Division. It did no deal with the merits of the argument (*Ye 2016*, at para 17).

[10] In June 2015, the Applicant applied for full parole under the regular parole review regime. This time, he submitted that his application should be considered using the APR regime criteria. On November 9, 2015, the Board denied the Applicant’s application, including the submission regarding the applicable parole review criteria. On that particular issue, the Board did not provide extensive reasons. It simply stated that the Applicant’s APR eligibility was spent as

he had already been considered for, and denied, APR day parole, adding that after having received a letter from the Board outlining that information, the Applicant had, according to his parole officer, "elected to proceed with a full parole review under the regular criteria" (Respondent's Record, at p 246).

[11] As indicated at the outset of these reasons, the Appeal Division, in a decision dated May 3, 2016, dismissed the Applicant's appeal of the Board's decision. In particular, the Appeal Division ruled, in light of former paragraph the 126(6) of the Act, that the Board had applied the correct legal test in considering the Applicant's application for full parole using the regular full parole review criteria, instead of the APR criteria. The Appeal Division's reasons on that point read as follows:

> Pursuant to subsection 126(6) of the [Act], an offender who is not released on parole is entitled to "subsequent reviews", in accordance with subsection 123(5) of the [Act], which is entitled "Further review". It is the Appeal Division's opinion that the "subsequent reviews" specified in subsection 126(6) of the [Act] refer to these further reviews, which are part of regular parole reviews, and the related timeframes provided in subsection 123(5), not the accelerated parole reviews. These regular parole reviews are subject to section 102 of the [Act], which outlines the following criteria for granting parole: "the offender will not, by reoffending, present an undue risk to society before the expiration according to law of the sentence the offender is serving"; and " the release of the offender will contribute to the protection of society by facilitating the reintegration of the offender into society as a law-abiding citizen." In addition to the fact that subsection 126(6) of the [Act] specifies that subsequent reviews are to be made in accordance with a subsection that falls under the regular "Parole reviews" heading and "further reviews" sub-heading, subsection 126(6) does not explicitly refer to an APR-type review, notwithstanding section 102, as it is made clear in subsection 126(6) or 126(5) of the [Act].
>
> Given the circumstances of your case, according to which you were not directed to be released on day parole in 2012, the Board proceeded correctly with regular full parole review in November 5,

> 2015, as it did when the Board denied parole on August 6, 2014. Consequently, the Appeal Division finds that, in denying full parole, the Board did not err in law as it applied the correct legal test, and that the Board did not exceed its jurisdiction when it rendered a decision on the basis of a review, with which you had elected to proceed at the hearing on November 5, 2015, and in which it applied the regular parole criteria, provided in section 102 of the [Act].
>
> (Respondent's Record, at p 257-258)

[12] The Applicant denies having elected to proceed before the Board using the regular full parole review criteria.

III. Standard of Review

[13] The parties disagree on the applicable standard of review. The Applicant submits that since the matter before the Court is one of statutory interpretation going to the jurisdiction of the Board, it is to be reviewed on a standard of correctness.

[14] The Respondent takes the position that it is now well settled that there is a presumption that the decision of an administrative decision-maker interpreting its enabling statute or statutes closely connected to its function and with which it has particular familiarity, is to be reviewed on a standard of reasonableness (*Dunsmuir v New-Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at para 54 [*Dunsmuir*]; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, 1 SCR 339, at para 25 [*Khosa*]; *Alberta (Information and Privacy Commissioner) v Alberta Teacher's Association*, 2011 SCC 61, [2011] 3 SCR 654, at paras 30-39 [*ATA*]; *McClean v British Columbia (Securities Commission)*, 2012 SCC 67, [2013] 3 SCR 895, at paras 21-22 [*McClean*]).

[15] It further contends that in at least two recent decisions - *Spring v Canada (Attorney General)*, 2016 FC 87 [*Spring*] and *Twins v Canada (Attorney General)*, 2016 FC 537 [*Twins*] - this Court applied the standard of reasonableness to decisions relating to the Board's interpretation of the Act or of legislation closely connected to the Board's functions. In *Spring*, the Board was called upon to interpret a provision of the *Criminals Records Act*, RSC 1985, c C-47, in relation to a request for record suspension. In *Twins*, a case of day parole revocation, the applicant claimed that the Board had the duty to interpret the Act in a way that addresses the systemic problem of over-representation of Aboriginal peoples imprisoned in Canada.

