

CANADA / JUDGMENT

De Luca v. Canada (Attorney General)

2003 FCT 261

COURT

Federal Court

DECIDED

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De Luca v. Canada (Attorney General)

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OTTAWA, ONTARIO, THE 28TH DAY OF FEBRUARY 2003

Present: THE HONOURABLE MR. JUSTICE LUC MARTINEAU

BETWEEN:

MICHEL DE LUCA

Applicant

- and -

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] This is an application for judicial review of the decision by the Correctional Service of Canada (the "Service") that the applicant is not eligible for accelerated parole review under the Corrections and Conditional Release Act, S.C. 1992, c. 20 (the "Act"), accompanied by an application for mandamus ordering the Service to review his case for the purpose of referral to the National Parole Board (the "Board").

[2] The decision issued by the Service on July 25, 2002, reads as follows:

[translation]

Having examined your file and more particularly the transcript of the Court's notes in case number (500-73-0015270015), we note that the Court pointed to certain factors that are related to criminal organization offences as described in the following place(s):

Page 7, 3rd paragraph "[translation] the evidence that this is a highly structured criminal organization; the fact that the network had some international ramifications, in particular in ... even in Colombia; Michel De Luca enjoyed the confidence of the organization and played a role as an intermediary; and the duration of the accused's involvement, which was for close to one year".

These factors meet the tests under section 2 of the Criminal Code and thus exclude you from accelerated parole review under section 125(1)(a)(vi) of the Corrections and Conditional Release Act.

Your dates of eligibility have been calculated in accordance with section 119(1)(c) for day parole and section 120(1) for full parole.

[3] An understanding of these reasons will be facilitated if we reproduce paragraph 119(1)(c), section 119.1, subsection 120(1) and sections 125, 126 and 126.1 of the Act:

119. (1) Subject to section 746.1 of the Criminal Code, subsection 140.3(2) of the National Defence Act and subsection 15(2) of the Crimes Against Humanity and War Crimes Act, the portion of a sentence that must be served before an offender may be released on day parole is

...

119. (1) Sous réserve de l'article 746.1 du Code criminel, du paragraphe 140.3(2) de la Loi sur la défense nationale et du paragraphe 15(2) de la Loi sur les crimes contre l'humanité et les crimes de guerre, le temps d'épreuve pour l'admissibilité à la semi-liberté est :

...

- (c) where the offender is serving a sentence of two years or more, other than a sentence referred to in paragraph (a) or (b), the greater of
- (i) the portion ending six months before the date on which full parole may be granted, and
- (ii) six months; or

...

- c) dans le cas du délinquant qui purge une peine d'emprisonnement égale ou supérieure à deux ans, à l'exclusion des peines visées aux alinéas a) et b), six mois ou, si elle est plus longue, la période qui se termine six mois avant la date d'admissibilité à la libération conditionnelle totale;

...

119.1 The portion of the sentence of an offender who is eligible for accelerated parole review under sections 125 and 126 that must be served before the offender may be released on day parole is six months, or one sixth of the sentence, whichever is longer.

...

119.1 Le temps d'épreuve pour l'admissibilité à la semi-liberté est, dans le cas d'un délinquant admissible à la procédure d'examen expéditif en vertu des articles 125 et 126, six mois ou, si elle est supérieure, la période qui équivaut au sixième de la peine.

...

- 120. (1) Subject to sections 746.1 and 761 of the Criminal Code and to any order made under section 743.6 of that Act, to subsection 140.3(2) of the National Defence Act and to any order made under section 140.4 of that Act, and to subsection 15(2) of the Crimes Against Humanity and War Crimes Act, an offender is not eligible for full parole until the day on which the offender has served a period of ineligibility of the lesser of one third of the sentence and seven years.

...

