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

RESPONDENT'S FACTUM

SCHOOL 2

PART I – OVERVIEW

[1] The Government of Canada seeks to contribute to the maintenance of a just, peaceful, and safe society by encouraging the gradual release of previous offenders into society. In the case of Matthews, the Correctional Service of Canada ("the Service"/ "le Service") rendered a decision on the timing of Matthew's release that best aligns with these goals.

1. Standing

[2] Khayat has no legal standing to bring these issues to the courts. While Khayat may have a personal interest in these issues, Khayat fails to demonstrate that she meets the legal test for private or public interest standing. The Federal Court of Appeal correctly found that Khayat has no legal standing to bring an application for judicial review of the Commissioner of Correctional Service of Canada's decision ("the Decision"/ "la Décision") or to challenge the statutory release scheme ("the Scheme"/ "le Régime", s. 129 through s. 132) of the *Corrections and Conditional Release Act* ("the *Act*"/ "la *Loi*").[1]

2. Reasonableness

[3] Reasonableness is the applicable standard of review of the Service's decision, as held by both the Federal Court and the Federal Court of Appeal. The Service reasonably interpreted the governing statutory framework. The Service also provided coherent reasoning for its decision, particularly in light of the legal and factual constraints.

3. Procedural Fairness

[4] The Scheme is procedurally fair. The discretional nature of the decision requires less procedural protection. As a result, oral hearings at both the Service *and* Board review stage are not required. Khayat's right to be heard was fulfilled through the oral hearing at the Parole Board ("The Board/ la Commission") stage.

4. Constitutionality

[5] The Scheme is constitutional. Khayat's s. 7 rights under the *Canadian Charter of Rights and Freedoms*[2] are not violated as she fails to establish on a balance of probabilities that there is sufficient causal connection between the Scheme and the harm suffered. Alternatively, even if Khayat's s. 7 rights are violated, the Scheme is saved under s. 1 as it is rationally connected, minimally impairing, and proportional.

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[1] SC 1992, c 20 [*The Act*].
[2] part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

5. Remedy Sought

[6] This appeal should be dismissed.

PART II – STATEMENT OF FACTS AND JUDICIAL HISTORY

1. Facts

1.1 The Corrections and Conditional Release Act

[7] The Act governs the supervision of offenders serving a sentence of 2 years or more. Under s. 3 of the Act,[3] the purpose of the federal correction system as well as the Act is cited as the "maintenance of a just, peaceful, and safe society" through safe and humane custody and supervision of offenders as well as assisting their rehabilitation and reintegration into the community as law-abiding citizens. In short, the Act's purpose aims to both protect society at large as well as to promote the rehabilitation of offenders.

[8] Under the Act, an offender is eligible for full parole after serving one third of their sentence, and statutory release after serving two thirds of their sentence. Presently, the statutory regime (ss. 129 through 132) is the scheme in contention.

[9] Where an offender is serving a sentence of two years or more for offences set out in Schedule I or II under the Act, the offender's case must be reviewed by the Service.[4] This includes aggravated assault. Where the Service is of the opinion that the offender is likely to commit an offence causing death or serious harm to another person before the expiration of the sentence, they are to refer the case to the Board. S. 132 expands on relevant factors that the Service may take into consideration. It should be noted that factors (i)-(vii) are not exhaustive, [5] and the Service may take into account any factor relevant in determining the likelihood of the commission of such offences. If the Service does not make a referral, the Board may impose conditions on statutory release, but may not interfere with the Service's decision.

[10] The Appellant stresses that if the Service does not refer a matter to the Board, someone like Khayat has no channel through which she can make submissions on the matter of statutory release. However, it is also important to note that Khayat has the means to present to the Board, and has exercised her right to do so. Based on Khayat's concerns, the Board imposed conditions on Matthews' statutory release, including mandatory drug testing, a 10pm curfew, regular psychiatric assessments, and strict orders not to contact Khayat.

1.2 The Incident

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[3] SC 1992, c 20 [*The Act*], s 3.
[4] *Ibid*, s 129(1).
[5] *Ibid*, s 132(1).

[11] In 2014, Darryl Matthews stabbed a woman twice in the back and proceeded to run away. He was seen by Ramza Khayat, who was the only witness to place him at the scene. Despite threats from Matthews' "friends", Khayat testified at trial and identified Matthews as the assailant. Matthews was convicted of aggravated assault and was subsequently sentenced to a 9-year prison term.

1.3 The Respondent

[12] Although Matthews' criminal history may seem condemnatory, it can be informed by his upbringing. To better understand Matthews' motivations, it is necessary to understand his personal background. He was orphaned when he was just four years old and went from foster home to foster home during his youth. Childhood trauma contributed to his quick temper. As a result, he spent much of his teenage years incarcerated, subsequently picking up a substance abuse problem. The company that Matthews kept led him further into undesirable behaviours.

[13] Matthews' failure to abide by parole conditions can largely be explained by his drug addiction. For example, he violated parole in 1993 after succumbing to his cocaine addiction. This was corroborated by psychological reports dating from 1992, 1998, 2005, and 2008, all of which identify drug addiction as the primary cause of his criminality.

[14] Matthews started serving his current sentence in 2015 and has since successfully managed to get clean. No drug-related incidents have been reported or noted.[6] In addition, he showed much progress in rehabilitation and has shown willingness to reform from criminality. He enrolled in violence control programs, and agreed to regular visits with the prison psychologist, Dr. Mats Salming. Dr. Salming has confirmed the shift in attitude in his reports.[7] Further, it should be noted that he has not carried out any acts of violence against prison guards or inmates since the start of his current sentence – a six-year period of non-violence.

1.4 The Decision of the Service/Commissioner

[15] Upon considering the history of Matthew's criminal behaviour, its underlying causes, his incarceration and his psychological assessments, the Service concluded that Matthews qualified for statutory release as there was no reasonable basis to believe he would commit an offence causing death or serious harm to another person before the expiration of his sentence. The Service listed several factors taken into consideration, most significantly: (1) His drug consumption problems have been resolved; (2) there was a decrease in violent behaviour during the past 12 months; (3) he has not followed through with any threats he may have made; (4) he has shown a desire for self-improvement and dedication to change.[8]

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[6] *Ramza Khayat v Minister of Public Safety and Emergency Preparedness and Attorney General of Canada*, 2021 FC 1986, 2021 FC 1993 at para 40 [*FC Decision*].
[7] *Ibid* at para 30.
[8] *Ibid* at para 44.

