Federal Court  Cour fédérale

Date: 20210722

Docket: T-90-21

Citation: 2021 FC 783

Toronto, Ontario, July 22, 2021

PRESENT: Mr. Justice Diner

BETWEEN:

MARK ANDREW JOHNSTON

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Mark Andrew Johnston, seeks judicial review of a decision of the Parole Board of Canada Appeal Division ("Appeal Division") affirming the revocation of his statutory release by the Parole Board of Canada ("Board"). For the reasons that follow, I will dismiss the Application.

II. Facts

[2] Mr. Johnston is a federal inmate residing at the Warkworth Institution, a medium security penitentiary administered by the Correctional Service of Canada ("CSC") under the *Corrections and Conditional Release Act*, SC 1992, c 20 [*Act*] and the *Corrections and Conditional Release Regulations*, SOR/92-620 [*Regulations*].

A. *Criminal History*

[3] Mr. Johnston is a long-time recidivist with a lengthy criminal history of fraudulent behaviour dating back to the early 1990s. His early problems with the law resulted in three federal sentences, including three years imposed in 1991 for two counts of fraud over $1,000; three years imposed in 2002 for 319 counts under the *Excise Tax Act*, RSC 1985, c E-15, two counts of failure to comply with recognizance, failure to attend court, five counts of fraud over, fraud under and personation with intent; and a little over two years imposed in 2008 for five counts of fraud over $5,000, fraud under $5,000, forgery, four counts of uttering a forged document, three counts of failure to comply with recognizance, personation with intent, and possession property obtained by crime under $5,000.

[4] Mr. Johnston, at the time of the hearing before this Court, was serving an eight-year and six-month aggregate sentence. He was first sentenced on July 15, 2013, to 16 months' imprisonment for paying legal retainer fees with a fraudulent cheque.

[5] Then, on September 6, 2013, he was sentenced to an additional four years imprisonment and ordered to pay over $22,000 in restitution for running up a 56-day hotel tab and presenting a fraudulent cheque purportedly to settle the bill. Out on bail at the time, Mr. Johnston's hotel scheme breached three of his release conditions.

[6] On November 20, 2014, Mr. Johnston received an additional sentence of three years plus two months' imprisonment for filing approximately 1,400 fraudulent income tax returns and 735 fraudulent Goods and Services Tax returns with the Canada Revenue Agency using the personal information of other inmates without their knowledge. The fraudulent scheme was valued at $2 million.

B. *Statutory Release*

[7] Mr. Johnston was granted statutory release for his current sentence on March 14, 2019. In addition to the mandatory release conditions under the *Act*, the Board imposed on Mr. Johnston certain special release conditions tailored to his specific risk, including:

- Financial disclosure;
- Seek or remaining employed;
- Reporting intimate relationships;
- Not being in a position of responsibility for the management of finances or investments for any other individual, business, charity, or institution;
- Not possessing any banking documents, *inter alia*, credit, debit and bank cards or cheques without prior approval; and
- Not being self-employed or owning a business.

[8] Mr. Johnston was placed under the supervision of the Downtown Toronto Parole Office Case Management Team ("CMT"), as he had been on various occasions in past sentences. With respect to his most recent series of offenses, his statutory release has been suspended three times, and on each of the first two occasions, that suspension was cancelled by the Board. With the second of these cancellations, the Board gave Mr. Johnston a severe reprimand, reproduced below.

[9] The CMT encountered a further issue with Mr. Johnston, resulting in a third cancellation of statutory release. The Board sustained this latest suspension. Mr. Johnston appealed that decision to the Appeal Division. The Appeal Division panel upheld the suspension. Those two decisions, both deciding to uphold the suspension of release, are the subject of this judicial review. However, as both panels addressed the earlier two suspensions in their reasons upholding the third, the two earlier suspensions are briefly summarized, along with the third, which Mr. Johnston is challenging in this judicial review.

(1) The First Suspension

[10] On April 1, 2019, it was alleged that Mr. Johnston had attempted to obtain information a new parole officer from her profile on the LinkedIn networking website. According to the CMT, Mr. Johnston initially denied any knowledge when confronted with the allegation, claiming he had not used the application in years, but then changed his story to claim that someone must have used his account, and he ultimately admitted to the truth of the allegation, explaining that he wanted to learn more about his new parole officer before meeting her.

[11] In addition, the CMT reported that Mr. Johnston had also failed to be honest with the officer when a call came in from a woman. Mr. Johnston told the officer that it was his sister, rather than the woman who had actually called. He was also found to have purchased groceries with a credit card for which he had not received prior authorization. Both of these incidents violated Mr. Johnston's special conditions for release.

[12] Accordingly, the CMT issued a warrant for suspension and arrest under s 135(1) of the *Act*. The CSC then recommended the revocation of Mr. Johnston's statutory release to the Board, noting that his risk was no longer manageable in the community in light of his numerous violations and uncooperative behaviour. Ultimately, while the Board noted Mr. Johnston's lack of transparency and his behavioural issues, it nevertheless cancelled the suspension and returned him to the community.

(2) The Second Suspension

[13] Mr. Johnston was then arrested on February 1, 2020, for shoplifting beer and beef from a grocery store. Mr. Johnston at first denied the theft, stating that the beer was purchased from the liquor store across the street before entering the grocery store – which he claimed could be proven with video evidence – and that he had simply forgotten to pay for the rest. While criminal charges were ultimately withdrawn, Mr. Johnston admitted to Board that he had indeed stolen the items.

[14] It was also revealed that Mr. Johnston had changed his residence without informing his parole officer of the address change, contrary to his release conditions.

[15] On the basis of these two incidents, the CMT issued a second warrant and the CSC once again recommended the revocation of Mr. Johnston's release, noting his tendency to withhold information and mislead the CMT.

[16] While the Board agreed that Mr. Johnston's risk was elevated, it nonetheless found the risk manageable in the community with conditions. The Board cancelled this second suspension, but in doing so, it also reprimanded Mr. Johnston in its cancellation decision as mentioned above, warning the Applicant:

> Mr. Johnston, your criminal history is concerning and you have returned to criminal behaviour repeatedly. This speaks to a deeply ingrained criminal value system. Your behaviours leading to your suspension are consistent with elements of your crime cycle and your PO / CMT were correct to flag the presence of these behaviours as indicators of risk. This is your second suspension and the second time that the Board has cancelled your suspension. Dishonesty and poor transparency with your PO / CMT will not be tolerated. Any future incidents and infractions will be met with immediate action and may result in a negative decision by the Board. Your case will be closely monitored from this point forward.

