CANADIAN COURT OF JUSTICE
(On appeal from the Federal Court of Appeal)

B E T W E E N:

RAMZA KHAYAT

Appellant

- and -

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS and ATTORNEY GENERAL OF CANADA

Respondent

APPELLANT'S FACTUM

SCHOOL 2

PART I – OVERVIEW

[1] Ramza Khayat, the Appellant, is an innocent woman who witnessed a violent criminal offence and testified as to the identity of the perpetrator, career criminal Darryl Matthews. Matthews has previously committed numerous violent offences and is a member of an organized crime group.

[2] Khayat now lives in constant fear that Matthews will attack her in retaliation for her role in his conviction. Yet, she has been denied the opportunity to be heard on the issue of his proposed early release. It was unreasonable and unconstitutional for the Service to allow for Matthews' release without hearing Khayat, given the deprivation of life and security of the person which would be suffered by her.

1. Standing

[3] Khayat appropriately brings this issue to the courts. She meets the legal test for both private and public interest standing to challenge the Commissioner of Correctional Service Canada's ("the **Service**") decision to not refer the matter in question to the Parole Board of Canada ("the **Board**"). Upholding the Federal Court of Appeal's decision on standing would be to immunize from judicial review the Service's decision ("the **Decision**") to not refer to the Board and to provide for statutory release, since neither the offender nor the Service would challenge such a decision.

2. Reasonableness

[4] Khayat accepts that the Decision should be analyzed under the standard of review of reasonableness but asserts that the Decision is unreasonable and must be overturned. Primarily, it was unreasonable because of the Service's noncompliance with legislated requirements and its own policies. Also, there was a lack of internal coherence in the Service's conclusions, which is unreasonable. Allowing the Decision to go unchallenged would be to countenance direct violations of the law and published policies and to allow the Service to make conclusions not supported by the facts. Finally, Khayat argues that the Federal Court of Appeal exceeded the bounds of appellate review when assessing this factor.

3. Constitutionality

[5] Khayat asserts that the regime for statutory release, as stated in the *Corrections and Conditional Release Act* ("the **Act**"),[1] is unconstitutional. The scheme sets the threshold to oppose early release far too high. This results in the almost automatic release of offenders who pose a threat to the life and security of Canadians.[2]

[6] Even if the scheme is constitutional, Khayat maintains that the decision of the Service to release Matthews pursuant to the considerations enumerated in the scheme was not. Matthews' early

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[1] SC 1992, c 20 [*The Act*].

[2] *Ramza Khayat v Minister of Public Safety and Emergency Preparedness and Attorney General of Canada*, 2021 FC 1986, 2021 FC 1993 at para 70 [*FC Decision*].

release clearly engages Khayat's right to life and security of the person. The deprivation of these rights was not in accordance with the principles of fundamental justice.

4. Procedural Fairness

[7] In addition to being arbitrary and grossly disproportionate in its effects, the means through which it was decided that Matthews should be released was procedurally unfair. The scheme for statutory release denies Khayat any opportunity to be heard by the Service when it becomes the final decision-maker on the question of statutory release. This is not in accordance with the high level of procedural protection Khayat is owed.

5. Remedy Sought

[8] The decision of the Service in Matthews' case should be set aside and the sections of the Act regarding statutory release declared inoperative. Matthews' case should be sent back to the Service and an oral hearing providing Khayat with an opportunity to be heard by the Service should be granted. In the alternative, the Federal Court's disposition of this case, ordering referral to the Parole Board, should be restored.

PART II – STATEMENT OF FACTS

1. Facts

1.1 Khayat's Involvement in Matthews' Case

[9] In 2014, Khayat witnessed Matthews stabbing a woman twice in her back.[3] Khayat immediately called emergency services, which aided the woman in surviving her injuries. The victim now suffers permanent limitations and lives in constant pain due to the injuries Matthews inflicted on her.[4]

[10] Khayat testified as the key witness at Matthews' trial.[5] This was done at great personal risk as Matthews' friends made numerous threats against Khayat and her family to dissuade her from testifying against him.[6] Khayat remained steadfast and Matthews was convicted and sentenced to a nine-year prison term "almost entirely" on the basis of her testimony.[7]

[3] *Ibid* at para 10.
[4] *Ibid* at para 11.
[5] *Ibid* at para 12.
[6] *Ibid* at para 13.
[7] *Ibid* at para 14.

1.2 Matthews' Time in Prison

[11] In 2015 Matthews began serving his nine-year prison term for the 2014 stabbing. Matthews, who idolizes famous criminals, has had a long history of incarceration in maximum security prisons.[8] He had previously been incarcerated following multiple convictions for theft, two previous convictions for assault, and one conviction of attempted murder of a police informant.[9]

[12] Matthews has only begun to show some signs of potential reform while incarcerated. While he has enrolled in violence control programs, he has failed to attend or complete any of these programs. There is some evidence that he has discontinued abusing drugs. While incarcerated, Matthews continues to be considered a safety risk to guards and fellow inmates, as evidenced by eight incidents requiring solitary confinement over the past six years of his term.[10]

[13] Matthews' history with conditional release has been similarly troubling. In 1993 and 2006, he was released on parole and almost immediately violated the conditions of his release.[11] During both release periods he committed multiple serious criminal offences. In 1993, he admitted to having possessed cocaine on release.[12] In 2006, Matthews was found in possession of a stolen car in pursuit of the proceeds of crime – he was driving to confront his criminal associate who had not paid him for a murder attempted on the associate's behalf.[13]

[14] Throughout his prison term, Matthews has exhibited an obsession with Khayat. He has expressed his intention to "pay her a visit" and "thank her properly" to retaliate for her testifying against him.[14] Matthews has personally sent written messages to Khayat, telling her he "looks forward to seeing her again."[15] Khayat thus lives in constant fear that Matthews will attack her if released.

1.3 Statutory Release Scheme - Key Provisions

[15] Subsection 127(1) of the Act provides that an offender is entitled to be released prior to the expiration of their term at law. Furthermore, s.127(3) provides that the statutory release date occurs when an offender has served two-thirds of their sentence at law.

[16] However, s. 129(1) of the Act requires that, before the statutory release of an offender serving a sentence of greater than two years, the Commissioner shall cause the case to be heard by the Service.

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[8] *Ibid* at paras 19, 21.
[9] *Ibid* at paras 18, 20.
[10] *Ibid* at paras 21, 29.
[11] *Ibid* at para 22.
[12] *Ibid*.
[13] *Ibid*.
[14] *Ibid* at para 30.
[15] *Ibid* at para 30.

[17] No more than six months prior to the date of statutory release, the Service shall refer the case to the Parole Board if they are satisfied, according to s. 129(2)(a)(i) of the Act, that the offender is likely to commit an offence causing death or serious harm to another person before the expiration of their sentence according to law.

[18] Where a decision is referred to the Board, the case is to be reviewed within four weeks of the date of referral.[16] In reviewing the case, the Board may order that the offender not be released from imprisonment before the expiration of their sentence according to law, if there is reason to believe that the offender is likely to commit an offence causing death or serious harm to another person.[17]

[19] In their review of an offender's case, both the Service and the Board are required to consider a number of factors set out in s. 132(1)(a) of the Act, including:

(a) a pattern of persistent violent behaviour;
(b) medical, psychiatric, or psychological evidence of such likelihood owing to a physical or mental illness or disorder of the offender;
(c) reliable information compelling the conclusion that the offender is planning to commit an offence causing the death of or serious harm to another person before the expiration of the offender's sentence;
(d) the availability of supervision programs that would offer adequate protection to the public from the risk the offender might otherwise present until the expiration of the offender's sentence according to law.