[16] It is well settled too that the principle invoked by the Respondent applies unless the interpretation of the home statute falls into one of the categories of issues to which the correctness standard continues to apply, that is:

a) Constitutional questions;

b) Questions of law that are of central importance to the legal system as a whole and that are outside the decision-maker's expertise;

c) Questions regarding the jurisdictional lines between two or more competing specialized tribunals; and

d) True questions of jurisdiction or vires.

(*ATA*, at para 30)

[17] Here, as we have seen, the Applicant claims that the standard of correctness applies as the statutory interpretation issue to be resolved goes to the jurisdiction of the Board. I do not agree since this issue is not, in my view, one of "true" jurisdiction. It is well established now that

"true" questions of jurisdiction are to be interpreted in the narrow sense of whether or not the administrative decision-maker has the authority to make the inquiry in the first place (*Dunsmuir*, at para 59). According to the majority in *ATA*, it is so because "anything a tribunal does that involves the interpretation of its home statue involves the determination of whether it has the authority or jurisdiction to do what is being challenged in judicial review" (*ATA*, at para 34).

[18] This is precisely the case here as the question to be resolved is not so much whether the Board has jurisdiction to review the Applicant's application for full parole, which it clearly has, but rather whether it has the authority to conduct such review using the criteria of the regular parole review regime instead of that of the now repealed APR regime.

[19] In *Ye 2016*, Justice Barnes quite rightfully, in my respectful view, characterized the issue the Applicant has now raised before the Board and the Appeal Division as to the applicable standard or criteria that should govern his full parole review as one "falling within the specialised knowledge of both decision-makers" (*Ye 2016*, at para 18). This calls for a deferential approach in reviewing the Appeal Division's decision. This deferential approach recognizes that there may be more than one single interpretation of a statutory provision as long as the one retained by the decision-maker falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*, at para 41; *Khosa*, at para 25).

[20] The burden was on the Applicant to demonstrate why the Court should not review the Appeal Division's interpretation of its home statue on the deferential standard of reasonableness (*ATA*, at para 39). That burden was not met.

## IV. Analysis

[21] The modern approach to statutory interpretation requires the interpreter to read the words of the statute "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the [statute], the object of the [statute] and the intention of Parliament" (*Bell ExpressVu Limited Partnership v Rex*, [2002] 2 SCR 559, at para 26, quoting from Driedger, *Construction of Statutes* (2nd ed. 1983)). In other words, it requires a purposive and contextual analysis (*Canada Trustco Mortgage Co. v Canada*, 2005 SCC 54, [2005] 2 SCR 601 at para 10; *Canada (Attorney General) v Celgene Corporation*, 2009 FCA 378, at para 36).

### A. *The "Regular" Parole Regime: Scheme and Object*

[22] The parole - or conditional release - regime established by the Act is found in Part II of the Act (sections 99 to 156). The purpose of conditional release is set out in section 100. It is "to contribute to the maintenance of a just, peaceful and safe society by means of decisions on the timing and conditions of release that will best facilitate the rehabilitation of offenders and their reintegration into the community as law-abiding citizens". Section 100.1 emphasises that the "protection of society" is the "paramount consideration for the Board […] in the determination of all cases".

[23] Whereas section 101 provides the Board with guidelines in achieving the purpose of the parole regime, section 102 sets out what is highly relevant to the case at hand, that is, the criteria for granting parole. Section 102 provides in this regard that the Board may grant parole to an offender if it is satisfied (i) that the offender will not, by reoffending, present an undue risk to

society before the expiration of his/her sentence; and (ii) that the offender's release will contribute to the protection of society by facilitating his/her reintegration into society as a law-abiding citizen.

[24] The next components of the regular regime which are relevant to the issue to be resolved in this case are the rules governing eligibility to parole and parole reviews found at sections 119 to 124. In particular, section 119 provides, under different scenarios, the portion of a sentence that must be served before an offender can be released on day parole. In this case, it is not disputed that the Applicant was not eligible for day parole under the regular regime until six months before he served one-third of his sentence. Section 120 does the same for full parole. It provides, subject to a number of exceptions, that an offender will normally be eligible for full parole on the day on which he/she has served one third of the sentence or seven years, whichever comes first.

