Court File Number: T-1041-21

FEDERAL COURT

BETWEEN:

JOHN CHAIF

Applicant

-and-

ATTORNEY GENERAL OF CANADA

Respondent

APPLICATION RECORD

Volume 2

Memorandum of Fact and Law

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APPLICANT'S MEMORANDUM OF FACT AND LAW

PART I – STATEMENT OF FACT

Overview

1. This is an application for judicial review of the Parole Board of Canada Appeal Division **("Appeal Division")** decision dated February 2, 2021, which affirmed the September 1, 2020, decision of the Parole Board of Canada **("Board")** denying the Applicant's application for day parole or full parole.

2. The Board decision was unreasonable because each of the Board's conclusions on the two statutory criteria set out in s. 102 of *Corrections and Conditional Release*

Act[1] were unreasonable. The Board's conclusion, under s. 102(a), that the Applicant would present an undue risk to society on day parole is unreasonable in three ways:

a. The Board provided no explanation for why the Applicant would present an undue risk on day parole in light of its determination that he would not present such a risk on virtually identical unescorted temporary absences **("UTAs")**;

b. The Board ignored the legislated principle that it must make the "least restrictive determinations that are consistent with the protection of society" and instead fettered its discretion by treating a "best step" agreed upon at the prior UTA hearing as a prerequisite to any less-restrictive release;

c. The Board completely ignored key submissions and evidence before it, including the police's support for day parole and the Applicant's willingness to pay for GPS monitoring.

3. The Board's conclusion, under s. 102(b), that the Applicant's release would not facilitate his reintegration into society as a law-abiding citizen is unreasonable since it is not supported by any reasons. The Board simply repeated statutory language and stated a peremptory conclusion.

4. The Board decision was also procedurally unfair because the lead Member's comments and reasons for decision present a reasonable apprehension that he approached the decision with a closed mind.

5. This case involves the straightforward application of *Vavilov*: the reasons for decision must let the affected person understand how the decision was made and how the decision complies with the governing statute. This did not happen.

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[1] *Corrections and Conditional Release Act*, SC 1992, c 20, s 102 [*CCRA*].

Background

6. The Applicant, John Chaif, is a 65-year-old inmate serving a life sentence at the minimum security site of Beaver Creek Institution.[2] He has been at this minimum security site since November 2016.[3]

7. Over the years, the Applicant has demonstrated good behaviour, and he has gained the trust of the outside community. He has a low public safety risk rating, a low actuarial risk of recidivism, and had a perfect institutional record for more than a year at the time of the decision under review. The Applicant engaged in his correction plan and had completed his correctional program.[4] As a result, both the Windsor Police and St. Leonard's Community Residential Facility agreed that the Applicant should be granted day parole and would not present an undue risk to society.[5]

Approved UTAs

8. To understand the decisions under review, one needs to know what happened the previous time the Applicant was before the Board, since one of the Board members was on both panels, and the Board repeatedly referred to the prior decision during the hearing and in its reasons for decision.

9. On March 4, 2020, the Board approved the Applicant's application for three 72-hour UTAs to be taken over the course of a year.[6] The substance of the UTAs was nearly identical to that of the later-denied day parole application, which is presently before this Court. The terms were as follows:

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[2] PBC Decision, September 1, 2020 **("PBC Decision")**, pages 1 & 3, **Application Record ("AR"), Vol 1, Tab 3, page 1 & page 3, para 5.**
[3] PBC Decision, page 4, **AR, Vol 1, Tab 3, page 11, para 6**.
[4] PBC Decision, page 5, **AR, Vol 1, Tab 3, page 12, para 7**.
[5] Assessment for Decision, July 15, 2020 **("Parole Assessment for Decision")**, page 14, **AR, Vol 1, Tab 14, page 233, para 5**.
[6] PBC UTA Decision, March 4, 2020 **("UTA Decision")**, page 2, **AR, Vol 1, Tab 16, page 240**.

a. The Applicant would reside at the St. Leonard's Community Residential Facility in Windsor;[7]

b. The Applicant would volunteer at the Ojibway Nature Center, local churches, and the halfway house on projects including park clean-up and graffiti removal.[8]

c. Public transportation would be used.[9]

d. The following conditions would be imposed:

   i. No direct or indirect contact with Margo Clinker;

   ii. Immediately report all relationships with females; and

   iii. No association with any person involved in criminal activity.[10]

10. The Board granted the UTAs after considering the Applicant's entire record, including all the institutional infractions, criminal history, and risk factors that were later considered in the denied parole application.[11] After reviewing all this information, the Board concluded that the Applicant would not present an undue risk to society during his absence, and that the UTAs were in the interests of reintegration.[12]

COVID-19 Disruption

11. Mere days after the UTAs were approved, in March 2020, CSC suspended all temporary absences due to COVID-19. Because of this, the Applicant was unable to complete the three UTAs.[13]

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[7] UTA Decision, page 2, **AR, Vol 1, Tab 16, page 240**; Parole Assessment for Decision, page 5, **AR, Vol 1, Tab 14, page 224, para 1**.
[8] Assessment for Decision for UTAs, January 27, 2020 **("UTA Assessment for Decision")**, page 6, **AR, Vol 1, Tab 19, page 262, para 3**.
[9] UTA Assessment for Decision, page 6, **AR, Vol 1, Tab 19, page 262, para 3**.
[10] UTA Decision, page 2, **AR, Vol 1, Tab 16, page 240**.
[11] *See* UTA Decision, **AR, Vol 1, Tab 16**.
[12] UTA Decision, page 5, **AR, Vol 1, Tab 16, page 243, para 6**.
[13] PBC Decision, page 4, **AR, Vol 1, Tab 3, page 11, para 5**.