[20] Where a case is not referred to the Board by the Service, the Board is precluded from making any orders preventing the statutory release of an offender.[18] In such circumstances, the Board is limited to imposing conditions on the release where it is deemed necessary in order to protect society and to facilitate the offender's successful reintegration into society.[19]

[21] The Act includes provisions which allow for attendance by others at hearings held by the Board.[20] Specifically, victims and persons who suffered physical or emotional harm resulting from an act of an offender, whether or not the offender was prosecuted or convicted for that act[21] are permitted to present a statement describing the harm or loss suffered and its continuing impact on them (including any safety concerns) and to comment on the possible release of the offender.[22] Importantly, there is no similar provision for hearings held by the Service.

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[16] *The Act*, *supra* note 1, s 129(7).
[17] *Ibid*, s 130(3).
[18] *Ibid*, s 129(2).
[19] *Ibid*, ss 133(1)-(3.1).
[20] *Ibid*, s 140(4).
[21] *Ibid*, s 142(3).
[22] *Ibid*, s 140(10)(b).

1.4 The Decision of the Service

[22] In 2021, six years into Matthews' nine-year term, the Service conducted its review and decided that "there were no grounds to refer the matter to the Parole Board" (the "**Decision**"). In deciding not to refer Matthews' case to the Board pursuant to subsection 129(2) of the Act, the Service denied Khayat the opportunity to be heard specifically on the issue of Matthews' early release.

[23] In its report, the Service acknowledged Matthews' high risk of recidivism but did not find it likely he would commit an offence causing the death of or harm to another person within the remaining three years of his sentence at law.[23] The report focused on Matthews' potential abstention from drugs and very recent decrease in reported violent behaviour, despite his continued verbal threats.[24] Matthews' failure to complete violence control courses or attend his sessions with the prison psychologist were noted in the Service's report.[25] The Service was satisfied that Matthews intends to get his life on track due to what they perceived as a "desire for self-improvement and an openness to change."[26]

[24] Following this report, Khayat filed her application for judicial review of the Decision.[27]

1.5 The Parole Board's Hearing

[25] While the Parole Board was precluded from opposing Matthews' release as the case was not referred by the Service, it did comment on the case while imposing release conditions. The Board found the Decision to be "surprising" given Matthews' violent history.[28] In reviewing the release conditions, the Board heard from Khayat, who expressed her fears regarding Matthews' release.[29] Khayat had no such opportunity to speak to the Service.

[26] Having reviewed the case, the Board used its limited power to impose some conditions on Matthews' release.[30] The conditions include requirements for regular drug-testing, a strict 10:00 PM curfew, obligatory twice-weekly psychological consultations, and an order not to contact Khayat.[31]

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[23] *FC Decision, supra* note 2 at para 44.
[24] *Ibid* at para 44.
[25] *Ibid*.
[26] *Ibid*.
[27] *Ibid* at para 46.
[28] *Ibid* at para 47.
[29] *The Act*, *supra* note 1, s 140(10); *FC Decision*, *supra* note 2 at para 48.
[30] *The Act*, *supra* note 1, s 133(1) - (3.1); *FC Decision*, *supra* note 2 at para 47.
[31] *FC Decision, supra* note 2 at para 47.

2. Judicial History

2.1 The Federal Court's Decision Ordering Referral to the Board

[27] Khayat successfully appealed to the Federal Court for judicial review of the Decision. The Federal Court held in her favour, concluding:

1. that Khayat had standing to seek judicial review;[32]
2. that the Decision not to refer the case to the Board was unreasonable;[33]
3. that the scheme for statutory release jeopardized Khayat's right under section 7 of the *Canadian Charter of Rights and Freedoms*[34] (the "**Charter**") to life and security of person.[35]

[28] The court ordered that the Decision be set aside and that the Service refer the case to the Board.[36]

[29] On the issue of standing, Price J. found that Khayat had standing to bring an application for judicial review of the Decision because: (i) she was directly affected by the Decision and thus had private standing; (ii) even without private standing, she had public interest standing because to hold otherwise would immunize the Decision from review, as Matthews nor the Service would challenge it.[37]

[30] On the reasonableness of the Decision, the court found that the Decision was flawed because it failed to take important factors into consideration.[38] As examples, the court held that the Service ignored evidence of the threat that Matthews posed to Khayat and failed to give proper weight to the fact that Matthews had only been prevented from carrying out an attack on Khayat and others because of the actions of prison officials, not by his own initiative.[39]

[31] Furthermore, the court held that the Decision was non-discretionary on the part of the Service and is thus entitled only to ordinary reasonableness analysis.[40] The court thus decided that the Service, while possessing some latitude in assessing the factors contributing to release, operates within a prescriptive legislative structure that mandates referral of a case when there are reasonable grounds to believe that the offender is likely to commit an offence causing death or serious harm

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[32] *Ibid* at paras 55-56.
[33] *Ibid* at para 58.
[34] part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
[35] *FC Decision, supra* note 2 at para 71.
[36] Ibid at para 76.
[37] *Ibid* at paras 55-56.
[38] *Ibid* at para 59.
[39] *Ibid* at paras 60, 65.
[40] *Ibid* at para 63.

to another person before the expiration of the offender's sentence.[41] Because of this prescriptive mandate, the Decision could not be considered discretionary.

[32] The second issue concerned the constitutionality of the statutory release scheme. The court held that the legislative scheme "almost automatically" releases dangerous offenders into society.[42] The scheme thus endangers the lives of all Canadians, particularly in view of the Act's purpose to "contribute to the maintenance of a just, peaceful and safe society."[43] Without providing a detailed analysis, the court did not accept Khayat's argument that, in view of the danger to her life and security of person, there must exist a forum for her to be heard.[44]

2.2 The Federal Court of Appeal's Decision Ordering the Decision Reinstated

[33] The Queen in Right of Canada appealed the Federal Court decision to the Federal Court of Appeal. The Court ordered the Decision reinstated.[45]

[34] Dryden J.A., writing for the majority of the Federal Court of Appeal, allowed the appeal and held that the Decision was not unreasonable and that the legal test under section 7 of the *Charter* was not met.[46]

[35] Furthermore, Dryden J.A. held that Khayat did not have standing as she did not appear to be a direct party to the Decision, which did not give rise to judicial review as it did not affect her "rights."[47] Specifically, Dryden J.A. held that the Decision did not deny her a legal remedy to which she would otherwise be entitled, and that Khayat would then suffer no prejudice as any alleged prejudice would be hypothetical.[48]

[36] On the reasonableness of the Decision, Dryden J.A. held that the Federal Court's decision did not give adequate weight to the statutory release conditions imposed by the Service.[49] Plante J.A., concurring, added that the Service was not obliged to give reasons and deal with all arguments, including those arguments concerning Khayat's safety.[50] Further, Plante J.A. held that perfection cannot be expected, and that this was not an "exceptional circumstance" in which a reviewing court should disrupt factual findings.[51]

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[41] *Ibid* at para 64.
[42] *Ibid* at para 70.
[43] *Ibid* at para 72.
[44] *Ibid* at para 69.
[45] *Minister of Public Safety and Emergency Preparedness and Attorney General of Canada v Ramza Khayat*, 2021 FCA 1978, 2021 FCA 1979 at para 11 [*FCA Decision*].
[46] *Ibid*.
[47] *Ibid* at para 2.
[48] *Ibid* at paras 4-5.
[49] *Ibid* at para 6.
[50] *Ibid* at paras 14-15.
[51] *Ibid*.