[25] Sections 122 to 124 deals with parole reviews. Sections 122 and 123 set out the procedure for day parole and full parole reviews, respectively, including the type of decisions the Board is entitled to make, instances in which it shall or may conduct a review, the maximum duration of day parole and, as per paragraph 123(5) more specifically, the timelines of further reviews where either day or full parole has been denied. Section 123 also contains specific provisions regarding further reviews for violent offenders having been denied parole (paragraph 123(5.01)) and for offenders, including violent offenders, whose parole has been cancelled or terminated (paragraphs 123(5.1) and (5.2)).

[26] For its part, section 124 governs the case of offenders unlawfully at large, the timing of release where an offender is granted parole but no date is fixed for his/her release and the Board's authority to cancel or terminate parole on the basis of information that could not reasonably have been provided to it at the time parole was granted or in instances where the offender refuses to submit to - or fails - a drug test. The effect of parole is set out in section 128 whereas sections 135 to 138 provides for the suspension, cancellation or termination of parole where the offender has breached a condition of parole or reoffended while on parole, or where the Board is satisfied that it is necessary and reasonable to suspend the parole in order to prevent a breach of any condition thereof or to protect society, and for recommitment to custody in such instances.

[27] Finally, sections 140 to 145 provide for when the Board is to conduct a parole review by way of a hearing and how such hearing is to be conducted, including who can be present at the hearing, who can assist the offender, how statements from victims are to be presented and considered, how prior disclosure of information to the offender and the victims is to be made and how the record of every hearing is to be maintained.

[28] Part II of the Act also provides for the constitution, jurisdiction and organization of the Board, including the Appeal Division (sections 103 to 111 and 146 to 155) and for rules governing unescorted temporary absences (sections 115 to 118), statutory release (section 127), detention during periods of statutory release (sections 129 to 132), and conditions for release and long-term supervision (sections 133 to 134.1). Regulatory authority is delegated to Governor in Council by section 156.

B. *The APR Regime: Scheme and Object*

[29] The APR regime was introduced in 1992. It was then applicable to full parole only and was set out in former sections 125 and 126. APR was meant to be "a simplified process that allowed first-time non-violent offenders to be considered for parole on the basis of a single question: Are there no reasonable grounds to believe that the offender, if released, is likely to commit a violent offence?" (*Whaling 2014*, at para 2).

[30] Paragraph 125(1) listed categories of first time offenders ineligible to APR. Those were offenders serving a sentence for a serious crime such as murder, terrorism, sexual-related offences or serious drug-related offences for which parole eligibility was delayed by court order. This list also included offenders "whose day parole has been revoked" (paragraph 125(1)(c)). The APR review process for those eligible to APR was set out in paragraphs 125(2), 125(3) and section 126. The review was to be conducted first by the Correctional Service of Canada (paragraphs 125(2) and (3)), then, upon referral by the Service, by the Board and finally, if parole refused, by a different Board panel (section 126).

[31] According to paragraph 126(2), eligible first-time offenders were automatically granted full parole "if the Board [was] satisfied that there [were] no reasonable grounds to believe that the offender, if released, [was] likely to commit an offence involving violence before the expiration of the offender's sentence according to law". The Board's review was conducted without a hearing (paragraph 126(1)) and if parole was refused, then the refusal and the Board's

reasons for refusal were to be referred for reconsideration to a panel of Board members other than those who had been involved in the refusal decision (paragraph 126(4)).

[32] Of particular relevance to this case are former paragraphs 126(6) and (8). Paragraph 126(6) provided that an offender whose full parole had been refused was "entitled to subsequent reviews in accordance with subsection 123(5)" whereas paragraph 126(8) disentitled from another review under the APR regime any offender previously released under that regime whose parole had been terminated or revoked.