[16] Although Khayat did not have an avenue to express her apprehension before the Service concerning the release of Matthews, she was heard by the Board following the Service's decision. This allowed the Board to take into consideration Khayat's fears and subsequently implement conditions for Matthews' statutory release. Such conditions include mandatory regular drug-testing, a strict 10pm curfew, the obligation of twice-weekly psychological consultations, and an order not to contact Khayat.[9]

2. Judicial History

2.1 Federal Court Ordered Referral to the Board

[17] Khayat brought two applications heard jointly by the Federal Court. First, Khayat sought judicial review of the Decision not to refer Matthew's case to the Board. Second, Khayat challenged the constitutionality of the statutory release scheme on the basis that it jeopardized her right to life, liberty, and security under s. 7 of the *Charter.*[10] The Federal Court granted both applications, set aside the Decision, and ordered the Service to refer the case to the Board.[11]

[18] The Federal Court recognized Khayat's private standing to bring these applications.[12] Justice Price held that Khayat has private standing simply because she is directly affected by the Decision.[13] Justice Price stated in *obiter* that even if Khayat had no private standing, he "would have" granted her public interest standing to challenge the decision.[14]

[19] When reviewing the Decision, the Federal Court applied the reasonableness standard.[15] Justice Price takes a fresh look at the facts and finds that certain factors should have been given greater weight in the Service's decision.[16] Justice Price found that if the Service had "properly considered and weighed all the relevant factors, it could have come to only one conclusion: statutory release was not appropriate for Matthews."[17]

[20] The Federal Court held that the Service is under no obligation to provide Khayat an opportunity to make submissions.[18] According to Justice Price, the argument that there

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[9] *Ibid* at para 47.
[10] *Supra* note 2, s 7.
[11] *FC Decision*, *supra* note 6 at para 76.
[12] *Ibid* at para 55.
[13] *Ibid*.
[14] *Ibid* at para 56.
[15] *Ibid* at para 58.
[16] *Ibid* at para 58-60.
[17] *Ibid* at para 65.
[18] *Ibid* at para 68.

is an obligation to hear Khayat relies on logic that conflates principles of administrative and constitutional law.[19]

[21] The Court found that the statutory release scheme endangers society by almost automatically releasing offenders into society.[20] Justice Price found that while there is expert evidence demonstrating that it is generally safer for society to gradually release an offender, this is not true in all cases.[21] Relying on this logic, Justice Price concludes that the statutory release scheme violates the *Charter.*[22]

2.2 Federal Court of Appeal Reinstated the Decision

[22] The Federal Court of Appeal allowed the appeal, dismissed the application for judicial review, and re-instated the Commissioner's decision.[23]

[23] The Court of Appeal held that Khayat did not have legal standing to bring an application for judicial review.[24] Khayat must be "directly affected by the matter" to bring an application for judicial review under the *Federal Courts Act.*[25] There is no right to review because the Decision did not affect legal rights, impose legal obligations, or cause prejudicial effects.[26] Khayat's argument that Matthews' release might cause prejudice is not sufficient to trigger a right to judicial review.[27] Such prejudice is purely hypothetical.[28] There is no evidence to suggest that the conditions imposed under statutory release are meaningless and ineffective.[29]

[24] The Court of Appeal also dismissed the constitutional challenge.[30] The Applicant failed to show a sufficient causal link between the statutory release scheme and the limit on life, liberty, or security of the person.[31] A hypothetical risk is not a breach of Khayat's right to life, liberty, and security of person.[32]

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[19] *Ibid* at para 68-69.
[20] *Ibid* at para 5 and 70.
[21] *Ibid* at para 74.
[22] *Ibid* at para 75; *Charter*, *supra* note 2.
[23] *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*].
[24] *Ibid* at para 2.
[25] *Federal Courts Act*, RSC 1986, c F-7, s 18.1(1) [*Federal Courts Act*].
[26] *FCA Decision*, *supra* note 23 at para 4.
[27] *Ibid* at para 5.
[28] *Ibid*.
[29] *Ibid* at para 6.
[30] *Ibid* at para 8.
[31] *Ibid* at para 10.
[32] *Ibid* at para 9.

[25] Plante JA, concurring, found that the Decision was reasonable.[33] The Commissioner was not obligated to deal with every possible argument in his report.[34] Perfection is not the legal standard applicable on judicial review.[35]

PART III – STATEMENT OF RESPONDENT'S POSITION CONCERNING THE POINTS IN ISSUE

[26] The Federal Court of Appeal's decision should be upheld for the following reasons:

1. Khayat did not have standing for judicial review of the Service's decision;
2. The Service's decision not to refer Matthews' case to the Parole Board of Canada was reasonable;
3. The Scheme is procedurally fair as the right to be heard is fulfilled; and
4. The Scheme does not violate s. 7 of the *Charter* and is constitutional.

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[33] *Ibid* at para 13.
[34] *Ibid*.
[35] *Ibid* at para 14.

PART IV – ARGUMENT

1. Khayat n'a pas la qualité pour agir

[27] Khayat ne démontre pas qu'elle possède soit la qualité privée pour agir, soit la qualité pour agir dans l'intérêt public pour (i) demander le contrôle judiciaire de la Décision, ou (ii) de mettre en cause la constitutionnalité du régime de libération d'office.

1.1 Khayat n'a pas la qualité privée pour agir

[28] La qualité pour agir à titre privé devant la Cour fédérale est déterminée par le paragraphe 18.1(1) de la *Loi sur les Cours fédérales*[36], qui prévoit qu'« une demande de contrôle judiciaire peut être présentée... par quiconque est directement touché par l'objet de la demande »[37]. L'intimé soutient que la reconnaissance de la qualité privée pour agir de Khayat est incorrecte ainsi qu'une erreur manifeste et dominante.

1.1.1 La norme de contrôle est celle de la décision correcte

[29] La qualité pour agir découlant de loi est soit une question de droit, soit une question mixte de droit et de fait[38]. Ainsi, une décision d'accorder la qualité pour agir en vertu de loi est réglée par la norme de la décision correcte[39]. En l'espèce de Khayat, la Cour fédérale a mal interprété le sens de « directement touché » en vertu du paragraphe 18.1(1). Cette mauvaise interprétation est une erreur sur une question de droit isolable qui justifie l'intervention d'une cour d'appel[40].

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[36] *Ligue des droits de la personne de B'Nai Brith Canada c Odynsky*, 2010 CAF 307 aux para 57-58 [*B'Nai Brith*].
[37] *Federal Courts Act, supra* note 25, art. 18.1(1).
[38] *Miners c Kings (County),* 2018 NSCA 5 au para 23.
[39] *Ibid*.
[40] *Administration de pilotage des Laurentides c Corporation des pilotes du Saint-Laurent Central Inc*., 2019 CAF 83 au para 29 [*Laurentides*].

[30] La Cour fédéral a commis une erreur de droit en interprétant le sens du terme « directement touché » dans son sens ordinaire[41], plutôt que dans le sens établi par le système judiciaire. Le sens juridique du terme « directement touché » est une question de droit. Il est un principe de droit bien établi qu'un demandeur n'est « directement touché » que si la Décision en cause affecte ses droits légaux, lui impose des obligations, ou lui cause des effets préjudiciables[42]. Khayat n'est pas « directement touché » au sens juridique du terme.

