IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

THANH TAM TRAN

APPELLANT

- and –

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

RESPONDENT

MEMORANDUM OF ARGUMENT OF THE APPELLANT

(Pursuant to ss. 40 and 43(1.2) of the *Supreme Court Act*)

Peter Edelmann
Aris Daghighian
Erin Roth
Garth Barriere

Edelmann & Company Law Corporation
Barristers & Solicitors
905 – 207 West Hastings Street
Vancouver, BC V6B 1H7

Solicitor for the Applicant

Michael Bossin

Community Legal Services Ottawa Centre
422-1 Nicholas St.
Ottawa, Ontario K1N 7B7
Phone: 613-241-7008 Ext: 224
Fax: 613-241-8680

Agent for the Applicant

François Joyal
Department of Justice Canada
Guy-Favreau Complex, East Tower, 200
Rene-Levesque Blvd West, 12th Floor,
Montreal (Quebec)
H2Z 1X4
Tel.: 514- 283-5880
Fax.: 514- 496-7876
francois.joyal@justice.gc.ca

Solicitor for the Respondent

Per: Robert J. Frater
William F. Pentney
Deputy Attorney General of Canada
Civil Litigation Branch, East Tower
234 Wellington Street
Ottawa ON, K1A 0H8
Tel: 613-957-4763
Fax: 613-954-1920
Robert.frater@justice.gc.ca

Agent for the Respondent

AND

Kathryn Hucal
Department of Justice Canada
Exchange Tower
130 King Street West
Suite 3400, Toronto, Ontario
M5X 1K6
Tel: 416-954-0625
Fax: 416-952-4518
kathryn.hucal@justice.gc.ca

Solicitor for the Respondent

OVERVIEW

1. The Appellant is a long-term permanent resident of Canada who was convicted in 2011 in relation to his relatively minor role in a marijuana production operation, for which a conditional sentence order ("CSO") of 12 months was imposed. Under the law in force at the time of the offence, the maximum penalty to which he was liable was seven years imprisonment. A later amendment raised the maximum penalty to fourteen years.

2. The issue in the decision under review was whether the Appellant should be referred for deportation under s.36(1)(a) of the *Immigration and Refugee Protection Act* ("*IRPA*") which reads as follows:

36 (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for: (a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;	36 (1) Emportent interdiction de territoire pour grande criminalité les faits suivants: (a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;

3. Two questions of statutory interpretation arise on the facts of the case. The first question is whether the twelve month CSO imposed on the Appellant is "a term of imprisonment of more than six months" for the purposes of s.36(1)(a). The second is whether a person who was subject to a maximum penalty of seven years when sentenced by a criminal court has nevertheless been convicted of an offence "punishable by a maximum term of imprisonment of at least 10 years" if a subsequent amendment raises the maximum penalty.

4. Finally, the underlying decision to refer is itself at issue, in relation to the reliance on arrests or charges as indicators of criminal behaviour. In particular, the issues are whether the officer can reasonably rely on the mere fact of an arrest or charge to infer criminal conduct, and whether reliance on undisclosed police reports is reasonable or procedurally fair.

PART I – STATEMENT OF FACTS

5. The Appellant, a 46 year old national of Vietnam, is a permanent resident who came to Canada as a teenager sponsored by his older brother 27 years ago. He has five Canadian born children, and is in a common-law relationship with a Canadian citizen. His parents also settled in Canada prior to their deaths, and his three siblings continue to reside in greater Vancouver. The Appellant currently holds the status of foreman with his company; his employers describe him as vital to the success of their business.

6. On November 29, 2012 the Appellant was convicted under s.7(1) of the *Controlled Drugs and Substances Act* ("*CDSA*") with respect to his limited involvement in March 2011 as a caretaker in a marijuana production operation. In the criminal court, the sentencing judge noted numerous mitigating factors, which included the limited role the Appellant played in the operation, that it was a non-violent offence, and that the Appellant was currently working hard to provide for his extended family. The Judge determined no term of incarceration was warranted and sentenced the Appellant to a CSO of 12 months.[1]

7. Given the date on which the offence was committed, the maximum penalty which could have been imposed by the criminal court under s.7(1) was seven years imprisonment. Subsequent to the offence, an amendment to the *CDSA* raised the maximum penalty to fourteen years.

8. On October 7, 2013, Officer Adam Parsons referred the Appellant to the Immigration Division ("ID") for deportation under s.44(2) of *IRPA*.[2] The officer began his reasons by stating quite candidly that he had not considered the legal arguments as he was of the view such issues did not fall into the scope of his duties.

9. The officer did not provide any reasons regarding the retrospective application of maximum penalties or the question of whether a CSO was a term of imprisonment in the context of *IRPA*.

10. The officer did explicitly address the submissions with respect to the Appellant's personal circumstances, relying in large part on information relating to arrests or charges that had not resulted in convictions to conclude that the Appellant had a history of criminality and would reoffend in the future. The officer based the conclusions on a number of police reports and other materials that had not been disclosed to the Appellant.

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[1] Reasons for Sentence re: Regina v Thanh Tam Tran, Appellant's Record [hereinafter "AR"] Vol. II, Tab 60, p. 75
[2] Referral Under Subsection 44(2) of *IRPA*, Vol. III, Tab 45, p. 19

Federal Court – Trial Division

11. Justice O'Reilly of the Federal Court set aside the decision, making three findings. First, he found that a CSO does not constitute a "term of imprisonment" for the purposes of and in the context in which it is used in the *IRPA*. Second, he determined the Appellant's conviction and offence was not "punishable" by a maximum sentence of at least 10 years as required by *IRPA* s.36(1)(a). Finally, he found the decision was unreasonable as it had improperly relied on past dismissed charges or arrests.[3]

12. The Federal Court certified two questions of general importance under s.74(d) of *IRPA*:

> Is a conditional sentence of imprisonment imposed pursuant to the regime set out in ss.742 to 742.7 of the Criminal Code a "term of imprisonment" under s.36(1)(a) of the *IRPA?*
>
> Does the phrase "punishable by a maximum term of imprisonment of at least ten years" in s.36(1)(a) of the *IRPA* refer to the maximum term of imprisonment available at the time the person was sentenced or to the maximum term of imprisonment under the law in force of the time admissibility is determined?

Federal Court of Appeal

13. The Federal Court of Appeal allowed the Minister's appeal, deferring to the implied reasons of the officer and answering the certified questions by finding an interpretation implicit in the decision which could be defended as falling within a range of reasonable outcomes.

14. On the question of interpreting a CSO as a term of imprisonment, the Court recognized that the implicit interpretation proposed by the officer leads to "[...] inconsistent consequences and even absurdity when one considers that the *IRPA* treats a CSO of imprisonment of seven months more severely than a five months jail term."[4]

15. The Court explicitly left open the possibility that there were other reasonable, and possibly even preferable, interpretations, leaving it open to the Immigration and Refugee Board to

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[3] *Tran v. Canada (Public Safety and Emergency Preparedness),* 2014 FC 1040, AR Vol. I, Tab 2, p. 4 [hereinafter "FC Decision"]
[4] *Canada (Public Safety and Emergency Preparedness) v. Tran*, 2015 FCA 237 at para. 81, AR Vol. I, Tab 4, p. 18 [hereinafter "FCA Decision"]

come to a contrary conclusion on such a fundamental admissibility issue.[5]

16. The Court of Appeal expressed uncertainty about the proper approach to the review of questions of law when reasons are not provided, explicitly requesting guidance from this Court.[6]

17. The Court also considered the use of the unproven allegations contained in police reports, but found that the ultimate conclusion of the officer was not unreasonable, allowing the appeal. The matter was therefore remitted to the Immigration Division for an admissibility hearing.

British Columbia Court of Appeal - current proceedings

18. On November 24, 2015, the Appellant filed an appeal and application for extension of time to have his sentence varied before the British Columbia Court of Appeal from a CSO to a custodial sentence of less than six months, following the principles set out by this Court in *Pham.*[7] The sentence appeal has been placed in abeyance pending a decision from this Court.[8]

PART II – ISSUES

1. What is the applicable standard of review and how is it to be applied to questions of law explicitly not considered by an administrative decision maker?

2. Is a conditional sentence imposed pursuant to the regime set out in ss. 742 to 742.7 of the *Criminal Code* a "term of imprisonment" under s.36(1)(a) of the *IRPA?*

3. Should the phrase "punishable by a maximum term of imprisonment of at least ten years" in s.36(1)(a) of the *IRPA* be interpreted in a manner consistent with the principle set out in section 11(i) of the *Charter*?

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[5] FCA Decision, *supra* note 4 at para 87.
[6] *Ibid* at paras 44-45.
[7] *R v. Pham*, 2013 SCC 15 [*Pham*]
[8] Bennett J.A. in chambers, June 30, 2016.

4. Was the reliance by the Officer on alleged past interactions with the police reasonable and procedurally fair?

PART III – LAW AND ARGUMENT

A. Standard of Review

19. As will be demonstrated in the following sections, the standard of review on the two issues of statutory interpretation central to this appeal should be correctness. The case at bar presents a nexus of live issues in the law of standard of review, many of which would benefit from the guidance of this Court. In the end, whether or not the ongoing debates are resolved, this Court should provide a clear answer to the two questions of statutory interpretation.

20. Faced with clear and compelling arguments on two issues of statutory interpretation directly related to the decision before him, the officer explicitly took the position that it was not within his mandate to consider these types of "legal arguments" and simply decided to seek a deportation order against the Appellant. Despite this explicit abdication of any status as a specialized tribunal, the Court of Appeal felt obliged to defer to any "implicit" reasons that could be conjured to justify the result, given its interpretation of the jurisprudence of this Court.

21. As it stands, permanent residents could be subject to diametrically different interpretations of the same statute, both found to be "reasonable" by the Court of Appeal. Identically situated applicants may either be inadmissible under the law or not, or have access to appeal rights or not, depending on the preference of the particular administrative decision-maker.

22. In a detailed case comment entitled "A Snapshot of What's Wrong with Canadian Administrative Law: MPSEP v. Tran",[9] Professor Paul Daly identifies a number of problems highlighted by the decision from the Court of Appeal. He concludes his case comment with rather strongly worded language on the state of the law after the decision from the Court of Appeal:

> But if *Tran* is right, then deference is due to decision-makers who have no legal expertise, who do not address relevant arguments expressly in their reasons, and who may reasonably come to diametrically opposed conclusions as to similarly

[9] Paul Daly, "A Snapshot of What's Wrong with Canadian Administrative Law: MPSEP v. Tran, 2015 FCA 237", Case Comment, Administrative Law Matters (November 13, 2015), CanLII Connects, online: http://canliiconnects.org/en/commentaries/36164.

> situated individuals. And the courts cannot intervene to resolve the issues authoritatively even though there is a strong indication that Parliament intended for them to do so. Somewhere along the line, something has gone rather badly wrong.

23. The following sections will address some of the problems highlighted by Professor Daly in the decision, but the conclusion underscores the need for this Court to provide clear guidance in this area.

24. The question of whether and how to apply the reasonableness standard was at the centre of the decision of Court of Appeal, and the case was decided on the basis that although the interpretations being put forward by the Appellant may well be reasonable, that the Court could not say the interpretation implied by the Officer's decision could not be defended.

25. This Court, on multiple occasions since *Dunsmuir*[10] has underlined the fact that reasonableness is a contextual, flexible standard. In *Rogers Communications*, this Court underlined that a contextual analysis could "rebut the presumption of reasonableness review for questions involving the interpretation of the home statute."[11]

i. Deference to Officers

26. Even after the decision of this Court in *Agraira*,[12] there is an ongoing debate about whether the same level of deference is owed to the statutory interpretation of a front-line officer or delegate as is afforded to truly expert tribunals. In *David Suzuki Foundation (a.k.a. Georgia Strait Alliance),*[13] the Court of Appeal provided a thorough argument against deference to Ministerial interpretations of the law. The same approach was followed by the majority in *Takeda*[14] where Dawson J.A. noted this Court has "albeit without discussion…applied a correctness review to the Minister of Citizenship and Immigration's interpretation…of the [*IRPA*]" on numerous occasions.[15]

27. While this Court ostensibly took a different approach in *Agraira*, the issue in that case dealt

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[10] *Dunsmuir v. New Brunswick,* [2008] 1 SCR 190, 2008 SCC 9 [*Dunsmuir*].
[11] *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35 at para 16; [2012] 2 S.C.R. 283 [*Rogers*]. See also *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 at para 22.
[12] *Agraira v. Canada (Public Safety and Emergency Preparedness)*, [2013] 2 SCR 559, 2013 SCC 36.
[13] *Canada (Fisheries and Oceans) v. David Suzuki Foundation,* 2012 FCA 40 at paras 70-105.
[14] *Takeda Canada Inc. v. Canada (Health),* 2013 FCA 13 at paras 111-116.
[15] *Ibid* at para 116.

with a highly policy-oriented interpretation of "national interest" undertaken by a very specialized and restricted group of ministerial delegates. Following *Agraira*, the Court of Appeal in *Kandola* accepted that the presumption of deference applies to ministerial interpretations of law, but found that "as in *Takeda*, this presumption can be quickly rebutted".[16] In dissent, Mainville J.A. expressed his "deep disagreement" with the presumption even if easily rebutted, specifically taking issue with the decision in *Agraira*:

> I deeply disagree with this approach on a principled basis for the reasons I extensively set out in *[David Suzuki Foundation]*. As I indicated there, assuming without clear legislative authority that Parliament intends to defer to the executive for the interpretation of its laws is, in my view, a paradigm shift in the fabric of Canada's constitution.