[37] In dissent, Roy J.A. held that the decision of the lower court should stand, as Khayat would have direct and public interest standing.[52] Roy J.A. would have relaxed the test for public interest standing where, as here, the principle of legality is a consideration and access to justice issues are involved.[53] In assessing the reasonableness of the decision, Roy J.A. would have found the Decision unreasonable as the central issues were not addressed (although he did not specify which issues were central).[54] Further, Roy J.A. noted that the Service had a statutory obligation under s. 132(1)(d) of the Act to consider whether placing Matthews in a halfway house can achieve the goal of the Act.[55]

[38] On the second issue, Dryden J.A. held that Khayat had failed to establish a sufficient causal connection and a real, rather than speculative, link between the statutory release scheme and a limitation on her life or security of person.[56] In dissent, Roy J.A. would have found the scheme unconstitutional on the basis that it jeopardizes Khayat's safety and left her without a remedy, contrary to the principles of fundamental justice.[57]

[39] Roy J.A. would have confirmed the Federal Court's decision, setting aside the Decision and ordering the Service to refer the matter to the Board.[58]

PART III – OBJECTIONS TO JUDGMENT APPEALED FROM

[40] This appeal should be allowed for the following reasons:

1. The Federal Court of Appeal erred in concluding that Khayat did not have standing.
2. The Federal Court of Appeal erred in concluding that the scheme for statutory release was constitutional.
3. The Federal Court erred in rejecting an argument that the statutory scheme was procedurally unfair.
4. The Federal Court of Appeal erred in concluding that the Decision was reasonable or constitutional.
5. The Federal Court of Appeal exceeded the bounds of appellate review in its analysis of the Federal Court's decision.

[52] *Ibid* at para 19.
[53] *Ibid* at para 20.
[54] *Ibid* at para 21.
[55] *Ibid* at para 22.
[56] *Ibid* at para 10.
[57] *Ibid* at paras 23-24.
[58] *Ibid* at para 25.

PART IV – ARGUMENTS

1. Khayat Has Public and Private Standing Before This Court

[41] Khayat has standing to: (i) seek judicial review of the Decision and (ii) challenge the statutory scheme generally. The standard of appellate review on standing is correctness.[59]

1.1 The Purpose of the Law on Private and Public Standing Supports Khayat's Claim

[42] The purpose of the law on standing is to balance access to justice and scarce judicial resources.[60] The following principles influence the law: (i) the concern that innumerable suits may be filed by observers without stakes in disputes, jeopardizing access to the courts; (ii) ensuring that disputes are litigated by direct adversaries who have a personal stake and will thus litigate diligently and thoroughly; and (iii) ensuring that the courts resolve disputes that they have the institutional competence to resolve, and do not stray into non-justiciable issues.[61]

[43] Both concerning the Decision and the statutory scheme, Khayat is not a mere observer. Matthews' release clearly implicates Khayat's personal interests as it potentially jeopardizes Khayat's life and physical security, and certainly jeopardizes her psychological security. Khayat is the recipient of concrete and personal threats from Matthews.[62] She therefore has a direct interest in what is decided, an interest directly adverse to Matthews' desire to be released. Khayat's application addresses justiciable issues: whether she should have the right to be heard in order to prevent potential harm to herself occasioned by an administrative decision, and whether that

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[59] *Miner v Kings (County)*, 2018 NSCA 5 at para 23.
[60] *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at para 25 [*Downtown Eastside*].
[61] *Ibid* at para 25.
[62] *FC Decision, supra* note 2 at para 31.

administrative decision is legally and constitutionally sound. Finally, Khayat can maintain private and public interest standing simultaneously.[63]

1.2 Khayat Has Private Standing to Challenge the Decision

[44] Khayat meets the statutory requirement for private interest standing because she is "directly affected by the matter in respect of which relief is sought."[64] Standing is established where the conduct at issue affects legal rights, or imposes legal obligations, or causes prejudicial effects to the applicant.[65] The Decision does not impose legal obligations, but it plainly implicates Khayat's legal rights and causes her prejudicial effects. The prejudice of the threat to Khayat's life and security of the person is at issue here, as well as her constitutional right to life and security of person. Khayat is the recipient of particularized threats made by Matthews. Matthews' release engenders the possibility of physical harm and guarantees that Khayat will feel less secure. Khayat's opportunity to make submissions is not simply formalistic – the Service and Board would benefit from hearing her on the issue of release, as this would lead to a more informed decision.

[45] Khayat's claim is more direct than in other cases where private standing has been found, and it is distinct from cases in which courts have not found private standing; it engenders more than cultural and religious interests in protecting a religious symbol (where standing was found),[66] and it is not a case in which the statute has vested an agency with discretion that it chose not to exercise (where standing was not found).[67] The statute here commands the Service to do something that Khayat claims it did not do - refer to the Board. In summary, Khayat's situation clearly fits the

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[63] *Sierra Club of Canada v Canada (Minister of Finance)*, [1999] 2 FC 211 at para 32.
[64] *Federal Courts Act*, RSC 1985, c F-7, s 18.1(1).
[65] *Canada (Attorney General) v Democracy Watch*, 2020 FCA 69 at para 19.
[66] *Canadian Jewish Congress v Chosen People Ministries Inc* (2002) 214 DLR (4th) 553 (FC) at paras 4, 47.
[67] *Canada (Attorney General) v Democracy Watch*, 2020 FCA 69 at paras 26, 38 [*Democracy Watch*].

"directly affected" requirement due to the substantial impact of the Decision on her legal rights and prejudice to her.

1.3 Khayat Has Public Interest Standing to Challenge the Decision and the Statutory Scheme

[46] Khayat also meets the test for public interest standing for her challenge to the Decision and statutory scheme because she: (i) raises a serious justiciable issue; (ii) has a real stake or a genuine interest in it; and (iii) in the circumstances, the action is a reasonable and effective way to bring the issue before the courts.[68] These three factors are applied "purposively and flexibly."[69]

1.3.1 Khayat Advances a Serious Justiciable Issue

[47] This factor is automatically met where there is a "serious constitutional issue" or an "important [issue]."[70] Where the claim is "far from frivolous," the courts do not conduct more than a preliminary inquiry into the merits.[71] Courts have expressed this inquiry as: "whether the claim was so unlikely to succeed that its result would be seen as a foregone conclusion."[72] Khayat challenges the Decision and Act on constitutional, procedural fairness, and reasonableness grounds. Four judges have arrived at varying conclusions on the legal analysis and facts. Similar to *Downtown Eastside*, the Decision *could* have had an impact on the lives and security of person of a specific person as well as the community at large.[73] It is open to the Service and the Board, upon hearing Khayat's and other similarly situated submissions, to conclude that releasing Matthews is inappropriate at this time. In particular, Matthews' 1996 attempted murder of a police informant, 1993 illegal possession of controlled substances, and 2006 appropriation of a stolen car

[68] *Downtown Eastside*, *supra* note 60 at para 37.
[69] *Ibid* at para 37.
[70] *Ibid* at para 42.
[71] *Ibid*.
[72] *Ibid*.
[73] *Ibid* at para 3.

and pursuit of the proceeds of crime are all offences against the community, independent of Khayat. These instances represent part of Matthews' threat to the community, which is a serious matter subject to consideration by the Service and the Board.