(3) The Third Suspension

[17] Mr. Johnston's statutory release was suspended a third time on June 26, 2020, after the CMT discovered two unauthorized credit cards linked to his Amazon account. Mr. Johnston denied owning the cards, explaining that they were likely owned by one of his sons. While Mr. Johnston strongly disputed whose charge cards these were, the CMT was nonetheless able to confirm that the cards were linked to the account in his name and that his sons also had access to the Amazon account.

[18] That same month, the CMT became aware of a $4,000 deposit made to Mr. Johnston's bank account. The CMT reported that Mr. Johnston was unable to provide a consistent or straightforward answer as to the source of the funds.

[19] For a third time, the CSC recommended that Mr. Johnston's release be revoked, noting that it had become "virtually impossible to provide proper supervision" under the circumstances, as "[w]ith each suspension, his behaviour and the manipulation by him and his collaterals becomes increasingly difficult to manage".

III. Decision under Review

A. *The Board Decision*

[20] On September 28, 2020, the Board revoked Mr. Johnston's release ("Board Decision"), finding that he posed an undue risk to society pursuant to s. 135(5) of the *Act*.

[21] The Board Decision engaged in a lengthy and detailed review of Mr. Johnston's criminal history, as well as the circumstances of the three suspensions of his statutory release. It found that Mr. Johnston's offence cycle "involves a consistent pattern of committing elaborate fraudulent schemes involving individuals, businesses, banks and the Government of Canada". The Board Decision recognized Mr. Johnston's affinity for abusing the trust of others and inability to abide by conditions:

> You have used your business knowledge to incorporate fictitious and real businesses to engage in criminal activity. Your offending also involves you gaining the trust of unsuspecting individuals, and

> using this trust to your own benefit while defrauding others of thousands of dollars.
>
> Additionally, your offence cycle involves continually disregarding imposed conditions, as you are a habitual offender with little regard for the law or the impact of your criminal actions upon the many victims. Your deficits derive from your criminal attitude, grandiose sense of self, need to impress others, manipulation of individuals, and lack of remorse towards others. You have a history of seeking out relationships, which you manipulate to support your criminal mindset, and heighten opportunities to engage in further fraudulent acts.

[22] Discussing the first suspension, the Board remarked that Mr. Johnston displayed open disregard for his conditions, noting that his "risk-enhancing behaviour towards supervision demonstrates that [he] will say or do anything [he needs] to in order to present [himself] in the best possible light". This ran counter to the Board's expectation that offenders work collaboratively with their CMT to avoid recidivism.

[23] The Board noted that while Mr. Johnston had completed a maintenance program, attended church, and had support from family and friends following the cancellation of the first suspension, concerns arose as to his ability to manage his finances, and to find and maintain meaningful employment.

[24] In relation to the second suspension, the Board once again noted Mr. Johnston's poor attitude and manipulative behaviour exhibited towards his CMT. It remarked that Mr. Johnston exhibited a continued lack of transparency in relation to the grocery store theft incident by continually changing his story. It then reiterated the reprimand against Mr. Johnston issued at the time of the cancellation of the second suspension.

[25] Finally, in relation to the third suspension, the Board found that Mr. Johnston – in failing to obtain permission to have, and to disclose the use of two prepaid credit cards on his Amazon account, as well as permitting others to access the Amazon account – "created a situation where it was nearly impossible for [the] CMT to monitory accurately" his finances. According to the Board, a similar pattern of half-truths and omissions permeated these events.

[26] The Board concluded that the circumstances warranted the revocation of his release. It remarked that with each suspension, Mr. Johnston made it increasingly difficult for the CMT to manage his risk in light of the "behaviour and manipulation by [him] and [his] collateral contacts". It noted the CSC's position that no trust remained between Mr. Johnston and his CMT, such that a new geographical location should be selected for any future statutory release.

[27] The Board also addressed arguments from Mr. Johnston that he should be released from custody in light of the ongoing COVID-19 Pandemic. Noting that public safety is paramount in all Board decisions, the Board concluded that the CSC was taking adequate steps at the Warkworth Institution to prevent that spread of COVID-19.

[28] Ultimately, the Board weighed a number of aggravating and mitigating factors for Mr. Johnston's release, finding that his risk-enhancing and oppositional attitude escalated the risk of recidivism. That risk, in the Board's view, was no longer manageable in the community.

B. *The Appeal Decision*

[29] The Appeal Division affirmed the Board Decision on December 10, 2020 ("Appeal Decision"). In its reasons, the Appeal Division rejected Mr. Johnston's grounds for appeal, namely that the Board Decision was not based on the information before the tribunal, and was therefore unreasonable.

[30] Specifically, it rejected his four principal contentions, that the Board: (i) concluded about his behaviour in relation to the first suspension without factual support; (ii) made exaggerated risk findings; (iii) failed to consider the lack of credibility of the CMT members in light of conflicting evidence; and (iv) failed to properly consider his submissions regarding his vulnerability to COVID-19.

[31] The Appeal Division first remarked that the Board is tasked under the *Act* to assess whether an inmate presents an undue risk to society to reoffend on statutory release. It also noted the various Policy Manuals that guide the post-release decisional process, including reference to consideration of all relevant aspects of a case, the offender's behaviour post-release and comparing that with previous patterns of criminal behaviour.

[32] The Appeal Division then closely examined the Board Decision, noting that it had compared Mr. Johnston's release behaviour with his criminal history and concluded that his attitude taken with the CMT increased his risk level. The Appeal Division proceeded to examine the Board's comments on each of the three suspensions, noting that the Board reasonably acted

upon the information before it, which the Appeal Division considered relevant, reliable, and persuasive. In finding the Board's decision to revoke statutory release reasonable, the Appeal Division found the Board acted within its discretion in assessing the risk posed by Mr. Johnston.

[33] Specifically, the Appeal Division noted the aggravating factors highlighted by the Board in assessing that risk, noting to Mr. Johnston "your extensive criminal history; your last two prior statutory releases were fraught with suspensions, revocations, and criminal activity; your attitude still requires a high need for improvement; and, you continue to be assessed with low levels of motivation and accountability".

[34] The Appeal Division concluded that the Board considered relevant, reliable, and persuasive information coming from CSC, and reasonably considered, based on the information before it, that Mr. Johnston had deficits in his decision-making, particularly in attitude, being neither open nor honest with his CMT.

[35] As for the COVID-19 argument, the Appeal Division found that the Board reasonably concluded, considering all relevant information – including Mr. Johnston's personal situation in the COVID-19 incarceration context – that the protection of society was paramount and that release was not warranted in the circumstances.

[36] Procedurally, the Appeal Decision makes two important points. First, the Appeal Division refused to address the argument that Mr. Johnston's parole officer had not acted nor managed his case appropriately, noting that neither it nor the Board have jurisdiction to manage

specific cases, nor to manage CSC personnel. It indicated that Mr. Johnston could instead submit an institutional grievance and/or contact the Office of the Correctional Investigator for such issues.