- 120. (1) Sous réserve des articles 746.1 et 761 du Code criminel et de toute ordonnance rendue en vertu de l'article 743.6 de cette loi, du paragraphe 140.3(2) de la Loi sur la défense nationale et de toute ordonnance rendue en vertu de l'article 140.4 de cette loi, et du paragraphe 15(2) de la Loi sur les crimes contre l'humanité et les crimes de guerre, le temps d'épreuve pour l'admissibilité à la libération conditionnelle totale est d'un tiers de la peine à concurrence de sept ans.

...

125. (1) This section and section 126 apply to an offender sentenced, committed or transferred to penitentiary for the first time, otherwise than pursuant to an agreement entered into under paragraph 16(1)(b), other than an offender
125. (1) Le présent article et l'article 126 s'appliquent aux délinquants condamnés ou transférés pour la première fois au pénitencier - autrement qu'en vertu de l'accord visé au paragraphe 16(1) -, à l'exception de ceux :
- (a) serving a sentence for one of the following offences, namely,
 - a) qui y purgent une peine pour une des infractions suivantes :
 - (i) murder,
 - (i) le meurtre,
 - (ii) an offence set out in Schedule I or a conspiracy to commit such an offence,
 - (ii) une infraction mentionnée à l'annexe I ou un complot en vue d'en commettre une,
 - (ii.1) an offence under section 83.02 (providing or collecting property for certain activities), 83.03 (providing, making available, etc. property or services for terrorist purposes), 83.04 (using or possessing property for terrorist purposes), 83.18 (participation in activity of terrorist group), 83.19 (facilitating terrorist activity), 83.2 (to carry out activity for terrorist group), 83.21 (instructing to carry out activity for terrorist group), 83.22 (instructing to carry out terrorist activity) or 83.23 (harbouring or concealing) of the Criminal Code or a conspiracy to commit such an offence,
 - (ii.1) une infraction mentionnée aux articles 83.02 (fournir ou réunir des biens en vue de certains actes), 83.03 (fournir, rendre disponibles, etc. des biens ou services à des fins terroristes), 83.04 (utiliser ou avoir en sa possession des biens à des fins terroristes), 83.18 (participation à une activité d'un groupe terroriste), 83.19 (facilitation d'une activité terroriste), 83.2 (infraction au profit d'un groupe terroriste), 83.21 (charger une personne de se livrer à une activité pour un groupe terroriste), 83.22 (charger une personne de se livrer à une activité terroriste) ou 83.23 (héberger ou cacher) du Code criminel, ou un complot en vue d'en commettre une,
 - (iii) an offence under section 463 of the Criminal Code that was prosecuted by indictment in relation to an offence set out in Schedule I, other than the offence set out in paragraph (1)(q) of that Schedule,
 - (iii) l'infraction prévue à l'article 463 du Code criminel et relative à une infraction mentionnée à l'annexe I - sauf celle qui est prévue à l'alinéa (1)q) de celle-ci - et ayant fait l'objet d'une poursuite par mise en accusation,
 - (iv) an offence set out in Schedule II in respect of which an order has been made under section 743.6 of the Criminal Code,

(iv) une infraction mentionnée à l'annexe II et sanctionnée par une peine ayant fait l'objet d'une ordonnance rendue en vertu de l'article 743.6 du Code criminel,

(v) an offence contrary to section 130 of the National Defence Act where the offence is murder, an offence set out in Schedule I or an offence set out in Schedule II in respect of which an order has been made under section 140.4 of the National Defence Act, or

(v) le meurtre, lorsqu'il constitue une infraction à l'article 130 de la Loi sur la défense nationale, une infraction mentionnée à l'annexe I ou une infraction mentionnée à l'annexe II pour laquelle une ordonnance a été rendue en vertu de l'article 140.4 de la Loi sur la défense nationale,

(vi) a criminal organization offence within the meaning of section 2 of the Criminal Code, including an offence under subsection 82(2);

(vi) un acte de gangstérisme, au sens de l'article 2 du Code criminel, y compris l'infraction visée au paragraphe 82(2);

(a.1) convicted of an offence under section 240 of the Criminal Code;

a.1) qui ont été déclarés coupables de l'infraction visée à l'article 240 du Code criminel;

(b) serving a life sentence imposed otherwise than as a minimum punishment; or

b) qui purgent une peine d'emprisonnement à perpétuité à condition que cette peine n'ait pas constitué un minimum en l'occurrence;

(c) whose day parole has been revoked.

c) dont la semi-liberté a été révoquée.

