Court File No. 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 -

MINISTER OF CITIZENSHIP AND IMMIGRATION and
THE SOLICITOR GENERAL OF CANADA

Respondents

Court File No. 30929

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

B E T W E E N:

HASSAN ALMREI

Appellant

- and -

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

Respondents

Court File No. 31178

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

B E T W E E N:

MOHAMED HARKAT

Appellant

- and -

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

Respondents

- and -

CRIMINAL LAWYERS' ASSOCIATION (ONTARIO);
UNIVERSITY OF TORONTO, FACULTY OF LAW – INTERNATIONAL HUMAN RIGHTS CLINIC, HUMAN RIGHTS WATCH; CANADIAN COUNCIL OF AMERICAN-ISLAMIC RELATIONS AND CANADIAN MUSLIM CIVIL LIBERTIES ASSOCIATION; CANADIAN ARAB FEDERATION;
CANADIAN CIVIL LIBERTIES ASSOCIATION;
CANADIAN COUNCIL FOR REFUGEES, AFRICAN CANADIAN LEGAL CLINIC, INTERNATIONAL CIVIL LIBERTIES MONITORING GROUP AND NATIONAL ANTI-RACISM COUNCIL OF CANADA; AMNESTY INTERNATIONAL CANADA; CANADIAN BAR ASSOCIATION; FEDERATION OF LAW SOCIETIES OF CANADA; BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION and ATTORNEY GENERAL OF ONTARIO

Interveners

FACTUM OF THE INTERVENERS,
THE UNIVERSITY OF TORONTO, FACULTY OF LAW –
INTERNATIONAL HUMAN RIGHTS CLINIC and
HUMAN RIGHTS WATCH

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PART I - FACTS

A Overview

1. The University of Toronto, Faculty of Law – International Human Rights Clinic (the "IHRC" or the "Clinic") and Human Rights Watch ("HRW") intervene jointly in these appeals, to provide the Court with the Clinic's academic expertise in international human rights law and comparative constitutional law and with HRW's perspective as an expert organization dedicated to the protection of human rights.

B The Position of the IHRC and HRW on these Appeals

2. The IHRC and HRW submit that:

The security certificates regime ("Regime"), set out in ss. 33 and 77 to 85 of the *Immigration and Refugee Protection Act* ("*IRPA"*),[1] is a *de facto* criminal law regime for two reasons: first, the very nature of the conduct it regulates is criminal; and second, its severe penalties are normally reserved for criminal matters. Accordingly, the Regime must comply with the fair trial guarantees of s. 7 of the *Charter*,[2] (including those found in s. 11) which it does not. In addition, the government has failed to meet its burden of justification under s. 1 of the *Charter.*

PART II – POINTS IN ISSUE

3. The IHRC and HRW submit that:

Sections 33 and 77 to 85 of *IRPA*, in whole or in part or through their combined effect, infringe s. 7 of the *Charter*; and

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

PART III - ARGUMENT

A The Regime is a *de facto* criminal law to which s. 7 applies, and the Regime violates s. 7

4. This Court has held that ss. 8 to 14 of the *Charter* address specific types of deprivations of s. 7.[3]

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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*].
[3] *Re BC Motor Vehicle Act,* [1985] 2 S.C.R 486 at para. 28.

Insight into the protections granted by s. 7 can be found in this Court's interpretations of those other rights; a violation of s.11 therefore also constitutes a violation of s.7. Section 11 of the *Charter* provides certain procedural protections to "any person charged with an offence," including the protection against self-incrimination, the presumption of innocence, and the availability of bail. The section clearly applies to criminal proceedings. In accordance with a purposive approach to *Charter* interpretation, this Court has held that s. 11 rights are accorded "to those who face the prosecutorial power of the State and who may well suffer a deprivation of liberty as a result of the exercise of that power," and that, within that sphere of application, the content of the rights "ought to be made crystal clear to the authorities who prosecute offences falling within the section."[4]

5. In *R. v. Wigglesworth,* this Court articulated a two-part test to determine the application of s. 11. Justice Wilson wrote:

> a matter could fall within s. 11 either because by its very nature it is a criminal proceeding or because a conviction in respect of the offence may lead to a true penal consequence.[5]

6. Under the first branch of the test, this Court has since held that a matter is penal in nature when it "is of a public nature, intended to promote public order and welfare within a public sphere of activity." Penal proceedings stand in contrast to administrative proceedings, which are "private, internal, or disciplinary."[6] According to the second branch, a matter falls within s. 11 if it attracts a true penal consequence. This Court noted that if someone "is to be subject to a penal consequence such as imprisonment – the <u>most severe deprivation of liberty known to our law</u> – then he or she … should be entitled to the highest procedural protection known to our law."[7] *Wigglesworth* noted that satisfying either branch of the test was sufficient.

7. The *Wigglesworth* test is clear but has been applied domestically in a limited range of cases. There is, however, a rich body of international jurisprudence that suggests that the reasoning of *Wigglesworth* ought to be extended to stand for the proposition that the *Charter* should be accorded a structural interpretation to preclude the state from evading ss. 7 to 14 through the creation of *de facto* criminal laws.

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[4] *R. v. Wigglesworth*, [1987] 2 S.C.R. 541 at para. 20 [*Wigglesworth*].
[5] *Wigglesworth*, *supra* note 4 at para. 21.
[6] *Martineau v. M.N.R.,* [2004] 3 S.C.R. 737 at para. 21.
[7] *Wigglesworth*, *supra* note 4 at para. 24 [emphasis added].

1 *European Jurisprudence*

8. This Court has consistently and repeatedly accepted the jurisprudence arising from the *Convention for the Protection of Human Rights and Fundamental Freedoms*[8] as an aid to *Charter* interpretation. The Court has cited the *European Convention* or decisions of the European Court of Human Rights ("ECHR") in over 45 cases.[9]

9. The jurisprudence interpreting the *European Convention* can assist the Court to interpret the *Charter* both because the *Convention* served as a model for the drafting of the *Charter*, and because there are close textual parallels between the two. For the purposes of this appeal:

Article 6(1) guarantees individuals "in the determination … of any criminal charge" the right "to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law," closely paralleling ss. 7, 11(b) and (d);

Article 6(2) guarantees the presumption of innocence "for everyone charged with a criminal offence," the analogue of which is found in s. 11(d); and

Article 6(3), *inter alia*, guarantees everyone the right "to defend himself in person or through legal assistance of his own choosing" and to "examine and have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him," all protected by s. 7.[10]

10. The threshold question under Article 6 is what constitutes a "criminal charge." In *Engel and Others v. the Netherlands*, the ECHR held that whether or not a law was criminal in nature for the purposes of the *European Convention* did not depend solely on the classification adopted by a member state. The ECHR held that the *European Convention* prevents states from establishing parallel, *de facto* criminal law regimes beyond the reach of Article 6. As the Court noted:

> [i]f the Contracting states were able at their discretion to classify an offence … the operation of the fundamental clauses of Article 6 … would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the purpose and object of the Convention.[11]

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[8] *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221 [*European Convention*].
[9] See Appendix "A."
[10] *European Convention*, *supra* note 8, Article 6(1); *Charter*, *supra* note 2, ss. 7, 11.
[11] *Engel and Others v. the Netherlands* (1976), 22 Eur.Ct.H.R. (Ser.A), 27 E.H.R.R. 647 at para. 81 [*Engel*].

11. The ECHR then articulated a three-part test to determine whether a statute imposed a "criminal charge": the determination depends on (i) the legal classification of the offence in question under national law, (ii) the very nature of the offence, and (iii) the nature and degree of severity of the penalty.[12] In subsequent cases, the Court clarified that these criteria were alternative, not cumulative, and that a cumulative approach can be applied when the analysis of the criteria separately does not yield a clear conclusion as to the existence of a criminal charge.[13]

12. To determine if the offence is criminal by its "very nature," the ECHR first looks to whether identical conduct is also prohibited under the general criminal law. The Court does so to prevent states from manipulating legal forms in order to avoid procedural protections arising under the Article 6. In such situations, without the discipline of Article 6, "there exists a possibility of opting between" proceedings which accord greater and lesser protection to the rights of persons subject to them.[14]

13. Second, the purpose of the penalty may not only be punitive but also preventative. Thus, in a case involving a threat made by a prisoner to a probation officer, which posed little genuine risk, the Court held that the disciplinary proceedings were nonetheless governed by Article 6.[15] Likewise, the Court has held that the confiscation of property to prevent its use in future drug-trafficking constituted a criminal penalty, since prevention is consistent with a punitive purpose and is a constituent element of the very notion of punishment.[16]

14. In the case of *Ezeh and Connors*, the ECHR held that because the penalty constituted a deprivation of physical liberty, "there is a presumption that the charges against them were criminal within the meaning of Article 6, a presumption which could be rebutted entirely exceptionally, and only if those deprivations of liberty could not be considered 'appreciably detrimental' given their nature, duration or manner of execution."[17]

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[12] *Engel*, *ibid.*
[13] *Lutz v.Germany* (1987), 123 Eur.Ct.H.R. (Ser.A), 10 E.H.R.R. 182; *Bendenoun v. France* (1994), 284 Eur.Ct.H.R. (Ser.A), 18 E.H.R.R. 54.
[14] *Engel*, *supra* note 11 at paras. 80, 82; *Campbell and Fell v. United Kingdom* (1984), 80 Eur.Ct.H.R. (Ser.A), 7 E.H.R.R. 165 at para. 71.
[15] *Ezeh and Connors v. United Kingdom* [G.C.] (2003), ECHR 2003-X, 39 E.H.R.R. 1 at para. 105 [*Ezeh and Connors*].
[16] *Welch v. the United Kingdom* (1995), 307-A Eur.Ct.H.R. (Ser. A), 20 E.H.R.R. 247 at para. 30.
[17] *Ezeh and Connors*, *supra* note 15 at para. 126.

2 The Canadian security certificate regime is a de facto criminal law regime under the Engel *and* Wigglesworth *framework*

15. *Wigglesworth* and *Engel* provide substantially similar tests for determining whether a law is *de facto* criminal. The Regime is not part of the *Criminal Code* and thus does not meet the first branch of the test. However, the ECHR jurisprudence suggests that the Regime is by its very nature criminal, and the punishment set out is so severe as to render those caught by the law deserving of criminal procedural protections. The Regime is a *de facto* criminal law system.