[37] The Appeal Division found that the Board "conducted an adequate and fair risk assessment in accordance with the [*Act*] and the Policy Manual". In concluding that the Board process was fair, the Appeal Division noted that Mr. Johnston had a full opportunity to present his case, noting that he was asked questions by the Board and was given the opportunity to provide answers.

IV. Issues and Analysis

[38] Generally, an application for judicial review is limited to a single order in respect of which relief is sought (*Federal Courts Rules*, SOR/98-106, s 302; *Ewonde v Canada (Attorney General)*, 2020 FC 829 at para 2 [Ewonde]). However, where the Appeal Division affirms a decision of the Board, the reviewing court must also examine whether the Board decision was lawful (*Ewonde* at para 2; *May v Canada (Attorney General)*, 2020 FC 292 at para 12; *Condo v Canada (Attorney General)*, 2005 CAF 391 at para 17; *Cartier v Canada (Attorney General)*, 2002 FCA 384 at para 10).

[39] Thus, in this judicial review I must determine whether both the Board and the Appeal Decisions are reasonable. Mr. Johnston asserts that the Decisions were both unreasonable due to the fact that they overlooked evidence, including of the CMT's "animus and bias" against Mr.

Johnston and his support network, along with errors in applying the law to the factual matrix presented, and in failing to apply the least restrictive measures, by revoking his statutory release.

[40] Mr. Johnston also submitted that the tribunals both failed to adequately respond to his arguments in their Decisions, and that the reasons provided by both panels were unresponsive to the evidence raised both in support of and at the Board hearing, and subsequently to the Appeal Division.

[41] Both Parties agree, as do I, that the applicable standard of review for the issues raised is reasonableness. A reasonableness review is not a line-by-line treasure hunt for error, but an examination of whether the decision is justified, transparent, and intelligible under its facts and the law, in both its rationale and outcome: *Vavilov v Canada (Citizenship and Immigration)*, 2019 SCC 65 at paras 83, 99, 102 [*Vavilov*]; *Irving Pulp & Paper Ltd v CEP, Local 30*, 2013 SCC 34 at para 54. Furthermore, both tribunals are highly specialized and owed deference in the discretionary areas of probation and attendant risk to the public, which fall squarely within their legislation and expertise (see *West v Canada (Parole Board)*, 2020 FC 126 at para 38; *Chartrand v Canada (Attorney General)*, 2018 FC 1183 at para 40).

A. *Statutory Framework*

[42] Conditional release serves the important purposes of contributing to the maintenance of a just, peaceful, and safe society by means of decisions on the timing and conditions of release that best facilitate the rehabilitation of offenders and their reintegration into the community as law-

abiding citizens (*Act* at s 100). In all cases, the paramount consideration is the protection of society (*Act* at s 100.1).

[43] Section 127 of the *Act*, subject to certain exceptions, entitles offenders to statutory release after having served two thirds of their sentence. Statutory release is supervised until the expiration of the sentence.

[44] While under statutory release, offenders must follow standard conditions prescribed by s 133 of the *Act* and s 161 of the *Regulations*. However, the Board may, under s 133(3) of the *Act*, additionally impose "any conditions that it considers reasonable and necessary in order to protect society and to facilitate the offender's successful reintegration into society". In this case, Mr. Johnston was subject to a number of special conditions, including those specific to his criminal history and his risk of reoffending, listed above at paragraph 7.

[45] The Board or a designated person may, by warrant, suspend an offender's statutory release, authorize their apprehension, and authorize their re-incarceration where the offender breaches a release condition, and where it is necessary and reasonable to suspend that release in order to prevent subsequent breaches or to protect the public (*Act* at s 135(1)). The person who issues a warrant under s 135(3) must, within 30 days of the offender's recommitment, cancel the suspension or refer it to the Board.

[46] Where an offender is serving a sentence of two years or more, the Board must ("shall") terminate or revoke the release if there exists an undue risk to society from the prospect of

reoffending and, if not, the Board must cancel the suspension and release the offender on the same or on amended conditions (*Act* at s 135(5); *Yassin v Canada (Attorney General)*, 2020 FC 237 at para 20). The Board may also, when cancelling a suspension, reprimand the offender where necessary and reasonable, to warn them of the Board's dissatisfaction with their behaviour since release (*Act* at s 135(6)).

[47] Under s 147(1) of the *Act*, an appeal from a decision of the Board lies to the Appeal Division on five grounds: that the Board, in making its decision, (i) failed to observe a principle of fundamental justice; (ii) made an error of law; (iii) breached or failed to apply a policy under s 151(2) of the *Act*; (iv) based its decision on erroneous or incomplete information; or (v) acted without jurisdiction or beyond its jurisdiction, or failed to exercise its jurisdiction.

B. *Analysis*

[48] At the outset of this judicial review hearing, I advised Mr. Sloan (counsel for Mr. Johnston), that I had read what appeared to be the key portions of the record. Both parties acknowledged that it was a very dense record with extensive documentation, including much background, such as that relating to the three suspensions that formed the key background to the Board and Appeal Decisions, as well as a significant amount of documentation that arose from Mr. Johnston's matters prior to the three suspensions of release. Both parties acknowledged the very extensive amount of materials contained in the Certified Tribunal Record ("CTR") numbering some 1,350 pages, reproduced in full by the Respondent in its Record.

[49] I thus asked Mr. Sloan which of the documents within the record he was particularly relying on for his arguments, pointing out that bias in particular was a serious allegation and required some particularity, and that I did not see any such specificity in his Memorandum of Fact and Law relating to those allegations. Of course, I was also interested in the specific evidence he claimed the tribunals had overlooked.

[50] Mr. Sloan responded that the totality of the materials contained in the record bore out his arguments, and that it was necessary to review all the materials provided. While counsel normally provides more direction for the Court, I did as requested by Mr. Sloan, knowing the crucial liberty interests at stake, and have carefully reviewed the entire record in coming to my conclusions.

(1) The Board and Appeal Decisions are reasonable

[51] Mr. Johnston argues that the Board and the Appeal Division failed to meet the standard of reasonableness demanded by *Vavilov*. He argues that the reasons from both tribunals were insufficient in light of their impact on his rights. In his view, the reasons from both tribunals justify the suspension of his statutory release on the basis that not doing so would lead to harm, yet they do not explain what that harm might be. Instead, he alleges that the tribunals merely allude to difficulties in managing the relationship between him and the CMT without explaining how these could not be accommodated by less restrictive measures in the community.

[52] While I acknowledge the Decisions have had a significant impact on Mr. Johnston as, by their virtue, he has been remanded to custody of the state, I disagree with his contention that the tribunals failed to meet the standards set out in *Vavilov*.