1.1.1 La Décision n'affecte pas les droits légaux de Khayat, ne lui impose aucune obligation légale et ne lui cause aucun effet préjudiciable

[31] Khayat n'a pas la qualité privée pour agir devant la Cour fédérale où il n'y a aucune preuve que la Décision en cause affecte ses droits légaux, lui impose une obligation, ou lui cause des effets préjudiciables directs[43]. La Décision crée simplement un risque hypothétique de préjudice pour Khayat qui est comparable au risque créé par la libération de tout autre délinquant envers chaque membre de la société. Ce risque hypothétique n'a aucun effet sur les droits légaux de Khayat et ne crée aucun effet préjudiciable direct. Bien que Khayat puisse avoir un intérêt dans la libération de Matthews, il n'y a aucun droit à la révision lorsque la preuve ne démontre pas un effet direct au sens du paragraphe 18.1(1)[44].

1.1.2 Étendre la qualité privée pour agir aux circonstances de Khayat serait contraire aux intentions du Parlement

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[41] *FC Decision*, *supra* note 11 au para 55.
[42] *B'Nai Brith*, *supra* note 36 au para 58; *Laurentides*, *supra* note 40 au para 31.
[43] *Bernard c Close*, 2017 CAF 52 au para 2; *B'Nai Brith*, *supra* note 35 au para 58.
[44] *Alberta c Canada (Commission du blé)*, 1997 CanLII 6374 (CF), [1998] 2 CF 156 au para 15; *Re Rothmans of Pall Mall Canada Ltd. et al. and Minister of National Revenue et al.*, 1976 CanLII 1163 (FCA) à la p 510.

[32] Bien que la jurisprudence accorde une interprétation large et libérale au paragraphe 18.1(1)[45], une interprétation trop large serait contraire aux intentions du Parlement. Suivant *Teva Canada Ltée*, il faut interpréter le paragraphe 18.1(1) conformément au « sens ordinaire des mots qui s'harmonise avec les autres dispositions de la loi avec l'objet de la disposition et de la loi »[46]. La *Loi sur les Cours fédérales* poursuit « des objectifs de justice, d'équité, d'utilité, d'ordre, d'efficacité et de réduction au minimum des frais, des retards et du gaspillage dans les matières qu'elle régit »[47]. Étendre la qualité privée pour agir aux demandeurs tels que Khayat ne poursuit pas l'objectif de justice. Matthews a déjà été jugé, reconnu coupable et condamné par un tribunal pénal. Le rôle de la Cour fédérale n'est pas de punir ou de dissuader davantage son comportement criminel. Étendre l'intérêt privé pour agir à tout demandeur qui conteste la libération d'office d'un criminel n'est pas pratique et entraînera des frais, des retards et du gaspillage incommensurable. Il s'ensuit que le législateur n'a pas prévu que le paragraphe 18.1(1) inclue les individus qui contestent la libération d'office des criminels qui ne sont pas « directement touchés » au sens établi par la jurisprudence.

1.2 Khayat ne satisfait pas le test pour agir dans l'intérêt public

1.2.1 La norme de contrôle et celle de l'erreur manifeste et dominante

[33] La détermination de la qualité pour agir dans l'intérêt public est fondée sur un pouvoir discrétionnaire[48]. Étant une décision de nature discrétionnaire, elle est soumise à

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[45] *Friends of the Island Inc. c Canada (Ministre des Travaux publics)*, 1993 CanLII 2942 (CF), [1993] 2 CF 229 à la p 283.
[46] *Teva Canada Ltée c Canada (Ministre de la santé)*, 2012 CAF 106 au para 54.
[47] *Ibid* au para 55.
[48] *Canada (Procureur général) c Downtown Eastside Sex Workers United Against Violence* Society, 2012 CSC 525 au para 35 [*Downtown Eastside*].

la norme de contrôle énoncée par la Cour suprême dans l'arrêt *Housen*[49]. Ainsi, la norme de contrôle applicable est celle de l'erreur manifeste et dominante[50]. La Cour fédérale d'appel a employé son pouvoir discrétionnaire afin de refuser à Khayat la qualité pour agir dans l'intérêt public. Cette Cour ne peut intervenir qu'en cas d'erreur manifeste et dominante de la Cour fédérale d'appel.

1.2.2 La Cour fédérale d'appel est le premier tribunal qui a déterminé la qualité de Khayat pour agir dans l'intérêt public

[34] La Cour fédérale n'a pas rendu une décision sur la question de la qualité pour agir dans l'intérêt public, ce qui signifie que la Cour d'appel fédérale était la première cour à se prononcer sur cette question. C'est la Cour d'appel fédérale qui a exercé son pouvoir discrétionnaire pour refuser à Khayat la qualité pour agir dans l'intérêt public.

[35] La Cour fédérale a seulement reconnu la qualité privée de Khayat pour agir[51]. Dans ses motifs, le juge Price a écrit « si je concluais que Khayat n'a pas d'intérêt juridique direct, je lui *aurais* accordé la qualité pour agir dans l'intérêt public pour attaquer la décision »[52] [nos italiques]. Ainsi, cette déclaration ne fait pas partie de la *ratio decidendi* du jugement, car il s'agit plutôt d'*obiter dicta* qui pourrait être persuasif dans des jugements subséquents.

[36] La Cour suprême du Canada a déterminé dans *R c Henry* qu'on doit demander ce que le cas « tranche effectivement » pour identifier la *ratio decidendi* contraignant[53]. En l'espèce de Khayat, la Cour fédérale n'a tranché que la question de la qualité privée pour

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[49] *Laurentides*, *supra* note 40 au para 29; *Housen c Nikolaisen*, 2002 CSC 33 au para 1.
[50] *Laurentides*, *supra* note 40 au para 29.
[51] *FC Decision*, *supra* note 11 au para 55.
[52] *FC Decision*, *supra* note 11 au para 56.
[53] *R c Henry*, 2005 CSC 76 au para 53.

agir. La Cour fédéral n'a pas tranché effectivement la question de la qualité pour agir dans l'intérêt public. Ainsi, la Cour d'appel fédérale a été le premier tribunal à se prononcer définitivement sur le critère de la qualité pour agir dans l'intérêt public.

1.2.3 Khayat ne satisfait pas le test de la qualité pour agir dans l'intérêt public

[37] Khayat n'a pas démontré qu'il y a une erreur manifeste et dominante dans l'analyse de la Cour d'appel fédérale.

[38] Subsidiairement, si cette Cour décide que la Cour fédérale a décidé la question de la qualité pour agir dans l'intérêt public, l'intimé soutient que la reconnaissance de la qualité pour agir dans l'intérêt public était une erreur manifeste et dominante.

[39] L'analyse suivante démontre à la fois : (i) que la conclusion de la Cour d'appel fédérale selon laquelle Khayat n'a pas la qualité pour agir dans l'intérêt public n'est pas une erreur manifeste et dominante, et, (ii) que la conclusion de la Cour fédérale selon laquelle Khayat a la qualité pour agir dans l'intérêt public est une erreur manifeste et dominante.

[40] Les tribunaux doivent tenir compte de trois facteurs lorsqu'ils appliquent le critère de l'intérêt public: « (1) une question justiciable sérieuse est-elle soulevée? (2) le demandeur a-t-il un intérêt réel ou véritable dans l'issue de cette question? et (3) compte tenu de toutes les circonstances, la poursuite proposée constitue-t-elle une manière raisonnable et efficace de soumettre la question aux tribunaux? »[54].