[33] Those three provisions read as follows:

| | |
|---|---|
| **123. […]** | **123. […]** |
| **Further review – Board does not grant parole**<br>(5) If the Board decides not to grant parole following a review under subsection (1) or section 122 or if a review is not made by virtue of subsection(2), the Board shall conduct another review within two years after the later of the day on which the review took place or was scheduled to take place and thereafter within two years after that day until | **Réexamen**<br>(5) En cas de refus de libération conditionnelle dans le cadre de l'examen visé au paragraphe (1) ou à l'article 122 ou encore en l'absence de tout examen pour les raisons exposées au paragraphe (2), la Commission procède au réexamen dans les deux ans qui suivent la date de la tenue de l'examen, ou la date fixée pour cet examen, selon la plus éloignée de ces dates, et ainsi de suite, au cours de chaque période de deux ans, jusqu'au premier en date des événements suivants : |
| (a) the offender is released on full parole or on statutory release; | a) la libération conditionnelle totale ou d'office; |
| (b) the offender's sentence expires; or | b) l'expiration de la peine; |

| | |
|---|---|
| (c) less than four months remain to be served before the offender's statutory release date. | c) le délinquant a moins de quatre mois à purger avant sa libération d'office. |
| **126. […] (repealed)**<br>**Refusal of parole**<br>(6) An offender who is not released on full parole pursuant to subsection (5) is entitled to subsequent reviews in accordance with subsection 123(5). | **126. […] (repealed)**<br>**Refus**<br>(6) Dans le cas contraire, la libération conditionnelle totale est refusée, le délinquant continuant toutefois d'avoir droit au réexamen de son dossier selon les modalités prévues au paragraphe 123(5). |
| **Termination or revocation**<br><br>(8) Where the parole of an offender released pursuant to this section is terminated or revoked the offender is not entitled to another review pursuant to this section. | **Conséquences de la révocation**<br>**(8)** En cas de révocation ou de cessation de la libération conditionnelle, le délinquant perd le bénéfice de la procédure expéditive |

[34] In 1997, the APR regime was expanded to include earlier eligibility for day parole by inserting in the Act the now repealed sections 119.1 and 126.1. Day parole was from then on accessible for the same category of first-time offenders after six months, or one sixth of the sentence, whichever was the longer, instead of six months before eligibility for full parole (section 119.1) and determining whether an APR eligible offender should be released on day parole was to be made by applying sections 125 and 126, with such modifications as the circumstances require (section 126.1).

[35] The process outlined in paragraphs 125(2), 125(3) and section 126 was to be conducted according to the steps and timelines set out in the now repealed paragraph 159(1) of the *Corrections and Conditional Release Regulations*, SOR/92-620 [Regulations]. That provision read as follows:

| | |
|---|---|
| **159** (1) The Service shall review the case of an offender to whom section 125 of the Act applies within one month after the offender's admission to a penitentiary, or to a provincial correctional facility where the sentence is to be served in such a facility. | **159** (1) Le Service doit examiner le cas du délinquant visé à l'article 125 de la Loi dans le mois qui suit son admission dans un pénitencier ou dans un établissement correctionnel provincial lorsqu'il doit purger sa peine dans cet établissement. |
| (2) The Service shall refer the case of an offender to the Board pursuant to subsection 125(4) of the Act not later than three months before the offender's eligibility date for full parole. | (2) Le Service doit, conformément au paragraphe 125(4) de la Loi, transmettre à la Commission le cas du délinquant au plus tard trois mois avant la date de son admissibilité à la libération conditionnelle totale. |
| (3) The Board shall, pursuant to subsection 126(1) of the Act, review the case of an offender not later than seven weeks before the offender's eligibility date for full parole. | (3) La Commission doit, conformément au paragraphe 126(1) de la Loi, examiner le cas du délinquant au plus tard sept semaines avant la date de son admissibilité à la libération conditionnelle totale. |
| (4) A panel shall, pursuant to subsection 126(4) of the Act, review the case of an offender before the offender's eligibility date for full parole. | (4) Le comité doit, conformément au paragraphe 126(4) de la Loi, réexaminer le cas du délinquant avant la date de son admissibilité à la libération conditionnelle totale. |

[36] In *Whaling 2014*, the Supreme Court described as follows the main differences between the APR and regular parole review regimes:

> a) The APR regime was simplified in the sense that the application of APR was automatic, which meant that eligible offenders were referred to the Board without having to apply for it;
>
> b) APR review was conducted without a hearing;
>
> c) The test for release under the APR regime was based on a presumptive standard that was lower than the "undue risk to society" standard applicable to normal parole and the Board had no discretion to decide against releasing the offender