(a) The Regime is criminal law by its very nature

16. Courts and public officials have taken the view that a cluster of United Kingdom (U.K.) laws similar in scope and employing procedures similar to *IRPA* constitute a *de facto* criminal law regime that violates Article 6. As discussed at paras. 57 to 63 below, the House of Lords found the British security certificate regime created by the *Anti-terrorism, Crime and Security Act 2001* to be incompatible with the *European Convention*.[18] In response, the U.K. Parliament repealed the security certificate system and replaced it with a "control orders" regime in the *Prevention of Terrorism Act 2005* ("*POTA*").[19]

17. A control order, defined as "an order against an individual that imposes obligations on him for purposes connected with protecting members of the public from a risk of terrorism," may be granted if the government "has reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity." "Terrorism related activity" is defined to include "the commission, preparation, instigation, facilitation, encouragement, support or assistance of "acts of terrorism."[20] The obligations which may be imposed include "house arrest, curfews, tagging, restrictions on movement, and other restrictive measures, including limits on telephone and internet use."[21]

18. Public officials and courts in Europe and the U.K. are of the view that a control order issued against a suspected terrorist constitutes a "criminal charge" for the purposes of Article 6 of the

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[18] *A v. Secretary of State for the Home Department*, [2004] UKHL 56 [*Re A*].
[19] *Anti-terrorism, Crime and Security Act 2001* (U.K.), 2001, c. 24 [*ATCSA*]*; Prevention of Terrorism Act 2005*, (U.K.), 2005, c. 2 [*POTA*].
[20] *POTA*, *ibid.*, ss. 1(1), 1(4) -1(9), 2.
[21] Peter W. Hogg & Leena Grover, "Detention of the Suspected Terrorist in Canada, the United Kingdom and the United States" (Paper presented at the Raoul Wallenberg International Human Rights Symposium, New York University School of Law, 19-20 January 2006) at 13, 30 [unpublished].

European Convention. The European Commissioner for Human Rights concluded that Article 6 applied to the control orders regime because it "is meant to deal precisely with terror suspects who, for one reason or another, cannot be subject to a criminal prosecution."[22]

19. Likewise, the Joint Committee on Human Rights of the U.K. House of Lords and House of Commons concluded that conduct triggering a control order "is not only of a criminal nature, but of a particularly serious criminal nature," such that "[t]he very act of making a control order therefore involves allegations of very serious criminal conduct on the part of the controlled person."[23]

20. The control orders regime was recently challenged before the British courts in *Re MB*. This case was brought under the *Human Rights Act 1998*,[24] which incorporates the *European Convention* into British law. Mr. Justice Sullivan clearly suggested that, in his view, the issuance of a control order for "terrorism-related activity" was tantamount to laying a "criminal charge" under Article 6, given the near equivalence of the grounds for issuing a control order and the definition of terrorism found in the *Terrorism Act 2000* and the *Terrorism Act 2006*:[25]

> When considering the second criterion in *Engel* much will depend upon the precise "terrorism-related activity" in which the controlee is suspected of having been involved. In many cases such activity may amount to a criminal offence: see the actions falling within subsection 1(2) of the 2000 Act (above) [*i.e.* the *Terrorism Act 2000*] and the new offences contained in the *Terrorism Act 2006* … in applying the second criterion in *Engel*, a distinction can and should be drawn between an allegation that an individual has been engaged in "anti-social behaviour" and an allegation that he has been involved in "terrorism-related activity." As a matter of first impression, the latter allegation would appear to be far more serious and more closely akin to an allegation of criminal behaviour …[26]

21. Similarly, the Regime covers conduct which is also criminalized under the *Criminal Code*. The Regime is triggered by a finding of inadmissibility under s. 34 of *IRPA*. Section 34 provides that an individual is inadmissible on security grounds for, *inter alia*, "engaging or instigating the

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[22] Council of Europe, Commissioner for Human Rights, *Report by Mr. Alvaro-Gil Robles, Commissioner for Human Rights, On His Visit to the United Kingdom 4th – 12th November 2004*, CommDH (2005) 6 (8 June 2005) at para. 19 ["Robles Report"].

[23] Joint Committee on Human Rights (U.K.), Counter-Terrorism Policy and Human Rights: Draft *Prevention of Terrorism Act 2005* (Continuance in force of sections 1 to 9) Order 2006 HL Paper 122, HC 915 at para. 51 ["Joint Committee Report"].

[24] *Human Rights Act 1998* (U.K.), 1998, c. 42.

[25] *Terrorism Act 2000* (U.K.), 2000, c. 11; *Terrorism Act 2006* (U.K.), 2006, c. 11.

[26] *Re MB* (12 April 2006), [2006] EWHC 1000 (H.C.J., Q.B. Admin.) at para. 39.

subversion by force of any government," "engaging in terrorism," "being a danger to the security of Canada," "engaging in acts of violence that would or might endanger" persons in Canada, or being a member of a group whose purpose is any of those activities.[27]

22. Paragraph 34(1)(c), which refers to "terrorism," must be read in conjunction with this Court's ruling in *Suresh*, which defined terrorism under the *Immigration Act*[28] (which *IRPA* replaces) as:

> any act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.[29]

23. Any conduct that would result in a finding of inadmissibility on security grounds could also result in criminal liability under Part II.1 of the *Criminal Code*, enacted under the *Anti-Terrorism Act,* as a legislative response to the terrorist attacks of September 11, 2001.[30]

24. Section 83.01 of the *Criminal Code* defines "terrorist activity" to include any act or omission committed "for a political, religious or ideological purpose," "with the intention of intimidating the public" or compelling a person or government "to do or refrain from doing any act," that intentionally "causes death or serious bodily harm," endangers life, or causes serious damage to property or essential public services. This definition also includes "a conspiracy, attempt or threat to commit any such act." Terrorist offences under the *Criminal Code* include s. 83.19, which provides that "everyone who knowingly facilitates a terrorist activity is guilty of an indictable offence." The concept is further broadened by s. 2 of the *Criminal Code*, which defines a "terrorism offence" to include "an indictable offence under this or any other Act of Parliament committed for the benefit of, at the direction of or in association with a terrorist group."[31]

25. A careful comparison of the grounds of inadmissibility set out in s. 34 of *IRPA* with the definition of terrorism under s. 83.01 of the *Criminal Code* indicates that the two are largely identical:

IRPA s. 34(1)(b)'s "engaging or instigating the subversion by force of any government," is

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[27] *IRPA*, *supra* note 1, s. 34.
[28] *Immigration Act*, R.S.C. 1985, c. I-2.
[29] *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 at para. 94 [*Suresh*].
[30] *Anti-Terrorism Act*, S.C. 2001, c. 41; *Criminal Code,* R.S.C. 1985, c. C-46 [*Criminal Code*].
[31] *Criminal Code*, *ibid.*, ss. 2, 83.01, 83.19.

equivalent to the *Criminal Code* s. 83.01's "compelling … a government … to do or refrain from doing any act";

IRPA s. 34(1)(c)'s "engaging in terrorism" (read subject to *Suresh*) is covered by the *Criminal Code* s. 83.01's definition of terrorism as an act committed "for a political, religious or ideological purpose … with the intention of intimidating the public… that intentionally causes death or serious bodily harm";

IRPA s. 34(1)(d)'s "being a danger to the security of Canada" is covered in general terms by the entire definition of terrorism in s. 83.01 of the *Criminal Code*, and in particular by the phrase "act … that intentionally … causes a serious risk to the health or safety of the public or any segment of the public"; and

IRPA s. 34(1)(e)'s "engaging in acts of violence that would or might endanger" persons in Canada is equivalent to the phrase an "act … that intentionally … endangers a person's life" in s. 83.01 of the *Criminal Code*.[32]

26. Paragraph 34(1)(f) of *IRPA* makes being a member of an organization dedicated to carrying out acts described in paras. 34(1)(a), (b), or (c) grounds for inadmissibility. This Court's decision in *Suresh* read the definition of membership down to exclude "those who innocently contribute to or become members of terrorist organizations" from the finding of inadmissibility.[33] Therefore, s. 34(1)(f) only proscribes knowing membership in an organization dedicated to terrorist activities. Likewise, s. 83.18 of the *Criminal Code* criminalizes such activity, by providing that "every one who knowingly participates in … any activity of a terrorist group … is guilty of an indictable offence."[34]

27. A complication is raised by s. 33 of *IRPA*, which provides for inadmissibility on the basis of acts which "have occurred, are occurring or may occur" in the future.[35] By contrast, the terrorist offences created by ss. 83.18 and 83.19 of the *Criminal Code* criminalize acts which have occurred or are occurring. But the *Anti-Terrorism Act* was also designed to prevent future acts of terror. As then Justice Minister Anne McLellan stated in testimony before the House of

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[32] *IRPA*, *supra* note 1 s. 34; *Criminal Code*, *ibid.*, s. 83.01.
[33] *Suresh, supra* note 29 at paras. 109-110.
[34] *IRPA*, *supra* note 1, s.34; *Criminal Code*, *supra* note 30, s. 83.18.
[35] *IRPA*, *supra* note 1, ss. 33, 34.

Commons Justice Committee:

> Perhaps the greatest gap in our current laws is created by the necessity of preventing terrorist acts. Our laws must reflect fully our intention to prevent terrorist activity and, currently, they do not. … The *Criminal Code* offences in C-36 will allow us to convict those who facilitate, participate in and direct terrorism and these must include preventative measures which are applicable whether or not the ultimate terrorist attacks are carried out.[36]

28. This sentiment was echoed by this Court in *Re Application under s. 83.28 of the Criminal Code*, where Justice Iacobucci noted that:

> The Preamble to the Act speaks to the "challenge of eradicating terrorism," the requirement for the "strengthening of Canada's capacity to suppress, investigate and incapacitate terrorist activity," and the need for legislation to "prevent and suppress the financing, preparation, facilitation and commission of acts of terrorism."[37]

29. The *Criminal Code* also creates offences which are designed to prevent terrorist acts before they occur. Subsection 83.19(2) criminalizes the act of facilitating a terrorist activity, "whether or not … any terrorist activity was actually carried out." Similar wording in s. 83.18(2) creates future-oriented liability for participation in a group.[38] As Professor Roach notes, the prospective character of terrorist offences is furthered by the inclusion of inchoate acts in the definition of terrorism, such that a terrorist activity includes "a conspiracy, attempt or threat to commit any" of the acts described in s. 83.01.[39] Moreover, this Court has held that the offence of counseling to commit an indictable offence, under s. 464 of the *Code*, includes the counseling of a crime that is never committed, thus widening the web of liability even further.[40]

(b) IRPA *creates the real possibility of indefinite detention without criminal charge or trial*

30. The Regime deprives those to whom it applies of their physical liberty, placing them in detention upon the issuance of a certificate.[41] Short-term detention for the purposes of removal is constitutional, but such constitutionality disappears when short-term detention devolves into indefinite detention without criminal charge or trial. The Regime creates the possibility of such

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[36] Canada, House of Commons, Standing Committee on Justice and Human Rights, Report of 49th Meeting (20 November 2001) at 1220 (Hon. Anne McLellan).
[37] *Application under s. 83.28 of the Criminal Code (Re)*, [2004] 2 S.C.R. 48 at para. 38 [emphasis added].
[38] *IRPA*, *supra* note 1, s. 34; *Criminal Code*, *supra* note 30, ss. 83.01, 83.18, 83.19.
[39] "The New Terrorism Offences and the Criminal Law" in R. Daniels, P. Macklem and K. Roach, eds., *The Freedom of Security: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) 151.
[40] *R. v. Hamilton*, [2005] 2 S.C.R. 432 at para. 26.
[41] *IRPA*, *supra* note 1, s. 82.

indefinite detention, "the most severe deprivation of liberty known to our law."[42] And it is this indefinite detention which renders the Regime *de facto* criminal according to the second branches of the *Wigglesworth* and *Engel* tests. Two alternative submissions explain the possibility of indefinite detention.