[41] Khayat n'a pas démontré que la question est justiciable, donc la question n'est pas appropriée pour une décision judiciaire[55]. Khayat conteste le régime de libération d'office, en particulier les mécanismes et processus mis en place par le Parlement et la durée des

[54] *Downtown Eastside*, *supra* note 48 au para 37.
[55] *Downtown Eastside*, *supra* note 48 au para 40.

peines des délinquants. Le régime législatif et la durée des peines sont des choix politiques qu'il vaut mieux laisser à la détermination du Parlement. Les décisions comportant des choix politiques échappent au contrôle judiciaire[56].

[42] De plus, Khayat ne réussit pas à démontrer qu'elle a un intérêt réel ou véritable dans le litige. Khayat soulève des préoccupations constitutionnelles qui sont purement hypothétiques. Il serait sans fondation de conclure qu'un risque hypothétique constitue une violation des droits garantis par la *charte*. Lorsque le système fait libérer des criminels, il existe un certain niveau de risque hypothétique envers tous les autres membres de la société. Khayat n'a pas plus d'intérêt « réel » ou « véritable » que tout autre individu. Reconnaître la qualité de Khayat pour agir dans l'intérêt public permettrait à chaque « trouble-fête » de contester la libération des délinquants, surchargeant les tribunaux avec « la prolifération inutile des poursuites marginales ou redondantes »[57]. Il est à la fois prévisible et hautement probable qu'étendre la qualité pour agir dans l'intérêt public à des individus tels que Khayat conduira à l'activisme politique dans le cadre du programme de libération conditionnelle.

[43] Le troisième facteur du test est la question suivante : « la poursuite proposée constitue-t-elle, compte tenu de toutes les circonstances, une manière raisonnable et efficace de soumettre la question à la cour? »[58]. La peine de Matthews a déjà été déterminée et ce n'est pas le rôle de cette Cour de le condamner à nouveau. Il est tout à fait déraisonnable et inefficace pour Khayat de faire part de ses préoccupations concernant la

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[56] *Smith c Canada (Procureur générale)*, 2009 CF 228 au para 26.
[57] *Downtown Eastside*, *supra* note 48 au para 41, citant Conseil canadien des Églises c Canada (Ministre de l'Emploi et de l'Immigration), 1992 CanLII 116 (CSC), [1992] 1 RCS 236 à la p 252 [*Conseil canadien*].
[58] *Downtown Eastside*, *supra* note 48 au para 52.

libération d'office de Matthews devant le tribunal. Il permettrait à toute personne ayant un intérêt dans la libération d'office d'un criminel de contester les décisions du Service devant la Cour fédérale.

[44] Les tribunaux ne devraient pas considérer les trois facteurs susmentionnés comme une liste de contrôle rigide, mais plutôt qu'ils « doivent être pris en compte et soupesés dans l'exercice du pouvoir discrétionnaire judiciaire en vue de servir les principes sous-jacents des règles de droit applicables à ce sujet »[59]. Les règles de droit relatives à la qualité pour agir cherchent à trouver un équilibre « entre l'accès aux tribunaux et la nécessité d'économiser les ressources judiciaires »[60]. Les tribunaux ont toujours reconnu qu'il est nécessaire de limiter la qualité pour agir; tous ceux qui veulent plaider une question ne devraient pas y avoir droit, même lorsque la question les concerne[61]. En plus, la limitation de la qualité pour agir est justifiée afin de préserver le rôle propre des tribunaux et leur relation constitutionnelle avec les autres branches du gouvernement.[62] Le forum approprié pour contester la durée des peines pénales se trouve dans la sphère politique, et non dans le système judiciaire. Reconnaître la qualité de Khayat pour agir dans l'intérêt public serait une erreur manifeste et dominante, car cela ouvre les vannes à un nombre écrasant de justiciables potentiels et ouvre la voie à l'activisme politique au sein du système judiciaire.

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[59] *Downtown Eastside*, *supra* note 48 au para 3.
[60] *Downtown Eastside*, *supra* note 48 au para 23, citant *Conseil canadien*, *supra* note 57 à la p 252.
[61] *Downtown Eastside*, *supra* note 48 au para 22.
[62] *Dowtown Eastside*, *supra* note 48 au para 25, citant *Finlay c Canada (Ministre des Finances)*, 1986 CanLII 6 (CSC), [1986] 2 RCS 607 à les p 631-634.

2. La Décision du Service est raisonnable

[45] L'appelante a la charge de prouver que la Décision est déraisonnable[63], ce dont elle ne s'est pas acquittée. Pour que cette Cour puisse annuler la Décision du Service, la Cour doit être « convaincue que la lacune ou la déficience qu'invoque la partie contestant la décision est suffisamment capitale ou importante pour rendre cette dernière déraisonnable »[64]. L'interprétation du régime législatif fait par le Service et la Décision elle-même étaient raisonnables.

2.1 La norme de contrôle applicable est celle de la décision raisonnable

[46] La Cour fédérale a correctement identifié la norme de contrôle de la décision raisonnable[65]. Elle est la norme de contrôle présumée[66]. Khayat n'a pas réfuté la présomption. Cette Cour doit également déterminer si la norme de la décision raisonnable a été appliquée correctement[67].

2.2 La Cour doit s'abstenir d'une nouvelle appréciation de la preuve

[47] L'intimé soutient respectueusement que la Cour fédérale a mal appliqué la norme de contrôle de la décision raisonnable. Le juge de première instance dans ses motifs fait remarquer quels facteurs du paragraphe 132 devraient jouer le rôle le plus important[68]. Cet exercice est une nouvelle appréciation de la preuve examinée par le décideur que les cours de révision devraient s'abstenir de faire[69]. Cette erreur faite par le juge Price l'amène à

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[63] *Canada (Ministre de la Citoyenneté et de l'Immigration) c Vavilov*, 2019 CSC 65 au para 100 [*Vavilov*].
[64] *Ibid* au para 100.
[65] *FC Decision*, *supra* note 11 au para 57.
[66] *Vavilov*, *supra* note 63 au para 16.
[67] *Agraira c Canada (Sécurité publique et Protection civile)*, 2013 CSC 26 au para 45; *Canada (Agence du revenu) c. Telfer*, 2009 CAF 23 au para 18.
[68] *FC Decision*, *supra note* 11 aux para 60-61.
[69] *Vavilov*, *supra* note 63 au para 125.

déterminer que le Service « n'aurait pu en venir qu'à une seule conclusion : la libération d'office n'est pas appropriée pour M. Matthews »[70]. Lorsqu'il fait cette déclaration, le juge Price substitue ses vues à ceux du Service tandis qu'il aurait dû déterminer si la Décision « fait partie des issues *possibles* » [nos italiques][71].