[53] The July 21, 2020 CSC assessment report (the third in the series of the three most recent CSC reports, which gave rise to the Decisions under review) ("3rd Assessment Report"), recommended the revocation of Mr. Johnston's release on the basis that he was no longer manageable within the community in light of his continuous lack of cooperation and transparency. The 3rd Assessment Report further notes that Mr. Johnston's immediate support network, consisting of his sister, brother, and son, are "all in with his mass manipulation". The 3rd Assessment Report goes onto explain:

> …the recent suspension has demonstrated that … they are all in with his mass manipulation. It is clear that his family including his sister, his brother and his son are all complicit in his activities and PBC violations. There does not appear to be any evidence the family is being manipulated. It appears they are all consciously and falsely manipulating the information and distracting from the facts in order to protect the offender. This is expected from the offender based on his history but it is now evident amongst his family as well.
>
> For these and many other reasons, I do not believe there is any trust between the offender, his supports and the CMT…. As previously mentioned, it is virtually impossible to provide proper supervision under the current circumstances including the mass manipulation by the offender and his collateral contacts. With each suspension, his behaviour and the manipulation by him and his collaterals becomes increasingly difficult to manage. Given the current circumstances including the complete lack of trust of his collateral contacts, the Correctional Service of Canada is faced with an extremely difficult task of fulfilling their mandate to the PBC of monitoring the very conditions imposed by the OBC that they deem necessary to manage the offender's risk.

[54] Not only do these comments from the CSC reveal that Mr. Johnston was, in the view of his parole supervisors, habitually unforthcoming with the CMT, but also that his immediate support network actively participated in his behaviour. In light of his criminal history described above, as well as the two previous suspensions around which Mr. Johnston exhibited a similar unwillingness to be straightforward and honest with the CMT, the CSC deemed it extremely difficult – in its words "virtually impossible" – to ensure compliance with his release conditions.

[55] The Board concluded, having considered the 3rd Assessment Report (and previous CSC reports), as well as his and his supports' submissions, and in the context of his criminal and correctional history, that Mr. Johnston presented an undue risk to society. In so deciding, the Board provided the following conclusion to its detailed and lengthy September 28, 2020 Decision:

> In summary, the Board considered both the aggravating and mitigating factors in assessing your risk to the community. To your credit, you engaged with your church group and participated in celebrate recovery. You also spent time with your former partner, your sister and brothers, as well as your children. You also completed the Community Program with noted gains. You had access to a program officer, parole officer, and any additional available resources through CSC.
>
> From an aggravating perspective, you are a fourth time federal offender, with an extensive criminal history comprised of fraud and breach of trust convictions. Your last two prior statutory releases were fraught with suspensions, revocations, and criminal activity. Despite completing the Community Program, your attitude still requires a high need for improvement. You continue to be assessed with low levels of motivation and accountability.
>
> Throughout your release, your statutory release has been suspended on multiple occasions due to your struggles with providing accurate factual answers to your parole officer's questions. Your answers and justifications continue to change as those supervising ask more and more questions. You have, on more than one occasion, had to revise your answers to questions

> such as where you purchased beer following your arrest, and where did you get the $4000? This demonstrates significant risk enhancing attitude and these instances are directly related to financial matters and transparency.
>
> By your decision to steal from a grocery store and not be truthful with your PO, your decision to entangle your finances with your son, and by your inability to provide a direct answer to where you got the $4000.00 when initially asked by your PO, you have shown a sustained and ingrained oppositional attitude towards your supervision. This is a clear escalation in your risk, which places you back into your offence cycle. Your risk is no longer manageable in the community due to your own attitude and inability to work collaboratively with your CMT.
>
> It is the Board's opinion that you will present an undue risk to society if statutorily released and that your release will not contribute to the protection of society by facilitating your reintegration into society as a law-abiding citizen.

[56] The Board was not concerned with conflicting versions of particular events so much as it focused on the fact that Mr. Johnston habitually displayed a lack of openness and transparency with his CMT. The very fact that Mr. Johnston regularly provided shifting accounts to the CMT in response to straightforward questions demonstrated that he was unwilling to foster a trust relationship, according to the Board. It was precisely for this type of behaviour that the Board reprimanded Mr. Johnston when it cancelled the second suspension. Indeed, not only did Mr. Johnston's behaviour draw the ire of the CMT and the Board, but it also impeded the CMT's ability to supervise his release.

[57] I do not accept Mr. Johnston's submission that the Board "simply allude[d] to perceived difficulties in managing relations with the applicant and his supporters, without explaining how these difficulties could not be accommodated by community-centered measures". The Board explains that Mr. Johnston's recorded repeated dishonesty and uncooperativeness made it nearly

impossible for the CMT to ensure compliance with his conditions, which, it bears reminding, were imposed specifically to address Mr. Johnston's risk in the community.

[58] The Board retains ultimate discretion to revoke an offender's statutory release, based on whether the offender's continued release would present an undue risk to society (*Act* at s 135). The protection of society is both the criminal law purpose and rationale of the revocation of conditional release, as well as the paramount consideration for decisions under the *Act*: *Canada (Attorney General) v Samuel*, 2019 ONCA 555 at para 23; *Act* at s 100.1.

[59] The reason for which the *Act* and the Board impose conditions on offenders released from custody is to foster rehabilitation – *i.e.*, deter recidivism – and promote successful reintegration into society as law-abiding citizens (*Act* at s 100). Compliance with release conditions – particularly those tailored to an offender's specific circumstances and history – is crucial to achieving these objectives. It thus is understood that parole officers and CMTs play a pivotal role in ensuring that the conditional release framework envisioned by Parliament operates effectively and justly.

[60] An offender who breaches their conditions risks losing their conditional release where their actions or conduct thwart the twin objectives of the conditional release framework (rehabilitation and reintegration). An offender who refuses to cooperate with their CMT equally thwarts these objectives because their conduct prevents the CMT from ensuring compliance. Without adequate supervision, offenders are not shielded from recidivism and are less likely to

reintegrate successfully into society with a proper appreciation and respect for the law. This, in turn, creates a significant risk to society.

[61] Upon review of the Decisions, I find it reasonable for the two tribunals to have concluded that Mr. Johnston presented an undue risk to society. As the extract at paragraph 55 demonstrates, the Board carefully weighed mitigating and aggravating factors of Mr. Johnston's case.

[62] In light of the evidence, I find the two tribunals' reasons each addressed the evidence, including the prior suspensions' circumstances, and considered the arguments made to them by Mr. Johnston, and his counsel (to whom the Board referred as an "assistant", given its inquisitorial process).