(1.1) For greater certainty, this section and section 126

(1.1) Il est entendu que le présent article et l'article 126 :

(a) apply to an offender referred to in subsection (1) who, after being sentenced, committed or transferred to penitentiary for the first time, is sentenced in respect of an offence, other than an offence referred to in paragraph (1)(a), that was committed before the offender was sentenced, committed or transferred to penitentiary for the first time; and

a) s'appliquent aux délinquants visés au paragraphe (1) et qui, après leur condamnation ou leur transfèrement au pénitencier pour la première fois, sont condamnés pour une infraction - autre qu'une infraction visée à l'alinéa (1)a) - commise avant cette condamnation ou ce transfert;

(b) do not apply to an offender referred to in subsection (1) who, after being sentenced, committed or transferred to penitentiary for the first time, commits an offence under an Act of Parliament for which the offender receives an additional sentence.

- b) ne s'appliquent pas aux délinquants visés au paragraphe (1) et qui, après leur condamnation ou leur transfèrement au pénitencier pour la première fois, commettent une infraction à une loi fédérale pour laquelle une peine d'emprisonnement supplémentaire est infligée.
- (2) The Service shall, at the time prescribed by the regulations, review the case of an offender to whom this section applies for the purpose of referral of the case to the Board for a determination under section 126.
- (2) Le Service procède, au cours de la période prévue par règlement, à l'étude des dossiers des délinquants visés par le présent article en vue de leur transmission à la Commission pour décision conformément à l'article 126.
- (3) A review made pursuant to subsection (2) shall be based on all reasonably available information that is relevant, including
- (3) L'étude du dossier se fonde sur tous les renseignements pertinents qui sont normalement disponibles, notamment :
 - (a) the social and criminal history of the offender obtained pursuant to section 23;
 - a) les antécédents sociaux et criminels du délinquant obtenus en vertu de l'article 23;
 - (b) information relating to the performance and behaviour of the offender while under sentence; and
 - b) l'information portant sur sa conduite pendant la détention;
 - (c) any information that discloses a potential for violent behaviour by the offender.
 - c) tout autre renseignement révélant une propension à la violence de sa part.
- (4) On completion of a review pursuant to subsection (2), the Service shall, within such period as is prescribed by the regulations preceding the offender's eligibility date for full parole, refer the case to the Board together with all information that, in its opinion, is relevant to the case.
- (4) Au terme de l'étude, le Service transmet à la Commission, dans les délais réglementaires impartis mais avant la date d'admissibilité du délinquant à la libération conditionnelle totale, les renseignements qu'il juge utiles.
- (5) The Service may delegate to the correctional authorities of a province its powers under this section in relation to offenders who are serving their sentences in provincial correctional facilities in that province.
- (5) Le Service peut déléguer aux autorités correctionnelles d'une province les pouvoirs que lui confère le présent article en ce qui concerne les délinquants qui purgent leur peine dans un établissement correctionnel de la province.