> unless it was satisfied that there were no reasonable grounds to believe that the offender, if released, was likely to commit an offence involving violence; and
>
> d) The APR process for day parole was triggered at an earlier date than in the normal process, that is after the offender had served one sixth of the sentence or six months, whichever was longer, instead of six months before the full parole eligibility date.
>
> (*Whaling 2014*, at paras 13-14)

C. *Parliament's Intention: What Did It Intend to Achieve in Creating APR*

[37] As indicated earlier, APR was described in *Whaling 2014* as a "simplified process" allowing "first-time non-violent offenders" to be considered for parole on the basis of a single test, that of whether there were reasonable grounds to believe that, if released, the eligible offender was likely to commit a violent offence (*Whaling 2014*,at para 2).

[38] Although courts must be mindful of their limited weight and reliability, legislative facts may be relied on as evidence of the background and purpose of the impugned legislation or, in some cases, as direct evidence of purpose (*Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53, [2011] 3 SCR 471, at para 44; *Canadian National Railway Co. v Canada (Attorney General)*, 2014 SCC 40, [2014] 2 SCR 135, at para 47). Here, I find that they are particularly useful.

[39] An important piece of evidence in that respect is the Green Paper - *Directions for Reform for Corrections and Conditional Release* - tabled in 1990 by the then Solicitor General of Canada. That document proved to be the blue print of the reform of the *Penitentiary Act* and the

*Parole Act* that led to the adoption, in 1992, of a single, unified piece of legislation - the Act - dealing with both corrections and conditional release.

[40] It is at that time that the idea of introducing APR into the Canadian parole review system was first proposed. This idea was introduced because under the system in place at the time, CSC and the Board's predecessor, the National Parole Board, were investing virtually the same amount of time, resources and energy in considering the possible release of first-time, non-violent offenders, such as property offenders, as they did for repeat violent offenders. The government of the day felt that this amounted to an ineffective use of resources as "the greatest effort should be concentrated on those offenders who represent the greatest threat to public safety" (Respondent's Record, at p 29).

[41] The government then proposed that "the preparation of those offenders serving their first federal term for a non-violent offence be accelerated on the presumption that the offender will be released at parole eligibility date, and that their release be effected by law on that date, unless the National Parole Board considers there are reasonable grounds to believe that a violent offence may be committed prior to warrant expiry" (Respondent's Record, at p 29). The difference between the APR and regular processes would be "in the criteria for release (i.e., risk of committing a future violent act, as opposed to the broader criterion of "undue risk"), and in the planned and deliberate identification of a group of offenders for whom reintegration into society at the earliest opportunity, consistent with public safety, would be the paramount goal" (Respondent's Record, at p 30).

[42] Earlier releases and a more streamlined case preparation approach would meet the government's objective of "free[ing] up resources to be concentrated on programs and lengthier incarceration for more serious, high-risk offenders" (Respondent's Record, at p 30).

[43] During the second reading of the Bill that would become the Act [Bill C-36], the then Solicitor General of Canada insisted that the number one principle driving this reform of the Canadian correction and parole systems was the protection of the public so that if the release of an offender would threaten society, release would not occur. He emphasized that "from this point forward", it is the Canadian public, not the offender, that "will get the benefit of the doubt" (Respondent's Record, at p 35). In such context, Bill C-36 was designed to "toughen the existing rules of eligibility for parole, in particular in relation to violent offenses, serious drug offenses and sexual offenses against children" (Respondent's Record, at p 35). It also proposed, "as a necessary balance", that first-time, non-violent offenders "[would] have a chance to gain regular parole when they are first eligible at one-third of their sentence" (Respondent's Record, at p 35). This process would provide these first-time, non-violent offenders "with a final chance to show that they can and will take steps to straighten out their lives and quickly become law abiding members of society" (Respondent's Record, at p 36).

[44] The Solicitor General then set out, very much in line with the problem the Green Paper had underlined, why APR was desirable for first-time, non-violent offenders:

> "This group is the one already most likely to benefit from release on parole at an earlier date, but unfortunately the failure to release them is too often the result of the complexity of the bureaucratic process of determining parole rather than the merits of the case."
>
> (Respondent's Record, at p 36)

[45] As indicated previously, APR was made available for day parole in 1997 by the addition of the now repealed sections 119.1 and 126.1 to the Act. The full parole APR process was made applicable to day-parole "with such modifications as the circumstances require" (section 126.1).