(i) *IRPA* must be administered in accordance with *Suresh*, which creates the possibility of indefinite detention for many individuals subject to security certificates

31. On its face, the Regime does not provide for indefinite detention. Rather, it envisages that detention is incidental to a process which culminates either in removal in the event that a certificate is found to be reasonable, or in release under a number of different situations.[43]

32. However, the possibility of indefinite detention arises because of the impact of *Suresh*, which confirmed that immigration removal decisions must comply with the *Charter*. *Suresh* arose in connection with s. 53(1)(b) of the *Immigration Act*, which on its face permitted removal to risk of torture if the Minister was of the opinion that a person inadmissible on security grounds constituted a danger to Canada. Subject to the alternative argument below, it applies equally to the corresponding provisions in the successor legislation, s. 115(2)(b) of *IRPA*.[44]

33. Administering *IRPA* in compliance with *Suresh* creates the possibility of indefinite detention. Putting the *Charter* to one side, the discretion granted to the Minister under the former s. 53(1)(b) and the current s. 115(2)(b) is very broad, and would appear to provide considerable latitude to the Minister to weigh the competing concerns of national security and the right to not be subjected to torture. *Suresh* reads down this Ministerial discretion to generally prohibit removal to risk of torture in all but "extraordinary" or "exceptional" circumstances.[45]

34. This Court construed that exception in exceedingly narrow terms. To illustrate what would amount to "extraordinary" or "exceptional" circumstances, the Court referred to *Re B.C. Motor Vehicle Act*, which held that a violation of s. 7 could only be saved under s. 1 "in cases … such as natural disasters, the outbreak of war, epidemics and the like."[46]

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[42] *Wigglesworth, supra* note 4 at para. 24.
[43] *IRPA*, *supra* note 1, ss. 80(2), 81(b), 83(3), 84(1)-(2), 114(1)(b).
[44] *IRPA*, *supra* note 1, s. 115(2)(b).
[45] *Suresh, supra* note 29 at paras. 76, 78.
[46] *Re B.C. Motor Vehicle Act*, *supra* note 3 at 518; *Suresh*, *supra* note 29 at para. 78.

35. This exception is extraordinarily narrow, because *Suresh* also interpreted the phrase "a danger to the national security Canada" to mean "a serious threat to the security of Canada," that is "grounded on objectively reasonable suspicion based on evidence and in the sense that the threatened harm must be substantial." Under s. 115(2)(b), the Minister could deport a person to risk of torture only if a "serious threat" to national security existed. The *Charter* further circumscribes the Minister's discretion and prohibits deportation to risk of torture, even if a "serious threat" to national security is present, unless exceptional circumstances exist. The mere presence of a "serious threat" would not suffice to permit deportation to risk of torture.[47]

36. Additional support for this reading of *Suresh* comes from submissions made by Canada to United Nations ("U.N.") human rights bodies. In its submissions to the U.N. Committee Against Torture in May 2005, Canada noted that while *Suresh* permits deportation to risk of torture in breach of the absolute ban under international human rights law, "the result will generally be the same" because "given the abhorrent nature of torture, it will almost always be disproportionate to interests on the other side of the balance, <u>even security interests</u>."[48] In October 2005, Canadian officials represented that the exceptional circumstances under which deportation to risk of torture would be permitted "would be very narrow," such as "wars and national emergencies." [49] In *United States v. Burns*, this Court drew on "Canada's principled advocacy on the international level" as support for its interpretation of the *Charter*.[50] Canada's statements before the U.N. on the meaning of *Suresh* should count in an identical fashion.

37. Canada's reluctance to acknowledge "exceptional circumstances" permitting deportation to face torture is informed by the sustained criticism the exception created by *Suresh* has received as a departure from the absolute prohibition against torture in international law. Both the *International Covenant on Civil and Political Rights* and *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* [51] explicitly prohibit the deportation of

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[47] *Suresh*, *supra* note 29 at para. 90.
[48] Government of Canada, *Canada's Responses to the List of Issues: Presentation of the Fourth and Fifth Reports,* United Nations Committee Against Torture, May 2005 at 4 [emphasis added].
[49] Government of Canada, *Canada's Responses to the List of Issues: Presentation of the Fifth Report on the International Covenant on Civil and Political Rights,* United Nations Human Rights Committee, October 2005 at 60-61.
[50] *United States v. Burns*, [2001] 1 S.C.R. 283 at para. 128.
[51] *International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 *entered into force* Mar. 23, 1976 ["*ICCPR*"]; *Convention Against*

individuals to risk of torture. The U.N. Human Rights Committee has repeatedly criticized this Court's holding in *Suresh,* as has the Committee Against Torture.[52] *Suresh* was criticized by the New Zealand Supreme Court in *Attorney-General v. Zaoui*.[53] The decision has provoked strong criticism from the academic community,[54] as well as from U.N. Human Rights Commissioner Louise Arbour, who recently observed that:

> Any extradition, expulsion, deportation, or other transfer of foreigners suspected of terrorism to their country of origin or to other countries where they face a real risk of torture or ill treatment violates the principle of non-refoulement which prohibits absolutely that a person be surrendered to a country where he or she faces a real risk of torture.[55]

38. In conclusion, *Suresh* prohibits the deportation of individuals to risk of torture, even if they pose a serious threat to national security, unless exceptional circumstances such as war exist. However, it does not follow that under the Regime such individuals would necessarily be released. Rather, if their certificates have been found to be reasonable, for as long as they pose an ongoing "danger to national security," ss. 83(3) and 84(2) require judges to authorize their continued detention. Moreover, the Regime does not impose any limit on the length of such detention. As Professor Hogg has explained, such individuals would be detained indefinitely, without criminal charge or trial until they no longer posed a threat to national security.[56]

(ii) *IRPA* requires that it be construed and applied in compliance with international human rights law, which absolutely prohibits deportation to risk of torture; therefore the *Suresh* exception does not apply to *IRPA*

39. *Suresh* addressed the impact of the *Charter* on deportation to the risk of torture under the old *Immigration Act*. The Court permitted deportation to risk of torture in extraordinary

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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 [*"CAT"*].

[52] *Ahani v. Canada,* U.N. Human Rights Comm., 80th Sess. Para. 1.2, U.N. Doc. CCPR/C.80/D/1051/2002 (2004) at para. 10.10; *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding observations of the Human Rights Committee*, CCPR/C.CAN/CO/5 (20 April 2006) at para. 15; *Dadar v. Canada*, Comm. No. 258/2004: Canada 05/12/2005, CAT/C/35/D.258/2005, CAT, paras. 2.14, 8.9, 9; *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusions and recommendations of the Committee against Torture*, UNCAT, CAT/C/CR/34/CAN (7 July 2005) at paras. 4(a), 5(a).

[53] *Attorney-General v. Zaoui*, [2005] NZSC 38 at para. 16.

[54] Hogg & Grover, *supra* note 21 at 8; Kent Roach, "Constitutional, Remedial, and International Dialogues About Rights: The Canadian Experience" (2004) 40 Tex. Int'l L.J. 537; Audrey Macklin, "Mr. Suresh and the Evil Twin" (2002) 20 Refuge 15; David Mullan, "Deference from Baker to Suresh and Beyond – Interpreting the Conflicting Signals" in David Dyzenhaus, ed., *The Unity of Public Law* (Oxford: Hart Publishing, 2004) 45.

[55] Louise Arbour, UN High Commissioner for Human Rights, *Address at Chatham House and the British Institute of International and Comparative Law* (16 February 2006).

[56] *IRPA*, *supra* note 1, ss. 83(3), 84(2); Hogg & Grover, *supra* note 21 at 13, 30.

circumstances, despite an absolute ban under international human rights law, on the basis of the interpretive principle that "[t]he inquiry into the principles of fundamental justice is informed … by international law" and "takes into account Canada's international obligations," as opposed to requiring that the *Charter* be interpreted to comply with international law.[57] By merely "taking into account" Canada's treaty obligations, *Suresh* explicitly acknowledged that it created a gap between Canadian constitutional law and international human rights law.

40. However, *IRPA* has dramatically changed the domestic legal context within which international human rights law comes into play in deportation decisions. Crucially, *IRPA* contains a new provision, paragraph. 3(3)(f), which provides:

> This Act is to be construed and applied in a manner that complies with international human rights instruments to which Canada is signatory.[58]

41. This new provision drastically alters the legal status in Canadian law of Canada's international obligations under the *ICCPR* and the *CAT* to categorically prohibit deportation to risk of torture under any circumstances. Rather than Canada's international legal obligations being a factor which courts may "take into account," *IRPA* "is to be construed in a manner that complies" with these obligations. The radical transformation wrought by s. 3(3)(f) was acknowledged by the Federal Court of Appeal in *De Guzman v. Canada (Minister of Citizenship and Immigration),* where the court wrote:

> … the words "shall be construed and applied in a manner that complies with ... " are mandatory and appear to direct courts to give the international human rights instruments in question more than persuasive or contextual significance in the interpretation of *IRPA*. By providing that *IRPA* "is to be" interpreted and applied in a manner that complies with the prescribed instruments, paragraph 3(3)(f), if interpreted literally, makes them determinative of the meaning of *IRPA*, in the absence of a clear legislative intent to the contrary.[59]

42. Since s. 3(3)(f) has fundamentally changed the relationship between international human rights law and Canadian immigration law, *IRPA* must be applied in a manner that complies with the *ICCPR* and *CAT*. Thus the discretion under s. 115(2)(b) of *IRPA* must be applied in a fashion that complies with the absolute ban on deportation to risk of torture under international human rights law. Removal to risk of torture, even in the face of a serious threat to national security, or

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[57] *Suresh, supra* note 29 at para. 46.
[58] *IRPA*, *supra* note 1, para. 3(3)(f).
[59] *De Guzman v. Canada (Minister of Citizenship and Immigration),* 2005 FCA 436 at para. 75.

per the *Suresh* exception, would not be possible, thus creating the potential for indefinite detention without criminal charge or trial.

(c) The issue of indefinite detention should be addressed now, not later

43. In *Almrei*, the Federal Court of Appeal refused to address the issue of indefinite detention arising from the interaction of s. 7 and *IRPA*, because, *inter alia*, "we are not, at this time, factually and legally confronted with a situation of indefinite detention resulting from an impossible removal or a lack of due diligence in effecting removal."[60]

44. However, this Court has frequently exercised its discretion to adjudicate constitutional issues arising from factual situations which have not arisen on the record, but which are sufficiently probable that they warrant the Court's attention in advance of them actually arising. This Court has held that a constitutional challenge can be based on a "reasonable hypothetical" which does not arise on the facts before the Court, but which could arise through the application of the challenged legislation. This jurisprudence originated in the context of s. 12 challenges to criminal penalties in *R. v. Smith* and *R. v. Goltz*, and was recently applied in *R. v. Wiles*. This Court has also extended this approach to s. 7 in challenges to legislation on overbreadth (*R. v. Heywood*) and procedural fairness (*R. v. Mills*).[61] Finally, in both *R. v. Sharpe* and *Canadian Foundation for Children, Youth and the Law v. Canada,* this Court narrowed the scope of *Criminal Code* offences to render them inapplicable to factual situations which could not have arisen on the record before the Court.[62]

45. The test which emerges from the s. 12 cases is whether the hypothetical arises from "imaginable circumstances which could commonly arise in day-to-day life" as opposed to those which are "far-fetched or only marginally imaginable."[63] The prospect of indefinite detention arising from the interaction of s. 7 and *IRPA* is far from remote. Although none of the appellants is currently the subject of a removal order, all three are in the midst of protection proceedings. Moreover, Canada has already determined that at least Charkaoui faces the risk of torture should he be

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[60] *Almrei v. Canada*, 2005 FCA 54 at para. 128.
[61] *R. v. Smith*, [1987] 1 S.C.R. 1045; *R. v. Goltz*, [1991] 3 S.C.R. 485 at 515; *R. v. Wiles*, 2005 SCC 84 at para. 5; *R. v. Heywood*, [1994] 3 S.C.R. 761 at 799; *R. v. Mills*, [1999] 3 S.C.R. 668 at para. 4.
[62] *R. v. Sharpe*, [2001] 1 S.C.R. 45 at paras. 111-119; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76 at para. 40.
[63] *Goltz*, *supra* note 61 at 515.

deported to Morocco.[64] The question of whether removal to torture is possible is a live one.