[48] Moreover, the standard for the evaluation of this factor is purposeful and flexible – precedent counsels against exaggerated fears of redundant actions.[74] The Act's purpose must be considered in the context of Khayat's action[75] - to contribute to the maintenance of a just, peaceful and safe society.[76] Justice, peace, and safety, for Khayat and others, as well as complex administrative and constitutional law questions, are at the core of this action and are serious justiciable issues.

1.3.2 Khayat Has a Clear Stake and Genuine Interest

[49] Khayat's stake and interests are manifest:

1. her actions on the night of Matthews' attack were taken at great personal risk and likely saved the victim's life;[77]
2. her fortitude in giving her testimony despite threats from Matthews' criminal associates led directly to Matthews' conviction;[78]
3. she has been threatened multiple times by Matthews while he serves his sentence;[79]
4. she has been prevented from submissions to the Service.[80]

[74] *Ibid* at para 41.
[75] *Ibid*.
[76] *The Act*, *supra* note 1, s 100.
[77] *FC Decision*, *supra* note 2 at para 11.
[78] *Ibid* at para 14.
[79] *Ibid* at para 30.
[80] *Ibid* at para 40.

[50] The courts have confirmed public interest standing in much less direct stakes and interests. Indeed, under this factor, courts have repeatedly granted standing for litigants to challenge whole statutes, solely owing to a reputation for advocacy[81] or interest in an area.[82]

[51] At this stage of the analysis, the courts evaluate the "engagement" of the applicant in the controversy.[83] While Khayat has no history advocating for parole issues at the societal level, she has a long-established commitment to the public interest. Indeed, by virtue of her quick aid to Matthews' victim and steadfastness in testifying against him, her commitment to the broader goals of justice, the rule of law, and peace and safety, are established. In brief, Khayat's commitment to the public interest has spanned the history of this case.

1.3.3 Khayat's Action is the Only Reasonable and Effective Way to Bring the Issue Before the Courts

[52] It is clear that Khayat's action is the only reasonable and effective way to bring the issue before the courts as Matthews will not challenge a decision in his favour and the Minister opposes Khayat's application. An important policy justification underlying this factor is ensuring that government action is not immunized from court review,[84] as it would be if Khayat would be barred from bringing an action.[85] Courts have specifically held that a group will be accorded standing if the effect of denying it would be to immunize an action.[86]

[53] Also important under this factor is the courts' interest in ensuring that an action is genuinely in the public interest, with a view to ascertaining the impact upon the public if the action is not

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[81] *Canadian Council of Churches v Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 236 at para 39.
[82] *League for Human Rights of B'Nai Brith Canada v Canada*, 2010 FCA 307 at paras 58, 60 [*B'Nai Brith*].
[83] *Downtown Eastside*, *supra* note 60 at para 43.
[84] *Ibid* at para 31.
[85] *FC Decision*, *supra* note 2 at para 56.
[86] *B'Nai Brith*, *supra* note 82 at para 61.

allowed.[87] While the genesis of Khayat's action comes from her private interests, this case has broad public consequences as it will affect the ability of all victims of crime to be heard by the Service and the Board in the context of perpetrators of crime being granted early release.

2. The Decision Was Unreasonable

2.1 The Standard of Review of the Decision is Context-Sensitive Reasonableness

[54] The Decision is subject to a context-sensitive reasonableness analysis.[88] The Decision was unreasonable because: (i) the process was flawed as it ignored the Service's governing statute and procedures;[89] and (ii) the Decision does not exhibit the "requisite degree of justification, intelligibility and transparency" leading to the outcome reached.[90]

2.1.1 The Process Was Flawed and The Decision Conflicted with the Prescriptive Governing Statute and Service Procedures

[55] This process clearly involved three defects that, individually and taken together, amount to unreasonableness: omitting analysis on large parts of statutory requirements,[91] ignoring central issues,[92] and misapprehending evidence.[93]

(i) The Service Ignored the Statute and Central Issues

[56] In assessing reasonableness, courts consider the administrative decision-maker's compliance with its own policies and procedures, as well as the statutory context.[94] The Service's departure from the mandatory statutory requirements was significant. The Service is obliged to assess

[87] *Downtown Eastside*, *supra* note 60 at para 51.
[88] *Canada (Minister of Citizenship and Immigration v Vavilov*, 2019 SCC 65 at paras 17, 40 [*Vavliov*].
[89] *Ibid* at para 83.
[90] *Ibid* at para 81.
[91] *Ibid* at paras 109-110.
[92] *Ibid* at para 100.
[93] *Ibid* at para 126.
[94] *Ibid* at para 94.

whether "there are reasonable grounds to conclude that the offender is likely to commit an offence causing death or serious harm to another person before the expiration of the offender's sentence according to law" and thus whether the case should be referred to the Board.[95] To make this assessment, subsection 132(1) of the Act mandates consideration of several factors, which the Service did not analyze adequately (or at all) in this case,[96] namely:

1. Matthews' "pattern of persistent violent behaviour" including the offences Matthews committed in the past, although the Service did comment on future violence;[97]
2. the "seriousness of the offences" for which Matthews was sentenced (including offences committed while a member of an organized crime group);[98]
3. his difficulty controlling "violent impulses": the Service only noted a decrease in violent behaviour in the final 12 months during incarceration;[99]
4. his previous "use of weapons" in the commission of past offences, such as the 2014 stabbing and the 1996 attempted murder;[100]
5. the threats of violence he issued against Khayat (it appears to have only considered threats he issued against guards and other inmates);[101]
6. the "brutal nature" associated with the commission of his past offences, for example his shooting of a victim in 1996 multiple times, at close range and in a public place;[102]

[95] *The Act*, *supra* note 1, s 132(1).
[96] *FC Decision*, *supra* note 2 at para 44.
[97] *The Act*, *supra* note 1, s 132(1)(a).
[98] *FC Decision*, *supra* note 2 at paras 10-13.
[99] *The Act*, *supra* note 1, s 132(1)(a).
[100] *Ibid*.
[101] *Ibid*.
[102] *Ibid*.

7. his "substantial degree of indifference" as to the consequences of his behaviour as it relates to others, particularly the victims of his previous offences and Khayat; and[103]
8. consideration of evidence from the prison psychologist regarding Matthews' likelihood to commit another offence causing death or serious harm,[104] which included his idealization of famous criminals, his wish to be "a feared and famous criminal,"[105] and his "obsession with Khayat" including the threats to Khayat expressed to the psychologist.[106]

[57] While omitting analysis does not automatically lead to an unreasonable decision, "a decision maker's failure to meaningfully grapple with key issues or central arguments" would make a decision unreasonable.[107] In this case, the Service's marked departure from the statutory requirements was a central defect and thus omitting the analysis above demonstrated that the Decision was unreasonable.

(ii) The Service's Disregard of Statutory Requirements is Compounded by Disregard of Service Procedures

[58] The Federal Court rightly noted that the Service's own directives are binding on it,[108] and the law on reasonableness supports this.[109] The directives mirror s. 132(1) of the Act, and thus compound the Service's error of failing to fully consider the s. 132(1) factors.[110]

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[103] *Ibid*.
[104] *Ibid*.
[105] *FC Decision, supra* note 2 at para 19.
[106] *Ibid* at para 30.
[107] *Vavilov, supra* note 88 at para 128.
[108] *FC Decision, supra* note 2 at para 39.
[109] *Vavilov, supra* note 88 at para 94.
[110] Correctional Services of Canada, Commissioner's Directive No 712-2, "Detention" (23 April 2015) at Annex D [*The Directive*].

(iii) The Service Misapprehended Evidence

[59] The Service was also compelled to consider "reliable information compelling the conclusion that the offender is planning to commit an offence causing the death of or serious harm to another person before the expiration of the offender's sentence."[111] In conducting its assessment, the Service did not properly consider this information, and misapprehended the evidence that it did consider. First, it decided only to consider whether Matthews has acted on his violent threats *while incarcerated*,[112] not analyzing what he might do *if released,* as the statute requires. As Price J. noted, this is significant as prison officials have repeatedly been required to control Matthews because they believe him to be capable of violence - it could simply be that these controls have successfully prevented violence, not that Matthews has a reduced propensity to be violent.[113] The conclusion that he did not follow-through on threats in prison being tantamount to establishing that he would not follow-through on threats when released is thus a misapprehension of the evidence.[114]

[60] Second, the Service considered Matthews' drug consumption, although there is no evidence for its conclusion that these problems "appear to be behind [Matthews]" - this is too strong of a conclusion to draw from the record, which shows that no drug-related incidents were recorded by prison guards.[115] It is a misapprehension to conclude that an absence of evidence of drug abuse means that Matthews no longer struggles with drug abuse.

[61] Third, it also concluded that there was a "marked decrease" of violent behaviour in custody, yet Matthews was placed in solitary confinement eight times due to fears by officials that he may

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[111] *The Act*, supra note 1, s 132(1)(c).
[112] *FC Decision*, *supra* note 2 para 44.
[113] *Ibid* at para 60.
[114] *Ibid* at para 44.
[115] *Ibid* at paras 44, 25.

harm others, as recently as July 2020.[116] In view of this, there is no consideration of the sustainability of Matthews alleged new non-violent disposition, including whether he continues to be a member of an organized crime group that may force the commission of violent offences upon release as a condition of membership.

[62] Finally, the report focussed on Matthews' self-expressed desire for improvement and openness to change,[117] his enrollment in a violence control course which he did not complete,[118] his unspecified "progress" with the prison psychologist, and his release plan.[119] None of these points are established with reference to specific evidence (for example, a report from the violence course, Dr. Salming's opinion, or specific analysis of the release plan).

[63] Briefly, throughout its analysis the Service drew unsupported conclusions based on misapprehended evidence, which lead to a finding of unreasonableness.[120]

2.1.2 The Decision's Analysis Does Not Reasonably Lead to Its Conclusion

[64] While Khayat acknowledges that a decision need not be perfect and all-encompassing, a decision is only reasonable when it "is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and law that constrain the decision maker."[121]

[65] The Decision's unreasonable analysis is most evident in the following conclusions: first, the Service acknowledges that Matthews "still poses a high risk of recidivism," yet states without support that it was not "convinced that he will commit an offence causing death or serious harm to another person."[122] This is unreasonable because the conclusion is not justifiable as the Service

[116] *Ibid* at para 29.
[117] *Ibid* at para 44.
[118] *Ibid*.
[119] *Ibid*.
[120] *Vavilov, supra* note 88 at paras 100-102, 126.
[121] *Vavilov, supra* note 88 at para 85.
[122] *FC Decision, supra* note 2 at para 44.

gives no reasons as to why it believes that Matthews' next offence is not likely to be one that causes death or serious harm. Second, while the Service later mentions Matthews' enrolment in and subsequent failure to complete violence control courses, as well as a new "desire for self-improvement and openness to change,"[123] it does not mention how any of these factors support its conclusion about Matthews' propensity to commit an offence occasioning death or serious harm. The Service did not follow its own directives to base its conclusions on "reasonable grounds," meaning objectively clear and verifiable facts that are "related to and supporting a conclusion of suspicion or belief."[124]

3. The Federal Court of Appeal Impermissibly Exceeded the Bounds of Appellate Review

[66] On appellate review, where the original dispute arose as part of an administrative decision, the only question for the appeals court in analyzing the administrative decision is whether the reviewing court chose the right standard of review and applied it correctly.[125] The Federal Court of Appeal ("the **FCA**") went much further than that – while agreeing with Price J. that the standard was reasonableness, it did not address her application of the reasonableness standard. Instead, it conducted a *de novo* review of the Decision, concluding that it was reasonable by substituting its own reasons. This is not permitted under judicial review.[126]

[67] The FCA decision noted that Price J. assumed the statutory release conditions were "meaningless and ineffective" and that this conclusion should not have been reached because "no evidence was brought to that effect and a release with conditions is not akin to complete freedom."[127] The court also went on to add that *it* sees no reason that Matthews will not abide by

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[123] *Ibid*.
[124] *The Directive*, *supra* note 110 at Annex A.
[125] *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 559 at para 45.
[126] *Delta Air Lines Inc v Lukács*, 2018 SCC 2 at para 24.
[127] *FCA Decision*, *supra* note 45 at para 6.

his conditions,[128] emphasizing the truly *de novo* review it conducted – neither Price J. nor the Service made this conclusion.

[68] The FCA thus did not analyze Khayat's challenge to the reasonableness of the Decision with the appropriate appellate standard. Respectfully, its review is poisoned by this error, and it further justifies restoring the Federal Court's judgement relating to reasonableness.

4. The Threshold to Oppose Statutory Release is Unconstitutional

[69] In addition to the Decision being unreasonable, it was made pursuant to an unconstitutional statutory scheme and led to a result which infringes on Khayat's *Charter* rights.

4.1 The Threshold to Oppose Statutory Release Engages the Right to Life and Security of the Person

[70] The Federal Court was correct in finding the sections regarding statutory release in the Act engage s.7 of the *Charter* as they endanger the life safety of all Canadians by setting a threshold to oppose statutory release which is too high.[129] Requiring that an offender be likely to commit an offence causing the death of or serious harm to another person before the expiration of their sentence[130] "almost automatically" releases offenders who pose a danger to the life and security of others.[131]

4.1.1 Matthews' Early Release Poses a Threat to Khayat's Life and to her Physical and Psychological Security

(i) Life

[71] Matthews' early release increases Khayat's risk of death. The right to life is engaged by a threat of death "where the law or state action imposes death or an increased risk of death on a

[128] *Ibid* at para 7.
[129] *FC Decision*, *supra* note 2 at para 71.
[130] *The Act*, *supra* note 1, ss 129(3), 130(3), 132(1)(a).
[131] *FC Decision*, *supra* note 2 at para 70.

person, either directly or indirectly."[132] By setting the threshold required to oppose statutory release too high, the state increases the risk that an offender is granted conditional release and causes the death of another person.