Day and Full Parole Hearing

12. On May 11, 2020, the Applicant applied for day and full parole.[14] The hearing was held on September 1, 2020.[15]

13. The requested day parole was the exact same in substance as the approved UTAs, with only three differences:

    a. The day parole involved less unsupervised travel;

    b. The day parole was of longer duration; and

    c. The day parole application included a description of certain regular activities (church, college, family visits, and woodworking) by which the Applicant would fill his time.[16]

14. For clarity, the substance of the requested day parole was as follows:

    a. The Applicant would reside at the St. Leonard's Community Residential Facility in Windsor.[17]

    b. The Applicant would volunteer at the Ojibway Nature Center, local churches, and the halfway house on projects including park clean-up and graffiti removal.[18]

    c. The Applicant would attend church and courses at the local college and spend time with family and engaging in woodworking as a hobby.[19]

    d. The following conditions would be imposed:

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[14] Parole Assessment for Decision, page 1, **AR, Vol 1, Tab 14, page 220**.
[15] PBC Decision, page 6, **AR, Vol 1, Tab 3, page 13**.
[16] PBC Decision, page 5, **AR, Vol 1, Tab 3, page 12, para 2**; Parole Assessment for Decision, page 11, **AR, Vol 1, Tab 14, page 230, para 4**.
[17] PBC Decision, page 5, **AR, Vol 1, Tab 3, page 12, para 2**; Parole Assessment for Decision, page 2**, AR, Vol 1, Tab 14, page 221, para 1**.
[18] PBC Decision, page 5, **AR, Vol 1, Tab 3, page 12, para 2**; Parole Assessment for Decision, page 11, **AR, Vol 1, Tab 14, page 230, para 4**.
[19] PBC Decision, page 5, **AR, Vol 1, Tab 3, page 12, para 2**; Parole Assessment for Decision, page 11, **AR, Vol 1, Tab 14, page 230, para 4**.

i. No direct or indirect contact with Margo Clinker;

ii. Immediately report all relationships with females; and

iii. No association with any person involved in criminal activity.[20]

15. Not a single new negative fact had been added to the Applicant's record in the six months since the UTAs had been approved. The Applicant had been incident free and had perfect institutional conduct in that time.[21]

16. However, in those six months, several new positive facts, which lowered the Applicant's risk in comparison to the approved UTAs, came to be:

a. The Applicant received an additional 16 new letters from community members who planned to support him on his release.[22]

b. The Windsor Police changed their view and expressed their support for the Applicant's day parole, whereas six months earlier, they had not been in support of the UTAs that were nevertheless granted.[23]

c. The Applicant expressed his willingness to be subject to GPS monitoring and pay for the monitoring himself.[24]

d. An additional six months had passed with no institutional infractions,[25] meaning the Applicant had gone for an entire year without institutional

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[20] *See* Parole Assessment for Decision, page 14, **AR, Vol 1, Tab 14, page 233**.
[21] PBC Decision, page 5, **AR, Vol 1, Tab 3, page 12, para 7**.
[22] PBC Recording 1:38:15-1:38:29; Submission from Shane Martinez, August 27, 2020, "Letters from Community", **AR, Vol 1, Tab 12(A), pages 125-160**; Submission from Shane Martinez, August 31, 2020, **AR, Vol 1, Tab 10, pages 116-118**.
[23] PBC Recording 1:43:53-1:44:50; UTA Assessment for Decision, page 11, **AR, Vol 1, Tab 19, page 267, 2nd last para, final sentence**; Parole Assessment for Decision, page 14, **AR, Vol 1, Tab 14, page 233, para 5**.
[24] PBC Recording 1:44:50-1:46:00; Submission from Shane Martinez, August 27, 2020, "GPS Monitoring, Recovery Science Corporation", **AR, Vol 1, Tab 12(C), pages 178-201**; Parole Assessment for Decision, page 11, **AR, Vol 1, Tab 14, page 230, para 2**; Application for Day and Full Parole, May 11, 2020, **AR, Vol 1, Tab 15, page 236, para 3**.
[25] PBC Decision, page 5, **AR, Vol 1, Tab 3, page 12, para 7**; Audio Recording of PBC Hearing, September 1, 2020 **("PBC Recording")**, 20:21-20:28, 135:48-1:36:18, 1:43:25-1:43-53.

infractions as compared to only six months at the time of the approved UTAs.[26]

e. The requested day parole would only involve one single trip from Gravenhurst to Windsor rather than the six 12-hour, unsupervised trips on public transit involved in the approved UTAs.[27]

f. The Applicant was willing to subject himself to an additional condition requested by his Case Management Team, which was to have no direct or indirect contact with any member of the victim's family.[28]

17. The Board hearing was held before two members. The lead member, Randy Mason, had also been one of the members who had decided the Applicant's March 4, 2020, hearing, and had granted the Applicant the three UTAs.[29]

18. During the September 1, 2020, hearing, Mr. Mason made many comments showing that he went into the hearing thinking that the "best step" for the Applicant would be to complete the granted UTAs before being released on parole. These comments indicate both that he was applying the wrong test to determine whether parole should be granted (whether parole would be the "best step" rather than whether it would create an "undue risk") and that he entered the hearing with a closed mind. Mr. Mason's comments show that he was fixated on the fact that the UTAs were not completed, seeing them as a necessary precondition to less-restrictive releases, rather than focusing on assessing the Applicant's risk on the specific day and full parole applications before him.

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[26] The Applicant's last recorded incident was September 13, 2019: UTA Decision, page 5, **AR, Vol 1, Tab 16, page 243, para 3, 2nd last sentence**.
[27] PBC Recording 1:36:49-1:37-57; *see* UTA Assessment for Decision, page 6, **AR, Vol 1, Tab 19, page 262, para 3**.
[28] Addendum to Assessment for Decision, page 1, **AR, Vol 1, Tab 11, page 119, para 4**.
[29] *See* UTA Decision, page 6, **AR, Vol 1, Tab 16, page 244**; PBC Decision, page 6, **AR, Vol 1, Tab 3, page 13**.