28. The concern expressed by Mainville J.A. is one that goes to the core of the constitutional order. It is difficult to see how the law provides a meaningful limitation on the actions of the executive in interactions with individuals when the executive is allowed to interpret the law as it sees fit, and is not even bound to a particular interpretation of the law.

ii. Divergent Interpretations of the Law

29. While upholding the implicit interpretation of the officer, the Court of Appeal explicitly recognizes that the opposite conclusion may also fall within a range of reasonable outcomes, and leaves it open to the other tribunals and officers to apply alternate interpretations. While such divergence may be tolerable in some technical areas within the core expertise of specialized tribunals, the grounds of deportation of permanent residents must be set out in clear and unequivocal terms. It is fundamentally offensive to the rule of law to have different decision-makers applying inconsistent interpretations of laws that affect fundamental personal interests, leading to inequitable treatment of similarly situated individuals. Such decisions should not depend on the luck of the draw, depending on which decision-maker is to hear the case.[17]

30. The need for guidance from this Court is not only at the level of reviewing Courts. The tribunals themselves struggle with the type of equivocal answers on fundamental questions of law like the ones given by the Court of Appeal in this case. If there are in fact multiple reasonable interpretations, this Court needs to provide guidance to administrative tribunals

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[16] *Canada (Citizenship and Immigration) v. Kandola*, 2014 FCA 85 at paras 42-43.
[17] *Wilson v. Atomic Energy of Canada Limited*, 2015 FCA 17 at paras 42-48; *Martinez-Caro v. Canada (Citizenship and Immigration)*, 2011 FC 640 at paras 48-49.

as to how and when they should select between the various "reasonable" interpretations of the law, whether they should provide reasons for selecting one interpretation over another, and whether parties should be given notice as to which interpretation might be applied. The ambiguity inherent in the approach suggested by the Court of Appeal will lead to these issues being litigated over and over again before administrative tribunals as parties seek to convince tribunal members to favour one interpretation over another, with no apparent mechanism for finality. Arguably, this also true of a multitude of legal issues decided on the pre-*Dunsmuir* standards but which are now open to being relitigated *ad infinitum* before administrative decision makers.

iii. The Rule of Lenity in Administrative Decision Making

31. The *rule of lenity* or strict construction of statutes requires that given the choice between two reasonable interpretations of a statute, a decision-maker must resolve the ambiguity in favour of the individual whose interests or rights are at stake.

32. This Court has repeatedly affirmed the principles of fundamental justice underpinning strict construction. The following passage from Maxwell (*The Interpretation of Statutes*) is cited by the Court in *Bélanger*[18] and later in *Hasselwander*:

> Where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject and against the Legislature which has failed to explain itself. [19]

33. In *Colet*[20] and later in *Morguard Properties,*[21] this Court made it clear that strict construction applies to encroachment on any right of a person or their property, and is not restricted to penal statutes. Notably, in *Morguard*, the issue was whether the statute restricted the taxpayer's right to an appeals process.

34. In the case at bar, if the Court of Appeal was correct in determining there are multiple defensible interpretations, then the ambiguity ought to have been resolved in favour of the individual facing deportation and loss of appeal rights.

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[18] *Bélanger v. The Queen*, [1970] S.C.R. 567.
[19] *R. v. Hasselwander*, [1993] 2 SCR 398 at para 414. See also *R. v. McIntosh*, [1995] 1 SCR 686 at paras 35-36.
[20] *Colet v. The Queen* [1981] 1 S.C.R. 2.
[21] *Morguard Properties Ltd. v. City of Winnipeg,* [1983] 2 SCR 493 ("[t]he Legislature has complete control of the process of legislation, and when it has not for any reason clearly expressed itself, it has all the resources available to correct that inadequacy of expression" at 508-509). See also *Canadian Marconi v. R.*, [1986] 2 SCR 522.

35. As indicated by Professor Daly, this Court has yet to provide clarity with respect to how this principle must work in the context of deference to administrative decision-makers and the role of a reviewing court.[22] That is, whether the *rule of lenity* or strict construction serves to narrow an otherwise broader range of reasonable outcomes available to administrative decision-makers and the deference owed to such decisions.

36. The Federal Court has applied strict construction to the procedural rights of long-term permanent residents under the *Immigration Act,*[23] and in the context of loss of permanent resident status under *IRPA*.[24]

37. In the United States, the Supreme Court has a long history of construing immigration statutes narrowly in favor of noncitizens when faced with ambiguity.[25] In *Fong Haw Tan v. Phelan*, the Court reviewed an ambiguous statute, which provided for the deportation of noncitizens convicted of certain crimes.[26]The Court held that "because deportation is a drastic measure and at times the equivalent of banishment or exile," such provisions are to be strictly construed in favor of the noncitizen.[27] While other interpretations may be reasonable, the Court explained "since the stakes are considerable for the individual, we will not assume that Congress means to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used."[28]

38. Furthermore, the U.S. Supreme Court has affirmed this principle carries greater import when the tribunal is interpreting criminal terms referenced in immigration statutes. Distinguishing between the U.S. Board of Immigration Appeals' interpretation of the Immigration and Nationality Act and interpretation of the federal criminal code, the Court has numerously held: "ambiguities in criminal statutes referenced in immigration laws should be construed

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[22] Daly, *supra* note 9.
[23] See e.g. *Solis v. Canada (Citizenship and Immigration),* [1997] 2 FCR 693.
[24] See e.g. *Canada (Citizenship and Immigration) v. Heidari Gezik*, 2015 FC 1268 at paras 61-62
[25] See Brian G. Slocum, "The Immigration Rule of Lenity and Chevron Deference" (2002) 17 GEO. IMMIGR. L.J. 515; Alina Das, "Unshackling Habeas Review - Chevron Deference and Statutory Interpretation in Immigration Detention Cases", (2014) 90:143 NYU L Rev 197-202.
[26] *Fong Haw Tan v. Phelan*, 333 U.S. 6 (1948). See also *INS* v. *Cardoza-Fonseca,* 480 U. S. 421 (1987) at 449 (referring to "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the [noncitizen])"; *INS v. St. Cyr*, 533 U.S. 289 (2001) at 320 (same).
[27] *Ibid* at 10 (in full, the Court reasoned: "We resolve the doubts in favor of that construction because deportation is a drastic measure, and at times the equivalent of banishment or exile, Delgadillo v. Carmichael, 332 U. S. 388. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But, since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.")
[28] *Ibid.*

in the noncitizen's favor."[29]

39. The principles underlying the U.S. Supreme Court's repeated application of lenity to immigration statutes affecting the deportation and fundamental interests of non-citizens are equally applicable in Canada.

iv. Diversity of Decision Makers

40. Aside from the serious consequences of criminal inadmissibility for the individuals affected, the provisions must be applied and interpreted by a large number of actors both inside and outside the administrative regime. In addition to CBSA officers and delegates of the Minister of Public Safety, the term is highly relevant to visa officers and delegates of the Minister of Immigration, Refugees and Citizenship who must apply the sections in both overseas visa posts and in relation to inland applications. The Immigration Division and the IAD must also interpret the provisions, not only in the context of admissibility findings, but with respect to the nature of a "term of imprisonment" on the very issue of the jurisdiction of the IAD itself[30].

41. Additionally, this Court has directed criminal courts to consider the collateral consequences of sentences,[31] an exercise made exceedingly difficult if the application of the sections is unclear or inconsistent. It is therefore not clear why the delegate's interpretation of a phrase with broad implications in *IRPA* ought to be given the deference sought by the Minister and granted by the Court of Appeal. While *IRPA* may be the officer's "home statute", he is but one of many tenants.

v. True Question of Jurisdiction

42. The question of whether a CSO is a "term of imprisonment" being a threshold question of jurisdiction for the IAD under s.64(2) has important implications for the standard of review. Assuming it is a "true" question of jurisdiction in the *Dunsmuir* sense, then presumably when the interpretation of the term in s.64(2) of *IRPA* comes before the Courts it will be reviewed on a correctness standard and a definitive answer will be provided. If an issue of statutory interpretation will have to be dealt with by the Courts on a correctness standard at some point, then presumably the reasoning in *Rogers Communications*[32] should apply to rebut the

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[29] *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010) at 2589 (unanimous decision, citing for this principle, the Court's prior decision in *Leocal v. Ashcroft*, 543 U. S. 1 (2004) at 11, fn. 8).
[30] *IRPA,* s.64(2).
[31] *Pham*, *supra* note 7.
[32] *Rogers*, *supra* note 11.

presumption of reasonableness. As the Court said in *SODRAC*:

> This Court has established that there is a presumption that the decisions of administrative bodies should receive deference when interpreting or applying their home statute. However, because of the "unusual statutory scheme under which the Board and the court may each have to consider the same legal question [under the *Copyright Act*] at first instance", the presumption is rebutted here: [*Rogers Communications*]. Thus, a standard of correctness applies to this issue.[33]

43. Because the Court will have to address this very question of statutory interpretation on a correctness standard when reviewing the IAD's jurisdiction, it ought to be addressed on a correctness standard now, for the reasons set out in *SODRAC*.

vi. Implied Reasons

44. In a series of decisions since *Dunsmuir*,[34] this Court has indicated that reviewing Courts should defer to administrative tribunals interpreting their "home statute". *Newfoundland Nurses*[35] reminded reviewing Courts that deficiency of reasons are not a standalone ground to overturn a decision, and one should seek to supplement reasons before subverting them. In *Alberta Teachers*, the Court affirmed this approach to implied reasons, with an important caveat:

> The direction that courts are to give respectful attention to the reasons "which could be offered in support of a decision" is **not a "carte blanche to reformulate a tribunal's decision** in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result" [...]. Moreover, this direction **should not "be taken as diluting the importance of giving proper reasons for an administrative decision"** [...]. On the contrary, **deference under the reasonableness standard is best given effect when administrative decision makers provide intelligible and transparent justification for their decisions**, and when courts ground their review of the decision in the reasons provided.[36]

45. Unlike *Alberta Teachers*, which dealt with a question that was raised for the first time on judicial review, in the present case the questions at issue were squarely before the officer.

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[33] *Canadian Broadcasting Corp. v. SODRAC 2003 Inc*., 2015 SCC 57 at para 35.
[34] *Dunsmuir, supra* note 10.
[35] *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 2 SCR 708, 2011 SCC 62.
[36] *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at para 54.

Not only did the officer not write reasons, he explicitly set out his view that addressing the legal arguments was not within the scope of his duties:

> I have reviewed counsel's submissions carefully and thoroughly, and given thought to each relevant point. Many are legal arguments that do not fall into the scope of my duties in this matter.[37]

46. The legal arguments in question related to the two issues of statutory interpretation which are now before this Court. In this context, it is difficult to understand how a reviewing Court is to defer to implied reasons on the interpretation of law when it is evident the officer has declined to interpret the law. The commentary from Professor Daly on this issue is compelling:

> Given the issues at stake, the absence of a detailed interpretation in the delegate's decision is a significant shortcoming. [...] While I am comfortable with the proposition that deference should be given to decision-makers on the application of statutory interpretations principles like the rule of lenity, it is surely stretching things too far to defer to them where they evidently have not even considered the principles at stake. [38]

47. The decision from the Court of Appeal makes it clear that the Court is uncomfortable with the approach it feels compelled to take given its interpretation of the jurisprudence of this Court, and is the subject of a plea for guidance from this Court.[39]

B. Conditional Sentence not a "Term of Imprisonment" under IRPA

48. The phrase "term of imprisonment" does not bear a uniform meaning within the *Criminal Code*, much less across all statutes. The term has been interpreted by this Court as not including CSOs when such an interpretation is justified by a contextual and purposive interpretation.

49. The *IRPA* uses the phrase "term of imprisonment" both in relation to inadmissibility and in the context of appeal rights to the Immigration Appeal Division.[40] A permanent resident or

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[37] Subsection 44(1) Decision of Officer Parsons, October 7, 2013, AR Vol. I, Tab 1, p. 1.
[38] Daly, *supra* note 9.
[39] FCA Decision, *supra* note 4 at paras 44-45.
[40] Unlike the Immigration Division, the IAD has equitable jurisdiction to assess humanitarian and compassionate factors, including the best interests of any children affected, before an ultimate decision is made on removal [*IRPA*, s.67]. The IAD also has the discretion to issue a stay of removal for a number of years on strict conditions, which if complied with will allow an applicant reprieve from removal [*IRPA*, s.68].

foreign national is inadmissible under s.36(1)(a) for "serious criminality" for:

> (a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;

50. The clause in 36(1)(a) uses the phrase "term of imprisonment" twice. The first reference, to a "maximum term of imprisonment of at least 10 years" clearly refers to the availability of lengthy penitentiary sentences, as CSOs are by definition less than two years in length.