2.3 Le Service a raisonnablement interprété le régime législatif

[48] Il existe une ambiguïté entre la version anglaise et la version française des paragraphes qui régissent la Décision faite par le Service (p 129 et 132). La version anglaise prévoit que le Service doit renvoyer le dossier à la Commission s'il estime que le délinquant est « likely to commit » un crime violent tandis que la version française dit « convaincu qu'il commettra »[72]. La Cour d'appel fédérale dans *Cartier* a décidé qu'il « faut favoriser le sens qui se dégage du texte anglais »[73]. Ainsi, en vertu des paragraphes 129 et 132 de la Loi, les mots « convaincue qu'il commettra » signifient « convaincue de la probabilité qu'il commette »[74].

[49] Dans le contexte du droit pénal, établir qu'il est probable qu'un acte puisse tuera nécessite un seuil élevé de preuve. Plus précisément, il nécessite un degré de probabilité suffisant ou un résultat probable connu. Dans *Nygaard*, la Cour suprême du Canada utilise indifféremment les termes « likely » et « known probable result »[75]. Plus récemment, la Cour d'appel de la Colombie-Britannique a exprimé que « likely » signifie « a substantial

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[70] *FC Decision*, *supra* note 11 au para 65.
[71] *Newfoundland and Labrador Nurses' Union c Terre-Neuve-et-Labrador (Conseil du trésor)*, 2011 CSC 62 au para 14 [*Newfoundland Nurses' Union*].
[72] *The Act*, *supra* note 3 aux arts 129, 132.
[73] *Cartier c Canada (Procureur général)*, 2002 CAF 384 au para 24.
[74] *Ibid* au para 26.
[75] *R c Nygaard*, 1989 CanLII 6 (CSC), [1989] 2 RCS 1074 à la p 1089.

degree of probability »[76]. Ainsi, il est raisonnable que le Service emploie une interprétation similaire de la phrase « likely to commit » des paragraphes 129 et 132 de la Loi.

[50] Le Service n'était pas tenu de « procéder à une interprétation formaliste » de la Loi[77]. L'interprétation de la Loi faite par le Service doit être « conforme à son texte, à son contexte et à son objet »[78]. L'objet des dispositions concernant la libération d'office sous condition se trouvent au paragraphe 100 de la Loi; les dispositions visent à « contribuer au maintien d'une société juste, paisible et sûre en favorisant, par la prise de décisions appropriées quant au moment et au conditions de leur mise en liberté, la réadaptation et la réinsertion social des délinquants en tant que citoyens respectueux des lois »[79]. En ce qui concerne le contexte, il est important à noter que le rapport d'expert du Dr. Curtis Palmateer démontre qu'il est habituellement « plus sécuritaire pour la société de remettre graduellement en liberté un délinquant »[80]. Il est tout simplement plus sûr, ce qui est l'un des objets de la Loi, d'assurer le passage de Matthews dans une maison de transition sous conditions de libération conditionnelle avant une libération inconditionnelle[81]. En examinant la Décision sous cet angle contextuel et téléologique, il est évident qu'il était raisonnable pour le Service d'interpréter les paragraphes 129 et 132 comme exigeant un seuil élevé de preuve. Il n'est pas le rôle de la Cour de révision de procéder à une analyse *de novo* du sens de ces paragraphes[82]. Cette Cour doit seulement déterminer si l'interprétation faite par le Service était raisonnable[83].

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[76] *R v Brar*, 2009 BCCA 585 au para 81.
[77] *Vavilov*, *supra* note 63 au para 119.
[78] *Ibid* au para 120.
[79] *Supra*, *note* 1 à art. 100.
[80] *FC Decision*, s*upra* note 11 au para 73.
[81] *Ibid*.
[82] *Vavilov*, *supra* note 63 au para 116.
[83] *Ibid* au para 115-116.

2.4 La question précise devant le Service est une question de moment

[51] La Cour fédérale a correctement identifié la question précise devant le Service comme la suivante: « le Service doit déterminer s'il existe des motifs raisonnables à croire que Matthews commettra probablement une infraction causant la mort ou un dommage grave à une personne au cours des *trois prochaines années* » [nos italiques][84]. Le Service doit avoir suffisamment de preuves pour satisfaire au critère des « motifs raisonnables de croire »[85]. Ainsi, le Service doit déterminer si la preuve l'amène à être convaincu de la probabilité que Matthews commettra un tel crime au cours de cette période spécifique de trois ans. Dans l'acte de révision juridique, le tribunal doit déterminer s'il était raisonnable que le Service ait conclu qu'il n'y avait pas suffisamment de preuve pour raisonnablement être convaincu de la probabilité que Matthews commettra un crime pendant cette période.

2.5 La Décision du Service est fondée sur un raisonnement cohérent

[52] Le Service a fourni des motifs suffisants pour démontrer que sa décision est raisonnable. Dans son rapport, le Service exprime que « nous ne sommes pas convaincu [que Matthews] commettra une infraction causant la mort ou un dommage grave à une autre personne avant l'expiration de sa peine »[86]. En d'autres termes, le Service n'avait aucune preuve démontrant une probabilité pour lui de commettre une telle infraction au cours des trois prochaines années. L'intimé est d'avis que l'absence totale de preuve indiquant le risque d'un crime violent imminent au cours de la période précise de trois ans

[84] *FC Decision*, s*upra* note 11 au para 37.
[85] Service correctionnel du Canada, *Maintien en incarcération* (Directive du commissaire 712-2), Ottawa, 2015 [Directive 712-2].
[86] *FC Decision*, s*upra* note 11 au para 44.

en cause est une raison suffisante pour justifier la Décision du Service de ne pas renvoyer le dossier de Matthews à la Commission.

[53] Le Service a également démontré logiquement que Matthews n'est pas suffisamment susceptible de causer la mort ou un dommage grave à tout moment. Neuf facteurs contribuent à la logique interne du Service dont les suivants: (i) Matthews ne consomme plus de drogue, ce que quatre rapports psychologiques identifient comme la cause de son comportement criminel; (ii) il a une diminution marquée du comportement violent de Matthews; (iii) Matthews s'est inscrit à un cours sur la lutte contre la violence[87].

[54] L'appelant prétend que le défaut par le Service de citer certains éléments de preuve ou de tenir compte de certains facteurs rend la décision incohérente. Cependant, appliquer la norme de la décision raisonnable n'est pas une « chasse au trésor » ligne par ligne à la recherche d'une erreur[88]. Le tribunal doit simplement être en mesure de suivre la ligne d'analyse du rapport qui pourrait raisonnablement amener le Service à partir des éléments de preuve disponibles jusqu'à la décision de ne pas renvoyer le dossier de Matthews à la Commission[89]. Dans le rapport du Service, l'accent mis sur les facteurs positifs par rapport au dossier de Matthews illustre comment le Service a déterminé que la preuve dont il disposait ne respectait pas le seuil élevé qui déclenche un renvoi de dossier à la Commission. Cette conclusion est tout à fait raisonnable. Plus de détails ne rendraient pas la décision plus raisonnable, car elle est raisonnable en soi.