46. There is an additional reason for addressing the problem of indefinite detention in these appeals. This Court has held that a major factor in determining the level of procedural protection required by s. 7 is the importance of the interests at stake.[65] Thus, in *Chiarelli*, this Court relied on the fact that non-citizens have no *Charter* right to enter and remain in Canada as a factor counting against full blown procedural rights in the context of deportation.[66] By contrast, indefinite detention is the severest restriction on physical liberty possible and warrants the highest level of procedural protection. The problem of adjudicating upon the procedural fairness of the reasonableness hearings in the Regime without acknowledging that the system will lead to indefinite detention is that this Court would be addressing the question of what procedures the *Charter* requires for deportation, not imprisonment. In other words, it would be asking itself the wrong question. To make matters worse, if this Court does not make the link to indefinite detention in these appeals, when that issue does eventually come before this Court, it will have already decided the issue of procedural fairness on the assumption that the issue was only deportation.

3 The Canadian security certificate regime is procedurally unfair and contravenes the Charter

47. As the Regime deals with conduct which by its very nature is criminal, and as the penalties which the Regime hands out – detention, including possible indefinite detention – are so severe, the Regime should be seen as *de facto* criminal. The procedural protections which the scheme provides to those whom it affects, however, are profoundly inadequate in light of this finding.

(a) The U.K. Equivalent to IRPA *is increasingly seen as procedurally unfair*

48. British parliamentarians and European officials have taken the legal position that the procedures in the *POTA* contravene Article 6(1) of the *European Convention*, which guarantees the right to a "fair" hearing, Article 6(2), which guarantees the presumption of innocence, and Article 6(3)(d), which guarantees the right "to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses

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[64] *Re Charkaoui,* 2005 FC 1670 at para. 14.
[65] *Winnipeg Child and Family Services v. K.L.W*., [2000] 2 S.C.R. 519 at paras. 93-98.
[66] *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711.

against him" (referred to in *Engel* as "equality of arms").[67]

49. In November 2004, the European Commissioner for Human Rights reviewed the scheme while it was before the House of Commons, before it was enacted. In his report, he stated that the proposed scheme was a flagrant violation of Articles 6(1), 6(2) and 6(3)(d):

> … the proceedings fall some way short of guaranteeing the equality of arms, in so far as they include in camera hearings, the use of secret evidence and special advocates unable subsequently to discuss proceedings with the suspect of the order. The proceedings, indeed, are inherently one-sided, with the judge obliged to consider the reasonableness of suspicions based, at least in part, on secret evidence, the veracity or relevance of which he has no possibility of confirming in the light of the suspect's response to them. Quite apart from the obvious flouting of the presumption of innocence, the review proceedings described can only be considered to be fair, independent, and impartial with some difficulty.[68]

50. On the issue of procedural fairness, the Joint Committee on Human Rights was equally clear:

> … we find it difficult to see how a procedure in which a person can be deprived of their liberty without having any opportunity to rebut the basis of the allegations against them, can be said to be compatible with the right to a fair trial in Article 6(1), the equality of arms inherent in that guarantee, … the presumption of innocence in Article 6(2), the right to examine witnesses in Article 6(3).[69]

51. Similar sentiments were expressed by the House of Lords with respect to the *ATCSA,* an act whose procedures were substantially similar to those under *IRPA,* in its judgment in *Re A:*

> An individual who is detained … will be a person accused of no crime but a person whom the Secretary of State has certified that he "reasonably … suspects … is a terrorist" …. The individual may then be detained in prison indefinitely. True it is that he can leave the United Kingdom if he elects to do so but the reality in many cases will be that the only country to which he is entitled to go will be a country where he is likely to undergo torture if he does go there. He can challenge … the reasonableness of the Secretary of State's suspicion that he is a terrorist but has no right to know the grounds on which the Secretary of State has formed that suspicion. … Indefinite imprisonment in consequence of a denunciation on grounds that are not disclosed and made by a person whose identity cannot be disclosed is the stuff of nightmares, associated whether accurately or inaccurately with France before and during the Revolution, with Soviet Russia in the Stalinist era and now associated, as a result of section 23 of the 2001 Act, with the United Kingdom.[70]

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[67] *Engel, supra* note 11 at para. 91.
[68] Robles Report, *supra* note 22 at para. 21.
[69] Joint Committee Report, *supra* note 23 at para. 76.
[70] *Re A, supra* note 18 at para. 155 (per Lord Scott).

(b) The British System and IRPA *share procedural flaws*

52. The procedural features set out in ss. 77 to 85 of *IRPA* are substantially similar to the procedures under *POTA*. In both jurisdictions, the decision on the applicability of the regime is made by a minister on the low standard of "reasonable grounds to believe" (*IRPA*) or "reasonable grounds for suspecting" (*POTA*).[71] In both jurisdictions, judicial oversight of this decision is extremely limited: the decision in *POTA* must be upheld unless it is "obviously flawed," the *IRPA* decision unless there are no "reasonable grounds" for believing the minister's assessment.[72]

53. There are three different procedural faults shared by the two regimes: extremely low standards for the admissibility of evidence, the possibility of *ex parte* hearings, and the possibility of decisions being made on the basis of undisclosed evidence or evidence disclosed only in summary form. Just as the provisions of *POTA* violate Article 6 of the *European Convention*, the substantially identical procedural provisions of the Regime violate the procedural rights accorded under s. 7 of the *Charter* to individuals involved in criminal proceedings.[73]

(c) The Regime lacks key procedural protections

54. A detailed review of the Regime in light of established principles of Canadian law regarding procedural protections due to individuals involved in criminal proceedings reveals that the Regime is in violation of those principles. In particular, the IHRC and HRW adopt the submissions contained in paras. 4 to 16 of the factum of the Criminal Lawyers' Association that reliance on secret evidence at a judicial hearing violates s. 7 of the *Charter*.

B The Government has not justified why Part II.1 of the *Criminal Code* was inadequate for dealing with the threats posed by permanent residents and foreign nationals.

55. As demonstrated above, the provisions of the *Criminal Code* enacted by the *Anti-Terrorism Act* criminalize substantially the same conduct as that which triggers the Regime. If proceedings are brought against individuals under those provisions, the procedural protections of the *Criminal Code* apply. The government must justify its decision not to rely on the *Criminal Code* to deal with the conduct impugned under the Regime, as well as the harmful results of that decision.

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[71] *IRPA*, *supra* note 1, ss. 33, 83(3); *POTA*, *supra* note 19, ss. 2(1)(a), 3(2)(a).
[72] *Attorney General of Canada v. Jolly*, [1975] F.C. 216 (C.A.) at 225-226.
[73] Compare *IRPA, supra* note 1, ss. 76, 78(b),(e),(g), (j) with the U.K. *Civil Procedure (Amendment No. 2) Rules 2005*, SI 2005/0656*,* ss. 76.22, 76.26(4), 76.28(1)(a),(2).

56. As described in paras. 21 to 29, above, conduct which leads to a finding of inadmissibility under s. 34 of *IRPA* also amounts to an offence under Part II.1 of the *Criminal Code*. Yet, as Professor Roach notes, it is *IRPA,* and not the *Criminal Code*, which has been the government's chosen tool for the detention of terror suspects: there has been only one charge under Part II.1, and no preventative arrests have taken place, yet five security certificates have been issued.[74] The government, in its Responding submissions in all three appeals, has provided no evidence as to why the danger posed by foreign nationals and permanent residents is so great as to require the government to imprison them under an immigration regime rather than prosecute them under the criminal law. The government's submission that *IRPA* is minimally impairing of the procedural rights which it infringes is based entirely on an analysis of *IRPA* itself, and makes no reference to the panoply of procedural guarantees of the *Criminal Code*.[75]

57. The House of Lords decision in *Re A* powerfully illustrates how the Court should apply the *Oakes* test in the national security context. In *Re A*, the House of Lords faced a situation nearly identical to that facing the Court in this appeal. The U.K. Parliament had enacted two pieces of anti-terrorism legislation: (a) the *ATCSA* which created a security certificate regime applicable only to non-nationals which was administered by the Special Immigration Appeals Commission, a central part of the institutional machinery of the British immigration system, and which provided for indefinite detention without charge or trial, and (b) the *Terrorism Act 2000*, a criminal law statute to address terrorist threats that applied equally to nationals and non-nationals, and did not provide for indefinite detention.[76]

58. In *Re A*, the House of Lords found that the security certificate regime in the U.K. contravened the *European Convention*, because it created the possibility of indefinite detention without charge or trial. However, under Article 15(1) of the *Convention*, states may derogate from Article 5(1) "in time of war or other public emergency threatening the life of the nation … to the extent strictly required by the exigencies of the situation." The United Kingdom had issued such a derogation order. The principal question before the Lords was whether the derogation was "strictly

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[74] Kent Roach, "The Criminal Law and Terrorism" in V. Ramraj, M. Hor & K. Roach, eds., *Global Anti-Terrorism Law and Policy* (Cambridge: Cambridge University Press, 2005) 129.
[75] Factum of the Respondents, *Almrei v. Canada* at paras. 109-14; Factum of the Respondents, *Charkaoui v. Canada* at paras. 113-14; Factum of the Respondents, *Harkat v. Canada* at paras. 99-100.
[76] *Re A*, *supra* note 18*; Terrorism Act 2000*, *supra* note 25*; ATCSA*, *supra* note 19.

required."[77]

59. Although *Re A* concerned a challenge to the legality of indefinite detention *per se*, as opposed to the process that lead to indefinite detention, it is nonetheless of direct relevance to this appeal because Article 15(1) mandates an inquiry into the proportionality of the means chosen to respond to a public emergency. The House of Lords explicitly linked its approach to proportionality to the *Oakes* test for s. 1.[78] It follows that *Re A* should inform the application of the *Oakes* test in these appeals.

