Court File: IMM-7818-05

FEDERAL COURT

B E T W E E N:

**CANADIAN COUNCIL FOR REFUGEES,
CANADIAN COUNCIL OF CHURCHES,
AMNESTY INTERNATIONAL, and
JOHN DOE**

Applicants

and

HER MAJESTY THE QUEEN

Respondent

APPLICANTS' MEMORANDUM OF FACT AND LAW

OVERVIEW

1. This is an application for leave and for judicial review of the *Agreement between the Government of Canada and the Government of the United States of America for cooperation in the examination of refugee status claims from nationals of third countries*, known as the Safe Third Country Agreement (STCA). This agreement prevents refugees from seeking safe haven in Canada, if they are seeking to enter from the United States at a land border. By denying access to Canada as a safe haven for genuine refugees, the application of the agreement can result in their *refoulement* to persecution and torture. Further the agreement adversely impacts on particular groups of refugees in a manner that effectively discriminates on the basis of gender, race, religion, nationality and/or sexual orientation. The Applicants are seeking a declaration that the agreement is unlawful and that it is in breach of the *Charter of Rights and Freedoms* and of international refugee and human rights law.

PART I: FACTS

A. Nature of Relief Sought

2. The Governor in Council, by Order dated October 12, 2004, designated the United States of America as a country that complies with Article 33 of the *Refugee Convention* and

Article 3 of the *Convention Against Torture*. This designation, pursuant to s. 5(1) and s. 102 of the *Immigration and Refugee Protection Act (IRPA)*, of the US as a "Safe Third Country" triggers the application of the ineligibility provision in s. 101(1)(e) of *IRPA* to asylum seekers as set out at paras. 159.1-159.7 of the *Regulations Amending the Immigration and Refugee Protection Regulations* (*STCA Regulations*). The Applicants challenge the lawfulness of this decision. They further challenge the lawfulness of the application of the ineligibility provision as a result of this designation.

Immigration and Refugee Protection Act [IRPA] , S.C. 2001, c. 27, s. 5(1), 101(1)e, 102
Regulations Amending the Immigration and Refugee Protection Regulations, SOR/2004-217, P.C. 2004-1157 [STCA Regulations]
Convention relating to the Status of Refugees, CTS 1969/6 [Refugee Convention]
Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/RES/39/46 (1984) [CAT]

3. The Applicants are seeking a declaration that this decision was in error and unconstitutional. They seek leave for judicial review and a declaration from this Court that the designation of the US, and the resulting ineligibility for refugee protection in Canada of certain asylum seekers, is invalid and unlawful, and contrary to the Charter and Canada's obligations under international human rights and refugee law.

B. The Applicants

4. The Applicant Canadian Council for Refugees (CCR) is a national umbrella organization comprising about 175 ethno-specific organizations, associations of refugee and immigration lawyers, settlement agencies and refugee advocacy groups across the country.

Affidavit of Janet Dench, para. 4

5. The Applicant Canadian Council of Churches (CCC) is the largest ecumenical body in Canada, representing 20 churches of Anglican, Eastern and Oriental Orthodox, Protestant and Roman Catholic traditions. Founded in 1944, the Council's member churches represent 85 per cent of Christian Canadians who professed adherence to a church.

Affidavit of Karen Hamilton, para. 2, 3

6. The Applicant Amnesty International (AI) is a worldwide voluntary movement founded in 1961 that works to publicize and prevent some of the gravest violations to people's fundamental human rights. Amnesty International has a membership of over 2 million people in over 162 countries, about 60,000 of them in Canada.

Affidavit of Alex Neve, para. 5-8

7. The CCR, CCC and AI all have proven track records of assisting and advocating for the rights of refugees in Canada generally. Specifically, all three organizations have been directly involved in opposing and monitoring the impact of the STCA.

Affidavit of Janet Dench, paras. 7-12; Affidavit of Karen Hamilton, paras. 6-14; Affidavit of Alex Neve, para. 22, 26-28

8. The Applicant John Doe is an asylum-seeker from Colombia currently residing in the United States. He sought asylum in the US but was refused because he had failed to apply within one year of arrival in the U.S. His application for withholding of removal was likewise refused because he had failed to establish his claim on the higher standard of "a clear probability of persecution" required for withholding to be granted. He is barred from seeking asylum in Canada under the STCA. He did not approach the border because he had been informed he was ineligible to make a claim in Canada.

Affidavit of John Doe, paras. 1, 20, 23-25

C. The Safe Third Country Agreement

C.1. Background

9. A "safe third country" clause first appeared in Canadian law in 1988 amendments to the *Immigration Act* of 1976. The provision allowed for the designation of another country as a "safe third country" such that refugee claimants seeking to enter Canada via such a country would be denied an opportunity to claim in Canada. In a constitutional challenge by the CCC to this and other amendments, the Federal Court of Appeal determined that litigation of the safe third country provision was premature as no country had yet been designated under the provision, but that if a country was designated the CCC would be an appropriate public interest litigant.

An Act to amend the Immigration Act, 1976 and the Criminal Code in consequence thereof, S.C. 1988, c. 36; An Act to amend the Immigration Act, 1976 and to amend other Acts in consequence thereof, S.C. 1988, c. 35; Canadian Council of Churches v. M.E.I., [1990] 2 FC 534, dismissed on other grounds, [1992] 1 S.C.R. 236

10. Through the 1990s, the Respondent engaged in negotiations with the US Government regarding a Memorandum of Understanding, later known as a Memorandum of Agreement, designating one another as safe third countries. While final agreement was not ultimately reached at this time, negotiations continued. On December 12, 2001, the US-Canada Smart Border Declaration was issued, setting out a 30 Point Action Plan that included a new commitment to negotiate a safe third country agreement. The final text of the STCA was signed on December 5, 2002. Following the introduction of operational regulations, it was announced in November 2004 that the agreement would enter into effect just one month later, on December 29, 2004.

Dench Affidavit, para. 11(c)-(e)
Smart Border Declaration: Building a Smart Border for the 21st Century on the Foundation of a North American Zone of Confidence, December 12, 2001
Siemens Affidavit, Exhibit A, Harvard Law Student Advocates for Human Rights, The International Human Rights Clinic, Human Rights Program, and Harvard Immigration and Refugee Clinical Program, Bordering on Failure: The US-Canada Safe Third Country Agreement Fifteen Months After Implementation (March 2006) [Harvard Report], p. 10

C.2. Ineligibility under the STCA and the exceptions

11. Under s. 101(1)(e) of IRPA, a person entering Canada from a "designated country" is ineligible to have her claim for refugee protection considered by the Refugee Determination Division of the Immigration and Refugee Board. Section 102 authorizes the Governor in Council to designate countries for this purpose. A designated country is one that complies with Article 33 of the Refugee Convention and Article 3 of CAT, the conventions' *non-refoulement* provisions. In designating a country, the Governor in Council is required to consider, *inter alia*: (*a*) whether the country is a party to the Refugee Convention and CAT; (*b*) its policies and practices with respect to claims under the Refugee Convention and obligations under CAT; and (*c*) its human rights record. The United States is the first, and to date the only, country designated for the purposes of s. 101(1)(e).

IRPA s. 101(1)(e), 102

12. Pursuant to the *STCA Regulations*, refugee claimants who request protection at a US-Canada land port of entry are denied access to the refugee determination process in Canada, unless they meet one of the enumerated exceptions in the regulations. The STCA applies only at land ports of entry. It does not apply at airports[1], harbour ports or ferry landings.
    STCA Regs 159.3, 159.4

13. There are several enumerated exceptions where the STCA does not apply, including where:
    - a family member[2] of the claimant is in Canada and is a Canadian citizen, protected person, or permanent resident; or is over 18 and a refugee claimant whose claim has not been withdrawn, abandoned, rejected, terminated or nullified; or is over 18 and holds a work permit or study permit that has not become invalid
    - the claimant is an unaccompanied minor
    - the claimant is stateless and is habitually resident in the US
    - the claimant is a person who may enter Canada without being required to hold a visa, and who would require a visa to enter the United States
    - the claimant is seeking to re-enter Canada, having been refused entry to the United States without having a refugee claim adjudicated there, or a permanent resident who has been ordered removed from the United States and is being returned to Canada
    - the claimant is charged with, or has been convicted of, an offence that is punishable with the death penalty in any country, including the US, and can prove that this is so
    - the claimant is a national of a moratorium country with respect to which the Minister has imposed a stay on removal orders, or is stateless and is a former

1 Unless the person has been ordered removed from the US and is merely transiting through a Canadian airport as part of the enforcement of the removal order. (STCA Reg 159.4(2))
2 For the purposes of the STCA, family member is defined as a spouse or common-law partner, legal guardian, child, father, mother, brother, sister, grandfather, grandmother, grandchild, uncle, aunt, nephew or

habitual resident of such a country or place (currently Afghanistan, Burundi, Democratic Republic of Congo, Haiti, Iraq, Liberia, Rwanda, and Zimbabwe).

STCA Regulations, 159.1, 159.5(a)-(e), 159.2, 159.5(f)-(h), 159.6(a)-(c)

C.3. Impact on refugees

14. The STCA has dramatically altered the Canadian refugee landscape. In its first year in effect, the STCA slashed the average number of claims at the Canada-US land border from 8,436 to around 4,000. In total, under 20,000 claims were made in Canada in 2005, fewer than at any point since the 1980s, and representing less than half of the average annual claims made since the current refugee determination system began to operate in 1989.

Dench Affidavit, Exhibit B, CCR, Closing the Front Door on Refugees: Report on the first year of the Safe Third Country Agreeement (December 2005) [CCR 12-month Report], p. 3-5; Koelsch Affidavit, para. 7; Giantonio Affidavit, para. 3-4

15. While Canada's other interdiction measures (including carrier sanctions on transport companies, visa requirements for "refugee-producing" countries, and immigration control officers posted abroad) had already had an effect in decreasing the number of claimants arriving in Canada in recent years, the existing trend indicated that overall claims should have fallen by six percent from 2004 to 2005. As a result of the STCA, the overall reduction was actually 20 percent.

Dench Affidavit, Exhibit B, CCR 12-month Report, p. 5-7; Audrey Macklin, Disappearing Refugees: Reflections on the Canada-U.S. Safe Third Country Agreement, (2004-2005) 36 Colum. Hum. Rts. L. Rev. 365 at 378-379; Siemens Affidavit, Ex. D, UNHCR, Asylum Levels and Trends in Industrialized Countries, 2005

16. The Applicant John Doe is a victim of the STCA, like numerous other Colombians. Colombia was the top country of origin in 2004 for claims made in Canada with an 80 percent acceptance rate. Almost all Colombian claimants made their claims at the land border, and so the STCA has reduced their numbers by 70 percent. Nearly 1,000 Colombians who would likely have obtained protection had they been able to come to Canada were rejected in the US in 2005. It is certain that they were either *refouled* or,

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niece.

like John Doe, their fear of returning home drove them to live underground in constant anticipation of arrest and deportation.

Dench Affidavit, Exhibit A, CCR 12-month Report, p. 8-9; Siemens Affidavit, Exhibit A, Harvard Report, p. 2-3, 16-18; John Doe Affidavit

17. While statistics and a handful of individual narratives help sketch out the STCA's devastating effects, in reality the human impact cannot be measured. Most of those who are barred from requesting Canada's protection are not identifiable, and are in no position to speak out once they learn the door is closed. It is impossible to track how many have been detained and *refouled*, how many are living underground, how many have been smuggled into Canada make claims inland, and how many have simply given up and returned to face their fates.

Dench Affidavit, Exhibit A, CCR 12-month Report, p. 10-11; Giantonio Affidavit, para. 4

18. There has been no government review of the STCA since it came into effect.

Siemens Affidavit, para. 7; Siemens Affidavit, Ex. A, Harvard Report, p. 8

D. Statutory scheme

19. Pursuant to s. 101(1)(e) of IRPA a refugee claimant is ineligible to have her protection claim considered by the Refugee Protection Division if she is seeking entry to Canada from a "designated" country:

101. (1) A claim is ineligible to be referred to the Refugee Protection Division if	**101.** (1) La demande est irrecevable dans les cas suivants :
…	…
(*e*) the claimant came directly or indirectly to Canada from a country designated by the regulations, other than a country of their nationality or their former habitual residence;	*e*) arrivée, directement ou indirectement, d'un pays désigné par règlement autre que celui dont il a la nationalité ou dans lequel il avait sa résidence habituelle;

IRPA, s. 101(1)e

20. Section 102 of IRPA provides for the designation of countries as follows:

102. (1) The regulations may govern matters relating to the application of sections 100 and 101, may, for the purposes of this Act, define the terms used in those sections and, for the purpose of sharing responsibility with governments of foreign states for the consideration of refugee claims, may include provisions	**102.** (1) Les règlements régissent l'application des articles 100 et 101, définissent, pour l'application de la présente loi, les termes qui y sont employés et, en vue du partage avec d'autres pays de la responsabilité de l'examen des demandes d'asile, prévoient notamment

(*a*) designating countries that comply with Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture;
(*b*) making a list of those countries and amending it as necessary; and
(*c*) respecting the circumstances and criteria for the application of paragraph 101(1)(*e*).

a) la désignation des pays qui se conforment à l'article 33 de la Convention sur les réfugiés et à l'article 3 de la Convention contre la torture;
b) l'établissement de la liste de ces pays, laquelle est renouvelée en tant que de besoin;
c) les cas et les critères d'application de l'alinéa 101(1)*e*).

(2) The following factors are to be considered in designating a country under paragraph (1)(*a*):
(*a*) whether the country is a party to the Refugee Convention and to the Convention Against Torture;
(*b*) its policies and practices with respect to claims under the Refugee Convention and with respect to obligations under the Convention Against Torture;

(*c*) its human rights record; and

(*d*) whether it is party to an agreement with the Government of Canada for the purpose of sharing responsibility with respect to claims for refugee protection.

(2) Il est tenu compte des facteurs suivants en vue de la désignation des pays :
a) le fait que ces pays sont parties à la Convention sur les réfugiés et à la Convention contre la torture;
b) leurs politique et usages en ce qui touche la revendication du statut de réfugié au sens de la Convention sur les réfugiés et les obligations découlant de la Convention contre la torture;
c) leurs antécédents en matière de respect des droits de la personne;
d) le fait qu'ils sont ou non parties à un accord avec le Canada concernant le partage de la responsabilité de l'examen des demandes d'asile.

(3) The Governor in Council must ensure the continuing review of factors set out in subsection (2) with respect to each designated country.

(3) Le gouverneur en conseil assure le suivi de l'examen des facteurs à l'égard de chacun des pays désignés.

IRPA, s. 102

21. Paragraph 159.3 of the *Regulations Amending the Immigration and Refugee Protection Regulations*, made by the Governor in Council on October 12, 2004, provides that:

159.3 The United States is designated under paragraph 102(1)(*a*) of the Act as a country that complies with Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture, and is a designated country for the purpose of the application of paragraph 101(1)(*e*) of the Act.

159.3 Les États-Unis sont un pays désigné au titre de l'alinéa 102(1)*a*) de la Loi à titre de pays qui se conforme à l'article 33 de la Convention sur les réfugiés et à l'article 3 de la Convention contre la torture et sont un pays désigné pour l'application de l'alinéa 101(1)*e*) de la Loi.

IRPRegs, s. 159.3

22. The legislature conferred on the Governor in Council the power to make regulations under the Act by way of s. 5(1) of IRPA. Regulations must conform to s. 3 of the *IRPA*, and of particular relevance here, to ss. (3)(d) and (f):

3. (3) This Act is to be construed and applied in a manner that
…
(*d*) ensures that decisions taken under this Act are consistent with the *Canadian Charter of Rights and Freedoms*, including its principles of equality and freedom from discrimination and of the equality of

(3) L'interprétation et la mise en oeuvre de la présente loi doivent avoir pour effet :
…
d) d'assurer que les décisions prises en vertu de la présente loi sont conformes à la *Charte canadienne des droits et libertés*, notamment en ce qui touche les principes, d'une part, d'égalité et de protection

English and French as the official languages of Canada; … (*f*) complies with international human rights instruments to which Canada is signatory.	contre la discrimination et, d'autre part, d'égalité du français et de l'anglais à titre de langues officielles du Canada; … *f*) de se conformer aux instruments internationaux portant sur les droits de l'homme dont le Canada est signataire.

IRPA, s. 3(3)d), 3(3)f; De Guzman v. MCI, 2005 FCA 436 at para. 82-89; Re Charkaoui, [2003] FC 1419

E. The US human rights record and asylum practice and policy

23. The US routinely violates the fundamental human rights of non-citizens. It has been repeatedly condemned by major human rights organizations for its use of torture and cruel and unusual treatment or punishment domestically and abroad and for visiting this treatment on Arabs and Muslims in its "war on terrorism", among other concerns. A February 2006 report by four UN Special Rapporteurs and the Chair of the Working Group on Arbitrary Detention condemns US use of torture against detainees at Guantanamo Bay and concludes they are being subjected to arbitrary detention. The report also condemns US "rendition" of suspects to countries where they will be tortured during interrogations. Further, the US record of disregarding international human rights law is well documented. It has not ratified fundamental agreements including the International Convention on Economic, Social and Cultural Rights and the Convention on the Rights of the Child.

Situation of Detainees at Guantanamo Bay, Report of the Rapporteurs, UN Commission on Human Rights, E/CN.4/2006/120, Feb. 15, 2006 at para. 55, 89; Watt Affidavit. And see articles cited in Watt Affidavit, footnotes 8 and 9, including: Human Rights Watch, Still at Risk: Diplomatic Assurances No Safeguard Against Torture, April, 2005; Association of the Bar of the City of New York and the Center for Human Rights and Global Justice at NYU School of Law, Torture by Proxy: International and Domestic Law Applicable to 'Extraordinary Renditions', Oct. 14, 2004; Seymour M. Hersch, Chain of Command: How the Department of Defense Mishandled the Disaster at Abu Ghraib, The New Yorker, May 17, 2004; Human Rights Watch, U.S. Systemic Abuse of Afghan Prisoners, May 13, 2004; Human Rights Watch, Enduring Freedom: Abuses by U.S. Forces in Afghanistan, (March 8, 2004); James C. Hathaway and Anne K. Cusick, Refugee Rights are not Negotiable, (2000) 14 Georgetown Imm. L.J. 481

24. The US asylum system is based on the 1967 Refugee Protocol, which the US acceded to in 1968. The "Overview" affidavit of Ramji-Nogales et al. sets out the system's principal

players, procedures and standards. There are three major forms of protection available in the US: asylum (the equivalent of recognition as a Convention refugee under s. 96 of *IRPA*); withholding of removal based on *Convention* grounds; and relief against removal based on fear of torture under CAT. Asylum is a discretionary remedy that entitles the individual to acquire permanent residence in the US, while withholding and CAT relief are mandatory remedies that provide protection against *refoulement* but do not lead to permanent residence or the ability to reunite with family members from abroad.

"Overview" Affidavit of Ramji-Nogales et al.; James C. Hathaway and Anne K. Cusick, Refugee Rights are not Negotiable, (2000) 14 Georgetown Imm. L.J. 481; IRPA, s. 96

25. The Applicants have filed a series of affidavits from leading US academics and practitioners on various aspects of US asylum law and policy. In sum, the affidavits describe a system that ignores fundamental aspects of the *Refugee Convention* and CAT. They describe how US institutions, law and practice have dramatically eroded protections for asylum seekers over the last decade. Among the major changes are greatly expanded exclusions from protection, ever-increasing use of detention, major restrictions on the scope of appeals and appeal boards and courts, and codification of controversial interpretations of asylum law that do not conform with international law. The affidavits also describe a system fraught with inconsistencies over fundamental issues, such that there is "anarchy in the jurisprudence" and a complete vacuum of policy guidance that make asylum seekers' chance of winning protection in many types of cases a matter of chance.

Anker Affidavit, para. 3-7, 9, 11-12, 15, 24, 35-36, 45, 49-52

26. These and other violations of the rights of asylum seekers are discussed below. New measures aiming to promote national security continue to restrict access to protection. Currently, legislation that has passed the House and is before the Senate proposes *inter alia* to criminalize unlawful presence in the US and entry with the use of improper documents, regardless of whether these documents were used to flee persecution, and make detention the rule rather than the exception for asylum seekers. The UNHCR and US human rights organizations have strongly criticized this legislation.

Anker Affidavit, para. 9, 11-12, 15, 24, 35-36, 45, 49-52; Harvard Report, p. 13-14

PART II: ISSUES

27. The Applicants submit that the designation under Paragraph 159.3 of the *Regulations Amending the Immigration and Refugee Protection Regulations* and Sections 5(1) and 102 of the *Immigration and Refugee Protection Act* of the United States as a "safe third country", and the resulting ineligibility to apply for protection in Canada of potential bona fide refugees, raises the following issues:

    1. Is the designation of the US as a country that complies with Article 33 of the *Refugee Convention* and Article 3 of *CAT* patently unreasonable and an error of fact and law?
    2. Does the effect of the designation of the US as a safe third country breach the life, liberty, and security of the person interests of those excluded from seeking protection in Canada under the STCA, in a manner that does not comply with the principles of fundamental justice, contrary to s. 7 of the *Charter*? If it does, is this justified under s. 1 of the Charter?
    3. Does the effect of the designation of the US as a safe third country breach the equality rights of those subject to the STCA, contrary to s. 15 of the *Charter*. If it does is this justified by s. 1?
    4. Is the designation of the US as a "safe third country" *ultra vires* the Governor in Council as being contrary to the obligation set out in s. 3(3)(f) of the *IRPA*?
    5. Such further and other grounds as the Applicants may advise and this Honourable Court may permit.

PART III: ARGUMENT

A. Standard of review

28. The Applicants submit that the appropriate standard of review is correctness for questions of law, and reasonableness *simpliciter* for questions of mixed fact and law.

29. The Supreme Court of Canada in *Law Society of New Brunswick v. Ryan* reaffirmed that there are three standards of review for the judicial review of administrative decisions:

> 24 In the Court's jurisprudence, only three standards of review have been defined for judicial review of administrative action (Chamberlain v. Surrey School District No. 36, 2002 SCC 86, at paras. 5, per McLachlin C.J.; Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817, at paras. 55; see also Pezim v. British Columbia (Superintendent of Brokers), [1994] 2 S.C.R. 557, at pp. 589-90; Canada (Director of Investigation and Research) v. Southam Inc., [1997] 1 S.C.R. 748, at paras. 30; Pushpanathan, supra, at paras. 27. The pragmatic and functional approach set out in Bibeault, supra, and more recently in Pushpanathan, supra, will determine, in each case, which of these three standards is appropriate. I find it difficult, if not impracticable to conceive more than three standards of review. In any case, additional standards should not be developed unless there are questions of judicial review to which the three existing standards are obviously unsuited.
>
> ...
>
> 26 A pragmatic and functional approach should not be unworkable or highly technical. Therefore I emphasize that, as presently developed, there are only three standards. Thus a reviewing court must not interfere unless it can explain how the administrative action is incorrect, unreasonable, or patently unreasonable, depending on the appropriate standard.

Law Society of New Brunswick v Ryan, [2003] S.C.J. No. 17, at para. 24-26

30. The Court identified four contextual factors to be considered in applying the pragmatic and functional approach to determining the standard of review for a particular issue on judicial review:

> 27 The pragmatic and functional approach determines the standard of review in relation to four contextual factors: (1) the presence or absence of a privative clause or statutory right of appeal; (2) the expertise of the tribunal relative to that of the reviewing court on the issue in question; (3) the purposes of the legislation and the provision in particular; and (4) the nature of the question -- law, fact, or mixed law and fact.

Law Society of New Brunswick v Ryan, [2003] S.C.J. No. 17, at para. 27

31. Applying these factors to this case:

(1) **The presence or absence of a privative clause or statutory right of appeal**: As the Supreme Court has noted in several cases concerning immigration legislation, there is no privative clause and there is no right of appeal. However, judicial review is available with leave of this Court. The Court indicated in *Pushpanathan v M.C.I.*, that the lack of a privative clause does not necessarily

signify a great deal of deference, where other factors militate against this.
Suresh v M.C.I., [2002] S.C.J. No. 3; 2002 SCC 1, at para. 31
Chieu v M.C.I. [2002] 1 S.C.R. 84; [2002] S.C.J. No. 1, at para. 23
Baker v M.C.I., [1999] 2 S.C.R. 817; [1999] S.C.J. No. 39, at para. 58
Pushpanathan v M.C.I., [1998] 1 S.C.R. 982; [1998] S.C.J. No. 46, at para. 30-31

(2) The expertise of the tribunal relative to that of the reviewing court on the issue in question:

The Supreme Court of Canada has considered the standard of review for a number of tribunals making decisions under the *IRPA*. There are expert tribunals rendering decisions in individual cases, however in the case at bar the decision maker is the Governor in Council, with no particular expertise in the matters which need be considered in the designation of a 'safe third country', either in respect of the law and practices in the US and in respect of international human rights treaty obligations. As such, while some deference may be warranted, the Governor in Council is not at the high end of the expertise spectrum and deference to it ought not be significant, particularly given that the STCA has a direct impact on the human rights of refugees seeking protection in Canada.
Pushpanathan v M.C.I., supra., at para. 47
Suresh v M.C.I., supra., at para. 31
Baker v M.C.I., supra., at para. 59
Chieu v M.C.I., supra., at para. 24

The expertise of the tribunal is not absolute in any event, as it must be considered in the context of the issues raised. In general, issues of law, particularly general ones, are not accorded the same deference by a reviewing court.
Chieu v M.C.I., supra., at para. 23-24
Pushpanathan v M.C.I., supra., at para. 33-34
Suresh v M.C.I., supra., at para. 31

(3) The purposes of the legislation and the provision in particular:
The purpose of the STCA is to restrict the entry of refugees to Canada. While this may involve policy considerations, at its core is a regulatory scheme which impacts on the individual human rights of refugees. It is not polycentric. The interest here relates to the threat of *refoulement*, and as such the purposes are closer to those identified by the Supreme Court of Canada in *Suresh v M.C.I.*, than the 'open textured' considerations in the humanitarian decisions considered in *Baker v M.C.I., supra.*
Suresh v M.C.I., supra, at para. 31
Sahin v M.C.I.,[1995] 1 F.C. 214; [1994] F.C.J. No. 1534

(4) The nature of the question -- law, fact, or mixed law and fact:
Generally questions of law are subject to a standard of correctness, mixed fact and law and reasonableness *simpliciter* and questions of fact, where the tribunal has

expertise, to a standard of patently unreasonable.

The Supreme Court has recognized that questions of law which may be certified to the Court of Appeal are generally ones subject to a review standard of correctness. In accordance with that Court's reasoning in *Pushpanathan v M.C.I.* there are general questions of law arising in this case which must be subject to the standard of correctness. In that case, the Court indicated:
43 .... The general importance of the question, that is, its applicability to numerous future cases, warrants the review by a court of justice. Would that review serve any purpose if the Court of Appeal were obliged to defer to incorrect decisions of the Board? Is it possible that the legislator would have provided for an exceptional appeal to the Court of Appeal on questions of "general importance", but then required that despite the "general importance" of the question, the court accept decisions of the Board which are wrong in law, even clearly wrong in law, but not patently unreasonable? The only way in which s. 83(1) can be given its explicitly articulated scope is if the Court of Appeal - and inferentially, the Federal Court, Trial Division - is permitted to substitute its own opinion for that of the Board in respect of questions of general importance. This view accords with the observations of Iacobucci J. in Southam, supra, at para. 36, that a determination which has "the potential to apply widely to many cases" should be a factor in determining whether deference should be shown. While previous Federal Court decisions, including, arguably, the dispute in Sivasamboo, involve significant determinations of facts, or at the highest, questions of mixed fact and law, with little or no precedential value, this case involves a determination which could disqualify numerous future refugee applicants as a matter of law. Indeed, the decision of the Board in this case would significantly narrow its own role as an evaluator of fact in numerous cases.

Pushpanathan v M.C.I., supra., at para. 43

To the extent that there are factual matters at issue, the Supreme Court has recognized that a more deferential standard is to be applied on review. In the case at bar, the 'factual' matters are integral to the legal issues to be determined and therefore to the extent that there are factual matters which must be considered, the standard of review is reasonableness *simpliciter*.
Suresh v M.C.I., supra., at para. 29, 31, 38
Pushpanathan v M.C.I., supra, at para. 45

In keeping with the reasoning of the Supreme Court of Canada in relation to questions of fact, even where the standard of review is a lesser standard than correctness, this is contextualized by the nature of the decision being made. The degree of cogency required of the evidence to be accepted on a balance of probabilities varies with the nature of the decision being made and the

> consequences to the persons concerned. Similar to an analysis of the norms of procedural fairness, which depend in part on the nature of the decision to be made and the consequences to those concerned, Canadian courts have recognized that the more serious the consequences, the greater the care to be taken in assessing the evidence. The consequences in this case are serious given the fundamental human rights involved.
>
> *R v Barber,* [1968] O.R. 245 (O.C.A.), at p. 252
> *Smith v Smith and Smedman,* [1952] 2 S.C.R. 312, at p. 317, 331
> *Bater v Bater,* 50 All.E.R. 458, at p. 459
> *Continental Insurance v Dalton Cartage,* [1982] 1 S.C.R. 164
> *American Automobile Insurance v Dickson,* [1943] S.C.R. 143
> *New York Life Insurance v Ross Estate,* [1945] S.C.R. 289

B. The Governor in Council erred in designating the US a "safe third country"

32. The extensive evidence provided by a wide range of leading US experts, as well as the expert opinion of Professor Hathaway, establish that US law and practice stand in routine violation of Art. 33 of the *Convention*, Art. 3 of CAT and the principle of *non-refoulement*. The fundamental human rights protected by these conventions are clear and not subject to varying interpretation:

> ... [A]s in the case of other multilateral treaties, the [Refugee] Convention must be given an independent meaning derivable from the sources mentioned in arts. 31 and 32 of the Vienna Convention and without taking colour from distinctive features of the legal system of any individual contracting state. In principle therefore there can only be one true interpretation of a treaty...
>
> In practice it is left to national courts, faced with the material disagreement on an issue of interpretation, to resolve it. But in doing so, it must search, untrammeled by notions of its national legal culture, for the true autonomous and international meaning of the treaty. And there can only be one true meaning.

R. v. Secretary of State for the Home Department, ex parte Adan and Aitseguer, [2001] 1 All ER 593 (U.K. House of Lords, Dec. 19, 2000), per Lord Steyn

33. The designation of the US as a "safe" country under s.102 of IRPA depends on fundamental misconceptions: that US law and practice accord with the *Refugee Convention* and CAT; and that it is acceptable for the US to stray from the *Convention* in certain areas because the US has a generally functional asylum determination system. It is submitted that the designation of the US as "safe" is an error.

B.1. The *Refugee Convention*

B1a. Law on *refoulement,* including indirect *refoulement* through another country

34. Article 33 of the 1951 Convention relating to the Status of Refugees provides:

> No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
> *Convention relating to the Status of Refugees, Art.33(1)*

35. The Refugee Convention restricts state parties from effecting *refoulement* in all instances, except where the person has been found on reasonable grounds to be a danger to the security of the country or has been convicted of a particularly serious crime and constitutes a danger to the community of that country.

> *Convention relating to the Status of Refugees, Art.33(2)*

36. Authoritative commentary on Article 33 and the principle of *non-refoulement* make it clear that *refoulement* to persecution is a last resort, justified only in exceptional circumstances and only where it has been established that the subject poses a serious threat to the country of asylum such that removal to the country of origin is the *only* way of countering the threat. Examples of situations in which *refoulement* to persecution might be justified at international law include with respect to "persons who try to overthrow the government by force or other illegal means, who are endangering the constitution, the territorial integrity, the independence or the peace of the country of refuge." If removal would not significantly reduce the danger to the country of asylum, then *refoulement* to persecution is not justified under international law.

> *Sir E. Lauterpacht and D. Bethlehem, "The scope and content of the principle of non-refoulement" in Refugee Protection in International Law, E. Feller, V. Turk and F. Nicholson, Eds., Cambridge: CUP, 2003,, at paras. 171, 172, 176, 218 (d) and (e)*
> *R. Bruin and K. Wouters, "Terrorism and the Non-derogability of Non-refoulement," (Jan. 2003) 15 IJRL 1, at pp. 18, 20*
> *V. Turk, "Forced Migration and Security," (January 2003) 15 IJRL 1, at p.120*
> *Statute of the International Court of Justice, Art. 38(1)d*

37. In application, Article 33 not only prohibits states from returning recognized refugees to

their country of persecution; it also requires that states assess the claims for protection of asylum seekers before returning them to their country of origin or of claimed persecution. This is because, as stated in the UNHCR Handbook:

> A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, he is recognized because he is a refugee.

Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, HCR/IP/4/Eng/REV.1, Reedited, Geneva, January 1992, UNHCR 1979; Hathaway Affidavit, para. 9-12; UNHCR Summary Conclusions: the principle of non-refoulement, Global Consultations on International Protection, 9-10 July 2001, in Feller et al, pp. 178-179

38. Hence the removal of an asylum-seeker prior to determining the merits of her claim constitutes what is sometimes termed "presumptive *refoulement*", and is barred by Article 33. The principle of *non-refoulement* includes the duty not to remove individuals to countries that will, in turn, remove them to countries where they face persecution or torture. The European Court of Human Rights (quoted below) and UK courts have firmly upheld this principle in the context of safe third country agreements:

> The Court finds that the indirect removal in this case to an intermediary country, which is also a Contracting State, does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the [European] Convention [on Human Rights] [the right to be free from torture or inhuman or degrading treatment or punishment]….Where States establish…international agreements, to pursue co-operation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution [citation omitted].

Hathaway Affidavit, para. 11-12; TI v. UK, [2000] INLR 211, App. No. 43844/98 (7 March 2000); R. v. Secretary of State for the Home Department, ex parte Bugdaycay, [1987] AC 514 (UK HL, Feb. 19, 1987); Adan v. Secretary of State for Home Department, [1999] E.W.J. No. 3793 (H.L.)R. v. Secretary of State for the Home Department, ex parte Yogathas, [2002] 4 All ER 800 (UK HL, Oct. 17, 2002); Razgar v. Secretary of State for Home Department, [2003] E.W.J. No. 320
UNHCR Executive Committee Conclusion No.17 XXXI 1980; No. 25 XXXIII 1982; No. 68

XLIII 1992; No. 79 XLVII 1996; No. 81 XLVIII 1997; No. 82 XLVIII 1997;85 XLIX 1998; No. 87 L 1999; Summary Conclusions: the principle of non-refoulement, supra Articles on State Responsibility, in J. Crawford, The International Law Commission's Articles on State Responsibility (Cambridge: Cambridge University Press, 2002); Sale v. Haitian Centers Council, Inc., 113 S. Ct. 2549, 125 L., 509 U.S. 155 (1993)

B1b. US law and practice

39. It is submitted that numerous aspects of US law and practice violate Art. 33 of the *Refugee Convention*. The US regularly *refoules* genuine refugees as a result of:
    1. Legislated exclusions beyond those in the *Convention*
    2. Fundamental deviations from the conventions and an institutionalized arbitrariness in policy and decision-making that make protection or *refoulement* in individual cases a matter of chance
    3. Obstacles to presenting claims such as arbitrary detention and lack of legal aid.

B1a(i) Legislated exclusions

40. U.S. law categorically excludes on a non-reviewable basis broad classes of refugees, without individual consideration or balancing of any kind, and without reference to the criteria set by Art. 1(D)-(F), 31(1) or 33(2) of the *Convention*.

Hathaway Affidavit, para. 14(d)-(f); Georgetown Affidavit; Anker Affidavit, para. 29-49

41. *The one-year bar:* With limited exceptions, US legislation bars asylum claims filed longer than one year after arrival in the US. Those who are excluded may be considered for withholding of removal, but must meet the much higher standard for withholding (51 percent chance that they will be persecuted on return, rather than the more than a mere possibility standard for refugees). This unique bar results in the *refoulement* of thousands of genuine refugees who did not file for asylum within their first year for any number of legitimate reasons, and who cannot meet the higher withholding standard. Contrary to the Canadian approach and UNHCR's longstanding condemnation of time bars for asylum, approximately 16,000 valid asylum claims were refused between 1999 and 2005 due solely to the deadline.

Hathaway Affidavit, para. 14, 21(c); Georgetown Affidavit, para. 3-19; UNHCR Comments on the Proposed Regulations Amending the Immigration and Refugee Protection Regulations; UN Executive Committee of the High Commissioner's

Programme, Note on International Protection, UN Doc. A/AC96/898, at para. 16 (1998); UNCHR Executive Committee, Refugees Without an Asylum Country, Executive Committee Conclusion No. 15, at para. (i) (1979); Huerta v. MEI, [1993] F.C.J. No. 271 (C.A.); Hue v. MEI, [1988] F.C.J. No. 283 (C.A.)

42. The one-year bar has a disproportionate impact on gender and sexual orientation claims. These applicants are more likely to miss the deadline *inter alia* due to a lack of awareness in their first year that asylum applies to them, and because their personal degradation, stigmatization and psychological condition are more likely to prevent them from coming forward for longer.

Georgetown Affidavit, para. 13, 15; Musalo Affidavit, para. 12-14; Neilson Affidavit, para. 3-7; Lawyers Committee for Human Rights (now Human Rights First, Refugee Women at Risk: Unfair US Laws Hurt Asylum Seekers 5 (2002) at 6-8; Diluna v. MEI, [1995] F.C.J. No. 399 at para. 8; A.G.I v. MCI, [2002] F.C.J. No. 1760 at para. 17-18; Diallo v. MCI, [2002] F.C.J. No. 1676 at para. 9; Saez v. MEI, [1993] F.C.J. No. 631 at para. 5 ; MCI v. Sivalingam-Yogarajah, [2001] F.C.J. No. 1414 at para. 18

43. *Exclusion for particularly serious crimes in the US, including aggravated felonies*: This unique US exclusion goes far beyond the Convention. A sentence of one year automatically qualifies an offence as an "aggravated felony" for immigration purposes, though the offence need not be either aggravated or a felony under the criminal law. Asylum seekers who committed shoplifting or unauthorized use of a motor vehicle have been excluded from protection without any balancing or individualized assessment of the danger they pose to security or the public.

Hathaway Affidavit, para. 14; Anker Affidavit, para. 34-38; IRPA, s. 115(2); UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status at para. 156

44. *Exclusion for danger to security and terrorism*: To include all who deserve protection, the *Convention* and Canadian law require reasonable grounds to believe applicants pose a security threat, and require individual responsibility for acts covered by Art. 1(F). The US ignores even these minimal standards in various ways, including:

    1. "Reasonable grounds" is now satisfied by speculation that the refugee may pose a non-substantial danger.
    2. Individual responsibility is not required to exclude those alleged to have engaged

in terrorism by providing funds ("material support"): if they supported social organizations that have militant wings, the "material support bar" does not require subjective knowledge of the link between their support and the group's militancy. Instead, the burden is on the applicant to demonstrate "by clear and convincing evidence" that he or she did not know, and should not reasonably have known, that the organization was a terrorist one.

3. The Board of Immigration Appeals (BIA)[3] rejects the duress defense that has consistently been part of Art. 1(F), such that the US excludes those who were compelled to pay "taxes" to organizations under threat of violence, and who fled at least in part because of this extortion.
4. Recent legislation defines "terrorist activities" to include use of a weapon other than for "mere personal gain", allowing *refoulement* of applicants who neither pose a substantial threat nor harbour any intention of doing so.

Hathaway Affidavit, para. 14; Anker Affidavit, para. 39-49; Akram Affidavit, para. 14
UNHCR, Guidelines on the Application of the Exclusion Clauses (Article 1F of the 1951 Convention), Sept. 4, 2003; Ramirez v. M.E.I. (1992), 2 F.C. 306 (C.A.); Moreno v. M.E.I., [1994] 1 F.C. 298 (C.A.); Sivakumar v. MCI (1994), 1 FC 433; Suresh v. MCI, supra at para. 15, 16, 18, 21, 90, 92; W.J. Fenrick, Individual Criminal Responsibility for Violations of International Humanitarian Law, in Refugee Law in Context: The Exclusion Clause 119 (Peter J. van Krieken ed., 1999) (reasonable grounds and individual responsibility)
MCI v. Asghedom, [2001] F.C.J. No. 1350 at para. 22ff, 38; Bermudez v. MCI, [2005] F.C.J. No. 345 (duress)
Sinnathamby v. MCI, [1993] F.C.J. No. 1160 (extortion)

B1a(ii) Deviations from the *Convention* in policy and jurisprudence:

45. *No recognition of nexus where the state fails to protect for a Convention reason against privately inflicted harm:* In violation of the Convention and long-standing Canadian law, US decision-makers regularly refuse asylum and withholding on the basis that no nexus exists in such cases and are regularly upheld by the courts. This has a disproportionate effect on gender claims, which are often claims against private actors. The lack of protection against persecution

[3] The Board of Immigration Appeals (BIA or Board) is the highest administrative body for interpreting and applying immigration laws. It is composed of 11 Members (recently reduced from 22). It decides appeals by conducting a paper review in most cases. Decisions of the BIA are binding unless modified or reversed by the Attorney General or a Federal court.

by non-state agents was precisely the basis for the finding of the House of Lords that France and Germany should not have been certified as "safe third countries" for all claimants.

Hathaway Affidavit, para. 14; Anker Affidavit, para. 22; UNHCR, Guidelines on International Protection No. 2: "Membership of a Particular Social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees at para. 20-23; Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689, at 713-17; Deborah Anker, Refugee Status and Violence Against Women in the "Domestic" Sphere: The Non-State Actor Question, 15 Geo. Immigr. L.J. 391 (2001); Adan v. Secretary of State for Home Department, [1999] E.W.J. No. 3793 (H.L.)

46. *No nexus without proof of persecutor's motivation:* The US requires applicants to establish that their persecutor's motivation relates to one of the five *Convention* grounds. This approach is widely criticized as an impossible burden, has no basis in the *Convention* and is wrong in Canadian law. Even worse, claims are routinely rejected on the ground that the *Convention*-based motivation was one but not the exclusive motivation.

Anker Affidavit, para. 18-21, 23-24; INS v. Elias-Zacarias, 502 U.S. 478 (1992); UNHCR, Inter-Office Memorandum/Field-Office Memorandum (unnumbered) (Mar. 1, 1990); James C. Hathaway, The Causal Nexus in International Refugee Law, 23 Mich. J. of Int'l L. 207, 208 (2002)
Resulaj v. MCI, [2004] F.C.J. No. 1389 at para. 7-8

47. *No definition of "persecution":* While "persecution" is internationally defined as a "sustained or systemic violation of basic human rights", the US has left the term vague and undefined, and decision-makers consider that they have discretion to define it without reference to basic human rights norms. The BIA commonly casts "persecution" in terms of an **intent** to punish and conflates "persecution" with nexus. US courts tend to defer to this approach.

Hathaway Affidavit, para. 14; Anker Affidavit, para. 26-28; Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689, 713-17

48. *Denial of gender as the basis of a "particular social group":* Women making gender asylum claims face *refoulement* by the US due to an absense of clear policy and arbitrary decision-making at all levels on the question of whether gender can form the basis of a particular social group (a question positively resolved by the UNHCR, Canada and other jurisdictions). The BIA first accepted a particular social group based on gender in 1996, but reversed itself in *Matter of*

R-A-. Since 1999, two Attorneys General have ordered reconsideration of *Matter of R-A-* in light of final regulations to be issued by the Department of Justice. To date no regulations have been issued. As a result, the chance of *refoulement* for women with valid gender claims "depends entirely on which decision-maker they draw."

Musalo Affidavit, para. 3-11, 19-21; UNHCR, Guidelines on International Protection No. 2: "Membership of a Particular Social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees at para. 10-12, 19; UNHCR, Guidelines on International Protection No. 1: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees at para. 28-31; Narvaez v. Canada (Minister of Citizenship and Immigration), [1995] 2 F.C. 55 (T.D.); Vidhani v. MCI, [1995] F.C.J. No. 902; IRB Chairperson's Guideline 4 on Women Refugee Claimants Fearing Gender-Related Persecution

49. *Rejection of claims based on peripheral credibility concerns:* The REAL ID Act allows immigration judges to reject applicant credibility based on "demeanor, candor, or responsiveness" and "without regard to whether an inconsistency, inaccuracy or falsehood goes to the heart of the applicant's claim." The Act specifically permits refusals for lack of corroboration and restricts federal court review of corroboration or credibility decisions. Applicants are regularly denied the chance to explain their lack of corroborating evidence, which has particularly harsh effects on those who are unrepresented and detained. In Canada it is recognized law that claimants cannot be categorically rejected on such credibility concerns.

Hathaway Affidavit, para. 14; Anker Affidavit, para. 8-13; UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, para. 196, 203-204; Yaliniz v MEI, [1988] F.C.J. No. 248 (C.A.); Maldonado v. M.E.I., [1980] 2 F.C. 302 (C.A.); Nagri v. MCI, [1999] FCJ No. 784; Attakora v. MEI, [1989] FCJ No. 444

50. These rules have a disproportionate impact on those with claims based on gender and sexual orientation. They are less likely to speak about their persecution upon arrival in the US so risk being denied for "inconsistency"; they are more likely to have kept their suffering secret or to be estranged from their families, so will have trouble obtaining corroboration; and they are more likely to be denied on "demeanour" for instance if they do not seem "gay" enough. In Canada exclusive reliance on demeanour by the IRB is a reviewable error.

Neilson Affidavit, para. 8-9; UNHCR, Guidelines on International Protection No. 1: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees at para. 37

B1a(iii) Factors aggravating risk of *refoulement*: detention and lack of access to counsel

51. Two US practices operate independently and together to heighten the risk of *refoulement* for many asylum-seekers: widespread detention of asylum-seekers; and state refusal to support any form of legal aid for asylum-seekers despite the complex and adversarial asylum process.

Kerwin Affidavit; Acer Affidavit

52. Almost 14,000 asylum seekers were detained in the US in 2003, including 83 percent of defensive asylum applicants. In 2004 Congress authorized 40,000 additional immigration detention bed spaces. Arrivals without proper travel documents face mandatory detention until they establish a "credible fear" upon removal (this is the "expedited removal" process); then their release is subject to inconsistent parole criteria. Detention powers and practices have expanded steadily since 9/11 and vary drastically by region. Policies have expressly targeted specific groups for detention (especially Haitians, Arabs and Muslims).

Hathaway Affidavit, para. 21(a), (d); Acer Affidavit, para. 6-11; Acer Affidavit, Ex. B, Eleanor Acer, "Living up to America's Values", Refuge, Vol. 20 No. 3 (2002); Acer Affidavit, Ex. C, Human Rights First, In Liberty's Shadow: U.S. Detention of Asylum Seekers in the Era of Homeland Security (2004); Watt Affidavit, para. 3; Koelsch Affidavit, para. 17-24; Giantonio Affidavit, para. 7, 9-11; Siemens Affidavit, Ex. A, Harvard Report, p. 12
For an overview of the expedited removal process, see Acer Affidavit, para. 4-5; and for criticisms of this process, see UNHCR, Reports on US Expedited Removal Process, 6 Update on the Americas 13 (2004) and Macklin, supra, p. 402

53. Detention markedly decreases applicants' chances of obtaining asylum, due largely to the difficulties of retaining counsel (half as many detained as undetained applicants have representation) and obtaining evidence from prison. Undetained represented applicants are well over twice as likely to win their claims as those without counsel, while detained represented applicants are six times as likely to receive asylum as detained applicants without counsel. Only three percent of detained applicants without counsel were accepted in 2003. Unrepresented applicants are also eight times more likely to abandon their claims at

Immigration Court. Detention in the U.S. appears to be a deterrence mechanism, not a justified and reasonable measure.