[55] La Décision était justifiée au regard des contraintes juridiques et factuelles. Comme l'a expliqué le juge Plante de la Cour d'appel fédérale, « le Service vit présentement une

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[87] *FC Decision*, *supra* note 11 au para 44.
[88] Vavilov, *supra* note 63 au para 102, citant *Newfoundland Nurses'* Union, *supra* note 71 au para 14.
[89] *Vavilov*, *supra* note 63 au para 100.

pénurie inusitée de personnel. Étant donné les échéances serrées prévues par la Loi et les directives pertinentes, on ne peut pas s'attendre à la perfection. Ce n'est d'ailleurs pas la norme applicable en matière de révision judiciaire »[90]. Dès lors, les circonstances de fait et de droit montrent clairement que la Décision était raisonnable.

3. The Scheme is Not Procedurally Unfair as the Right to be Heard is Fulfilled

[56] As previously stated, Khayat has no standing to be heard by the Service. In the alternative, even if the Court decides Khayat has the duty to be heard, it has been satisfied through her submissions to the Board.

[57] The Appellant submits the scheme violates her right to be heard, and thus does not adhere to the principles of procedural fairness. The Respondent disagrees with this conclusion. Writing for the majority in the FC decision, Price J. held that "if the Service does not refer a matter of statutory release to the Board, someone like Khayat will never have the opportunity of making submissions on the matter of statutory release".[91] The conclusion that this procedure precludes the Appellant from being heard at all is drawn erroneously. In fact, Price J. acknowledges that the Board has indeed heard Khayat, thus the Respondent asserts that this has fulfilled the Appellant's right to be heard.

3.1 The Content of the Right to be Heard is Limited to an Oral Hearing at Any Stage of the Scheme

[58] Pursuant to the *Baker* factors, [92] Khayat has already been afforded procedural protections through her oral hearing with the Board, and therefore it is not necessary that she is heard by the Service.

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[90] *FCA Decision*, s*upra* note 24 au para 44.
[91] *Supra*, note 11 at para 40.
[92] *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 23-25.

3.1.1 The Decision and Process Followed are Discretional in Nature

[59] Where an administrative body is afforded discretion, less procedural protections are required.[93] Conversely, the closer the procedural protections resemble a judicial process, the more such protections are required.[94] The Appellant argues that s. 132(a)-(e) evidences the Service's lack of discretion. However, these factors are not exhaustive.[95] The Service is permitted to carry out its own investigation and consider other factors and evidence should they deem it necessary. Decisions for referral turn on varied reasons and necessitates that the Service be given wide discretion to weigh each factor on a case-by-case basis. The majority in the *Mooring* decision at the Supreme Court held that the Board does not play a quasi-judicial role as it does not settle any debates between two opposing parties, but performs investigative functions. There is no requirement to apply rules of evidence, hear testimony or summon witnesses.[96] These characteristics also apply to the Service, and thus, the Service has implied discretionary powers.

3.1.2 The Decision is Not Wholly Determinative

[60] The Service's decision is not wholly determinative, which reduces the requirement for more procedural protection. Matthews is the party directly impacted by the decision and he has the means to appeal the decision. Furthermore, even for individuals such as Khayat, the decision for statutory release is not entirely determinative since conditions for statutory release have yet to be imposed. Khayat is not summarily removed from the procedural process following the Service's decision as she is still able to present at the

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[93] *Ibid* at para 23.
[94] *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 115.
[95] *Baker, supra* note 92 at para 28.
[96] *Mooring v Canada (National Parole Board)* [1996] 1 SCR 75 at para 25.

Board hearing before the decision is finalized. Denial of statutory release is only part of the decision. The decision is only finalized when conditions are put into place. This is especially significant where conditions imposed are sufficient to mitigate risks – imminent and real or not – to Khayat. As such, the imposition of such conditions lessens the requirement for procedural protection.

3.1.3 Conditions to Statutory Release Reduce Importance of the Decision

[61] Conditions to Matthews' statutory release reduces the requirement for procedural protection. The Respondent submits that although they are sympathetic to Khayat's apprehensions, Matthews' release is not unconditional. Matthews is not a "free man". He is required to abide by the conditions imposed by the Board. Most significantly, he is under strict orders not to contact Khayat. This condition should be interpreted widely—any attempt to do so will result in Matthews' violation of his conditions, and subsequently, the revocation of his statutory release. These measures are not meaningless and mitigate the risk of harm to Khayat.

3.1.4 Khayat Has No Legitimate Expectations of Oral Hearings at the Service Stage

[62] The Appellant has not submitted any evidence that there is a legitimate expectation that she would be entitled to oral submissions at the Service stage. The Service has not shown past conduct that would support this expectation. Unless there is evidence of actual representation[97] or a pattern of conduct, it cannot be proven that legitimate expectations exist to warrant a higher degree of procedural protection.

[97] *Canada v Mavi*, 2011 SCC 30 at para 68.

3.1.5 The Service's Expertise Warrants a Higher Level of Discretion

[63] Where an administrative body has more expertise in determining the procedures, more discretion should be afforded to the administrative body.[98] The Service is uniquely positioned to interact with offenders who are currently serving sentences. This gives them exclusive insight into whether the offenders exhibit any desire to reform, the degree to which they hold this desire, as well as any other related behavioural changes. Their experience and expertise therefore warrant more discretion, which contributes to a finding that less procedural protection is required.

[64] It is clear that discretion underlies the five factors and requires a finding of less procedural protection. This is particularly apparent with regards to factors one and five – the nature and process of the decision as well as the Service's expertise. Therefore, oral hearings at the Service *and* Board review stage should not be required, so long as the victim is allowed to voice their concerns during the statutory release scheme.

3.2 The Scheme Fulfills the Right to be Heard through an Oral Hearing at the Parole Board Stage

[65] The Service's mandatory consideration of her Victim Impact Statement, as well as Khayat's ability to make representations to the Board satisfies her right to be heard. Under the *Canadian Victims Bill of Rights*, a victim (defined as an individual who has suffered physical or emotional harm as a result of the commission of an offence) may provide the Service with any information at any time during the sentence.[99] In addition, if Khayat has filed a Victim Impact Statement with the court at sentencing, the Service must take this into consideration.[100] Subsection (1)(a)(v) explicitly requires the Service to consider any

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[98] *Baker, supra* note 92 at para 27.
[99] *Canadian Victims Bill of Rights*, SC 2015, c 13, s 2.
[100] *The Act, supra* note 1, s 132.

explicit threats of violence made by the offender. It should be emphasized that the failure to find Matthews as posing a threat of serious harm does not suggest that no consideration was paid to Khayat's circumstances. The duty to be heard does not require the administrating body to find in the applicant's favour.