60. The courts below have held that since the security certificate regime is part of immigration law, it is not subject to the same constitutional requirements as the criminal justice system. However, although immigration law and criminal law generally have different purposes, since they are both tools used by governments to combat terrorism, it is legitimate to compare the procedures employed by one regime with those employed by the other. In *Re A*, the House of Lords held that both statutory regimes were directed at threats to national security. The focus was on form, not substance. The fact that the criminal law regime used means which were less restrictive of liberty put into question the proportionality of the security certificate system under immigration law. This Court should make the same comparison between *IRPA* and the *Criminal Code*.[79]

61. The government can justify the differential treatment of nationals and non-nationals only if it tenders evidence which demonstrates that non-nationals pose a greater risk than nationals. Given that both nationals and non-nationals pose a terrorist threat, and given the use of less restrictive means to combat the former, the House of Lords held that the security certificate system could only be justified if the government adduced evidence that non-nationals posed a greater security risk than nationals. The government failed to discharge this burden. Likewise, it is for Canada to tender evidence that justifies why the *Criminal Code* is insufficient to meet the terrorist threat posed by non-citizens.[80]

62. Governments would not be acting proportionately by subjecting everyone to security certificates and indefinite detention. In *Re A*, the House of Lords addressed the concern that hinging its

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[77] *European Convention*, *supra* note 8, Arts. 5(1), 15(1); *Human Rights Act 1998* (Designated Derogation) Order 2001, SI 2001/3664.

[78] *Re A, supra* note 18 at paras. 30 (per Lord Bingham), 214 (per Lord Walker); *R. v. Oakes*, [1986] 1 S.C.R. 103.

[79] *Re A, supra* note 18 at para. 54 (per Lord Bingham).

[80] *Re A, supra* note 18 at paras. 127 (per Lord Hope), 168, 185 (per Lord Scott).

proportionality analysis on the distinction between nationals and non-nationals suggested that the security certificate regime would not have breached the *European Convention* had indefinite detention applied to everyone, irrespective of citizenship. But as the House of Lords noted, this concern confuses the role of legislative distinctions in assessing the proportionality of a regime with determining whether the regime is discriminatory. An equality-rights analysis would lead to the conclusion that governments are under a duty to treat nationals and non-nationals identically. But a proportionality analysis would call into question the credibility of the government's factual claim that the challenged measure is necessary for achieving the government's stated goals. The Court should make the same kind of comparison between *IRPA* and the *Criminal Code*.[81]

63. Finally, even if courts should defer in national security cases, courts should accept that governments have struck the correct balance between liberty and security in the framing of anti-terrorism criminal legislation, and should question why more intrusive means under immigration laws with respect to non-nationals are necessary. In *Re A*, Lord Rodger agreed with the government's argument that courts should not second-guess the government's own assessment of the security threat posed by nationals, or the means necessary to address those threats – in effect, by setting the benchmarks. What he demanded was that the government should be consistent in the means chosen to respond to national security threats that, in the absence of contrary evidence, were equivalent.[82]

PART IV – COSTS

64. The IHRC and HRW do not seek costs, and ask that they not be liable for costs of other parties.

PART V – ORDER SOUGHT

65. The IHRC and HRW request a declaration that ss. 33 and 77 to 85 of *IRPA* are unconstitutional.

May 25, 2006

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[81] *Re A, supra* note 18 at paras. 168, 186-88.
[82] *Re A, supra* note 18 at para. 188 (per Lord Rodger).

PART VI – TABLE OF AUTHORITIES

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International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 *entered into force* Mar. 23, 1976	37

Other Materials	**Paragraph**
Louise Arbour, UN High Commissioner for Human Rights, *Address at Chatham House and the British Institute of International and Comparative Law* (16 February 2006)	37
Canada, House of Commons, Standing Committee on Justice and Human Rights, Report of 49th Meeting (20 November 2001) at 1220 (Hon. Anne McLellan).	27
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Council of Europe, Commissioner for Human Rights, *Report by Mr. Alvaro-Gil Robles, Commissioner for Human Rights, On His Visit to the United Kingdom 4th – 12th November 2004*, CommDH (2005) 6 (8 June 2005)	18, 49

Government of Canada, *Canada's Responses to the List of Issues: Presentation of the Fourth and Fifth Reports,* United Nations Committee Against Torture, May 2005	36
Government of Canada, *Canada's Responses to the List of Issues: Presentation of the Fifth Report on the International Covenant on Civil and Political Rights,* United Nations Human Rights Committee, October 2005	36
Joint Committee on Human Rights (U.K.), Counter-Terrorism Policy and Human Rights: Draft *Prevention of Terrorism Act 2005* (Continuance in force of sections 1 to 9) Order 2006 HL Paper 122, HC 915	19, 50
Peter W. Hogg & Leena Grover, "Detention of the Suspected Terrorist in Canada, the United Kingdom and the United States" (Paper presented at the Raoul Wallenberg International Human Rights Symposium, New York University School of Law, 19-20 January 2006) [unpublished]	17, 37, 38
Audrey Macklin, "Mr. Suresh and the Evil Twin" (2002) 20 Refuge 15	37
David Mullan, "Deference from Baker to Suresh and Beyond – Interpreting the Conflicting Signals" in David Dyzenhaus ed., *The Unity of Public Law* (Oxford: Hart Publishing, 2004) at 45-46	37
Kent Roach, "Constitutional, Remedial, and International Dialogues About Rights: The Canadian Experience" (2004), 40 Tex. Int'l L.J. 537	37
Kent Roach, "The New Terrorism Offences and the Criminal Law" in Daniels, Macklem and Roach eds *The Freedom of Security: Essays on Canada's Anti-Terrorism Bill Bill* (Toronto: University of Toronto Press, 2001) 151.	29
Kent Roach, "The Criminal Law and Terrorism" in V. Ramraj, M. Hor & K. Roach, eds., *Global Anti-Terrorism Law and Policy* (Cambridge: Cambridge University Press, 2005) 129	56

PART VII – STATUTES RELIED ON

Canadian Charter of Rights and Freedoms

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.	**1.** La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.
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.	**7.** Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.
11. Any person charged with an offence has the right *a*) to be informed without unreasonable delay of the specific offence; *b*) to be tried within a reasonable time; *c*) not to be compelled to be a witness in proceedings against that person in respect of the offence; *d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal; *e*) not to be denied reasonable bail without just cause; *f*) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment; *g*) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations; *h*) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for	**11.** Tout inculpé a le droit : *a*) d'être informé sans délai anormal de l'infraction précise qu'on lui reproche; *b*) d'être jugé dans un délai raisonnable; *c*) de ne pas être contraint de témoigner contre lui-même dans toute poursuite intentée contre lui pour l'infraction qu'on lui reproche; *d*) d'être présumé innocent tant qu'il n'est pas déclaré coupable, conformément à la loi, par un tribunal indépendant et impartial à l'issue d'un procès public et équitable; *e*) de ne pas être privé sans juste cause d'une mise en liberté assortie d'un cautionnement raisonnable; *f*) sauf s'il s'agit d'une infraction relevant de la justice militaire, de bénéficier d'un procès avec jury lorsque la peine maximale prévue pour l'infraction dont il est accusé est un emprisonnement de cinq ans ou une peine plus grave; *g*) de ne pas être déclaré coupable en raison d'une action ou d'une omission qui, au moment où elle est survenue, ne constituait pas une infraction d'après le droit interne du Canada ou le droit international et n'avait pas de caractère criminel d'après les principes

it again; and *i*) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.	généraux de droit reconnus par l'ensemble des nations; *h*) d'une part de ne pas être jugé de nouveau pour une infraction dont il a été définitivement acquitté, d'autre part de ne pas être jugé ni puni de nouveau pour une infraction dont il a été définitivement déclaré coupable et puni; *i*) de bénéficier de la peine la moins sévère, lorsque la peine qui sanctionne l'infraction dont il est déclaré coupable est modifiée entre le moment de la perpétration de l'infraction et celui de la sentence.

Criminal Code, R.S.C. 1985, c. C-46

2. In this Act, … "terrorism offence" means (*a*) an offence under any of sections 83.02 to 83.04 or 83.18 to 83.23, (*b*) an indictable offence under this or any other Act of Parliament committed for the benefit of, at the direction of or in association with a terrorist group, (*c*) an indictable offence under this or any other Act of Parliament where the act or omission constituting the offence also constitutes a terrorist activity, or (*d*) a conspiracy or an attempt to commit, or being an accessory after the fact in relation to, or any counselling in relation to, an offence referred to in paragraph (*a*), (*b*) or (*c*);	**2.** Les définitions qui suivent s'appliquent à la présente loi. … « infraction de terrorisme » *a*) Infraction visée à l'un des articles 83.02 à 83.04 et 83.18 à 83.23; *b*) acte criminel — visé par la présente loi ou par une autre loi fédérale — commis au profit ou sous la direction d'un groupe terroriste, ou en association avec lui; *c*) acte criminel visé par la présente loi ou par une autre loi fédérale et dont l'élément matériel — acte ou omission — constitue également une activité terroriste; *d*) complot ou tentative en vue de commettre l'infraction visée à l'un des alinéas *a*) à *c*) ou, relativement à une telle infraction, complicité après le fait ou encouragement à la perpétration.
83.01 (1) The following definitions apply in	**83.01** (1) Les définitions qui suivent

this Part. … "terrorist activity" means (*a*) an act or omission that is committed in or outside Canada and that, if committed in Canada, is one of the following offences: (i) the offences referred to in subsection 7(2) that implement the *Convention for the Suppression of Unlawful Seizure of Aircraft*, signed at The Hague on December 16, 1970, (ii) the offences referred to in subsection 7(2) that implement the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, signed at Montreal on September 23, 1971, (iii) the offences referred to in subsection 7(3) that implement the *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*, adopted by the General Assembly of the United Nations on December 14, 1973, (iv) the offences referred to in subsection 7(3.1) that implement the *International Convention against the Taking of Hostages*, adopted by the General Assembly of the United Nations on December 17, 1979, (v) the offences referred to in subsection 7(3.4) or (3.6) that implement the *Convention on the Physical Protection of Nuclear Material*, done at Vienna and New York on March 3, 1980, (vi) the offences referred to in subsection 7(2) that implement the *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation*, supplementary to the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, signed at Montreal on February	s'appliquent à la présente partie. « activité terroriste » *a*) Soit un acte — action ou omission, commise au Canada ou à l'étranger — qui, au Canada, constitue une des infractions suivantes : (i) les infractions visées au paragraphe 7(2) et mettant en oeuvre la *Convention pour la répression de la capture illicite d'aéronefs*, signée à La Haye le 16 décembre 1970, (ii) les infractions visées au paragraphe 7(2) et mettant en oeuvre la *Convention pour la répression d'actes illicites dirigés contre la sécurité de l'aviation civile*, signée à Montréal le 23 septembre 1971, (iii) les infractions visées au paragraphe 7(3) et mettant en oeuvre la *Convention sur la prévention et la répression des infractions contre les personnes jouissant d'une protection internationale, y compris les agents diplomatiques*, adoptée par l'Assemblée générale des Nations Unies le 14 décembre 1973, (iv) les infractions visées au paragraphe 7(3.1) et mettant en oeuvre la *Convention internationale contre la prise d'otages*, adoptée par l'Assemblée générale des Nations Unies le 17 décembre 1979, (v) les infractions visées aux paragraphes 7(3.4) ou (3.6) et mettant en oeuvre la *Convention sur la protection physique des matières nucléaires*, conclue à New York et Vienne le 3 mars 1980, (vi) les infractions visées au paragraphe 7(2) et mettant en oeuvre le *Protocole pour la répression des actes illicites de violence dans les aéroports servant à*

