FACTUM OF THE INTERVENER CANADIAN COUNCIL FOR REFUGEES

PART I - OVERVIEW AND FACTS

1. The Canadian Council for Refugees ("the CCR") submits that the principle of *non-refoulement* creates clear obligations on the part of Canada to protect a Convention refugee who is sought for extradition from future serious ill-treatment in the Requesting State. This principle places fundamental limits on the right and duty of Canada to surrender individuals under extradition agreements. In cases of conflict, bars to surrender under international refugee and human rights law must prevail over any obligation to extradite. When a Convention refugee's extradition has been requested and the question arises as to whether the need for protection has ceased, it is incumbent upon the Minister of Citizenship and Immigration to bring an application under s.108(2)(e) of the *Immigration and Refugee Protection Act*. Absent a finding by the Refugee Protection Division that the need for protection has ceased, no Convention refugee should be extradited to a country with respect to which he or she has a well-founded fear of persecution.

2. The CCR takes no position on the facts as summarized by the parties.

PART II - POSITION ON APPELLANTS' ISSUES

3. The CCR agrees that this appeal raises the issues of law identified in paragraphs 11 and 12 of the Appellants' factum.

PART III - ARGUMENT

4. Extradition is a serious denial of liberty and security of the person. When extradition is ordered, a person "is taken from Canada and forcibly removed to another country to stand trial according to that other country's rules."[1] Section 7 of the *Canadian Charter of Rights and Freedoms* is engaged and the principles of fundamental justice must be respected throughout the process.[2]

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[1] *United States of America v. Ferras*, [2006] 2 S.C.R. 77 at para. 12 *[Intervener's Book of Authorities ("B.A."), Tab 14]*

[2] *United States of America v. Cobb*, [2001] 1 S.C.R. 587 at para. 34 *[B.A. Tab 13]*

5. Section 7 of the *Extradition Act* provides that the Minister of Justice "is responsible for the implementation of extradition agreements, the administration of this Act and dealing with requests for extradition made under them."[3] Among the Minister's responsibilities is to decide whether a person who has been ordered committed after an extradition hearing should be surrendered on the extradition request.[4] While this decision has been described as "primarily political in nature,"[5] the Minister's discretion is not absolute.[6] In the exercise of his or her discretion to order surrender, the Minister "must give regard to *Charter* considerations. "[7] Ministerial discretion must be exercised in accordance with the principles of fundamental justice.[8] Whether surrender complies with the *Charter* is determined in the first instance by the Minister but this determination is subject to judicial review.[9]

6. This appeal concerns the implications of refugee protection law for the law of extradition. It raises critically important issues touching upon the interaction of provisions of the *Extradition Act*, the *Immigration and Refugee Protection Act*,[10] and the *Charter* as well as, more broadly, the relationship of these provisions to international refugee protection and human rights law. The relevance of refugee status (or a pending claim for such status) to an extradition request depends on the circumstances of the case. It may be entirely irrelevant if there is no risk of persecution in the requesting State or any other State to which the person might subsequently be sent. On the

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[3] S.C. 1999, c.18, s.7

[4] *Extradition Act*, s.40.

[5] *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631 at p.659 *[B.A. Tab 5]*

[6] *Lake v. Canada (Minister of Justice)*, [2008] 1 S.C.R. 761 at para. 22 *[B.A. Tab 6]*

[7] *United States of America v. Kwok*, [2001] 1 S.C.R. 532 at para. 34 *[B.A. Tab 15]*; *Canada (Justice) v. Fischbacher*, 2009 SCC 46 at para. 39

[8] *Idziak v. Canada (Minister of Justice), supra [B.A. Tab 5]*

[9] *Canada v. Schmidt*, [1987] 1 S.C.R. 500 at 520-23 *[B.A. Tab 2]*; *United States of America v. Burns*, [2001] 1 S.C.R. 283 at paras. 58-69 *[B.A. Tab 12]*

[10] S.C. 2001, c.27 ("*IRPA*")

other hand, it is highly relevant if, as in the case at bar, the request for extradition comes from the very country with respect to which the refugee has a well-founded fear of persecution. Both the *Extradition Act* and the *IRPA* address what is to occur when extradition is requested while a claim for refugee status is pending.[11] Neither statute, however, addresses the implications of recognized refugee status for an extradition request. This is the central issue raised in this appeal.