19. Mr. Mason's first comment, after administrative opening remarks, was to tell the Applicant that the incomplete UTAs were top of his mind:

> Okay, so, Mr. Chaif, we met with you back in March. And at that time, even though there were concerns that were presented, and even though you didn't have support from the community assessment team, the CAT, we agreed to authorize your UTAs […]
>
> Now, Mr. Chaif, by no fault of your own, your UTAs did not occur, with the whole COVID pandemic and so forth. Everything has been put on hold. And even though you met the cutoff date, it was a fact that these were going to be overnight, that your UTAs were not supportive. A little disappointing, I'm sure from your end, sir.
>
> But again, you understand clearly our decision making at that time and your agreement. You understood clearly why the UTAs were fundamentally important for you in terms of moving forward and progressing towards other forms of conditional release.[30]

20. Moments later Mr. Mason asked the question which would evidently guide his thinking throughout the rest of the hearing:

> So my question to you right off the bat is what's changed, then? What's changed? You, yourself, agreed that the UTAs, were a necessary step for you before moving forward to other forms of conditional release. What has changed, sir?[31]

21. The Applicant responded that the two things that had changed: he had reached his mandated full parole review date, and COVID-19 had resulted in a prolonged cancellation of all UTAs.[32]

22. Mr. Mason then told the Applicant that he took the Applicant's prior agreement that UTAs were the "good strategy" to mean that they were now a "step" that could not be "jumped":

> Given your agreement with us that the UTAs would be the <u>best sort of interim step</u> for you, and you agreed with us that that would be a good risk-mitigating

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[30] PBC Recording 16:30-17:59.
[31] PBC Recording 18:08-18:27.
[32] PBC Recording 18:27-19:27.

> strategy, do you not agree, sir, that a jump to day parole or even full parole at this time has bypassed that step for your risk mitigation?[33]

23. Almost half an hour later, Mr. Mason brought the conversation back to the UTAs, and he affirmed that he still believed that Applicant's risk was manageable on the UTAs after weighing all the circumstances:

> We did authorize the three 72 hour UTAs, as we discussed, but unfortunately, they have not happened as of yet. That's not to say they're closed, they're still open, they're still there. They still can unfold as we projected. And I want to remind you, Mr. Chaif, that's a good thing. That's a very good thing.
>
> That decision was given to you because after weighing all the circumstances of your file. We saw there was good progress in certain areas and so forth. And we felt that your risk was manageable under that kind of scenario.[34]

24. As his final comment after questioning the Applicant, Mr. Mason explicitly exposed that he was fettering his discretion: he insisted the Applicant must start with the course of action agreed upon at the prior UTA hearing:

> I think the only question I have, the last remaining question I have for you is that it's a jump, sir. You know, as we mentioned, the agreed upon course of action was the UTAs as a starting point.[35]

25. At the end of the hearing, the Board denied the requests for day and full parole and delivered some brief reasons orally. In these oral reasons, Mr. Mason extensively referenced the incomplete UTAs as the reason for the denial, referring to the UTAs as though they were necessary, simply because the Applicant had agreed with him at the prior UTA hearing that they were "best step". Mr. Mason indicated that he was maintaining a position from the prior hearing, rather than making a fresh assessment of the Applicant's risk on day or full parole:

> … we believe that the unescorted temporary absences are going to be a necessary, but a ver-, very positive step for you, sir, to work towards other forms

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[33] PBC Recording 19:53-20:21.
[34] PBC Recording 49:33-50:10.
[35] PBC Recording 1:23:19-1:23:36.

> of conditional release. We still maintain that position, sir, that we want to see the completion of the UTAs.[36]
>
> … you agreed with our plan, with our last decision as well. You said that that was the best step for moving forward.[37]

Day and Full Parole Decision

26. The Board released the written decision on September 3, 2020. In these reasons, the Board stated that it was denying the parole because it had concluded that the Applicant would present an undue risk to society if released, and that his release would not facilitate his reintegration into society.[38]

Undue Risk

27. In concluding the Applicant's release would present an undue risk, the Board stated that it agreed with its previous decision, that the Applicant's risk would be manageable on the authorized UTAs.[39] However, every single reason the Board listed to support its conclusion that the risk for day and full parole would be unmanageable had also been taken into account by the Board when it approved the UTAs.[40]

28. The decision does not articulate what danger the Applicant will present to society if he is released on day parole. The concluding statement only says that the Applicant "will present an undue risk to society if released"[41] but does not state that the risk would be from re-offense, which is the statutory criteria.[42] This is odd, since the decision approving the UTAs, written by the same member, was not so opaque in

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[36] PBC Recording 1:50:03-1:50:25.
[37] PBC Recording 1:50:44-1:50:52.
[38] PBC Decision, page 6, **AR, Vol 1, Tab 3, page 13, para 4**.
[39] PBC Decision, page 5, **AR, Vol 1, Tab 3, page 12, final paragraph**.
[40] *Compare* PBC Decision, **AR, Vol 1, Tab 3** with UTA Decision, **AR, Vol 1, Tab 16** and UTA Assessment for Decision, **AR, Vol 1, Tab 19**.
[41] PBC Decision, page 5, **AR, Vol 1, Tab 3, page 12, final paragraph**.
[42] *CCRA*, *supra* note 1, s 102(a).

its language, stating explicitly, “you will not by reoffending present an undue risk to society”.[43]

29. Despite the only notable difference between the approved UTAs and denied day parole being their length, there is not a single statement in the decision that the additional length of time would be something that increases the Applicant’s risk, nor is there anything in the decision that makes it clear that the Board implicitly based its decision on this.

30. Additionally, the decision fails mention several key factors which significantly decreased or mitigated the Applicant’s risk, and about which his parole assistant made submissions:

    a. The Applicant was willing to be subject to GPS monitoring and pay for the monitoring himself;[44]

    b. The Windsor Police were in support of the Applicant’s day parole, whereas six months earlier, they had not been in support of the UTAs that were nevertheless granted;[45] and

    c. The requested day parole would only involve one single trip from Gravenhurst to Windsor rather than the six 12-hour, unsupervised trips on public transit involved in the approved UTAs.[46]

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[43] UTA Decision, page 5, **AR, Vol 1, Tab 16, page 243, para 6**.
[44] PBC Recording 1:44:50-1:46:00; Submission from Shane Martinez, August 27, 2020, “GPS Monitoring, Recovery Science Corporation”, **AR, Vol 1, Tab 12(C), pages 178-201**; Parole Assessment for Decision, page 11, **AR, Vol 1, Tab 14, page 230, para 2**; Application for Day and Full Parole, May 11, 2020, **AR, Vol 1, Tab 15, page 236, para 3**.
[45] PBC Recording 1:43:53-1:44:50; UTA Assessment for Decision, page 11, **AR, Vol 1, Tab 19, page 267, 2nd last para, final sentence**; Parole Assessment for Decision, page 14, **AR, Vol 1, Tab 14, page 233, para 5**.
[46] PBC Recording 1:36:49-1:37-57; *see* UTA Assessment for Decision, page 6, **AR, Vol 1, Tab 19, page 262, para 3**.