[66] In addition, pursuant to the *Baker* factors analysis, the content of Khayat's right to be heard has already be fulfilled through oral submissions to the Board. Serious consideration has been given at every stage to ensure that Matthews' statutory release will not place an undue risk both to Khayat, as well as to society at large. The Board is required to consider Khayat's concerns about the release and following their consideration, the Board implemented conditions to mitigate the risk. The conditions include regular drug-testing, a strict 10pm curfew, and twice-weekly psychological consultations. In addition, he is under an order not to contact Khayat. As Dryden J. held in the FCA decision, unless there is evidence to suggest otherwise, it should not be assumed that such conditions are effective or meaningless.[101]

4. Khayat's Life, and Security of Person Were Not Infringed

4.1 Khayat's Life or Security of the Person is Not Engaged

[67] The Appellant submits that the statutory release scheme engages the security of the person of Khayat, therefore violating her s. 7 rights. The Respondent is sympathetic that Khayat's fear of retaliation is genuine. However, this is not a new risk. If Matthews is not granted statutory release now, Khayat will inevitably be confronted with these concerns in three years when Matthews completes his sentence. Moreover, Khayat's concerns regarding a speculative threat is based on the assumption that Matthews' desire to reform

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[101] *Supra* note 23 at para 11.

is not genuine and that he would have the means to carry out his threats under the conditions of his statutory release. It would be contrary to the objectives of the Scheme if hypothetical threats were sufficient to warrant the denial of statutory release. Where there is no sufficient evidence to prove the link between the action and the future harm, remedial action cannot be justified.[102]

4.2 The Procedural Process of Statutory Release is Not Causally Related to Any Potential Threat Against Khayat

[68] The failure to hear Khayat results does not deprive her life and security of person. There has been no indication to suggest that her circumstances were not taken into consideration. In fact, the Commissioner's report provides a detailed analysis that takes into consideration his criminal behaviour, the underlying causes of his behaviour, incarceration, as well as various psychological assessments. In particular, Matthews' assessments with Dr. Salming considers his behaviour and attitude towards Khayat. The Appellant draws comparisons to *Bedford*, illustrating that indirect harm caused by the Scheme still fulfills the causality requirement. In *Bedford,* however, but for the government's interference, the sex workers would have been able to take precautions to mitigate their risk.[103] Here, Matthews would inevitably be released in three years at the end of his sentence regardless. *Bedford* can be distinguished from this case and does not apply.

[69] Even then, the proposed harm must be real. Speculative and hypothetical threats are not real[104] as threatened future injuries might not happen. Matthews' prior threats are

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[102] *Operation Dismantle v The Queen*, [1985] 1 SCR 441 at para 30.
[103] *Canada (Attorney General) v Bedford*, 2013 SCC 72 at paras 64, 71.
[104] *Ibid* at para 76.

speculative if there is no channel through which he may carry them out. In *Bilodeau-Masse v Canada*, the Board denied statutory release where no supervisory program could adequately protect society against the applicant's risk of recidivism.[105] It can be inferred that where the conditions of statutory release can prevent Matthews from carrying out his threat, the harm is only speculative.

[70] Moreover, threatened future injuries must be assessed against Matthews' conduct, which has improved during his incarceration. The frequency of Matthews' threats has decreased since 2015, and the last threat made was two years ago in 2019.[106] This shift is further reflected in his attempt to reform from criminality through drug rehabilitation and other programs. Matthews has expressed a desire to lead a normal and crime-free life. The desire is best reflected in his participation in drug rehabilitation and other criminal reform programs. The Appellant posits that Matthews is likely to reoffend yet is unable to support this claim with evidentiary support that the Act requires.[107] Matthews' improvement during his incarceration is further corroborated by psychologist reports that Matthews is ready to lead a crime-free life. The Service will generally refer the case to the Board where psychological reports show the offender's behaviour pose a danger to society thereby necessitating a denial of statutory release.[108] This was not present in Matthews' report. In the contrary, Matthews has shown commendable progress and there is no indication that he poses an imminent or real threat to Khayat's security of person. Any potential threat is contingent on Matthews' future lapse of self-control or judgement, which cannot be known

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[105] *Bilodeau-Massé v Canada (Attorney General)*, [2018] 1 FCR 386 at para 25 [*Bilodeau-Massé*].
[106] *FCA Decision, supra* note 23 at para 30.
[107] *Directive 712-2*, *supra* note 85.
[108] *McBride v Canada (Commissioner of Corrections)*, [1994] FCJ no 2014 at para 48.

at this time. This is speculative harm at best.[109] It is therefore unreasonable to find the mere possibility of harm would constitute a violation of Khayat's security of person.

4.3 If the Court Finds Khayat's s. 7 Rights were Violated, it is in Accordance to the Principles of Fundamental Justice

[71] The purpose of conditional release is cited as the maintenance of a just, peaceful and safe society through rehabilitating and reintegrating offenders as law-abiding citizens. The Scheme protects society and rehabilitates offenders. Although the safety of society is paramount, this does not come at the expense of the rehabilitation and reintegration of offenders – these two objectives are not diametrically opposed. The maintenance of a just, peaceful and safe society comes *through* rehabilitation and reintegration – the criminal justice system cannot simply be retributive.

[72] The Appellant's s. 7 claim should fail at both the trigger and causation stage. Should the Court find otherwise, the claim would nevertheless fail as any deprivation would be in accordance with the principles of fundamental justice. As previously stated in Section 1, the procedural fairness requirement has been fulfilled by the duty to hear Khayat's oral submissions at the Board stage. The principles of fundamental justice do not require that an individual benefit from the most favourable procedure, simply that the procedure be fair.[110] Substantively, s. 132 of the Scheme is rationally connected, not overbroad, and not grossly disproportionate.[111]

[73] The Scheme is rationally connected to the purpose since the provision prevents those who may pose a serious risk of harm from entering society, which contributes to the

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[109] *Okokie v Canada* 2019 FC 880, [2019] FCJ no 1580 at para 109.
[110] *Bilodeau-Masse, supra* note 105 at para 176.
[111] *R v Oakes*, [1986] 1 SCR 103 at para 70.

safety of society. At the same time, it allows non-dangerous offenders an opportunity to reintegrate into society safely. By limiting the denial of statutory release to dangerous offenders, the provision minimally impairs its effects. Further, s. 132 balances the interests of the state and the individual by carving out exceptions without placing vulnerable individuals at risk. It is important to note that Khayat is not the only individual that the decision affects. Matthews' stake in the decision is high. It would be inappropriate to withhold his freedom where there is simply not enough evidence to conclude that he presents a danger. Moreover, psychiatric reports stress that a "cold release" is more dangerous than a gradual release.[112] The Appellant refers to Matthews' history of criminality but neglects to mention he has since shown tremendous progress. The standard by which statutory release is determined should not be perfection. Matthews must start somewhere, and because a gradual release is safer and his progress can be monitored, statutory release is appropriate and not unconstitutional. Strict detention is not "the push"[113] Matthews needs. The sudden freedom that he receives at the conclusion of his sentence may in fact prove to be too tempting. Instead, Matthews should gradually build up the habit of discipline best afforded through a stringent regime. For example, the various conditions to Matthews' statutory release are more likely to be the incentive or "push" that allows him to rehabilitate as a law-abiding citizen into society.