126. (1) The Board shall review without a hearing, at or before the time prescribed by the regulations, the case of an offender referred to it pursuant to section 125.
126. (1) La Commission procède sans audience, au cours de la période prévue par règlement ou antérieurement, à l'examen des dossiers transmis par le Service ou les autorités correctionnelles d'une province.
- (2) Notwithstanding section 102, if the Board is satisfied that there are no reasonable grounds to believe that the offender, if released, is likely to commit an offence involving violence before the expiration of the offender's sentence according to law, it shall direct that the offender be released on full parole.
- (2) Par dérogation à l'article 102, quand elle est convaincue qu'il n'existe aucun motif raisonnable de croire que le délinquant commettra une infraction accompagnée de violence s'il est remis en liberté avant l'expiration légale de sa peine, la Commission ordonne sa libération conditionnelle totale.
- (3) If the Board does not direct, pursuant to subsection (2), that the offender be released on full parole, it shall report its refusal to so direct, and its reasons, to the offender.
- (3) Si elle est convaincue du contraire, la Commission communique au délinquant ses conclusions et motifs.
- 4) The Board shall refer any refusal and reasons reported to the offender pursuant to subsection (3) to a panel of members other than those who reviewed the case under subsection (1), and the panel shall review the case at the time prescribed by the regulations.
- (4) La Commission transmet ses conclusions et motifs à un comité constitué de commissaires n'ayant pas déjà examiné le cas et chargé, au cours de la période prévue par règlement, du réexamen du dossier.
- (5) Notwithstanding section 102, if the panel reviewing a case pursuant to subsection (4) is satisfied as described in subsection (2), the panel shall direct that the offender be released on full parole.
- (5) Si le réexamen lui apporte la conviction précisée au paragraphe (2), le comité ordonne la libération conditionnelle totale du délinquant.
- (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).
- (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).

- (7) In this section, "offence involving violence" means murder or any offence set out in Schedule I, but, in determining whether there are reasonable grounds to believe that an offender is likely to commit an offence involving violence, it is not necessary to determine whether the offender is likely to commit any particular offence.
- (7) Pour l'application du présent article, une infraction accompagnée de violence s'entend du meurtre ou de toute infraction mentionnée à l'annexe I; toutefois, il n'est pas nécessaire, en déterminant s'il existe des motifs raisonnables de croire que le délinquant en commettra une, de préciser laquelle.
- (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.
- (8) En cas de révocation ou de cessation de la libération conditionnelle, le délinquant perd le bénéfice de la procédure expéditive.

126.1 Sections 125 and 126 apply, with such modifications as the circumstances require, to a review to determine if an offender referred to in subsection 119.1 should be released on day parole.

126.1 Les articles 125 et 126 s'appliquent, avec les adaptations nécessaires, à la procédure d'examen expéditif visant à déterminer si la semi-liberté sera accordée au délinquant visé à l'article 119.1.

- [4] Since the Service refers in its decision to the exception under paragraph 125(1(a)(vi) of the Act, the definitions of "criminal organization offence" and "criminal organization" in section 2, as well as section 467.1, subparagraph 718.2(a)(vi) and subsection 743.6(1.1) of the Criminal Code, R.S.C. 1985, c. C-46 (the "Code"), as these read before the amendments made by the Act to amend the Criminal Code, S.C. 2001, c. 32, are also relevant:

"criminal organization offence" means

- (a) an offence under section 467.1 or an indictable offence under this or any other Act of Parliament committed for the benefit of, at the direction of or in association with a criminal organization for which the maximum punishment is imprisonment for five years or more, or
- « Acte de gangstérisme »
- a) Soit l'acte criminel défini par l'article 467.1 ou tout autre acte criminel défini par la présente loi ou une autre loi fédérale, passible d'un emprisonnement maximal de cinq ans ou plus et commis au profit ou sous la direction d'un gang, ou en association avec lui;
- (b) a conspiracy or an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to, an offence referred to in paragraph (a);
- b) soit le complot ou la tentative de commettre un tel acte, la complicité après le fait à tel égard ou le fait de conseiller de le commettre.