D. *The Applicant's Position*

[46] The Applicant contends that there is nothing in the Act indicating that Parliament, expressly or by necessary implication, intended that the APR regime be spent if an offender is initially denied day parole under that regime. He says that to the contrary, Parliament has specified in express terms the instances where disentitlement to the APR regime occurs, being denied day parole under that regime not being one of them. Those instances are rather where day parole has been revoked (paragraph 125(1)(c)) or where parole is terminated or revoked (paragraph 126(8)).

[47] The Applicant further contends that former paragraph 126(6) of the Act did not alter the criteria to be used in reviews subsequent to the denial of day parole under the APR regime. He submits in this respect that by specifically only referring to paragraph 123(5) of the Act, Parliament made it clear that it was only the timeframes for those subsequent reviews that were being addressed by paragraph 126(6), not the criteria upon which these reviews were to be conducted by the Board. He says that if Parliament intended to direct that reviews subsequent to a denial of day parole be made under the broader "undue risk to society" criteria applicable under the regular parole review regime, it would have said so expressly by specifying that such reviews be conducted in accordance with section 123 of the Act and by omitting any reference to a specific paragraph of that provision.

[48] In the absence of such direction, it is proper to assume, the Applicant says, that Parliament intentionally limited the applicability of section 123 to the timeframe-oriented paragraph 123(5) so as to retain the integrity of the APR criteria at the full parole review stage. The Applicant submits that in such context, an APR eligible offender who is initially denied day parole and who is not eligible for full parole until sometime in the future is entitled to continue programming in order to show that by the time of his full parole review, he meets the APR criteria. In other words, such offender's eligibility to APR continues unless and until disentitlement occurs through the provisions of the Act expressly removing such eligibility.

[49] Finally, the Applicant contends that any ambiguity in the provisions at issue must be interpreted in his favour because of the liberty interests at stake.

E. *The Appeal Division Interpretation of the Former APR Scheme is Reasonable*

[50] The issue to be resolved in this case is whether the Board and the Appeal Division's interpretation that the APR regime is spent once day parole has been denied, is defensible in respect of the facts and law. A purposive and contextual analysis of that regime leads me to the conclusion that this interpretation is a defensible outcome, if not the only defensible outcome.

[51] As far as I see it, APR was introduced in a context where the protection of the public was the paramount consideration and the rules of eligibility for parole were being toughened and it was intended, in such context, to be a process that would allow CSC and the Board, by releasing certain first-time, non-violent offenders at their earliest eligibility parole date, to focus their resources on more serious and higher risk offenders.

[52] Then, it only make sense, as contended by the Respondent, that APR was to provide those first-time, non-violent offenders with a one-time opportunity to be directed for parole under that regime, that is to show that they did indeed belong to that category of first-time but also non-violent offenders. If one of these offenders was to miss the mark, that is if he/she was found at his/her earliest eligibility parole date to be prone to commit an offence involving violence before the expiry of his/her sentence, then there are no principled reasons why this offender should be treated any differently from then on than the more serious and higher risk offenders, including violent offenders, for which APR was designed to free-up resources in a context where the protection of the public was - and still is - the paramount and overarching consideration of the Act's parole regime.

[53] In other words, it would appear antinomical with the Act and APR's policy objectives that higher risk offenders, such as the Applicant, who was not directed on APR day parole because the Board considered him to be at risk of reoffending in violent crimes, would continue to enjoy the less stringent APR criteria for subsequent parole reviews.

[54] There is nothing in the words of former sections 126 and 126.1 of the Act, and in particular of former paragraph 126(6) which provided that an offender not released on parole (or day parole as per former section 126.1) after having been through the APR process was nevertheless entitled to subsequent reviews pursuant to the regular regime's paragraph 123(5), that precludes that interpretation. A plain reading of these provisions, together with section 159 of the Regulations, which can assist in ascertaining Parliament's intention, especially considering that section 159 and the Act's APR provisions were "closely meshed" (*Monsanto Canada Inc. v*

*Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 SCR 152, at para 35), tends to show that APR was intended not to be repeated in subsequent reviews following refusal but rather to be a one-time process with a particular criteria for release designed to apply at the time the offender's first parole eligibility date. Paragraph 140(1)(b) of the Act, which, as it then read, required that an in-person hearing be held for "the review" conducted by the Board panel pursuant to paragraph 126(4), reinforces the view that APR was intended to be this one-time process.

| **Review Hearings** | **Audiences** |
|---|---|
| 140(1) The Board shall conduct the review of the case of an offender by way of a hearing, conducted in whichever of the two official languages of Canada is requested by the offender, unless the offender waives the right to a hearing in writing or refuses to attend the hearing, in the following classes of cases: | 140(1) La Commission tient une audience, dans la langue officielle du Canada que choisit le délinquant, dans les cas suivants, sauf si le délinquant a renoncé par écrit à son droit à une audience ou refuse d'être présent : |
| (a) the first review for day parole pursuant to subsection 122(1), except in respect of an offender serving a sentence of imprisonment of less than two years; | a) le premier examen du cas qui suit la demande de semi-liberté présentée en vertu du paragraphe 122(1), sauf dans le cas d'une peine d'emprisonnement de moins de deux ans; |
| (b) the first review for full parole pursuant to subsection 123(1), including the review conducted pursuant to subsection 126(4), and subsequent annual reviews pursuant to subsection 123(5); | b) l'examen prévu au paragraphe 123(1), le réexamen visé au paragraphe 126(4) et chaque réexamen prévu en vertu du paragraphe 123(5); |
| (c) a review conducted pursuant to section 129, 130 or 131; | c) les examens ou réexamens prévus aux articles 129, 130 et 131; |

| | |
|---|---|
| (d) a review following a suspension, cancellation, termination or revocation of parole or following a suspension, termination or revocation of statutory release; and | d) les examens qui suivent, le cas échéant, la suspension, l'annulation, la cessation ou la révocation de la libération conditionnelle ou d'office; |
| (e) any review of a class specified in the regulations. | e) les autres examens prévus par règlement. |

[55] The Applicant offers no rational justification for the proposition that former section 126 should be read as disentitling from further APR reviews only offenders whose APR parole has been revoked or terminated and not offenders whose release under the APR regime has been refused in the first place. As the Respondent rightfully points out, offenders whose APR parole has been revoked or terminated were, contrary to the Applicant, offenders directed for release under APR in the first place. In other words, they were held, contrary to the Applicant, not to be likely to commit an offence involving violence before the expiration of their sentence.

[56] This begs the question as to why these confirmed first-time, non-violent offenders, who have already met the less stringent criteria of former 126(2), would be treated less favorably for further parole reviews than offenders such as the Applicant who, while they failed to meet that criteria, claim they should be allowed the opportunity to convince the Board in future parole reviews that they are no longer likely to commit an offence involving violence.

[57] With all due respect, there is here an incongruity which cannot have been intended by Parliament. I would add to this that for obvious reasons, revocation (and termination) and refusals are treated separately in the regular parole review regime: they do not occur at the same time and in the same way and not necessarily for the same reasons. Former section 126 simply

mirrored that structure but that does not change the fact that the APR process is spent the moment APR day or full parole is refused, revoked or terminated.

[58] In *Leduc v Canada (Attorney General)*, (2000) 196 FTR 74 (FC), the Court dismissed the argument that the issue of whether APR parole should be revoked following its suspension ought to be determined using the APR criteria. It held that such an interpretation would mean adding some language not found in section 135 of the Act. In the same way, the Applicant's argument would mean, in my view, adding language to former paragraph 126(6) which, as indicated previously, provided for further reviews to be conducted under paragraph 125(3) where APR parole was refused. However, it did so without specifying that these further reviews were to be conducted, as claimed by the Applicant, using the APR criteria.

[59] I note in this respect, as did the Appeal Division, that when the Board and the Board panel are to direct that an offender be released on APR parole, be it day parole through the operation of section 126.1, or full parole, under former paragraphs 126(2) and 126(5), respectively, this is expressly done "[n]otwithstanding section 102", which provides, as we have seen, for the regular regime's parole review criteria. There is no such notwithstanding clause for further reviews conducted, by way of former paragraph 126(6), under paragraph 125(3).