5. If the Court Finds Khayat's S. 7 Rights are Violated, the Scheme is Still Saved Under S. 1

[112] *FC Decision, supra* note 6 at para 73.
[113] *Ibid* at para 27.

[74] In the event that the Court finds the Scheme is not implemented in accordance with principles of fundamental justice, it is still saved under S. 1 of the *Charter*. The Respondent finds it unnecessary to discuss in detail whether the Scheme was prescribed by law, as it is expressly provided for by statute.[114]

5. 1 The Purpose of the Scheme is a Pressing and Substantial Objective

[75] The stated purpose of the Scheme is "the maintenance of a safe society through rehabilitation and reintegration of offenders as law-abiding citizens", and the Appellant has agreed that it is of pressing concern[115] such as to warrant overriding a constitutionally protected right or freedom.

5.2 The Scheme is Proportional as it is Rationally Connected and Minimally Impairing

[76] The Scheme is rationally connected to the purpose such that it is not arbitrary. Its goal to rehabilitate and reintegrate offenders is fulfilled when offenders are allowed to serve the last part of their sentence in society under conditions that mitigate risk to society. Dr. Palmateer's report clearly states the importance of gradual release in rehabilitation[116], and it is certainly preferable to a "cold release" upon which the offender may find the newfound freedom all too tempting.

[77] In addition, the Scheme is minimally impairing. The Scheme is the least intrusive means to achieve its purpose. S. 4 of the Act expressly requires the Service to "use the least restrictive measures consistent with the protection of society, staff members and offenders".[117] This is measured both with regards to society and the offender. It is

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[114] *R. v Therens*, [1985] 1 SCR 613 at para 1.
[115] *R. v. Big M Drug Mart Ltd.*, [1985] 1 SCR 295 at para 69.
[116] *FC Decision, supra* note 6 at para 73.
[117] *The Act, supra* note 1, s 4.

minimally impairing to both society through excluding dangerous offenders, as well as to the offender through setting a reasonable threshold of what constitutes serious risk of harm.

[78] Lastly, the Scheme balances the deleterious and salutary effects of the objectives. The benefits of maintaining a safe society outweighs the detriment to the individual who is affected by the law. Here, the hypothetical harm from the Scheme is minimal owing to effective conditions to Matthews' statutory release. Once again, this hypothetical harm is inevitable – either it materializes now, or it materializes three years later upon the conclusion of Matthews' sentence. In addition, the threat is merely speculative and may not be realized. The Respondent urges the Court to recognize that gradual release is more beneficial for both the offender and society than cold release in rehabilitation, and it is upon this premise that the Act requires automatic statutory release for all non-dangerous offenders. In turn, the only logical conclusion to be drawn is that the protection of society outweighs the "expedited" fear that Khayat will undoubtedly eventually face.

[79] If the Court finds that Khayat's s. 7 rights have been violated, the Scheme would be saved under s. 1 as the Scheme is rationally connected, minimally impairing, and proportional to its objectives.

6. The Threshold to Oppose Statutory Release is Not Too High So as to Automatically Release Dangerous Offenders

[80] Statutory release is not the end of the offender's sentence. Although "release" is in its title, the Scheme does not, in a strict sense, "release" offenders, but rather, allows them to serve the final third of their sentence in the community with stringent conditions.[118] It is not complete freedom and is not treated as such. In Matthews' case, he is obligated to

[118] *The Act, supra* note 1, s 100.

participate in drug testing, refrain from contacting Khayat, comply with a 10pm curfew, and several other measures. These are all measures that can mitigate the risk to society and Khayat through curtailing Matthews' freedom of movement, as well as providing him with the resources necessary to facilitate rehabilitation (e.g. psychiatric support).

6.1 The Scheme is Rationally Connected to the Purpose of the Legislation

[81] The purpose of conditional release is to maintain a just, peaceful and safe society through rehabilitating and reintegrating offenders as law-abiding citizens.[119] Statutory release, in particular, is triggered automatically where an offender serves two-thirds of his sentence.[120] However, s. 132 places safeguards that prevent dangerous offenders from being released. Each of the factors that the Service must consider specifically targets dangerous offenders, for example, requiring "persistent violent behaviour"[121] *and* reliable information proving the offender is planning to cause serious harm or death to other persons.[122] This ensures the protection of society from dangerous offenders who are likely to cause serious harm to individuals.

6.2 The Scheme is Minimally Impairing

[82] The Appellant further posits that requiring the offender to "likely" cause serious harm or death is too high of a threshold. The Respondent disagrees. Any other requirement would be too broad. Denying statutory release to any offender that may "potentially" or "possibly" cause serious harm or death to another individual is too low a threshold. It completely defeats the purpose as it effectively denies most offenders the possibility of

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[119] *Ibid*
[120] *Ibid*, s 127(3).
[121] *Ibid*, s 132(a).
[122] *Ibid*, s 132(c).

statutory release. Requiring at least some evidence of likelihood is minimally impairing on offenders who wish to be released and are making a conscious effort to reform. When compared with s. 229(a)(ii) of the *Criminal Code*, in which "likely" requires a substantial degree of probability *and* means to cause death or serious bodily harm,[123] the Scheme already sets a significantly lower threshold. It would place undue burden on the offender if the Scheme were to require only a mere possibility that serious harm or death could be caused, especially if there is very little chance that the offender has the means to commit the proposed acts of violence.

[83] Matthews' conditional release enables the Service to achieve its statutory objective of gradually and safely re-integrating offenders such as Matthews back into society. The Decision reasonably and constitutionally facilitates this objective. For these reasons, this appeal should be dismissed.

PART V – ORDER SOUGHT AND NAMES OF COUNSEL

[84] The Attorney General of Canada requests that the Canadian Court of Justice

DISMISS this appeal,
UPHOLD the decision of the Federal Court of Appeal,
DECLARE the decision not to refer Darryl Matthews' case to the Parole Board of Canada a reasonable exercise of the Service's discretion,
DECLARE the statutory release scheme under the Act to be constitutional.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of February 2022.

Andrea Strathdee	Valerie Cheng
Counsel # 1 for the Respondent	Counsel #2 for the Respondent

[123] RSC 1985, c C-46, s 229.

APPENDIX A – LIST OF AUTHORITES

1. Legislation

Canadian Victims Bill of Rights, SC 2015, c 13, s 2.
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.
Criminal Code, RSC 1985, c C-46.
Loi sur les Cours fédérales, LRC 1985, c F-7, art. 18.1(1)

2. Government Documents

Service correctionnel du Canada, *Maintien en incarcération* (Directive du commissaire 712-2), Ottawa, 2015 [Directive 712-2].

3. Jurisprudence

Administration de pilotage des Laurentides c Corporation des pilotes du Saint-Laurent Central Inc., 2019 CAF 83.
Agraira c Canada (Sécurité publique et Protection civile), 2013 CSC 26.
Alberta c Canada (Commission du blé), 1997 CanLII 6374 (CF), [1998] 2 CF 156.
Baker v Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817.
Bernard c Close, 2017 CAF 52.
Bilodeau-Masse v Canada (Attorney General), [2018] 1 FCR 386.
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