[63] Furthermore, I find the written reasons from both tribunals to be careful, rigorous, and internally coherent. They adequately address the relevant evidence in light of the law, and principles of risk and the goal of rehabilitation, within a context of least restrictive measures. The Board Decision was extremely thorough in reviewing the explanation given by Mr. Johnston, but was constrained by a clear and justifiable reprimand resulting from the previous two cancellations of his suspensions of release.

[64] Following from the Board Decision, and in light of its thoroughness of analysis and lack of errors, I am equally satisfied that it was reasonable for the Appeal Division to uphold the Board Decision.

[65] Mr. Johnston contends that the Appeal Division ignored his evidence and failed to address his arguments. Mr. Johnston raised a number of issues in his submissions to the Appeal Division. He submitted that the CMT's conclusions regarding his alleged misconduct were mistaken. In relation to the third suspension, he contended that he had opened the Amazon account with his sons and that he never himself owned a credit card. He submitted that his sons had used the account with their own debit or credit cards – a fact he alleges was made known to the CMT. He alleges that this assertion went unchallenged by the Board.

[66] Mr. Johnston also alleged that his clarifications regarding the $4,000 deposit to his account went unchallenged by the Board. He argued that the Board ignored arguments and evidence as to the CMT's alleged bias against him, including an e-mail from his friend Sade Cole recalling derogatory comments made by his parole officer. I address the bias argument later in these Reasons.

[67] Though Mr. Johnston asserts that the Board failed to properly consider evidence or assess credibility, in my view, his real complaint lies with the outcome of the Board's Decision. The Board member discussed the Amazon situation, remarking that by granting his family access to his Amazon account, he "created a situation where it was nearly impossible for [his] CMT to accurately monitor [his] finances". On this point, the Board continued:

> You told the Board that having a shared amazon account was a way to be closer to your son, and the Board finds that explanation a rather odd or unique way to promotion familiar bonds. Your CMT also noted that you did not seek permission to obtain a prepaid VISA and these types of cards do not produce a monthly statement, therefore your CMT cannot review your purchases. Here the Board see clear deficits in your decision-making, and specifically your attitude, which is a contributing factor in your offending.

[68] Clearly, the Board did not take issue solely with the fact that Mr. Johnston had prepaid charge cards assigned to his Amazon account – whether or not they were his. Rather, the concern was that allowing others to access his account would make it increasingly difficult for the CMT to monitor Mr. Johnston's finances, particularly as the charge cards were assigned to the account under his own name, as opposed to his son's name.

[69] Furthermore, the fact that the charge cards used with the Amazon account did not produce monthly statements – as would be the case with ordinary credit or debit cards – compounded the matter, since one of the key conditions for Mr. Johnston's release had been to monitor his financial activity, including any credit card activity. Indeed, the Board imposed two special conditions specifically related to financial transactions and credit card use:

- Provide documented income information, expense information, debt information, banking information, financial transaction information to the satisfaction of your parole supervisor on a monthly basis at minimum.
- Not to possess any banking document including credit cards, debit cards, bank cards or cheques without the prior written permission of your parole supervisor.

[70] Even if one were to accept that the charge cards belonged to Mr. Johnston's son, and that Mr. Johnston himself had not used them to make purchases, but that rather his son made the purchases – according to the testimony provided by both Mr. Johnston and his son – it is still concerning that Mr. Johnston had not disclosed his shared account to his CMT.

[71] As the Board points out, and as borne out by the record, the correctional institutions, parole officers, and courts have all addressed Mr. Johnston's pattern of crime involving fraudulent behaviour and breach of trust over several years involving various victims, including both those he knew and/or had relationships with, and others (such as the general prison population regarding his tax return scheme). The parole officials – whether those managing his case within the CMTs, or those reviewing the CMT recommendations at the tribunals – were obliged to monitor risk to the public closely.

[72] This is precisely why Mr. Johnston was subject to strict conditions concerning financial disclosure, the obtaining of banking documents, holding positions of authority or influence, and having intimate relationships with women, whom the Board found he had manipulated to facilitate his various fraudulent schemes.

[73] Therefore, withholding from the CMT the existence of his Amazon account, the linked credit cards, and his son's access to that account, all run counter to the strict surveillance and financial oversight to which the *Act* subjects Mr. Johnston. The Board thus not only considered the Amazon account issue, contrary to Mr. Johnston's assertion – but did so with sufficient explanation.

[74] Similarly, Mr. Johnston claims that the Board ignored his evidence in relation to the $4,000 deposit in June 2020. Before the Board, he testified that the money came from a number of sources: first, he claimed that a portion of the funds had been transferred from his brother via his sister who held it in trust, as his brother had served as the executor to his parents' estate;

second, he claimed another portion came from his savings account via an inter-account transfer; and third, another portion came directly from his brother, who had agreed to help him financially.

[75] Yet, the 3rd Assessment Report details that Mr. Johnston informed his parole officer prior to the suspensions that the funds had all come from his brother. Mr. Johnston's parole officer contacted the brother to confirm whether he had in fact sent the funds, and while the brother told the parole officer that he had agreed to help out Mr. Johnston by providing him $500/month, he also indicated that he had not yet began disbursing the funds. He indicated that he would be able to do so as of July 2020.

[76] Indeed, Mr. Johnston's parole officer testified before the Board about a conversation with Mr. Johnston's brother, saying that the latter had been "very, very clear" that no money had been sent to Mr. Johnston via his sister or any other mechanism. Thus, there exist conflicting reports as to the origins of the deposit. The Board highlighted this discrepancy in its Decision:

> You claimed these funds came from your brother. Your PO contacted your brother who indicated he did not transfer you any money. He confirmed he planned to assist you by giving you $500 each month as previously agreed, but had not yet done so. When asked It is also important to recall that this was not an isolated incident – Mr. Johnston had, in relation to the first and second suspensions, engaged in about the $4,000 transferred to your bank account, you maintained it came from your brother, however your story surrounding this changed somewhat. You explained funds went from your brother to your sister to you, but ultimately came from your brother. You provided representation prior to today's hearing which is inconsistent with what you told your PO. You now claim that the money came from your sister by way of your brother. Again, the Board finds that you lacked transparency and accountability with your PO. You could not provide a simple answer to as to how and from whom you received the $4000.

> Again, you appear to be entangling your community supports in your finances and not being open and honest from the start with your CMT. This incident is yet another example of a poor attitude, low accountability, and a lack of trustworthiness.

[77] The finding that he was "entangling his community supports in [his] finances" is perfectly reasonable on the facts, contrary to Mr. Johnston's argument. In addition to being concerned about the failure to comply with the release conditions and update the supervising parole officers, the Board was equally concerned about the fact that Mr. Johnston failed to provide straightforward, consistent answers when confronted.