[72] Specifically, Matthews has a criminal history encompassing numerous incidences of violence, including offences committed while on conditional release.[133] This is in addition to clear threats effected by Matthews against Khayat and her family prior to her testimony at his trial, as well as throughout his incarceration.[134]

(ii) Security of the Person: Physical Harm

[73] The threat to Khayat's safety is made evident by Matthews' repeated and clear intentions to physically harm her once he is given the opportunity to "pay her a visit" [135] Security of the person encompasses freedom from the threat of physical suffering.[136] Matthews' history of violence includes two convictions for assault,[137] and one conviction for aggravated assault.[138] His actions seriously affected his victims, leaving at least one with permanent limitations and constant pain.[139] The Board, in exercising its limited powers, imposed conditions on Matthews' release.[140] However, this does not negate the risk posed to Khayat's life and physical security as Matthews has a history of almost immediately breaching the conditions of early release.[141]

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[132] *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 62 [*Carter*].
[133] *FC Decision*, *supra* note 2 at paras 18, 22.
[134] *Ibid* at paras 13, 30.
[135] *Ibid* at para 30.
[136] *Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177 at 207 [*Singh*].
[137] *FC Decision*, *supra* note 2 at para 18.
[138] *Ibid* at paras 10, 14.
[139] *Ibid* at para 11.
[140] *Ibid* at para 47.
[141] *Ibid* at para 22.

[74] Matthews will be released regardless of the threat he poses at the end of his sentence.[142] However, the decision to allow Matthews' early release would realize this risk three years sooner, making the threat more immediate. Further, Matthews' drug use, identified by four psychologists as a factor contributing to his "criminality," has only potentially declined while he has been incarcerated.[143] Without strict limits on his freedom Matthews is likely to be tempted to resume his drug use, as observed in previous breaches of the conditions of his early release.[144] Incarceration has been the "firm push to do the right thing" which Dr. Salming's notes suggest Matthews needs to begin his "crime free" life.[145] The threat Matthews presents to Khayat's life and security may thus be mitigated with the benefit of three additional years of incarceration.

[75] As it stands, Matthews cannot be considered consistent and committed to the improvements he has only begun to make, and still poses a significant threat to Khayat's life and security. He has twice started and failed to complete violence control programs,[146] and continues to require solitary confinement due to concerns that he will harm guards or fellow inmates.[147]

(iii) Security of the Person: Psychological Harm

[76] The right to security of the person also encompasses freedom from serious psychological suffering.[148] Releasing Matthews while he still poses a significant threat to Khayat and her family would result in psychological harm to Khayat which goes beyond ordinary stress or anxiety.[149]

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[142] *FCA Decision*, *supra* note 45 at para 5.
[143] *FC Decision*, *supra* note 2 at paras 24, 25.
[144] *Ibid* at para 27.
[145] *Ibid*.
[146] *Ibid* at para 26.
[147] *Ibid* at para 29.
[148] *Carter*, *supra* note 132 at para 64.
[149] *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46 at para 59,60 [*G(J)*]; *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 at para 123.

The psychological stress Khayat would suffer includes not only a concern for her own life and security, but also for her family, whom Matthews has threatened to harm in the past.[150]

4.2 There is Sufficient Causal Connection Between Matthews' Release and the Threat to Khayat's Life and Security of the Person

[77] The "sufficient causal connection" standard in the s. 7 analysis is a flexible one, requiring a connection between the state-caused effect and the prejudice suffered by the claimant.[151] This standard does not require the government's actions to be the only or dominant cause.[152] The standard is meant to represent a fair and workable threshold for claimants, and should not be so restrictive as to risk the exclusion of meritorious claims.[153]

[78] It can be reasonably inferred on a balance of probabilities that Matthews' release, pursuant to the application of the statutory scheme by the Service, will cause Khayat serious psychological stress and place her life and physical security in great jeopardy.[154] This inference is drawn on the evidence of Matthews' history of violence[155] and non-compliance with the conditions of early release.[156] It has also been observed that while incarcerated Matthews has developed an "obsession with Khayat," and has made express threats where he reveals his vengeful intentions for her once released.[157]

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[150] *FC Decision*, *supra* note 2 at para 13.
[151] *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 75 [*Bedford*].
[152] *Ibid* at para 76; *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 68.
[153] *Bedford*, *supra* note 151 at para 78.
[154] *Ibid* at para 76.
[155] *FC Decision*, *supra* note 2 at para 18.
[156] *Ibid* at para 22.
[157] *Ibid* at para 30.

4.3 The Threat to Life and Security of The Person is Not in Accordance with the Principles of Fundamental Justice Because it is Arbitrary and Grossly Disproportionate

[79] Matthews' early release results in a threat to Khayat's life and security which is arbitrary to the purpose of conditional release, and grossly disproportionate in its effects. Thus his release contravenes well-accepted principles of fundamental justice.[158] The principle of fundamental justice against arbitrariness requires that there be a "rational connection between the object of the law and the limit it imposes" on s.7 rights.[159] In order for the threshold to oppose statutory release to be in accordance with this principle, it must be consistent with the purpose of the statutory release and be capable of fulfilling its objective.[160]

[80] Part II of the Act provides that the "purpose of conditional release is to contribute to the maintenance of a just, peaceful and safe society" by making decisions on early release which also facilitate rehabilitation and reintegration of offenders into society.[161] If there is any ambiguity in the Act it will "operate in favour of the public interest rather than in the interest of the offender."[162] The Act further qualifies this purpose by noting that "the protection of society is the paramount consideration" in the determination of any case."[163] While a guiding principle of the Act is that decision-makers should seek the "least restrictive determination," this is limited by the requirement that the decision be nonetheless "consistent with the protection of society."[164]

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[158] *Bedford, supra* note 151 at para 97.
[159] *Carter, supra* note 132 at para 83, citing *Bedford, supra* note 151 at para 111.
[160] *Carter, supra* note 132 at para 83.
[161] *The Act, supra* note 1, s 100.
[162] *Cartier v Canada (Attorney General)*, 2002 FCA 384 at para 19.
[163] *The Act, supra* note 1, s.100.1.
[164] *Ibid*, s 101(c).

The early release of offenders like Matthews, while they still pose a serious threat to the life and security of others, not only fails to achieve the Act's purpose of protecting society but undermines this objective by introducing a new risk.

[81] The principle of gross disproportionality is infringed "if the impact of the restriction on the individual's life, liberty, or security of the person is grossly disproportionate to the object of the measure."[165] The onerous threshold to oppose statutory release is the result of an effort to promote minimally restrictive determinations.[166] However, it has been established that the paramount consideration of conditional release is the protection of society. The risk that Matthews' early release will pose to Khayat's life and security of the person blatantly outweighs the object of being minimally restrictive to the offender.

4.4 The Threshold is Not Saved by S.1

[82] The onerous threshold to oppose early release is not demonstrably justified as it is not rationally connected to the purpose of protecting society, minimally impairing in achieving the rehabilitation and reintegration of offenders into society, or proportionate in its overall effects.[167] Generally, the rights protected by s.7 are "not easily overridden by competing social interests."[168]

[83] As identified in the s.7 analysis of the principles of fundamental justice, the object of conditional release is to maintain a just, peaceful and safe society by facilitating the rehabilitation of offenders, *always* subject to the protection of society.[169] The early release of an offender into society while they pose a threat to the life and security of others cannot be rationally connected to

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[165] *Carter*, *supra* note 132 at para 89.
[166] *The Act*, *supra* note 1, s 101.
[167] *R v Oakes*, [1986] 1 SCR 103 at 139 [*Oakes*].
[168] *Carter*, *supra* note 132 at para 95, citing *Charkaoui v Canada Citizenship and Immigration*, 2007 SCC 9 at para 66; *G(J)*, *supra* note 149 at para 99, citing *Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at 518. [*BC Motor*].
[169] *The Act*, *supra* note 1, s 100.

the purpose of maintaining a just, peaceful, and safe society.[170] In order to be rationally connected, a limit on s.7 rights must not be "arbitrary, unfair, or based on irrational considerations."[171] A threshold which almost automatically releases dangerous offenders is therefore inconsistent with this purpose.