"criminal organization" means any group, association or other body consisting of five or more persons, whether formally or informally organized,

« Gang » Groupe, association ou autre organisation d'au moins cinq personnes, constitué de façon formelle ou non et qui remplit les conditions suivantes :

- (a) having as one of its primary activities the commission of an indictable offence under this or any other Act of Parliament for which the maximum punishment is imprisonment for five years or more, and
- a) l'une de ses principales activités consiste à commettre des actes criminels définis par la présente loi ou une autre loi fédérale et passibles d'un emprisonnement maximal de cinq ans ou plus;
- (b) any or all of the members of which engage in or have, within the preceding five years, engaged in the commission of a series of such offences;

...

- b) ses membres ou certains d'entre eux commettent ou ont commis, au cours des cinq dernières années, une série d'actes criminels passibles d'un emprisonnement maximal de cinq ans ou plus.

...

467.1 Every one who

467.1 Est coupable d'un acte criminel et passible d'un emprisonnement maximal de quatorze ans quiconque, à la fois :

- (a) participates in or substantially contributes to the activities of a criminal organization knowing that any or all of the members of the organization engage in or have, within the preceding five years, engaged in the commission of a series of indictable offences under this or any other Act of Parliament for each of which the maximum punishment is imprisonment for five years or more, and
- a) participe aux activités d'un gang, ou y contribue de façon importante, tout en sachant que les membres de celui-ci ou certains d'entre eux commettent ou ont commis, au cours des cinq dernières années, une série d'actes criminels définis par la présente loi ou une autre loi fédérale et passibles d'un emprisonnement maximal de cinq ans

ou plus

- (b) is a party to the commission of an indictable offence for the benefit of, at the direction of or in association with the criminal organization for which the maximum punishment is imprisonment for five years or more is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

- b) est partie à la perpétration d'un acte criminel passible d'un emprisonnement maximal de cinq ans ou plus et commis au profit ou sous la direction du gang, ou en association avec lui.
- (2) A sentence imposed on a person for an offence under subsection (1) shall be served consecutively to any other punishment imposed on the person for an offence arising out of the same event or series of events and to any other sentence to which the person is subject at the time the sentence is imposed on the person for an offence under subsection (1).

...

- (2) La peine infligée à une personne pour une infraction prévue au paragraphe (1) est purgée consécutivement à toute autre peine sanctionnant une autre infraction basée sur les mêmes faits et à toute autre peine en cours d'exécution.

...

718.2 A court that imposes a sentence shall also take into consideration the following principles:

718.2 Le tribunal détermine la peine à infliger compte tenu également des principes suivants :

- (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,

...

- a) la peine devrait être adaptée aux circonstances aggravantes ou atténuantes liées à la perpétration de l'infraction ou à la situation du délinquant; sont notamment considérées comme des circonstances aggravantes des éléments de preuve établissant :

...

(iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization, or

...

(iv) que l'infraction a été commise au profit ou sous la direction d'un gang, ou en association avec lui,

...

743.6(1.1) Notwithstanding subsection 120(1) of the Corrections and Conditional Release Act, where an offender receives a sentence of imprisonment of two years or more, including a sentence of imprisonment for life imposed otherwise than as a minimum punishment, on conviction for a criminal organization offence, the court may order that the portion of the sentence that must be served before the offender may be released on full parole is one half of the sentence or ten years, whichever is less.

743.6(1.1) Par dérogation au paragraphe 120(1) de la Loi sur le système correctionnel et la mise en liberté sous condition, le tribunal peut ordonner que le délinquant condamné pour un acte de gangstérisme, sur déclaration de culpabilité, à une peine d'emprisonnement de deux ans ou plus - y compris une peine d'emprisonnement à perpétuité à condition que cette peine n'ait pas constitué un minimum en l'occurrence - purge, avant d'être admissible à la libération conditionnelle totale, le moindre de la moitié de sa peine ou dix ans.