7. Canada has ratified the key international instruments for the protection of refugees – the 1951 *Convention relating to the Status of Refugees* ("*Refugee Convention*") and the 1967 *Protocol relating to the Status of Refugees* ("the *Protocol*"). These instruments thus "reflect not only international consensus, but also principles that Canada has committed itself to uphold."[12] Canada ratified these instruments long after the conclusion of its extradition treaty with Hungary in 1873. It did so without reservation, presumably intending all the treaty obligations to work together.[13] In addition, as will be seen below, the fundamental international law principles concerning refugees have been incorporated into Canadian law. Even apart from this incorporation,

> a court must presume that legislation is intended to comply with Canada's obligations under international instruments and as a member of the international community. In choosing among possible interpretations of a statute, the court should avoid interpretations that would put Canada in breach of such obligations: see *Driedger on the Construction of Statutes* (3rd ed. 1994), at p.330.[14]

8. Canada's international obligations can assist courts charged with interpreting the *Charter*'s

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[11] See *IRPA*, s. 105 and *Extradition Act*, s.40(2). See also Jones and Baglay, *Refugee Law* (Irwin Law: 2007), at pp. 228-29 *[B.A. Tab 20]*

[12] *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 at para. 71 *[B.A. Tab 3]*

[13] Harrington, Joanna. "The Role for Human Rights Obligations in Canadian Extradition Law", *The Canadian Yearbook of International Law 200,* p.92 *[B.A. Tab 19]*

[14] *Orden Estate v. Grail*, [1998] 3 S.C.R. 437 at para. 137 *[B.A. Tab 7]*; *R. v. Hape*, 2007 SCC 26 at para. 53 *[B.A. Tab 9]*; *Baker v. Canada (Minister of Employment and Immigration)*, [1999] 2 S.C.R. 817 at para. 70 *[B.A. Tab 1]*

guarantees.[15] Thus, the inquiry into the principles of fundamental justice

> is informed not only by Canadian experience and jurisprudence, but also by international law, including *jus cogens*. This takes into account Canada's international obligations and values as expressed in "[t]he various sources of international human rights law – declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, [and] customary norms" [references omitted].[16]

This Court has, wherever possible, "sought to ensure consistency between its interpretation of the *Charter*, on the one hand, and Canada's international obligations and the relevant principles of international law, on the other."[17] This Court has also repeatedly expressed the view that the *Charter* generally should be presumed to provide protections at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.[18]

9. A refugee under Article 1(A)(2) of the *Refugee Convention* is person who has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear is unwilling to return to it.

The definition of "refugee" in s.96 of the *IRPA* incorporates the core meaning of "refugee" in the *Refugee Convention* read together with the 1967 *Protocol*. Section 97(1) of the *IRPA* also recognizes grounds from the 1984 *Convention Against Torture* and the 1966 *International Covenant on Civil and Political Rights* ("*ICCPR*") upon which protection may be granted.

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[15] *Health Services and Support v. British Columbia*, *supra*, at para. 69 *[B.A. Tab 3]*

[16] *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 at paras. 46 and 59-60 *[B.A. Tab 10]*

[17] *R. v. Hape*, *supra*, at para. 55 *[B.A. Tab 9]*

[18] See, for example, *R. v. Hape*, *supra*, at para. 55 *[B.A. Tab 9]*

10. Two principles of refugee law ought to inform this Court's approach to the central issue raised by this appeal. First, as this Court stated in *Canada (Attorney General) v. Ward*, it is appropriate to find inspiration in concepts of anti-discrimination in interpreting the grounds of persecution.[19] The Court quotes with approval James Hathaway's historical analysis of the evolution of the international refugee regime. According to Hathaway, a common feature of those who benefited from the early refugee accords was "the shared marginalization of the groups in their states of origin, with consequent inability to vindicate their basic human rights at home." Of particular relevance in the extradition context, the history of persecution and discrimination demonstrates that the protections afforded to accused persons frequently are denied to members of disenfranchised groups (like Roma).