24, 1988,

(vii) the offences referred to in subsection 7(2.1) that implement the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, done at Rome on March 10, 1988,

(viii) the offences referred to in subsection 7(2.1) or (2.2) that implement the *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*, done at Rome on March 10, 1988,

(ix) the offences referred to in subsection 7(3.72) that implement the *International Convention for the Suppression of Terrorist Bombings*, adopted by the General Assembly of the United Nations on December 15, 1997, and

(x) the offences referred to in subsection 7(3.73) that implement the *International Convention for the Suppression of the Financing of Terrorism*, adopted by the General Assembly of the United Nations on December 9, 1999, or

(*b*) an act or omission, in or outside Canada,

(i) that is committed

(A) in whole or in part for a political, religious or ideological purpose, objective or cause, and

(B) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the public or the person, government or organization is inside or outside Canada, and

(ii) that intentionally

l'aviation civile internationale, complémentaire à la Convention pour la répression d'actes illicites dirigés contre la sécurité de l'aviation civile, signé à Montréal le 24 février 1988,

(vii) les infractions visées au paragraphe 7(2.1) et mettant en oeuvre la *Convention pour la répression d'actes illicites contre la sécurité de la navigation maritime*, conclue à Rome le 10 mars 1988,

(viii) les infractions visées aux paragraphes 7(2.1) ou (2.2) et mettant en oeuvre le *Protocole pour la répression d'actes illicites contre la sécurité des plates-formes fixes situées sur le plateau continental*, conclu à Rome le 10 mars 1988,

(ix) les infractions visées au paragraphe 7(3.72) et mettant en oeuvre la *Convention internationale pour la répression des attentats terroristes à l'explosif*, adoptée par l'Assemblée générale des Nations Unies le 15 décembre 1997,

(x) les infractions visées au paragraphe 7(3.73) et mettant en oeuvre la *Convention internationale pour la répression du financement du terrorisme*, adoptée par l'Assemblée générale des Nations Unies le 9 décembre 1999;

b) soit un acte — action ou omission, commise au Canada ou à l'étranger :

(i) d'une part, commis à la fois :

(A) au nom — exclusivement ou non — d'un but, d'un objectif ou d'une cause de nature politique, religieuse ou idéologique,

(B) en vue — exclusivement ou non — d'intimider tout ou partie de la population quant à sa sécurité, entre

(A) causes death or serious bodily harm to a person by the use of violence, (B) endangers a person's life, (C) causes a serious risk to the health or safety of the public or any segment of the public, (D) causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in any of clauses (A) to (C), or (E) causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (A) to (C), and includes a conspiracy, attempt or threat to commit any such act or omission, or being an accessory after the fact or counselling in relation to any such act or omission, but, for greater certainty, does not include an act or omission that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law or conventional international law applicable to the conflict, or the activities undertaken by military forces of a state in the exercise of their official duties, to the extent that those activities are governed by other rules of international law. "terrorist group" means (*a*) an entity that has as one of its purposes or activities facilitating or carrying out any terrorist activity, or (*b*) a listed entity, and includes an association of such entities.	autres sur le plan économique, ou de contraindre une personne, un gouvernement ou une organisation nationale ou internationale à accomplir un acte ou à s'en abstenir, que la personne, la population, le gouvernement ou l'organisation soit ou non au Canada, (ii) d'autre part, qui intentionnellement, selon le cas : (A) cause des blessures graves à une personne ou la mort de celle-ci, par l'usage de la violence, (B) met en danger la vie d'une personne, (C) compromet gravement la santé ou la sécurité de tout ou partie de la population, (D) cause des dommages matériels considérables, que les biens visés soient publics ou privés, dans des circonstances telles qu'il est probable que l'une des situations mentionnées aux divisions (A) à (C) en résultera, (E) perturbe gravement ou paralyse des services, installations ou systèmes essentiels, publics ou privés, sauf dans le cadre de revendications, de protestations ou de manifestations d'un désaccord ou d'un arrêt de travail qui n'ont pas pour but de provoquer l'une des situations mentionnées aux divisions (A) à (C). Sont visés par la présente définition, relativement à un tel acte, le complot, la tentative, la menace, la complicité après le fait et l'encouragement à la perpétration; il est entendu que sont exclus de la présente définition l'acte — action ou omission — commis au

	cours d'un conflit armé et conforme, au moment et au lieu de la perpétration, au droit international coutumier ou au droit international conventionnel applicable au conflit ainsi que les activités menées par les forces armées d'un État dans l'exercice de leurs fonctions officielles, dans la mesure où ces activités sont régies par d'autres règles de droit international. … « groupe terroriste » *a*) Soit une entité dont l'un des objets ou l'une des activités est de se livrer à des activités terroristes ou de les faciliter; *b*) soit une entité inscrite. Est assimilé à un groupe terroriste un groupe ou une association formé de groupes terroristes au sens de la présente définition.
83.18 (1) Every one who knowingly participates in or contributes to, directly or indirectly, any activity of a terrorist group for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years. (2) An offence may be committed under subsection (1) whether or not (*a*) a terrorist group actually facilitates or carries out a terrorist activity; (*b*) the participation or contribution of the accused actually enhances the ability of a terrorist group to facilitate or carry out a terrorist activity; or (*c*) the accused knows the specific nature of any terrorist activity that may be facilitated or carried out by a terrorist group. (3) Participating in or contributing to an	**83.18** (1) Est coupable d'un acte criminel passible d'un emprisonnement maximal de dix ans quiconque, sciemment, participe à une activité d'un groupe terroriste, ou y contribue, directement ou non, dans le but d'accroître la capacité de tout groupe terroriste de se livrer à une activité terroriste ou de la faciliter. (2) Pour que l'infraction visée au paragraphe (1) soit commise, il n'est pas nécessaire : *a*) qu'une activité terroriste soit effectivement menée ou facilitée par un groupe terroriste; *b*) que la participation ou la contribution de l'accusé accroisse effectivement la capacité d'un groupe terroriste de se livrer à une activité terroriste ou de la faciliter; *c*) que l'accusé connaisse la nature exacte de toute activité terroriste susceptible d'être menée ou facilitée par un groupe

activity of a terrorist group includes (*a*) providing, receiving or recruiting a person to receive training; (*b*) providing or offering to provide a skill or an expertise for the benefit of, at the direction of or in association with a terrorist group; (*c*) recruiting a person in order to facilitate or commit (i) a terrorism offence, or (ii) an act or omission outside Canada that, if committed in Canada, would be a terrorism offence; (*d*) entering or remaining in any country for the benefit of, at the direction of or in association with a terrorist group; and (*e*) making oneself, in response to instructions from any of the persons who constitute a terrorist group, available to facilitate or commit (i) a terrorism offence, or (ii) an act or omission outside Canada that, if committed in Canada, would be a terrorism offence. (4) In determining whether an accused participates in or contributes to any activity of a terrorist group, the court may consider, among other factors, whether the accused (*a*) uses a name, word, symbol or other representation that identifies, or is associated with, the terrorist group; (*b*) frequently associates with any of the persons who constitute the terrorist group; (*c*) receives any benefit from the terrorist group; or (*d*) repeatedly engages in activities at the instruction of any of the persons who constitute the terrorist group.	terroriste. (3) La participation ou la contribution à une activité d'un groupe terroriste s'entend notamment : *a*) du fait de donner ou d'acquérir de la formation ou de recruter une personne à une telle fin; *b*) du fait de mettre des compétences ou une expertise à la disposition d'un groupe terroriste, à son profit ou sous sa direction, ou en association avec lui, ou d'offrir de le faire; *c*) du fait de recruter une personne en vue de faciliter ou de commettre une infraction de terrorisme ou un acte à l'étranger qui, s'il était commis au Canada, constituerait une telle infraction; *d*) du fait d'entrer ou de demeurer dans un pays au profit ou sous la direction d'un groupe terroriste, ou en association avec lui; *e*) du fait d'être disponible, sous les instructions de quiconque fait partie d'un groupe terroriste, pour faciliter ou commettre une infraction de terrorisme ou un acte à l'étranger qui, s'il était commis au Canada, constituerait une telle infraction. 4) Pour déterminer si l'accusé participe ou contribue à une activité d'un groupe terroriste, le tribunal peut notamment prendre en compte les faits suivants : *a*) l'accusé utilise un nom, un mot, un symbole ou un autre signe qui identifie le groupe ou y est associé; *b*) il fréquente quiconque fait partie du groupe terroriste; *c*) il reçoit un avantage du groupe terroriste; *d*) il se livre régulièrement à des activités selon les instructions d'une personne

	faisant partie du groupe terroriste.
83.19 (1) Every one who knowingly facilitates a terrorist activity is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years. (2) For the purposes of this Part, a terrorist activity is facilitated whether or not (*a*) the facilitator knows that a particular terrorist activity is facilitated; (*b*) any particular terrorist activity was foreseen or planned at the time it was facilitated; or (*c*) any terrorist activity was actually carried out.	**83.19** (1) Est coupable d'un acte criminel passible d'un emprisonnement maximal de quatorze ans quiconque sciemment facilite une activité terroriste. (2) Pour l'application de la présente partie, il n'est pas nécessaire pour faciliter une activité terroriste : *a*) que l'intéressé sache qu'il se trouve à faciliter une activité terroriste en particulier; *b*) qu'une activité terroriste en particulier ait été envisagée au moment où elle est facilitée; *c*) qu'une activité terroriste soit effectivement mise à exécution.

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

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;	**3.** (1) En matière d'immigration, la présente loi a pour objet : *a*) de permettre au Canada de retirer de l'immigration le maximum d'avantages sociaux, culturels et économiques; *b*) d'enrichir et de renforcer le tissu social et culturel du Canada dans le respect de son caractère fédéral, bilingue et multiculturel; *b*.1) de favoriser le développement des collectivités de langues officielles minoritaires au Canada; *c*) de favoriser le développement économique et la prospérité du Canada et de faire en sorte que toutes les régions puissent bénéficier des avantages économiques découlant de l'immigration;

(*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.

(2) The objectives of this Act with respect to refugees are

(*a*) to recognize that the refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted;

(*b*) to fulfil Canada’s international legal obligations with respect to refugees and affirm Canada’s commitment to international efforts to provide assistance to those in need of resettlement;

(*c*) to grant, as a fundamental expression of

d) de veiller à la réunification des familles au Canada;

e) de promouvoir l’intégration des résidents permanents au Canada, compte tenu du fait que cette intégration suppose des obligations pour les nouveaux arrivants et pour la société canadienne;

f) d’atteindre, par la prise de normes uniformes et l’application d’un traitement efficace, les objectifs fixés pour l’immigration par le gouvernement fédéral après consultation des provinces;

g) de faciliter l’entrée des visiteurs, étudiants et travailleurs temporaires qui viennent au Canada dans le cadre d’activités commerciales, touristiques, culturelles, éducatives, scientifiques ou autres, ou pour favoriser la bonne entente à l’échelle internationale;

h) de protéger la santé des Canadiens et de garantir leur sécurité;

i) de promouvoir, à l’échelle internationale, la justice et la sécurité par le respect des droits de la personne et l’interdiction de territoire aux personnes qui sont des criminels ou constituent un danger pour la sécurité;

j) de veiller, de concert avec les provinces, à aider les résidents permanents à mieux faire reconnaître leurs titres de compétence et à s’intégrer plus rapidement à la société.