[78] In short, it was open to the Appeal Division to find that the Board reasonably came to its conclusions based on a review of the record and on relevant, reliable, and persuasive evidence. My review of the full record, and the totality of the evidence, confirms that it was indeed open to both tribunals to arrive at their conclusions regarding risk to the public and the outcome revoking statutory release.

[79] Mr. Johnston also pleaded before the Appeal Division that the Board erred in drawing a negative inference from the fact that he had used LinkedIn to obtain information on his new parole officer prior to the first suspension. I disagree; the Board highlighted that these circumstances revealed yet another instance of Mr. Johnston's evasive communication with the CMT, and that conclusion was open to the Board based on the factual matrix presented:

> Approximately one month later, your release was suspended as you used a credit card contrary to your special conditions and displayed clear deficits in accountability and transparency. <u>You were unable to answer even a simple question about viewing your Parole Officer's (PO) LinkedIn profile and that is clearly risk-enhancing behaviour.</u> During a supervision meeting, your parole officer asked

> you about viewing her profile. You initially denied any knowledge of the LinkedIn App. Then your story changed. You eventually disclosed that you had used the App years ago and denied knowing the account still existed. Then your story changed again. Someone else created the account while you were incarcerated as you were unsure how to use the App. Then your story changed yet again. You did use the LinkedIn App to view your PO's profile, as you wanted to know who would supervise you on your legislative release. At today's hearing, your story changed yet again and you denied every [*sic*] using the App. In the Board's view, this instance is yet another example of your manipulation and resistance towards the expectations of supervision. This risk-enhancing attitude towards supervision demonstrates that you will say or do whatever you need to in order to present yourself in the best positive light. The Board expects offenders to work collaboratively with your Case Management Team (CMT) as it mitigates recidivism. You clearly have difficulty doing so.
>
> [Emphasis added.]

[80] In conclusion, I see no errors in either the Board Decision or in the Appeal Decision on the substantive merits. I do not agree that the Board overlooked evidence. Having reviewed all the evidence, including all Mr. Johnston's statements and submissions, and those of his support network and lawyers, Mr. Johnston's quarrel is with the manner in which the two tribunals viewed and ultimately weighed the evidence.

[81] Indeed, the first two times the matter went before the Board, the scales tilted in Mr. Johnston's favour. First, the Board provided Mr. Johnston with the benefit of the doubt with respect to the first CSC assessment report, and cancelled the revocation.

[82] The second strike against Mr. Johnston also provided him with the benefit of the doubt in terms of the outcome – namely allowing him to maintain his release in the community. However,

this second strike occurred only after having provided a reprimand. That reprimand could not have been clearer.

[83] The Board was true to its word the next (third) time there were missteps. Mr. Johnston was closely monitored, which resulted in immediate action by CSC and, subsequently, two negative decisions. This was, to use an overused expression, Mr. Johnston's third strike, and it was reasonable for both the Board and the Appeal Division to uphold the third suspension, unlike the cancellation of each of the first two.

(2) Jurisdictional Issue and Bias

[84] Mr. Johnston also argues before this Court that neither the Board nor the Appeal Division addressed the CMT's alleged mismanagement of his case and any alleged bias or animus that existed amongst the members of the CMT. In other words, he argues that both tribunals should have considered his complaints as to the quality of the CMT's work, and whether any actual or apparent animus or bias diminished the accuracy of their assessment of his risk such that the decision to suspend his release was unreasonable.

[85] I do not agree. The Appeal Division pointed out that issues relating to actions or decisions by the CMT fall under a grievance process, and lie outside the jurisdiction of the tribunals of risk in returning to the community. The *Act* and the *Regulations* provide a grievance framework for offenders (provided for by s 91 of the *Act* and detailed in ss 74-82 of the *Regulations*). The *Regulations* provide that an offender concerned with the decision or the action of a CSC staff member must first submit a written complaint to that staff member's supervisor

and, if dissatisfied with the outcome of that complaint, may file a grievance to the institutional head (ss 74-75). If dissatisfied with the outcome of the grievance, the offender may appeal the decision to the Commissioner.

[86] From there, under s 167(1) of the *Act*, the Correctional Investigator may conduct "investigations into the problems of offenders related to decisions, recommendations, acts or omissions of the Commissioner" or of "any person under the control and management of, or performing services for or on behalf of, the Commissioner that affect offenders either individually or as a group".

[87] Thus, to the extent that Mr. Johnston takes issue with the day-to-day management of his case by the CMT, the proper forum for adjudication is neither the Board nor the Appeal Division, nor this Court.

[88] However, I also recognize that, as the Board considers the CMT's assessment of an offender in deciding whether to suspend, revoke, or terminate conditional release, claims that this underlying assessment is founded on bias are relevant insofar as they challenge the veracity of the CSC's conclusions and evidence. Certainly, claims that a CMT assessment is unfounded or arbitrary are properly within the jurisdiction of the Board, and thus of this Court on judicial review.

[89] I also note that assessments from the CMT are but one factor among many the Board considers in assessing whether an offender poses an undue risk to the community. Being an

independent entity, the Board is not bound by the conclusions of the CSC, as evidenced by the fact that the Board twice cancelled Mr. Johnston's suspension despite the CSC's strong recommendation to the contrary in both cases. As noted above, the Board gave Mr. Johnston two strikes. It only called him out on the third, as did the Appeal Division. Both tribunals considered the totality of the circumstances, including the cumulative effect of Mr. Johnston's actions since his statutory release in 2019.

[90] It is worth noting that the Board does not act in a judicial or quasi-judicial manner; it does not hear and assess evidence in the same manner and under the same rules as a court of law, nor is it held to the same standards. As the Supreme Court held in *Mooring v Canada (National Parole Board)*, [1996] 1 SCR 75, [1996] SCJ No 10 (QL) [*Mooring*] at paragraph 26:

> Clearly then, the Parole Board does not hear and assess evidence, but instead acts on information. The Parole Board acts in an inquisitorial capacity without contending parties — the state's interests are not represented by counsel, and the parolee is not faced with a formal "case to meet"…

(See also *Ouellette v Canada (Attorney General)*, 2013 FCA 54 at para 66 [*Ouellette*]).

[91] While the Courts have been clear that the Board plays an inquisitorial role and acts on information gathered in the course of an investigation, and not a formal adversarial proceeding (*Mooring*; *Ouellette*), the Board is bound by s 100.1 of the *Act* to consider the protection of society as the paramount consideration in the determination of a case, which includes assessing whether an offender presents an undue risk to society. The Board must thus pay special attention to the circumstances and evaluate whether it is imposing the least restrictive means.