11. Second, the principle of *non-refoulement* is a cornerstone of international and domestic Canadian law protecting Convention refugees and others who are in need of protection. Article 33(1) of the *Refugee Convention* provides:

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

No reservation in respect of this principle is permitted.[20] As Lauterpacht and Bethlehem observe, Article 33(1) "embodies the humanitarian essence of the Convention."[21] The Executive Committee of the UNHCR has affirmed repeatedly the fundamental character of the principle of *non-refoulement* and the need for scrupulous respect for it.[22] The principle of *non-refoulement*

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[19] [1993] 2 S.C.R. 689 at p. 734

[20] *Refugee Convention*, Art. 42(1); *Protocol*, Art. VII

[21] Lauterpacht, Sir Elihu and Daniel Bethlehem. "The Scope and Content of the Principle of *Non-Refoulement*: Opinion" in Erika Feller et al., eds. *Refugee Protection in International Law: United Nations High Commissioner for Refugee's Global Consultations on International Protection* (Cambridge University Press: 2003) at para. 51 *[B.A. Tab 21]*. The *Convention Against Torture* (Art. 3) and the *ICCPR* (Art. 7) also prohibit *refoulement*.

[22] United Nations High Commissioner for Refugees, *A Thematic Compilation of Executive Committee Conclusions* (4th ed., August 2009), pp. 323-27 *[B.A. Tab 23]*

has been incorporated into domestic Canadian law in s.115(1) of the *IRPA*, which provides:

> A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment.

The principle of *non-refoulement* in Article 33(1) of the *Refugee Convention* and s.115(1) of the *IRPA* are both subject to narrow exceptions.[23] In theory, when these very limited exceptions are engaged, surrender could be ordered without violating the principle of *non-refoulement*.

12. There can be no question that the principle of *non-refoulement* is engaged in extradition proceedings.[24] While removal under the *IRPA* and surrender under the *Extradition Act* are legally distinct State actions, they can engage equally Canada's obligations under the principle of *non-refoulement*.[25] Indeed, it is submitted that respect for the principle of *non-refoulement* in extradition is required for compliance with s.7 of the *Charter*, either because the principle is itself a principle of fundamental justice or because s.7 must provide at least the same protection as the principle.[26] Contrary to the view of some Courts of Appeal, the core concepts of refugee protection law are directly relevant to the surrender decision.[27] These principles place

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[23] See Art. 33(2) of the *Refugee Convention* and s.115(2) of the *IRPA.* See also Lauterpacht and Bethlehem, paras. 151-59 *[B.A. Tab 21]*

[24] Lauterpacht and Bethlehem, paras. 71-75 *[B.A. Tab 21]*; UNHCR, *Guidance Note on Extradition and International Refugee Protection* (April 2008), para. 10 *[B.A. Tab 27]*

[25] *Suresh v. Canada (Minister of Citizenship and Immigration)*, *supra*, at paras. 52-55 *[B.A. Tab 10]*

[26] It is not necessary for the purpose of this appeal to decide whether the principle of *non-refoulement* respecting Convention refugees is itself a principle of fundamental justice or simply informs the interpretation of other principles of fundamental justice (although a strong argument can be made that it satisfies the defining criteria for a principle of fundamental justice).

[27] Judgment of the Quebec Court of Appeal below, paras. 16, 20-21 ; *Gavrila c. Canada (Ministre de las Justice)*, 2009 QCCA 1288 at paras. 23-24; *Hungary v. Horvath*, 2007 ONCA 734 at para. 25*[B.A. Tab 4]*

fundamental limits on the right and duty of states to order surrender under extradition agreements. In cases of conflict, it is submitted that bars to surrender under international refugee protection and human rights law must prevail over any obligation to extradite.[28] Like the potential imposition of the death penalty, exposure to a risk of persecution "opens up a different dimension" in the application of extradition policy and makes it incumbent upon the courts to ensure that *Charter* rights and values (including equality and protection from discrimination for members of vulnerable groups) are respected.[29]