51. In the vast majority of cases, the maximum penalty is sufficient for a finding of inadmissibility under s.36(1)(a), without considering the actual sentence. Whereas, under s.64(2), the maximum available penalty is not relevant to appeal rights. A person will not have a right of appeal if they are inadmissible for serious criminality in relation to an offence that was "punished in Canada by a term of imprisonment of at least six months". Consequently, the relevance of whether a CSO is a "term of imprisonment" will be in the context of appeal rights.

52. Under s.64(2), a person will not have a right of appeal if they are inadmissible for serious criminality in relation to an offence "punished in Canada by a term of imprisonment of at least six months."[41] The maximum available penalty is not relevant to appeal rights.

i. Conditional Sentences not always a "term of imprisonment"

53. Although on the face of s.742.1 of the *Criminal Code*, it might appear that a CSO is a "term of imprisonment", starting in *Proulx* this Court has advocated a purposive interpretation with respect to issues surrounding CSOs and use of the word "imprisonment" specifically so as to "avoid the pitfalls of the literal interpretation."[42] The Court concluded in *Proulx*:

> [T]he word 'imprisonment' in s. 718.2(e) should be interpreted as 'incarceration' rather than in its technical sense of encompassing both incarceration and a conditional sentence.[43]

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[41] The two thresholds are slightly different, that under s.36(1) "more than six months" applying only to sentences greater than six months, while s.64(2) "at least six months" presumably applies to any sentence greater than six months less a day.

[42] *R. v. Proulx*, 2000 SCC 5 at para 61 [*Proulx*].

[43] *Ibid* at para 95. This is even more evident with the passage of *An Act to amend the Criminal Code (conditional sentence of imprisonment)*, R.S.C. 2007, c. 12 and the *Safe Streets and Communities Act*, S.C. 2012, c. 1, which included a long list of offences for which the imposition of conditional sentence orders is precluded. Section 742.1

54. In *Middleton*, this Court cited numerous examples of provisions in the *Criminal Code* where a term of imprisonment could not include a CSO:

> Moreover, contrary to the appellant's submission, "imprisonment" in the phrases "sentence of imprisonment" and "term of imprisonment" does not bear a uniform meaning for all purposes of the *Criminal Code*. In several instances, these terms necessarily contemplate incarceration.[44]

55. The Court held there must be a "purposive and contextual" analysis of the specific provision in question in order to determine whether, in the circumstances, the term "necessarily refers to 'incarceration' — and not to conditional sentences served in the community."[45]

56. As highlighted by O'Reilly J. of the Federal Court in the case at bar, this is even more important when the provisions in question are outside the *Criminal Code*: "Obviously, then, if [a CSO] does not bear a uniform meaning throughout the *Criminal Code*, it cannot bear a uniform meaning across the whole of the federal statute book." [46]

57. A term cannot be interpreted in a vacuum and must be construed with regard to its associated terms and the immediate context in which it is used. In the words of this Court:

> The modern approach recognizes the important role that context must inevitably play when a court construes the written words of a statute. It is undoubted that words take their colour from their surroundings.[47]

58. Associated terms are often "…relied on to resolve ambiguity or limit the scope of the terms. Often the terms are restricted to the scope of their broadest common denominator."[48]

59. As will be seen in the following sections, both uses of "term of imprisonment" in *IRPA* are directly connected to defining "serious criminality" using a 6 month threshold. Both the concept of "serious criminality" and the temporal threshold provide strong contextual indicators that CSOs ought not to be treated the same as terms of incarceration.

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of the CCC is now very restrictive. It is difficult to reconcile this with the position of the Minister that the length of a CSO would, in another Act, continue to define "serious criminality".

[44] *R. v. Middleton*, 2009 SCC 21 at para 14.

[45] *Ibid.* at para 19.

[46] FC Decision, *supra* note 3 at para 9.

[47] *Marche v. Halifax Insurance Co.,* 2005 SCC 6 at para 64, [2005] 1 SCR 47 (quoting in part *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at para 27) [*Marche*].

[48] *Ibid* at para 68 (quoting R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002) at p 173).

ii. Conditional sentences are not indicative of "serious" criminality

60. In the context of *IRPA*, the length of a "term of imprisonment" is explicitly linked to serious criminality in both places the phrase is used. In s.36, a six month term of imprisonment is one of the criteria distinguishing criminality under 36(2) from "serious criminality" under s.36(1). Section 64(2) defines an even higher threshold of "serious criminality" for which there is no right of appeal on the basis of a six month term of imprisonment. Unlike the length of a term of incarceration, the imposition of a CSO is in no way an indicator of "serious criminality", in fact quite the opposite, as this Court said in *Proulx*: "The conditional sentence is a meaningful alternative to incarceration for <u>less serious</u> and <u>non-dangerous</u> offenders**.**"[49]

61. In *R. v. Knoblauch*, this Court engaged in a review of the legislative background and purpose of CSOs, and affirmed two points of relevance. First, CSOs are not meant to be equated as the equivalent of institutional sentences. Second, CSOs are specifically designed to separate the "less serious offenders" from the more serious ones:

> [T]he legislative history of the conditional sentencing provisions also suggests that Parliament intended that conditional sentences be non-institutional in nature and that supervision in the community was not meant to be equivalent to confinement in an institution. [...]
> It seems to me that such an approach would promote the protection of the public by seeking to separate the most serious offenders from the community while providing that less serious offenders can remain among other members of society. [...][50]

62. This analysis is even more apt following amendments restricting use of CSOs. In 2006, when then Bill C-9 was presented on second reading, the Parliamentary Secretary to the Minister made the government's view clear that "Conditional sentences were never intended for serious offences."[51] More recently, amendments further reduced the scope and severity of offences for which a CSO rather than a custodial sentence may be imposed.[52]

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[49] *Proulx, supra* note 42 at para 21. See also *R. v. Fice*, [2005] 1 SCR 742 at para 39; *R. v. Koenders*, 2007 BCCA 378 at para 42 (speaking specifically of marijuana offences).
[50] *R. v. Knoblauch*, 2000 SCC 58 at para 102.
[51] Honourable Rob Moore (Parliamentary Secretary to the Minister of Justice and Attorney General of Canada, CPC), speaking on Bill C-9, An Act to amend the Criminal Code (conditional sentence of imprisonment). House of Commons (May 29, 2006).
[52] *Safe Streets and Communities Act*, S.C. 2012, c. 1.

iii. Conditional sentences longer than equivalent terms of incarceration

63. In *Proulx*, Lamer CJ engaged in a detailed comparison of CSOs and incarceration, concluding:

> [102] Incarceration will usually provide more denunciation than a conditional sentence, as a conditional sentence is generally a more lenient sentence than a jail term of equivalent duration. That said, a conditional sentence can still provide a significant amount of denunciation. This is particularly so when onerous conditions are imposed and the duration of the conditional sentence is extended beyond the duration of the jail sentence that would ordinarily have been imposed in the circumstances.[53]

64. This reasoning has been explicitly adopted and discussed by sentencing and appellate courts.[54]

65. The application of this principle in practice effectively illustrates the underlying issue in the case at bar, as highlighted in two sets of cases. The first set are cases where the Courts have rejected or overturned a jail term of six months or less and instead imposed a CSO significantly longer than six months as a result of *mitigating* factors.[55] The second set are cases in which a CSO longer than six months was rejected or overturned and a jail term of less than six months imposed due to *aggravating* factors.[56] A review of the cases cited shows that although the Court, the Crown and defence counsel did not necessarily agree on the appropriate sentence, all were invariably in agreement that the shorter jail sentences were more severe sentences than the longer CSOs.

66. Moreover, unlike jail sentences, CSOs of equivalent length are not necessarily of the same gravity. A five month CSO with very onerous conditions of house arrest might in effect be a more severe sentence than a seven or eight month CSO with a curfew allowing the offender to continue with employment and childcare activities. This flexibility is precisely what

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[53] *Proulx*, *supra* note 42 at para 102.
[54] See e.g. *R. v. Laliberte*, 2000 SKCA 27; *R. v. Stroshein*, 2001 SKCA 20; *R. v. Parsons*, 2000 ABPC 108 at para 22.
[55] *R. v. Shah*, 2003 BCCA 294 (reduction from 3 months jail to 12 month CSO); *R. v. Gan*, 2007 BCCA 59 (reduction from 90 days intermittent jail to 12 month CSO); *R. v. Saundercook-Menard*, 2009 ONCA 493 (reduction from 3 months jail sentence to 18 month CSO); *R. v. Chapman*, 2007 YKSC 55 (rejecting 4-5 months jail and imposing 12 month CSO due to mitigating factors); *R. v. Jacobson*, 2006 CanLII 12292 (ON CA) (reduction from 6 months jail to 18 month CSO).
[56] *R. v. Keller*, 2009 ABCA 418(increase from 18 month CSO to 90 day intermittent jail); *R. v. Weatherbie*, 1998 ABCA 88 (increase from 12 month CSO to 3 months jail); *R. v. Sandhu*, 2014 ONCJ 95(rejecting CSO imposing 90 days intermittent jail); *R. v. Kasakan*, 2006 SKCA 14 (lower court rejecting 9 month CSO and imposing 4 months jail – upheld); *R. v. Lebar*, 2010 ONCA 220(increase from CSO of 2 years less a day to 6 months jail).

makes CSOs a useful tool for the criminal courts. Seeking to artificially attribute meaning to a CSO crossing a six month threshold is not consistent with the practice in the criminal courts, in particular not at the time the Appellant was sentenced.

67. All of the examples cited would, for a permanent resident, result in inadmissibility and loss of appeal rights upon imposition of a lesser sentence, or conversely admissibility and the maintenance of appeal rights when more severe sentences are imposed. This is the very definition of absurd and inequitable results.

68. In the case at bar, the sentencing judge imposed a CSO on the Appellant because he found mitigating factors surrounding the conviction, including the relatively small scale of the operation, the limited role as a "caretaker", family and employment.[57] It would be a perverse application of the law and a miscarriage of justice to subject an individual to automatic deportation and loss of appeal rights for being found less culpable.

69. Treating CSOs as a term of imprisonment under *IRPA* would lead to a two-tier criminal sentencing system whereby permanent residents would be forced to request they be incarcerated in cases that would normally incur CSOs, so that the 6 month threshold is not triggered by a longer CSO. The criminal courts will be in the unenviable position of deciding whether a sentencing court could impose a more severe sentence in consideration of immigration consequences even if jail was not otherwise necessary, an issue not directly addressed by the Court in *Pham*.[58]

70. This is precisely the request the Appellant finds himself making to the British Columbia Court of Appeal in a sentence appeal filed after the decision from the Federal Court of Appeal in this matter.

iv. Presumption against absurdity

71. The Court of Appeal acknowledged the absurdity of treating CSOs as terms of imprisonment under *IRPA* in clear terms:

> [W]hat I consider the most serious argument militating against the interpretation adopted by the Minister's delegate: the inconsistent consequences and even absurdity when one considers that the *IRPA* treats a conditional sentence of imprisonment of seven months more severely than a five months jail term.[59]

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[57] Reasons for Sentence re: Regina v Thanh Tam Tran, AR Vol. II, Tab 60, p. 75
[58] *Pham, supra* note 7.
[59] FCA Decision, *supra* note 4 at para 81.

72. For this reason, the Court of Appeal allowed that both interpretations may be reasonably open to decision-makers: "It is thus obviously open to the ID and the IAD to adopt another interpretation should they believe that it is warranted by the inconsistent consequences described above."[60] However, the Court of Appeal was willing to accept the absurd result as one "reasonable" interpretation, almost exclusively on the basis of the legislative record, which will be addressed below.

73. It is a long standing principle of statutory interpretation that Parliament does not intend absurd results.[61] Given the choice between two possible constructions of a term, a court must eschew the one that leads to absurdity. Notably, this Court in *Rizzo Shoes* included in the definition of what is absurd, interpretations that lead to inequitable, illogical, and unreasonable consequences.[62]

74. The principle has often been referred to as the "golden rule" of interpretation, as explained by Robertson J.A.:

> An interpretation which leads to an absurd result or manifest injustice undermines public confidence and respect in the judicial system. Thus, it is not difficult to understand why the literal rule of construction would, with the passage of time, be qualified by the "golden rule" which directs that the grammatical and ordinary sense of words need not be adhered to if their meaning leads to a "repugnance" or "inconsistency" with the rest of the instrument, or to an "absurdity": see Grey v. Pearson (1857), 10 E.R. 1216 (H.L.), at page 1234.[63]

75. Professor Sullivan has summarised these principles, concluding *inter alia*

> (2) Absurd consequences are not limited to logical contradictions or internal incoherence…they also include violations of widely accepted standards of justice and reasonableness.
> (3) Whenever possible, an interpretation that leads to absurd consequences is rejected in favour of one that avoids absurdity.

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[60] *Ibid* at para 87.
[61] *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 SCR 27at para 27 [*Rizzo Shoes*].
[62] *Ibid.*
[63] *Canada (Attorney General) v. Consolidated Canadian Contractors Inc.,* [1999] 1 FCR 209at para 27.