(2) S’agissant des réfugiés, la présente loi a pour objet :

a) de reconnaître que le programme pour les réfugiés vise avant tout à sauver des vies et à protéger les personnes de la persécution;

b) de remplir les obligations en droit international du Canada relatives aux réfugiés et aux personnes déplacées et d’affirmer la volonté du Canada de participer aux efforts de la communauté

Canada's humanitarian ideals, fair consideration to those who come to Canada claiming persecution; (*d*) to offer safe haven to persons with a well-founded fear of persecution based on race, religion, nationality, political opinion or membership in a particular social group, as well as those at risk of torture or cruel and unusual treatment or punishment; (*e*) to establish fair and efficient procedures that will maintain the integrity of the Canadian refugee protection system, while upholding Canada's respect for the human rights and fundamental freedoms of all human beings; (*f*) to support the self-sufficiency and the social and economic well-being of refugees by facilitating reunification with their family members in Canada; (*g*) to protect the health and safety of Canadians and to maintain the security of Canadian society; and (*h*) to promote international justice and security by denying access to Canadian territory to persons, including refugee claimants, who are security risks or serious criminals. (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*	internationale pour venir en aide aux personnes qui doivent se réinstaller; *c*) de faire bénéficier ceux qui fuient la persécution d'une procédure équitable reflétant les idéaux humanitaires du Canada; *d*) d'offrir l'asile à ceux qui craignent avec raison d'être persécutés du fait de leur race, leur religion, leur nationalité, leurs opinions politiques, leur appartenance à un groupe social en particulier, ainsi qu'à ceux qui risquent la torture ou des traitements ou peines cruels et inusités; *e*) de mettre en place une procédure équitable et efficace qui soit respectueuse, d'une part, de l'intégrité du processus canadien d'asile et, d'autre part, des droits et des libertés fondamentales reconnus à tout être humain; *f*) d'encourager l'autonomie et le bien-être socioéconomique des réfugiés en facilitant la réunification de leurs familles au Canada; *g*) de protéger la santé des Canadiens et de garantir leur sécurité; *h*) de promouvoir, à l'échelle internationale, la sécurité et la justice par l'interdiction du territoire aux personnes et demandeurs d'asile qui sont de grands criminels ou constituent un danger pour la sécurité. (3) L'interprétation et la mise en oeuvre de la présente loi doivent avoir pour effet : *a*) de promouvoir les intérêts du Canada sur les plans intérieur et international; *b*) d'encourager la responsabilisation et la transparence par une meilleure connaissance des programmes d'immigration et de ceux pour les réfugiés; *c*) de faciliter la coopération entre le gouvernement fédéral, les gouvernements

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.	provinciaux, les États étrangers, les organisations internationales et les organismes non gouvernementaux; *d*) d'assurer que les décisions prises en vertu de la présente loi sont conformes à la *Charte canadienne des droits et libertés*, notamment en ce qui touche les principes, d'une part, d'égalité et de protection contre la discrimination et, d'autre part, d'égalité du français et de l'anglais à titre de langues officielles du Canada; *e*) de soutenir l'engagement du gouvernement du Canada à favoriser l'épanouissement des minorités francophones et anglophones du Canada; *f*) de se conformer aux instruments internationaux portant sur les droits de l'homme dont le Canada est signataire.
33. The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.	**33.** Les faits — actes ou omissions — mentionnés aux articles 34 à 37 sont, sauf disposition contraire, appréciés sur la base de motifs raisonnables de croire qu'ils sont survenus, surviennent ou peuvent survenir.
34. (1) A permanent resident or a foreign national is inadmissible on security grounds for (*a*) engaging in an act of espionage or an act of subversion against a democratic government, institution or process as they are understood in Canada; (*b*) engaging in or instigating the subversion by force of any government; (*c*) engaging in terrorism; (*d*) being a danger to the security of Canada; (*e*) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or (*f*) being a member of an organization that there are reasonable grounds to believe	**34.** (1) Emportent interdiction de territoire pour raison de sécurité les faits suivants : *a*) être l'auteur d'actes d'espionnage ou se livrer à la subversion contre toute institution démocratique, au sens où cette expression s'entend au Canada; *b*) être l'instigateur ou l'auteur d'actes visant au renversement d'un gouvernement par la force; *c*) se livrer au terrorisme; *d*) constituer un danger pour la sécurité du Canada; *e*) être l'auteur de tout acte de violence susceptible de mettre en danger la vie ou la sécurité d'autrui au Canada;

engages, has engaged or will engage in acts referred to in paragraph (*a*), (*b*) or (*c*). 2) The matters referred to in subsection (1) do not constitute inadmissibility in respect of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest.	*f*) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle est, a été ou sera l'auteur d'un acte visé aux alinéas *a*), *b*) ou *c*). 2) Ces faits n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui convainc le ministre que sa présence au Canada ne serait nullement préjudiciable à l'intérêt national.
76. The definitions in this section apply in this Division. "information" means security or criminal intelligence information and information that is obtained in confidence from a source in Canada, from the government of a foreign state, from an international organization of states or from an institution of either of them. "judge" means the Chief Justice of the Federal Court or a judge of that Court designated by the Chief Justice.	**76.** Les définitions qui suivent s'appliquent à la présente section. « juge » Le juge en chef de la Cour fédérale ou le juge de cette juridiction désigné par celui-ci. « renseignements » Les renseignements en matière de sécurité ou de criminalité et ceux obtenus, sous le sceau du secret, de source canadienne ou du gouvernement d'un État étranger, d'une organisation internationale mise sur pied par des États ou de l'un de leurs organismes.
77. (1) The Minister and the Minister of Public Safety and Emergency Preparedness shall sign a certificate stating that a permanent resident or a foreign national is inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality and refer it to the Federal Court, which shall make a determination under section 80. (2) When the certificate is referred, a proceeding under this Act respecting the person named in the certificate, other than an application under subsection 112(1), may not be commenced and, if commenced, must be adjourned, until the judge makes the determination.	**77.** (1) Le ministre et le ministre de la Sécurité publique et de la Protection civile déposent à la Cour fédérale le certificat attestant qu'un résident permanent ou qu'un étranger est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux, grande criminalité ou criminalité organisée pour qu'il en soit disposé au titre de l'article 80. (2) Il ne peut être procédé à aucune instance visant le résident permanent ou l'étranger au titre de la présente loi tant qu'il n'a pas été statué sur le certificat; n'est pas visée la demande de protection prévue au paragraphe 112(1).
78. The following provisions govern the determination: (*a*) the judge shall hear the matter;	**78.** Les règles suivantes s'appliquent à l'affaire : *a*) le juge entend l'affaire;

(*b*) the judge shall ensure the confidentiality of the information on which the certificate is based and of any other evidence that may be provided to the judge if, in the opinion of the judge, its disclosure would be injurious to national security or to the safety of any person; (*c*) the judge shall deal with all matters as informally and expeditiously as the circumstances and considerations of fairness and natural justice permit; (*d*) the judge shall examine the information and any other evidence in private within seven days after the referral of the certificate for determination; (*e*) on each request of the Minister or the Minister of Public Safety and Emergency Preparedness made at any time during the proceedings, the judge shall hear all or part of the information or evidence in the absence of the permanent resident or the foreign national named in the certificate and their counsel if, in the opinion of the judge, its disclosure would be injurious to national security or to the safety of any person; (*f*) the information or evidence described in paragraph (*e*) shall be returned to the Minister and the Minister of Public Safety and Emergency Preparedness and shall not be considered by the judge in deciding whether the certificate is reasonable if either the matter is withdrawn or if the judge determines that the information or evidence is not relevant or, if it is relevant, that it should be part of the summary; (*g*) the information or evidence described in paragraph (*e*) shall not be included in the summary but may be considered by the judge in deciding whether the certificate is reasonable if the judge determines that the information or evidence is relevant but that its disclosure would be injurious to national security or to the safety of any person;	*b*) le juge est tenu de garantir la confidentialité des renseignements justifiant le certificat et des autres éléments de preuve qui pourraient lui être communiqués et dont la divulgation porterait atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui; *c*) il procède, dans la mesure où les circonstances et les considérations d'équité et de justice naturelle le permettent, sans formalisme et selon la procédure expéditive; *d*) il examine, dans les sept jours suivant le dépôt du certificat et à huis clos, les renseignements et autres éléments de preuve; *e*) à chaque demande d'un ministre, il examine, en l'absence du résident permanent ou de l'étranger et de son conseil, tout ou partie des renseignements ou autres éléments de preuve dont la divulgation porterait atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui; *f*) ces renseignements ou éléments de preuve doivent être remis aux ministres et ne peuvent servir de fondement à l'affaire soit si le juge décide qu'ils ne sont pas pertinents ou, l'étant, devraient faire partie du résumé, soit en cas de retrait de la demande; *g*) si le juge décide qu'ils sont pertinents, mais que leur divulgation porterait atteinte à la sécurité nationale ou à celle d'autrui, ils ne peuvent faire partie du résumé, mais peuvent servir de fondement à l'affaire; *h*) le juge fournit au résident permanent ou à l'étranger, afin de lui permettre d'être suffisamment informé des circonstances ayant donné lieu au certificat, un résumé de la preuve ne comportant aucun élément dont la divulgation porterait atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui;

(*h*) the judge shall provide the permanent resident or the foreign national with a summary of the information or evidence that enables them to be reasonably informed of the circumstances giving rise to the certificate, but that does not include anything that in the opinion of the judge would be injurious to national security or to the safety of any person if disclosed; (*i*) the judge shall provide the permanent resident or the foreign national with an opportunity to be heard regarding their inadmissibility; and (*j*) the judge may receive into evidence anything that, in the opinion of the judge, is appropriate, even if it is inadmissible in a court of law, and may base the decision on that evidence.	*i*) il donne au résident permanent ou à l'étranger la possibilité d'être entendu sur l'interdiction de territoire le visant; *j*) il peut recevoir et admettre en preuve tout élément qu'il estime utile — même inadmissible en justice — et peut fonder sa décision sur celui-ci.
79. (1) On the request of the Minister, the permanent resident or the foreign national, a judge shall suspend a proceeding with respect to a certificate in order for the Minister to decide an application for protection made under subsection 112(1). (2) If a proceeding is suspended under subsection (1) and the application for protection is decided, the Minister shall give notice of the decision to the permanent resident or the foreign national and to the judge, the judge shall resume the proceeding and the judge shall review the lawfulness of the decision of the Minister, taking into account the grounds referred to in subsection 18.1(4) of the *Federal Courts Act*.	**79.** (1) Le juge suspend l'affaire, à la demande du résident permanent, de l'étranger ou du ministre, pour permettre à ce dernier de disposer d'une demande de protection visée au paragraphe 112(1). 2) Le ministre notifie sa décision sur la demande de protection au résident permanent ou à l'étranger et au juge, lequel reprend l'affaire et contrôle la légalité de la décision, compte tenu des motifs visés au paragraphe 18.1(4) de la *Loi sur les Cours fédérales*.
80. (1) The judge shall, on the basis of the information and evidence available, determine whether the certificate is reasonable and whether the decision on the application for protection, if any, is lawfully made. (2) The judge shall quash a certificate if the	**80.** (1) Le juge décide du caractère raisonnable du certificat et, le cas échéant, de la légalité de la décision du ministre, compte tenu des renseignements et autres éléments de preuve dont il dispose. (2) Il annule le certificat dont il ne peut