13. Sections 44 through 47 of the *Extradition Act* set out grounds upon which the Minister of Justice either must or may refuse surrender. While some of these grounds can be superseded by the terms of specific extradition agreements, no derogation from s.44(1) is permitted.[30] Section s.44(1)(a) of the *Extradition Act*, requires the Minister of Justice to refuse to order surrender if the Minister is satisfied that "the surrender would be unjust or oppressive having regard to all the relevant circumstances." It is submitted that this provision is concerned with at least some of the same considerations as s.7 of the *Charter* but is potentially of greater ambit in a given case.[31] Similarly, s.44(1)(b) requires the Minister of Justice to refuse to order surrender if the Minister is satisfied that

> the request for extradition is made for the purpose of prosecuting or punishing the person by reason of their race, religion, nationality, ethnic origin, language, colour, political

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[28] UNHCR, *Guidance Note on Extradition and International Refugee Protection* (April 2008), paras. 21-23 *[B.A. Tab 27]*

[29] *United States of America v. Burns*, *supra*, at para. 38 *[B.A. Tab 12]*; *Lake v. Canada (Minister of Justice)*, *supra*, at para. 33 *[B.A. Tab 6]*; The test that the Minister usually applies under s.7 of the *Charter* is whether ordering surrender would "shock the conscience," (*R. v. Schmidt*, *supra*, at 522 *[B.A. Tab 2]*.) or whether the fugitive faces "a situation that is simply unacceptable" *United States of America v. Allard*, [1987] 1 S.C.R. 564 at 572. In *Burns*, this Honourable Court emphasized that the words "shock the conscience" should not "be allowed to obscure the ultimate assessment that is required: namely, whether or not the extradition is in accordance with the principles of fundamental justice" (*supra*, at para. 68 *[B.A. Tab]*; *Lake v. Canada*, *supra*, at paras. 31-32 *[B.A. Tab]*).

[30] *Extradition Act*, s-s. 45(1) and (2)

[31] *Lake v. Canada (Minister of Justice)*, *supra*, at para. 24 *[B.A. Tab 6]*; *R. v. Bonamie*, 2001 ABCA 267 at paras. 46-47 *[B.A. Tab 8]*

> opinion, sex, sexual orientation, age, mental or physical disability or status or that the person's position may be prejudiced for any of those reasons.

On its face, this ground for refusing surrender is both broader (in terms of grounds and who may benefit from it) and narrower (in terms of risk in the requesting State) than the protections afforded to Convention refugees under international and domestic Canadian law.[32] While neither provision necessarily incorporates exactly the international legal protections for Convention refugees, both should be interpreted and applied in light of those protections.

14. In the case at bar, the Minister of Justice does not rely on an exception to the principle of *non-refoulement*. Nor does he rely on the exclusion clauses under Art. 1(F) of the *Refugee Convention*. Rather, the Minister found that the Appellants are no longer at risk of persecution in their country of nationality. It is submitted that in ordering surrender on this basis the Minister of Justice has arrogated to himself a determination that must be made by the Refugee Protection Division and has eroded the fundamental protections of the principle of *non-refoulement*.

15. Article 1(C)(5) of the *Refugee Convention* provides that the Convention shall cease to apply to any person who otherwise meets the definition of "refugee" if he or she

> can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality.

When this provision is satisfied, removal to one's country of nationality would not offend the principle of *non-refoulement* because one has been found no longer to require protection. Fundamental changes in the country which remove the basis of the fear of persecution must be established.[33] The idea of cessation is incorporated into the *IRPA*, where refugee protection may

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[32] Section 44(1)(b) parallels Article 3(b) of the U.N. *Model Treaty on Extradition [B.A. Tab 31]*. While provisions to the same effect are found in modern extradition treaties, there is no corresponding provision in the 1873 treaty which applies in the case at bar.