- [5] In the present case, the Court must determine whether the Service erred in law or otherwise refused to carry out its legal duty by determining that the applicant was not eligible for accelerated parole review and by refusing to review his case under subsection 125(2) of the Act for the purpose of referral to the Board under section 126 of the Act.
- [6] First, it should be noted that this is not a case in which, in the exercise of its discretion, the Court should refuse to hear an application for judicial review or to exercise the powers conferred on it by sections 18 and 18.1 of the Federal Court Act, R.S.C. 1985, c. F-7. Although I need not rule on this point, even if under subsection (4)(g), sections 90 et seq. of the Act and sections 74 et seq. of the Corrections and Conditional Release Regulations, SOR/92-620, the applicant could have disputed the Service's decision by way of a grievance, I am of the view that his failure to file such a grievance is not fatal in this instance. Indeed, the point at issue is the correct interpretation of the scope of subparagraph 125(1)(a)(vi) of the Act, which refers to a "criminal organization offence" within the meaning of section 2 of the Code. However, the administrative interpretation reported in the Bulletin of April 22, 1999 (Applicant's Record, at pages 161-62), on which the Service implicitly relies in its reasoning, is disputed by the applicant, who considers it a usurpation of authority. This case is therefore clearly distinguished from the decisions cited by the respondent in support of its preliminary objection ((Giesbrecht v. Canada (1998), 148 F.T.R. 81 (F.C.T.D.); Condo v. Canada (Attorney General), [2003] F.C.J. No. 91 (QL); Anderson v. Canada (Armed Forces) (C.A.), [1997] 1 F.C. 273 (F.C.A.); and Bordage v. Archambault Institution, (2000), 204 F.T.R. 133, [2002] F.C.J. No. 710 (F.C.A.)). That objection is consequently overruled.
- [7] The applicant, for whom this is a first conviction and first penitentiary sentence, was convicted by Judge Elizabeth Corte of the Court of Quebec (Criminal and Penal Division) (the "court") of the offence under section 465 of the Code, as a result of his participation in a conspiracy to import a substance listed in Schedule I of the Controlled Drugs and Substances Act, S.C. 1996, c. 19, in this instance cocaine (exhibit A-1 of the affidavit of Michel De Luca). For this offence, the applicant was sentenced to six years imprisonment, which was set at four years from the date of sentencing, May 27, 2002, taking into account the period of his pre-trial detention.
- [8] According to the record, the applicant was never prosecuted for the commission of the offence referred to in section 467.1 of the Code, nor was he convicted by the court of a "criminal organization offence" within the meaning of section 2 of the Code. That being the case, it should be noted here that the offence under section 467.1 of the Code requires evidence beyond a reasonable doubt of membership by the accused in a criminal

organization and of the nature of the alleged offence. As Judge Robert Sansfaçon of the Court of Quebec (Criminal and Penal Division) remarked, in *R. v. Leclerc (C.Q.)*, [2001] R.J.Q. 747, at pages 791-92:

Rather, it must be determined whether the action of a person, on the one hand, is an offence punishable by imprisonment for five years or more committed for the benefit of, at the direction of or in association with the organization or, on the other hand, participates or takes part at that time in the activities of the organization or substantially contributes to them.

...

Since this is an essential element of the offence, we require not only evidence beyond a reasonable doubt that each alleged member is in fact a member of the organization but also, whether or not the person is a member, that the accused be aware of such membership. In this regard, there was no indication that Parliament required the "organization" to be formally structured; it may be established for a single job and/or be informal in nature. This factor causes a double problem. If the organization is informal and its members are accordingly not officially recognized, a judicial determination will officially create the organization and it will then be very difficult to show that a person, the accused, knew that it consisted of at least five members or was aware of their identity.

If the organization is formally structured, there will be membership rules known to the members and it will accordingly be almost impossible for a judicial determination a posteriori to include persons as members of this gang when, as far as the members of the organization itself are concerned, they were in fact not members. Furthermore, we will then find it difficult to assert that the accused knew that a person was a member when he was not one on the basis of the group's membership rules.

...