31. There is no mention of these three facts in the decision. There is no analysis as to whether they would decrease the Applicant's risk to a suitable level. Nor is there even a bare conclusion that the GPS monitoring would not be feasible.

32. It is impossible to tell from the decision why the Applicant's risk might be manageable for the UTAs but not manageable for the nearly identical day parole. The clearest indications from the Board are that the Board had determined UTAs were the "best next step" and thus saw UTAs as a necessary precondition to day or full parole. The Board listed off a handful of negatives about the Applicant to give some cover for this preferred result without truly turning its mind to whether the Applicant was unduly likely to reoffend while on day parole with GPS monitoring.

Facilitate Reintegration

33. In coming to its conclusion that parole would not facilitate the Applicant's reintegration, the Board failed to provide a single reason. The Board quoted the statutory language at the beginning of the decision,[47] and at the end, the Board claimed that the criteria was not met.[48] But there were no reasons.

Upheld by Appeal Division

34. The Applicant appealed the Board decision to the Appeal Division, and on February 2, 2021, the Appeal Division dismissed the appeal.[49]

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[47] PBC Decision, page 2, **AR, Vol 1, Tab 3, page 9, para 2**.
[48] PBC Decision, page 6, **AR, Vol 1, Tab 3, page 13, para 4**.
[49] Appeal Division Decision, page 2, **AR, Vol 1, Tab 4, page 15**.

PART II – POINTS IN ISSUE

35. The Applicant submits that the following issues are to be determined:

ISSUE 1: What is the standard of review?

ISSUE 2: Was the conclusion on undue risk unreasonable?

ISSUE 3: Was the conclusion on facilitating reintegration unreasonable?

ISSUE 4: Was the decision procedurally fair?

PART III – SUBMISSIONS

ISSUE 1: The Standard of Review is Reasonableness and Procedurally Fair

36. Decisions of the Board and Appeal Division are reviewed on the standard of reasonableness. If either the underlying Board decision or the Appeal decision is unreasonable, the decision must be set aside.[50]

37. The *CCRA* sets out the two criteria that the Board must assess when determining whether to grant parole. If the Board's conclusion on either of these two critical points is unreasonable, the decision must be set aside.[51] These criteria are whether the requested parole will

    a. present an undue risk to society by reoffending, and

    b. contribute to protection of society by facilitating reintegration into society.[52]

38. The standard of review for procedural fairness is correctness.[53]

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[50] *Cartier v Canada (Attorney General)*, 2002 FCA 384 at para 10, [2003] 2 FC 317; *Latimer v Canada (Attorney General)*, 2014 FC 886 at para 19.
[51] *See Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 103, 441 DLR (4th) 1 [*Vavilov*].
[52] *CCRA*, *supra* note 1, s 102.
[53] *Mission Institution v Khela*, 2014 SCC 24 at para 79, [2014] 1 SCR 502.

ISSUE 2: The Conclusion on Undue Risk was Unreasonable

39. The Board's conclusion that day parole would present an undue risk is unreasonable in three ways:

    a. The Board provided no explanation for why it determined the Applicant would present an undue risk on day parole when also it determined that he would not present such a risk on virtually identical UTAs;

    b. The Board ignored the legislated principle requiring it make the least restrictive determination consistent with the protection of society, and instead fettered its discretion by treating a "best step" agreed upon at the prior UTA hearing as a prerequisite to any less-restrictive release;

    c. The Board completely ignored key submissions and evidence before it.

A. No Justification Provided for Increased Risk on Identical Day Parole

40. The Board's conclusion that the Applicant's day parole would present an undue risk to society is unreasonable because the substance of the day parole was virtually identical to the substance of the approved UTAs, and the Board did not provide any reasons as to why day parole would present an increased risk.

41. In *Vavilov*, the Supreme Court emphasized the importance of paying attention to a decision-maker's reasons when conducting reasonableness review. An outcome which might appear reasonable will not be reasonable if the basis upon which it was made is not justified:

> it is not enough for the outcome of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons[54]

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[54] *Vavilov*, *supra* note 51 at para 86.

42. The Court emphasized that even if the outcome of the decision could be reasonable under different circumstances, it is "not ordinarily appropriate for the reviewing court to fashion its own reasons in order to buttress the administrative decision."[55]

43. The Federal Court of Appeal noted this shift in reasonableness review in *Farrier*, when it found a Parole Board Appeal Division decision unreasonable for failing to provide reasons on two issues. The Court of Appeal explained, "Before *Vavilov* I would probably have found, as did the Federal Court, that, in light of the presumption that the decision-maker considered all of the arguments and the case law before it and after having read the record, the decision was reasonable."[56] However, as a result of the shift in the law, the Court held that "the reasons do not meet the standard of reasonableness described by the Supreme Court in *Vavilov*."[57]

44. The reason for prohibiting an outcome-focused review is that it would "allow an administrative decision maker to abdicate its responsibility to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion".[58]

45. While all decisions must be justified, and not merely justifiable, the duty to provide transparent justification is further heightened in two circumstances, both of which are present in this case. First, the duty is heightened when a decision affects a person's liberty.[59] This necessarily includes Parole Board decisions.