> (4) The greater the absurdity, the greater the departure from ordinary meaning that is tolerated.[64]

76. This Court has specifically applied these principles to the issue of whether the phrase "term of imprisonment" includes CSOs in a given statute, so as to mitigate "absurd results" and "avoid the pitfalls of the literal interpretation."[65]

77. In *Wust*, this Court affirmed the need to avoid disparate treatment of similarly situated individuals under the law.[66] Likewise, the Minister here would place the Immigration Board in the position of "delivering unequal treatment to similarly situated offenders"; in fact, the Board would be treating more serious offenders sentenced up to 6 months incarceration more leniently – allowing them appeal rights – than those offenders sentenced conditionally.

v. The legislative history provides little assistance

78. The Court of Appeal placed a great deal of emphasis on the legislative history surrounding subsequent amendments to s.64(2) finding that it was "particularly relevant in this case to assessing [...] the inconsistent consequences and even absurdity" resulting from treating CSOs as a term of imprisonment under s.36(1) *IRPA*.[67]

79. This Court has held *Hansard* evidence may be of limited use in determining the broad legislative intent of a particular statute, but rarely a particular provision of a statute or nuance therein. Sopinka J. cited Peter Hogg with approval on this issue in *R. v. Morgentaler*:

> Legislative history has usually been held inadmissible in Canada under ordinary rules of statutory interpretation. **But the interpretation of a particular provision of a statute is an entirely different process from the characterization of the entire statute for purposes of judicial review.** There seems to be no good reason why legislative history should not be resorted to for the latter purpose, and, despite some earlier authority to the contrary, it is now established that…even parliamentary debates are indeed admissible.[68]

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[64] Ruth Sullivan, *Sullivan on the Construction of Statutes,* 6th ed., Ontario, LexisNexis Canada Inc., 2014, p. 308, para 10.5. See also Pierre-André Côté, *Interprétation des lois*, 4e éd., Montréal, Les Éditions Thémis, 2009 at pp. 522-525.
[65] *Proulx*, *supra* note 42 at paras 92, 61.
[66] *R. v. Wust*, 2000 SCC 18 at paras 42-43.
[67] FCA Decision, *supra* note 4 at paras 81-86.
[68] *R. v. Morgentaler,* [1993] 3 S.C.R. 463 at 485, citing Peter W. Hogg, *Constitutional Law of Canada*, vol. 1, 3rd ed. (Supplemented). Scarborough, Ont.: Carswell, 1992 (loose-leaf), at pp.15-14, 15-15 [emphasis added].

80. In *Heywood*, this Court affirmed that legislative history could be used to show the general purpose of the legislation. The Court then went on to emphasize:

> Nonetheless there are persuasive reasons advanced which support the position that legislative history or debates are inadmissible as proof of legislative intent in statutory construction. Many of these same reasons are also put forward to demonstrate that such materials should be given little weight even in those cases where they are admitted.[69]

81. The note of caution was further emphasized in *Rizzo Shoes*: "Although the frailties of Hansard evidence are many, this Court has recognized that it can play a limited role in the interpretation of legislation."[70]

82. In the case at bar, the approach taken by the Court of Appeal was not problematic in establishing the apparent purpose of the provisions in question, to impose stricter immigration consequences on more serious criminals.[71] There is, however, no evidence Parliament intended for the legislation to treat less culpable offenders more stringently than more culpable offenders.

83. The statements relied upon by the Court of Appeal were almost exclusively statements by opposition members and independent witnesses made in committee. There is a substantive difference in relying on a statement from the Minister responsible for the legislation at issue regarding the intent of provisions they themselves draft or introduce on the House floor.[72] This is especially so if the Minister has directly addressed the ambiguity at issue.[73] In the case of Bill C-43, there was no statement on behalf of the government or even individual members who supported the legislation about an intention that CSOs be caught by the words "term of imprisonment".

84. It is a wholly different matter to place reliance as to legislative intent on statements of criticism, among many, that were made by opposition Members and fell on deaf ears in committee. In fact, the debates reveal that not once did the government members reference

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[69] *R. v. Heywood,* [1994] 3 S.C.R. 761 at 787-788.
[70] *Rizzo Shoes, supra* note 61 at para 35.
[71] FCA Decision, *supra* note 4 at para 84.
[72] *R. v. J.W.,* 2007 BCPC 55 at para 13 ("[w]hile parliamentary debates in general are of somewhat limited help in discerning legislative intent, statements by the responsible minister and parliamentary secretary may be of greater assistance.")
[73] In support of its reliance on the legislative history in the case at bar, the FCA cited *Canada 3000 Inc., Re; Inter-Canadian (1991) Inc. (Trustee of),* 2006 SCC 24 at paras 57-59, in which the Honourable Binnie J. noted statements on point made by the Minister of Transport at the time he personally introduced the *Civil Air Navigation Services Commercialization Act* (CANCSA).

CSOs or demonstrate an understanding that such sentences are issued for much longer durations of time than a comparable sentence of incarceration.

85. The Court below took particular note of the fact "Several discussions prompted the proposal of three distinct motions to expressly exclude [CSOs] from the provision, each of which was defeated." Yet, a closer examination of those three motions reveals the legislative history is of little assistance in determining the issue at bar. The amendment to *IRPA* in Clause 24 of Bill C-43 read as follows:

> 24. Subsection 64(2) of the Act is replaced by the following:
> (2) For the purpose of subsection (1), serious criminality must be with respect to a crime that was punished in Canada by a term of imprisonment of at least six months or that is described in paragraph 36(1)(b) or (c).[74]

86. The amendment had the impact of removing appeal rights from three groups of people. The first were those sentenced in Canada to terms of imprisonment of at least six months. The second are those described under s.36(1)(b), which includes anyone who has been convicted of a described offence overseas, regardless of the sentence imposed. The third, those described under s.36(1)(c) is arguably the broadest group which includes anyone whom there are reasonable grounds to believe committed an offence outside Canada for which the maximum penalty in Canada is 10 years or more, whether or not they were ever arrested, charged or convicted. The loss of appeal rights for the second and third groups were the subject of a great deal of debate and commentary before Parliament and in committee, and it is within this context that the three amendments must be understood.

87. The first amendment in committee moved by Member Jinny Sims[75] proposed that the last portion of Clause 24 be amended as follows:

> [term of imprison]ment of at least six months, other than a crime that was punished in Canada by a conditional sentence under section 742.1 of the Criminal Code.[76]

88. The second proposed amendment to the clause, moved by Member Kevin Lamoureux[77]

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[74] *Faster Removal of Foreign Criminals Act,* S.C. 2013, c. 16.
[75] House of Commons. Standing Committee on Citizenship and Immigration, Evidence, 41st Parl., 1st Sess., Meeting No. 64 (28 November 2012) at 2, 4 (Jinny Jogindera Sims (Newton-North Delta, NDP)).
[76] Minutes of the Standing Committee on Citizenship and Immigration, Meeting No. 64 (November 28, 2012).
[77] House of Commons. Standing Committee on Citizenship and Immigration, Evidence, 41st Parl., 1st Sess., Meeting No. 64 (28 November 2012) at 4, 7 (Kevin Lamoureux (Winnipeg North, Liberal)).

affected the same portion:

> [term of imprison]ment of at least six months that is not a conditional sentence and was not committed by a foreign national who proves by any means that he or she has habitually resided in Canada since the age of 13 or younger or has lawfully resided in Canada for more than 20 years.[78]

89. While both amendments refer to CSOs, this portion of the amendment is minimized by Member Sims who described it as "modest" .[79] The much more substantive aspect of both amendments is to maintain appeal rights for the second and third groups described above by removing the final portion of the clause: "or that is described in paragraph 36(1)(b) or (c)." The issue of foreign criminality had been the subject of significant controversy and these amendments removed it completely. These two amendments are therefore not a clear indication of the views of members of the committee on the CSO issue.

90. The Parliamentary secretary to the Minister of Immigration was the only government Member to speak to the amendment. He demonstrated a serious misunderstanding of the nature of the CSO issue, and appeared to connect it to parole:

> I think there is a little confusion around the fact that, while the timeframe from two years to six months is changing in terms of what would be considered the timeframe of a sentence you would receive for a serious crime, the Immigration and Refugee Protection Act is not changing. It's remaining consistent with what has always been there. **It doesn't include parole. The only thing that changes is the timeframe.** Perhaps we could have staff confirm that what I've said is correct.
> [...]
> **Ms. Jillan Sadek (Director, Case Review, Department of Citizenship and Immigration):**
> The definition of serious criminality is found in a different section of the Immigration and Refugee Protection Act, which is section 36. **It has not been affected by the amendment to subsection 64(2).** That definition remains the same and, actually, it doesn't necessarily require any time served in jail to meet the definition of serious criminality.[80]

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[78] *Supra* note 76.
[79] *Supra* note 75.
[80] House of Commons. Standing Committee on Citizenship and Immigration, Evidence, 41st Parl., 1st Sess., Meeting No. 64 (28 November 2012) at 1550 (Rick Dykstra (St. Catharines, Conservative)) [emphasis added].

91. Ms. Sadek's answer, although technically correct with respect to s.36 of *IRPA*, overlooked that while the definition of serious criminality had not changed *per se,* that the question of whether CSOs were captured in s.64(2) was arising for the first time as a result of the amendments. Prior to the amendments, 64(2) only applied to sentences of 2 years or more, by definition excluding CSOs which are only available on sentences up to 2 years less a day.

92. This issue is important to understanding the third amendment relied upon by the Court of Appeal, proposed by Senator Art Eggleton.[81] The motion contained six separate amendments to Bill C-43, one of which proposed removing clause 24 in its entirety. This was even more radical than the two proposals discussed above, as it sought to maintain the 2 year threshold for loss of appeal rights as well as the appeal rights on foreign criminality. There was no specific mention in the amendment of CSOs, as maintaining the 2 year threshold made the CSO issue irrelevant. While Senator Eggleton gave a statement in which he addressed a number of issues including CSOs,[82] in the brief discussion that followed no other senators made reference to CSOs or expressed views on the issue. All six parts of the motion were voted down as a whole.

93. Neither the Federal Court of Appeal nor the Respondent point to a single passage or statement in which the supporters of the legislation indicate an intention to include CSOs, much less any rational defence for doing so. In fact, there is not even a statement from the government members or experts that they concur with the interpretation put forward by the Members and witnesses who did raise the issue.

94. Even if one were to assume that Parliamentarians supporting the bill were conscious of the CSO issue but chose not to talk about it, the ultimate passage of the bill is just as reasonably understood assuming they were aware of the state of the criminal law in which the phrase "term of imprisonment" does not have uniform meaning. The strong presumption that the law would not be applied in an absurd fashion would make an amendment or clarification unnecessary, as the Courts could be relied upon to apply the approach in *Proulx* and *Middleton*.

C. Retrospective Application of Law

95. The Appellant was sentenced under s.7(2)(b) of the *CDSA* as it read at the time the offence was committed in 2011, providing for a maximum sentence of 7 years imprisonment. In November 2012, the section was amended to double the maximum applicable sentence for

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[81] Debates of the Senate, 41st Parl., 1st Sess., No.168 (30 May 2013) at 4081-4082 (Senator Art Eggleton).
[82] *Ibid.*

the production of marijuana from 7 to 14 years.

96. There is no question that the Appellant was never liable to imprisonment for more than 7 years. The question before the Court is whether s.36(1)(a) should be applied as if the offence had been committed at the time admissibility is assessed, and would therefore be subject to a maximum term of imprisonment of ten years or more.

97. The Minister's Delegate noted that the maximum sentence had increased, but otherwise did not engage in any analysis other than the bare assertion in the report under s.44(1) stating that "Section 7(1) of the [CDSA] is an indictable offence punishable by a maximum term of imprisonment of 14 years".[83]

98. The Federal Court determined that it was the punishment as at the time of conviction that informed s. 36(1)(a).[84]

99. The Court of Appeal determined that it was reasonable to assess s.36(1)(a) at the time of evaluating admissibility. The Court also agreed that the circumstances of the Appellant's case give rise to more than one reasonable interpretation of law:

> [52] I agree with the judge that the wording of paragraph 36(1)(a) itself could support an interpretation that the time one must assess whether an offence was punishable under the Act of Parliament by the maximum term set out in paragraph 36(1)(a) is at the time at which the person was convicted [...]
> [60] In view of the foregoing, and **although there may well be other defensible interpretations**, I cannot conclude that the interpretation adopted by the Minister's delegate is unreasonable […][85]

100. The criminal law is unequivocal on the issue of retroactivity of penal statutes. Section 11(*g*) of the *Charter* is clear that an individual can only be convicted under the laws in force at the time of the offence. Subject to the further benefit of the lesser punishment provided for in s.11(i), discussed next, it is a principle of fundamental justice under s.7 that an accused must be tried and punished under the law in force at the time the offence is committed.[86]

101. With respect to the retrospectivity of sentencing statutes, the criminal law gives the offender

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[83] CBSA Decision, AR Vol. I, Tab 1, p. 2.
[84] FC Decision, *supra* note 3 at para 20(at the time the Appellant was convicted, he was punishable under the version of s.7(1) of the *CDSA* that existed at the time of offence (2011); he was thus punishable by a maximum seven years of imprisonment, rather than the maximum sentence of fourteen years which was enacted in 2012 before sentencing).
[85] FCA Decision, *supra* note 4 at paras 51-52, 60 [emphasis added].
[86] *R. v. Gamble*, [1988] 2 S.C.R. 595.

the benefit of the lesser maximum sentence if the law changed since the date of the offence. This foundational principle is enshrined in s.11(i) of the *Charter*:

> 11. Any person charged with an offence has the right [...] (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.