In order for an accused to be found guilty under section 467.1 Cr.C., the prosecution must, inter alia, prove that he or she knew that any or all of the members of the organization engaged in or had engaged in the commission of a series of indictable offences etc. within the preceding five years. In the instant case, we must determine how evidence of such knowledge can be adduced.

Knowledge by the accused of the commission of indictable offences by certain members of the organization is one of the essential elements of the offence since the trial judge must be convinced beyond a reasonable doubt that this knowledge exists in respect of each element of the offence in order to find the accused guilty.

[9] Let us note at this point that the applicant acknowledged his guilt on the conspiracy offence; however, he has never made any admission whatsoever as to the perpetration of a criminal organization offence. A person convicted of a criminal act always has the benefit of a reasonable doubt about the issues pertaining to the sentence that will be given to him. Consequently, the prosecution had to prove beyond a reasonable doubt all the aggravating circumstances that it cited and that were not covered by the applicant's confession (*R. v.*

Gardiner, [1982] 2 S.C.R. 368, at p. 414).

- [10] In the case at bar, the respondent concedes that the applicant was not charged or convicted of any of the offences specifically mentioned in subsection 125(1) of the Act. However, he submits that the applicant is ineligible for accelerated parole review because of the general implication of subparagraph 125(1)(a)(vi) of the Act, for during sentencing the court accepted as an aggravating factor the fact that the applicant had played an "[translation] intermediary role" and had "[translation] the confidence... of the other members of the organization" involved in the conspiracy, characterizing the latter as a "[translation] highly structured criminal organization" (sentence, transcript, respondent's record, at pages 56 and 58). The respondent submits that it can reasonably be inferred that the specific offence for which the applicant was convicted, the conspiracy, was therefore "for the benefit of, at the direction of or in association with a criminal organization", and that the Service's decision not to consider the applicant eligible for accelerated parole review has a valid basis in fact and in law.
- [11] I am unable to adopt the argument of the respondent, since the Service bases itself on an administrative interpretation of the scope of subparagraph 125(1)(a)(vi) of the Act that is erroneous and contrary to the Act. I also find that its decision is patently unreasonable.
- [12] Absent a conviction by the court on any of the offences expressly indicated in subsection 125(1) of the Act, and with the exception of the cases expressly provided for in the Act or the Code (for example, where an order was made by the court under subsection 743.6(1.1) of the Code), it is clear that sections 125 and 126 of the Act apply automatically to offenders sentenced or transferred for the first time to the penitentiary. This is the applicant's situation. The fact that in determining the appropriate sentence for the commission of the offence for which the applicant was convicted the court could take into account the aggravating factor indicated in subparagraph 718.2(a)(iv) of the Code does not alter the primary nature of the offence for which the applicant was convicted and is serving his sentence. This was and remains a conspiracy offence that is not expressly covered by subsection 125(1) of the Act.
- [13] The exceptions under subsection 125(1) of the Act must be strictly construed; for the exception under subparagraph 125(1)(a)(vi) of the Act to apply, the court must necessarily, in my opinion, have specifically convicted the offender of a "criminal organization offence", and that is not the case in this instance. Furthermore, although the court, when handing down the sentence, referred in connection with aggravating circumstances to a "highly structured criminal organization", I note that it never expressly mentioned that the record had established beyond a reasonable doubt that the conspiracy offence of which it had convicted the applicant had been committed "for the benefit of, at the direction of or in association with a criminal organization" or that "the highly structured criminal organization" that was at issue in the sentencing actually constituted a "criminal organization" within the meaning of section 2 of the Code.