46. Second, those affected by decision "are entitled to expect that like cases will generally be treated alike".[60] Where two similar cases are decided differently, the decision maker "bears the justificatory burden of explaining that departure in its reasons."[61]

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[55] *Ibid* at para 96.
[56] *Farrier v Canada (Attorney General)*, 2020 FCA 25 at para 12, 161 WCB (2d) 531.
[57] *Ibid* at para 19.
[58] *Vavilov*, *supra* note 51 at para 96.
[59] *Ibid* at paras 133-135.
[60] *Ibid* at para 129.
[61] *Ibid* at para 131.

47. In the present case, the Board provided no justification to explain why the Applicant would not pose an undue risk to public safety for the approved UTAs, but would for the virtually identical day parole.

48. The Board noted that the Applicant was authorized for three 72-hour UTAs in March 2020, and that the Board determined that the Applicant's risk would be assumable under this release.[62] During the day parole hearing, the lead Board Member explicitly agreed that the Applicant's risk was manageable under the UTAs.[63]

49. These UTAs are identical in all but three respects to the requested day parole. Both consist of the following:

    a. The Applicant would reside at the St. Leonard's Community Residential Facility in Windsor;[64]

    b. The Applicant would volunteer at the Ojibway Nature Center, local churches, and the halfway house on projects including park clean-up and graffiti removal.[65]

    c. The following conditions would be imposed:

        i. No direct or indirect contact with Margo Clinker;

        ii. Immediately report all relationships with females; and

        iii. No association with any person involved in criminal activity;[66]

50. The only three differences are the increased unsupervised travel time involved in the three UTAs, the longer duration of the day parole, and the included mention of

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[62] PBC Decision, page 5, **AR, Vol 1, Tab 3, page 12, final paragraph**.
[63] PBC Recording 49:56-50:10.
[64] UTA Decision, page 2, **AR, Vol 1, Tab 16, page 240**; Parole Assessment for Decision, page 5, **AR, Vol 1, Tab 14, page 224, para 1**; PBC Decision, page 5, **AR, Vol 1, Tab 3, page 12, para 2**; Parole Assessment for Decision, page 2**, AR, Vol 1, Tab 14, page 221, para 1**.
[65] Assessment for Decision for UTAs, January 27, 2020 **("UTA Assessment for Decision")**, page 6, **AR, Vol 1, Tab 19, page 262, para 3**; PBC Decision, page 5, **AR, Vol 1, Tab 3, page 12, para 2**; Parole Assessment for Decision, page 11, **AR, Vol 1, Tab 14, page 230, para 4**.
[66] UTA Decision, page 2, **AR, Vol 1, Tab 16, page 240**; Parole Assessment for Decision, page 14, **AR, Vol 1, Tab 14, page 233**.

some innocuous day-to-day activities upon which the Applicant would spend his time during day parole. The Board made no mention as to which of these three differences led to the different conclusion on risk.

51. There is no logical way in which a decrease in unsupervised travel time would make day parole riskier. If anything, this increases the safety of day parole as compared to the UTAs.

52. The fact that day parole has a longer duration than the three UTAs does not, in and of itself, lead to a logical inference that day parole presents more risk. None of the risk factors or prior conduct which the Board mentioned in its decision logically imply that a longer period at a community residential facility would result in a higher likelihood of the Applicant being a danger to the public. If the Board was meaning to rely on this assumption, it needed to, at the very least, have stated this assumption.

53. The innocuous day-to-day activities do not, in and of themselves, lead to a logical inference of higher risk. The activities were attending church and courses at a local college, spending time with family, and engaging in woodworking as a hobby.[67] If the Board meant to rely on the assumption that these activities increased risk, the Board needed to have stated this, and, further, would have needed to assess whether it could simply prohibit these activities while still allowing the day parole.

54. It would not be appropriate for a reviewing Court to speculate as to the Board's unstated reasons nor buttress the decision with the Court's own reasons.[68] Therefore, because of this lack of justification for the critical finding related to risk, the Board's decision is unreasonable.

B. Fettered Discretion Not in Line with Legislative Principles

55. The Board's conclusion regarding risk is also unreasonable because the Board did not comply with the statutory principle that it must make the "least restrictive

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[67] PBC Decision, page 5, **AR, Vol 1, Tab 3, page 12, para 2**; Parole Assessment for Decision, page 11, **AR, Vol 1, Tab 14, page 230, para 4**.
[68] *See Vavilov*, *supra* note 51 at para 96.

determination",[69] but instead fettered its own discretion by refusing to approve parole because it believed that UTAs were the "best next step" and had procured the Applicant's agreement with this at the previous UTA hearing.

56. Even when administrative decision makers have considerable discretion, their decision must comply with the rationale and purview of the statutory scheme under which the decision is made.[70] If the decision maker might have arrived at a different result if it had considered a key element of the statutory provision's text or purpose, the failure to consider that element makes the decision unreasonable.[71]

57. One of the five principles listed in the *CCRA* to guide the Board in achieving the purpose of the Act is that "parole boards make the least restrictive determinations that are consistent with the protection of society".[72] This means that the Board must turn its mind to whether the decision grants the inmate the most amount of freedom possible without endangering society. It must "carefully tailor the conditions of an offender's release" to ensure this is so.[73] The Board cannot ignore this principle and make its decision on another principle idiosyncratically created by one of its members.

58. Another statutory constraint is that a decision maker cannot fetter its discretion if the law grants it wide discretion.[74] No standards other than legal standards can be used:

> Any decision that draws upon something other than the law – for example a decision based solely upon an informal policy statement without regard or cognizance of law, cannot fall within the range of what is acceptable and defensible[75]

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[69] *CCRA*, *supra* note 1, s 101(c).
[70] *Vavilov*, *supra* note 51 at para 108; *Latimer v Canada (Attorney General)*, 2014 FC 886 at para 31.
[71] *Vavilov*, *supra* note 51 at para 122.
[72] *CCRA*, *supra* note 1, s 101(c).
[73] *Latimer v Canada (Attorney General)*, 2010 FC 806 at para 63, [2011] 4 FCR 88.
[74] *Vavilov*, *supra* note 51 at para 108.
[75] *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 at para 24, 425 NR 341.