102. Accordingly, the Appellant was convicted of a Canadian criminal offence punishable by a maximum possible sentence of 7 years. At no time was the Appellant's conduct "punishable" by 14 years imprisonment. The maximum possible sentence applicable to the Appellant's conviction has always been and remains 7 years.

103. There is only one reasonable interpretation of s. 36(1)(a): the relevant punishment is the one which the criminal court could apply. This meets expectations and creates a harmonious interpretation across Federal statutes. However, should the Federal Court of Appeal be correct that there are other reasonable interpretations, then genuine ambiguity exists which should be resolved in accordance with *Charter* values and the rule of lenity in favour of the Appellant.

i. Presumption against retrospectivity

104. A retrospective application of a statute has been described as one which "increases a party's liability for past conduct."[87] The British Columbia Court of Appeal, citing *Dreidger*: "A retrospective statute […] changes the law only for the future, but it looks to the past and attaches new prejudicial consequences to a completed transaction."[88] There is no question that the Minister's proposed interpretation is retrospective.

105. The interpretation proposed by the Minister violates the long-standing presumption against the retrospective or retroactive operation of statutes, unless expressly required by the language of the act.[89] It must be possible for individuals to know the law, such that the law is able to guide their actions.[90] Changes in law are presumed to be prospective as, absent clear statutory language, it is presumed that it was not the legislative intent to 'pull the rug out from under a person', to 'change the rules of the game', or to otherwise create new

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[87] *Landgraf v. USI Film Products*, 511 U.S. 244 (1994) at 280 [*Landgraf*], adopted in *British Columbia v. Imperial Tobacco Canada Ltd*., 2005 SCC 49 at para 71 [*Imperial Tobacco*].
[88] *Krangle (Guardian ad litem of) v. Brisco*, 2000 BCCA 147 at para 51.
[89] *Gustavson Drilling (1964) Ltd v Canada (Minister of National Revenue),* [1977] 1 SCR 271, 1975 CanLII 4 (SCC) at 279.
[90] See *R. K.R.J.,* 2016 SCC 31 at paras. 23, 25 [*K.R.J.*].

consequences for past actions. This Court has emphasized that, in addition to the wording of an act, the intention of Parliament must also be examined with respect to whether they had specifically and clearly accounted for any costs or unfairness associated with retrospective or retroactive effect.[91]

106. The presumption against the retrospective application of law flows from principles of fairness and the rule of law. As this Court recently stated in *R. v. K.R.J.*:

> [23] This constitutional aversion to retrospective criminal laws is in part motivated by the desire to safeguard the rule of law. As Lord Diplock put it, "acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it" […]
> [25] Relatedly, retrospective laws implicate fairness. "It is unfair to establish rules, invite people to rely on them, then change them in mid-stream, especially if the change results in negative consequences" [...].[92]

107. The Court pointed out "the concerns with retrospective laws are particularly potent in proceedings that are criminal, quasi-criminal, or in which a "true penal consequence" is at stake". In the case at bar, the Appellant faces deportation as a result of criminal conviction, a consequence this Court has explicitly directed sentencing courts to consider.[93]

108. The consequences of inadmissibility under s.37 of *IRPA* were described by this Court as a "penalty" in *B010*: "Obstructed or delayed access to the refugee process is a "penalty" within the meaning of art. 31(1) of the *Refugee Convention*."[94] The analysis is also pertinent in the context of s.36(1)(a), as a finding that someone has been convicted in Canada of an offence with a maximum penalty of 10 years or more leads to a finding of ineligibility under ss.101(1)(f) and 101(2)(a), obstructing or delaying access to refugee protection in a manner similar to that at issue in *B010*.

109. In any event, the presumption against retrospectivity is not concerned only with punishment or penal consequences. The principle has been applied in the immigration context[95] and

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[91] *Imperial Tobacco, supra* note 87 at para 71.
[92] *K.R.J., supra* note 90.
[93] *Pham, supra* note 7.
[94] *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58 at para 57.
[95] *Singh v. Canada (Citizenship and Immigration),* 2005 FCA 417 at para 33.

elsewhere outside the criminal context.[96]

110. In *Imperial Tobacco*[97] this Court determined that Parliament is required to have "clearly indicated any desired retroactive or retrospective effects" to "ensure that the legislature has turned its mind to such effects and "determined that the benefits of retroactivity [or retrospectivity] outweigh the potential for disruption or unfairness". When amending the *CDSA* in 2012, Parliament did not need to turn its mind to the retrospective application of a criminal statute, as such application is prohibited by ss. 7 and 11(i) of the *Charter*. There is no indication that the implications for the *IRPA* were considered by Parliament at the time, much less whether retrospective application would lead to unfairness. The absence of such consideration underscores the reasons for the presumption of prospectivity. If retrospectivity is to be implied through ambiguous language in associated statutes like *IRPA*, Parliament would need to consider broad retrospective implications whenever amending the criminal law.

111. If the position on retrospectivity taken by the Minister were correct, then upon the amendments to the *CDSA* being brought into force, a large number of permanent residents suddenly became inadmissible for convictions going back decades. A permanent resident convicted for marijuana production 25 years ago would suddenly go from having been admissible for many years to inadmissible.

112. There would also be various other retrospective effects of the amendment to the *CDSA* within *IRPA* for those with convictions like the Appellant's. Refugee claimants who had been found eligible could suddenly find themselves retrospectively ineligible and have their claim terminated.[98] Persons on stays of removal granted by the IAD could suddenly have stays automatically terminated by operation of law,[99] perhaps even if the IAD had already reconsidered the case and allowed the stay to continue.[100] If such wide-ranging

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[96] *Mackenzie v. Commissioner of Teachers' Pensions*, 1992 CanLII 229 (BC CA).

[97] *Imperial Tobacco, supra* note 87 at para 71. See also the discussion by the U.S. Supreme Court in *Landgraf, supra* note 87 at 280:

> When a case implicates a federal statute enacted after the events in suit, **the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach**. If Congress has done so, of course, there is no need to resort to judicial default rules. **When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i. e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed**. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result. [emphasis added]

[98] *IRPA,* ss. 101(1)(f), 101(2)(a), 104(1)(b).

[99] *IRPA,* s.68(4).

[100] *IRPA,* s.68(3).

retrospectivity were to be envisaged by Parliament, the language used would have been clear and unambiguous about the intended effect.

113. This is contrary to the need for finality in law, and would foreseeably constitute an abuse of process. Furthermore, such an outcome is not overcome by there possibly being "compelling reasons to not refer the person to the ID" as the Federal Court of Appeal suggested.[101] Discretionary relief does not prevent absurdity.

114. In the case at bar, the Appellant is among a class of individuals convicted under a Canadian criminal statute that provided for a maximum penalty of seven years. Because the provision is later changed, modified, repealed, or replaced does not *ex post facto* change the status of the individual. The individual remains convicted and sentenced under the same Canadian statute in force at the time the Court made its determination.

ii. Principles of statutory interpretation favour Appellant

115. As provided by E. Driedger, in "The Construction of Statutes": "Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[102]

116. This Court examined the purpose of the criminality provisions in *IRPA* in *Medovarski*, pointing out that one of the goals of the provisions was "emphasizing the obligation of permanent residents to behave lawfully while in Canada".[103] If the goal is to emphasize an obligation, one must be aware of the nature of the obligation and the consequences of failure to adhere to it[104]. The retrospective application of the legislation is inconsistent with that objective.

117. The harmonious application of the overall statutory scheme requires consideration of criminal law principles. Canadian criminal law is used as a point of reference in s.36(1)(a) of *IRPA,* which derives its meaning, in this case, from the *CDSA*. If the *CDSA* cannot be applied retrospectively and punishments under the *CDSA* are used to inform s.36(1)(a), the harmonious application of both laws requires consistency.[105] To interpret the *CDSA* at the

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[101] FCA Decision, *supra* note 4 at para 59.
[102] See e.g. *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at para 26 [*Bell ExpressVu*].
[103] *Medovarski v. Canada (Citizenship and Immigration),* 2005 SCC 51 at para 10.
[104] *K.R.J.*, *supra* note 90 at para 82.
[105] The Federal Court has repeatedly determined that the "reality of sentencing" is a relevant consideration in assessing inadmissibility under s.36(1)(a) of *IRPA*: *Canada (Citizenship and Immigration) v. Atwal*, 2004 FC 7 at para 13. See

time of assessing eligibility under s.36 of *IRPA* is to import a retrospective application of the *CDSA* that is inconsistent with the *Charter* and is unharmonious with the statutory scheme for assessing criminal consequences in Canada.

118. The grammatical sense of the provisions does not support a retrospective interpretation. The main clause in s.36(1) begins in the present tense with the words "*is inadmissible*". However, s.36(1)(a), by using the perfect gerund "*having been convicted*" unequivocally refers to a point in time preceding the inadmissibility. The adjective "*punishable*" does not inherently provide a temporal indicator, but its location in the subclause with the perfect gerund "*having been convicted*" provides clear temporal context.

119. The second portion of 36(1)(a) provides additional context. It is helpful to separate the disjunction in the clause to see the clear meaning:

> 36 (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for (a) having been convicted in Canada [...] of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;

120. The present perfect continuous "*has been imposed*" clearly indicates an imposition preceding the present "*is inadmissible*" in the main clause of s.36(1). More importantly, the subclause "*has been imposed*" only makes sense if the legislator is talking about the imposition of the sentence on the specific person concerned. If the Minister's interpretative approach to the first part of the clause were applied to the second part, then the section would refer to whether a sentence of six months has ever been imposed with respect to the offence, not the person. If that interpretation were applied, then the CSO issue set out above is moot as there is no doubt that a jail sentence of more than six months has been imposed at some time under s.7(2)(b) of the *CDSA*, just not on the Appellant.

121. The French version of the text confirms this interpretation. The use of the infinitive in the passive voice "*être déclaré coupable"* clearly refers to the completed action of a conviction by a criminal court in Canada. As in the English text, the adjective "*punissable*" does not provide an inherent temporal marker, but the same reasoning set out above applies in terms of context with respect to the first part of the subclause. The second part of the subclause "*(a) être déclaré coupable au Canada [...] d'une infraction à une loi fédérale pour laquelle*

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also *Canada (Citizenship and Immigration) v. Gomes*, 2005 FC 299 at para 18 and *Canada (Citizenship and Immigration) v. Smith*, 2004 FC 63 at para 8. While in the context of considering pre-trial detention, the importance of following the applicable criminal rules of interpretation remains. It is the scope of criminal law, the application of criminal law, that defines s.36(1)(a).

un emprisonnement de plus de six mois est infligé" is much less equivocal than the English version, and much more clearly refers to the sentence imposed on the person concerned, not any sentence that may have been imposed on others.

122. The Court of Appeal refers to s.33 of *IRPA* to support a retrospective interpretation. According to s.33 there is no temporal dimension to the assessment of facts. This is however limited by use of the past tense in s.36(1)(a): "*having been convicted*", requiring that the offence have already resulted in a conviction. It is important to underline that s.33 does not apply to questions of law. The conviction is a legal fact not in dispute, but s.33 is of little assistance in deciding whether today's criminal law should be retrospectively applied to that legal fact.

123. The Court of Appeal turns to the other parts of s.36 to search for a contextual reading that might support the interpretation "implicit" in the officer's decision. The sections in question are not, however, very helpful.

124. The Court first turned to ss. 36(1)(b) and (c), finding that in those subsections "it is clear the criteria is an objective one".[106] Even if one were to accept the interpretation given by the Court, there are inherent problems in the purported parallel with s.36(1)(a).

125. On the grammatical level, the sections dealing with foreign criminality use the present conditional "*would constitute*" in English and "*constituerait*" in French which are simply not contained in 36(1)(a) even though the legislator could have added them. The decision by Parliament not to include the words "*would constitute*" in 36(1)(a) in fact militates against the interpretation proposed by the Minister. While the use of the present conditional in ss.36(1)(b) and (c) might arguably assist in assessing the temporal context and application of the word "*punishable*" in those subsections, it is in the context of a conditional equivalency analysis, not in the context of the actual Canadian conviction which is the subject of 36(1)(a).