[92] In balancing the objectives and principles regarding risk to the community and individual freedoms, members are bound to provide reasons that are justifiable, transparent, and intelligible, as well as responsive to the considerations put before them. Both parties relied on *Vavilov* in this regard. Apart from the need to provide justification in the reasoning, there are several other *Vavilov* principles apropos *Mooring*/*Ouellette*, and the tribunals in question here. For instance, *Vavilov* observes at paragraph 93 that:

> Administrative decision makers cannot always be expected to deploy the same array of legal techniques that might be expected of a lawyer or judge — nor will it always be necessary or even useful for them to do so. Instead, the concepts and language employed by administrative decision makers will often be highly specific to their fields of experience and expertise, and this may impact both the form and content of their reasons. These differences are not necessarily a sign of an unreasonable decision — indeed, they may be indicative of a decision maker's strength within its particular and specialized domain….

[93] *Vavilov* also instructs courts not to hold the reasons of administrative decision makers to a standard of perfection (at para 91; see also *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 18).

[94] Furthermore, decision makers such as the Board and the Appeal Division cannot always be expected to deploy the same array of legal techniques that might be expected of lawyers or judges, and the reviewing court must pay close attention to the application of the tribunals' institutional experience and expertise (*Vavilov* at paras 91-93). As the Supreme Court explained in *Vavilov* at para 93:

> Respectful attention to a decision maker's demonstrated expertise may reveal to a reviewing court that an outcome that might be puzzling or counterintuitive on its face nevertheless accords with the purposes and practical realities of the relevant administrative

> regime and represents a reasonable approach given the consequences and the operational impact of the decision. This demonstrated experience and expertise may also explain why a given issue is treated in less detail.

[95] While it would have been preferable for the Board to address Mr. Johnston's arguments about actual or perceived bias explicitly, it is nevertheless evident from the Board's reasons that it saw no merit to those claims. By weighing all of the circumstances, including Mr. Johnston's extensive criminal and conditional release history, and coming to a decision without reference to the claims of bias, the Board demonstrated that it felt Mr. Johnston posed an undue risk to society regardless of whether there existed a bias on the part of the CMT.

[96] I find it perfectly reasonable for the Board to have relied on the large volume of evidence on the record that demonstrates Mr. Johnston's disregard for the law and his conditions, as well as his uncooperative attitude towards his CMT, and the CSC, over the course of not only his most recent statutory release, but also prior junctures in his past. Again, those instances are well documented in the record and in terms of numerous CSC reports prior to 2019, which had different parole officers authoring those reports, and a different make-up of the CMTs.

[97] The factual matrix alone suggests it was reasonable for the tribunals not to have dwelled on claims that the fault lay with the people monitoring and evaluating Mr. Johnston – a common theme in pre-2019 reports of Mr. Johnston blaming others for his predicaments. Instead, both tribunals found that the breaches lay with Mr. Johnston himself, rather than any personal animus or bias against him.

[98] The past factual matrix included that during his second and third federal sentences, the Board (prior to 2019) released Mr. Johnston on statutory release during which he continued to reoffend, resulting in several revocations. At the time Mr. Johnston was most recently convicted, he was on bail for previous offences.

[99] Ultimately, it is my conclusion that Mr. Johnston simply disagrees with the outcome of the Board's Decision, rather than having pointed to any reviewable error, or any evidence of bias the Board considered the totality of all the circumstances in making its Decision.

[100] I also disagree, based on my own review of the record, that the claims and evidence put forward by Mr. Johnston demonstrate the CMT's inability to assess his case objectively and reasonably. As one example, which I mentioned in the previous section, Mr. Johnston objects to the CMT's conclusion – which both the Board and the Appeal Division accepted – that his use of LinkedIn to obtain information on his new parole officer prior to the first suspension was "yet another example of [his] manipulation and resistance towards the expectations of supervision". He claims this conclusion indicates a "predisposition toward finding fault with the applicant" because it implies negative intent from an otherwise mundane happenstance.

[101] The issue with Mr. Johnston's argument on this point is twofold. First, it mischaracterizes what the Board actually said; and second, it assumes that the Board examined events in isolation, rather than holistically within the context of his checkered history.

[102] On the first point regarding mischaracterization, the Board did not conclude that Mr. Johnston's use of LinkedIn to obtain information on his new parole officer was in itself problematic; the real issue was that, when confronted with the fact, Mr. Johnston could not provide a straightforward, honest answer to his parole officer. Indeed, the Board noted that his story even changed during the hearing, in the extract at paragraph 79 of these Reasons. This is just one example amongst many the Board pointed to, such as other shifting stories or alternate truths coming from Mr. Johnston.

[103] On the second point, Mr. Johnston overlooks that these comments were made within a discussion of his overall history, one rife with instances of his disregard for imposed conditions, and of manipulation (see extract from the Board Decision at paragraph 21 of these Reasons). Mr. Johnston referred to additional events he claims suggest a bias on the part of the CMT before the Board, including alleged disparaging remarks made about his son's use of his Amazon account, a cancelled meeting between his parole officer and his son to inspect one of the credit cards linked to the account, and a disparaging phone call alleged to have been made to one of Mr. Johnston's friends about him.

[104] Yet, these submissions attempt to divert attention away from the true matter at hand, namely, Mr. Johnston's continued reticence for sharing information with his parole officers and for abiding by his conditions. I say parole officers, because while Mr. Johnston appeared focused on the alleged bias and animus coming specifically from Ms. Sitt (his Parole Office Supervisor) and Mr. Blair (his parole officer), I note that this CMT listed mitigating factors of Mr. Johnston's

behaviour in his performance reports. This was consistent with various other prior parole officers and Supervisors who did the same (for instance, Mr. Buchanan, Ms. Brennan, and Ms. Jaffer).

[105] In sum, the balance evident within the many CSC reports contained in the CTR, and the fact that patterns of negative cycles of behaviour occurred consistently over the years, was indicative not of problems with the CMT's management of Mr. Johnston's file, but rather of Mr. Johnston's inability and unwillingness to commit to the twin objectives of statutory release

[106] A careful examination of the record and a holistic assessment of Mr. Johnston's risk demonstrates that the Board Decision is logical, coherent, and justified in light of the facts and the law, given the concerns that the Board had with Mr. Johnston's shifting stories and failure to disclose matters in compliance with his conditions. Similarly, the Appeal Decision upholding the conclusions of the Board are equally justified, and therefore reasonable. There is simply no evidence of bias.

[107] Finally, I turn back to *Vavilov*, which holds as follows at paragraph 98:

> … In *Alberta Teachers*, this Court also reaffirmed the importance of giving proper reasons and reiterated that "deference under the reasonableness standard is best given effect when administrative decision makers provide intelligible and transparent justification for their decisions, and when courts ground their review of the decision in the reasons provided": para. 54. Where a decision maker's rationale for an essential element of the decision is not addressed in the reasons and cannot be inferred from the record, the decision will generally fail to meet the requisite standard of justification, transparency and intelligibility.
>
> [Emphasis added.]