59. The Board's decision is unreasonable because it was made on a basis that ignored the statutory guidance that the "least restrictive determination" be made, and instead fettered its discretion, refusing day parole because it saw UTAs as the "best step". The lead Board Member's comments during the hearing, and the reasons for decision, demonstrate that this occurred.

60. Randy Mason, the Board Member leading the hearing,[76] repeatedly demonstrated that he was caught up on the UTAs he had granted at the prior hearing. He saw them as the best next step, and since the Applicant had not completed them (at no fault of his own), the Applicant should not be allowed to "jump" this step and be considered for day parole. A few examples of his comments during the hearing are as follows:

    a. "… you agreed with our plan, with our last decision as well. You said that that was the best step for moving forward."[77]

    b. "… given your agreement with us that the UTAs would be the best sort of interim step for you, and you agreed with us that that would be a good risk-mitigating strategy, do you not agree, sir, that a jump to day parole or even full parole at this time has bypassed that step for your risk mitigation? Sir, would you agree with that?"[78]

    c. "… the last remaining question I have for you is that it's a jump, sir. You know, as we mentioned, the agreed upon course of action was the UTAs as a starting point."[79]

    d. "…we believe that the unescorted temporary absences are going to be a necessary, but a ver-, very positive step for you, sir, to work towards other

[76] PBC Recording 15:31-15:40.
[77] PBC Recording 1:50:44-1:50:52.
[78] PBC Recording 19:28-20:21.
[79] PBC Recording 1:23:19-1:23:36.

> forms of conditional release. We still maintain that position, sir, that we want to see the completion of the UTAs."[80]

61. There is no statutory requirement that inmates complete each level of conditional release before moving onto the next. There is no statutory prohibition on inmates "jumping" over a certain step, such as UTAs, and moving straight on to day parole. This is, in fact, expressly allowed by the principle in *CCRA* s. 101(c) that inmates should be placed under the least restrictive measures possible while keeping the public safe. By requiring each step before the next, the Board fettered its own discretion by something other than the law. The Board's procurement, at the prior hearing, of the Applicant's agreement that UTAs were the next best step does not make this fettering permissible.

62. We are not submitting that Mr. Mason's comments alone conclusively demonstrate that he fettered his discretion and ignored the statutorily mandated principle. In another circumstance, it might be possible that a Board Member could make an off-hand comment about "best steps" in a hearing, but the Board still render its decision in line with the principle in *CCRA* s. 101(c). If this was the case, the reasons for decision would demonstrate that the principle was followed.

63. However, the reasons for decision lack any indication that the s. 101(c) principle was even considered. There is no analysis of different possibilities for conditional release and the nature or degree of risk that might result from these releases. There is no indication that the Board thought incrementally, moving from full parole to day parole and, finally, to UTAs and determined, for some articulable, evidence-based reason, that UTAs granted the most liberty that could be allowed without endangering the public.

64. There was also no consideration of mitigation measures that might be put in place. If the Board concluded that day parole would present an undue risk of reoffense, the Board should have then turned its mind to whether a mitigation measure such as

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[80] PBC Recording 1:50:03-1:50:25.

GPS monitoring would have allowed for a less restrictive release than simply denying day parole altogether.[81]

65. The combination of Mr. Mason's repeated comments about "jumping steps" and complete lack of analysis as to whether UTAs truly were the least restrictive measure safely possible, demonstrate that he ignored the statutory guidance in s. 101(c) and substituted it for his own idiosyncratic policy. This is not a minor mistake. Clearly, if the Board had considered s. 101(c), it may well have arrived at a different result. This failure, therefore, renders the decision unreasonable.[82]

C. Ignored Submissions and Failed to Account for Evidence

66. The Board's conclusion regarding risk was also unreasonable because it failed to meaningfully grapple with key submissions raised by the Applicant's parole assistant and failed to account for the new, positive evidence before it.

67. A decision will be unreasonable if the decision maker has failed to account for the evidence before it.[83] A decision will also be unreasonable if the decision maker failed to "meaningfully grapple with key issues or central arguments raised by the parties".[84] Decision makers do not have to respond to every single argument or line of possible analysis, but they do have to demonstrate, by way of their reasons, that they actually listened to the parties.[85]

68. The Decision-Making Policy Manual for Board Members **("Policy Manual")** gives specific guidance on this issue. While not binding, the Policy Manual provides "a useful indicator of what constitutes a reasonable interpretation of the power conferred".[86] The Policy Manual requires that the Board include in its reasons for

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[81] *See* the parole assistant's submissions at PBC Recording 1:44:50-1:46:00; Submission from Shane Martinez, August 27, 2020, "GPS Monitoring, Recovery Science Corporation", **AR, Vol 1, Tab 12(C), pages 178-201**.
[82] *Vavilov*, *supra* note 51 at para 122.
[83] *Ibid* at para 126.
[84] *Ibid* at para 128.
[85] *Ibid* at para 127.
[86] *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 72, 243 NR 22; *Latimer v Canada (Attorney General)*, 2014 FC 886 at para 34.

decision “an overview of the offender’s representations obtained in writing or at the hearing”.[87]

69. Despite this, neither the reasons for decision, nor the recording of the hearing itself, give any indication that the Board Members turned their minds to three important facts and submissions that the Applicant raised about the lowered public safety risk of granting day parole as compared to the already approved UTAs:

    a. The Applicant was willing to be subject to GPS monitoring and pay for the monitoring himself;[88]

    b. The Windsor Police had changed their view and expressed their support for the Applicant’s day parole, whereas six months earlier, they had not been in support of the UTAs that were nevertheless granted;[89] and

    c. The requested day parole would only involve one single trip from Gravenhurst to Windsor rather than the six 12-hour, unsupervised trips on public transit involved in the approved UTAs.[90]

70. Each of these three facts and submissions are key issues, which, if considered, could have had a real impact on the outcome of the case. A GPS monitor could potentially have a substantial mitigating effect on the risk to reoffend since the police could see in advance if the Applicant was travelling anywhere that he should not go. It would have a deterring effect on the Applicant, since he would know that he could be placed at the scene of a crime, and that he would not be able to evade