126. The grammatical divergence in the construction of the sections is consistent with the overall context of a fundamental divergence between the treatment foreign and domestic criminality under *IRPA*.[107] Section 36(1)(c) has no equivalent in relation to domestic criminality, which requires a conviction. There is a clear and unequivocal intention on the part of Parliament to treat foreign criminal activity differently than criminal activity in Canada. Turning to the

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[106] FCA Decision, *supra* note 4 at para 36, see also para. 53.
[107] The distinction is notable in s.64(2) which bars appeals with respect to any foreign criminality under s.36(1)(b) and (c), while maintaining appeal rights in relation to many domestic convictions under s.36(1)(a).

sections dealing with foreign criminality to interpret s.36(1)(a) is therefore not helpful.[108]

127. The Court of Appeal also turns to s.36(2)(a), which Gauthier J.A. reads in the context of s.36(3)(a) finding it to be "absolutely clear" the frame of reference is an objective one.[109] With respect, the analysis does not hold up to closer scrutiny. The words of s.36(2)(a) "*having been convicted of an offence under an Act of Parliament punishable by way of indictment*" provides no greater insight than the wording of s.36(1)(a). Section 36(3)(a) is of no assistance in this respect, as it simply deems hybrid offences to be indictable for the purposes of s.36(2). The timing of the analysis would only be relevant in cases where a strictly summary offence has subsequently become a hybrid or indictable offence. The section is far from being "absolutely clear" that it is intended to be retrospective in those circumstances. Moreover, the threshold for inadmissibility of foreign nationals and permanent residents being fundamentally different throughout the *IRPA* makes direct analogies between ss. 36(1) and 36(2) of questionable relevance in any event.

128. Similar cautions apply to the Court of Appeal's reliance on *Robertson,*[110] which the Court describes as the "other side of the coin" of the case at bar, in which an offence was serious when it was committed but became less serious over time. It should be underlined that in *Robertson*, the Court of Appeal was dealing with a section that had substantially different wording – in fact, it is not even clear on the face of the case whether the criminality in question was domestic or foreign. As pointed out by the Court of Appeal, reconciling the result in *Robertson* with that of the application judge in the case at bar would be consistent with the principle enshrined in s.11(i) of the *Charter* and the rule of lenity giving the benefit of the doubt to the individual, in particular when the legislator has been ambiguous. The principle is also set out in s.44(e) of the *Interpretation Act,*[111] which is explicitly applicable to penalties. As set out above, this Court in *B010* found inadmissibility to be a penalty in certain contexts.[112]

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[108] This is highlighted by the reference of the Court of Appeal to *Sanchez*, a case dealing with the application of Article 1F(b) of the *Refugee Convention*. Under Article 1F(b), only foreign criminality is relevant: FCA Decision, *supra* note 4 at paras. 24, 58.
[109] FCA Decision, *supra* note 4 at para 50.
[110] *Robertson v. Canada (Employment and Immigration)*, [1979] 1 F.C. 197.
[111] Section 44(e) of the *Interpretation Act* states: "(e) when any punishment, penalty or forfeiture is reduced or mitigated by the new enactment, the punishment, penalty or forfeiture if imposed or adjudged after the repeal shall be reduced or mitigated accordingly […]".
[112] See above para. 118.

iii. Where there is ambiguity, resolve in favour of *Charter* values

129. Even assuming, as the Federal Court of Appeal appears to have found, that there is a genuine ambiguity in the provision and that more than one reasonable interpretation is available, this Court has made it clear that *Charter* values can be used a tool of interpretation in such cases.[113] Section 36(1)(a) should therefore be interpreted in a manner consistent with the principles enshrined in ss. 7 and 11(i) of the *Charter*. *IRPA* explicitly directs that it be construed and applied in a manner consistent with the *Charter* in 3(3)(d). In providing the direction in 3(3)(d) the legislator is going beyond technical "compliance" with the *Charter*, which is implicit in every statute, but is directing that the statute be construed in a manner "consistent" with the *Charter*, or what this Court has referred to as *Charter* values.

130. Speaking for the majority in *Hills v. Attorney General,*[114] L'Heureux‑Dubé J. was clear: "I agree that the values embodied in the *Charter* must be given preference over an interpretation which would run contrary to them." Subsequently, Iacobucci J. explained that *Charter* values would generally only be applicable in cases of ambiguity:

> 62 Statutory enactments embody legislative will. They supplement, modify or supersede the common law… In this regard, although it is sometimes suggested that "it is appropriate for courts to prefer interpretations that tend to promote those [*Charter*] principles and values over interpretations that do not" (Sullivan, *supra*, at p. 325), it must be stressed that, to the extent this Court has recognized a "*Charter* values" interpretive principle, such principle can only receive application in circumstances of genuine ambiguity, i.e., **where a statutory provision is subject to differing, but equally plausible, interpretations**.[115]

131. The Federal Court of Appeal accepted that there were two reasonable interpretations for the word *punishable* in s.36(1)(a): (1) the Appellant's argument, that it is the criminal law applicable to the conviction which applies, and (2) the Minister's position, that it is the criminal law applicable at the time of assessing inadmissibility which applies.[116] If this is correct, genuine ambiguity exists, as s. 36(1)(a) is "subject to differing, but equally plausible, interpretations", and so the ambiguity should be resolved in conformity with *Charter* values.

132. While ss. 11(h) and 11(i) refer to criminal law, the values underlying these provisions are applicable when considering the effects of an amendment to criminal law impacting the

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[113] *Bell ExpressVu, supra* note 102.
[114] *Hills v. Canada (Attorney General),* [1988] 1 SCR 513, at para 93.
[115] *Bell ExpressVu, supra* note 102 at para 62 [emphasis added].
[116] FCA decision, *supra* note 4 at paras 51-52, 60.

IRPA. In such circumstances, the ambiguity in s.36(1)(a) should be resolved in favour of the *Charter* values unequivocally prohibiting retrospective applications of law, in particular those which have such fundamental implications for the lives of the individuals concerned.

D. Reasonableness of Referral

133. Prior to addressing the problems with the decision under review, it will be helpful to provide a more detailed history of the procedure leading to the decision.

134. In a letter dated June 4, 2013, the Appellant was given notice that an Enforcement Officer from the Canada Border Services Agency ("CBSA") was considering whether to seek a deportation order under s.36(1)(a).[117] Former counsel subsequently made submissions as to why such an order should not be pursued, including issues of statutory interpretation and his personal history and family circumstances.

135. On September 12, 2013 correspondence was sent to new counsel providing an opportunity to make further submissions given CBSA's position that appeal rights would be lost following recent amendments to *IRPA*.[118] The deadline for submissions was set for October 4, 2013.[119]

136. Also on September 12, 2013, CBSA sent communications to multiple police agencies requesting police reports relating to various incidents alleged to involve the Appellant. Neither the Appellant nor his counsel was copied on those communications.[120]

137. On September 13, 2013, counsel for the Appellant contacted CBSA and requested an extension of time in order for counsel to obtain a copy of the CBSA file through requests under the *Access to Information Act* filed on September 6, 2013. The Officer denied the request, indicating that CBSA would likely not be complying with the requirement under s.7 of that Act to disclose the file within 30 days and there was no "exceptional" reason to grant an extension.[121]

138. CBSA received a series of packages containing police reports from various agencies

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[117] Letter from Peter Kho, CBSA, to Thanh Tam Tran, AR Vol. III, Tab 53, p. 44.
[118] The "*Faster Removal of Foreign Criminals Act*" was enacted on June 19, 2013.
[119] Letter from Adam Parsons, CBSA to Thanh Tam Tran, September 12, 2013, AR Vol. 2 pp. 142-43
[120] Communication between CBSA and multiple police departments, AR, Vol. II, pp. 115-136
[121] E-mail thread between Adam Parsons, CBSA, and Aris Daghighian, Edelmann & Co. Law Offices, AR Vol. II, Tab 22, p. 112*ff*

including the Abbottsford Police Department (September 25, 2013)[122]; RCMP (September 25, 2013)[123]; Vancouver Police Department (September 30, 2013).[124] The communications from the various police forces each contain a direction that the information not be shared with the Appellant.

139. On October 4, 2013, the Appellant's counsel provided submissions related both to the admissibility and humanitarian factors to be considered in the case.

140. The Officer purported to consider equitable factors including the over 25 years the Appellant had been in Canada, his extensive family including five children in Canada and the situation he would face in Vietnam. The overwhelming factor for the Officer was the Appellant's criminal history, which brought the Officer to conclude he would re-offend.

141. A summary of the alleged criminal conduct is set out in the decision. It will be helpful to examine each allegation in the order and in the way described by the Officer. The portions in italics are taken directly from the decision:

    a) *"22 Aug 1996: Operation while impaired (Comox Valley RCMP File 95-3059) – Stayed."* The materials relating to this incident were purged.[125] .

    b) *"19 Aug 1998: Assault, criminal harassment, unlawfully in a dwelling home (Comox Valley RCMP File 98-83) - Stayed."* These materials were also purged.[126]

    c) *"13 Jan 2003: Utter threats (Comox Valley RCMP file 02-6563) - Stayed."* The police report was disclosed to CBSA, along with the court information.[127] There is no indication or inquiry why the charges were stayed, but the file does indicate that charges on 2002-6561 were not approved because "it comes down to oath versus oath", a strong indication that the Appellant had a contrary version of events.[128]

    d) *"28 Jun 2005: TRAN is Identified as a person of interest when he is found inside*

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[122] Letter from Abbotsford Police Dept to Adam Parsons, CBSA, AR Vol. II, Tab 17, pp. 100-105
[123] Cover letter from Burnaby RCMP to CBSA, AR Vol. II, Tab 18, p. 106
[124] Letter from Jeremy Lee, Vancouver Police Dept, to Adam Parsons, CBSA, with attached Occurrence Report, AR Vol. II, Tab 16, pp. 85-99
[125] Letter from B. McDonald, Comox Valley RCMP, to CBSA, AR Vol. II, Tab 23, p. 114.
[126] *Ibid.*
[127] Information and Report to Crown Counsel, AR Vol. III, Tab 61-62, pp. 92-95.
[128] Letter from B. McDonald, Comox Valley RCMP Detachment to CBSA, AR Vol. II, Tab 20, p. 110

a marihuana grow operation by Abbotsford (BC) Police Department." A report was received by CBSA and not disclosed to the Appellant[129], but provides no indication why the Appellant was a person of interest. Another police force mentions in passing that he was a "Subject of interest associated to a vehicle observed at the marijuana grow operation."[130]. There is no indication of how he was associated to the vehicle or why. More importantly, being associated to a vehicle is very different from being "*found inside a marihuana grow operation"* as the CBSA Officer finds in his decision. In fact, the police report specifically provides: "No subjects were located inside and there is no likelihood of convictions by charge based on the lack of evidence of control inside the residence."[131] Making a directly contrary finding was a serious mistake of fact by the CBSA officer.

e) *"26 Mar 2006; Operation while impaired (Lower Mainland Traffic Services – Port Mann Freeway Patrol)."* No information or report – it would appear a report was not received.[132]

f) *"17 Nov 2006: Utter threats (Vancouver Police Department File 2006-247063)."* Information provided to CBSA with direction not to disclose to the Appellant.[133]

g) *"xx xxx 2010: Drive while prohibited - Motor Vehicle Act (Maple Ridge RCMP file 10-29365)."* A fax from the RCMP with direction not to disclose to the Appellant makes a bare assertion that there was a "charge", but no indication of the circumstances or resolution.[134]

h) *"21 Jan 2012: Operation while Impaired (Burnaby RCMP file 12-3028) - Convicted - Vancouver Provincial Court file number 224796."* Police report and Court documents are available.[135]

i) *"18 Jan 2013: Production of a controlled substance (Burnaby RCMP file 11-12837) - Convicted - Vancouver Provincial Court file number 202703)."* This is

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[129] Letter from Abbotsford Police Dept. to Adam Parsons, CBSA, AR Vol. II, Tab 17, pp. 100-105.
[130] Letter from Alan Liang, CBSA to Records Division, RCMP Burnaby, AR Vol. III, Tab 57, p. 53.
[131] Letter from Abbotsford Police Dept. to Adam Parsons, CBSA, with attached Occurrence Report, AR Vol. II, Tab 17, p. 105.
[132] Documents Requested - Decision to Refer/Not to Refer to Admissibility Hearing, AR Vol. III, Tab 64, p. 100.
[133] Letter from Jeremy Lee, Vancouver Police Dept., to Adam Parsons, CBSA, with attached Occurrence Report, AR Vol. II, Tab 16, pp. 85-93.
[134] Facsimile Transmittal from OIC RCMP to Adam Parsons, CBSA, Vol. II, Tab 21, p. 111.
[135] Burnaby RCMP Narrative Text, AR. Vol. II, p. 108; Information, AR Vol. III, Tab 63, p. 96*ff.*

the index offence, for which there is substantial information.[136]

142. In summary, the only driving offence for which there was any evidence aside from the mere fact of an arrest or purported charge was the 2012 conviction. There is no information on the record about (a) and (e), and a bare assertion that there was a "charge" with respect to (g). There is in fact no confirmation there were arrests, or any indication of the reasons charges were not pursued. The officer makes findings as if the Appellant had committed all three offences.

143. The Officer cites, relies on, and draws bald conclusions from charges and police contact which never resulted in conviction. Specifically, the Officer lists nine police reports that mention the Appellant;[137] only two lead to convictions, the first for production of a controlled substance (marijuana) and the second for driving while impaired. The Appellant was charged on six other occasions and on one occasion was neither arrested nor charged.