[60] This leads us to the second main criticism the Applicant addresses to the Appeal Division's reading of the Act. As indicated previously, the Applicant claims that Parliament, by specifically referring to paragraph 123(5) in former paragraph 126(6), only altered the timeframes for the subsequent reviews contemplated by that provision, not the criteria upon

which these reviews are to be conducted by the Board. As a result, he contends that although the regular regime's timeframes are now applicable to him by way of former paragraph 126(6), the regular regime's criterion is not. He claims that if Parliament had intended that criterion to apply, in lieu of the APR criterion, it would have said so in expressed terms or would have at least made a reference to section 123 as a whole.

[61] There are two difficulties with this submission. First, it does not explain why Parliament expressly excluded the regular regime's criterion when it comes to deciding, under former paragraphs 126(2) or 126(4), whether an APR eligible offender should be released on parole but not when it comes to subsequent reviews conducted pursuant to paragraph 126(6) once APR parole had been denied in the first place. That structure rather points to an intention not to exclude the regular regime's criterion from the review process contemplated by former paragraph 126(6).

[62] Second, there is a close and logical link between paragraph 123(5) and former paragraph 126(6) as both provisions deal with the next step to an initial refusal to grant parole, that next step being the entitlement to subsequent reviews within a specified timeframe. In that regard, the other provisions of section 123 are of no assistance to the Applicant as they set out different parts, steps and timeframes of the full parole review process, further review following the initial dismissal of day or full parole being one of them. More particularly, section 123 does not specify the applicable criteria for this process. Section 102 does. In such context, referring generally to section 123 in former paragraph 126(6) would probably have been perceived as an odd move on the part of Parliament.

[63] This signals, in my view, that there is nothing in the provisions at issue - and in the Act generally - that supports the idea of a bifurcated process when it comes to the further reviews contemplated by former paragraph 126(6), one aspect of this process being borrowed from the regular regime, the other from the APR regime. As we have seen, there is nothing either in the legislative facts that supports such a view.

[64] Overall, I agree with the Respondent when he writes at para 53 of his written submissions:

> "A more coherent and consistent interpretation of sub-sections 126(6) and (8) is that offenders who are not directed for release on parole under APR, or whose release on parole under APR was subsequently terminated or revoked, are subject to subsequent reviews under sections 122 or 123 of the [Act]. Subsection 126(8) actually reinforces the interpretation of section 126 as providing an offender with <u>one</u> opportunity for release on parole under APR. If the offender is not directed for release under APR, or such release is terminated or revoked, then section 126 no longer applies to the offender. This interpretation of APR as a one-time opportunity for an offender to obtain parole in an accelerated fashion is further demonstrated by the legislative history of the APR provisions."
>
> (Emphasis in the original)

[65] The liberty interest raised by the Applicant does not displace the rules of interpretation, particularly in a context where the Applicant was not deprived of APR. He had access to it. The issue in this case was whether the Board and Appeal Division's interpretation that APR is spent once APR parole is denied falls within a range of possible, acceptable outcomes. Not only am I satisfied that it does but I am also satisfied, on the basis of a purposive and contextual analysis, that this is the correct interpretation.

[66] APR was designed to be a process providing a category of first-time, non-violent offenders "with a final chance to show that they can and will take steps to straighten out their lives and quickly become law abiding members of society" (Respondent's Record, at p 36) (My emphasis). The idea that APR eligible offenders who were provided that chance but found to be prone to commit a crime involving violence, would be given a second chance to be assessed under the less stringent APR criterion was simply not contemplated by Parliament.

[67] For all these reasons, the Applicant's application for judicial review is dismissed, with costs to the Respondent. It was suggested by the Respondent at the hearing that the costs be set at a fix amount of $500.00. This is the amount that Justice Barnes, in *Ye 2016*, ordered the Applicant to pay. This amount appears reasonable to me.

## JUDGMENT

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

"René LeBlanc"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-1456-16 |
| **STYLE OF CAUSE:** | YONG LONG YE v ATTORNEY GENERAL OF CANADA |
| **PLACE OF HEARING:** | VANCOUVER, BRITISH COLUMBIA |
| **DATE OF HEARING:** | JANUARY 11, 2017 |
| **JUDGMENT AND REASONS:** | LEBLANC J. |
| **DATED:** | JULY 7, 2017 |

**APPEARANCES:**

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| Mark E. W. East | FOR THE RESPONDENT |

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