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[87] Parole Board of Canada, *Decision-Making Policy Manual for Board Members* (13 April 2021) 2nd Ed. No. 19, “2.1 Assessment for Pre-Release Decisions” at para 17(g).
[88] PBC Recording 1:44:50-1:46:00; Submission from Shane Martinez, August 27, 2020, “GPS Monitoring, Recovery Science Corporation”, **AR, Vol 1, Tab 12(C), pages 178-201**; Parole Assessment for Decision, page 11, **AR, Vol 1, Tab 14, page 230, para 2**; Application for Day and Full Parole, May 11, 2020, **AR, Vol 1, Tab 15, page 236, para 3**.
[89] PBC Recording 1:43:53-1:44:50; UTA Assessment for Decision, page 11, **AR, Vol 1, Tab 19, page 267, 2nd last para, final sentence**; Parole Assessment for Decision, page 14, **AR, Vol 1, Tab 14, page 233, para 5**.
[90] PBC Recording 1:36:49-1:37-57; *see* UTA Assessment for Decision, page 6, **AR, Vol 1, Tab 19, page 262, para 3**.

capture. The Board's failure to assess the effect that a GPS monitor would have on the Applicant's risk level is therefore unreasonable.

71. The Windsor Police's support of the Applicant's day parole also should have been accounted for. In its reasoning, the Board acted as though the Applicant was in the exact same situation as six months prior in his need to establish "credibility".[91] However, the police's change of opinion about the Applicant demonstrates that he had gained credibility with, arguably, the most important assessors of public safety risk: the local police. Since the Windsor Police were the best situated as local experts to assess the risk of the Applicant's presence in the community of Windsor, and they were the entity that would be tasked with preventing and reacting to any offense the Applicant committed, their opinion as to his risk should have been meaningfully grappled with in the decision. While the Board did not have the obligation to agree with the police's assessment, it needed to, at the very least, give some reason for disagreeing with the police assessment for the decision to be justified.

72. Finally, the Board should have addressed, in some manner, the Applicant's parole assistant's submission that day parole would result in *less* risk to public safety because he would spend less time travelling unsupervised. This submission is more important than it might appear at first glance if viewed in context of the Board's expressed concerns. Much of the Board's concern about the Applicant's "credibility" at both the March and September Board hearings arose from the fact that during a previous UTA in September 2018, the Applicant had taken nine hours to travel from the institution to the community residential facility instead of the allotted six hours.[92] (The Board saw this as problematic despite the fact that the Applicant had called the parole office and half-way house and obtained pre-approval for the stops.[93]) The

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[91] PBC Decision, page 6, **AR, Vol 1, Tab 3, page 13, para 2, sentences 3-4**.
[92] *See* PBC Decision, page 4, **AR, Vol 1, Tab 3, page 11, para 4, sentence 4 ff**; PBC Recording 41:19-44:53.
[93] *See* Letter from Michelle Graham in Submission from John Chaif, February 10, 2020, **AR, Vol 1, Tab 18, page 253**; PBC Recording 43:15-43:24, 43:36-43:41, 44:29-44:33.

Applicant had completed a number of UTAs and ETAs prior to this without any incident,[94] so this event was one of the most, if not *the* most, influential reason for the Board's view that the Applicant needed to "establish credibility". Because the Board's stated concerns stemmed primarily from the Applicant's unsupervised travel time, the Board should have addressed the fact that the requested day parole would involve one-sixth the amount of unsupervised travel.

73. In summary, the Board's conclusion regarding undue risk is unreasonable since it failed to provide any reasons that day parole would be riskier than the approved UTAs, it ignored the statutory principles in favour of its own idiosyncratic principle, and it failed to demonstrate that it had meaningfully grappled with the Applicant's submissions.

ISSUE 3: The Conclusion on Facilitating Reintegration was Unreasonable

74. The Board's conclusion that the Applicant's release "will not contribute to the protection of society by facilitating [his] reintegration into society as a law-abiding citizen"[95] is unreasonable since it is not supported by any reasons. The Board simply repeated statutory language and stated a peremptory conclusion.

75. For a decision to be reasonable, a reviewing court must be able to trace the decision maker's reasoning and be satisfied that there is a line of analysis within the reasons that leads the from the evidence to the conclusion arrived at.[96] A decision will be unreasonable "if the reasons read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a critical point".[97] The reasons cannot "simply repeat statutory language, summarize arguments made, and then state a peremptory conclusion".[98]

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[94] PBC Recording 41:19-44:53.
[95] PBC Decision, page 6, **AR, Vol 1, Tab 3, page 13, para 4**.
[96] *Vavilov*, *supra* note 51 at para 102.
[97] *Ibid* at para 103.
[98] *Ibid* at para 102.

76. As previously stated, this requirement is heightened when a decision has harsh consequences for the affected individual, including decisions with consequences that threaten liberty. The decision maker must explain why its decision best reflects the legislature's intention.[99]

77. The Board repeated the language of the *CCRA* s. 102 criteria at the beginning of its decision,[100] and then stated conclusions about each of these two criteria at the end of the decision,[101] but justification for the second criteria, which should have been in the middle, is completely missing.

78. There is no analysis in the Board's decision as to whether day parole or full parole would facilitate the Applicant's reintegration into society. All the analysis in the decision is related to the issue of whether the Applicant would present an undue risk to society.

79. It might have been open to the Board, after it found that the first criteria was not met, to deny parole and decline to consider the second criteria. Similarly, because of the discretion granted by the word "may" in s. 102, it might be possible for the Board to find that both criteria were met and still deny parole. However, the Board cannot state a conclusion on a criteria without providing any reasons.

80. Parole Board decisions stay with an inmate for years, if not life. As evidenced by the certified tribunal record in this decision, previous decisions and the conclusions within them are referred to and relied upon by the Board even years in the future in subsequent decisions.[102] Because of this, the Board's conclusion that day parole will not facilitate his reintegration in society is likely to haunt the Applicant in future applications, despite it being completely unjustified.