144. The existence of a charge is insufficient to assess criminality or recidivism. Yet, the Officer treats the charges and arrests themselves with a great deal of significance as if they were dispositive proof of past criminal activity, concluding *inter alia*:

- "The evidence provided is that he has been involved in criminal activity in the past...."
- "TRAN has now been crime-free for a year and a half, his history shows that he tends to get arrested every couple of years."
- "Based on the little information before me**, I can only assume he will reoffend because he has done so in the past** [...]"[138]

145. The Appellant has never "reoffended" within the legal or colloquial meaning of the term unless one assumes he was guilty of the alleged offences. There were two unrelated convictions, with none before and none since. The conviction for driving while impaired, while relevant, is not a related offence to the production of marijuana plants.

146. An immigration official's reliance on a withdrawn criminal charge when assessing recidivism is improper. In *Veerasingam*, the Federal Court summarized the jurisprudence, concluding: "*I would conclude from the cases that there is a unanimous view that a*

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[136] Cover letter from Burnaby RCMP to CBSA, with attached Occurrence Report, AR Vol. III, Tab 56, pp. 51-73.
[137] CBSA Decision, AR Vol. I, Tab 1, p. 2.
[138] *Ibid*, p. 2-3.

withdrawn charge, in and of itself, may not be relied on." [139] Snider J. then set out the applicable test in determining whether immigration officials have erred in reliance on past charges and arrests:

> 1. Was the IAD relying on the charge to come to its conclusion or was it relying on evidence underlying the charge?
> 2. Is the evidence underlying the charge reliable and credible and, thus, sufficient to provide a foundation for a good-faith opinion that, having regard to all the circumstances of the case, the Applicant should be removed from Canada?
>
> If the IAD has relied on the charge to come to its decision or if the underlying evidence is not sufficient, the IAD has erred.[140]

147. The Federal Court has relied on *Veerasingam* in other cases including the one at bar, concluding further that, while underlying evidence may be relied upon, a charge without a conviction should not amount to a finding of guilt by an immigration official.[141] The Federal Court of Appeal also confirmed this analysis in *Sittampalam*:

> [50] The jurisprudence of this Court indicates that evidence surrounding withdrawn or dismissed charges can be taken into consideration at an immigration hearing. However, such charges cannot be used, in and of themselves, as evidence of an individual's criminality [...][142]

148. Turning to the test posed by Justice Snider, the Officer was required to clearly distinguish between the fact of the criminal charge and the evidence underlying that charge. In this case, the Officer admitted that he only reviewed the information surrounding "*half*" of the incidents; two sets of police records had been destroyed (1996 and 1998, (a) and (b) above) and one set had not been received by date of decision (2006, (e) above).[143] The Officer could not have relied upon the underlying evidence, as he did not have it, for three of the Appellant's six charges. Any reliance on these three charges was erroneous.

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[139] *Veerasingam v. Canada (Citizenship and Immigration)*, 2004 FC 1661 at paras 5-6 [*Veerasingam*]. See also *Thuraisingam v. Canada (Citizenship and Immigration)*, 2004 FC 607 at para 35 and *Kravchov v. Canada (Citizenship and Immigration)*, 2008 FC 101 at paras 18, 24. In *Veerasignam*, the decision maker relied on myriad actual convictions for violent offences amidst which reference was also briefly made to the circumstances of a single withdrawn charge. Yet, Justice Snider ultimately found this single reference was sufficient to undermine the decision as a whole (paras. 8-9).

[140] *Veerasingam, ibid* at para 6 [emphasis added].

[141] *Younis v. Canada (Citizenship and Immigration)*, 2008 FC 944 at para 55 [*Younis*].

[142] *Sittampalam v. Canada (Citizenship and Immigration),* 2006 FCA 326 at para 50.

[143] CBSA Decision, AR Vol. I, Tab 1, p. 2.

149. Turning to the second prong of the test from *Veerasingam*, the Officer was required to assess the credibility and reliability of the underlying evidence. This is critical, and the failure to have conducted this evaluation is fatal, as noted by the Federal Court in *Younis*:

> [56] Further, as noted above, the IAD's Decision is void of any discussion regarding the reliability and credibility of the Report to Crown Counsel. The absence of any analysis in this regard suggests that the IAD failed to turn its mind to whether the Report was reliable and credible. This omission constitutes an error of law. [144]

150. While the Officer states that the reports are "from credible and reliable sources" this is apparently because they are from the "6 police departments that have investigated Tran". There is no further assessment of the credibility and reliability of those materials.[145] If all that was needed was for a police officer to write a report, there would be no need for criminal courts. An explanation was needed as to what the police officers relied upon, the types of evidence within the police file,[146] and an assessment of why that evidence was credible and reliable. The Officer failed to perform this analysis, which, as found by Justice Russell found in *Younis*, is an error of law.

151. Importantly, the "police reports" were not disclosed to the Appellant, who was therefore prevented from commenting upon any details set forth in the police investigation. The Officer's evidence is one-sided. In considering the duty of fairness owed by Officers when assessing admissibility under s.44(1) of *IRPA*, the Federal Court provided in *Hernandez*: "I would think that the duty of fairness would require the immigration officer put to the interviewee any information he has that the interviewee would not reasonably be expected to have." [147]

152. The Federal Court has specifically contemplated an applicant's knowledge of convictions and charges in *Galvez Padilla*. In reviewing the issuance of a danger opinion, the Court

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[144] *Younis, supra* note 141 at para 56.

[145] CBSA Decision, AR Vol. I, Tab 1, p. 2.

[146] In *Muneeswarakumar v. Canada (Citizenship and Immigration)*, 2013 FC 80 at paras 23-24, the Court considered the evidence that could be reviewed by a Minister's Delegate in assessing a danger opinion. It determined that there was sufficient evidence in the police reports, because they contained the investigation report, interviews with witnesses, and polygraph evidence. Similarly, in *Bankole v. Canada (Citizenship and Immigration)*, 2011 FC 373 at paras 7, 46-48, an RCMP file was available detailing a charge that was not laid because the witnesses were overseas. The Court determined that the decision on admissibility was reasonable as the officer reviewed the evidence, including the factual findings made by the RCMP based on the evidence collected during their investigation.

[147] *Hernandez v. Canada (Citizenship and Immigration),* 2005 FC 429 at para 71.

provided:

> [56] Procedural fairness, however, goes beyond the obligation to ensure that the applicant is aware of the information that will be used in making a decision affecting him. **The fact that the applicant knows about the charge and conviction does not relieve the delegate of the duty of procedural fairness to ensure that all evidence to be relied upon is provided to the applicant for rebuttal prior to a decision being rendered**.[148]

153. The Minister cannot rely on the directions from the police forces in question to avoid the disclosure obligation when seeking and then considering information from those sources. If the Minister agrees to receive that information and then considers it, it must be disclosed. In the context of a statutory right to information or a summary of that information in the prison context, the Federal Court said of information from the RCMP and CSIS:

> In my view, the Correctional Service cannot avoid its obligations to inmates by means of an agreement with third parties. The Service's obligation to comply with subsection 27(2) is qualified only by subsection 27(3) and not by any contractual arrangements which the Correctional Service may make with other agencies[149].

154. Even when a person has been convicted, police notes are not evidence of the underlying facts of the offence:

> The report contains allegations as the officer recorded them upon investigating the complaint, not the findings of fact reached by the court that convicted the applicant and imposed sentence. Though the IAD could have referred to evidence or testimony to support an argument that on a balance of probabilities the police report likely characterized the underlying facts of the offence in an accurate manner, the IAD did not do so.[150]

155. It is submitted that under both branches of the assessment from *Veerasingam* the Officer's decision fails. First he did not actually have any evidentiary basis beyond the mere fact of the Appellant being charged in 1996, 1998, and 2006 to rely upon. Second, the Officer failed

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[148] *Galvez Padilla v. Canada (Citizenship and Immigration),* 2013 FC 247 at para 56 [emphasis added].
[149] *Marachelian v. Canada (Attorney General)*, [2000] 1 F.C. 17 at para 26.
[150] *Rajagopal v. Canada (Public Safety and Emergency Preparedness)*, 2007 FC 523 at para 43. See also *Singh Dhadwar v. Canada (Public Safety and Emergency Preparedness)*, 2008 FC 482, where the Court provided:

> [29] [T]he police report does not record findings of fact, but rather allegations of fact following an investigation. In my view, it was not open to the Board to accept as fact the allegations contained in the police report without pointing to evidence or testimony to support an argument that on a balance of probabilities the police report characterizes the underlying facts in an accurate manner.

to set forth – of the remaining three charges and one interaction with police not resulting in a charge – the evidence contained within the police reports, and in so doing failed to evaluate why that evidence was credible and reliable. The mere existence of police reports is insufficient evidence of criminality, particularly where the Officer predicated the entire notion of a long criminal history solely on the existence of stayed charges and arrests which were never charged.

156. *Veerasingam* holds: "If the IAD has relied on the charge to come to its decision or **if the underlying evidence is not sufficient**, the IAD has erred."[151] In the immediate decision, the underlying evidence either does not exist or was not disclosed, therefore it cannot be sufficient and fails both the first and second prongs of the test.

157. In conclusion, the Appellant was denied procedural fairness and the Officer's decision is unreasonable.

PART IV: SUBMISSIONS AS TO COSTS

158. The Appellant does not seek costs and asks that no costs be awarded against him.

PART V: NATURE OF THE ORDER SOUGHT

The Appellant requests an order quashing the decision of the Officer and remitting the matter to a different delegate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Vancouver, British Columbia this 5th day of August, 2016.

Peter Edelmann
Aris Daghighian
Erin Roth
Garth Barriere

Solicitors for the Appellant

[151] *Veerasingam, supra* note 139 at para 6 [emphasis added].

PART VI: TABLE OF AUTHORITIES

DOCUMENT	PARAGRAPHS
LEGISLATION	
A second Act to implement certain provisions of the budget tabled in Parliament on February 11, 2014 and other measures, Bill C-43, section 24	83, 85, 92
Access to Information Act, RSC 1985, c A-1, section 7	137
An Act to amend the Criminal Code (conditional sentence of imprisonment), R.S.C. 2007, c. 12	53, 62
The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11, sections 7, 11	100, 101, 103, 110, 117, 128, 129 - 132
Controlled Drugs and Substances Act, SC 1996, c. 19, section 7	6, 7, 95, 97, 98, 110, 111, 112, 117, 120
Criminal Code, RSC 1985, c C-46, sections 742-742.7	12, 48, 53, 54, 56, 87
Faster Removal of Foreign Criminals Act, S.C. 2013, c. 16	85,113
Immigration and Refugee Protection Act, SC 2001, c. 27, sections 33, 36, 37, 44, 64, 67, 68, 101	2, 8, 9, 11, 12, 14, 26, 36, 40 – 42, 49, 59, 60, 69, 71, 78, 85, 90, 91, 108, 110, 112, 116, 117, 122, 126, 127, 129, 132, 135, 151.
Interpretation Act, RSC 1985, c I-21, section 44	128
Safe Streets and Communities Act, S.C. 2012, c. 1	53, 62
JURISPRUDENCE	
Domestic Case law	

PART VII: STATUTORY PROVISIONS

Immigration and Refugee Protection Act, S.C. 2001, c. 27	**Loi sur l'immigration et la protection des réfugiés (L.C. 2001, ch. 27)**
Serious criminality	***Grande criminalité***
36. (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for	**36. (1)** Emportent interdiction de territoire pour grande criminalité les faits suivants :
(*a*) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;	*a*) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;
(*b*) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or	*b*) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;
(*c*) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.	*c*) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans.
...	…
Report on Inadmissibility	***Constat de l'interdiction de territoire***
44. (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the	**44.** (1) S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de territoire, l'agent

relevant facts, which report shall be transmitted to the Minister. (2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, [...]	peut établir un rapport circonstancié, qu'il transmet au ministre. (2) S'il estime le rapport bien fondé, le ministre peut déférer l'affaire à la Section de l'immigration pour enquête, sauf s'il s'agit d'un résident permanent interdit de territoire pour le seul motif qu'il n'a pas respecté l'obligation de résidence ou, dans les circonstances visées par les règlements, d'un étranger; il peut alors prendre une mesure de renvoi.
…	...
Loss of Status **Permanent resident** **46.** (1) A person loses permanent resident status (*a*) when they become a Canadian citizen; (*b*) on a final determination of a decision made outside of Canada that they have failed to comply with the residency obligation under section 28; (*c*) when a removal order made against them comes into force; or (*d*) on a final determination under section 109 to vacate a decision to allow their claim for refugee protection or a final determination under subsection 114(3) to vacate a decision to allow their application for protection.	***Perte du statut*** **Résident permanent** **46.** (1) Emportent perte du statut de résident permanent les faits suivants : *a*) l'obtention de la citoyenneté canadienne; *b*) la confirmation en dernier ressort du constat, hors du Canada, de manquement à l'obligation de résidence; *c*) la prise d'effet de la mesure de renvoi; *d*) l'annulation en dernier ressort de la décision ayant accueilli la demande d'asile ou celle d'accorder la demande de protection.
…	...
Right to appeal — removal order **63 (3)** A permanent resident or a protected person may appeal to the Immigration Appeal Division against a decision at an examination or admissibility hearing to make a removal order against them.	**Droit d'appel : mesure de renvoi** **63 (3)** Le résident permanent ou la personne protégée peut interjeter appel de la mesure de renvoi prise au contrôle ou à l'enquête. **Restriction du droit d'appel**

No appeal for inadmissibility **64**. **(1)** No appeal may be made to the Immigration Appeal Division by a foreign national or their sponsor or by a permanent resident if the foreign national or permanent resident has been found to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality.	**64. (1)** L'appel ne peut être interjeté par le résident permanent ou l'étranger qui est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux, grande criminalité ou criminalité organisée, ni par dans le cas de l'étranger, son répondant.
Serious criminality **(2)** For the purpose of subsection (1), serious criminality must be with respect to a crime that was punished in Canada by a term of imprisonment of at least two years.	**Grande criminalité** **(2)** L'interdiction de territoire pour grande criminalité vise l'infraction punie au Canada par un emprisonnement d'au moins deux ans.
Disposition **66.** After considering the appeal of a decision, the Immigration Appeal Division shall (*a*) allow the appeal in accordance with section 67; (*b*) stay the removal order in accordance with section 68; or (*c*) dismiss the appeal in accordance with section 69.	**Décision** **66.** Il est statué sur l'appel comme il suit : *a*) il y fait droit conformément à l'article 67; *b*) il est sursis à la mesure de renvoi conformément à l'article 68; *c*) il est rejeté conformément à l'article 69.
Appeal allowed **67. (1)** To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of, (*a*) the decision appealed is wrong in law or fact or mixed law and fact; (*b*) a principle of natural justice has not been observed; or (*c*) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient	**Fondement de l'appel** **67. (1)** Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé : *a*) la décision attaquée est erronée en droit, en fait ou en droit et en fait; *b*) il y a eu manquement à un principe de justice naturelle; *c*) sauf dans le cas de l'appel du ministre, il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les

humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.	autres circonstances de l'affaire, la prise de mesures spéciales.
Removal order stayed **68.** (1) To stay a removal order, the Immigration Appeal Division must be satisfied, taking into account the best interests of a child directly affected by the decision, that sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.	**Sursis** **68.** (1) Il est sursis à la mesure de renvoi sur preuve qu'il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.
Effect **(2)** Where the Immigration Appeal Division stays the removal order (*a*) it shall impose any condition that is prescribed and may impose any condition that it considers necessary; (*b*) all conditions imposed by the Immigration Division are cancelled; (*c*) it may vary or cancel any non-prescribed condition imposed under paragraph (*a*); and (*d*) it may cancel the stay, on application or on its own initiative.	**Effet** **(2)** La section impose les conditions prévues par règlement et celles qu'elle estime indiquées, celles imposées par la Section de l'immigration étant alors annulées; les conditions non réglementaires peuvent être modifiées ou levées; le sursis est révocable d'office ou sur demande.
Reconsideration **(3)** If the Immigration Appeal Division has stayed a removal order, it may at any time, on application or on its own initiative, reconsider the appeal under this Division.	**Suivi** **(3)** Par la suite, l'appel peut, sur demande ou d'office, être repris et il en est disposé au titre de la présente section.
Termination and cancellation **(4)** If the Immigration Appeal Division has stayed a removal order against a permanent resident or a foreign national who was found inadmissible on grounds of serious criminality or criminality, and they are convicted of another offence referred to in	**Classement et annulation** **(4)** Le sursis de la mesure de renvoi pour interdiction de territoire pour grande criminalité ou criminalité est révoqué de plein droit si le résident permanent ou l'étranger est reconnu coupable d'une autre infraction mentionnée au paragraphe 36(1), l'appel étant dès lors classé.

subsection 36(1), the stay is cancelled by operation of law and the appeal is terminated. **Dismissal** **69. (1)** The Immigration Appeal Division shall dismiss an appeal if it does not allow the appeal or stay the removal order, if any.	**Rejet de l'appel** **69. (1)** L'appel est rejeté s'il n'y est pas fait droit ou si le sursis n'est pas prononcé.
Immigration and Refugee Protection Regulations, SOR/2002-27 **Section 251** Conditions **251.** If the Immigration Appeal Division stays a removal order under paragraph 66(*b*) of the Act, that Division shall impose the following conditions on the person against whom the order was made: *(a)* to inform the Department and the Immigration Appeal Division in writing in advance of any change in the person's address; (*b*) to provide a copy of their passport or travel document to the Department or, if they do not hold a passport or travel document, to complete an application for a passport or a travel document and to provide the application to the Department; (*c*) to apply for an extension of the validity period of any passport or travel document before it expires, and to provide a copy of the extended passport or document to the Department; (*d*) to not commit any criminal offences;	**Règlement sur l'immigration et la protection des réfugiés (DORS/2002-227)** **La section 251** Conditions **251.** Si la Section d'appel de l'immigration sursoit à une mesure de renvoi au titre de l'alinéa 66*b*) de la Loi, elle impose les conditions suivantes à l'intéressé : *a*) informer le ministère et la Section d'appel de l'immigration par écrit et au préalable de tout changement d'adresse; *b*) fournir une copie de son passeport ou titre de voyage au ministère ou, à défaut, remplir une demande de passeport ou de titre de voyage et la fournir au ministère; *c*) demander la prolongation de la validité de tout passeport ou titre de voyage avant qu'il ne vienne à expiration, et en fournir subséquemment copie au ministère; *d*) ne pas commettre d'infraction criminelle;

(*e*) if they are charged with a criminal offence, to immediately report that fact in writing to the Department; and (*f*) if they are convicted of a criminal offence, to immediately report that fact in writing to the Department and the Division.	*e*) signaler au ministère, par écrit et sans délai, toute accusation criminelle portée contre lui; *f*) signaler au ministère et à la Section d'appel de l'immigration, par écrit et sans délai, toute condamnation au pénal prononcée contre lui.

Criminal Code (R.S.C., 1985, c. C-46)	**Code criminel, L.R.C. (1985), ch. C-46**
Imposing of conditional sentence **742.1** If a person is convicted of an offence and the court imposes a sentence of imprisonment of less than two years, the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the conditions imposed under section 742.3, if • (*a*) the court is satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2; • (*b*) the offence is not an offence punishable by a minimum term of imprisonment; • (*c*) the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 14 years or life; • (*d*) the offence is not a terrorism offence, or a criminal organization	**Octroi du sursis** **742.1** Le tribunal peut ordonner à toute personne qui a été déclarée coupable d'une infraction de purger sa peine dans la collectivité afin que sa conduite puisse être surveillée — sous réserve des conditions qui lui sont imposées en application de l'article 742.3 —, si elle a été condamnée à un emprisonnement de moins de deux ans et si les conditions suivantes sont réunies : • *a*) le tribunal est convaincu que la mesure ne met pas en danger la sécurité de la collectivité et est conforme à l'objectif essentiel et aux principes énoncés aux articles 718 à 718.2; • *b*) aucune peine minimale d'emprisonnement n'est prévue pour l'infraction; • *c*) il ne s'agit pas d'une infraction poursuivie par mise en accusation et passible d'une peine maximale d'emprisonnement de quatorze ans ou d'emprisonnement à perpétuité;

offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 10 years or more;
• (*e*) the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 10 years, that
  ○ (i) resulted in bodily harm,
  ○ (ii) involved the import, export, trafficking or production of drugs, or
  ○ (iii) involved the use of a weapon; and
• (*f*) the offence is not an offence, prosecuted by way of indictment, under any of the following provisions:
  ○ (i) section 144 (prison breach),
  ○ (ii) section 264 (criminal harassment),
  ○ (iii) section 271 (sexual assault),
  ○ (iv) section 279 (kidnapping),
  ○ (v) section 279.02 (trafficking in persons — material benefit),
  ○ (vi) section 281 (abduction of person under fourteen),
	• *d*) il ne s'agit pas d'une infraction de terrorisme ni d'une infraction d'organisation criminelle poursuivies par mise en accusation et passibles d'une peine maximale d'emprisonnement de dix ans ou plus;
	• *e*) il ne s'agit pas d'une infraction poursuivie par mise en accusation et passible d'une peine maximale d'emprisonnement de dix ans, et, selon le cas :
	  ○ (i) dont la perpétration entraîne des lésions corporelles,
	  ○ (ii) qui met en cause l'importation, l'exportation, le trafic ou la production de drogues,
	  ○ (iii) qui met en cause l'usage d'une arme;
	• *f*) il ne s'agit pas d'une infraction prévue à l'une ou l'autre des dispositions ci-après et poursuivie par mise en accusation :
	  ○ (i) l'article 144 (bris de prison),
	  ○ (ii) l'article 264 (harcèlement criminel),
	  ○ (iii) l'article 271 (agression sexuelle),
	  ○ (iv) l'article 279 (enlèvement),
	  ○ (v) l'article 279.02 (traite de personnes : tirer un avantage matériel),

○ (vii) section 333.1 (motor vehicle theft), ○ (viii) paragraph 334(*a*) (theft over $5000), ○ (ix) paragraph 348(1)(*e*) (breaking and entering a place other than a dwelling-house), ○ (x) section 349 (being unlawfully in a dwelling-house), and ○ (xi) section 435 (arson for fraudulent purpose).	○ (vi) l'article 281 (enlèvement d'une personne âgée de moins de quatorze ans), ○ (vii) l'article 333.1 (vol d'un véhicule à moteur), ○ (viii) l'alinéa 334*a*) (vol de plus de 5 000 $), ○ (ix) l'alinéa 348(1)*e*) (introduction par effraction dans un dessein criminel : endroit autre qu'une maison d'habitation), ○ (x) l'article 349 (présence illégale dans une maison d'habitation), ○ (xi) l'article 435 (incendie criminel : intention frauduleuse).

Interpretations Act, RSC 1985, c I-21	**Loi sur l'immigration et la protection des réfugiés (L.C. 2001, ch. 27)**
Repeal and substitution	***Abrogation et remplacement***
44 Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefor,	**44** En cas d'abrogation et de remplacement, les règles suivantes s'appliquent :
(a) every person acting under the former enactment shall continue to act, as if appointed under the new enactment, until another person is appointed in the stead of that person;	**a)** les titulaires des postes pourvus sous le régime du texte antérieur restent en place comme s'ils avaient été nommés sous celui du nouveau texte, jusqu'à la nomination de leurs successeurs;

(b) every bond and security given by a person appointed under the former enactment remains in force, and all books, papers, forms and things made or used under the former enactment shall continue to be used as before the repeal in so far as they are consistent with the new enactment;	**b)** les cautions ou autres garanties fournies par le titulaire d'un poste pourvu sous le régime du texte antérieur gardent leur validité, l'application des mesures prises et l'utilisation des livres, imprimés ou autres documents employés conformément à ce texte se poursuivant, sauf incompatibilité avec le nouveau texte, comme avant l'abrogation;
(c) every proceeding taken under the former enactment shall be taken up and continued under and in conformity with the new enactment in so far as it may be done consistently with the new enactment;	**c)** les procédures engagées sous le régime du texte antérieur se poursuivent conformément au nouveau texte, dans la mesure de leur compatibilité avec celui-ci;
(d) the procedure established by the new enactment shall be followed as far as it can be adapted thereto **(i)** in the recovery or enforcement of fines, penalties and forfeitures imposed under the former enactment, **(ii)** in the enforcement of rights, existing or accruing under the former enactment, and **(iii)** in a proceeding in relation to matters that have happened before the repeal;	**d)** la procédure établie par le nouveau texte doit être suivie, dans la mesure où l'adaptation en est possible : (i) pour le recouvrement des amendes ou pénalités et l'exécution des confiscations imposées sous le régime du texte antérieur, (ii) pour l'exercice des droits acquis sous le régime du texte antérieur, (iii) dans toute affaire se rapportant à des faits survenus avant l'abrogation;
(e) when any punishment, penalty or forfeiture is reduced or mitigated by the new enactment, the punishment, penalty or forfeiture if imposed or adjudged after the repeal shall be reduced or mitigated accordingly;	**e)** les sanctions dont l'allégement est prévu par le nouveau texte sont, après l'abrogation, réduites en conséquence;
(f) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to	**f)** sauf dans la mesure où les deux textes diffèrent au fond, le nouveau texte n'est pas réputé de droit nouveau, sa teneur étant

operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;	censée constituer une refonte et une clarification des règles de droit du texte antérieur;
(g) all regulations made under the repealed enactment remain in force and are deemed to have been made under the new enactment, in so far as they are not inconsistent with the new enactment, until they are repealed or others made in their stead; and	**g)** les règlements d'application du texte antérieur demeurent en vigueur et sont réputés pris en application du nouveau texte, dans la mesure de leur compatibilité avec celui-ci, jusqu'à abrogation ou remplacement;
(h) any reference in an unrepealed enactment to the former enactment shall, with respect to a subsequent transaction, matter or thing, be read and construed as a reference to the provisions of the new enactment relating to the same subject-matter as the former enactment, but where there are no provisions in the new enactment relating to the same subject-matter, the former enactment shall be read as unrepealed in so far as is necessary to maintain or give effect to the unrepealed enactment.	**h)** le renvoi, dans un autre texte, au texte abrogé, à propos de faits ultérieurs, équivaut à un renvoi aux dispositions correspondantes du nouveau texte; toutefois, à défaut de telles dispositions, le texte abrogé est considéré comme étant encore en vigueur dans la mesure nécessaire pour donner effet à l'autre texte.