[33] UNHCR, *Handbook*, para. 135 *[B.A. Tab 22]*; UNHCR, *Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees*, paras. 8-14 *[B.A. Tab 26]*

cease on application by the Minister of Citizenship and Immigration to the Refugee Protection Division under s.108(2) of the *IRPA*. Section 108(2)(e) in particular states that a person is no longer a refugee if the reasons for which the person sought refugee protection have ceased to exist. It is submitted that absent a finding by the Refugee Protection Division that the need for refugee protection has ceased, no Convention refugee should be extradited to a country with respect to which he or she has a well-founded fear of persecution.

16. Requiring a finding of cessation to be made under s.108(2) of the *IRPA* even in the extradition context ensures that the determination is made by the tribunal Parliament chose to do so. The presumption in *IRPA* is that a claim for refugee status will be determined by an expert independent tribunal. This is consistent with the principle in anti-discrimination law that majoritarian political processes are inappropriate for the determination of discrimination claims made by members of minority groups. Deviations from this principle must be done explicitly and construed narrowly. Nothing in the *Extradition Act* confers on the Minister of Justice the authority to determine cessation of refugee status, although this could easily have been done.

17. Allowing the Minister of Justice to determine whether cessation has occurred (even after consultation with the Minister of Citizenship and Immigration) means that the burden on the State under s. 108(2) of the *IRPA* to prove cessation on a balance of probabilities before an independent decision maker is circumvented. This is because the Minister acts both as prosecutor (in respect of whether cessation has occurred) and decision-maker (in respect of whether to surrender). International law sources instruct that the burden must rest on the State to prove cessation to justify removing a protection to which the person sought has already been found to be entitled.[34]

[34] UNHCR, *Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses)* (10 February 2003), para. 25 *[B.A. Tab 22]*; Fitzpatrick, Joan and Rafael Bonoan. "Cessation of Refugee Protection", in Erika Feller et al., *op. cit.*, p.515 *[B.A. Tab 18]*. Similarly, the burden rests on the State to show that an exclusion clause is engaged: UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* (4 September 2003), para. 105 *[B.A. Tab 25]*; UNHCR, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* (4 September 2003), para. 34 *[B.A. Tab 26]*.

Moreover, under both s.7 of the *Charter* and s. 44(1) of the *Extradition Act*, the Minister has placed a burden on the person sought to demonstrate, first, that the persecution to which the person could be subject would sufficiently shock the conscience or would be fundamentally unacceptable to our society and, second, demonstrate on a balance of probabilities that he will in fact be subjected to that persecution if surrendered.[35] It is submitted that, when applied to Convention refugees or other protected persons, this twin burden undermines the protections Canada is required to extend to refugees. In light of the principles set out above, this interpretation of s.7 of the *Charter* and s. 44(1) of the *Extradition Act* should be rejected (at least as applied to Convention refugees or other protected persons). The burden should rest instead on the Minister to demonstrate that surrender of a Convention refugee or protected person complies with the *Charter*. Finally, although the strict requirements of the principles of issue estoppel and collateral attack may not be met here, allowing the Minister of Justice to revisit the need for refugee protection raises concerns about abuse of process by re-litigation which are avoided in proceedings under s.108(2) of the *IRPA*.[36]

PART IV - COSTS

18. The CCR does not seek costs, and respectfully requests that no order as to costs be made against it.

PART V - ORDER REQUESTED

19. The CCR respectfully requests permission to present oral argument at the hearing of the appeal. The CCR takes no position on the disposition of this appeal, but respectfully requests that the legal issues raised in the appeal be decided in accordance with the foregoing submissions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Ottawa, Ontario, this day of December, 2009.

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[35] *United States of Mexico v. Hurley* (1997), 116 C.C.C. (3d) 414 (Ont. C.A.) at paras. 50 and 58 *[B.A. Tab 17]*; *United States of America v. Pannell* (2007), 227 C.C.C. (3d) 336 (Ont. C.A.) at paras. 30-32 *[B.A. Tab 16]*; *Hungary v. Horvath, supra*, at para. 28 *[B.A. Tab 4]*.

[36] *Toronto (City) v. C.U.P.E., Local 79* [2003] 3 S.C.R. 77 at paras. 35-58 *[B.A. Tab]*

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PART VI - TABLE OF AUTHORITIES

Para. No(s).

B) Authors Cited

C) Treaties and Other International Instruments Cited