[84] The reintegration and rehabilitation of offenders does not require, at a minimum, that they be almost automatically granted early release. Minimal impairment requires that the means taken impair s.7 rights "as little as possible."[172] A lower statutory threshold would achieve the standard of minimal impairment as it would allow the Service to oppose the release of a dangerous offender such as Matthews, without capturing those who do not pose a threat to the life and safety of others.

[85] There must exist a balance between the salutary benefits resulting from a measure and its deleterious effects on fundamental rights and freedoms.[173] Here, an effort to rehabilitate and reintegrate Matthews by introducing a risk to the life and security of others is clearly disproportionate in its effects. This much is implied within the stated purpose of conditional release, which qualifies the objective of rehabilitation and reintegration with the requirement that the protection of society be the paramount consideration.[174]

5. Even if the Threshold is Constitutional, The Decision is Not

5.1 The Charter Applies to the Decision

[86] The Decision may be challenged on *Charter* grounds as it was made by the Service, a delegated decision maker with statutory authority to decide on issues of early release.[175] Being a

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[170] *Ibid*, ss 100, 100.1
[171] *Oakes*, *supra* note 167 at 139.
[172] *Ibid* at 139, citing *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 352.
[173] *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 at 887-888.
[174] *The Act*, *supra* note 1, s 110.1.
[175] *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 625 at paras 20, 21 [*Eldridge*]; *Godbout v Longueuil (City)*, [1997] 3 SCR 844 at para 48 [*Godbout*].

delegated decision maker, the Service can be considered a government entity which carries out governmental activities and mandates.[176]

5.2 The Decision Engages the Right to Life and Security of the Person

[87] Section 7 of "the *Charter* may be infringed, not by the legislation itself, but by the actions of a delegated decision-maker in applying it"[177] as the *Charter* "applies to action taken under statutory authority."[178] The decision the Service took and its latitude in applying s.132(1) engaged Khayat's right to life and security of the person. In weighing the provision's enumerated considerations, the Service should have come to the decision that Matthews was likely to cause the death of or harm to Khayat.

[88] As previously established, Matthews has exhibited a pattern of persistent violent behaviour.[179] This is made evident by his numerous convictions for assault, aggravated assault, and attempted murder;[180] the seriousness of the offences which caused permanent limitations and constant pain to his victims;[181] his difficulties in controlling his violent impulses to the point of endangering others;[182] his use of a weapon in both an attempted murder and aggravated assault;[183] the brutal nature of the aggravated assault in which he stabbed a woman twice in the back;[184] and the numerous threats of violence made against Khayat, guards, and other inmates.[185]

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[176] *Eldridge*, *supra* note 175 at para 44; *Godbout*, *supra* note 175 at para 47.
[177] *Eldridge*, *supra* note 175 at para 20.
[178] *Ibid* at para 21.
[179] *The Act*, *supra* note 1, ss 132(1)(a)(i)-(vii).
[180] *FC Decision*, *supra* note 2 at paras 14, 18.
[181] *Ibid* at para 11.
[182] *Ibid*.
[183] *Ibid* at paras 10, 20.
[184] *Ibid* at para 10.
[185] *Ibid* at paras 13, 29-31.

[89] As per s.132(1)(c) of the Act, the Service was required to consider reliable information that Matthews is planning to commit an offence causing death or serious harm to another person. Throughout Matthews' prison term it was observed by his psychologist, Dr. Salming, that he is obsessed with Khayat and has even directly threatened her life and physical safety through written messages sent to her.[186]

[90] While the Service was required to consider the availability of supervision programs, such as those implemented in the conditions imposed by the Board, it was also required to consider how effective such programs would be. "Availability" in s.132(1)(d) of the Act cannot be taken to mean the mere existence of a program, regardless of its ability to mitigate the risks an offender poses to the life and security of others. Such an interpretation would nullify the practical implications of this consideration. Therefore, while certain supervision programs may exist and be ordered as a condition of release, Matthews' history of non-compliance and immediate breach of these conditions should have suggested to the Service that they would be ineffectual and therefore "unavailable" within the meaning of s.132(1)(d).

[91] As previously established, there is a sufficient causal connection between Matthews' release and the threat to Khayat's life and security of the person. Granting Matthews early release is contrary to the principles of fundamental justice against arbitrariness and gross disproportionality, resulting in an infringement which is not saved by section 1.

6. The Scheme for Statutory Release is Procedurally Unfair

6.1 The Statutory Scheme Denies Khayat Participatory Rights Required by The Duty of Procedural Fairness

[186] *Ibid* at para 30.

[92] The procedure undertaken by the Service in coming to its decision not to oppose statutory release nor refer the case to the Board did not provide Khayat an opportunity to be heard as required by procedural fairness. The principles of fundamental justice are both substantive and procedural in nature.[187] The procedural principles of fundamental justice "demand, at a minimum, compliance with the common law requirements of procedural fairness.[188] The duty of procedural fairness is not limited to judicial or quasi-judicial decisions but includes administrative decisions.[189] "The fact that a decision is administrative and affects 'the rights, privileges, or interests of an individual' is sufficient to trigger the application of the duty of fairness."[190]

[93] While the Board had the benefit of Khayat's testimony, it was limited in its power and restricted from opposing statutory release. Therefore, the scheme results in Khayat being denied an opportunity to be heard by the *ultimate decision-maker*. It is in this context and without the benefit of Khayat's testimony that the Service made a decision guaranteeing Matthews' early release. As previously established, this decision poses significant risk to Khayat's life and security of the person.

6.1.1 The Duty of Procedural Fairness Required a High Level of Procedural Protection

[94] The Supreme Court of Canada in *Baker* set out five factors which determine the contents of a duty of procedural fairness:

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[187] *BC Motor, supra* note 168 at 498-499.
[188] *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 113 [*Suresh*], citing *Singh*, *supra* note 136 at 212-213.
[189] *Nicholson v Haldimand-Norfolk Regional Police Commissioners*, [1979] 1 SCR 311 at 325-326; *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643 at para 14 [*Cardinal*]; *Knight v Indian Head School Division No 19*, [1990] 1 SCR 653 at 669.
[190] *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 20 [*Baker*], citing *Cardinal*, *supra* note 189 at 653.