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[99] *Ibid* at para 133.
[100] PBC Decision, page 2, **AR, Vol 1, Tab 3, page 9, para 2**.
[101] PBC Decision, page 6, **AR, Vol 1, Tab 3, page 13, para 4**.
[102] For example, 11 decisions are included in the present certified tribunal record at Tabs 29, 64, 78, 93, 95, 109, 111, 121, 122, 132, & 155: *See* Certified Copy of Record, Index, July 12, 2021, **AR, Vol 1, Tab 6, pages 89-92**.

81. This conclusion must be overturned – both for the sake of the Applicant's future parole applications, and because if this bare conclusion is allowed to stand, it would allow the Board to abdicate from its responsibility to justify its decision.[103]

ISSUE 4: The Decision was Procedurally Unfair

82. The Board's decision was procedurally unfair because of the reasonable apprehension that the lead Board Member, Randy Mason, had a closed mind. Mr. Mason had determined in the March 4, 2020, decision to grant the Applicant UTAs, and Mr. Mason viewed them as the "best step" for the Applicant, based on the prior hearing. It is likely that because of this Mr. Mason went into the September 1, 2020, hearing with a firm belief that the Applicant must complete the granted UTAs before any further releases could be authorized, and he did not review the evidence with an open mind to fairly assess whether the proposed day or full parole would present an undue risk to the public.

83. The test for reasonable apprehension of bias asks whether an informed person, viewing the matter realistically and practically, and having thought the matter through conclude that it is more likely than not that the decision maker, whether consciously or unconsciously, would not decide fairly.[104] The test does not ask whether actual bias can be shown, but whether there is a "likelihood of bias".[105]

84. In *Vavilov*, the Supreme Court reaffirmed that reliance on irrelevant considerations and failure to consider relevant evidence can lead to a conclusion that there was a reasonable apprehension of bias.[106]

85. The Board is not bound by *stare decisis*,[107] and at each hearing, a fresh assessment of risk should be done to determine if risk is manageable on the form of release sought. However, the Board's decision and Mr. Mason's comments

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[103] *Vavilov*, *supra* note 51 at para 96.
[104] *Wewaykum Indian Band v Canada*, 2003 SCC 45 at para 74, [2003] 2 SCR 259.
[105] *Boucher v Canada (Attorney General)*, 2006 FC 1342 at para 13, 303 FTR 235.
[106] *Vavilov*, *supra* note 51 at para 126.
[107] *Ibid* at para 129.

throughout the hearing would make a reasonable person believe that it was likely that the Board instead started from the presumption that the UTAs granted in the prior decision must be the next step for the Applicant, and no other release should be granted until these UTAs were completed.

86. Mr. Mason repeatedly demonstrated that he was overly preoccupied with the fact that he had granted UTAs at the prior hearing; he saw them as the next step; and since the Applicant had not completed them (at no fault of his own), the Applicant should not be allowed to "jump" this "step" and be considered for day parole.

87. Mr. Mason's first comments, after administrative opening remarks, were to *tell* the Applicant that he considered the UTAs to be "fundamentally important". Moments later, Mr. Mason revealed the criteria by which he was making his internal determination. He asked the Applicant: "What's changed, then? What's changed? You, yourself, agreed that the UTAs, were a necessary step for you before moving forward to other forms of conditional release. What has changed, sir?"[108]

88. As outlined in paragraph 60 above, Mr. Mason made many comments throughout the hearing indicating he used the wrong test ("next best step" rather than "least restrictive determination"), and these same comments also indicate that he came into the hearing with this test in mind, rather than the proper legal test.

89. Mr. Mason then concluded his questioning of the Applicant with the following indication that he was maintaining a position rather than deciding a new request in a new circumstance:

> …we believe that the unescorted temporary absences are going to be a necessary, but a ver-, very positive step for you, sir, to work towards other forms of conditional release. <u>We still maintain that position</u>, sir, that we want to see the completion of the UTAs.[109]

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[108] PBC Recording 18:09-18:27.
[109] PBC Recording 1:50:03-1:50:25.

90. In the conclusion of the written reasons for decision, the Board also gave an indication that it did not conduct a fresh analysis as to the risk of day or full parole but took its past approval of UTAs to mean UTAs were a necessary step:

> As indicated, the approved UTAs are there for you to establish credibility. The Board holds that this remains the case.[110]

91. A reasonable person would, therefore, find it likely that Mr. Mason did not conduct a fresh analysis of the risk of reoffending based on the evidence before him. He instead came into the hearing with a preconceived notion that UTAs were the best step for the Applicant, and because of this Mr. Mason largely ignored the Applicant's submissions and evidence.

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[110] PBC Decision, page 6, **AR, Vol 1, Tab 3, page 13, para 2**.

PART IV – ORDER SOUGHT

92. Based on the foregoing, the Applicant seeks the following relief:

a. An order pursuant to section 18.1 of the *Federal Courts Act* quashing the February 2, 2021, decision of the Appeal Division and the September 3, 2020, decision of the Board, and remitting the decision to a differently constituted panel of the Board for redetermination;

b. The costs of this application; and

c. Such further and other relief as counsel may request and this Honourable Court may permit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 21 October 2021

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PART V – LIST OF AUTHORITIES

Legislation

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

Jurisprudence

2. *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 243 NR 22

3. *Boucher v Canada (Attorney General)*, 2006 FC 1342, 303 FTR 235

4. *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, 441 DLR (4th) 1

5. *Cartier v Canada (Attorney General)*, 2002 FCA 384, [2003] 2 FC 317

6. *Farrier v Canada (Attorney General)*, 2020 FCA 25, 161 WCB (2d) 531

7. *Latimer v Canada (Attorney General)*, 2010 FC 806, [2011] 4 FCR 88

8. *Latimer v Canada (Attorney General)*, 2014 FC 886

9. *Mission Institution v Khela*, 2014 SCC 24, [2014] 1 SCR 502

10. *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299, 425 NR 341

11. *Wewaykum Indian Band v Canada*, 2003 SCC 45, [2003] 2 SCR 259

Secondary Sources

12. Parole Board of Canada, *Decision-Making Policy Manual for Board Members* (13 April 2021) 2nd Ed. No. 19