Court File Number: T-1470-19

FEDERAL COURT

BETWEEN:

ROBERT SCHEIRING

Applicant

-and-

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

APPLICANT'S MEMORANDUM OF FACT AND LAW

PART I – CONCISE STATEMENT OF FACTS

Overview

1. This is an application for judicial review of the August 13, 2019 decision of the Respondent Minister of Public Safety and Emergency Preparedness (hereinafter referred to as "**the Minister**") denying the Applicant's request for transfer from the United States to Canada pursuant to the *International Transfer of Offenders Act* ("**the *Act***" or "***ITOA***").

2. The Minister's decision is unreasonable in that it focuses on past, unchangeable events, predetermining the outcome of any future applications, which is contrary to the purpose of the *Act*.[1] Additionally, the Minister's decision cannot stand because his only two reasons for denying the transfer – that the Applicant intended to abandon Canada and that the Applicant would endanger public safety – are completely unsupported by any evidence on record. These conclusions are

[1] *See Carrera v Canada (Public Safety)*, 2015 FC 69 at para 79 [AR Vol 3, Tab 6].

strongly contradicted by the evidence cited by the Minister himself, making his decision unjustified and unintelligible.

3. Given the Minister's flagrant disregard for the evidence and the statutory parameters required by the ITOA and its jurisprudence, the Applicant submits that this case is appropriate for an order in the nature of a directed verdict for acceptance of the Applicant's transfer of sentence back to Canada.

Background and History of the Case

4. The Applicant is a 53-year old Canadian citizen originally from Manitoba, a place to which he continues to have strong personal and family connections.[2] He grew up in Manitoba and qualified as an actuary, moving to Winnipeg then Toronto. During this time, he married and, with his spouse, raised three children. In 2000, he relocated to the United States for work purposes, following which he was charged with criminal offenses.[3]

5. In 2010, the Applicant pleaded guilty to the offenses of possession and distribution of materials involving the sexual exploitation of minors. In June 2010, he was sentenced to a period of incarceration of 14 years (including a concurrent carceral sentence of 10 years for the lesser offence of possession), followed by a period of supervised release for life.[4]

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[2] Amended Affidavit of N Valela ("Valela Affidavit"] at para 2 [Application Record ("AR") Vol 1 at 19]; Decision of Minister of Public Safety and Emergency Preparedness ("Minister's Decision") at 2, para 6 [AR Vol 1 at 11]; Valela Affidavit, Exhibit "A" [AR Vol 1 at 25]. All documents included as Exhibits "A" through "J" to the Valela Affidavit were provided to the Applicant by Dan Kunic, Director, Population Management and Transfers Division in a sharing package dated September 20, 2017. Mr. Kunic indicated in his cover letter (included as Exhibit "C" to the Valela Affidavit, [AR Vol 1 at 37]) that all the information in the sharing package would be submitted to the Minister for his consideration of the application for transfer. This is consistent with the fairness requirement established by the Federal Court in *Balili v Canada (Public Safety and Emergency Preparedness)*, 2011 FC 396 (CanLII).

[3] Valela Affidavit at para 2 [AR Vol 1 at 19]; Valela Affidavit, Exhibit "A" [AR Vol 1 at 25].

[4] Valela Affidavit at para 2 [AR Vol 1 at 19]; Valela Affidavit, Exhibit "A" [AR Vol 1 at 25].

6. Sentencing for a similar offence in Canada would carry a maximum of 10 years and does not provide for a period of supervised release for life.[5] However, were the Applicant's sentence to be transferred to Canada, he would be required to be registered as a sex offender under section 490.011 of the Criminal Code.[6]

7. On or about January 6, 2017, the Applicant submitted his current and fourth request for transfer to Canada.[7]

8. None of the Applicant's previous three transfer requests submitted to CSC in 2011, 2013 or 2016 has been determined by Canada as each was denied by the United States prompting a closure of Canada's transfer file before a Ministerial determination could be made. On these occasions, the US had erroneously concluded that the Applicant had taken residence in the United States, whereas the evidence clearly establishes that his ties to his community in Canada have been strong, consistent and extensive with only a short period of relocation to the United States for employment in the decade prior to his arrest.[8] In view of all the available evidence, following the Applicant's current transfer request dated January 6, 2017, the US approved his transfer on October 6, 2017.[9]

9. The Applicant's connection to Canada and scope for reintegration has been repeatedly and exhaustively established through the provision of over 50 detailed support letters expressing emotional, physical, financial, family and professional support for him upon his transfer of sentence to Canada.[10]

10. Evidence presented at the Applicant's sentencing further supports CSC's own assessment that the Applicant would not pose a danger to any person,

[5] Minister's Decision at 1, para 4 [AR Vol 1 at 10].
[6] Minister's Decision at 5, para 5 [AR Vol 1 at 14].
[7] Valela Affidavit at para 5 [AR Vol 1 at 20]; Valela Affidavit, Exhibit "D" [AR Vol 1 at 39-45].
[8] Valela Affidavit at para 5 [AR Vol 1 at 20].
[9] Valela Affidavit at para 13 [AR Vol 1 at 22]; Valela Affidavit, Exhibit "K" [AR Vol 1 at 133]; Letter from Paula A. Wolff [AR Vol 1 at 137].
[10] Valela Affidavit at para 7 [AR Vol 1 at 20]; Valela Affidavit, Exhibit "E" [AR Vol 1 at 47-79].

including children, in relation to the matters for which he was convicted.[11] Additionally, neither CSC nor its partners have any indication that the Applicant is linked to any security or criminal concerns in Canada.[12] Significantly, during his term of incarceration, the Applicant has completed pro-social education programs, has demonstrated satisfactory institutional adjustment and has not been the subject of any disciplinary report.[13]

11. Although the Applicant maintains strong ties with family in Canada, the 2013 CSC Community Assessment notes that being incarcerated in the US makes it challenging for family members to visit him due to the distance.[14]

Decision of the Minister – August 13, 2019

12. On August 13, 2019, the Minister denied the Applicant's application for transfer.

13. The Minister stated, in his decision, that the following four factors are in favour of the Applicant's transfer to Canada:
    a. The Applicant has strong social and family ties in Canada;[15]
    b. The Applicant has accepted responsibility for the offence, including by acknowledging the harm done to victims and the community;[16]
    c. The Applicant cooperated with law enforcement during every stage of the investigation;[17] and
    d. The Applicant has made positive strides to support his rehabilitation through participation in institutional programming, employment, and education.[18]

[11] Valela Affidavit at para 10 [AR Vol 1 at 21]; Valela Affidavit, Exhibit "H" [AR Vol 1 at 100-114].
[12] Valela Affidavit at para 14 [AR Vol 1 at 22]; Valela Affidavit, Exhibit "A" [AR Vol 1 at 27].
[13] Valela Affidavit at para 12 [AR Vol 1 at 22]; Valela Affidavit, Exhibit "J" [AR Vol 1 at 122-131].
[14] Minister's Decision at 2, para 3 [AR Vol 1 at 11].
[15] *Ibid* at para 6.
[16] Minister's Decision at 3, para 2 [AR Vol 1 at 12].
[17] *Ibid.*
[18] Minister's Decision at 4, para 3 [AR Vol 1 at 13].

14. The Minister unreasonably, and contrary to the evidence, found that two factors were against the Applicant's transfer to Canada:
    a. Endangerment of public safety, and
    b. Intention to abandon Canada as his place of permanent residence.[19]

15. The only three facts the Minister stated to support that the public safety factor weighs against the Applicant's transfer were:
    a. The seriousness of the offense,
    b. The large amount of images and videos in the Applicant's possession at the time of his arrest,
    c. The fact that the Applicant would be immediately released upon transfer to Canada.[20]

16. The only two facts the Minister stated to support his conclusion that the Applicant had intended to abandon Canada were:
    a. The lengthy period of time the Applicant lived in the US, and
    b. The Applicant's ties to immediate family in the US.[21]

17. In relying solely on these five facts to deny the transfer, the Minister focused his decision on unchangeable aspects of the Applicant's past.

18. The Minster consequently denied the Applicant's transfer.

[19] Minister's Decision at 6, para 5 [AR Vol 1 at 14].
[20] Minister's Decision at 5, para 6 [AR Vol 1 at 14].
[21] Minister's Decision at 6, para 2 [AR Vol 1 at 15].

PART II – POINTS IN ISSUE

19. The Applicant submits that the following issues are to be determined in the instant application for judicial review:

ISSUE 1: What is the appropriate standard of review for a decision regarding an offender transfer pursuant to the *International Transfer of Offenders Act*?

ISSUE 2: Should the Minister's decision of August 13, 2019 be set aside upon judicial review?

ISSUE 3: Is an order pursuant to section 18.1 of the *Federal Courts Act* quashing the Respondent's decision dated August 13, 2019 and directing the Minister to approve the Applicant's transfer request an appropriate remedy?

PART III – LAW AND ARGUMENTS

Issue 1: Standard of Review is Reasonableness

20. The appropriate standard of review of the Minister of Public Safety and Emergency Preparedness' decision in respect of the merits of a transfer request pursuant to the *International Transfer of Offenders Act* is reasonableness.[22]

21. While deference is to be afforded to a Ministerial exercise of discretion, the Court must examine the decision-making process in order to ensure it contains a rational justification for the decision and is transparent and intelligible. In addition, the Court must determine whether the decision itself falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law.[23]

[22] *LeBon v Canada (Attorney General)*, 2012 FCA 132 at para 15 [AR Vol 3, Tab 11].
[23] *Ibid* at para 16.

22. If the Minister's reasons do not allow the Court to understand why the Minister made his decision, or if the Minister's conclusion was not within the range of acceptable outcomes, it must be set aside.[24]

Issue 2: The Minister's Decision is Unreasonable and Should be Set Aside

Statutory Context

23. Under the *ITOA*, a Canadian citizen imprisoned abroad may make a request to serve the remainder of his prison sentence in Canada. A transfer requires the consent of the individual, the foreign country, and Canada to be effected.[25]

24. Upon considering a request for transfer, the Minister may consider the factors outlined in *ITOA,* s 10, which include:

    a. Whether the offender's return to Canada will constitute a threat to the security of Canada;
    b. Whether the offender's return will endanger public safety;
    c. Whether the offender is likely to continue to engage in criminal activity after the transfer;
    d. Whether the offender left or remained outside Canada with the intention of abandoning Canada as their place of permanent residence;
    e. Whether the foreign entity or its prison system presents a serious threat to the offender's security or human rights;
    f. Whether the offender has social or family ties in Canada;
    g. The offender's health;
    h. Whether the offender has refused to participate in a rehabilitation or reintegration program;
    i. Whether the offender has accepted responsibility for the offence for which they have been convicted, including by acknowledging the harm done to victims and to the community;

[24] *Ibid* at para 18.
[25] *International Transfer of Offenders Act*, SC 2004, c 21 ("*ITOA"*), ss 7-8 [AR Vol 3, Tab 2].

j. The manner in which the offender will be supervised after the transfer;
k. Whether the offender has cooperated with a law enforcement agency;
l. Any other factor the Minister considers relevant.

Minister's Decision

25. The Minister's decision cites two reasons for the denial of the request: 1) abandonment of Canada as the Applicant's place of residence; and 2) risk to public safety.[26]

26. The minister's decision is unreasonable in three respects:

    a. The overall conclusion is unreasonable in that it focuses on past, unchangeable events, contrary to the purpose of the *Act*.

    b. The conclusion that the Applicant's transfer to Canada will endanger public safety is unreasonable;

    c. The conclusion that the Applicant has intended to abandon Canada as a place of residence is unreasonable;

A. Conclusion Focused on Past Events is Unreasonable

27. Even if the Minister had not erred in his assessments of the abandonment and public safety factors, the Minister's overall decision not to approve the transfer is unreasonable because 1) the decision is focused on past, unchangeable events, and 2) the decision is not transparent.

i) It is unreasonable for a denial of transfer to be focused on past events

28. The Minister's overall decision to deny a transfer is unreasonable because it is based on unchangeable, past events.

[26] Minister's Decision at 6, para 5 [AR Vol 1 at 15].

29. The Federal Court of Appeal made it clear in *Carrera*, after the Minister denied Carrera's transfer solely on the basis that he had abandoned Canada, that a past event, such as the abandonment of Canada, cannot be a "show stopper". A reading that exalts the abandonment factor above all other section 10 factors is not a reasonable reading of the *Act*.[27]

30. The Court of Appeal sent the case back to the Minister for reconsideration with the guidance that "any decision must be made with the statutory purposes under section 3 front of mind",[28] namely to further "the administration of justice" and "the rehabilitation of offenders and their reintegration into the community" by "enabling offenders to serve their sentences in the country of which they are citizens or nationals."[29]

31. The Minister denied Carrera's transfer a second time, this time on the basis of both abandonment and endangerment of public safety. The Minister's reasons for concluding Mr. Carrera would endanger the public if returned to Canada were the seriousness of the offense, Carrera's extensive criminal record, and his prior failure to obey parole conditions.[30]

32. When the *Carrera* case made its way back to the Federal Court for a second time, the Court found that the Minister was correct that Carrera had abandoned Canada. Despite this, the Minister's decision was unreasonable because a decision that "focuses on past events that will remain forever unchangeable" is unreasonable.[31]

33. The Court found that the "Minister's emphasis on the backward-looking [intention to abandon factor] and the assessment of public risk and future criminality which also was guided by past events make it almost inevitable that Mr. Carrera will never be granted a transfer … this predetermines the outcomes of any future applications and is contrary to the purpose of the *Act*."[32]

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[27] *Canada (Public Safety) v Carrera*, 2013 FCA 277 at paras 5-6 [AR Vol 3, Tab 5].
[28] *Canada (Public Safety) v Carrera*, 2013 FCA 277 at para 6 [AR Vol 3, Tab 5].
[29] *Ibid* at para 9.
[30] *Carrera v Canada (Public Safety)*, 2015 FC 69 at para 22 [AR Vol 3, Tab 6].
[31] *Carrera v Canada (Public Safety)*, 2015 FC 69 at para 80 [AR Vol 3, Tab 6].
[32] *Carrera v Canada (Public Safety)*, 2015 FC 69 at para 79 [AR Vol 3, Tab 6].

34. Therefore, the decision was found to be unreasonable because it placed almost insurmountable weight on factors that cannot be changed.[33]

35. In the case at bar, the Minister has denied the Applicant's transfer on the basis of past events that cannot be changed: alleged abandonment of Canada, and the seriousness of his crime. Therefore, based on the reasons proffered by the Minister, his decision is clearly unreasonable and must be set aside.

ii) The Minister's decision is neither transparent nor intelligible

36. Where there are factors that support a transfer, the Minister "must demonstrate some assessment of the competing factors so as to explain why he refused to consent to a transfer. Without such an assessment, the Minister's decision is neither transparent nor intelligible."[34]

37. Moreover, a reading that exalts certain factors above all other section 10 factors is not a reasonable reading of the *Act*. Section 10 does not attach primacy to any one factor.[35]

38. In the Minister's decision denying the Applicant's transfer, he provides no explanation as to why he attached primacy to the abandonment and public safety factors, and why he discounted the other evidence.

39. Therefore, the Minister's decision is unreasonable and must be set aside.

B. Conclusion of a Risk to Public Safety is Unreasonable

40. The Minister unreasonably concludes that the Applicant's return to Canada will endanger public safety. This conclusion is unintelligible in three respects: 1) it contradicts the evidence before the Minister; 2) the Minister determined that a

[33] *Ibid* at para 106.
[34] *LeBon v Canada (Attorney General)*, 2012 FCA 132 at para 25 [AR Vol 3, Tab 11].
[35] *Canada (Public Safety) v Carrera*, 2013 FCA 277 at para 6 [AR Vol 3, Tab 5].

transfer may improve public safety; and 3) the conclusion of a risk to public safety is based on clearly insufficient and irrelevant grounds.

i) The Conclusion is Contrary to the Evidence

41. All the evidence cited in the Minister's decision supports the conclusion that the Applicant's transfer to Canada will not endanger public safety.

42. In his decision, the Minister noted the following in his analysis of the public safety risk:

    a. A report by Dr. Plaud stated that "there is no significant indication that [the Applicant] would act in a hands-on sexually abusive manner towards pre-pubescent females."[36]

    b. The Applicant "has participated in numerous programs and courses, as well as a sex offender treatment program and religious and community-based activities, in order to support his rehabilitation."[37]

    c. The Applicant "is a first-time offender with no criminal record in Canada."[38]

    d. "The US Case Summary states that the Applicant has maintained a clear disciplinary record since his incarceration."[39]

ii) The Minister Determined a Transfer May Improve Public Safety

43. Further, the Minister determined that "public safety may be improved by Mr. Scheiring's transfer."[40]

44. In his decision, the Minister outlined that if transferred, "Mr. Scheiring would be informed of his lifetime requirement to comply with obligations under the *Sex Offender Information Registration Act* (SOIRA) and the *Criminal Code*, which require him to register for the National Sex Offender Registry, provide his address

[36] Minister's Decision at 4, para 7 [AR Vol 1 at 13].
[37] *Ibid* at 5, para 4 [AR Vol 1 at 14].
[38] *Ibid.*
[39] *Ibid*.
[40] *Ibid* at 5, para 5.

and telephone number to local police (among other required information), and to inform police of the details of any travel."[41]

45. By contrast, the Minister stated that if the Applicant is not transferred to Canada, "it would be challenging to ensure Mr. Scheiring complies with the obligations as there are no formal mechanisms in place to guarantee Canadian authorities are always alerted when an offender is deported to Canada."[42]

iii) The Conclusion is Based on Irrelevant and Insufficient Grounds

46. Neither of the two grounds the Minister cites as reasons for deciding the factor of public safety weighs against a transfer logically support the conclusion that the Applicant will pose a danger to the public. The two grounds cited are that 1) the Applicant's original offense was serious and involved a large amount of images and videos, and 2) the Applicant would be immediately released upon transfer.

47. The conclusion is unreasonable because neither ground, separately or conjunctively, may be sufficient to reasonably conclude that the Applicant will endanger the public. The Applicant's submission relating the unreasonableness of the Minister's conclusion is based on two considerations: 1) the seriousness of the past offense, including the amount of images involved is not a relevant or evidence-based predictor to conclude the Applicant would commit an offense in the future, and 2) the fact that the Applicant would immediately be released upon transfer is not relevant to endangerment if there are no grounds to believe he would pose a danger.

(a) Seriousness of offence is not sufficient to conclude future danger

48. The seriousness of a prior offense alone is not relevant to conclude that the Applicant would endanger public safety if transferred.

[41] Minister's Decision at 5, para 5 [AR Vol 1 at 14].
[42] *Ibid.*

49. The Minister's analysis must be forward-looking,[43] such that the nature and seriousness of the offense should not be a bar to transfer. The wording of *ITOA* subsection 10(1)(b)(iii) is clearly focused on the future, not the past. It asks whether the transfer "will endanger public safety" (emphasis added).

50. A retrospective look at past criminality as the determinant for approval would result in a blanket ban of transfer applicants, which is contrary to the meaningful analysis that Parliament contemplated when drafting the *ITOA*.[44]

51. This Court has consistently found cases in which the Minister denied a transfer due to the seriousness of the original offense to be unreasonable. In the case of Getkate, who was convicted on one count of child molestation and three counts of aggravated child molestation, the Federal Court held the Minister's denial of transfer on the basis of the offender's risk was unreasonable and set aside the decision.[45]

52. In the case of LeBon, the Minister denied Mr. Lebon's transfer because he was caught with a "very large amount" of cocaine, reasoning that it would "discredit the administration of justice." The Court of Appeal ordered the minister to consent to Mr. LeBon's transfer, clearly establishing that public safety concerns not based on evidence on the record, or simply based on the nature of the offense itself, may not properly form the basis to deny a transfer request.[46]

53. This Court may take judicial notice of the fact that even a Canadian offender convicted of terrorism and murder charges in the United States, Omar Khadr, has been transferred to Canada under the *ITOA*.[47] In this regard, the public position of the Crown as posted on its website or otherwise widely known and disseminated to

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[43] *Del Vecchio v Canada (Public Safety and Emergency Preparedness)*, 2011 FC 1135 at para 53 [AR Vol 3, Tab 7].
[44] *Ibid.*
[45] *Getkate v Canada (Public Safety and Emergency Preparedness)*, 2008 FC 965 at paras 3 & 33-36, [2009] 3 FCR 26 [AR Vol 3, Tab 9].
[46] *Lebon v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 1500 at para 20, [AR Vol 3, Tab 12; *affirmed Canada (Public Safety and Emergency Preparedness) v LeBon*, 2013 FCA 55 [AR Vol 3, Tab 11].
[47] *Canada (Justice) v Khadr*, 2008 SCC 28 at para 5, [2008] 2 SCR 125 [AR Vol 3, Tab 3].

the public that it decided to transfer Khadr despite the very serious nature of his terrorism offences, can form the subject of judicial notice.[48] Accordingly, the seriousness of the conviction of the offender, even one encompassing matters as serious as terrorism, is not a bar to transfer under the *Act*. Such an argument is fundamentally inconsistent with the purpose of the *Act*.

54. In light of the clearly established principle that the seriousness of an offense, including the amount of illegal material involved in the offense, are not sufficient to prove future danger and are not a bar to transfer under the *ITOA*, it was unreasonable for the Minister to rely on the seriousness of the Applicant's offense and the amount of materials he possessed at the time to determine that the Applicant would pose a danger to public safety.

(b) Immediate release is not relevant given no evidence of danger

55. Mr. Schering's immediate release upon transfer to Canada is not a relevant consideration given that there is no evidence that he is a risk to reoffend.

56. Even if it were relevant, the Minister has put forward no reasons (and there is no evidence in support of such conclusion) to indicate that the supervision he would be subject to by CSC would not be sufficient to mitigate against any potential risk.

57. The Court of Appeal has provided some guidance as to the nature of concern that may trigger a public safety. The nature of the threat that may properly found the basis of refusal is one that is beyond what the Canadian federal penitentiary system can administer.

> [55] ...Parliament has decided that it may be preferable, in certain circumstances, not to allow convicted offenders who pose such threats to be allowed to serve their sentence in Canada. I cannot conclude that this legislative choice is itself irrational.
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> [56] Indeed, I do not find it irrational for Parliament to empower the Minister to refuse the transfer of a convicted terrorist if it is reasonable to believe that the incarceration of that terrorist in Canada would result in retaliatory terrorist attacks on Canadian citizens. Likewise, I do not find it irrational for Parliament to empower the Minister to refuse the transfer of an international drug cartel kingpin if it is reasonable to believe that such a transfer would result in attacks on

[48] *Kaur v Canada (Citizenship and Immigration)*, 2010 CanLII 79335 at para 24 [AR Vol 3, Tab 10].

> Canadian prison guards or would facilitate the criminal operations of that offender or of his criminal organization. These are clear cases were the Minister could properly refuse a transfer to Canada.
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> [57] Of course, these examples are extreme, and not all the offenders convicted of security or related offences, or of offences related to terrorism or organized crime, pose a threat to Canada or to Canadians should they serve their foreign sentences in Canada. There are some cases which clearly justify refusing a transfer on the grounds set out by Parliament, and other cases where such a refusal would clearly be inappropriate and contrary to the *Charter* right at issue. Many cases will however fall between these two extremes. This is precisely why Parliament has empowered the Minister to decide each individual case on its particular facts, taking into account pertinent circumstances and prescribed factors.[49]

58. The operative question, therefore, is how the potential threat posed by the Applicant is elevated beyond the capacity of what the Correctional system can accommodate so as to raise a public safety risk within the meaning of the *Act*.

59. There is no evidence on the record of any risk of that the Applicant will reoffend – in fact the evidence on the record suggest the opposite. The evidence before the Minister is that the Applicant is a first-time offender with no criminal record in Canada and has maintained a clean institutional record since incarceration.[50] Dr. Plaud's report states that "there is no significant indication that he would act in a hands-on sexually abusive manner towards pre-pubescent females";[51] the Applicant cooperated with law enforcement to help them disable child pornography forums,[52] and he has accepted responsibility for the offense and is remorseful for his actions.[53]

60. The Minister stated that upon transfer to Canada under the *ITOA*, the Applicant would be required to register for the National Sex Offender Registry, provide his address and telephone number to local police, among other information, and inform police of the details of any travel.[54]

61. The Minister's decision is unreasonable in considering the Applicant's immediate release as relevant to the analysis of whether his transfer would endanger public safety when there is no evidence that the Applicant is likely to reoffend. Even if there

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[49] *Divito v Canada (Public Safety and Emergency Preparedness)*, 2011 FCA 39 at paras 55-57 [AR Vol 3, Tab 8].
[50] Minister's Decision at 5, para 4 [AR Vol 1 at 14].
[51] Minister's Decision at 4, para 7 [AR Vol 1 at 13].
[52] Minister's Decision at 3, para 4 [AR Vol 1 at 12].
[53] *Ibid* at 3, paras 1-2.
[54] Minister's Decision at 5, para 5 [AR Vol 1 at 14].

was such evidence, the Minister's decision would still be unreasonable in that it provides no analysis or evidence that would support a reasonable conclusion that a potential threat created by the Applicant would be elevated beyond the capacity the Correctional system can accommodate.

C. Intention to Abandon Conclusion is Unreasonable

62. The conclusion that the Applicant has intended to abandon Canada as his place of residence is unreasonable in that 1) it contradicts the vast majority of the evidence, 2) all the evidence the Minister relied upon in support of abandonment is irrelevant to the analysis of the Applicant's intentions.

63. The Federal Court has held that it is unreasonable to conclude a person intended to abandon Canada as their place of residence merely because they spent a long time in the US and had ties to family in the US.

64. In the case of Arend Getkate, the offender moved to the US with his mother as a minor in 1996. He moved back to Canada for only 6 months as an adult before returning to the US in February 2001 to attend university. He was arrested in August 2002. The Federal Court found the Minister's conclusion that Getkate had abandoned Canada to be unreasonable on its face and set it aside.[55]

65. By contrast, the type of case in which the Court can find it reasonable to conclude the offender had the intention to abandon Canada is one where relevant evidence as to the offender's state of mind and reason for leaving Canada is on record.

66. The *Carrera* case provides an example of the kind of evidence required. In 1987, Carrera was on day parole serving a sentence for crimes he was convicted of in Canada when he fled the halfway house and absconded to the US. There he changed his name from Raphael Milone to Raphael Carrera to

[55] *Getkate v Canada (Public Safety and Emergency Preparedness)*, 2008 FC 965 at para 40, [2009] 3 FCR 26 [AR Vol 3, Tab 9].

avoid detection and begin a new life.[56] While in the US, he operated a business, had a long-term relationship, and owned a home. Although Carrera did not sever all ties with people in Canada, a 2006 Correctional Service of Canada Community Assessment determined that he had left with the intention of abandoning Canada.[57] The Federal Court found that it was reasonable to conclude Carrera had abandoned Canada because there was no indication he would have left his American life behind or returned to Canada had he not been arrested.[58]

i) The Conclusion is Contrary to the Evidence

67. All the evidence cited in the Minister's decision regarding the Applicant's past intention supports the conclusion that the Applicant did not leave or remain outside of Canada with the intention to abandon Canada as his place of residence.

68. The Minister cited the following evidence:
    a. The Applicant originally moved to the US for employment purposes;[59]
    b. The Applicant made several attempts to move back to Canada;
    c. The Applicant accepted a job in Fargo, North Dakota, to be closer to his family in Winnipeg, Canada;
    d. The Applicant visited Canada frequently, which he referred to as "home";
    e. The Applicant maintained close ties to family and friends in Canada;
    f. The Applicant has always maintained his Canadian citizenship;
    g. The Applicant has never become a US citizen;
    h. The Applicant's mother, father, sisters, relatives, and friends all reside in Canada;

[56] *Carrera v Canada (Public Safety)*, 2015 FC 69 at para 5 [AR Vol 3, Tab 6].
[57] *Ibid* at paras 58-59.
[58] *Ibid* at para 77.
[59] Minister's Decision at 5, para 7 [AR Vol 1 at 14].

i. The Applicant's long-term plan was to return to Canada,[60] and the 2013 Correctional Service of Canada Community Assessment noted that the Applicant's eventual release plans include returning to live with his father in Manitoba.[61]

69. Significantly, section 10(d) of *the Act* does not involve a deemed or presumed basis for inferring abandonment of residence, but specifically requires that the Minister turn his mind to the Applicant's intention. The language of the provision identifies a relevant inquiry for the Minister relating to "… whether the offender left or remained outside Canada **with the intention** of abandoning Canada as their place of permanent residence" (emphasis added).

70. However, in light of the very facts acknowledged by the Minister, it would be unreasonable for the Minister to conclude that the Applicant intended to abandon Canada. Every single fact identified by the Minister suggests that the Applicant has explicitly maintained ties to Canada, with a view of returning to Canada and with the express indication that his move was predicated on employment interests subject to an ultimate objective of returning to Canada. Based on both the objective evidence and the stated subjective concerns of the Applicant himself as identified by the Minister, there is no logical or justified basis for concluding that the Applicant left Canada with the purpose of abandoning Canada as his place of residence.

ii) The Minister's Reasons are Irrelevant

71. The two reasons the Minister put forward to support his conclusion of intent to abandon are both irrelevant to the analysis of this factor, which is intended to be both retrospective and related to the Applicant's intention.

[60] Minister's Decision at 6, para 1 [AR Vol 1 at 15].
[61] Minister's Decision at 2, para 3 [AR Vol 1 at 11].

72. The first reason the Minister put forward is that the Applicant spent a "lengthy time" (10 years) outside Canada. The amount of time spent outside Canada, without more, does not speak to the Applicant's intention. This is especially true when the evidence shows that the Applicant made several attempts to move back to Canada.

73. The second reason the Minister identifies in support of intent to abandon is that the Applicant has "ties to his immediate family in the US". This is not relevant in that it is not a retrospective analysis of his past intentions before he was incarcerated.[62]

74. Even if the Applicant's current "ties" with four people in the US is viewed as relevant, it should be noted that the Minister concluded earlier on that the Applicant has "strong family and social ties in Canada".[63] Based on this evidence, therefore, the Minister's own assessment militates against a finding of intent to abandon.

75. If the Minister's logic is accepted, every person who moves away from Canada together with their immediate family would automatically be regarded as intending to abandon Canada, regardless of all other circumstances. This is clearly unreasonable.

76. Therefore, the Minister's conclusion that the Applicant intended to abandon Canada as his place or residence is unreasonable and should be set aside.

Issue 3: Directed Verdict for Minister's Decision is Appropriate Remedy

77. A directed verdict that the Minister accept the Applicant's transfer request and confirm in writing that all reasonable steps have been taken for his prompt transfer to Canada is the appropriate remedy for this case.

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[62] *See Canada (Public Safety) v Carrera*, 2013 FCA 277 at para 9 [AR Vol 3, Tab 5].
[63] Minister's Decision at 2, para 6 [AR Vol 1 at 11], emphasis added.

78. In *Lebon*, the Federal Court directed the Minister to accept the transfer for the following reasons:

    a. There was no factual substratum which was in dispute;
    b. The Minister made a conclusion based on speculation that cannot be rationally inferred from the facts;
    c. More than four years elapsed since the request for transfer had been made;
    d. The Minister had shown a bias and ignored clear evidence on record supporting the transfer;
    e. The continued refusal of the applicant's transfer request had a serious impact on him, including alienation from his family and support network, frustration of his rehabilitation and deprivation of superior programming in a Canadian prison.[64]

79. It is submitted that the Applicant's case meets these same criteria as identified in *Lebon*, *supra*. In particular, the relevant considerations as applied to the Applicant would be assessed as follows:
    a. There is no factual substratum in dispute;
    b. The Minister made a conclusion based on speculation that cannot be rationally inferred from the facts;
    c. Almost three years have elapsed since the request for transfer has been made;[65]
    d. The Minister has shown a bias and ignored clear evidence on record supporting the transfer;

[64] *Lebon v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 1500 at paras 25-26 [AR Vol 3, Tab 12].
[65] Valela Affidavit at para 5 [AR Vol 1 at 20]; Valela Affidavit, Exhibit "D" [AR Vol 1 at 39-45].

e. The continued refusal of the Applicant's transfer request may have a serious impact on him, including alienation from his family and support network due to the challenges of traveling a long distance to visit.[66]

80. Based on the evidence on record, there can be no reasonable basis for the Minister to deny the Applicant's transfer, and further delays will have an unnecessarily negative impact on the Applicant. In the circumstances, it is submitted that the appropriate remedy is for this Court to direct the Minister to approve the Applicant's transfer.

Conclusion

81. Parliament enacted the *ITOA* with a goal of reintegrating offenders into their communities by enabling them to serve their sentences in their own country. While the Minister is granted discretion, there are limits. He cannot use that discretion to thwart the object of the *Act*, nor can he draw unreasonable conclusions to the contradiction of all evidence before him.

82. Significantly, it is also not within the purview of the *ITOA* for the Minister to use the *Act* to look backwards and punish the Applicant for his original offence.

83. For these reasons the Minister's decision is not justifiable and cannot be allowed to stand.

PART IV - ORDER SOUGHT

84. 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 Respondent's decision dated August 13, 2019;

b. An order directing the Minister to approve the Applicant's transfer, based

[66] Minister's Decision at 2, para 3 [AR Vol 1 at 11]; Valela Affidavit at para 11 [AR Vol 1 at 21]; Valela Affidavit, Exhibit "I" [AR Vol 1 at 119].

on this Court's jurisdiction under section 18.1 of the *Federal Courts Act* and the *Lebon* criteria;

c. In the alternative to "b" above, an Order remitting the matter back to the Respondent for a redetermination of the Applicant's transfer within 45 days of this Court's order in accordance with the reasons for decision of this Court;

d. The costs of this application on a substantial or full indemnity scale above the highest prescribed schedule; and

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 13 day of December, 2019

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Cases Cited:

Legislation

1. *Criminal Code of Canada*, RSC 1985, c C-46.
2. *International Transfer of Offenders Act*, SC 2004, c 21.

Jurisprudence

3. *Canada (Justice) v Khadr*, 2008 SCC 28, [2008] 2 SCR 125.
4. *Canada (Public Safety and Emergency Preparedness) v LeBon*, 2013 FCA 55.
5. *Canada (Public Safety) v Carrera*, 2013 FCA 277.
6. *Carrera v Canada (Public Safety)*, 2015 FC 69.
7. *Del Vecchio v Canada (Public Safety and Emergency Preparedness)*, 2011 FC 1135.
8. *Divito v Canada (Public Safety and Emergency Preparedness)*, 2011 FCA 39.
9. *Getkate v Canada (Public Safety and Emergency Preparedness)*, 2008 FC 965, [2009] 3 FCR 26.
10. *Kaur v Canada (Citizenship and Immigration)*, 2010 CanLII 79335 (CA IRB).
11. *LeBon v Canada (Attorney General)*, 2012 FCA 132.
12. *Lebon v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 1500.