judge is of the opinion that it is not reasonable. If the judge does not quash the certificate but determines that the decision on the application for protection is not lawfully made, the judge shall quash the decision and suspend the proceeding to allow the Minister to make a decision on the application for protection. (3) The determination of the judge is final and may not be appealed or judicially reviewed.	conclure qu'il est raisonnable; si l'annulation ne vise que la décision du ministre il suspend l'affaire pour permettre au ministre de statuer sur celle-ci. (3) La décision du juge est définitive et n'est pas susceptible d'appel ou de contrôle judiciaire.
81. If a certificate is determined to be reasonable under subsection 80(1), (*a*) it is conclusive proof that the permanent resident or the foreign national named in it is inadmissible; (*b*) it is a removal order that may not be appealed against and that is in force without the necessity of holding or continuing an examination or an admissibility hearing; and (*c*) the person named in it may not apply for protection under subsection 112(1).	**81.** Le certificat jugé raisonnable fait foi de l'interdiction de territoire et constitue une mesure de renvoi en vigueur et sans appel, sans qu'il soit nécessaire de procéder au contrôle ou à l'enquête; la personne visée ne peut dès lors demander la protection au titre du paragraphe 112(1).
82. (1) The Minister and the Minister of Public Safety and Emergency Preparedness may issue a warrant for the arrest and detention of a permanent resident who is named in a certificate described in subsection 77(1) if they have reasonable grounds to believe that the permanent resident is a danger to national security or to the safety of any person or is unlikely to appear at a proceeding or for removal. 2) A foreign national who is named in a certificate described in subsection 77(1) shall be detained without the issue of a warrant.	**82.** (1) Le ministre et le ministre de la Sécurité publique et de la Protection civile peuvent lancer un mandat pour l'arrestation et la mise en détention du résident permanent visé au certificat dont ils ont des motifs raisonnables de croire qu'il constitue un danger pour la sécurité nationale ou la sécurité d'autrui ou qu'il se soustraira vraisemblablement à la procédure ou au renvoi. (2) L'étranger nommé au certificat est mis en détention sans nécessité de mandat.
83. (1) Not later than 48 hours after the beginning of detention of a permanent resident under section 82, a judge shall commence a review of the reasons for the continued detention. Section 78 applies with respect to	**83.** (1) Dans les quarante-huit heures suivant le début de la détention du résident permanent, le juge entreprend le contrôle des motifs justifiant le maintien en détention, l'article 78 s'appliquant, avec les adaptations

the review, with any modifications that the circumstances require. (2) The permanent resident must, until a determination is made under subsection 80(1), be brought back before a judge at least once in the six-month period following each preceding review and at any other times that the judge may authorize. (3) A judge shall order the detention to be continued if satisfied that the permanent resident continues to be a danger to national security or to the safety of any person, or is unlikely to appear at a proceeding or for removal.	nécessaires, au contrôle. (2) Tant qu'il n'est pas statué sur le certificat, l'intéressé comparaît au moins une fois dans les six mois suivant chaque contrôle, ou sur autorisation du juge. (3) L'intéressé est maintenu en détention sur preuve qu'il constitue toujours un danger pour la sécurité nationale ou la sécurité d'autrui ou qu'il se soustraira vraisemblablement à la procédure ou au renvoi.
84. (1) The Minister may, on application by a permanent resident or a foreign national, order their release from detention to permit their departure from Canada. (2) A judge may, on application by a foreign national who has not been removed from Canada within 120 days after the Federal Court determines a certificate to be reasonable, order the foreign national's release from detention, under terms and conditions that the judge considers appropriate, if satisfied that the foreign national will not be removed from Canada within a reasonable time and that the release will not pose a danger to national security or to the safety of any person.	**84.** (1) Le ministre peut, sur demande, mettre le résident permanent ou l'étranger en liberté s'il veut quitter le Canada. (2) Sur demande de l'étranger dont la mesure de renvoi n'a pas été exécutée dans les cent vingt jours suivant la décision sur le certificat, le juge peut, aux conditions qu'il estime indiquées, le mettre en liberté sur preuve que la mesure ne sera pas exécutée dans un délai raisonnable et que la mise en liberté ne constituera pas un danger pour la sécurité nationale ou la sécurité d'autrui.
85. In the case of an inconsistency between sections 82 to 84 and the provisions of Division 6, sections 82 to 84 prevail to the extent of the inconsistency.	**85.** Les articles 82 à 84 l'emportent sur les dispositions incompatibles de la section 6.
114. (1) A decision to allow the application for protection has (*a*) in the case of an applicant not described in subsection 112(3), the effect of conferring refugee protection; and	**114.** (1) La décision accordant la demande de protection a pour effet de conférer l'asile au demandeur; toutefois, elle a pour effet, s'agissant de celui visé au paragraphe 112(3), de surseoir, pour le pays ou le lieu en cause, à

(*b*) in the case of an applicant described in subsection 112(3), the effect of staying the removal order with respect to a country or place in respect of which the applicant was determined to be in need of protection. (2) If the Minister is of the opinion that the circumstances surrounding a stay of the enforcement of a removal order have changed, the Minister may re-examine, in accordance with paragraph 113(*d*) and the regulations, the grounds on which the application was allowed and may cancel the stay. (3) If the Minister is of the opinion that a decision to allow an application for protection was obtained as a result of directly or indirectly misrepresenting or withholding material facts on a relevant matter, the Minister may vacate the decision. (4) If a decision is vacated under subsection (3), it is nullified and the application for protection is deemed to have been rejected.	la mesure de renvoi le visant. (2) Le ministre peut révoquer le sursis s'il estime, après examen, sur la base de l'alinéa 113*d*) et conformément aux règlements, des motifs qui l'ont justifié, que les circonstances l'ayant amené ont changé. (3) Le ministre peut annuler la décision ayant accordé la demande de protection s'il estime qu'elle découle de présentations erronées sur un fait important quant à un objet pertinent, ou de réticence sur ce fait. (4) La décision portant annulation emporte nullité de la décision initiale et la demande de protection est réputée avoir été rejetée.
115. (1) 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. (2) Subsection (1) does not apply in the case of a person (*a*) who is inadmissible on grounds of serious criminality and who constitutes, in the opinion of the Minister, a danger to the public in Canada; or (*b*) who is inadmissible on grounds of security, violating human or international rights or organized criminality if, in the opinion of the Minister, the person should not be allowed to remain in Canada on the	**115.** (1) Ne peut être renvoyée dans un pays où elle risque la persécution du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques, la torture ou des traitements ou peines cruels et inusités, la personne protégée ou la personne dont il est statué que la qualité de réfugié lui a été reconnue par un autre pays vers lequel elle peut être renvoyée. (2) Le paragraphe (1) ne s'applique pas à l'interdit de territoire : *a*) pour grande criminalité qui, selon le ministre, constitue un danger pour le public au Canada; *b*) pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou criminalité organisée si, selon le ministre, il ne devrait pas être présent au Canada en raison soit de la nature et de la gravité de

basis of the nature and severity of acts committed or of danger to the security of Canada. (3) A person, after a determination under paragraph 101(1)(*e*) that the person's claim is ineligible, is to be sent to the country from which the person came to Canada, but may be sent to another country if that country is designated under subsection 102(1) or if the country from which the person came to Canada has rejected their claim for refugee protection.	ses actes passés, soit du danger qu'il constitue pour la sécurité du Canada. (3) Une personne ne peut, après prononcé d'irrecevabilité au titre de l'alinéa 101(1)*e*), être renvoyée que vers le pays d'où elle est arrivée au Canada sauf si le pays vers lequel elle sera renvoyée a été désigné au titre du paragraphe 102(1) ou que sa demande d'asile a été rejetée dans le pays d'où elle est arrivée au Canada.

APPENDIX "A"
Supreme Court of Canada Cases citing the Convention for the Protection of Human Rights and Fundamental Freedoms or Decisions of the European Court of Human Rights

2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool), [1996] 3 S.C.R. 919
Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 183
B.C.G.E.U. v. British Columbia (Attorney General), [1988] 2 S.C.R. 214
Blencoe v. British Columbia (Human Rights Commission), [2000] 2 S.C.R. 307
Canada (Human Rights Commission) v. Taylor, [1990] 3 S.C.R. 892
Canadian Foundation for Children, Youth and the Law v. Canada, [2004] 1 S.C.R. 76
Chamberlain v. Surrey School District No. 36, [2002] 4 S.C.R. 710
Committee for the Commonwealth of Canada v. Canada, [1991] 1 S.C.R. 139
Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835
Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326
Ford v. Quebec (Attorney General), [1988] 2 S.C.R. 712
Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927
Kindler v. Canada (Minister of Justice), [1991] 2 S.C.R. 779
Lavigne v. Ontario Public Service Employees Union, [1991] 2 S.C.R. 211
McKinney v. University of Guelph, [1990] 3 S.C.R. 229
Miron v. Trudel, [1995] 2 S.C.R. 418
R v. Clay, [2003] 3 S.C.R. 735
R. v. Advance Cutting & Coring Ltd., [2001] 3 S.C.R. 209
R. v. Butler, [1992] 1 S.C.R. 452
R. v. Conway, [1989] 1 S.C.R. 1659
R. v. Jones, [1986] 2 S.C.R. 284
R. v. Kalanj, [1989] 1 S.C.R. 1594
R. v. Keegstra, [1990] 3 S.C.R. 697
R. v. Lippé, [1991] 2 S.C.R. 114
R. v. Lucas, [1998] 1 S.C.R. 439
R. v. Mills, [1986] 1 S.C.R. 863
R. v. Morgentaler, [1988] 1 S.C.R. 30
R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606
R. v. Oakes, [1986] 1 S.C.R. 103
R. v. O'Connor, [1995] 4 S.C.R. 411
R. v. Potvin, [1993] 2 S.C.R. 880
R. v. Prosper, [1994] 3 S.C.R. 236
R. v. Rahey, [1987] 1 S.C.R. 588
R. v. Smith, [1987] 1 S.C.R. 1045
R. v. Tran, [1994] 2 S.C.R. 951
R. v. Valente, [1985] 2 S.C.R. 673
R.B. v. Children's Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315
Reference Re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313
Reference re Secession of Quebec, [1998] 2 S.C.R. 217
Reference re ss. 193 and 195.1(1)(c) of the Criminal Code, [1990] 1 S.C.R. 1123
Rodriguez v. British Columbia (Attorney General), [1993] 3 S.C.R. 519

Ruffo v. Conseil de la magistrature, [1995] 4 S.C.R. 267
Sauvé v. Canada (Chief Electoral Officer), [2002] 3 S.C.R. 519
Suresh v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3
Thomson Newspapers Co. (c.o.b. Globe and Mail) v. Canada (Attorney General), [1998] 1 S.C.R. 877
Tremblay v. Daigle, [1989] 2 S.C.R. 530
United States of America v. Burns, [2001] 1 S.C.R. 283
United States of America v. Cotroni, [1989] 1 S.C.R. 1469