- [14] On the other hand, I stop at this point to note that under subsection 125(3) of the Act, when the Service reviews the case of an offender, it must ascertain for which offence(s) the offender was convicted; however, that does not authorize the Service to substitute itself for the court. The Service has no jurisdiction to determine whether, according to the evidence in the record, the offender may have committed a "criminal organization offence" within the meaning of section 2 of the Code. The interpretation of subparagraph 125(1)(a)(vi) of the Act proposed by the respondent is not only incompatible with the strict construction given to the other exceptions under subsections 125(1) and (1.1) of the Act, which require a prior conviction on each of these offences, but it runs directly counter to the presumption of innocence recognized in section 6 of the Code and subsection 11(d) of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, constituting Schedule B of the Canada Act 1982 (U.K.) 1982, c. 11. But the withdrawal of the accelerated review status has direct consequences on the freedom of the individual who is incarcerated. Consequently, the Service can deprive an offender of eligibility for the day parole provided in sections 119 and 119.1 of the Act only in compliance with the principles of fundamental justice and any provision of the Act that is applicable in that case.
- [15] In this regard, the scheme of the Code clearly suggests that *actes de gangstérisme* (or *infractions d'organisation criminelle* ["criminal organization offences"]) as they are now designated [in the French version of the Code] may give rise to distinct convictions provided of course that distinct charges have been brought before the court, which is not the case in this instance. Where there are distinct convictions, the sentences imposed by the court shall or may be served consecutively. Moreover, I note that Parliament seems to have specifically considered the question of the impact of a conviction for a criminal organization offence on the offender's eligibility for parole. For example, under subsection 743.6(1.1) of the Code, notwithstanding section 120 of the Act, where an offender receives a sentence of imprisonment of two years or more on conviction for a criminal organization offence, the court may order that the portion of the sentence that must be served before the offender may be released on full parole is one half of the sentence or ten years, whichever is less. I conclude therefore that there would have to be some provision that is otherwise more specific than the present provisions of the Act to allow the Service to exclude from accelerated parole review, on its own initiative and a posteriori, an offender who has not first been convicted of a "criminal organization offence" under the Act in a fair and public hearing by an independent and impartial court.
- [16] I am well aware that criminal organizations are a menace to society and public order. Nevertheless, I do not think it is the job of this Court to correct any statutory deficiency that may result from the fact that, prior to the 2001 amendments to the Code, it seemed impossible for the prosecution to obtain a conviction related to a "criminal organization offence" other than for the specific offence under the old section 467.1 of the Code. In this regard, I note that the new sections 467.11, 467.12 and 467.13 of the Code cover a much more varied set of situations and that a criminal act committed for the benefit of, at the direction of or in association with a criminal organization is expressed covered by section 467.12 of

the Code, which now makes it a specific offence.

- [17] In the case that concerns us, I conclude from the evidence in the record that under sections 119.1 and 126.1 of the Act, the applicant is eligible for accelerated parole review, and that under subsection 125(2) of the Act, the Service is required to review the applicant's case for the purpose of its referral to the Board for a determination under section 126 of the Act. The applicant is therefore entitled to the relief he seeks in his application for judicial review.

ORDER

THE COURT ORDERS:

1. This application for judicial review under section 18 of the Federal Court Act is allowed;
2. The decision made on July 25, 2002, by the Correctional Service of Canada, that the applicant is not eligible for accelerated parole review under sections 125 and 126 of the Corrections and Conditional Release Act, is set aside; and
3. The Correctional Service of Canada is ordered to proceed, under subsection 125(2) of the Corrections and Conditional Release Act, with the review of the applicant's case for the purpose of its referral to the National Parole Board for a determination under section 126 of the Corrections and Conditional Release Act.

"Luc Martineau"

Judge

Certified true translation

Suzanne Gauthier, C. Tr., LL.L

FEDERAL COURT OF CANADA

TRIAL DIVISION

SOLICITORS OF RECORD

DOCKET: T-1340-02

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CANADA

PLACE OF HEARING: MONTRÉAL, QUEBEC

DATE OF HEARING: FEBRUARY 18, 2003

REASONS FOR ORDER AND ORDER

DATED: FEBRUARY 28, 2003

APPEARANCES:

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