(i) The Decision and the Process Followed Are Judicial in Nature

[95] The nature of the issue to be determined is of great importance to affected individuals such as Khayat, giving the decision judicial character.[191] The process of coming to a decision to allow or oppose statutory release also bears resemblance to judicial proceedings. The Service has the latitude to make a decision based on its own risk assessment in light of Matthews' past actions, the present dangers he poses to others, as well as his predicted future behaviour.[192] It is a hearing of an investigative nature which, though it allows for some subjectivity, does not amount to discretion within the legal meaning of the word.[193]

(ii) The Role of The Decision Within the Statutory Scheme is Determinative of the Issue

[96] Greater procedural protections are required when a decision is determinative of the issue.[194] Per the statutory scheme, the Service may decide not to oppose early release nor refer the case to the Board.[195] This clearly makes the Decision final. While the Board may impose conditions on release,[196] it restricted from opposing early release altogether given a lack of referral.[197]

(iii) The Decision is Highly Important to Khayat, Implicating Her Life and Security

[97] A decision made by the Service is of great importance to Khayat, requiring stringent procedural protections in the process of determination. It was held in *Kane v Board of Governors of the University of British Columbia* that a risk to one's employment or profession is great enough

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[191] *Baker*, *supra* note 190 at para 25, citing *R v Higher Education Funding Council, ex parte Institute of Dental Surgery*, [1994] 1 All ER 561 (QB) at 667.
[192] *Suresh*, *supra* note 188 at para 116.
[193] *FC Decision*, *supra* note 2 at para 64.
[194] *Baker*, *supra* note 190 at para 24.
[195] *FC Decision*, *supra* note 2 at para 47; *The Act*, *supra* note 1, s 129(2).
[196] *The Act*, *supra* note 1, ss 133(1)-(3.1).
[197] *FC Decision*, *supra* note 2 at para 38; *The Act*, *supra* note 1, s 129(2).

to attract a high standard of justice.[198] A risk to one's life and security of the person must therefore require the greatest procedural protection possible. As was held in *Suresh*, the "greater the effect on the life of the individual by the decision, the greater the need for procedural protections to meet the common law duty of fairness and the requirements of fundamental justice."[199]

(iv) Khayat has a Legitimate Expectation That Dangerous Offenders Will Not Be Granted Early Release

[98] Legitimate expectations can arise both in relation to procedure and outcome.[200] Khayat's expectation, that offenders who still pose a threat to her life and security as a Canadian citizen will not be granted early release, arises from what the Act described as the dominant consideration of conditional release: the protection of society.[201] While the doctrine of legitimate expectations does not lead to substantive rights to an outcome outside of the procedural domain, it does make the Service's contravention of a substantive promise, without according significant procedural rights to Khayat, patently unfair.[202]

(v) The Statutory Scheme is Prescriptive and the Constitutional Infringement Mandates Elevated Procedural Protection

[99] The Act leaves little room for the Service to make procedural choices,[203] but still grants the Service latitude in its application of the relevant factors for detention reviews.[204] However, any need for deference to such latitude is outweighed when reconciled with the "elevated level of procedural protections mandated by the serious situation" of affected persons such as Khayat.[205]

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[198] *Baker*, *supra* note 190 at para 25, citing *Kane v Board of Governors of the University of British Columbia*, [1980] 1 SCR 1105 at 1113.
[199] *Suresh*, *supra* note 188 at para 118.
[200] *Baker*, *supra* note 190 at para 26.
[201] *The Act*, *supra* note 1, s 100.1.
[202] *Baker*, *supra* note 190 at para 26.
[203] *Ibid* at para 27.
[204] *The Act*, *supra* note 1, s 132(1).
[205] *Suresh*, *supra* note 188 at para 120.

6.1.2 The Protections Required by The Duty of Procedural Fairness Include an Oral Hearing

[100] A full oral hearing would have allowed the Service to make an informed decision which does not infringe on Khayat's life and security of the person. Effective participation of affected persons at the hearing of offenders who pose a danger to their life and security is essential in determining whether a case for statutory release should be opposed.[206]

[101] Khayat was only heard by a Board which was stripped of its powers to oppose statutory release. Limiting Khayat's participatory rights in such a manner contravenes the principle of procedural fairness which provides "that the individual ... should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision."[207] The duty owed to Khayat encompassed far greater procedural protections than she was afforded.

6.2 The Statutory Scheme is Not Saved by S.1

[102] The purpose of the scheme is to facilitate decisions on the conditional release of offenders which "maintains a just, peaceful and safe society"[208] through a process of "effectiveness and openness" and the "timely exchange of relevant information."[209]

[103] Denying Khayat a right to be heard is inconsistent with, and therefore lacks rational connection to[210] the dominant purpose of conditional release: protecting society.[211] The Service cannot make fully informed decisions which promote a peaceful and safe society if it does not hear

[206] *G(J), supra* note 149 at para 73.
[207] *Baker, supra* note 190 at para 28.
[208] *The Act, supra* note 1, s 100.
[209] *Ibid*, s 101(b).
[210] *Oakes, supra* note 167 at 139.
[211] *The Act, supra* note 1, ss 100, 100.1.

evidence which indicates that an offender continues to present a risk to the life and security of others.

[104] While hearing from fewer sources may expedite the Service's decision-making process, such efficiency does not require, at a minimum, that seriously affected parties be denied a right to be heard. Efficiencies gained by denying Khayat a right to be heard are vastly outweighed by deleterious effects resulting from a lack of procedural fairness in a process which has serious ramifications on her life and security of the person. Any salutary benefits are comparatively negligible to this consequence.[212]

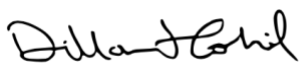
[105] Matthews' release is a danger which hangs over Khayat. It is the Decision in this case that moves the danger nearer to her. It does so unreasonably and unconstitutionally, and Khayat has standing to address it.

PART V – ORDER SOUGHT AND NAME OF COUNSEL

[106] The Appellant requests that the Canadian Court of Justice:

> **ALLOW** the appeal of the Appellant;
> **DECLARE** the sections of the Act regarding statutory release (ss. 129(3), 130(3)(a)-(c), 132(1)(a)) inoperative;
> **SET ASIDE** the Decision allowing for Matthews' statutory release;
> **REMIT** the matter back to the Service for reconsideration with an order that Khayat be granted the right to make oral representations;
> **WITH COSTS** throughout.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of January, 2022



Dillon Gohil
Counsel #1 for the Appellant

Roula Khairalla
Counsel #2 for the Appellant

[212] *Oakes*, *supra* note 167 at 139.

APPENDIX A – LIST OF AUTHORITIES

1. Legislation

Canadian Charter of Rights and Freedoms, part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

Corrections and Conditional Release Act, SC 1992, c 20.

2. Government Documents

Correctional Services of Canada, Commissioner's Directive No 712-2, "Detention" (23 April 2015) at Annex D.

3. Jurisprudence

Agraira v Canada (Public Safety and Emergency Preparedness), 2013 SCC 559.

Baker v Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817.

Blencoe v British Columbia (Human Rights Commission), 2000 SCC 44.

Canada (Attorney General) v Bedford, 2013 SCC 72.

Canada (Attorney General) v Democracy Watch, 2020 FCA 69.

Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society, 2012 SCC 45.

Canada (Minister of Citizenship and Immigration v Vavilov, 2019 SCC 65.

Canadian Council of Churches v Canada (Minister of Employment and Immigration), [1992] 1 SCR 236.

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Rodriguez v British Columbia (Attorney General), [1993] 3 SCR 519.

R v Big M Drug Mart Ltd, [1985] 1 SCR 295.

R v Morgentaler, [1988] 1 SCR 30.

R v Oakes, [1986] 1 SCR 103.

Sierra Club of Canada v Canada (Minister of Finance), [1999] 2 FC 211.

Singh v Minister of Employment and Immigration, [1985] 1 SCR 177.

Suresh v Canada (Minister of Citizenship and Immigration), 2002 SCC 1.