[108] Here, to the extent that the tribunals did not speak further about bias nor address the specific claims of Mr. Johnston and those of his support network in their Affidavits (some of which are unsigned) and other statements, the rationale and reasons for favouring the objective facts including a lack of credibility, over the claims of bias, can be easily and plainly "inferred from the record".

(3) COVID-19

[109] Lastly, Mr. Johnston claims that the Board gave insufficient regard to his age, medical condition, and susceptibility to serious infection from COVID-19. He argues that the Appeal Division merely brushed off the argument, suggesting that the institution in which Mr. Johnston is incarcerated had adequately prevented COVID-19 from spreading within its walls up to that point.

[110] In my view, the Board adequately assessed Mr. Johnston's situation and personal susceptibility to COVID-19, including the report from a physician submitted in support. Once again, it must be borne in mind that the Board came to its decision as to Mr. Johnston's risk in the community based on a holistic analysis of the entire file.

[111] To the COVID-19 argument specifically, the Board determined that the risk of infection and serious consequences specific to Mr. Johnston did not outweigh the risk he posed to society. The Board wrote:

> The Board considered the COVID pandemic in its decision today. As in all PBC decisions, public safety remains paramount. In your representation, a physician conducted a review of your case, based

> on information you provided. He caveated his comments with the following. “I have no means of knowing if the information is accurate, but I can provide my opinion assuming the information is true.” The specialist believes you are in the high-risk category for severe outcomes to COVID, due to chronic asthma and a gradient age for severe outcomes. In your representation, you discuss concerns accessing healthcare and hygiene. The Board encourages you to seek out your CMT or the Office of the Correctional Investigator in order to address these issues. The Board received updates from your PO, indicating that there are no active COVID cases in the institution. The Board is confident in the resiliency measures taken by CSC, including the need for temporary lockdowns that you referenced in your letter. In the Board’s view, the measures taken by CSC have kept COVID out of the institution and are sufficiently resilient as to outweigh your specific vulnerability to this pandemic.

[112] The Appeal Division found this conclusion reasonable, as do I, in summarizing the Board’s findings thus:

> Contrary to your submission, the Board did consider the information you submitted in regard to your vulnerabilities and your risk in the context of the COVID-19 pandemic. The Board considered the information you provided, the specific correctional environment in the context of COVID-19, and the measures implemented by the correctional facility. The Board reasonably encouraged you to address your concerns in accessing healthcare and hygiene with your CMT or the Office of the Correctional Investigator. The Appeal Division finds that the Board conducted a fair risk assessment, that it weighed all the relevant information, including your personal circumstances in the COVID-19 incarceration context, and reasonably concluded that the paramount consideration was the protection of society.

V. Order and Costs Sought

[113] At the hearing, each side made a special request, the Applicant for an Order that CSC appoint a new CMT, and the Respondent for costs on an elevated scale, in an amount of $3,500.

[114] As for the Order requested by the Applicant, the Respondent pointed out that the Applicant had not made the request in its written submissions. It also noted that CSC was not put on notice or otherwise able to provide any submissions on the matter, not being a party to the proceedings. Quite apart from the Respondent's persuasive points regarding the non-involvement of CSC, I see no basis upon which to make such an Order given (i) the decisions under review, (ii) the nature of the allegations and outcome, and (iii) the evidence on the record.

[115] As for the Respondent's request for costs on an elevated scale, I do not feel that would be appropriate. Rather, given that the Applicant raised legitimate questions, I do not think it appropriate to provide an award of heightened costs for two reasons.

[116] First, the burden is on the party seeking increased costs to demonstrate why the particular circumstances warrant an increased award (*Nova Chemicals Corporation v Dow Chemical Company*, 2017 FCA 25 at para 13). The Respondent sought increased costs, in part, based on Mr. Johnston's challenges to prior revocation decisions before this Court. I have seen no evidence that Mr. Johnston was not entitled to commence those prior proceedings, nor that he did so in an abusive, frivolous, or vexatious manner, just as I find he did not do so in this application.

[117] Second, while I recognize that the enhanced costs are sometimes awarded when a party alleges bias with no evidence in support – because alleging bias is a serious step that should not be undertaken lightly (*Jaffal v Davidson*, 2016 FCA 226 at para 7 [*Jaffal*]) – like in *Jaffal*, I am unpersuaded that the Applicant's conduct warrants the sanction of enhanced costs.

[118] However, as the successful party, I agree that the Respondent is entitled to some costs. Taking all circumstances into account, and considering the factors set out in Rule 400(3), including Mr. Johnston's liberty interests and his limited resources, I will award nominal costs of $250. This will not place an undue burden on Mr. Johnston's stated commitment to rehabilitate himself and successfully reintegrate into society, which could arise with elevated costs.

VI. Conclusion

[119] The protection of society is the paramount consideration in all decisions made in relation to conditional release. The Board examined Mr. Johnston's case, including his criminal history, two strikes with release revocation, and personal medical situation, as factors in assessing whether to revoke Mr. Johnston's statutory release. It determined that in light of his third strike, continued release posed an undue risk to society. That assessment was reasonable, as was the Appeal Division's decision not to interfere. For these reasons, this Application for judicial review is refused.

VII. Postscript

[120] One personal concluding remark: based on Mr. Sloan's comments at the hearing of this judicial review, his client Mr. Johnston will, by the time of publication of these Reasons, have been released. As noted above, I have read and heard Mr. Johnston's eloquent statements and expressions of commitment to change, along with those of his support network, including his laudable future plans to leave his past behind and use his skills in a productive manner.

[121] Mr. Johnston, I suspect there is not a single member of your CMT, nor anyone who has worked with you over the past few years, who does not want you to succeed in this endeavour. I too wish you only good luck and strength in your path to rehabilitation to which you avow commitment.

JUDGMENT in T-90-21

THIS COURT'S JUDGMENT is that the judicial review is dismissed. The Applicant shall pay costs to the Respondent in the amount of $250.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-90-21
STYLE OF CAUSE:	MARK ANDREW JOHNSTON v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HEARD BY VIDEOCONFERENCE
DATE OF HEARING:	JULY 6, 2021
JUDGMENT AND REASONS:	DINER J.
DATED:	JULY 22, 2021

APPEARANCES:

J. Todd Sloan	FOR THE APPLICANT
Taylor Andreas	FOR THE RESPONDENT

SOLICITORS OF RECORD:

J. Todd Sloan Barrister and Solicitor Ottawa, Ontario	FOR THE APPLICANT
Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT