File Number: 30762

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

B E T W E E N:

ADIL CHARKAOUI

Appellant

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION and
THE SOLICITOR GENERAL OF CANADA

Respondents

File Number: 30929

HASSAN ALMREI

Appellant

- and –

THE MINISTER OF CITIZENSHIP & IMMIGRATION and
THE SOLICITOR GENERAL OF CANADA

Respondents

File Number: 31178

MOHAMED HARKAT

Appellant

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION,
THE SOLICITOR GENERAL OF CANADA,
and THE ATTORNEY GENERAL FOR CANADA

Respondents

FACTUM OF THE INTERVENERS CANADIAN COUNCIL FOR REFUGEES, AFRICAN CANADIAN LEGAL CLINIC, INTERNATIONAL CIVIL LIBERTIES MONITORING GROUP and NATIONAL ANTI-RACISM COUNCIL OF CANADA

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PART I - STATEMENT OF FACTS

1. The Intervener, a coalition consisting of the Canadian Council for Refugees, the African Canadian Legal Clinic, the International Civil Liberties Monitoring Group, and the National Anti-Racism Council of Canada, relies upon the facts as pleaded in the *Appellants' Facta*.

PART II - QUESTIONS IN ISSUE

2. The Intervener submits that:

(i) Sections 33 and 77 to 85 of the *Immigration and Refugee Protection Act* ["*IRPA*"],[1] in whole or in part or through their combined effect, infringe sections 7, 12 and 15 of the *Charter*.[2]

(ii) The infringement is not a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society under section 1 of the *Charter*.

3. The Intervener's position on these issues is as follows:

(i) With respect to the *Charkaoui* appeal, the impugned provisions of *IRPA prima facie* discriminate on the grounds of citizenship in denying persons suspected of being security threats constitutional protections and processes commensurate with the rights at stake, only because they are not citizens. Section 15 is also infringed by the disparate impact of the challenged provisions on protected racialized and religious groups, to which the Appellant Adil Charkaoui belongs.

(ii) With respect to the *Charkaoui*, *Harkat* and *Almrei* appeals, the impugned provisions of *IRPA*, interpreted through the lens of international and *Charter* norms, including non discrimination, impinge upon liberty and security of the person in a manner inconsistent with the principles of fundamental justice contrary to section 7 of the *Charter*.

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[1] *Immigration and Refugee Protection Act,* S.C. 2001, c. 27 ["*IRPA*"]
[2] *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

(iii) With respect to the *Almrei* appeal, the impugned provisions of *IRPA* violate section 12 of the *Charter*, being treatment that is grossly disproportionate to the objectives served by the detention, and offensive to Canadian standards of decency and the egalitarian principles of our justice system.

(iv) With respect to the *Charkaoui*, *Harkat* and *Almrei* appeals, the government has failed to demonstrate that the security certificate regime ("regime") is rationally connected to its stated objectives, that the rights the government seeks to limit are minimally impaired or that the benefits of the regime outweigh its deleterious effects. Recourse to alternatives in either existing criminal law or through the introduction of enhanced protections in immigration law would ensure that the constitutional rights of non-citizens are respected.

PART III – ARGUMENT

A. Section 15 Infringement: The regime discriminates on the ground of citizenship

(i) A Purposive and Contextual Approach

4. This Court has emphasized the importance of both a purposive and contextual interpretation of the *Charter* to permit the realization of the equality guarantee's strong remedial purpose. Accordingly, the scope of *Charter* protection with respect to the security certificate provisions of *IRPA* must be determined in a manner consistent with the purposes of the equality guarantee to promote equal benefit of the law, in order 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 discrimination against them, to ameliorate their position, and to prevent the perpetuation of their vulnerability.[3]

5. The contextual analysis mandated by section 15 is broad and intended to enhance and effect its guarantee of equal protection and benefit of the law.[4] This Court has adopted such a broad approach in the determination of the rights of non-citizens, including equality rights, looking beyond the challenged legislation to the wider political and social setting within which the issues arise.[5]

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[3] *Law v. Canada*, [1999] 1 S.C.R. 497, ¶ 23, 40, 42, 44, 46-48, 51, 72, 81, 88; *New Brunswick v. G. (J.)*, [1999] 3 S.C.R. 46, ¶ 115; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 169, 171, 185; *R. v. Williams*, [1998] 1 S.C.R. 1128, ¶ 48-50; *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 ¶66.

[4] *Law v. Canada, supra* ¶ 88, 45, 62-63, 72.

[5] *Singh v. M.E.I.* [1985] 1 S.C.R. 177 at 152, 164; *Lavoie v. Canada* [2002] 1 S.C.R. 769, ¶ 45-46; *Hilewitz v. Canada* [2005] 2 S.C.R. 706, ¶ 83-85.

6. In these appeals, therefore, the necessary contextual approach would be one that looks beyond the confines of the impugned provisions in *IRPA* to examine the overall framework for national security determinations and its cumulative effects on the position and treatment of non-citizens within this framework and the political and social context post September 11, 2001 [9/11]. It would consider the pre-existing disadvantage of non-citizens, including racialized non-citizens, the history of discrimination in Canada's immigration laws and policies against these groups, and their vulnerability to targeting in times of political and social insecurity and turmoil.[6]

7. The pre-existing disadvantage and vulnerability of non-citizens as well as their susceptibility to having their interests compromised by legislative measures, have been judicially recognized.[7] In *Lavoie*, the majority of this Court found it was settled law that non-citizens suffer from "political marginalization, stereotyping and historical disadvantage" and that they are a group "lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated *...no matter ... the nature of the impugned law.*"[8]

8. This Court has also recognized that discrimination against non-citizens has historically been an "inseparable companion of discrimination on the basis of race and national or ethnic origin".[9] Indeed, the history of immigration laws and policies in Canada has been marred by discrimination against racialized immigrants.[10] Within this history, refugees have experienced particular vulnerability. In times of insecurity, non-citizens, refugees, and racialized groups, have been particularly susceptible to repressive and exclusionary measures.[11]

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[6] *Law v. Canada, supra* ¶ 43, 59, 62, 63, 88.
[7] *Andrews v. L.S.B.C., supra* at 152, 195; *Law v, Canada*, ¶ 29, 43, 78.
[8] *Lavoie v. Canada supra* ¶ 45, per Bastarache J. [emphasis added].
[9] *Andrews v. L.S.B.C., supra* at 195, per Laforest J.
[10] Frances Henry and Carol Tator, et al., *The Colour of Democracy: Racism in Canadian Society*, 2nd Ed., (Harcourt Canada Ltd.: 2000), at 78-81; Canadian Council for Refugees, *Report on Systemic Racism and Discrimination in Canadian Refugee and Immigration Policies – In Preparation for the UN World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, 1 November 2000 at 2-3; Sharryn J. 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) at 64, 66 [hereinafter "From Slavery to Expulsion"]; Ninette Kelley and Michael Trebilcock, *The Making of the Mosaic: A History of Canadian Immigration Policy* (Toronto: University of Toronto Press, 1998) at 15 [hereinafter "The Making of the Mosaic"]; Sherene H. Razack,,*"Your Client Has A Profile": Race and National Security in Canada - A Working Paper,* Court Challenges Program of Canada, at 6-7 [hereinafter "Your Client Has a Profile"].
[11] Sharryn Aiken, "Of Gods and Monsters: National Security and Canadian Refugee Policy" (2001) 14.2 R.Q.D.I. 1, at 3, 4, 6-7 [hereinafter "Of Gods and Monsters"]; Kelley, *The Making of the Mosaic, supra*; Irving Abella and Harold Troper, *None is too Many: Canada and the Jews of Europe 1933-1948* (Toronto: Lester Publishing, 1983); "From Slavery to Expulsion", *supra* at 64, 108; *"Your Client Has A Profile", supra* at 6-7.

9. In the aftermath of 9/11 numerous reports confirmed an increase in hate crimes and scrutiny against identifiable racialized and religious groups, that is, Muslims, Arabs, African Canadians and South Asians, and over-surveillance and racial profiling of these communities by Canada's security agencies, all of which fostered a climate of distrust and fear.[12] The *Anti-terrorism Act* was enacted but seldom utililized.[13] Instead, immigration procedures have been the primary mechanism used by the Canadian authorities to deal with suspected security threats.[14] Within this context, widespread stereotypes, perpetuated by the media, about the fanaticism and propensity of Arabs and Muslims, especially Arab or Muslim men, to engage in acts of violence and terrorism operate. These stereotypes are historical but were magnified after 9/11.[15]

(ii) Discrimination and citizenship status

10. Although located within *IRPA,* the regime is functionally equivalent to *Criminal Code* provisions that proscribe terrorist activities and establish special procedures for identifying terrorist threats. While non-citizens are not excluded from the operation of the *Criminal Code*, almost five years after implementing the wide ranging reforms of the *ATA*, the government continues to opt for immigration remedies and deportation in security cases involving non-citizens, including Convention refugees.[16] Viewed in this way, there are distinct statutory schemes and procedures for non-citizen security suspects as opposed to citizens who are dealt with pursuant to the *Criminal Code*. The *IRPA* scheme as such is discriminatory, in that it permits a non-citizen to be designated a security risk according to vastly inferior procedures than those in the *Criminal Code*, even though the potential consequences are equally severe.[17]

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[12] *Report of the United Nations Special Rapporteur in Contemporary Forms of Racism, Mission to Canada*, 1 March 2004, E/CN.4/2004/18/Add.2, at 18; Canadian Council on American-Islamic Relations (CAIR-CAN), *Presumption of Guilt: A National Survey on Security Visitations of Canadian Muslims*, June 8, 2005; Toronto Police Service, *2001 Hate Bias Crime Statistical Report*, at 4, 8-9

[13] *Anti-Terrorism Act*, S.C. 2001, c. 41 [*ATA*]

[14] *Report of the Working Group on Arbitrary Detention – Visit to Canada (1-15 June 2005)*, E/CN.4/2006/7/Add.2, 5 December 2005, at ¶ 30; US Department of State, *2005 Country Reports on Terrorism* (April, 2006) at 162; Faisal A. Bhabha, "Tracking 'Terrorists' or Solidifying [S]tereotypes? Canada's Anti-Terrorism Act in the Light of the Charter's Equality Guarantee" *(2003) 16 Windsor Review of Legal and Social Issues 95* at 118, 122 [hereinafter "Tracking Terrorists"].

[15] Reem Bahdi, "No Exit: Racial Profiling and Canada's War Against Terrorism" *(2003) 41 Osgoode Hall Law Journal 293,* at 304-306, ¶ 20-21, [hereinafter "No Exit"]; "Tracking Terrorists", *supra* at 117-118; *"Your Client Has A Profile", supra*, at 13-14, 26-26, 25-28.

[16] *Report of the Working Group on Arbitrary Detention – Visit to Canada (1-15 June 2005)*, supra ¶ 30; US Department of State, *2005 Country Reports on Terrorism, supra* 162; Re Zundel [2005] F.C.J. 314 ¶ 111-116; *Suresh v. Canada* [2002] 1 S.C.R. 3; *Jaballah v. Solicitor General*, [2006] F.C.J. No. 110 ¶ 47; see, *Conclusions and Recommendations of the Committee Against Torture: Canada.* 07/07/2005, UNCAT, CAT/C/CR/34/CAN. (2005) ¶ 4(e).

[17] *Andrews v. L.S.B.C., supra* at 183, per McIntyre J; *Singh v. M.E.I. supra* at 201-202; *Law v. Canada, supra* ¶ 88; *A and others v. Secretary of State for the Home Department* [2004] HL 56 (H.L.) ["*Re A*"] at 30-31, 55.

11. A different security regime for non-citizens perpetuates and exacerbates the judicially recognized vulnerability and powerlessness of non-citizens. As stated by this Court in *Lavoie*, "[o]ne must never lose sight of the overarching question, which is whether the law perpetuates the view that non-citizens are less capable or less worthy of recognition or value as human beings or as members of Canadian society."[18]

12. Further, there is no correspondence between the legislative distinction in the treatment of non-citizens in *IRPA* with respect to public safety and the situation of non-citizens, that is, there is no basis to conclude that non-citizens represent more of a security threat than citizens and therefore should be dealt with under a separate statutory scheme.[19] As argued below, differentiating between citizens and non-citizens with respect to security issues cannot be justified on the basis of promoting Canadian or international security.

13. The discrimination claim of the Appellant Charkaoui can be grounded solely on citizenship status as an analogous ground under section 15, without the need to adduce evidence.[20] The claim is further grounded on the intersecting basis of race (Arab) and religion (Muslim), given the judicial recognition of the inextricable link between racism and discrimination against non-citizens and the contextualized nature of the discrimination analysis under section 15.[21]

14. The appropriate comparator group is "the one that mirrors the characteristics of the claimant ... relevant to the benefit or advantage sought...".[22] It is to be determined from the perspective of the claimant and deference should be accorded to that perspective. This flows from the purpose of section 15 to protect against discrimination and the importance that is placed on the perception of the claimant on the impact of the law.[23] The characteristics of the comparator group are to be developed particularly with reference to contextual factors.[24] For non-citizens, "what is required is a

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[18] *Lavoie v. Canada, supra* ¶ 46.
[19] *Re A, supra*, at 29-30, 34, 41-42, 48, 54; *Little Sisters Book and Art Emporium v. Canada*, [2000] 2 S.C.R. 1120 at ¶12; *Andrews v. L.S.B.C., supra* at 152, 195; *Lavoie v. Canada, supra* ¶45; *Law v. Canada, supra* ¶ 88.
[20] *Andrews v. L.S.B.C., supra* at 183; *Lavoie v. Canada, supra* ¶ 39; *Law v. Canada, supra* ¶ 77, 78.
[21] *Andrews v. L.S.B.C., supra* at 195; *Lavoie v. Canada, supra* ¶ 45-46; *Law v. Canada, supra* ¶ 88; *Ontario Human Rights Commission*, "An Intersectional Approach to Discrimination: Addressing Multiple Grounds in Human Rights Claims" Discussion Paper, (2001), at 5.
[22] *Hodge v. Canada* [2004] 3 S.C.R. 357, ¶ 23.
[23] *Law v. Canada, supra* ¶ 58, 59, 70.
[24] *Hodge v. Canada, supra* ¶ 17.

contextualized look at how a non-citizen legitimately feels when confronted by a particular enactment."[25] When determined within the broader context of the operation of Canada's security laws and given the nature of the benefit sought or deprived of (that is the right of access to justice and constitutional protection in security procedures), the appropriate comparator group relevant to the Appellant Charkaoui is citizens suspected of being security threats.[26]

15. Canada has pledged to respect and ensure the right to non-discrimination pursuant to a range of international human rights treaties. These treaty obligations inform the scope of *Charter* rights.[27] States must ensure that measures which aim to combat terrorism are applied without discrimination as between citizens and non-citizens.[28]

16. A norm of non-discrimination in the determination of whether a person constitutes a security threat does not derogate from the inequality between citizen and non-citizen in relation to the right to remain in Canada under section 6 of the *Charter*. Subject to the *Charter*, the *IRPA* still authorizes the state to deport a non-citizen convicted of a serious criminal offence, including a terrorism-related offence.[29]

17. The Appellants are not claiming that they be allowed to enter and remain in Canada analogous to the right accorded to Canadian citizens by section 6(1) of the *Charter*. Rather, they assert the right to equal protection of their *Charter* rights in procedures for determining whether they are security threats.[30] With the exception of mobility rights and the franchise, which are specifically confined to citizens, *Charter* rights must be enjoyed by everyone subject to Canadian law. Indeed, this Court recognized in *Burns and Rafay* that section 7 independently and *equally* constrains the ability of the state to remove citizens and non-citizens to face the death penalty, even though only

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[25] *Lavoie v. Canada, supra* ¶ 46.
[26] *Re A, supra* at 33-34, 44-47, 54-55, 65-66, 80.
[27] *R. v. Keegstra*, [1990] 3 S.C.R. 697 at 750; *Baker v. Canada*, [1999] 2 S.C.R. 817 at ¶69, 70; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at 1056-57; *International Convention For The Elimination of All Forms of Racial Discrimination* (ICERD) U.N.T.S. No. 195; U.K.T.S.77 (1969), Art. 1; *International Covenant on Civil and Political Rights*, G.A. Res. 2200A (XXI), 16 December 1966, Arts. 2, 4, 26; *Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live*, General Assembly resolution 40/144 of 13 December 1985, Arts. 2, 5; UN Human Rights Committee, *General Comment No. 15: The position of aliens under the Covenant: 11/04/86*, Arts. 1, 2, 7.
[28] *UN Committee on the Elimination of All Forms of Racial Discrimination General Recommendation 30 on Discrimination Against Non-citizens*, Arts. 1, 3, 4, 10.
[29] *IRPA, supra* ss. 44, 45(d), 48, 115 (2)(a),(b).
[30] *Singh v. M.E.I., supra*, at 189; *Canada (M.E.I.) v. Chiarelli*, [1992] 1 S.C.R. 711; *Suresh v. Canada* [2002] 1 S.C.R. 3, at ¶ 17.

citizens are protected by section 6.[31] *Burns and Rafay* supports the proposition that where the consequences of state action for citizens and non-citizens are comparable, equal benefit of *Charter* protection is due, regardless of citizenship status. Non-citizens may have no absolute right to enter or remain in the country but they are not disentitled to other *Charter* protections simply by virtue of their lack of citizenship. Certain statutory inequalities between citizens and non-citizens may be sustained and access to citizenship itself is qualified.[32] However, this Court's holdings in *Chiarelli* and *Medovarski* should not be interpreted to sanction the blanket exclusion of non-citizens from section 15 protection even within the context of immigration law itself.[33]

18. As recently affirmed by the House of Lords in *Re A.*, the lack of citizenship status does not serve to justify any and all incursions on fundamental rights, including equality and liberty:

> ...the fact that it is sometimes permissible to treat foreigners differently does not mean that every difference in treatment serves as a legitimate aim... Democracy values each person equally. In most respects this means the will of the majority must prevail. But valuing each person equally also means that the will of the majority cannot prevail if it is inconsistent with the equal rights of minorities... No one has the right to be an international terrorist. But substitute 'black', 'disabled', 'female', 'gay', or any other similar adjective for 'foreign' before 'suspected international terrorist' and ask whether it would be justifiable to take power to lock up that group but not the 'white', 'able-bodied', 'male' or 'straight' suspected international terrorists. The answer is clear.[34]

(iii) Discrimination - Disparate Impact

19. A primary consideration in an equality analysis is the impact of the law on the individual or group concerned. When determining discrimination, one looks to the effect of the impugned distinction. Discrimination may occur when the operation of laws, by failing to take into account the disadvantage or vulnerability experienced by an individual or group, results in a disparate or disproportionate impact on that individual or group.[35]

20. As referenced above, applicable social science authorities indicate that the *IRPA* security certificate provisions have operated in a context of racial and religious stereotyping and profiling

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[31] *United States of America v. Burns*, [2001] 1 S.C.R. 283 ¶ 43, 124.
[32] *Lavoie v. Canada, supra; Canada (M.E.I.) v. Chiarelli, supra* ¶ 24.
[33] *Canada (M.E.I.) v. Chiarelli, supra; Medovarski v Canada*, [2005] SCC 51;*UN Committee on the Elimination of All Forms of Racial Discrimination General Recommendation 30 on Discrimination Against Non-citizens*, Art. 3.
[34] *Re A, supra* 100 (per Baroness Hale of Richmond).
[35] *Law v. Canada, supra* ¶ 23, 25, 39, 63; *Andrews v. L.S.B.C., supra* at 173-175; *New Brunswick v. G. (J.), supra* ¶ 112-115; *Eaton v. Brant County Board of Education, supra* ¶ 67; *Vriend v. Alberta*, [1998] 1 S.C.R. 493, ¶ 70, 82, 83;

and have had a disparate impact on certain racialized and religious communities, including Arab Muslim men. These groups are disproportionately targeted by security agencies and are thus disproportionately subjected to the security certificate process.[36] Indeed, all three Appellants are Arab Muslim men.

21. In this way, stereotypes about the assumed terrorist involvement of the affected groups based on their race and religion underlie and are interwoven into the application of the impugned provisions. The application of the legislation thus serves to perpetuate the invidious stereotypes against Arabs and Muslims, based on race as it intersects with other grounds. The enforcement of laws through racism, racist assumptions or racial targeting of identifiable racialized and religious groups, constitutes an infringement of section 15. Racial profiling has been recognized as an illegal, discriminatory means of singling individuals out for disparate enforcement of the law, based on the personal characteristic of race and not on actual threat.[37]

B. The regime violates sections 7 and 12

(i) Sections 7 and 12 must be interpreted through an equality lens

22. The principle of the rule of law is one of the fundamental organizing principles of the Constitution. A crucial element of the rule of law is that there should be one law for all. This principle subjects the powerful to the ordinary law of the land, with no special privileges or immunities, and protects the vulnerable and the disadvantaged from being subject to a specialized, more onerous regime.[38] The principles of equality before and under the law embedded in section 15 are particular applications of the rule of law, specifically located in an anti- discrimination context aimed at protecting vulnerable minorities.

23. Salient features of the Canadian consciousness as identified by courts and other authorities inform the application of both section 7 and 12 of the *Charter*. The "reasonable person" in Canada is taken to be aware of, and acknowledge, the prevalence of racism in a particular community, and

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Thibaudeau v. Canada, [1995] 2 S.C.R. 627, ¶ 101; *Eldridge v. British Columbia (A.G.)*, [1997] 3 S.C.R. 624, ¶ 60, 61; *Egan v. Canada,* [1995] 2 S.C.R. 513, ¶ 161.

[36] "Tracking 'Terrorists" at 117-118, 122; "No Exit", *supra* at 304-306, ¶ 20-21; *Report of the United Nations Special Rapporteur in Contemporary Forms of Racism, Mission to Canada, supra* at 18; Canadian Council on American-Islamic Relations (CAIR-CAN), *Presumption of Guilt, supra*; *"Your Client Has A Profile", supra*, at 13-14, 26-26, 25-28.

[37] *Little Sisters Book and Art Emporium v. Canada, supra* at 120, 125; *Brown v. Durham Regional Police Force* (1998), 43 O.R. (3d) 223 (Ont. C.A.) at ¶ 25, 31, 34, 35, 38-41; *R. v. Brown* (2004), 64 O.R. (3d) 161 (Ont. C.A.) at ¶ 7-10, 44-45.

the history of discrimination faced by disadvantaged groups protected by the *Charter's* equality provisions.[39] As a member of the Canadian community, such person is supportive of the principles of equality.[40]

(ii) Section 7

24. The principal question under section 7 is the content of applicable "principles of fundamental justice". The principles of fundamental justice are to be found in the basic tenets, not only of our judicial process, but of our legal system, exemplars of which are found in sections 8 to 14 of the *Charter*. There must be significant societal consensus that such principles are vital or fundamental to our notions of justice and the way the legal system ought to operate; they must be legal principles; and they must be capable of being identified with some precision and applied in a manner which yields an understandable result.[41]

25. At a minimum, the concept of fundamental justice as it appears in section 7 includes the notion of procedural fairness as developed in the administrative law context. In this regard, *Re M.B.*, a recent judgment concerning the British regime of control orders considered the requirements of a fair hearing through the lens of the liberty and fair trial rights guaranteed by the *European Convention on Human Rights*.[42] In contrast to the *IRPA* regime, "derogating" and "non-derogating" control orders could be imposed on both citizens and non-citizens suspected of involvement in "terrorism-related activities." Nevertheless, the procedures utilized by the two regimes share important commonalities. In holding the British scheme "conspicuously unfair", Mr. Justice Sullivan considered the process as a whole, from the issuance of the certificate by the Secretary of State, to the standard of proof applied in making the decision, the role of the supervising judge, as well as rules which permitted significant parts of the government's case to be presented *in camera, ex parte*. The Court emphasized that considered individually, these features would not necessarily have rendered the process as a whole unfair.[43] However,

> [s]tanding back and looking at the overall picture, there can be only one conclusion. To say that the Act does not give the respondent in this case, against whom a non-derogating

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[38] *R. v. Campbell*, [1999] 1 S.C.R. 565 at ¶ 18.
[39] *R V. S. (R.D.)*, [1997] 3 S.C.R. 484, at ¶ 26, 46, 111.
[40] *R v. S. (R.D.), supra*, ¶ 48.
[41] *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, ¶ 30-31, 63-64; *Rodriguez*, ¶ 26; *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869, at p. 882; *R v. Malmo-Levine*, [2003] 3 S.C.R. 571 ¶ 113.
[42] *Re MB* (2006), [2006] EWHC 1000 (Admin) (Q.B.); *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221.
[43] *Re MB, supra*, ¶ 42-52; 64-65, 78, 85.

> control order has been made by the Secretary of State, a fair hearing in the determination of his rights ... would be an understatement ... The thin veneer of legality which is sought to be applied by section 3 of the Act cannot disguise the reality. That controlees' rights under the Convention are being determined not by an independent court... but by executive decision-making, untrammelled by any prospect of effective judicial supervision.[44]

26. In the Canadian context, this Court has enumerated five non-exhaustive factors for determining the specific content of procedural fairness. Among these was the significance of the decision to the person affected. According to *Baker*, "[t]he more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated".[45] The impact of a decision must be measured contextually by reference to the actual effect on the life of the person concerned, rather than by measuring it against the presence or absence of legal entitlement to a particular outcome. In contrast to the Appellant Chiarelli, a permanent resident lawfully present in Canada, Ms. Baker was a non-status immigrant with no legal entitlement to be in Canada at all. She was seeking an exemption from immigration rules and her request to remain in Canada was a matter of discretion. Yet, this Court displayed considerable sensitivity to the impact of deportation, rather than deportation *per se*, on Ms. Baker and her children in considering the content of fairness. In *Suresh,* this Court subsequently adopted the *Baker* criteria for purposes of determining the content of fundamental justice under section 7.[46]

27. Reading *Chiarelli* and *Medovarski* in light of *Baker* and *Suresh*, the consequences of applying the security certificate regime to the Appellants, including prolonged detention and deportation to possible torture or death, mandate more stringent procedural protections. Indeed, it is unlikely that a person labelled by Canada as a 'terrorist' and then removed to another state would *not* face dire consequences from authorities in the receiving state. The issue of *refoulement* does not arise directly in the context of the current appeals, but as a possible outcome of a security certificate determination, it is relevant to the assessment of the content of fundamental justice. The impact of the security certificate regime on the interests and rights of persons affected is profound, and comparable in stigma and consequence to the impact of a criminal conviction.[47] Accordingly, the requirements of both fairness and fundamental justice must reflect this congruity.

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[44] *Re MB, supra,* ¶ 103.
[45] *Baker v. Canada, supra* ¶ 23.
[46] *Suresh v. Canada, supra.*
[47] *R. v. Martineau*, [1990] 2 S.C.R. 633.

28. Further, the rights protected by sections 7 to 14 have been identified as anti-discrimination rights under section 15. This Court has observed that the application, intentional or unintentional, of racial stereotypes to the detriment of an accused person ranks among the most destructive forms of discrimination. The result of such discrimination is the loss of the accused's very liberty. Thus, the right to a fair trial must fall at the core of the guarantee in section 15 of the *Charter* that every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination.[48]

29. Clauses 3(3)(d) and (f) of *IRPA* leave no doubt that decision-making under *IRPA* must conform with *Charter* equality values and international human rights norms. These values and norms also illuminate the interpretation of other sections of the *Charter* itself.[49] Recent case law establishes that in the absence of a clear legislative intent to the contrary, international human rights instruments are determinative of the meaning of *IRPA*.[50] Of particular relevance in this regard are equality and security of the person guarantees, the right to be free from arbitrary and indeterminate detention, the absolute prohibition on return to torture as well as the right to due process of law.[51]

30. In considering whether the impugned conduct is "fundamentally unacceptable to our notions of fair practice and justice,"[52] it is significant that the justice system acknowledges that racial prejudice and discrimination affecting all visible minorities are intractable features of our society and must be addressed.[53] The impugned provisions impact a minority characterized by race and religion, which

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[48] *R v. Williams*, [1998] 1 S.C.R. 1128 at ¶ 48

[49] *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 ¶ 60; *Baker v. Canada*, [1999] 2 S.C.R. 817; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *International Convention For The Elimination of All Forms of Racial Discrimination, supra*; *International Covenant on Civil and Political Rights, supra*; *R. v. Golden,* [2001] 3 S.C.R. 679 ¶ 86, citing *RWDSU v. Dolphin Delivery Ltd.,* [1986] 2 S.C.R. 573, *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, *R. v. Salituro*, [1991] 3 S.C.R. 654 at pp. 675-76, *R. v. Pan*, [2001] 2 S.C.R. 344. See also *Dagenais v. C.B.C.*, [1994] 3 S.C.R. 835, ¶ 72-76, 149-159; *R. v. Lavallee*, [1990] 1 S.C.R. 852, at ¶ 35-38; *R v. Park*, [1995] 2 S.C.R. 836 ¶ 51; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 at ¶ 69-74; *R. v. Osolin*, [1993] 4 S.C.R. 595 ¶ 33-34; and *R. v. Mills*, [1999] 3 S.C.R. 668 at ¶ 90-93; *New Brunswick (Minister of Health and Community Services) v. G.(J.), supra ¶ 112-115; R. v. Morrisey*, [2000] 2 S.C.R. 90 ¶ 59-60; Peter W. Hogg, "Equality as a Charter Value in Constitutional Interpretation", (2003) 20 *Supreme Court Law Review* (2d) 113-136.

[50] *De Guzman v. Canada (Minister of Citizenship and Immigration),* 2005 FCA 436 ¶75, 82-89.

[51] *Baker v. Canada, supra*; *Singh v. Canada (Minister of Employment and Immigration) supra,* per Beetz at 430, 433; *Universal Declaration of Human Rights*, G.A. Res. 217 (III), U.N. Doc. A/810 at 71 (1948), arts. 2,3,5,7,8,9; *International Covenant on Civil and Political Rights, supra,* arts. 7, 9, 14*; 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); arts. I, II, XVIII, XXVI; *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. res. 39/46 [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc A/39/51 (1984)] *entered into force* June 26, 1987, art. 3.

[52] *Suresh, supra,* ¶ 49; *R v. Kindler*, [1991] 2 S.C.R. 779 ¶ 35.

[53] *R v. S. (R.D.), supra* ¶ 26, 46, 111; *R v. Spence*, [2005] SCC 71 ¶ 1, 5; *R. v. Koh* (1998), 42 O.R. (3d) 668 (Ont. C.A.) at 11-13.

has been stereotyped as posing a particular danger of terrorist activity. It is offensive to the Canadian conscience that this minority should be singled out for harsh treatment and diminished procedural rights in a scheme which omits or overrides the most essential elements of the rule of law: basic procedural fairness, equality before the law, access to counsel,[54] judicial independence and impartiality,[55] and open proceedings.[56]

31. The need for these protections inherent in the rule of law, and protected by section 7, is particularly important when state measures may be actuated or characterized by stereotyping of an unpopular or feared minority. These rights will permit stereotyping of particular minority groups to be identified and attacked, so that invidious assumptions do not underpin official decision-making.[57] Such safeguards will thus promote compliance with the requirements of sub-sections 3(3)(d) and (f) of the *IPRA*. Denial of such rights offends the egalitarian principles of justice embraced by Canada and is contrary to section 7.

32. Elucidation of the content of the principles of fundamental justice should take account not only of the interest of the state in battling terrorism, but also the fact that Canadians value the importance of human life and liberty and the protection of society through respect for the rule of law.[58] Although some balancing of the interests of the individual and the state is involved in delineating the principles of fundamental justice, this balancing under section 7 is not a "free-standing inquiry" of the sort required to be pursued under section 1[59]. The section 1 analysis below elaborates upon the availability of less restrictive alternatives, demonstrating that equality and due process rights, particularly the right to a fair hearing, need not be so severely compromised in order to safeguard Canadian or international security.

(iii) Section 12

33. Under section 12, a court considers whether a punishment or treatment is "so excessive as to outrage standards of decency".[60] The court must be satisfied that the penalty or treatment is grossly

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[54] *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869 at p. 888; *Re Vancouver Sun*, [2004] 2 S.C. R. 332 at ¶ 49.
[55] *Re s. 83.28*, *supra* ¶ 87.
[56] *Re Vancouver Sun*, *supra* ¶ 23-25.
[57] *Little Sisters Book and Art Emporium v. Canada*, *supra*; *Brown v. Durham Regional Police Force*, supra
[58] *Re Application under s. 83.28 of the Criminal Code*, [2004] 2 S.C.R. 248 at ¶ 5-7.
[59] *Malmo-Levine*, *supra* at ¶96, 98. See Nicholas Daube, "Charkauoi: the Impact of Structure on Judicial Activism in Times of Crisis", (2005) 4:2 J.L. & Equality, forthcoming, June 2006.
[60] *R v. Smith*, [1987] 1 S.C.R. 1045 at ¶ 89; *Suresh*, *supra* ¶ 51.

disproportionate, "such that Canadians would find the punishment abhorrent or intolerable."[61] The detention of permanent residents and foreign nationals pursuant to a security certificate is 'treatment" within the meaning of section 12, as exertion of state control over the individual within a state administrative structure.[62] In evaluating such treatment under section 12, a court is to consider the gravity of the offence, the personal characteristics of the offender and the particular circumstances of the case. It will measure the effect of the sentence actually imposed, taking into account its duration, and the conditions under which it is served. Among the factors considered in assessing whether the treatment is grossly disproportionate are whether it is unusually severe and hence degrading to human dignity and worth. Not just the terms of the legislation but its effects may be considered.[63]

34. The impugned provisions violate section 12. Given that this treatment is particularly directed at a small, vulnerable and disadvantaged minority it is especially shocking to our egalitarian values. It shocks the conscience by its duration, its very real potential for indefiniteness, and, with respect to the *Almrei* appeal in particular, the fact that it is spent in prolonged solitary confinement.[64] Even where there exist grounds for successfully challenging the "danger opinions" prepared by Canada, a detainee faces the stark alternatives of removal or prolonged detention, if he cannot meet a reverse onus of proving he is not a danger to national security.[65] This deprivation of liberty is imposed upon persons who have not been convicted of any offence in accordance with due process. Such provisions marginalize and devalue the members of the minority communities subject to them, compromising their human dignity and autonomy.[66]

C. The regime is not saved by section 1

35. While deference may be appropriate with respect to legislative choices involving competing social and political policies, it is never warranted for limitations on fundamental rights.[67] The broad objectives of sections 33 and 78 to 84 of *IRPA* include the protection of Canadian and international security, clearly pressing and substantial objectives.[68] However, it is doubtful whether violations of section 7 of the *Charter* can ever be sustained under section 1, apart from "cases … such as natural

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[61] *R v. Morrisey*, [2000] 2 S.C.R. 90 at ¶ 26; see also *R v. Smith*, [1987] 2 S.C.R. 1045 at ¶ 80-81.
[62] *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 at ¶ 65, 67.
[63] *R v. Smith, supra* at ¶ 80-81, 86, 91-92; *R. v. Goltz*, [1991] 3 S.C.R. 485 at ¶ 31, 32, 44.
[64] *Almrei v. Canada (Attorney General)*, [2003] O.J. No. 5198.
[65] *Almrei v. Canada (Minister of Citzienship and Immigration)*, [2005] F.J. No. 1994 (Fed. Ct).
[66] *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at ¶ 53
[67] *Sauvé v. Canada*, [2002] 3 S.C.R. 519 at ¶ 9, 13, 14.

disasters, epidemics, the outbreak of war, and the like."[69] The prospect that a violation of the right to be free from cruel and unusual treatment or punishment would be found justifiably limited is even more doubtful.[70]

36. The government's justification for any *Charter* violation must be supported by evidence or in reason or logic. The regime must be viewed in its entirety; the cumulative and multiplicative effects of the rights violations will slip from view if each rights violation is disaggregated and measured separately. The specific consequences of these measures for non-citizens as racialized and religious minorities in Canada must be assessed in direct and explicit terms against the objective benefits postulated by the government.[71]

37. The infringing measures are not "rationally connected" to the objectives of combating international terrorism or protecting Canada's security. Non-citizens may be subject to security certificates in circumstances where they are not alleged to have engaged in terrorism or pose any actual security risk. The consequences of being deemed a security risk are triggered not simply when there are reasonable grounds for that specific conclusion, but when the Ministers have reasonably certified that there are reasonable grounds for believing that a person is, was, or may be a member of an organization that there are reasonable grounds to believe is, was or will engage in terrorism.[72] The regime is both overbroad and under-broad because there is little to prevent innocent persons from being detained and subsequently deported - but equally, little to ensure that persons who represent genuine security risks will be effectively dealt with by either Canadian law or the law of the state to which the individual is ultimately removed.[73] Even in circumstances of possible risk, the severity of the human rights infringements posed by the extreme administrative measures adopted in *IRPA* are disproportionate to the gravity of such risk.

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[68] *IRPA*, s. 3 (1) (h), (i).

[69] *Reference Re s. 94(2) of the Motor Vehicle Act (BC)*, [1985] 2 S.C.R 486 at ¶ 83; *R. v. Heywood*, [1994] 3 S.C.R. 761 at ¶ 69-70.

[70] Peter Hogg, *Constitutional Law of Canada* (Loose Leaf Edition), 35-45.

[71] *RJR-MacDonald Inc. v. Canada*, [1995] 3 S.C.R. 199 at ¶ 153; *Vriend v. Alberta*, *supra* at ¶ 111; *Thomson Newspapers Co. v. Canada* , [1998] 1 S.C.R. 877 at ¶ 125.

[72] *Immigration and Refugee Protection Act*, *supra* ss. 33, 34 (1)(f) and 80; "Of Gods and Monsters" at 22-31; Canadian Council for Refugees, *Refugees and Non-Citizens in Canada, Submission to the Human Rights Committee of the United Nations* (16 September 2005) at 4.

38. Laws and policies premised on status-based distinctions between non-citizens compared to citizens are an ineffective counter terrorism strategy. The fact that citizens can and have been recruited to engage in international terrorism further diminishes the rational connection between the present regime and national security.[74]

39. The impairment is not minimal. Once determined reasonable, the security certificate is a removal order. It results in the loss of the right to become a permanent resident, or the loss of residence status if the person was landed, as well as the likelihood of continued detention. For refugees and others in need of protection, the impairment could be as significant as *refoulement* to torture or other forms of persecution.[75] No system that attempts to weigh individual rights against collective security interests will achieve a perfect balance but it does not follow that all balances fall within a margin of appreciation. The law must be carefully tailored so that rights are impaired no more than necessary. There are less drastic measures that the government can adopt which protect the rights of persons who are alleged to be security risks, while meeting legitimate security objectives.[76]

(i) Criminal Prosecutions

40. Recourse to criminal law, which includes an extensive array of robust and effective preventative, pre-emptive and deterrent measures, does not discriminate in substance or process between citizens and non-citizens and should constitute the preferred law enforcement response to national security concerns.[77] *Criminal Code* offences apply not only to completed crimes but a wide range of inchoate crimes from attempts, threats and conspiracies to counselling, aiding and encouraging the commission of crimes, as well as being an accessory after the fact. Subject to certain limitations, crimes committed outside of the country, regardless of the nationality of the offender or victim, are also subject to prosecution in Canada.[78]

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[73] Audrey Macklin, "Borderline Security" in Daniels, Macklem and Roach (eds.), *The Security of Freedom* (2001) 383 at 397-398; Kent Roach and Gary Trotter, "Miscarriages of Justice in the War against Terror" (2005) 109 Penn St. L. Rev. 967 at 1001-1006 [hereinafter "Roach and Trotter"]; *Re A, supra* at ¶ 33.

[74] Kent Roach, "Must We Trade Rights for Security?" (2006) 27:5 Cardozo L. Rev. 2151 at 2186-88 [hereinafter, "Rights for Security?"]; Intelligence and Security Committee, *Report into the London Terrorist Attacks on 7 July 2005* (May 2006) at 11, 25 -30.

[75] See, *R. v. Wiles*, 2005 SCC 84 at ¶ 5.

[76] Canadian Council for Refugees, *Brief to the House of Commons Subcommittee on Public Safety and National Security, Anti-Terrorism Act Review*, 8 September 2005 at 6-8; Kent Roach, "Ten Ways to Improve Canadian Anti-Terrorism Law" (2005) 24 Crim. L.Q. 102 at 124-125.

[77] *Criminal Code*, R.S., 1985, c. C.-46, ss. 230, 76-78, 7 (3.2)-(3.6), 46, 61, 269, 222, 279, 57-58, 366-369 ; and see, *Crimes Against Humanity and War Crimes Act,* 2000, c. 24, s. 6.

[78] *Criminal Code, supra* ss. 83.01- 83.04, 83.08.

41. Implementation of the *ATA* in 2001 introduced a further preventative focus to criminal law. Standard investigative tools such as search and seizure, personal surveillance and the use of anonymous informants were supplemented with a range of new measures in aid of the collection of intelligence.[79] An investigative hearing power allows evidence to be compelled at the early stages of an investigation before an offence has even been committed.[80] The *Canada Evidence Act* was amended to include changes to courtroom and other proceedings to ensure the protection of classified information.[81] Provisions for preventive arrest/recognizance with conditions allow police to make preventive arrests on the basis of a reasonable belief that terrorist activity will be carried out and a reasonable suspicion that an arrest or the imposition of a recognizance is necessary to prevent the carrying out of terrorist activity. Judicially supervised conditions, including a requirement to remain within the jurisdiction, report to a police officer or deposit one's passport with the court, can be imposed.[82] Extensive changes to money laundering provisions along with new financial reporting requirements constitute core legal responses to terrorist activity.[83] Cumulatively these measures demonstrate that recourse to immigration law can no longer be justified with reference to any legal or procedural constraints impinging upon the investigation and prosecution of terrorist offences.

42. In contrast to immigration security certificate procedures, the measures noted above include some important protections for individuals suspected of involvement in terrorist activities as well as for individuals who are charged with terrorist offences. With respect to compelled questioning at the pre-charge stage of an investigation, individuals are afforded extensive self-incrimination and derivative use immunity protections. No such protections exist under immigration security certificate procedures. The primary feature of the preventive arrest/recognizance with conditions scheme is presumptive release in contrast to automatic and often indeterminate detention pursuant to *IRPA*. Guilt in relation to terrorist offences must be proven beyond a reasonable doubt and convictions are subject to appeal in contrast to the compound "reasonable grounds" standard of the *IRPA* and the absence of any right of appeal with respect to Federal Court decisions on the reasonableness of security certificates.[84]

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[79] *Criminal Code*, *supra* ss. 185(1.1), 186(1.1), 186.1, 196. (5).
[80] *Re Application under s. 83.28 of the Criminal Code*, [2004] 2 S.C.R. 248.
[81] *Canada Evidence Act*, R.S.C. 1985, c.C-5, ss. 38.13, 38.15(1).
[82] Stanley A. Cohen, *Privacy, Crime and Terror* (Markham: LexisNexis Canada, 2005) at 195-221.
[83] *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17 at s. 3; FINTRAC, *2005 Annual Report* at 9-21, 45.
[84] *R. v. Malik* 2005 BCSC 350 at ¶ 662-66.

43. Perhaps most importantly, the *Canada Evidence Act* provides that a criminal trial judge has the right, with regard to non-disclosure of national security information, to make any order, including a stay of the entire criminal proceedings, that he or she "considers appropriate in the circumstances to protect the right of the accused to a fair trial."[85] To the extent that much of the evidence about alleged terrorist activity comes from intelligence sources of unknown or limited reliability, this is a critical safeguard.[86] As well, cooperative disclosure practices have developed in the context of criminal trials that provide defense counsel with an opportunity for a preliminary review of classified material subject to an undertaking not to disclose the information to anyone, including their clients. Such an approach was adopted in the Air India trial – and although the trial ended in acquittals, it was not due to disclosure related problems but rather, *inter alia*, serious mistakes made in the course of investigation which allowed major suspects to evade prosecution.[87]

44. While a number of other countries have resorted to exceptional immigration security measures as a method of dealing with suspected terrorists, most jurisdictions have sought to deal with those who pose a threat to national security or who are suspected of involvement in international terrorism by means of criminal prosecutions.[88] Indeed the record of prosecutions for terrorism and related conspiracy offences in Canada and other jurisdictions suggests that criminal remedies can be successful.[89]

45. Despite being a party to the United Nations *Terrorism Conventions* and pledging to prosecute or extradite suspected terrorists within its territory, Canada continues to rely primarily on immigration

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[85] *Canada Evidence Act*, *supra* s. 38.14 (1).

[86] Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar, Policy Review, *National Security and Rights and Freedoms, Background Paper* (10 December 2004) at 13-14, 17-18; "Rights for Security" at 2216-2217; "Of Gods and Monsters" at 28; Roach and Trotter at 1005-06, 1028-29; *Tian-Yong Chen, aka Tian Yong Chen v. US Immigration and Naturalization Service*, Docket No. 00-4136 (2nd Cir. 2004) at 15.

[87] Michael Code, "Problems of Process in Litigating Privilege Claims under the Flexible Wigmore Model" in Law Society of Upper Canada, *Special Lectures 2003: The Law of Evidence* (2004) at pp. 272-73; Roach and Trotter, at 1004 and 1028; *Lessons to be Learned: The Report of the Honourable Bob Rae on outstanding questions with respect to the bombing of Air India Flight 182* (2005) at 14-17 ["Rae Report"].

[88] House of Lords, House of Commons, Joint Committee on Human Rights, *Review of Counter-Terrorism Powers*, HL Paper 158 (2004) at 26 [hereinafter "Joint Committee on Human Rights"].

[89] *R. v. Critton*, [2002] O.J. No. 2594 (Ont. Sup. C.J.); *R. v Stanford* (1975), 27 C.C.C. (2d) 520 (Que. C.A.); *R. v. Reyat*, [2003] B.C.J. No. 363; *US v. Dynar*, [1997] 2 S.C.R. 462 at ¶67, 89, 109; Historica, The Canadian Encyclopedia, "Front de libération du Québec"; *R. v. Balian* [1988] O.J. 1692 (Ont. C.A.); Cass. Crim., 17 October 2001 (N° de pourvoi : 01-81.453); Cass. Crim., 28 February 2001 (N° de pourvoi : 00-84108); US Department of State, *2005 Country Reports on Terrorism, supra* 97-102; *USA v. Ressam*, Unreported, US Dist. Ct. (W.D. Wa. No. CR99-666C, 2005).

remedies in security cases involving non-citizens, including Convention refugees.[90] In an era of global, network terrorism, domestic prosecution or extradition is a more rational, coherent response to non-citizens suspected of involvement in terrorist crimes. The denunciatory, deterrent and retributive purposes of sentencing are a necessary and appropriate response to terrorist violence as opposed to the export of terrorism under immigration law.[91] In addition to conforming to UN treaty obligations, the "criminal law alternative" more readily affords crucial safeguards against potential miscarriages of justice while ensuring that immigration decisions do not result in impunity for terrorists.

46. Immigration law must not be an all purpose substitute for the criminal law in security cases involving non-citizens. However, in the event that special procedures for addressing national security concerns within immigration law are preserved, recourse to such procedures should be strictly limited to cases involving allegations of actual threats to Canada's national security interests, consistent with the definition of "threat" in the *Canadian Security Intelligence Service Act*.[92] The essential features for an acceptable model within immigration law are elaborated below.

(ii) *Special Advocate "Plus" for Immigration Security Procedures*

47. Minimum benchmarks for immigration security procedures that accord with natural justice, the requirements of the *Charter* and international law would include carefully crafted mechanisms to ensure a fair hearing with fewer impairments to fundamental due process guarantees.[93] Such mechanisms would include five key elements: (i) a prohibition on the use of *in camera, ex parte* procedures except in circumstances where the government has clearly demonstrated a legitimate national security interest; (ii) the right to effective legal representation including measures, carefully tailored on a case-by-case basis, to protect to the greatest extent possible, the client's right to

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[90] *International Convention for the Suppression of the Financing of Terrorism*, 9 December 1999, GA. Res. 54/109, ratified by Canada 15 February, 2002, Arts. 4, 9,10, Annex; see also, UN Security Council Resolution 1456 (2003), 20 January 2003, UN Doc.S/RES/1456;UN General Assembly Resolution 58/81 (2003), 9 December 2003, UN Doc.A/RES/58/81; Patrick Macklem, "Canada's Obligations at International Criminal Law" in Daniels, Macklem and Roach (eds.), *The Security of Freedom* (2001) 353-364.

[91] *Criminal Code*, ss. 718, 718.2(a)(v); *R. v. Proulx*, [2000] 1 S.C.R. 61 at ¶ 102, 114;Rae Report, *supra* 27.

[92] *Canadian Security Intelligence Service Act*, R.S. 1985, c.C-23, s. 2 See also, *Report of the Special Senate Committee on Security and Intelligence* ("Kelly Committee"), January 1999, ch. 2 at 11.

[93] *Reference Re s. 94(2) of the Motor Vehicle Act (BC)*, supra ¶ 27-31; *Baker v. Canada, supra* at ¶ 21-28; *Suresh v. Canada., supra* at ¶ 113-115; *May v. Ferndale Institution*, 2005 SCC 82 at ¶ 77, 92; *American Declaration on the Rights and Duties of Man, supra*, arts. I, XVIII, XXIV, XXV and XXVI; Inter-Am. C. H.R., *Report on the Situation of Human Rights of Asylum seekers within the Canadian Refugee Determination System* (2002) at ¶ 143-157; OAS, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, 22 October 2002 at ¶ 398-413; *Universal Declaration of Human Rights, supra*, arts. 3, 8; *International Covenant on Civil and Political Rights, supra,* arts. 2.3, 9.1. 9.4, 14.1.

respond to the government's case; [94] (iii) the substitution of the current "reasonable grounds to believe" standard used in the review of immigration security certificates with a more rigorous standard that is the equivalent of the civil balance of probabilities;[95] (iv) presumptive release with clear restrictions on the use and length of detention;[96] and finally, (v) access to judicial review and a further right of appeal consistent with the general rules for judicial review in *IRPA*.[97]

48. Of the benchmarks identified above, further elaboration regarding the right to effective legal representation is warranted. In the United States the appointment of a special attorney who can review classified information and assist a permanent resident facing removal proceedings in the Alien Terrorist Removal Court is mandatory. [98] In the United Kingdom special advocate procedures have been in use before the Special Immigration Appeals Commission since 1998 and more recently, in proceedings pursuant to the *Anti-terrorism and Security Act*. These procedures have been the subject of significant criticism due to their inherent limitations.[99] Once the special advocates have reviewed the privileged material, they can no longer communicate with the person affected, thereby circumscribing their ability to effectively challenge the government's evidence. In contrast, procedures adopted by US military commissions, in Federal Court Rules, as well as those in use in other contexts where the protection of sensitive information is a paramount concern, illustrate a partial range of more acceptable options.[100] These examples suggest that a "special

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[94] *Chahal v. United Kingdom* (1996), 23 EHRR 413, ¶ 130-131; 140-155; *The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Freedom of Expression and Access to Information*, U.N. Doc. E/CN.4/1996/39 (1996); UN Working Group on Arbitrary Detention, *Visit to Canada*, E/CN.4/2006/7/Add.2 (2005) at 2-3, 18-23; Amnesty International, *A Human Rights Approach to National Security Confidentiality, Submission to the Maher Arar Commission* (28 May 2004) at 9-12; *Re Vancouver Sun*, [2004] 2 S.C.R. 332 at ¶ 23-27, 31, 42-43; Robert W. Hubbard, *The Law of Privilege in Canada* (Aurora: Canada Law Book, 2006), c.1, ¶ 1.10 – 1.60. Disclosure practices developed by the Security Intelligence Review Committee merit review: see, Murray Rankin, "The Security Intelligence Review Committee: Reconciling National Security with Procedural Fairness" (1989-1990) 3 C.J.A.L.P. 173 at 174-84; Ian Leigh, "Secret Proceedings in Canada" (1996) 34 Osgoode Hall L.J. 113 at 159-164.

[95] *R. v. Zeolkowski,* [1989] 1 S.C.R. 1378 at ¶ 16-17; *Smith v. Canada* [1991] 42 F.T.R. 81at ¶ 96-98; Roach and Trotter at 1020-21; *Re MB,* ¶ 52-60.

[96] See, for example, *Criminal Code*, s. 83.3; Concluding observations of the Human Rights Committee: Canada. 02/11/2005. CCPR/C/CAN/CO/5 at ¶ 14.

[97] *IRPA*, ss. 72 and 74; see, Victor Ramraj, "Terrorism, risk perception and judicial review" in Ramraj, Hor and Roach (eds.), *Global Anti-Terrorism Law and Policy* (Cambridge University Press, 2005) 107 at 120-26.

[98] *Immigration and Nationality Act*, Pub. L. No. 82-414, s. 504 (e)(3)(F), 66 Stat. 163 (June 17, 1952).

[99]Constitutional Affairs Committee, *The Operation of the Special Immigration Appeals Commission (SIAC) and the Use of Special Advocates*, Vol. I at 14 -33, and Vol. II at 42-47; 53-59; 75-76 (3 April 2005); Joint Committee on Human Rights, *supra* at 14 -15; Amnesty International, "Human rights: a broken promise" (23 February 2006) at 15-17.

[100] *In Re Guantanamo Detainee Cases,* 2005 U.S. Dist. LEXIS 1236 (D.C.) at 25; *Federal Court Rules* (SOR/2004-283), s. 152; Robert W. Hubbard, *The Law of Privilege in Canada, supra*, c. 3 at ¶ 3.51-3.52; *Hunter v. Canada (Consumer and Corporate Affairs)* [1991] F.C.J. No. 245 (FCA) at ¶ 27-29; *Maislin Industries Limited v. Minister for Industry, Trade and Commerce* [1984] 1 F.C. 939 (FCTD) at 942; *A.M. v. Ryan* [1997] 1 S.C.R. 157 at ¶ 33. 37, 41;

advocate plus" model premised on the right of the individual's own counsel to review the privileged evidence based on an undertaking not to disclose its contents to the client or anyone else, constitute a less rights-infringing alternative than special advocate procedures, with all of their documented shortcomings.

49. The government has failed to demonstrate why significantly less intrusive and equally effective measures have not been utilized or how the benefits of the security certificate regime outweigh its profound and tangible deleterious effects. Neither criminal prosecution nor the introduction of a "special advocate plus" model into Canadian immigration law interferes with the principle that only citizens are accorded full mobility rights under section 6 of the *Charter*. Indeed subject to certain limits, the government would still retain the authority to deport individuals convicted of criminal offences or determined security risks pursuant to a fair immigration process. However, the notion that Canadian law should accord second tier justice to non-citizens on basic questions of civil rights is an affront to the core values of a free and democratic society. Ultimately, it should be Parliament's task to consider which, among the alternative models elaborated above, should be adopted to ensure that the constitutional rights of non-citizens are accorded appropriate respect.[101]

PART V - ORDER REQUESTED

50. The Intervener requests a declaration that sections 33 and 77 to 85 of *IRPA* are unconstitutional.

All of which is respectfully submitted this 25th day of May, 2006.

Sharryn Aiken	Marie Chen	Mary Eberts

Of Counsel for the Interveners the Canadian Council for Refugees, the African Canadian Legal Clinic, the International Civil Liberties Monitoring Group, and the National Anti-Racism Council of Canada

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Molson Breweries v. Labatt Brewing Co. [1992] F.C.J. No. 506 (FCA) at ¶ 13; *Dynaflair Corp. Canada Inc. v. Mobiflex Inc.* [2001] F.C.J. No. 199 (FCTD) at ¶ 18.

[101] *R. v. Oakes*, [1986] 1 S.C.R. 103 at 136-140; *Egan v. Canada*, [1995] 2 S.C.R. 513 at ¶182; *RJR-MacDonald Inc. v. Canada*, [1995] 3 S.C.R. 199 at ¶160; *Thomson Newspapers Co. v. Canada* , *supra* at ¶110-130; *Harper v. Canada*, [2004] 1 S.C.R. 827 at ¶32 – 44.

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PART VII – STATUTE, REGULATION, RULE

Canadian Security Intelligence Service Act, R.S. 1985, c.C-23

INTERPRETATION

Definitions

2. In this Act,

"department" « *ministère* »
"department", in relation to the government of Canada or of a province, includes

(*a*) any portion of a department of the Government of Canada or of the province, and

(*b*) any Ministry of State, institution or other body of the Government of Canada or of the province or any portion thereof;

"Deputy Minister" « *sous-ministre* »
"Deputy Minister" means the Deputy Minister of Public Safety and Emergency Preparedness and includes any person acting for or on behalf of the Deputy Minister of Public Safety and Emergency Preparedness;

"Director" « *directeur* »
"Director" means the Director of the Service;

"employee" « *employé* »
"employee" means a person who is appointed as an employee of the Service pursuant to subsection 8(1) or has become an employee of the Service pursuant to subsection 66(1) of the *Canadian Security Intelligence Service Act*, chapter 21 of the Statutes of Canada, 1984, and includes a person who is attached or seconded to the Service as an employee;

"foreign state" « *État étranger* »
"foreign state" means any state other than Canada;

"Inspector General" « *inspecteur général* »
"Inspector General" means the Inspector General appointed pursuant to subsection 30(1);

"intercept" « *intercepter* »
"intercept" has the same meaning as in section 183 of the *Criminal Code*;

"judge" « *juge* »
"judge" means a judge of the Federal Court designated by the Chief Justice thereof for the purposes of this Act;

"Minister" « *ministre* »
"Minister" means the Minister of Public Safety and Emergency Preparedness;

"place" « *lieux* »
"place" includes any conveyance;

"Review Committee"
"Review Committee" means the Security Intelligence Review Committee

« comité de surveillance »	established by subsection 34(1);
"security assessment" *« évaluation de sécurité »*	"security assessment" means an appraisal of the loyalty to Canada and, so far as it relates thereto, the reliability of an individual;
"Service" *« Service »*	"Service" means the Canadian Security Intelligence Service established by subsection 3(1);
"threats to the security of Canada" *« menaces envers la sécurité du Canada »*	"threats to the security of Canada" means (*a*) espionage or sabotage that is against Canada or is detrimental to the interests of Canada or activities directed toward or in support of such espionage or sabotage, (*b*) foreign influenced activities within or relating to Canada that are detrimental to the interests of Canada and are clandestine or deceptive or involve a threat to any person, (*c*) activities within or relating to Canada directed toward or in support of the threat or use of acts of serious violence against persons or property for the purpose of achieving a political, religious or ideological objective within Canada or a foreign state, and (*d*) activities directed toward undermining by covert unlawful acts, or directed toward or intended ultimately to lead to the destruction or overthrow by violence of, the constitutionally established system of government in Canada, but does not include lawful advocacy, protest or dissent, unless carried on in conjunction with any of the activities referred to in paragraphs (*a*) to (*d*).

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 **(U.K.), 1982, c. 11 [*Charter*]**

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

Guarantee of Rights and Freedoms

Rights and freedoms in Canada	**1.**	The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Mobility of citizens

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

Legal Rights

Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Treatment or punishment

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Equality Rights

Equality before and under law and equal protection and benefit of law

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Affirmative action programs

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Federal Court Rules **(SOR/2004-283)**

FILING OF CONFIDENTIAL MATERIAL

Motion for order of confidentiality

151.(1) On motion, the Court may order that material to be filed shall be treated as confidential.

Demonstrated need for confidentiality

(2) Before making an order under subsection (1), the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings.

Marking of confidential material

152.(1) Where the material is required by law to be treated confidentially or where the Court orders that material be treated confidentially, a party who files the material shall separate and clearly mark it as confidential, identifying the legislative provision or the Court order under which it is required to be treated as confidential.

Access to confidential material

(2) Unless otherwise ordered by the Court,

(*a*) only a solicitor of record, or a solicitor assisting in the proceeding, who is not a party is entitled to have access to confidential material;

(*b*) confidential material shall be given to a solicitor of record for a party only if the solicitor gives a written undertaking to the Court that he or she will

(i) not disclose its content except to solicitors assisting in the proceeding or to the Court in the course of argument,

(ii) not permit it to be reproduced in whole or in part, and

(iii) destroy the material and any notes on its content and file a certificate of their destruction or deliver the material and notes as ordered by the Court, when the material and notes are no longer required for the proceeding or the solicitor ceases to be solicitor of record;

(*c*) only one copy of any confidential material shall be given to the solicitor of record for each party; and

(*d*) no confidential material or any information derived therefrom shall be disclosed to the public.

Order to continue

(3) An order made under subsection (1) continues in effect until the Court orders otherwise, including for the duration of any appeal of the proceeding and after final judgment.

Immigration and Refugee Protection Act, 2001, c. 27,

OBJECTIVES AND APPLICATION

Objectives — immigration

3. (1) The objectives of this Act with respect to immigration are

(*a*) to permit Canada to pursue the maximum social, cultural and economic benefits of immigration;

(*b*) to enrich and strengthen the social and cultural fabric of Canadian society, while respecting the federal, bilingual and multicultural character of Canada;

(*b*.1) to support and assist the development of minority official languages communities in Canada;

(*c*) to support the development of a strong and prosperous Canadian economy, in which the benefits of immigration are shared across all regions of Canada;

(*d*) to see that families are reunited in Canada;

(*e*) to promote the successful integration of permanent residents into Canada, while recognizing that integration involves mutual obligations for new immigrants and Canadian society;

(*f*) to support, by means of consistent standards and prompt processing, the attainment of immigration goals established by the Government of Canada in consultation with the provinces;

(*g*) to facilitate the entry of visitors, students and temporary workers for purposes such as trade, commerce, tourism, international understanding and cultural, educational and scientific activities;

(*h*) to protect the health and safety of Canadians and to maintain the security of Canadian society;

(*i*) to promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks; and

(*j*) to work in cooperation with the provinces to secure better recognition of the foreign credentials of permanent residents and their more rapid integration into society.

Application

.....

(3) This Act is to be construed and applied in a manner that

(*a*) furthers the domestic and international interests of Canada;

(*b*) promotes accountability and transparency by enhancing public awareness of immigration and refugee programs;

(*c*) facilitates cooperation between the Government of Canada, provincial governments, foreign states, international organizations and non-governmental organizations;

(*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 English and French as the official languages of Canada;

(*e*) supports the commitment of the Government of Canada to enhance the vitality of the English and French linguistic minority communities in Canada;

and

(*f*) complies with international human rights instruments to which Canada is signatory.

International Convention on the Elimination of All Forms of Racial Discrimination

Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965

Article I

1. In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

2. This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.

3. Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.

Committee on the Elimination of All Forms of Racial Discrimination
General Recommendation 30 - Discrimination Against Non-citizens
CERD/C/64/Misc.11/rev.3, 64th session 23 February-12 March 2004

1. Article 1, paragraph 1, of the Convention defines racial discrimination. Article 1, paragraph 2, provides for the possibility of differentiating between citizens and non-citizens. Article 1, paragraph 3 declares that, concerning nationality, citizenship or naturalization, the legal provisions of States parties must not discriminate against any particular nationality;

2. Article 1, paragraph 2, must be construed so as to avoid undermining the basic prohibition of discrimination; hence, it should not be interpreted to detract in any way from the rights and freedoms recognized and enunciated in particular in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights;

3. Article 5 of the Convention incorporates the obligation of States parties to prohibit and eliminate racial discrimination in the enjoyment of civil, political, economic, social and cultural rights. Although some of these rights, such as the right to participate in elections, to vote and to stand for election, may be confined to citizens, human rights are, in principle, to be enjoyed by all persons. States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law;

4. Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim. Differentiation within the scope of article 1, paragraph 4, of the Convention relating to special measures is not considered discriminatory;

.....

10. Ensure that any measures taken in the fight against terrorism do not discriminate, in purpose or effect, on the grounds of race, colour, descent, or national or ethnic origin and that non-citizens are not subjected to racial or ethnic profiling or stereotyping;

International Covenant on Civil and Political Rights

Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 4

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

.....

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

UN Human Rights Committee
General Comment No. 15: The position of aliens under the Covenant: 11/04/86

1. Reports from States parties have often failed to take into account that each State party must ensure the rights in the Covenant to "all individuals within its territory and subject to its jurisdiction" (art. 2, para. 1). In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness.

2. Thus, the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2 thereof. This guarantee applies to aliens and citizens alike. Exceptionally, some of the rights recognized in the Covenant are expressly applicable only to citizens (art. 25), while article 13 applies only to aliens. However, the Committee's experience in examining reports shows that in a number of countries other rights that aliens should enjoy under the Covenant are denied to them or are subject to limitations that cannot always be justified under the Covenant.

.....

5. The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory. However, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.

6. Consent for entry may be given subject to conditions relating, for example, to movement, residence and employment. A State may also impose general conditions upon an alien who is in

transit. However, once aliens are allowed to enter the territory of a State party they are entitled to the rights set out in the Covenant.

7. Aliens thus have an inherent right to life, protected by law, and may not be arbitrarily deprived of life. They must not be subjected to torture or to cruel, inhuman or degrading treatment or punishment; nor may they be held in slavery or servitude. Aliens have the full right to liberty and security of the person. If lawfully deprived of their liberty, they shall be treated with humanity and with respect for the inherent dignity of their person. Aliens may not be imprisoned for failure to fulfil a contractual obligation. They have the right to liberty of movement and free choice of residence; they shall be free to leave the country. Aliens shall be equal before the courts and tribunals, and shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of any criminal charge or of rights and obligations in a suit at law. ..... They may not be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence. They have the right to freedom of thought, conscience and religion, and the right to hold opinions and to express them. .....In those cases where aliens constitute a minority within the meaning of article 27, they shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion and to use their own language. Aliens are entitled to equal protection by the law. There shall be no discrimination between aliens and citizens in the application of these rights. These rights of aliens may be qualified only by such limitations as may be lawfully imposed under the Covenant.

Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live

Adopted by General Assembly resolution 40/144 of 13 December 1985

Article 2

1. Nothing in this Declaration shall be interpreted as legitimizing the illegal entry into and presence in a State of any alien, nor shall any provision be interpreted as restricting the right of any State to promulgate laws and regulations concerning the entry of aliens and the terms and conditions of their stay or to establish differences between nationals and aliens. However, such laws and regulations shall not be incompatible with the international legal obligations of that State, including those in the field of human rights.

Article 5

1. Aliens shall enjoy, in accordance with domestic law and subject to the relevant international obligation of the State in which they are present, in particular the following rights:

(a) The right to life and security of person; no alien shall be subjected to arbitrary arrest or detention; no alien shall be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established by law;

(b) The right to protection against arbitrary or unlawful interference with privacy, family, home or correspondence;

(c) The right to be equal before the courts, tribunals and all other organs and authorities administering justice and, when necessary, to free assistance of an interpreter in criminal proceedings and, when prescribed by law, other proceedings;

Universal Declaration of Human Rights, 1948, U.N. Doc. A/810

Article 3

Everyone has the right to life, liberty and security of person.

Article 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984, entered into force 26 June 1987

Article 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.

International Convention for the Suppression of the Financing of Terrorism

Adopted 9 December 1999, GA. Res. 54/109, ratified by Canada 15 February, 2002

Article 4

Each State Party shall adopt such measures as may be necessary:
(a) To establish as criminal offences under its domestic law the offences set forth in article 2;
(b) To make those offences punishable by appropriate penalties which take into account the grave nature of the offences.

Article 9

1. Upon receiving information that a person who has committed or who is alleged to have committed an offence set forth in article 2 may be present in its territory, the State Party concerned

shall take such measures as may be necessary under its domestic law to investigate the facts contained in the information.

2. Upon being satisfied that the circumstances so warrant, the State Party in whose territory the offender or alleged offender is present shall take the appropriate measures under its domestic law so as to ensure that person's presence for the purpose of prosecution or extradition.

3. Any person regarding whom the measures referred to in paragraph 2 are being taken shall be entitled to:
(a) Communicate without delay with the nearest appropriate representative of the State of which that person is a national or which is otherwise entitled to protect that person's rights or, if that person is a stateless person, the State in the territory of which that person habitually resides;
(b) Be visited by a representative of that State;
(c) Be informed of that person's rights under subparagraphs (a) and (b).

4. The rights referred to in paragraph 3 shall be exercised in conformity with the laws and regulations of the State in the territory of which the offender or alleged offender is present, subject to the provision that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under paragraph 3 are intended.

5. The provisions of paragraphs 3 and 4 shall be without prejudice to the right of any State Party having a claim to jurisdiction in accordance with article 7, paragraph 1, subparagraph (b), or paragraph 2, subparagraph (b), to invite the International Committee of the Red Cross to communicate with and visit the alleged offender.

6. When a State Party, pursuant to the present article, has taken a person into custody, it shall immediately notify, directly or through the Secretary-General of the United Nations, the States Parties which have established jurisdiction in accordance with article 7, paragraph 1 or 2, and, if it considers it advisable, any other interested States Parties, of the fact that such person is in custody and of the circumstances which warrant that person's detention. The State which makes the investigation contemplated in paragraph 1 shall promptly inform the said States Parties of its findings and shall indicate whether it intends to exercise jurisdiction.

Article 10

1. The State Party in the territory of which the alleged offender is present shall, in cases to which article 7 applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.

2. Whenever a State Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that State to serve the sentence imposed as a result of the trial or proceeding for which the extradition or surrender of the person was sought, and this State and the State seeking the extradition of the person agree with this option and other terms they may deem appropriate, such a conditional extradition or surrender shall be sufficient to discharge the obligation set forth in paragraph 1.

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)

Article I

Every human being has the right to life, liberty and the security of his person.

Article XVIII

Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.

Article XXIV

Every person has the right to submit respectful petitions to any competent authority, for reasons of either general or private interest, and the right to obtain a prompt decision thereon.

Article XXV

No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law.

No person may be deprived of liberty for nonfulfillment of obligations of a purely civil character. Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released. He also has the right to humane treatment during the time he is in custody.

Article XXVI

Every accused person is presumed to be innocent until proved guilty.
Every person accused of an offence has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre- existing laws, and not to receive cruel, infamous or unusual punishment.

ADIL CHARKAOUI Appellant	**THE MINISTER OF CITIZENSHIP AND IMMIGRATION, ET AL.** Respondent	File Number: 30762
HASSAN ALMERI Appellant	**THE MINISTER OF CITIZENSHIP AND IMMIGRATION, ET AL.** Respondent	File Number: 30929
MOHAMED HARKAT Appellant	**THE MINISTER OF CITIZENSHIP AND IMMIGRATION, ET AL.** Respondent	File Number: 31178

SUPREME COURT OF CANADA
(On Appeal from the Federal Court of Appeal)

FACTUM OF THE INTERVENERS THE CANADIAN COUNCIL FOR REFUGEES, AFRICAN CANADIAN LEGAL CLINIC, INTERNATIONAL CIVIL LIBERTIES MONITORING GROUP and NATIONAL ANTI-RACISM COUNCIL OF CANADA

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