Acer Affidavit, para. 14-17; Kerwin Affidavit, para. 2-4, 16; Georgetown Affidavit, para. 11, 18; Overview Affidavit, para. 4-5; Koelsch Affidavit, para. 17-24; Macklin, supra at 404-405

54. Asylum applicants are not allowed to work until a decision has been pending for 180 days, and US legal aid programs do not cover asylum claims. Congress blocks federally funded legal aid offices from representing asylum applicants, even with private donations. As a result, two in three asylum seekers lack counsel at the Asylum Office, and one in three is unrepresented in Immigration Court.

Kerwin Affidavit, para. 6-12; Overview Affidavit, para. 5, 9; Georgetown Affidavit, para. 11

B1a(iv). Non-compliance with other Convention rights

55. The US also fails to grant asylum-seekers many fundamental rights to which the Convention entitles them during the determination process. These include:

1. *Non-discrimination (Art. 3)*: Detention policies targeting Haitians, Arabs, Muslims directly violate this right.

Hathaway Affidavit, para. 21(a)

2. *Penalties for illegal entry (Art. 31(1))*: Asylum seekers are subject to mandatory detention if they enter without valid travel documents.

Hathaway Affidavit, para. 21(c)

3. *Freedom of movement (*Art. *31(2) prohibits detention unless it is necessary and justifiable):* American detention of asylum-seekers is widespread and expanding. In addition to the information on detention set out above in Section B1a(iii), the US annually detains about 5,000 child asylum seekers and other minors, who have reported inadequate food, cold and dirty cells, placement with adults, and physical and verbal abuse including shackles, strip-searches and solitary confinement.

Hathaway Affidavit, para. 21(d); Siemens Affidavit, Ex. C, Amnesty International, "Why am I here?": Unaccompanied Children In Immigration Detention (2003)

4. *Duty to give consideration in good faith to naturalization of refugees (Art. 34):* Asylum applicants are known to be offered "deals" by government attorneys and judges, who grant them withholding of removal if they abandon their asylum claims.

> These deals tend to be accepted under the threat that the asylum claim may fail. Because of the higher standard of risk for withholding, those who accept withholding "deals" necessarily qualify for asylum, but are denied the attendant right to consideration for naturalization.

Hathaway Affidavit, para. 21(e); Pistone Affidavit, para. 5-11; Overview Affidavit, para. 7-8

56. For these reasons, it is submitted that the designation of the US under s.102 of IRPA as a country that complies with Art. 33 of the *Refugee Convention* is an error.

B2. U.S. non-compliance with Article 3 of the Convention Against Torture

57. Article 3 of CAT provides:

> **3.** (1) No State Party shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
> (2) For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.
>
> *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,*

58. Article 3 of the CAT is absolute and allows for no derogations or exceptions under any circumstances.

Suresh v. MCI, 1 SCR 3, paras. 66-75; A (F.C.) V Sec. of State for the Home Department, [2005] UKHL 71, para.11-13,30-53,64-69; Report of the UN Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment, 2 July 2002, UN Doc. A/57/173; Report of the UN Special Rapporteur on Torture to the UN Commission on Human Rights, 58th Session, 26 February 2002, UN Doc. E/CN.4/2002/137; Tapia Paez v. Sweden, 28 April 1997, Communication No. 39/1996, UN Doc. CAT/C/18/D/39/1996 ; Lauterpacht and Bethlehem, supra; Conclusions and recommendations of the Committee against Torture: Canada, July 7, 2005, CAT/C/CR/34/CAN

59. *Refoulement* of refugees to torture violates Art. 3 of CAT. The narrow US interpretation of CAT results in *refoulement* specifically to torture, above and beyond the ways set out above. Specifically, the government and many decision-makers interpret CAT's requirement of state acquiescence to torture as an onus to prove the state "willfully accepted" the torture, rather

than the accepted view that acquiescence means willful blindness. They also impose a burden on applicants to demonstrate their torturers harboured a "specific intent" to inflict torture, going beyond CAT's standard that torture need only be a foreseeable consequence.

Sklar Affidavit, para. 4-13; Hajrizi Dzemajl et al. v. Yugoslavia, UN Committee Against Torture, Communication 161/2000 (21 November 2002), UN Doc. CAT/C/29/D/161/2000; Velasquez Rodriguez Case, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988)

60. These limitations have a disproportionate impact on gender claims, where it is often impossible to prove an individual abuser's intent, or where torture is generally not imposed with a specific intent to harm but as part of cultural practices, or where the state cannot be said to "willfully accept" as it has spoken out against abuses on an official level, yet in practice provides little or no protection.

Sklar Affidavit, para. 8, 13

61. The US use of the practice of extraordinary rendition to countries where there is a substantial risk of torture violates Art. 3 of CAT. This was one of many condemnations of US violations of CAT in a February 2006 report authored by four UN Special Rapporteurs.

Siemens Affidavit, Ex. B, Situation of Detainees at Guantanamo Bay, Report of the Rapporteurs, UN Commission on Human Rights, E/CN.4/2006/120, Feb. 15, 2006 at para. 55, 89; Watt Affidavit, para. 4-6

62. For these reasons, it is submitted that the designation of the US under s. 102 of IRPA as a country that complies with Art. 3 of CAT is an error.

B3. Lack of cogent and adequate reasons for the designation

63. Beyond the grave error in inappropriately designating the US as a "safe third country", it is submitted the Governor-in-Council erred by failing to provide cogent and adequate reasons for the determination that the US complies with Art. 33 of the *Refugee Convention* and Art. 3 of CAT. Reasons are required for a determination that takes away fundamental human rights.

Oberlander v. Canada (A.G.), [2004] F.C.J. No. 920 (C.A.)

64. The only reasons provided are the Regulatory Impact Analysis Statement (RIAS). This provides

no insight into the process by which the Respondent came to her conclusions nor of the evidence on which the conclusions are founded, with the exception of a single study on gender-based claims. The RIAS acknowledges that NGOs opposed the designation of the US as "safe", and notes they made "specific reference to American detention practices, expedited removal procedures and mandatory bars to asylum" among other concerns. However, no response to these concerns is provided. The only mention of international standards is with respect to gender-based claims, and consists of the simple, bald assertion that "Canada and the United States have similar approaches and both countries meet international standards on the treatment of gender issues." The Gender Based Analysis section of the RIAS goes on to say that the research commissioned "concludes that the body of case law is broadly supportive of gender-based claims", yet no reasons are provided as to why "broadly supportive" is sufficient when it is clear that at least some gender-based claimants are not protected.

Canada Gazette Part II, Vol. 138, No. 22, Regulatory Impact Assessment Statement [RIAS], p. 1625, 1627 (Application Record, p. 17, 19)

65. The RIAS also states that the government "acknowledges the on-going debate and recognizes that it will be in a better position to assess the impacts of the Safe Third Country Agreement on different groups after its implementation, once the data has been gathered and analyzed." No reasons are provided as to how Canada complies with *non-refoulement* by assessing **after the fact** whether or not some refugees who should have been recognized in the US were actually returned to face persecution.

RIAS, p. 1627 (*Application Record, p. 19)*

66. Finally, s. 102(2)(b) makes the US human rights record beyond its commitment to *non-refoulement* a relevant factor in the designation. However, the Respondent has nowhere explained her absolute failure to consider widespread and widely known US violations of CAT outside the asylum context, such as in the detention and interrogation of non-citizens held on suspicion of terrorism or as "enemy combatants" domestically and in Guantanamo Bay Naval Station, Cuba, Afghanistan and Iraq, as well as in its use of unlawful rendition.

Watt Affidavit; Siemens Affidavit, Ex. B, Situation of Detainees at Guantanamo Bay, Report of the Rapporteurs, UN Commission on Human Rights, E/CN.4/2006/120, Feb. 15, 2006

C. CHARTER RIGHTS

C1. Intersections between fundamental justice, equality and international human rights norms

67. The Applicants submit that the STCA infringes the rights guaranteed by section 7 of the Charter, namely the right to life, liberty and security of the person and the right not to be deprived of those rights except in accordance with the principles of fundamental justice. The Applicants also submit that the STCA violates the right to equality as guaranteed by s. 15 of the Charter. The applicants provide detailed submissions in respect of each breach under separate headings below. They also submit that in defining the protections afforded by s. 7, the Court must take into account the differential impact of the s. 7 breaches and the pre-existing disadvantage of the groups whose life, liberty and security of the person rights are breached by the STCA.

R. v. Golden, [2001] 3 SCR 679 at para 83

68. Section 15 is the broadest of all guarantees and applies to and supports all other rights guaranteed by the Charter. As a result, the scope of other Charter rights, including the concepts of life, liberty and security of the person and fundamental justice under s. 7, must be interpreted in a manner that is consistent with the principles and purposes of s. 15's equality guarantee. As the House of Lords found in *Belmarsh*, lack of citizenship status does not serve to justify any and all incursions on fundamental rights including equality and security of the person. The Charter rights set out in s. 7 must be interpreted in a manner that is consistent with the purposes of the equality guarantee to promote equal benefit of the law, to ensure that the law responds to the needs and realities of those disadvantaged and vulnerable groups whose protection is at the heart of the equality guarantee, to prevent the violation of their human dignity, to protect and prevent discrimination against them, to ameliorate their position, and to prevent the perpetuation of their vulnerability. The operation or enforcement of legislation that has a disparate and discriminatory impact on certain disadvantaged groups would constitute a violation of section 7.

Law v. MEI, [1999] 1 S.C.R. 497, at para. 40, 42, 44, 46-48, 51, 72, 81, 88; New Brunswick v. G. (J.), [1999] 3 S.C.R. 46, at para. 115; Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143 at paras. 32, 34, 52; Eaton v. Brant County Board of Education, [1997] 1 S.C.R. 241; Singh v. M.E.I., [1985] 1 S.C.R. 177; Canada (M.E.I.) v. Chiarelli, [1992] 1 S.C.R. 711; A and others v. Secretary of State for the Home Department [2004] HL 56 (H.L.) ["Belmarsh"]; R. v. Golden,

[2001] 3 SCR 679 at para 83; Lavoie v. Canada, [2002] 1 S.C.R. 769, at para. 45

69. Likewise, international law informs the scope and content of the Charter, including both s.7 and s.15. The universal human rights to life, liberty and security of the person, and to equality and freedom from discrimination, are norms of international law, entrenched in the Universal Declaration of Human Rights and the United Nations Charter, as well as in a wide array of international human rights treaties and declarations. The Court has clearly indicated that Charter rights must be interpreted to the fullest extent possible in compliance with Canada's international human rights obligations, both conventional and customary. This is particularly so in the case of the IRPA, by virtue of Parliament's express requirement that the legislation be "construed and applied in a manner that complies with international human rights instruments to which Canada is signatory."

IRPA, s. 3(3)(f); De Guzman v. MCI,[2005] FCJ No. 2119 (CA); Baker v. Canada [1999] 2 S.C.R. 817; Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038; Universal Declaration of Human Rights, G.A. Res. 217 A (III) Doc. A810 (1948), Preamble, Arts 1,2,3,7; UN Charter, Preamble, 59 Stat. 1031, TS 993, 3 Bevans 1153, Art 1(3); International Covenant of Civil and Political Rights, CTS 1976/47, Preamble, Arts 2,3 6,7,9; International Covenant on Economic Social and Cultural Rights, UNTS, vol. 993, p. 3, CTS 1976/46, Preamble, Arts 2,3; Convention For The Elimination of All Forms of Racial Discrimination, UNTS, vol. 660, p. 195, CTS 1970/28; Convention on the Elimination of Discrimination Against Women, UNTS, vol. 1249, p. 13, CTS 1982/31; American Declaration on the Rights and Duties of Man. Adopted at Bogota by the Ninth International Conference of American States, Mar. 30-May 2, 1948. O.A.S. Res. XXX O.A.S. Off. Rec. OEA/Ser. L/V/1.4 Rev. (1965); Convention relating to the Status of Refugees, CTS 1969/6, Preamble, Art. 3; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CTS 1997/36, G.A. Res. 39/46 39 U.N. GAOR Supp. (No. 51), at 197, UN Doc. A/RES/39/46 (1984), Preamble, Art. 1; Convention on the Rights of the Child, CTS1992/3, Preamble, Art. 2

C2. Section 7 of the Charter

70. It is submitted that the ineligibility determinations which follow from the designation of the US as a "safe third country" violate the s. 7 rights of many applicants who do not qualify for protection in the US for a variety of reasons, or whose treatment in the US during or after the determination process violates international human rights norms. For the sake of conciseness, the following submissions rely on but do not restate the evidence set out above in Section B.

C2a. Application of *Charter* and engagement of s. 7

71. The *Charter* protects individuals who make refugee claims at Canada's borders. Wilson J. determined in *Singh* that s. 7 protects "everyone" who is physically present in Canada and that presence in Canada includes at a port of entry. In this case, no individual applicant has approached the border out of fear of making themselves known to US authorities and being detained or deported once they were found ineligible to enter Canada. However, it is submitted that this Court must consider the *Charter* rights of those who would approach the border and establish presence were it not for their fear. *Charter* remedies may be granted to those who are not physically present in Canada.

Singh v. MEI, [1985] 1 S.C.R. 177 at para. 52-55; *Schreiber v. Canada (A.G.), [1998] 1 S.C.R. 841 at para. 16*; *R. v. A., [1990] 1 S.C.R. 995 at para. 6-7, 29; Siemens Affidavit, para. 6*

72. Determinations that applicants are ineligible to make refugee claims in Canada engage their s. 7 rights to life, liberty and security of the person. Most importantly, when Canada is involved in indirect *refoulement* or indirect removal to a country where applicants' life, liberty or security will foreseeably be infringed, Canada is causally connected to the ultimate deprivation. For many, liberty, in the classic sense of freedom from physical restraint, is engaged by US detention practices. The right to security of the person is further engaged by the state-imposed serious psychological stress of having to live under threat of *refoulement* from the US. Security of the person is also engaged by state interference with the ability to make personal fundamental choices, such as the choice to seek protection in a country which follows the Convention in many ways that the US does not. Applicants who would only be eligible for withholding in the US (and if accepted, would never be entitled to petition for their family members) are denied the fundamental choice to make claims in Canada, a choice which could ultimately allow them to reunify with their families.

Re Application under s. 83.28 of the Criminal Code, 2004 SCC 42, para. 75-76; United States v. Burns, [2001] 1 S.C.R. 283, para. 124; Suresh v. MCI, [2002] 1 S.C.R. 3, paras. 54, 76; Singh, supra at para. 44, 47; R. v. Morgentaler, [1988] 1 S.C.R. 30 at para. 22, 240; Blencoe v. British Columbia (Human Rights Commission), [2000] 2 S.C.R. 307 at paras. 49-52, 55-57; Godbout v. Longueuil, [1997] 3 S.C.R. 844 at paras. 51, 66; R.B. v. Children's Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315; New Brunswick (Minister of Health and Community Services) v. G.(J.), [1999] 3 S.C.R. 46 at paras. 58-59

C2b. Principles of fundamental justice

73. The principles of fundamental justice are to be discerned by reference to Canada's common law tradition, its international obligations, and other fundamental rights in the *Charter*. Fundamental justice includes a "norm of non-complicity": it prohibits Canada from doing indirectly what it cannot do directly. Canada is therefore forbidden from returning individuals to the US if it is reasonably foreseeable the US will violate fundamental justice in its treatment of them.

Reference Re s. 94(2) of the Motor Vehicle Act (B.C.) (*1985), 23 C.C.C. 289, p. 301-02; Burns, supra at para. 60; Suresh, supra; Macklin, supra at 399-400*

C2b(i).*Refoulement*

74. Fundamental justice prohibits removal to persecution and torture. It also prohibits removal to an intermediate country which will execute a removal to persecution or torture.

Suresh v. MCI, 1 SCR 3, paras. 66-75; *Burns, supra, at para. 60; Farhadi v. MCI, [2000] F.C.J. No. 646 at para. 3 (C.A.); TI v. UK, [2000] INLR 211, App. No. 43844/98 (7 March 2000); R. v. Secretary of State for the Home Department, ex parte Bugdaycay, [1987] AC 514 (UK HL, Feb. 19, 1987); Adan v. Secretary of State for Home Department, [1999] E.W.J. No. 3793 (H.L.)R. v. Secretary of State for the Home Department, ex parte Yogathas, [2002] 4 All ER 800 (UK HL, Oct. 17, 2002); Razgar v. Secretary of State for Home Department, [2003] E.W.J. No. 3208*

75. There are only two ways for Canada to comply with fundamental justice while removing individuals to the US under the STCA, if those individuals assert that they face persecution, risk to life, or risk of torture or cruel and unusual treatment or punishment. Canada must either perform a refugee determination itself, as it did prior to December 29, 2004, or Canada must ensure that the individuals receive a full and fair determination in the US.

76. To the extent that the evidence outlined above at Sections B1 and B2 demonstrates that in a large number of cases the assessment of risk in the US fails to recognize and excludes genuine refugees and persons in need of protection, then the STCA leads to *refoulement* and violates fundamental justice. The lack of any review of the STCA despite on-going erosion of legal safeguards in US law and practice further indicates Canada's willful blindness to indirect *refoulement* and violates fundamental justice. Finally, US detention practices and the lack of legal aid violate fundamental justice by significantly impeding asylum seekers' ability to prosecute their cases, enhancing the likelihood of *refoulement.* The STCA has a disproportionate

impact on the s. 7 rights of those groups who are at greatest risk in the US, including women, Arabs and Muslims, gays and lesbians, Colombians and Haitians.

77. It is arbitrary to eliminate the fundamental right to a refugee determination without an individual assessment. The STCA and the STCA Regulations categorically render individuals ineligible to make refugee claims in Canada with no opportunity to establish that the US system is not "safe" for them - i.e. that they will not receive a full and fair individual assessment there of their risk of persecution, risk to life, risk of torture, or risk of cruel or unusual treatment or punishment.

R. v. Heywood, [1994] 3 S.C.R. 761 at para. 49; R v Swain , [1991] 1 S.C.R. 933; Suresh, supra at para. 47. See also R. v. Arkell, [1990] 2 S.C.R. 695 and R. v. Malmo-Levine,[2003] 3 SCR 571 at paras. 142-143, 160-161

78. McLachlin J. (as she then was) held in *Rodriguez v. BC (AG)* that a law is arbitrary if it "infringes a particular person's protected interests in a way that cannot be justified having regard to the objective of this scheme. The principles of fundamental justice require that each person, considered individually, be treated fairly by the law." The STCA is arbitrary in violation of fundamental justice because it fails to ensure that every individual is assessed and protected.

Rodriguez v. BC (AG), [1993] 3 S.C.R. 519 at paras. 203-207 (per McLachlin J. dissenting in the result)

C2b(ii). Arbitrary detention

79. The characterization of a detention as arbitrary has been the subject of judicial and juristic comment. Detention is "arbitrary" where a person is detained without individual consideration of the need to detain. As well, as the Working Group on Arbitrary Detention has noted, a detention which is discriminatory or is grounded in a person's religion and personal beliefs and opinions is also arbitrary. It is submitted that US detention practices are frequently arbitrary because they have no regard for personal circumstances and are discriminatory. They also violate the constitutional requirement to consider children's best interests in decisions affecting children.

Charter, s. 9; R v Swain , [1991] 1 S.C.R. 933; [1991] S.C.J. No. 32, para. 128-131; UN Working Group on Arbitrary Detention, Fact Sheet No. 26, para. IV. A & B; Report of the Working Group on Arbitrary Detention, Visit to Canada, E/CN.4/2006/7/Add.2, 5 December 2005, para. 84-86, 91, 92(d); Basic Principles for the Treatment of Prisoners, G.A. res. 45/111, annex, 45 U.N. GAOR Supp. (No. 49A) at 200, U.N. Doc. A/45/49 (1990); Body of Principles for

the Protection of All Persons under Any Form of Detention or Imprisonment, G.A. res. 43/173, annex, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988); Baker v. Canada [1999] 2 S.C.R. 817

80. With s. 15 as a lens for s. 7 analysis, it is also submitted that consideration of whether a detention is arbitrary also requires the Court to be cognizant of the marginalized and vulnerable position refugee claimants, their lack of political power, and the very real danger of their demonization. Detention can not comply with the principles of fundamental justice if it is grounded in discrimination.

Andrews v. Law Society of B.C., [1989] 1 SCR 143; [1989] S.C.J. No. 6, para. 48-49; *Lavoie v. Canada*, [2002] 1 S.C.R. 769, at para. 45

81. It is submitted that US detention practices violate fundamental justice. As set out above in Section B1a(iii), the US routinely detains asylum seekers based on their status as asylum-seekers and their entry into the US without appropriate travel documents. It detains Arabs and Muslims in particular, and in smaller numbers Haitians. It detains children without legal obligation to do so only as a last result and after considering their best interests. And the US detains these groups without an individualized assessment of the necessity of the detention and applies parole criteria arbitrarily even when they are eligible for release. Conditions in detention, including conditions for detained children, are often inhumane and violate human rights standards.

Acer Affidavit; Akram Affidavit, para. 13; *Siemens Affidavit, Ex. C, Amnesty International, "Why am I here?": Unaccompanied Children In Immigration Detention (2003), Siemens Affidavit, Ex. A, Harvard Report, p. 19-20; IRPA, s. 60; Macklin, supra at 385-387, 389-392, 400-401*

C2b(iii). Access to counsel at the ineligibility interview

82. It is submitted that fundamental justice requires legal representation at the eligibility determination at the land borders where the STCA is applied. The right to counsel is an essential aspect of fundamental justice when there is a final decision being made in the proceeding and grave consequences for the individual, and when the proceeding is complex. Here, the ineligibility decision permanently removes a fundamental human right. The Respondent's position of allowing counsel on a discretionary basis does not meet the constitutional standard.

Ha v. MCI, [2004] F.C.J. No. 174 (C.A.); N.B. (Minister of Health & Community Services v J.(G.), [1999] 3 S.C.R. 46; [1999] S.C.J. No. 47; Winters v Legal Services Society, [1999] 3 S.C.R. 160; [1999] S.C.J. No. 49, para. 34; Citizenship and Immigration Canada, Policy Manual on Processing

Claims for Refugee Protection in Canada, (PP1, January 7, 2005), s. 15.12

83. Determinations made at the eligibility interview as to whether individuals meet an exception may involve complex legal or factual questions. For example, the exception for a person who has been charged with an offence punishable by the death penalty requires proof, which could be a complex task if the country does not issue a document proving this. Defining and proving family relation can be complex, particularly for claimants from countries where customary practice is the primary means of dealing with marriage or adoption. The Manual advises officers to seek proof of family relationships by asking claimants for relatives' birthdays, profession and status in Canada, yet this may not be known to claimants from societies where birthdays are not recorded or celebrated annually or who are unaware of their relatives' status or occupation. Likewise, establishing statelessness, nationality or habitual residence can be complicated and often requires expertise beyond the knowledge of the claimant.

Macklin, supra at 409-410; Siemens Affidavit, Ex. A, Harvard Report, p. 19; Citizenship and Immigration Canada, Policy Manual on Processing Claims for Refugee Protection in Canada, (PP1, January 7, 2005), s. 17.9

C2b(iv). Lack of a review

84. Notwithstanding the legislative intention that there be ongoing review of the impact of a designation of a country as 'safe', Canada appears not to have undertaken any review since the STCA came into effect in December, 2004. The STCA is not fixed in time, as is the practice in Canada when legislation is implemented that may have an adverse impact on civil liberties. [4] Further there has been no review of its impact on the human rights of those in need of safe haven who are prevented under its terms from being able to access this in Canada. [5]

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[4] See for example, the review clause in the *Criminal Code* respecting the Anti-terrorism provisions.

[5] The STCA constitutes an effective derogation from Canada's constitutional obligations and its international human rights obligations. Derogating from fundamental human rights protections in the domestic context requires state justification under s. 1 of the *Charter* or the use of the 'notwithstanding' clause under s. 33 of the *Charter*. Derogating from Canada's international treaty obligations requires in the context of the *ICCPR* specific notice to the United Nations under Article 4. Canada has not used the notwithstanding clause, nor claimed in the RIAS that the STCA is justifiable in a free and democratic country, nor has it filed a formal derogation

85. Even if it could be said that it was not improper for Canada to designate the US as a safe country, the designation cannot be indefinite and without ongoing review, given the restrictions on the human rights of refugees who need to seek safe haven in Canada. Measures restricting the human rights of individuals, must be necessary and may not be effected indefinitely. A lack of review of the impact of the STCA on persons in need of protection and a lack of review of the US practices clearly constitute a failure of Canada to meet its ongoing obligations both under s.102(3) of IRPA and under the *Charter* and the international treaties which it has ratified. Clearly while Canada might mount a tenuous justification for the implementation of the STCA, it can hardly maintain this justification in later years without having ensured that the program does not result in *refoulement*, return to torture, arbitrary detention or discrimination, for example. State compliance with human rights obligations is not fixed in time but may well vary with changes in government or changes in the attitudes of the people of a state. Thus if one state is relying on another to comply with its human rights obligations, it can only purport to maintain this reliance where it has evidence of continued compliance.

Marks, S. & Clapham, A., International Human Rights Lexicon, Oxford Press, at p. 77-78, 352-354; R v Swain, [1991] S.C.J. No. 32

C3. Section 15 equality rights

C3a. Purpose of s. 15

86. In *R. v. Turpin,* the Supreme Court defined the purpose of Section 15 thusly: "The guarantee of equality before the law is designed to advance the value that all persons be subject to the equal demands and burdens of the law and not suffer any greater disability in the substance and

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notice with the United Nations. Further, it is questionable whether Canada could even derogate from its obligations in respect of ensuring that the merits of a refugee claim be assessed because the consequence of a failure to assess may be *refoulement* to persecution or to torture, which is a non-derogable right. There are human rights which may not be subject to derogation, for eg. access to a court to determine the lawfulness of a decision to deny human rights protection, freedom from torture and other forms of cruel treatment. Marks, S. & Clapham, A., *International Human Rights Lexicon*, Oxford Press, at p. 77-78, 352-354

application of the law than others."

R. v. Turpin, [1989] 1 SCR 1296 at 1329, quoted in Auton v. BC, [2004] 3 SCR 657, at 28

87. A decade later, in *Law v. MEI*, Justice Iacobucci elaborated that the purpose of the provision is "to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration." Section 15, he wrote, was intended to serve as a mechanism to remedy the "imposition of unfair limitations upon opportunities, particularly for those persons or groups who have been subject to historical disadvantage, prejudice, and stereotyping."

Law v. M.E.I., supra, at 42, 51, 53

88. Justice Iacobucci went on to explain the meaning of human dignity for the purpose of the equality analysis:

> Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society *per se*, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?
>
> *Law v. MEI, supra, at 53*

89. A concern for the protection of human dignity is an essential part of the complex of interacting values sought to be protected by the *Charter* as a whole. This is as true of s.15 as it is of s.7

Law v. MEI, supra, at 47-52; Rodriguez v. British Columbia (Attorney General), [1993] 3 S.C.R. 519 at para 144; Blencoe v. British Columbia (Human Rights Commission), [2000] S.C.J. No. 43 at paras. 76-78; R. v. Golden, supra; Denise G. Reaume, "Discrimination and Dignity", (2003) 63 La. L. Rev. 645

90. In assessing whether a particular distinction is injurious to human dignity, the Court adopts the perspective of "the reasonable person, in circumstances similar to those of the claimant, who takes into account the contextual factors relevant to the claim."

Law v. M.E.I., supra, at 88

C3b. The Law "test"

91. The list of prohibited grounds of discrimination has been recognized as an open one, comprising both enumerated and analogous grounds. As Chief Justice McLachlin wrote in Gosselin v. Quebec (M.I.N.A.): "Differential treatment based on these grounds invites judicial scrutiny."

Andrews v. Law Society of B.C., supra, at para. 46; Gosselin v. Quebec (A.G.), [2002] S.C.J. No. 85; 2002 SCC 85 at para 21

92. This judicial scrutiny involves the application of a three-part analysis, to be undertaken in a contextual and purposive way. First established by Justice McIntyre in *Andrews*, and modified in *Egan v. Canada* and *Miron v. Canada*, the modern form of the analytical "test" for discrimination was set out for the Court by Justice Iacobucci in *Law v. M.E.I.:*

> First, does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics? If so, there is differential treatment for the purpose of s. 15(1). Second, was the claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds? And third, does the differential treatment discriminate in a substantive sense, bringing into play the purpose of s. 15(1) of the Charter in remedying such ills as prejudice, stereotyping, and historical disadvantage?
> *Law v. M.E.I., supra, at 39; Egan v. Canada, [1995] 2 S.C.R. 513; Miron v. Canada, [1995] 2 S.C.R. 418*

C3b(i).Differential treatment

93. The assessment of whether permanently denying an asylum-seeker who arrives at a border port of entry the opportunity to claim refugee protection in Canada constitutes differential treatment within the meaning of s.15(1), must proceed from the starting point of the purpose of the equality

guarantee.

94. Despite setting out a series of analytical steps that have since become established as the proper jurisprudential approach to the discrimination analysis, Justice Iacobucci himself warned of the necessity of adopting a purposive and contextual analysis and avoiding the pitfalls of a formalistic or mechanical approach to the elements of the s. 15(1) analysis. Indeed, a review of the evolution of the s. 15 jurisprudence reveals an awareness by the Court that it must remain willing to change and adapt its analytical approach to ensure that no one is denied protection from discrimination as a result of the strict adherence to an established test, and likewise that the test does not become so over-inclusive that it becomes meaningless.

Law v. MEI, supra, at para 88; Andrews v. Law Society of BC, supra; Egan v. Canada, supra; Miron v. Canada, supra

95. The first step of the Law analysis, then, requires consideration of, inter alia, the claimant's "already disadvantaged position within Canadian society." As is further discussed below, the persons to whom the STCA applies are non-citizens, and specifically refugees and asylum-seekers, who occupy a significantly disadvantaged position within both Canadian and global society. Subclasses within this group of persons face additional widely recognized disadvantages due to their gender, race, national origin and/or sexual orientation. The STCA was specifically designed to deny human rights protection in Canada to these already disadvantaged groups. Before December 29, 2004, such persons were able to seek protection in Canada at a land border with the U.SA. with few significant impediments. With the implementation of the Agreement, this door to safety and human rights protection was slammed shut.

Law v. M.E.I., supra, at 58; Hodge v. Canada (MHRD) 2004 SCC 65at 21-22; Affidavit of Janet Dench, para. 11g, Ex B: 12 Month Report; Affidavit of Andrea Siemens, para. 7; Ex. A, Harvard Report

96. Further, the *Law* approach calls for an evaluation of whether the impugned provision fails to take into account this disadvantaged position, resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics. In the case at bar, the Applicants submit that their character as non-citizens, and more particularly as refugees and

asylum-seekers seeking Canada's protection at a land port of entry, was not simply not taken into account, but even more perversely is the overt and intentional basis upon which they are denied protection of their fundamental human rights not to be persecuted or tortured. Further additional personal characteristics such as gender, race, national origin, and sexual orientation, are not taken into account in the decision to exclude them from protection under the STCA.

Law v. M.E.I., supra, at 58; Affidavit of Janet Dench, para. 11g, Ex B: 12 Month Report; Affidavit of Andrea Siemens, para 7, Ex A: Harvard report

97. In contrast, citizens seeking protection of their human rights have access to judicial protection of their human rights in Canada under our system of justice. Likewise non-citizens who are in Canada are eligible for protection under Canada's justice system. Indeed, even non-citizens who are outside of Canada and seek entry to Canada either by air, even if they are seeking asylum, or under other categories of immigration, for example as visitors, students or workers, whether they come to a land port of entry or by any other route, are not barred from entry and access to protection under the STCA.

IRPA; STCA Regs; Singh v. MEI, supra

98. It is difficult to conceive of a more direct and overt violation of the human dignity of an already disadvantaged group than to deny access to safe haven to those who are fleeing persecution or torture, and who have no meaningful access to protection in the country to which they are being deflected. That some of these persons face additional pre-existing disadvantages due to their gender, race, national origin or sexual orientation, or face the probability of detention in the US on the basis of discriminatory grounds, serves only to exacerbate the already clear violation of their human dignity.

Acer Affidavit; Anker Affidavit, para. 22; Deborah Anker, Refugee Status and Violence Against Women in the "Domestic" Sphere: The Non-State Actor Question, 15 Geo. Immigr. L.J. 391 (2001); Georgetown Affidavit, para. 13, 15; Hathaway Affidavit, para. 14, 21(a), (d); Kerwin Affidavit, para. 2-4, 16; Musalo Affidavit, para. 3-11, 12-14, 19-21; Neilson Affidavit, para. 3-9; Watt Affidavit, para. 3.

99. Since human dignity is the fundamental value informing the discrimination inquiry, it is natural that the claimant herself is best placed to choose the person or group to whom she should be

compared. The Court should only intervene in this selection where it is incorrect.

Law v. M.E.I., supra, at 58; Hodge v. Canada, supra, at 21-22

100. In *Hodge*, Justice Binnie states that the appropriate comparator group is "the one that mirrors the characteristics of the claimant (or claimant group) relevant to the benefit or advantage sought except that the statutory definition includes a personal characteristic that is offensive to the Charter or omits a personal characteristic in a way that is offensive to the Charter."

Hodge v. Canada, supra, at 23

101. While in *Auton v. BC* the Supreme Court appeared to take a narrower approach to the choice of comparator than it had in previous jurisprudence, that case is clearly distinguishable from the context of the herein case. In *Auton* the question was whether the government had violated s. 15 by failing to proactively confer a new benefit on persons suffering from a certain type of disability (autism). The herein case, however, concerns not the conferral of a new social benefit, but the Respondent's legal obligation to protect the fundamental, universal human right not to be returned to persecution and to torture. The Applicants challenge the discriminatory unilateral withdrawal of access to basic human rights protection for a discrete group of already disadvantaged persons, in violation, it is submitted, of both Canada's international treaty obligations as well as section 7 of the Charter and the expressed will of the legislature in s. 102 of IRPA. These factors militate strongly in favour of a liberal and inclusive approach to the choice of comparators.

Auton v. BC, supra, at 41

102. The Applicants' equality claim requires an intersectional approach to the identification of the appropriate comparator. As the Supreme Court found in *Law v. Canada*:

> A discrimination claim positing an *intersection* of grounds can be understood as analogous to, or as a synthesis of, the grounds listed in s. 15(1). If the CPP had based entitlement on a combination of factors, the appellant would still have been able to establish the requisite distinction, whether on the basis of age alone or based on a *combination* of grounds.
>
> *Law v. MEI, supra, headnote* (emphasis added)

103. The importance of this more nuanced, contextualized approach to analyzing discrimination has also been recognized by the Ontario Human Rights Commission as better reflecting the real experience of discrimination, which tends today to be less overt, more subtle, systemic, multi-layered and institutionalized.

Ontario Human Rights Commission, "An Intersectional Approach to Discrimination: Addressing Multiple Grounds in Human Rights Claims" Discussion Paper, (2001)

104. In light of this intersectional approach, the Applicants submit that the appropriate comparator is found within the general context of persons seeking protection of their fundamental human rights in the Canadian justice system. Within this broad group, noncitizens seeking a legal remedy for the serious violation of their basic human rights (i.e. refugee protection, which is the only remedy available to them in the circumstances) face treatment that is different from that accorded to Canadian citizens seeking a remedy for violations of their human rights, who may seek the protection of the Canadian judicial system. Refugees form a discrete group within this broader class of non-citizens. More specifically still, refugees in the U.S. seeking access to protection in Canada at a land port of entry are targeted by the agreement, while other refugees seeking protection at an airport or harbour port or inland are not caught be the agreement. Nor, indeed, are those who seek to enter Canada at a land port of entry under any immigration category other than that of refugee.

STCA Regs

105. It is settled law that a finding of discrimination against a group may be found despite the fact that not every member of the group is affected by the discriminatory treatment – legislation that discriminates against pregnant women is gender-based discrimination despite the fact that only those women who are pregnant are affected. The Applicants therefore submit that the fact that the STCA applies only to some noncitizens – i.e. those seeking protection at a land border via the U.S. – is irrelevant to the discrimination claim.

Ont. Human Rights Comm. v. Simpsons-Sears, [1985] 2 S.C.R. 536; Janzen v. Platy Enterprises Ltd., [1989] 1 S.C.R. 1252

106. Furthermore, the agreement also has an adverse impact on certain subgroups of the larger group of noncitizens seeking refugee protection in Canada, on the basis of intersecting

enumerated and analogous grounds such as citizenship status, national origin, race, religion, gender, and sexual orientation.

Andrews v. Law Society of B.C., supra; Lavoie v. Canada, supra; Corbiere v. Canada (MINA), (1999) 2 S.C.R. 203; BC v. BCGSEU, (1999) 3 S.C.R. 3

- *Gender claimants* are disproportionately affected by the one-year bar; by inconsistency in the law on gender as a social group and on nexus to state protection for persecution by private actors; by the restrictive interpretation of CAT; and by strict credibility and corroboration requirements.

Georgetown Affidavit, para. 13, 15; Musalo Affidavit, para. 12-14; Neilson Affidavit, para. 3-7; Musalo Affidavit, para. 3-11, 19-21; Sklar Affidavit, para. 8, 13

- *Sexual orientation claimants* are disproportionately affected by the one-year bar and by strict credibility and corroboration requirements. Those who are accepted despite these obstacles have no way to reunite with same-sex partners through sponsorship or equivalent applications, as US federal agencies are prohibited from recognizing same-sex relationships.

Neilson Affidavit, para. 8-12; U.S. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996)

- *Arabs and Muslims* are disproportionately affected by detention practices specifically targeting them by country of origin, race and religion; and the associated difficulties of obtaining counsel and prosecuting their claims.

Hathaway Affidavit, para. 21(a), (d); Acer Affidavit, para. 12-17; Watt Affidavit, para. 3; Dench Affidavit, para 11g, Ex. B: Twelve-Month Report; Siemens Affidavit, para. 7, Ex. A: Harvard Report

- *Haitians* are disproportionately affected by detention practices specifically targeting them by country of origin.

Hathaway Affidavit, para. 21(a), (d); Acer Affidavit, para. 6- 11; Watt Affidavit, para. 3; Affidavit of Janet Dench, para 11g, Ex. B: Twelve-Month Report; Affidavit of Andrea Siemens, para. 7, Ex. A: Harvard Report

- *Colombians* are disproportionately affected by the material support bar as their country of

origin predisposes them to have been extorted by a terrorist organization.

Affidavit of Janet Dench, para 11g, Ex. B: Twelve-Month Report; Affidavit of Andrea Siemens, para. 7, Ex. A: Harvard Report p. 16-17

C3b(ii). Discrimination

107. To determine whether the differential treatment described above amounts to discrimination, the analysis focuses in on "the larger context of the legislation in question, and society's past and present treatment of the claimant and other persons or groups with similar characteristics or circumstances."

Law v. MEI, supra, at 59

108. Among the relevant contextual factors which should inform the Court's analysis of whether s. 15 has been violated is whether the person claiming discrimination suffers a pre-existing disadvantage.

Law v. MEI, supra; Andrews v. Law Society of BC, supra; Hodge v. Canada, supra; Lavoie v. Canada, supra, at 45

109. Canada has a long history of subjecting refugees and other non-citizens to repressive and exclusionary measures, especially in times of insecurity or perceived insecurity, such as those following the Ahmed Ressam affair and the events of September 11, 2001. The so called "none is too many" policy of turning away Jews fleeing the Nazi horror in the 1930s and 1940s, and the internment of Japanese Canadians during the Second World War, are among this country's most infamous acts in recent history. Buried deeper in Canada's past are other examples such as the infamous continuous passage policy of 1908 and the explicitly racist Chinese Exclusion Act of 1885. Like the Safe Third Country Agreement, these policies were designed to prohibit entry by certain vulnerable groups, but more overtly on racial grounds, rather than on the basis of their status as persons fleeing persecution.

Kelley, Ninette and Trebilcock, Michael. 1998. The Making of the Mosaic: A History of Canadian Immigration Policy. Toronto: University of Toronto Press; Valerie Knowles, Strangers at our Gates: Canadian Immigration and Immigration Policy, 1540-1997 (Toronto: Dundurn Press, 1997); Irving Abella and Harold Troper, None is too Many: Canada and the Jews of Europe 1933-1948 (Toronto: Lester Publising, 1983); S. Aiken, "Risking Rights: An Assessment of Canadian Border Security Policies", forthcoming in Grinspun, Ricardo and Shamsie, Yasmine. The Slippery Slope: Canada, Free Trade, and Deep Integration in North America. McGill-Queen's University Press; S.

Aiken, "From Slavery to Expulsion: Racism, Canadian Immigration Law, and the Unfulfilled Promise of Modern Constitutionalism," forthcoming in Vijay Agnew, ed., Interrogating Race and Racism, University of Toronto Press; S. Aiken, Of Gods and Monsters: National Security and Canadian Refugee Policy," (2001) 14 RQDI no 1, 7-36

110. While it is settled law that "non-citizens suffer from political marginalization, stereotyping and historical disadvantage," refugees suffer from added disadvantage by virtue of their prior experiences of persecution, including arbitrary deprivation of liberty, cruel treatment and torture, as well as their particular vulnerability due to the inability to return to their country of nationality. Whereas most migrants can choose to return or invoke the assistance of their consular officials should conditions in Canada prove undesirable or worse, refugees cannot go home and, because of the breakdown in the relationship with their government, cannot seek consular assistance without endangering themselves or their remaining family in the country of origin.

Lavoie v. Canada, supra, at 45; Andrews v. Law Society of BC, supra; S. Aiken, "Risking Rights: An Assessment of Canadian Border Security Policies", forthcoming in Grinspun, Ricardo and Shamsie, Yasmine. The Slippery Slope: Canada, Free Trade, and Deep Integration in North America. McGill-Queen's University Press; S. Aiken, "From Slavery to Expulsion: Racism, Canadian Immigration Law, and the Unfulfilled Promise of Modern Constitutionalism," forthcoming in Vijay Agnew, ed., Interrogating Race and Racism, University of Toronto Press; S. Aiken, Of Gods and Monsters: National Security and Canadian Refugee Policy," (2001) 14 RQDI no 1, 7-36

111. The community of nations has recognized the specific vulnerability of refugees and those claiming refugee status by adopting international treaties on the subject and establishing the Office of the United National High Commissioner for Refugees (UNHCR), a specialized agency to protect refugees and promote and supervise implementation of the 1951 Convention relating to the Status of Refugees. The 1951 Convention, to which Canada is a party, lays out internationally agreed standards for the treatment of refugees – standards that have since been supplemented by the other human rights instruments noted supra.

Statute of the Office of the United Nations High Commissioner for Human Rights

112. Because the Safe Third Country Agreement targets this already vulnerable group, it is more likely to be found discriminatory.

113. A second relevant contextual factor recognized by the Court in *Law* is the relationship between the grounds and the claimant's characteristics or circumstances.

Law v. MEI, supra

114. The exclusion from the benefit of IRPA of asylum-seekers entering Canada at a land border ignores the circumstances that they face in the US, and is based on an incorrect premise that protection is available to such persons there. While the Agreement has been implemented with a number of exceptions allowing entry to Canada of persons who would otherwise be covered by the Agreement, the exceptions do not and probably could not address the full extent of the failures of the US asylum system to provide protection to those who need it, nor are officers determining eligibility provided with discretion to grant entry to an otherwise ineligible person for reasons other than those explicitly enumerated in the regulations.

Affidavit of Janet Dench, para 11g, Ex. B: Twelve Month Report; Affidavit of Andrea Siemens, para. 7, Ex. A, Harvard Report

115. The particular consequences for refugees and asylum-seekers of exclusion from protection in Canada under the STCA are set out above in the discussion of US non-compliance with s. 33 of the Refugee Convention and Article 3 of the Convention Against Torture, as well as under s.7. Most important among these are the risks of *refoulement* and of arbitrary detention in the US. These issues have not been addressed either by way of explicit exceptions in the STCA Regulations or through guidelines and the availability of discretion by port of entry officers.

116. There are also some significant differences between the two countries with respect to the result of a grant of withholding of removal, which have not been taken into account or remedied by the STCA. Most significant among these are the lack of a possibility for family reunification in the US for those granted withholding of removal, and the lack of possibility to acquire US citizenship for such persons.

Overview Affidavit, para. 7; Neilson Affidavit, para. 8-12

117. The last contextual factor proposed by Justice Iacobucci is the nature and scope of the interests affected. This factor likewise indicates that refugees' equality rights are violated by their

automatic exclusion from the benefit of Canadian immigration law and their return to the U.S. As set out in the expert affidavits, and in the preceding arguments relating to U.S. compliance with *non-refoulement* requirements and Canada's breach of Section 7 of the Charter, the interests affected by the impugned provisions in this case are at the very heart of human dignity itself: the right to life, liberty, security of the person and physical integrity, the right not to be persecuted or tortured. These rights, in particular the right to life and the prohibition of torture, are protected not only under the Canadian Charter, but also international conventional and customary law. The prohibition of *refoulement* to torture has risen to the status of *jus cogens.*

Sir E. Lauterpacht and D. Bethlehem, "The scope and content of the principle of non-refoulement" in Refugee Protection in International Law, E. Feller, V. Turk and F. Nicholson, Eds., Cambridge: CUP, 2003,, at paras. 171, 172, 176, 218 (d) and (e); R. Bruin and K. Wouters, "Terrorism and the Non-derogability of Non-refoulement," (Jan. 2003) 15 IJRL 1, at pp. 18, 20; V. Turk, "Forced Migration and Security," (January 2003) 15 IJRL 1, at p.120; Statute of the International Court of Justice, Art. 38(1)d; Suresh v. MCI, 1 SCR 3, paras. 66-75; A (F.C.) V Sec. of State for the Home Department, [2005] UKHL 71, para.11-13,30-53,64-69; Report of the UN Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment, 2 July 2002, UN Doc. A/57/173; Report of the UN Special Rapporteur on Torture to the UN Commission on Human Rights, 58th Session, 26 February 2002, UN Doc. E/CN.4/2002/137; Tapia Paez v. Sweden, 28 April 1997, Communication No. 39/1996, UN Doc. CAT/C/18/D/39/1996; Lauterpacht and Bethlehem, supra

118. On the basis of all of these factors, it is submitted that the STCA violates the equality rights of those to whom it is applied.

D. Section 1

119. It is submitted that the breaches of ss. 7 and 15 are not demonstrably justifiable in a free and democratic society. While the onus to justify *Charter* breaches lies with the Respondent, it is clear that if the US is not in fact a "safe third country", then the executive action in declaring it to be violates Parliament's will as expressed in the legislation. The legislation does not even meet the first branch of the *Oakes* test.

R. v. Oakes, [1986] 1 S.C.R. 103

PART IV: ORDER SOUGHT

120. Leave of the Court to commence an application for judicial review, and a declaration that the designation of the United States of America as a "Safe Third Country" for asylum seekers, and the resulting ineligibility for refugee protection in Canada of certain asylum seekers, is invalid and unlawful.

Dated at Toronto this 27th day of March, 2006.

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TO: THE REGISTRY, FEDERAL COURT OF CANADA

AND TO: THE MINISTER OF CITIZENSHIP AND IMMIGRATION

AND TO: THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS