SCC File number: 39749

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

B E T W E E N:

THE CANADIAN COUNCIL FOR REFUGEES, AMNESTY INTERNATIONAL, THE CANADIAN COUNCIL OF CHURCHES, ABC, DE [BY HER LITIGATION GUARDIAN ABC], AND FG [BY HER LITIGATION GUARDIAN ABC], MOHAMMAD MAJD MAHER HOMSI, HALA MAHER HOMSI, KARAM MAHER HOMSI AND REDA YASSIN AL NAHASS and NEDIRA JEMAL MUSTEFA

Appellants
(Appellants)

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents
(Respondents)

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PART I – OVERVIEW AND STATEMENT OF FACTS

Overview

[1] Under international law, Canada is prohibited from "the direct or indirect removal of refugees to a territory where they run a risk of serious human rights violations."[1] As this Court recognized in *Singh*,[2] refugee claimants arriving in Canada have the corresponding rights under the *Charter* to be treated in accordance with the principles of fundamental justice.

[2] The legislation implementing the *Canada-U.S. Safe Third Country Agreement* ("*STCA*")[3] violates those rights. Under s. 101(1)(e) of the *Immigration and Refugee Protection Act* ("*IRPA*"), refugee claimants who arrive from a country designated as a "safe third country" are ineligible to seek refugee protection in Canada.[4] Canadian immigration officers at the border summarily return these claimants to the United States (US). The officers have no discretion in applying the provisions and do not consider whether US authorities will respect claimants' rights under international law.

[3] This legislative scheme effectively contracts out Canada's international obligations to refugee claimants based on the premise that the US will fulfill those obligations for us. While the Governor in Council ("GIC") is statutorily required to ensure that this premise remains valid through ongoing monitoring of US asylum policies and practices,[5] it has failed to do so. Indeed, since the provisions came into force, the Federal Court ("FC") has twice found that the scheme exposes refugees to a risk of *indirect refoulement*, violating their rights under the *Charter*.

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[1] *Németh v Canada (Minister of Justice)*, 2010 SCC 56 at para 19; *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) [*CAT*]; *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) [*Refugee Convention*].
[2] *Singh v Canada (Minister of Employment and Immigration)*, 1985 CanLII 65, [1985] 1 SCR 177; *Canadian Charter of Rights and Freedoms*, s 7, Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[3] *Agreement between the Government of Canada and the Government of the United States of American for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries*, 5 December 2002, [2004] Can TS No 2 [*STCA*]; *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], ss 101(1)(e), 102(1); *Immigration and Refugee Protection Regulations*, SOR/2002-227, as amended, s 159.3 [*IRPR*].
[4] *IRPA*, s 101(1)(e).
[5] *IRPA*, 102(3).

[4] In 2007, the FC ruled that the *STCA* regime violates ss. 7 and 15(1) of the *Charter* because claimants who had been in the US for more than one year and women survivors of domestic violence faced a risk of *refoulement* from the US.[6] In 2020, in the present case, the FC ruled that the regime violates the s. 7 *Charter* rights of refugee claimants returned to the US as a result of that country's immigration detention practices.[7]

[5] The Federal Court of Appeal ("FCA") reversed both decisions. Both times, it declined to engage with the substantive merits of the case and the legal implications of the prohibition on indirect *refoulement*.[8]

[6] In the judgment under appeal, the FCA erred not only in interfering with the findings of the FC, made on the basis of a thorough evidentiary record, but also in adopting an unprecedented and highly restrictive approach to *Charter* review. The effect of this judgment is to insulate, if not immunize, Canada's "safe third country" regime from review under the *Charter* and administrative law and to erect major obstacles to constitutional scrutiny of government action generally.

[7] This case is about the circumstances under which Canada can sustain a refugee transfer agreement with another state, in accordance with the international legal prohibition on indirect *refoulement* and international minimum standards for the detention of asylum seekers. In the case at bar, the GIC failed in its duty to ensure that refugees returned to the US under the *STCA* have access to effective protection in the US and did not respond to serious *Convention* violations for refugees transferred to the US. The result is that the regulation designating the US violates the *Charter* and is *ultra vires* its enabling legislation. Absent this Court's intervention, refugees will continue to be transferred to the US despite the real risk of *refoulement* from the US for some of them. Like the Appellant Nedira Mustefa, most are also transferred into the US immigration detention system, which is widely condemned for its serious violations of international minimum standards for the detention of asylum-seekers.

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[6] *Canadian Council for Refugees v R*, 2007 FC 1262 at paras 285, 333, 338 [*CCR 2007*].
[7] *Canadian Council for Refugees v Canada (Immigration, Refugees and Citizenship*), 2020 FC 770 at paras 138-140, 150 [*CCR 2020*].
[8] *Canadian Council for Refugees v Canada*, 2008 FCA 229 at paras 98-103 [*CCR 2008*]; *Canada (Citizenship and Immigration) v Canadian Council for Refugees*, 2021 FCA 72 at para 131 [*CCR 2021*].

FACTS

A. The *STCA* regime

[8] Under s. 101(1)(e) of *IRPA*, refugee claimants entering Canada from a "designated country" are ineligible to make claims for refugee protection in Canada. Section 102 authorizes the Governor in Council ("GIC") to designate countries for this purpose.

[9] Section 102(a) of *IRPA* requires that a designated country must be one that complies with the *non-refoulement* provisions under the *Refugee Convention* and the *Convention Against Torture* ("CAT"). In 2004, the US was designated as a safe third country under s. 159.3 of the *IRPR*. It remains the only designated country.

[10] Parliament recognized that conditions in the designated country will change over time. Section 102(3) requires the GIC to ensure ongoing review of the designated country's human rights record and its "policies and practices with respect to claims under the *Refugee Convention* and obligations under the *Convention Against Torture*" (factors set out at s. 102(2)) in order to assess ongoing compliance (s. 102(1)(a)). The purpose of s. 102(3) is to ensure that the GIC remains in a position to reconsider the designation "should the evolution of the factors so require."[9] However, the GIC delegated the review obligation to the Minister of Immigration, and has not received a report on the designation of the US as a "safe third country" since 2009.[10]

[11] Refugee claimants arriving at a Canadian land port of entry from the US are examined by Canada Border Services Agency ("CBSA") officers to determine their eligibility. Unless they meet one of the limited regulatory exemptions,[11] CBSA officers must find them ineligible under s. 101(1)(e) and issue a removal order. Officers are required to execute the removal orders and return

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[9] *CCR 2008* at para 92.

[10] Ex C to the Aff of Andre Baril (Appellants' Record, Vol II, Tab C: Appeal Book [hereinafter "AB"], Vol 37, p 15646).

[11] *STCA*, Article 2 (exemptions for US citizens); *IRPR*, s 159.2 (stateless habitual residents of the US); ss IRPR s 159.5(a)-(d) (exceptions for individuals with certain close family members in Canada); s 159.5(e) (unaccompanied minors); s 159.5(g) (individuals who require a visa for the US but do not require it for Canada); s 159.6 (individuals facing the death penalty).

the claimants to the US as soon as possible. This usually happens within hours.[12] CBSA provides claimants' information, including the fact that they attempted to make refugee claims in Canada, to US Customs and Border Protection (CBP).[13]

[12] Article 6 of the *STCA* contains a "public interest exception" that allows both parties to grant exemptions either to classes of claimants and or on an individualized basis. As detailed below, both the United Nations High Commissioner for Refugees ("UNHCR") and the House of Commons Standing Committee on Citizenship and Immigration recommended class exemptions that would address the protection gaps raised by this appeal, but the government did not implement them and did not grant CBSA officers any discretion for individualized exemptions.[14] While Canada has relied on Article 6 to create a regulatory exemption for individuals facing the death penalty, CBSA officers have no discretion to exempt refugee claimants based on risks of *refoulement* or detention upon return to the US.[15] Accordingly, CBSA officers at the border do not assess whether claimants have access to protection in the US or whether they will be detained.[16]

[13] Apart from the cases of the two Appellant families who obtained judicial stays of removal on the basis of this constitutional challenge, there is no evidence of other individuals having avoided removal to the US upon being found ineligible under s. 101(1)(e).

B. Conditions in the US asylum system

[14] This legislative scheme is premised on the "safe third country" fulfilling Canada's international obligations to prevent both direct and indirect *refoulement*.[17] However, the evidence

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[12] *IRPA*, s 48; Ex A to the 15 January 2019 CXE of Sharon Spicer (AB, Vol 42, p 17853-56); Aff of Anwen Hughes at paras 19-23 (AB, Vol 20, p 8543-44); Aff of Sharon Spicer at para 14 (AB, Vol 42, p 17790); Transcript of 15 January 2019 CXE of Sharon Spicer, Q 66, 69 (AB, Vol 42, p 17823-25).

[13] Ex A to the 15 January 2019 CXE of Sharon Spicer (AB, Vol 42, p 17853-55).

[14] Ex E, F and G to the Aff of Bruce A Scoffield (AB, Vol 35, p 15053-55, 15059, 15063-64, 15067, Vol 36 p. 15070-71)). See paras 67, 71.

[15] *IRPR*, s 159; Respondents' Further Memorandum of Argument for the FC at para 21 (AB, Vol 50, p 21457) [*RFM*]. The Respondents acknowledge: "a negative finding on eligibility cannot be avoided on the basis of risk considerations".

[16] *RFM* at para 21 (AB, Vol 50, p 21457).

[17] *Németh* at para 19; Aff of James C Hathaway at para 10 (AB, Vol 35, p 14919); *STCA*, Preamble; and see further UN High Commissioner for Refugees (UNHCR), *The Principle of Non-*

demonstrates that key aspects of US asylum law and practice are contrary to the *Refugee Convention* and other international human rights protections. Three of the major concerns involve:

a. **Detention:** Refugee claimants returned to the US under the *STCA* are subject to the immigration detention regime that applies in the interior of the US, which detains by default.[18] Most individuals who lack valid immigration status in the US are immediately detained upon their return under the *STCA*.[19] Those subject to a US removal order are detained without the possibility of release on bond.[20] Contrary to the UNHCR Detention Guidelines, US authorities are not required to justify the detention of an asylum seeker by reference to a legitimate purpose of immigration detention, and there is no automatic review of immigration detention.[21] Detainees must request a bond hearing before an Immigration Judge, and the detainee bears the burden to justify release.[22] Barring a change in circumstances, a detainee can only seek release once.[23] In the result, many remain detained throughout their asylum proceedings.[24] Asylum seekers are often detained in conditions that violate international standards, including solitary confinement;[25] inadequate and/or delayed medical care;[26] cold

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refoulement as a Norm of Customary International Law. *Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93*, 31 January 1994; Sir E. Lauterpacht and Daniel Bethlehem, "The scope and content of the principle of *non-refoulement*: Opinion" in Feller, E., V. Türk & F. Nicholson, eds, *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (New York: Cambridge University Press, 2003).

[18] Trans of CXE of Ruby Robinson, p 28, Q 92 (AB, Vol 33, p 13917).

[19] Aff of Anwen Hughes at paras 11, 19-23 (in AB, Vol 20, p 8541-44).

[20] Aff of Anwen Hughes at para 21 (in AB, Vol 20, p 8544).

[21] Aff of Anwen Hughes at paras 11, 14 (in AB, Vol 20, p 8541-42); Supp Aff of Anwen Hughes at para 27 (in AB, Vol 27, p 11116-17); Ex. 11 to 10 Jan 2019 CXE of André Baril (AB, Vol 38, p 16319).

[22] Aff. of Anwen Hughes at para. 13 (AB, Vol 20, p. 8542).

[23] Aff. of Anwen Hughes at para. 14 (AB, Vol 20, p. 8542).

[24] Aff of Deborah Anker at para 19 (in AB, Vol 17, p 7318); Aff of Ruby Robinson at para. 22 (AB, Vol 33, p. 13885); Aff of Anwen Hughes at paras 11-18 (in AB, Vol 20, p 8541-43);

[25] Aff of Ruby Robinson at para 18 (AB, Vol 33, pp. 13884-85); and e.g. Aff of PQ at paras 12-16 (AB, Vol 9, pp 3559-60).

[26] Ex C to the Aff. of Clara Long (AB, Vol 35, pp 14790-869); Aff of Christina Fialho at paras 7, 11-12 (AB, Vol. 34, pp 14628-30).

temperatures;[27] inadequate or religiously inappropriate food/water;[28] staggering rates of sexual assault;[29] and little or no time outdoors.[30] Detention often interferes with their ability to advance their claims for protection, most critically due to barriers to access to counsel in a system where obtaining asylum depends heavily on having counsel.[31]

b. **The one-year bar:** Apart from two limited and narrowly construed exceptions, asylum seekers in the US must make their claim within one year of arrival.[32] Those who fail to meet this one-year bar may apply for "withholding of removal" or relief under the *CAT*. However, to succeed they must show that they are "more likely than not" (i.e. more than 50% likely) to be persecuted or tortured, which is significantly higher than the standard applied in asylum claims.[33] As conceded by the Respondents' expert, Stephen Yale-Loehr, the one-year bar sanctions *refoulement* in contravention of the *Convention*.[34]

c. **Gender-based claims:** Women facing gender-based persecution are frequently denied protection in the US due to the restrictive US interpretation of the particular social group ("PSG") *Convention* ground, which is out of step with the long-standing recognition of

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[27] Aff of N. Mustefa at para. 37 (AB, Vol 15, pp. 6347-48).
[28] Aff of N. Mustefa at para 36 (AB, Vol 15, p 6347); Aff of PQ at para 17 (AB, Vol. 9, p 3560); Aff of Christina Fialho at paras 13-14 (in AB, Vol 34, p 14630).
[29] Aff of Christina Fialho para 8 (in AB, Vol 34, Tab 105, p 14628).
[30] Ex B29 to the Aff of Deborah Anker (AB, Vol 19, p 8168).
[31] Aff of Deborah Anker at para. 27 (in AB, Vol. 17, Tab 98, p. 7322); Aff of Anwen Hughes at paras 24-29 (in AB, Vol 20, Tab 100, p 8545-48); Supp Aff of Anwen Hughes at paras 3-12 (in AB, Vol 27, Tab 118, p 11109-13); Transcript of 25 January 2019 CXE of Stephen Yale-Loehr, Q 401-03 (in AB, Vol 48, Tab 186, p 20429-30).
[32] Transcript of 25 January 2019 CXE of Stephen Yale-Loehr, Q 655, 660-64 (in AB, Vol 48, p 20505, 20507-08); Aff of Deborah Anker, at para. 60 (in AB, Vol 17, p 7337); Aff of Jaya Ramji-Nogales, at para 9 (in AB, Vol 30, p 12752-53); Supp Affidavit of Karen Musalo, at paras 549-53 (in AB, Vol 28, p 11768-11770).
[33] Aff of Stephen Yale-Loehr at para 34, 35, 36, 41,98 (in AB, Vol 47, p 20089-91, 20093, 20123-24); Aff of Deborah Anker, at para. 65-67 (in AB, Vol 17, p 7340-41).
[34] Transcript of 25 January 2019 CXE of Stephen Yale-Loehr, Q 662-64, 690 (in AB, Vol 48, Tab 186, p 20507-08, 20516-17); Ex 10 to 10 January 2019 CXE of Andre Baril (AB, Vol 38, pp 16289-16290. See also CCR 2007 at paras 144-164; *Németh* at paras 99-102 and 115.

gender-based claims by Canada[35] and the UNHCR.[36] As Professor Karen Musalo, a leading expert in gender-based asylum claims, stated in this case: "Cumulatively, what the U.S. is doing is essentially putting women, in many cases, outside the refugee definition."[37] The evidence also shows that women are disproportionately impacted by the one-year bar[38] and detention.[39]

C. Litigation history

C1. Prior litigation

[15] The previous *STCA* challenge was brought by the public interest parties and a refugee claimant in the US who had not yet come to the border to seek Canada's protection. The FC found that the designation of the US as a "safe country" was *ultra vires* and contrary to ss. 7 and 15 of the *Charter*.[40] On appeal, the FCA left the FC's factual findings undisturbed but found that only an individual who had already been found ineligible pursuant to the *STCA* would have standing to bring the *Charter* challenge.[41] It quashed the FC's *vires* finding because the issue was not properly pled in the initiating notice, and because it found the issue of whether the US "actually" complied with the relevant *Conventions* was not open to judicial review.[42]

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[35] *Canada (Attorney General) v Ward*, 1993 CarswellNat 90 (SCC) at p. 739; *Narvaez v. Canada (Minister of Citizenship and Immigration)*, 1995 CarswellNat 104 (SCC), [1995] 2 FC 55; *Vidhani v. Canada (Minister of Citizenship and Immigration)*, [1995] 3 FC 601995 CarswellNat 680F (FC TD) at para. 12; Immigration Refugee Board, *Chairperson's Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution*, 13 November 1996.

[36] Ex 22 to the 22 August 2019 CXE of André Baril (AB, Vol 40, p 16972-74).

[37] Transcript of 30 November 2018 CXE of Karen Musalo, Q 84 (AB, Vol 28, p 11937-38); see also Q 21, 92, 198 (AB, Vol 28, p 11902-03, 11939-42 & Vol 29, p 11988); Aff of Karen Musalo at paras 6, 11-13, 16-17, 19 (AB, Vol 21, p 8964-68); Supp Aff of Karen Musalo at para 56 (AB, Vol 28, p 11770); Aff of James Hathaway at para 12(d) (AB, Vol 35, p 14920); Ex 22 to the 22 August 2019 CXE of André Baril (AB, Vol 40, p 16972-73); Applicants' Further Memorandum for the FC [*AFM*] at paras 38-40 (AB, Vol 50, p 21403-06).

[38] Aff of Deborah Anker at para 61-63, Vol 17, p. 7338-39; Supp Aff of Karen Musalo at para 45-54, Vol 28, p.11766-70; Transcript of 22 August 2019 CXE of Andre Baril, p. 16764-65. See also *CCR* 2007 at paras. 162-64.

[39] Aff of Karen Musalo at paras 32-33, Vol 21, p 8972-74; Aff of Katharina Obser at paras 10-17, Vol 23, p 9363-65; Aff of Anwen Hughes at para 27(a)-(b), Vol 20, p 8545-46.

[40] *CCR 2007* at paras 285, 333, 338.

[41] *CCR 2008* at paras 98-103.

[42] *CCR 2008* at paras 80-90.

[16] The current challenge, filed in 2017, responds to the issues raised by the FCA in 2008. The parties include several individuals already deemed ineligible under the *STCA* provisions. The Appellants also pled all of the *vires* issues in their initiating notices.[43]

C2. The parties

[17] The parties consist of eight refugee claimants from Syria, Ethiopia and El Salvador and three organizations with public interest standing, the Canadian Council for Refugees, Amnesty International and the Canadian Council of Churches.[44]

[18] ABC and her two young daughters fled gender-based violence by gangs in El Salvador. They were advised that they had little prospect of receiving protection in the US. They then approached the Canadian border to seek protection here in July 2017. ABC's husband was already in Canada and aware that they would be found ineligible under the *STCA* provisions. He retained counsel in advance of their arrival. In consultation with the Department of Justice, counsel arranged to initiate this litigation and to bring a stay motion, which was granted.[45]

[19] The Homsi family are Syrian citizens. They were afraid to remain in the US after the passage of Executive Order 13769, which declared "that the entry of nationals of Syria as refugees is detrimental to the interests of the United States."[46] They made refugee claims at the Canadian border in February 2017. After being found ineligible under the *STCA* provisions they managed, through a personal connection, to contact counsel in Canada, who obtained an emergency interim stay from the FC based on this *Charter* challenge.[47] Before the full stay motion could be heard and

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[43] Application for leave and judicial review IMM-2977-17 at paras 12(a) (AB, Vol 2 , p 522).
[44] Order for public interest standing (AB, Vol 1, p 71); Order for consolidation (AB, Vol 14, p 5776).
[45] Aff of ABC at para 8, 31-33 (AB, Vol 4, p 1514); Aff of ABC at para 31-32, Ex E, Ex F (AB, Vol 4, p 1575, 1605, 1608-11); Applicants' notice of motion for stay of removal (AB, Vol 3, p 841); Application for leave and judicial review IMM-2977-17(AB, Vol 2, p 519); Rule 9 IMM-2977 (AB, Vol 4, p 1547- 49); Order for stay and confidentiality granted, (AB, Vol 14, p 5672).
[46] Ex B3 to the Aff of Deborah Anker (AB, Vol 17, p 7364-69); Transcript of 11 December 2018 CXE of Reda Alnahhas, Q 158 (AB, Vol 14, p 5755); Aff of Reda Alnahhas paras 15-18 (AB, Vol 14, p 5711).
[47] Aff of Reda Alnahhas at paras 20-24 (AB, Vol 14, p 5711-12); Aff of Samira Remtulla at para 3 (AB, Vol 14, p 5864); Transcript of 11 December 2018 CXE of Reda Alnahhas, Q 194 (AB, Vol 14, p 5762); Applicants' request to the Federal Court for an interim stay of removal in IMM-516-17 (AB, Vol 14, p 5691); Interim stay of removal Order in IMM-516-17 (AB, Vol 14, p 5693).

in the midst of the public outcry over the US Executive Orders, the Minister intervened and issued Temporary Resident Permits ("TRPs") for them to enter Canada.[48]

[20] ABC and the Homsi family avoided the normal outcome of an ineligibility determination thanks to what the FC found were the "extraordinary" efforts of counsel not "generally…available" to most.[49] The more typical experience was that of 20-year-old Nedira Mustefa. She feared persecution in Ethiopia due to her Oromo ethnicity but expected to be barred from obtaining asylum in the US as she had been there for more than one year.[50] She made a refugee claim at the Canadian border in April 2017 and was found ineligible under the *STCA* provisions. She was returned to the US and immediately detained in conditions that the FC found "shock the conscience."[51]

C3. The record

[21] The Appellants led evidence from nine highly qualified refugee law experts, including Prof. James C. Hathaway, who provided detailed affidavits regarding, *inter alia*, international standards for "safe third country" regimes; widespread detention of asylum seekers in the US; the impact of detention on individuals' ability to pursue asylum claims; detention conditions; and the treatment of gender-based claims in the US.

[22] The record also contains detailed evidence from the Individual Appellants, from nine individuals ("the Anonymized Affiants") who were detained in the US following attempts to seek refugee protection in Canada,[52] and from five US attorneys who represent individuals returned to the US under the *STCA*.[53]

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[48] Rule 9 in IMM-775-17 (AB, Vol 1, pp 113, 139); *IRPA* s. 24(1).
[49] *CCR 2020* at para 130; and see *CCR 2021* at para 129.
[50] Aff of Nedira Jemal Mustefa at para 24 (AB, Vol 15, p 6343).
[51] *CCR 2020* at paras 95-96, 137. Aff of Nedira Jemal Mustefa at paras 33-43 (AB, p 6346-50); Transcript of 8 November 2018 CXE of Nedira Jemal Mustefa, Q 475 (AB, Vol 15, p 6484-85).
[52] *CCR 2020* at paras 30-32.
[53] Aff of Carol Anne Donohoe (AB, Vol 32, p 13728); Aff of Ryan Witmer (AB, Vol 32, p 13736); Aff of Timothy Warden-Hertz (AB, Vol 33, p 13805); Aff of Ruby Robinson (AB, Vol 33, p 13881); Aff of Ramon Irizarry (AB, Vol 33, p 14099).

[23] The record also contains extensive evidence on the government's implementation of its obligation to review the designation under 102(3), produced over the course of a 3-day cross examination and the Appellants' successful motion for production.[54] Some records were withheld or substantially redacted because the Respondents asserted cabinet confidence, international relations privilege, solicitor-client privilege and other public interest privileges.[55] The redacted records demonstrate that IRCC failed to reasonably monitor US compliance with the *Conventions* and that IRCC and the Minister unreasonably failed to report as required to the GIC.[56]

D. Reasons of the Federal Court and Federal Court of Appeal

[24] The FC struck *IRPA* s. 101(1)(e) and *IRPR* s. 159.3 as contrary to s. 7 of the *Charter*. It found that refugee claimants returned to the US are detained without consideration of their individual circumstances, often under harsh and inhumane conditions, with limited access to release. It further found that US detention conditions create serious obstacles to obtaining legal assistance and mounting an asylum claim, thereby putting detainees at risk of *refoulement.*[57]

[25] The FC found that some refugee claimants returned to the US face infringements of their s. 7 *Charter* rights to liberty and security of the person that have no connection to the legislative purpose, and that the regime is therefore overbroad.[58] It concluded that the effects on some individuals are grossly disproportionate to the legislative purpose.[59] Having declared the regime violates s. 7, the FC declined to consider s. 15 of the *Charter*.[60] The Court also found that it was bound by the FCA's 2008 decision that s. 159.3 of the *IRPR* is not *ultra vires.*[61]

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[54] *Canadian Council for Refugees v Canada (Immigration, Refugees and Citizenship),* 2019 FC 285. Aff and CXE of Andre Baril and exhibits thereto, (AB Vols 37-41).
[55] *Canada Evidence Act* (R.S.C., 1985, c. C-5), ss. 38 and 39; Excerpt of Respondent Pleadings in response to February 12, 2021 Direction (in Appellants' Record, Vol II, Tab B5, p 143); Ex 3 to the 22 August 2019 CXE of André Baril (AB, Vol 39, p 16638).
[56] See paras 108-121, below.
[57] *CCR 2020* at paras at paras 94-114.
[58] *CCR 2020* at para 115, 119-120
[59] *CCR 2020* at paras 131, 136-137.
[60] *CCR 2020* at para 154.
[61] *CCR 2020* at para 80.

[26] The Respondents appealed on ss. 7 and 1. The Appellants cross-appealed on s. 15 and *vires.*[62]

[27] Departing from the arguments of both parties and the FC judgment, the FCA (per Stratas JA) again refused to decide the *Charter* claims. Citing this Court's decision in *PHS,* the FCA found that the only permissible target for *Charter* review of the scheme was the GIC's monitoring of the US under s. 102(3), and then found that the record was "too incomplete" for adjudication of the issues as reframed.[63] In so finding, the Court declined to draw adverse inferences from the Respondent's refusal to disclose certain records because the claims of privilege had not been subject to "constant and firm objections".[64] The FCA then provided guidance for future s. 7 claims, asserting that the effects suffered by *STCA* claimants in the US cannot be considered under overbreadth and gross disproportionality analysis and that "shocks the conscience" is the only standard.[65]

[28] The FCA neither decided nor remitted the s. 15 issue, leaving it unresolved.[66] On *vires,* it endorsed its 2008 finding and declined to consider the issue further.[67]

PART II – ISSUES ON APPEAL

[29] The Appellants raise the following issues:

a. Whether the FCA erred in refusing to determine the constitutionality of the operative provisions;

b. Whether the combined effects of *IRPA* s. 101(1)(e) and s. 159.3 of the *IRPR* violate the s. 7 *Charter* rights of refugee claimants;

c. Whether the gender equality claim under s. 15 of the *Charter* must be adjudicated; and

d. Whether s. 159.3 of the *Regulations* is *ultra vires.*

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[62] *CCR 2021* at paras 8, 9.
[63] *CCR 2021* at paras 61-63, 68, 70, 76-83, 90, 107-122, citing *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44.
[64] *CCR 2021* at paras 111-112.
[65] *CCR 2021* at para 158.
[66] *CCR 2021* at paras 169-174.
[67] *CCR* 2021 at paras 176-179.

PART III – ARGUMENT

A. The FCA erred in refusing to assess the constitutionality of the operative provisions

[30] The FCA refused to assess the merits of the *Charter* challenge to the operative *STCA* provisions on the basis that the Appellants did not focus their *Charter* challenge on the failure of the GIC to reasonably conduct the s. 102(3) reviews. In doing so, the FCA adopted an unprecedented interpretation of this Court's judgment in *PHS* to justify shifting the focus from the effects of the designation to the process that could have enabled the GIC to review and revoke it.

[31] The FCA's refusal to assess the constitutionality of the operative provisions subverts the settled causation standard for *Charter* cases. The FCA restructured the framework for *Charter* analysis such that litigants can no longer challenge the law whose operation violated their rights, but instead must identify and challenge each of the administrative and legislative actions or inactions that *might* have worked as a "safety valve" to prevent the harm. This approach denies litigants an effective means of enforcing their *Charter* rights and must be rejected.

A1. The FCA erred in law in imposing a "real cause" standard and misapplying settled principles of causation

[32] The *Charter* protects against the harmful effects of laws, and s. 52(1) *Charter* remedies must lie where laws produce unconstitutional effects.[68] Accordingly, where there is a sufficient causal connection between the impugned provisions and the violation of *Charter* rights, causation is established even if there are other contributing causes.[69]

[33] Notwithstanding this Court's settled causation threshold, the FCA refused to decide the ss. 7 and 15 challenges to the operative provisions because it found the regulations are not the "real cause" of any *Charter* breach. The FCA found that the "real cause" is neither the designation itself (*IRPR* s. 159.3) nor the ineligibility based on the designation (under *IRPA* s. 101(1)(e)) that leads to the removal of claimants to the US; according to the FCA, the "real cause" is the administrative conduct underlying the GIC's failure to *revoke* the designation upon review under s. 102(3).[70] The

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[68] *R v Ferguson*, 2008 SCC 6 at paras 59-64; *Ontario (Attorney General) v G*, 2020 SCC 38 at para 40; *Reference re Same-Sex Marriage*, 2004 SCC 79 at para 40.
[69] *Canada (Attorney General) v. Bedford, 2013 SCC 72*, at paras 75-76; *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3, at para 54.
[70] *CCR 2021* at paras 55, 61-83, 90, 131, citing *PHS*.

FCA's novel "real cause" standard and its refusal to assess the constitutionality of the more proximate causes of the breaches – the operative provisions – are wrong in law.

[34] Undoubtedly, the 102(3) reviews have an important role to play: properly implemented and applied, the review should preclude the maintenance of a designation that exposes affected refugees to indirect *refoulement* and treatment inconsistent with the *Convention* (see further, Section D (*vires*) below); and could thus protect against *Charter* breaches. The GIC's failure to conduct a proper review has therefore allowed a *Charter*-violating regulation to stand. However, the fact remains that the law on the books (s. 159.3 *IRPR*) is the cause of the *Charter* breaches in issue and is therefore the proper object of *Charter* scrutiny and s. 52 relief.[71]

A2. The FCA erred in its expansion of *PHS* and in finding s. 102(3) is a safety valve

[35] Beyond its application of a novel "real cause" standard, the FCA also cited this Court's decision in *PHS* to find that *Charter* claims must be directed at the failure of mechanisms deemed to be "safety valves" in the legislation, rather than at the operative provisions themselves.[72] However, *PHS* does not support this proposition. This Court in *PHS* found that a Ministerial exemption mechanism in the *Controlled Drugs and Substances Act* acted "as a safety valve" to ensure that the impugned offence would not produce "arbitrary, overbroad or grossly disproportionate…effects" contrary to the principles of fundamental justice.[73] The FCA, by contrast, seized on *PHS* for something entirely different: it cited *PHS* to hold that the failure to attack the constitutionality of every potentially relevant provision in the legislative scheme is "fatal to the Claimant's challenge".[74] This is far beyond what this Court held in *PHS,* which at most is that "safety valves" may be relevant to the principles of fundamental justice analysis.

[36] The FCA also erred in characterizing GIC reviews under s. 102(3) as "safety valves" of the type identified by this Court in *PHS.* According to *PHS,* a "safety valve" is a statutory mechanism by which affected individuals can seek relief from the unconstitutional operation of a provision.[75] GIC reviews under s. 102(3), however, offer no such relief. Refugee claimants found ineligible at

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[71] *Ferguson* at para 65.
[72] *CCR 2021* at paras 61-75.
[73] *Controlled Drugs and Substances Act*, SC 1996, c 19; *PHS* at para 113.
[74] *CCR 2021* at para 63.
[75] *PHS* at para 114.

the border cannot apply to the GIC to review the *IRPR* s. 159.3 designation of the US in order to be relieved of their ineligibility and its foreseeable consequences, including detention in the US or *refoulement* from the US. Instead, the 102(3) reviews are a mechanism by which the GIC assesses the justification for maintaining or revoking the regulation *itself*.

[37] Further, this Court was able to grant a remedy for the *Charter* breaches in *PHS* by ordering the Minister to grant the exemption. It corrected the administrative action that produced the breach. On the FCA's reasoning, the (in)action that caused the breach at issue here, however, is the GIC's failure to revoke or amend the regulations. As recognized by the FCA, the only effective remedy would lie in a *mandamus* order requiring the GIC to *retroactively* repeal or amend the regulations.[76] Quite apart from the significant jurisdictional and doctrinal quagmires that this would raise (namely, re-writing the settled law of mandamus[77] and an unprecedented foray by the courts into the exercise of executive and legislative powers[78]), the Appellants reiterate that if the remedy lies only in amending or repealing a regulation that is producing unconstitutional effects, then it follows that the regulation itself must be the proper object of *Charter* scrutiny.[79]

[38] The FCA also erred in relying on *Little Sisters* for its finding that the s. 102(3) reviews are the only proper object of *Charter* scrutiny, thus misapplying the framework established in *Slaight*

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[76] *CCR 2021* at paras 96-97.

[77] See *Apotex Inc v Canada (Attorney General*), 1993 CarswellNat 820 (FCA) at para 55, [1994] 1 FC 742 (FCA), affirmed [1994] 3 SCR 1100 (SCC), which requires that the duty be owed to an applicant personally and a prior demand for its performance. The GIC's review obligation is not owed to any individual, and there is no mechanism for a claimant at the border to demand performance.

[78] See *Nelson (City) v Marchi*, 2021 SCC 41 at para 43*; Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43 at para 29; Halsbury's Laws of Canada (online), *Crown (2021 Reissue),* "Status and Structure of the Crown in Canada: Structure of the Crown: Cabinet" (I.4.(3)) at HCW-16 "The role of the Cabinet"; *Canada v South Yukon Forest Corporation*, 2012 FCA 165 at para 84, leave to appeal to SCC refused, 34946 (6 December 2012); *ATU, Local 1374 v Saskatchewan (Minister of Finance),* 2017 SKQB 152 at paras 46-49; *Brown v Newfoundland (Minister of Environment and Lands),* 993 CanLII 8447 (NL SC), 109 Nfld & PEIR 11 at para 11; *CUPE v Canada (Minister of Health),* 2004 FC 1334 at para 43 (cited in *Friends of the Earth v Canada (Governor in Council*), 2008 FC 1183 at para 40); *Mikisew Cree First Nation v Canada (Governor General in Council),* 2018 SCC 40 at paras 33-35.

[79] *Ferguson* at para 65.

Communications.[80] *Little Sisters* was about the unconstitutional misapplication by government agents of broadly drafted legislation. This case, however, is not about the misapplication of a discretion conferred by the regulation; here, the issue is with the regulation itself, which is being applied as intended.

[39] The FCA's approach has no basis in this Court's jurisprudence and fundamentally undermines the right to challenge unconstitutional legislation. Applying settled *Charter* principles, it is clear that the operative provisions breach section 7 and a remedy is required.

B. The combined effects of *IRPA* s. 101(1)(e) and s. 159.3 of the *IRPR* violate the s. 7 rights of refugee claimants

[40] As found by the FC, the operative *STCA* provisions infringe the rights to liberty and security of the person contrary to the principles of fundamental justice prohibiting overbreadth and gross disproportionality.

B1. The rights to security of the person and liberty are engaged

[41] The impugned provisions engage the s. 7 rights of refugee claimants at the border. This Court has established that "since the refugee claim determination process has the *potential* to deprive a *Convention* refugee of security of the person, the determination process must accord with the principles of fundamental justice".[81] It would be "unthinkable" to deny s. 7 protections given the rights and interests at stake.[82]

[42] Canada cannot avoid these constitutional obligations to refugee claimants by transferring them to a foreign state. At a minimum, just as the processes afforded to claimants in Canada must accord with the principles of fundamental justice, Canadian laws that purport to transfer responsibility for these processes to a foreign state must also accord with fundamental justice. The Respondents did not contest engagement on this ground in the courts below.

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[80] *CCR 2021* at paras 58, 84-89), citing *Little Sisters Book and Art Emporium v Canada (Minister of Justice),* 2000 SCC 69 at paras 133-139; *Slaight Communications Inc v Davidson,* 1989 CarswellNat 193 (SCC), [1989] 1 SCR 1038 at p 1080.
[81] *Dehghani v Canada (Minister of Employment and Immigration),* 1993 CarswellNat 1380 (SCC) [1993] 1 SCR 1053 at 1074-75.
[82] *Singh* at p 210. See also *United States v Burns*, 2001 SCC 7 at paras 59-60; *Suresh* at para 54.

[43] In addition, the FC properly found that *STCA* returnees face a risk of detention in the US. It found that "the actions of Canadian officials in returning ineligible *STCA* claimants to US authorities" meet the *Suresh* threshold for causation where the harm is suffered outside of Canada: the harm is "an entirely foreseeable consequence of Canada's participation".[83] While all *STCA* returnees are at risk of detention under US authorities' discretion to detain, those without status face an elevated risk, and those under a removal order *will* be detained.[84] The FC further found that the *STCA* regime engages the right to security of the person due to the conditions some returnees face in the US detention system.[85]

[44] The FC's findings were based on the extensive evidence discussed above at para 14, including: the Respondent's own witness' description of the processes at the border;[86] uncontradicted experts on the US detention regime;[87] the uncontradicted evidence of US lawyers who represent *STCA* returnees;[88] and the sworn evidence of several *STCA* returnees – including the Appellant Mustefa.[89]

[45] Contrary to the FCA's view, the FC's engagement analysis does not turn on its two references to "automatic" detention of *STCA* returnees.[90] The FCA ignored the FC's conclusion that s. 7 was engaged by the entirely foreseeable "risk of detention"[91]; and that for many, the risk is borne out. Whether or not the detention can be qualified as "automatic" was not determinative in the engagement analysis and does not amount to a palpable and overriding error.[92] The FC

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[83] *CCR 2020* at paras 93-116; *Suresh* at para 54.
[84] Aff of Anwen Hughes at paras 19-23 (AB, Vol 20, p 8543-44).
[85] *CCR 2020* at paras 93-116.
[86] *CCR 2020* at para 90, 101, citing Aff of Sharon Spicer (AB, Vol 42, p 17786).
[87] *CCR 2020* at paras 32, 99, citing Aff of Anwen Hughes at paras 11-23 (AB, Vol 20, p 8541-44).
[88] *CCR 2020* at paras 98-99, citing Transcript of 17 December 2018 CXE of Ruby Robinson, Q 92 (AB, Vol 33, p 13917); Transcript of 3 December 2018 CXE of Anwen Hughes, Q 367 (AB, Vol 27, p 11368-70); Aff of Carol Anne Donohoe at para 31 (AB, Vol 32, p 13733-34); Aff of Ramon Irizarry at para 8 (AB, Vol 33, p 14101); Aff of Ryan Witmer at para 3 (AB, Vol 32, p 13738).
[89] *CCR 2020* at paras 96-97, citing the anonymized affiants (AB, Vol 5-14).
[90] *CCR 2021* at para 133-140; *CCR 2020* at paras 103, 135.
[91] *CCR 2020* at para 138.
[92] *Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157 at paras 61-65, 70.

properly found a "sufficient causal connection" between the impugned law and the deprivation of liberty.[93]

[46] The FCA further erred by undermining the FC's finding on detention conditions with its assertion that "[a]ll that the Federal Court said here was that … there were 'related harms'".[94] In fact, the FC made detailed findings on these "related harms",[95] based on the uncontradicted evidence of detained *STCA* returnees and the lawyers who serve them. The detainees attested that their time in immigration detention was "like being a caged animal", and "hell on earth", a "nightmare" that "still haunts" them.[96] They reported, *inter alia*, separation from family; detention of toddlers; parents being prohibited from comforting their children; having to use toilets stationed in open rooms, or separated from the rest of the jail only by a glass window pane.[97] They described the obstacles to mounting their asylum claims from within detention. These individual reports were supplemented by countless published reports introduced by the experts making clear that US detention practices fall well below basic human rights standards and that detainees face a foreseeable risk of *refoulement* due to obstacles to mounting an effective asylum claim.[98]

B2. The deprivations are contrary to the principles of fundamental justice

[47] As argued in the preceding paragraphs, the *STCA* regime engages the rights to liberty and security of the person. The Appellants submit that these s. 7 infringements do not accord with the principles of fundamental justice because there is a foreseeable risk that the US will not discharge Canada's obligations to affected refugees. The impugned provisions are grossly disproportionate because the treatment of returnees in the US detention system falls well below international

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[93] *CCR 2020* at para 94; *Suresh* at paras 54-55; *Bedford* at paras 75-76; *Canada (Justice) v. Khadr, 2008 SCC 28, [2008] 2 SCR 125* at para 19.
[94] *CCR 2021* at para 153.
[95] *CCR 2020* at paras 95-99.
[96] Aff of H.I. at para 23 (in AB, Vol 5, p 1873); Aff of R.S. at para 48 (in AB, Vol 9, p 3641); Aff of V.W. at para 24 (in AB, Vol 11, p 4382); Aff of P.Q. at para 29 (in AB, Vol 9, p 3562).
[97] Aff of V.W. at paras 23, 38 (in AB, Vol 11, p 4382, 4384); Aff of X.Y. at para 18 (in AB, Vol 11, p 4727); Aff of Carol Anne Donohoe at paras 18-23 (in AB, Vol 32, p 13731-32); Aff of P.Q. at para 14 (in AB, Vol 9, p. 3559); Aff of V.W. at para 27 (in AB, Vol 11, p 4368).
[98] *CCR 2020* at 105-114; see further note 121, infra; Aff of Timothy Warden-Hertz at para 8 (AB, Vol 33, p 13807-08); See e.g. Aff of PQ at paras 12-17 (AB, Vol 9, p 3559-60); Ex C to the 30 August 2018 Aff of Clara Long (AB, Vol 35, p 14796-869); Aff of Christina Fialho at paras 7-9, 11-14 (AB, Vol 34, p 14628-30); Aff of Karen Musalo at para 32 (AB, Vol 21, p 8972-73); Aff of Nedira Mustefa at paras 36-37 (AB, Vol 15, p 6347-48).

standards and overbroad because they apply to refugees who will not have access to effective protection in the US.

B2a. The FCA erred by excluding the "actions of US Officials" from overbreadth and gross disproportionality and in finding that "shocks the conscience" is the only standard

[48] The Appellants maintain that, contrary to the judgment below,[99] the s. 7 deprivations in issue must be measured against the established principles of fundamental justice prohibiting overbreadth and gross disproportionality.

[49] The FCA erred when it determined that because returnees will "face treatment under the United States legal system and administration", Canadian courts will respond "only where they will suffer effects that are so deplorable they 'shock the conscience'" and the doctrines of overbreadth and gross disproportionality do not apply.[100]

[50] First, in the specific context of this case, Canadian courts are required to assess whether the treatment of *STCA* returnees in the US is consistent with Canada's international legal obligations to avoid indirect *refoulement* and to treat refugee claimants in conformity with the *Refugee Convention*. As the FC found, assessing the constitutionality of the impugned provisions requires assessment of the law's foreseeable effects, regardless of whether those effects are produced directly by Canada or by a foreign state. [101]The Appellants acknowledge that the third party here is a foreign state and that this is an important consideration. However, the FCA erred in concluding that the doctrines of comity and state sovereignty apply and act as bars to assessing the US in the context of the *STCA* regime.[102]

[51] Indeed, the *STCA* is explicitly premised on each country agreeing to meet its international legal obligation to provide effective protection, and the US agreed to be bound by those same

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[99] Though the FCA framed much of its s. 7 reasoning as "guidance [for] those advancing s. 7 claims in this area in the future," (*CCR 2021* at para 132) it is nevertheless part of a broad *ratio decidendi*, intended to be authoritative and binding. See *R v Henry*, 2005 SCC 76 at para 57.
[100] *CCR 2021* at paras 157-158, 161.
[101] *Suresh* at para 54; *Application under s. 83.28 of the Criminal Code (Re*), 2004 SCC 42 at paras 75-76; *Burns* at paras 59-60.
[102] *CCR 2021* at para 156.

standards in entering into the *STCA*.[103] The *IRPA* requires that a designated country comply with its *non-refoulement* obligations and have an acceptable human rights record.[104]

[52] Thus, unlike extradition, which is "founded on the concepts of reciprocity, comity and respect for differences in other jurisdictions,"[105] the transfers in this case are founded on a mutual agreement to ensure effective protection for refugees. While both parties have sovereign authority to implement those obligations in accordance with their domestic law, they have agreed to be bound by a common set of minimum standards.[106] Ensuring that those minimum standards are met when assessing the constitutionality of the Canadian law authorizing the transfer does not in any way offend US sovereignty or the doctrine of comity. As this court held in *Hape*, "deference [to the foreign state conduct] ends where clear violations of international law and fundamental human rights begin."[107]

[53] Further, there is no legal justification for adopting "shocks the conscience" as the *only* applicable principle of fundamental justice. The "shocks the conscience" standard *does not* displace the other principles of fundamental justice.[108] Rather, it was developed to structure administrative exercises of Ministerial discretion in individual cases to weigh the competing principles of fundamental justice favouring a deportation or extradition against an individual's rights.[109] Challenges to the underlying statutory provisions themselves have never been limited to this standard, and in both *Burns* and *Suresh*, this Court expressly held that all of the principles of fundamental justice remain applicable.[110]

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[103] *STCA*, Preamble (final clause).
[104] *IRPA*, s 102(2)(a).
[105] *Kindler v Canada (Minister of Justice)*, 1991 CarswellNat 3 (SCC) [1991] 2 SCR 779 at para 160.
[106] *STCA*, Preamble (final clause).
[107] *R v Hape*, 2007 SCC 26 at para 52, as cited in *Nevsun Resources Ltd. v Araya*, 2020 SCC 5 at para 50; and see further *Khadr* 2008 at para 26; *Canada (Prime Minister) v Khadr*, *2010 SCC 3*, [2010] 1 SCR 44 at para 16.
[108] *Burns* at para 68; *Suresh* at para 54.
[109] *Suresh* at para 27; *United States of America v Ferras*; *United States of America v Latty*, 2006 SCC 33 at para 27*ff*; *Burns* at para 66-69; *Lake v Canada (Minister of Justice)*, 2008 SCC 23 at paras 31-32; *Canada (Attorney General) v Barnaby*, 2015 SCC 31 at para 2.
[110] *Burns* at para 68; *Suresh* at para 54.

[54] Moreover, in *Németh*, the Court found that "shocks the conscience" could not be the only standard because the *Extradition Act* must *also* give effect to Canada's *non-refoulement* obligations when a refugee is sought for extradition."[111] This reasoning applies *a fortiori* to removals under the *IRPA*, which expressly implements the *Convention*'s prohibitions against both direct and indirect *refoulement*. Per *Németh*, restricting the standard to conduct that "shocks the conscience" is inconsistent with Canada's *non-refoulement* obligations.[112] It is well-established that Canada's international obligations must inform the content of fundamental justice under s.7.[113]

B2b. The scheme offends the doctrine against gross disproportionality and overbreadth

[55] The Appellants submit that the doctrines of overbreadth and gross disproportionality are applicable and provide the appropriate analytical framework. Their application does not, contrary to the judgment below, involve imposing Canadian constitutional standards on a foreign state. The principles require nothing more than ensuring that the *STCA* regime is not "inadequately connected to its objective" and does not "go too far in seeking to attain it".[114]

[56] The objective of the impugned provisions is *to share responsibility for the protection of refugees in accordance with Canada's international obligations*. Consistent with the direction of this Court, this formulation reflects the full statutory context of the provisions,[115] which in this case includes: (a) the requirements imposed under s. 102; (b) the objectives of *IRPA* toward refugees[116] and (c) the emphasis on the protection of refugees and compliance with international obligations in the *STCA* itself.[117] It strikes "the appropriate level of generality," between the broad "animating social values" of the *STCA* regime – which, according to Government statements, are the enhancement of the refugee protection system and restoration of public confidence in that

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[111] *Németh* at paras 73-77, 114.2.
[112] See note 17, *supra*.
[113] *Suresh* at para 46.
[114] *Bedford* at para 107.
[115] *R v Moriarity*, 2015 SCC 55 at para 31; *R v Safarzadeh-Markhali*, 2016 SCC 14 at para 31.
[116] *IRPA*, ss 3(2)(b)(d)(e), 3(3)(f).
[117] *STCA*, Preamble.

system—and the means adopted.[118] The FCA's articulation of the objective conflates the objective with the means by which the statute seeks to achieve it.[119]

B2c. Return to the US detention regime is a grossly disproportionate effect

[57] The harms suffered in the US immigration detention regime are grossly disproportionate to this objective. As this Court confirmed in *Bedford*, a grossly disproportionate law produces harms that are extreme and "totally out of sync" with its objective.[120] In the case at bar, the treatment of returned refugees falls well below international standards for the detention of asylum-seekers which (a) limit the circumstances in which asylum seekers can be detained; (b) require individualized assessments of the necessity to detain, and ongoing review of detention; (c) require that states minimize the use of criminal jails and ensure that asylum seekers are separated from the general prison population and (d) set minimum conditions for access to medical treatment, hygiene, counsel and family, and for religious observance.[121]

[58] The FC properly assessed the "foreseeable consequences" – the treatment awaiting *STCA* returnees in the US – against the objective. Based on its examination of the extensive evidence discussed above at para 14, the FC determined that the detention of some *STCA* returnees is a grossly disproportionate effect. It found that "imprisonment or the deleterious effects of cruel and unusual detention conditions, solitary confinement, and the risk of *refoulement*" are out of sync

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[118] Aff of Bruce A Scoffield, para 10-14 and Ex G, H, B8 (AB, Vol 36, pp 14987-14990, 15069, 15083, 15383); *STCA*, Preamble.

[119] *Moriarity* at para 28. In the context of its *vires* analysis, the FCA identified the objective as "the sharing of responsibility for the consideration of refugee claims with countries that are signatory to and comply with the relevant Articles of the Conventions and have an acceptable human rights record" (*CCR 2008* at para 75); and see *CCR 2020* at para 119; *CCR 2021* at para 164.

[120] *Bedford* at para 120.

[121] UNHCR Detention Guidelines, paras 14, 18, 21, 47, 48, 51 at Ex 11 to the 10 January CXE of Andre Baril (AB, Vol 38, p 16306 ff); Aff of James Hathaway, paras 12(h), 25 (AB, Vol 35, pp 14919, 14672); Ex B19 to the Aff of Deborah Anker (AB, Vol 18, p 7879 ff); Ex A.17 to the Supp Aff o Katharina Obser (AB, Vol 32, pp 13344 ff); Ex E to the Aff of Gloria Nafziger (AB, Vol 34, pp 14439 ff); Ex B and C to the Aff of Clara Long (AB Vol 35, pp 14676 ff and 14790 ff); Ex E to the Aff of Bruce Scofield (AB, Vol 35, p 15055); Ex 7 and 10 to the 10 January 2019 CXE of Andre Baril (AB, Vol 38, pp 16102-16110, 16284-16288); Ex 38 to the 22 August 2019 CXE of Andre Baril (AB, Vol 40, p 17276).

with the objective of responsibility sharing, and that to find otherwise would be "entirely outside the norms accepted in our free and democratic society." Indeed, the FC specifically found that the treatment experienced by the Appellant Mustefa upon return under the *STCA* – including being held in solitary confinement in a county jail, being transferred to the criminalized population in the jail, being given religiously prohibited food, suffering "freezing cold" temperatures and denied blankets during the day, and having no idea whether or when she would be released – was so grossly disproportionate that it would shock the conscience of Canadians.[122]

[59] The FCA failed to identify a palpable and overriding error in this finding and offered no justification for substituting its own appreciation of the evidence.

[60] The FCA also misapplied the test for gross disproportionality, stating that "the means chosen, ineligibility to the Refugee Protection Division for refugee claimants arriving from the United States, is not disproportionate with the objective of sharing responsibility".[123] It thus erred in assessing the *means* chosen to meet the legislative objective, rather than the rights violating *effects* of the law. It also erred, as set out above, in excluding from the gross disproportionality analysis any effects that returnees suffer in the US.

[61] Further, the FCA had no valid basis upon which to interfere with the evidentiary findings undergirding the FC's gross disproportionality conclusion. The FCA's statements that the FC erred in making "system-wide" inferences from "limited…individual incidents" and mere media reports,[124] and that it is "unclear whether all of the expert evidence on this point was critically assessed",[125] are inaccurate and fail to accord appellate deference. The FC's findings were supported not only by the sworn evidence of affected individuals, including the Appellant Mustefa, but also by expert evidence, and that of qualified observers, as *supplemented* by published reports demonstrating that the US regime falls well below international standards for the detention of asylum-seekers.[126]

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[122] *CCR 2020* at paras 136-137, citing *Bedford*.
[123] *CCR 2021* at para 168.
[124] *CCR 2021* at para 146.
[125] *CCR 2021* at para 149.
[126] See notes 18-31, *supra*.

B2d. The law is overbroad

[62] In addition, the provisions are unconstitutionally overbroad. *STCA* ineligibility applies broadly to *all* non-exempt claimants at the Canada-US border, including those who will not be treated in accordance with the *Conventions* under US law and policy. The law thus "goes too far by denying the rights of some individuals in a way that bears no relation to the object".[127]

[63] The *STCA* ineligibility provisions apply to groups of refugee claimants who will foreseeably not receive protection in the US, and so face indirect *refoulement* under the *STCA*. These include:

> (a) individuals barred from applying for asylum in the US under the one-year bar who face a serious risk of *refoulement* that they would not face in Canada;[128] and
>
> (b) women fleeing gender-based persecution who face a serious risk of *refoulement* that they would not face in Canada.[129]

[64] Applying this Court's guidance in *Carter*,[130] the FC also found overbreadth because the detention of *STCA* returnees under conditions that violate international standards, and prevent them from effectively presenting their claims bore no connection to the objective. [131]

[65] UNHCR raised precisely these concerns about overbreadth in its reviews of the draft Agreement and draft Regulations in 2002. The agency urged Canada to use the power under Article 6 of the *STCA* to create exceptions and allow discretion in cases where individuals faced a risk of *refoulement* from the US as a result of the one-year bar or gaps in protection for gender-based claims, and raised concerns about US detention practices.[132] As noted, a Parliamentary Standing Committee on Citizenship and Immigration echoed these calls in 2003.[133] Yet Canada maintained a blanket application of the law.[134] There are no exemptions for these classes of claimants. CBSA officers have no discretion. As the Respondents acknowledged,"a negative finding on eligibility

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[127] *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 85; *Bedford* at paras 101, 112-13.
[128] See para 14(b), above.
[129] See para (14c), above.
[130] *CCR 2020* at para 123.
[131] *CCR 2020* at paras 123, 131.
[132] Ex E, F to the Aff of Bruce A Scoffield (AB, Vol 35, p 15053-55, 15059, 15063-64, 15067).
[133] Ex G to the Aff of Bruce A Scofield, (AB, Vol 36, p 15070-71).
[134] *Ibid.*

cannot be avoided on the basis of risk considerations".[135] By contrast, European countries applying the E.U.-wide refugee-sharing agreement conduct individualized assessments to ensure the receiving state will treat individuals in accordance with the relevant *Conventions*.[136]

[66] The FCA's findings on overbreadth repeat the errors in its approach to gross disproportionality: it assessed only whether the *means* – ineligibility for a refugee hearing – are rationally connected to the objective,[137] and ignored the *actual effects* of being denied access to effective protection. It is these *effects* that have no rational connection to the objective and that render the provisions overbroad.

B2e. Discretionary remedies do not cure overbreadth or gross disproportionality

[67] The overbroad and grossly disproportionate effects cannot be cured by the "powers and discretions" cited by the FCA at paras 43-45, and relied upon by the Respondents in the Courts below. These powers include: stays of removal, administrative deferral of removal, temporary residence permits (TRP), and transfer to Immigration, Refugees and Citizenship Canada for a humanitarian exemption.

[68] First and foremost, McDonald J. found these "safeguards" to be "illusory" and "largely out of reach" for refugee claimants at the border in the minutes or hours between being found ineligible and removal to the US.[138] The Respondents acknowledge that these remedies are "not typically requested or initiated at the POE". In overturning this finding, the FCA mistook the FC as finding that these recourses were legally unavailable, whereas the FC clearly made a factual finding that they are practically inaccessible.[139] The FC finding of fact is dispositive and amply grounded in the law and in the record.

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[135] *RFM* at para 21 (AB, Vol 50, p 21457).
[136] Aff of James C. Hathaway at paras 10, 26 (AB, Vol 35, p 14919, p 14925); Ex B to the Aff of James C. Hathaway (AB, p 14969-14981); See also Ex 9 to the 10 January 2019 CXE of Andre Baril (AB, Vol 38, p 16225); and *Interamerican Commission on Human Rights,* Report No 78/11, Case 12.586, Merit John Doe et al v. Canada.
[137] *CCR 2021* at paras 163-166.
[138] *CCR 2020* at para 130.
[139] *CCR 2021* at paras 144, 168.

[69] Moreover, the powers cited by the FCA are not part of the *STCA* scheme: the powers derive from provisions in the *IRPA*, but are not among the legislative and regulatory provisions implementing the *STCA* ineligibility. Indeed, Canada intentionally excluded discretionary safety valves from the legislation. While the *STCA* itself has a provision for Canada and the US to exercise a public interest discretion to exempt "any refugee status claim",[140] Canada chose not to allow CBSA Officers to exercise that discretion, despite calls from the UNHCR and the House of Commons Standing Committee to do so.[141] Accordingly, the official instructions to the officers who implement the *STCA* make no mention of any of the powers cited by the FCA.[142] Unlike European safe third country agreements, the Canadian law and regulations implementing the *STCA* create a mandatory ineligibility without any individualized assessment of whether a claimant has access to protection in the US or whether they will be detained there.[143]

[70] The fact that some of the Appellants avoided summary removal by launching this litigation does not, contrary to the judgment below, demonstrate that there is a "safety valve" to prevent

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[140] *STCA*, Article 6.

[141] See note 14, *supra*.

[142] Any instruction to that effect is absent from officer guidelines on the application of the *STCA*. See Ex. A to the CXE of Sharon Spicer (AB, Vol. 42, Tab 177, pp. 17852-54); Ex. B to the CXE of Sharon Spicer (AB, Vol. 42, Tab 177); Ex. F to the CXE of Sharon Spicer (AB, Vol. 42, Tab 177). The only mechanism that is expressly cited in the guidance is judicial review, but barring a constitutional claim, a judicial review could only address an error in the application of an exception to the *STCA*, and wouldn't protect against risk in the US for otherwise ineligible claimants. Ex. F to the Aff. of Bruce Scoffield (AB, Vol. 35, Tab 165, p. 15067). The Appellants' own witness conceded that judicial reviews were rare. Trans. of CXE of Sharon Spicer, pp. 34-35, Q. 75 (AB, Vol. 42, Tab 177, pp. 17826-27). See also Ex. G and L to the Aff. of Bruce Scoffield (AB, Vol. 36, Tab 165, pp. 15073, 15199).

[143] *RFM* at para 21 (in AB, Vol 50, p 21457).

unconstitutional applications of the law in issue. Recourse to constitutional litigation is not a "safety valve".

[71] Finally, apart from the Homsi and ABC Appellants, the record does not contain a single example of a case where one of the proposed "safety valves" prevented a claimant from being returned under the *STCA*. The evidence in this case demonstrates the practical unavailability of these recourses. In addition to the fact that claimants at the border (who are almost always unrepresented and often not fluent in English or French) face removal to the US mere minutes or hours following a finding of ineligibility, the removal process provides them no opportunity to invoke the highly exceptional and discretionary recourses.[144]

[72] Ultimately, like the FCA's characterization of s. 102(3) as a "safety valve" discussed above, the argument that these powers cure a constitutional infirmity requires an unwarranted expansion of this Court's findings in *PHS*, where the safety valve provided an exemption from the impugned provision, as opposed to *ex post facto* relief against *some* of its effect. It likewise disregards this Court's well-settled case law which holds that the possibility of discretionary relief cannot cure a law with unconstitutional effects.[145]

B3. There is no s. 1 justification for the s. 7 breaches

[73] A law that violates s. 7 is "unlikely to be justified under s. 1."[146] The FC properly rejected the Respondents' central argument—the alleged unsustainability of the refugee system and

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[144] See FN 12, above and Aff of Sharon Spicer at para 14 (in AB, Vol 42, Tab 176, p 17790); Transcript of 15 January 2019 CXE of Sharon Spicer, Q 66, 69 (in AB, Vol 42, Tab 177, p 17823, 17824-25). Aff of PQ at para 7 (in AB, Vol 34, p 14334); Aff of XY at para 15 (in AB, Vol 34, p 14372); Aff of VW at para 20 (in AB, Vol 34, p 14366).

[145] *R v Smith*, 1987 CanLII 64 (SCC) [1987] 1 SCR 1045 at para 68; *R v Goltz*, 1991 CarswellBC 280 (SCC) [1991] 3 SCR 485 at paras 92-98; *Montréal (City) v 2952-1366 Québec Inc*, 2005 SCC 62 at para 169; *R v Seaboyer; R v Gayme*, 1991 CarswellOnt 109 (SCC) [1991] 2 SCR 577 at paras 83-88; *Canada (Human Rights Commission) v Taylor*, 1990 CarswellNat 1030 (SCC) [1990] 3 SCR 892 at para 150 (per McLachlin J. dissenting); *R v Zundel*, [1992] 2 SCR 731 at paras 62-64; *Osborne v Canada (Treasury Board)*, 1991 CarswellNat 348 (SCC) [1991] 2 SCR 69 at paras 1-2. See further *R v Appulonappa*, 2015 SCC 59 at para 74. And see *R v Ferguson*, 2008 SCC 6 at para 65: "[t]he presence of s. 52(1) with its mandatory wording suggests an intention of the framers of the that unconstitutional laws are deprived of effect to the extent of their inconsistency, not left on the books subject to discretionary case-by-case remedies."

[146] *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at para. 129, citing *Re B.C. Motor Vehicle Act*, 1985 CanLII 81 (SCC), [1985] 2 S.C.R. 486 at p. 518.

associated supports if the *STCA* provisions were struck—as unsupported by the evidence.[147] The FC also properly concluded that the Respondents failed to demonstrate that less-impairing alternatives would not have met the legislative objective."[148]

[74] As argued above, the particular safety valves on which the Respondents have relied throughout this litigation (TRPs, deferrals, judicial reviews and stays of removal) do not cure the regimes overbreadth and gross disproportionality. Such avenues for discretionary relief may be relevant in addressing s. 1, where the state properly bears the burden;[149] however, the Respondents failed to file any evidence of their adequacy. There is no basis to disturb the FC's finding that these "safety valves" are "illusory".

B4. Remedy for s. 7 breaches

[75] The first step in crafting a s.52(1) remedy is to determine the extent of the *Charter* breach.[150] The combined effects of *IRPR* s. 159.3 (the designation of the US) and *IRPA* s. 101(1)(e) (the ineligibility) breach s. 7. While other provisions could in principle partially mitigate these effects (a matter that erroneously preoccupied the FCA), it is the mandatory operation of s. 101(1)(e) ineligibility as a result of the s. 159.3 designation that leads to the violation of s. 7 rights.

[76] To preserve the constitutional aspects of a statutory scheme, individual provisions should be declared of no force and effect "only to the extent that they violat[e] rights".[151]Absent the designation in *IRPR* s. 159.3, *IRPA* s. 101(1)(e) will cause no unconstitutional effects. As such, declaring s. 159.3 of no force or effect is a sufficient remedy. Striking the regulation remedies the s. 7 *Charter* violation while allowing Parliament and/or the GIC the prospect of crafting constitutional refugee responsibility-sharing measures in future regulations.

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[147] *CCR 2020* at paras. 145-150.
[148] *Ibid.* See also notes 132-133, *supra.*
[149] *Bedford* at paras 113, 123-129; *Carter* at paras 79-82, 102-121; *R v Appulonappa*, 2015 SCC 59 at paras 81-82; See also Hamish Stewart, "*Bedford* and the Structure of Section 7" (2015) 60:3 McGill LJ 575 at p 588-593.
[150] *Ontario (Attorney General) v G*, 2020 SCC 38 at para 108.
[151] *Ibid* at para 111.

C. The s. 15 gender equality claim must be adjudicated

[77] Women fearing gender-based persecution are among those most adversely affected by the *STCA*. As set out above at para 14, the evidence establishes that the US routinely fails to protect them.

[78] The Appellants submit that the FC should have decided the s. 15 issue or that the FCA, having denied s. 7 relief on appeal, should have remitted the s. 15 issue to the FC. There is no justification for what happened here, where a fully documented, fully pleaded *Charter* claim has been left by the wayside.[152]

[79] Judicial restraint is an important discretion to avoid prejudicing future cases and to avoid decisions without a full factual basis.[153]

[80] In cases involving multiple *Charter* grounds**,** however, the Appellants submit that first instance courts must apply an access to justice lens to their discretion to use judicial restraint. A key role of first instance courts is to establish "the record on which subsequent appeals are founded":[154] accordingly, they must be cautious about finding it "unnecessary" to determine *Charter* violations as they cannot know the road ahead for the case.[155] They must consider how judicial restraint might impede access to meaningful appellate review, force disadvantaged litigants to undertake the significant costs and suffer the lengthy delays of re-determination and create unnecessary duplication of litigation that wastes courts' scarce resources.

[81] Where first instance courts limit their decision to just one of the alleged *Charter* violations, and that decision is overturned on appeal, courts of appeal must either decide the remaining *Charter* issues or remit them for determination.

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[152] *AFM* paras 93-101 (AB, Vol 50, p 21381); *RFM* paras 215-23 (AB, Vol 50, p 21448); *CCR 2020* at para 154; *CCR 2021* at para 171.

[153] *Phillips v Nova Scotia (Commissioner, Public Inquiries Act)*, 1995 CarswellNS 12 (SCC) at paras 6-11, [1995] 2 SCR 97, citing *Air Canada v Manitoba*, 1980 CarswellMan 170, [1980] 2 SCR 303; Peter W Hogg, *Constitutional Law*, 5th ed (Toronto: Thomson Carswell, 2007), ch 59.5; *Carter* at para 93; *Bedford* at para 160.

[154] *Bedford* at para 49; *Housen v Nikolaisen*, 2002 SCC 33; *R v Sheppard*, 2002 SCC 26 at para 55; *Brokenhead First Nation v Canada (Attorney General)*, 2011 FCA 148 at para 32–33.

[155] See *Gateway Bible Baptist Church v Manitoba*, 2021 MBQB 219 [2021] MJ No 309 at paras 225-226.

[82] The combined approach of the courts below has immunized the *STCA* regime from review under s. 15 of the *Charter*. This Court should remit the s. 15 issue to the Federal Court.

D. Section 159.3 is *ultra vires*

[83] The designation of the US as a safe third country is also *ultra vires.* It exceeds the factual and legal constraints on the authority delegated to the GIC for two related reasons: (1) it was unreasonable to maintain the designation in the face of evidence that many refugees cannot access effective protection in the US; and (2) the GIC's obligation to ensure "continuing review" of US compliance under *IRPA* s. 102(3) was breached because IRCC and the Minister, to whom the review was delegated, unreasonably interpreted and applied the review obligation.

D1. Standard of review: reasonableness

[84] *Vires* review of subordinate legislation ensures that it respects the terms of the delegating provision and "accord[s] with the purposes and objects of the parent enactment read as a whole".[156]

[85] The applicable standard of review is reasonableness. The review is "robust and responsive to context."[157] Where "a decision has particularly harsh consequences", there is a "heightened responsibility" to ensure that "those consequences are justified in light of the facts and law".[158]

[86] The question here is whether, in light of the legal and factual constraints on its statutory grant of power, there is any reasonable interpretation of the enabling statute that would give the GIC the authority to maintain the designation.[159] The question applies both to the criteria for designation (ss. 102(1)(a) and 102(2)) and the content of the s. 102(3) review obligation.

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[156] *Waddell v. Governor in Council* (1983), 1983 CanLII 189 (BC SC), 8 Admin. L.R. 266, at p. 292, as cited in *Katz Group Canada Inc. v Ontario (Health and Long-Term Care)*, 2013 SCC 64 at para 24; *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at para 73.
[157] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para 68; and see *Catalyst Paper Corp. v North Cowichan (District)*, 2012 SCC 2 at para 15; *Green v Law Society of Manitoba*, 2017 SCC 20 at paras 20 and 78; *West Fraser Mills Ltd. v British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22 at paras 12ff.
[158] *Vavilov* at paras 133-135.
[159] *Vavilov* at paras 67, 88-90, 143; *Portnov v Canada (Attorney General)*, 2021 FCA 171 at paras 19-28. See further *CCR 2007* at paras 57, 96-97; *1120732 B.C. Ltd. v Whistler (Resort Municipality)*, 2020 BCCA 101 at paras 33-46, 80 84, 88; *1193652 B.C. Ltd. v New Westminster (City)*, 2021 BCCA 176 at para 76; *Innovative Medicines Canada v Canada (Attorney General)*, 2020 FC 725 at paras 65-73 and 135.

[87] In order to determine the reasonableness of the ongoing designation, this Court can only assess whether the outcome – i.e. the ongoing designation itself – is consistent with the legal and factual constraints imposed by the *IRPA*, as there is no decision to review.[160]

[88] On the question of the nature and scope of the s. 102(3) review obligation, there is no formal decision to review, but there is a record to which the Court can look to understand the ways the Minister and IRCC, to whom the review obligation was delegated, misinterpreted and misapplied the obligation.[161] While the Court's ability to review the Minister's and IRCC's reasons has been hampered by their refusal to release a complete record of the reviews,[162] this lack of transparency is itself a further hallmark of unreasonableness.[163] As this Court held in *Vavilov,* an administrative decision maker cannot "expect that its decision would be upheld on the basis of internal records that were not available to" the affected parties.[164]

D2. Legal and factual constraints

D2a. Compliance with the Conventions and access to effective protection

[89] Under s. 102 of the *IRPA,* read in context and in light of the purpose of the scheme, the central constraint on the GIC's power to designate is a country's ongoing compliance with the relevant treaty obligations.

[90] Section 102(1)(a) limits designation to "countries that comply with" Article 33 of the *Refugee Convention* and Article 3 of the *CAT*.[165] These "precise and unequivocal" words must be given effect.[166] Unlike statutes which require only that the statutory authority form a particular opinion,[167] the constraint imposed by s. 102(1)(a) is the objective fact of compliance with the

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[160] *Vavilov at* paras 137-138.
[161] *Ibid.*
[162] See note 55 *supra*.
[163] *Vavilov* at para 98; *Gitxaala Nation v Canada*, 2016 FCA 187 at paras 313-324 and see further *Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 SCR 3 at para 39, and *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1995 CanLII 64 (SCC), [1995] 3 SCR 199 at paras 165-166.
[164] *Vavilov* at para 95.
[165] *IRPA* s 102(1)(a) and see further s 3(3)(f).
[166] *Vavilov* at paras 110, 120.
[167] *Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)*, SC 2017, c 21, s 4(1); *Species at Risk Act*, SC 2002, c 29, s. 29(1); *Human Pathogens and Toxins Act*, SC 2009, s 9(1); *Canada-United States Free Trade Agreement Implementation Act*, s. 9(1); *Controlled Drugs*

Conventions. Therefore, contrary to the interpretation adopted by the FCA, the designation is lawful only if the GIC has reasonably concluded that the country complies with the *Conventions.*[168]

[91] The statutory context confirms this interpretation. Section 102(2) gives meaning to "countries that comply" by setting out factors for assessing compliance, including not just whether the state is signatory to the *Conventions*, but also its refugee determination "practices" and its human rights record.[169] A country that does not actually comply in practice cannot be designated.

[92] Finally, the legislative purpose and Canada's binding international obligations require actual compliance. As this Court held in *B010,* the refugee protection aspects of the *IRPA* "serve principally to discharge Canada's obligations under the 1951 *Convention*".[170] This is therefore a context in which "international law will operate as an important constraint".[171] The purpose of s. 102 is to share responsibility for the protection of refugees in accordance with Canada's international obligations. Canada would not be upholding its obligations to refugees by sharing responsibility with a state that does not do the same.[172] Therefore, s. 102(1)(a) limits the power to designate to countries that in fact comply with the *Conventions.*

[93] The standard at international law for whether a state complies with the *Refugee Convention* is access to "effective protection".[173] The stated premise of the *STCA* is that refugees denied access

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and Substances Act, ss 60, 60.1(1). See further *First Nations Commercial and Industrial Development Act*, SC 2005, c 53, s 3(2)(b); *Energy Supplies Emergency Act*, RSC 1985, c E-9, ss 26(1), 27(1); *Official Languages Act*, RSC 1985, c 31 (4th Supp) ss 32(2)(c), 33; *Governor General's Act*, RSC 1985, c G-9, s 8(3)(d).

[168] *Contra CCR 2008* at para 78; *contra CCR 2021* at para 166.

[169] *IRPA* ss 102(2)(b), (c).

[170] *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58, at para 47.

[171] *Vavilov* at para 114.

[172] See note 17 *supra*.

[173] *STCA*, Preamble; Aff of James C. Hathaway at paras 15-19 (AB, Vol 35, p 14921-22); Ex A to the Aff of Andre Baril at para 15 (AB, Vol 38, p 15935); Ex 14 and 16 to the 22 August 2019 CXE of Andre Baril (AB, Vol 39, p 16830, Vol 40, 16844); Ex 6 to the 6 November 2018 CXE of Kay Hailbronner (AB, Vol 47, p 20022-20073); Michelle Foster, "Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State" (2007) 28:2 Mich. J. Int'l L. 223 at 245-248, 284; *R v Secretary of State for the Home Department; Ex parte Adan*, [2000] UKHL 67; *Regina (ex parte Yogathas) v. Secretary of State for the Home Department* [2003] 1 A.C. 92; James C Hathaway, *The Rights of Refugees Under International Law*, 2d ed (Cambridge: Cambridge University Press, 2021), pp 373-374; Ex 15 to the 22 Aug 2019 CXE of Andre Baril (AB, Vol 40, pp 16836-38).

to the Canadian system have access to "effective protection" in the US. At minimum, "effective protection" requires the US to provide protection against arbitrary deprivations of refugees' liberty and ensure that those transferred have "access to a sound process of refugee status assessment there, under which the refugee definition as authentically understood is reliably applied."[174]

D2b. Post-promulgation constraints: ongoing compliance and continuing review

[94] Though this Court has never ruled on the role of post-promulgation facts in *vires* review, both courts below found themselves bound by *CCR* 2008 to reject any *vires* challenge involving post-promulgation facts.[175] However, in *CCR 2008,* the FCA excluded post-promulgation facts only because it found the question of "continuing review" under s. 102(3) was not properly before it *in that case*.[176]

[95] A textual, purposive and contextual interpretation of s. 102 demonstrates that Parliament has imposed post-promulgation constraints on the GIC's authority to maintain a designation.

[96] The text of s. 102(1)(a) refers to "countries that comply", and s. 102(2)(b) requires that the list of designated countries be amended "as necessary". Maintaining the designation of a country that no longer complies is contrary to the express terms of the statute.

[97] Further, by imposing the s. 102(3) continuing review obligation and by giving the GIC the power not only to designate, but also to de-designate, suspend, or amend the scope of those impacted by a designation, Parliament recognized that justification for designation is necessarily fluid and depends on how refugee claimants are being treated in the country in question. [177]

[98] The domestic and international legal contexts further support this interpretation.

[99] Domestically, there are other federal statutes that impose post-promulgation review requirements and where Parliament has expressly stipulated that the conduct of the review does

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[174] James C Hathaway & Michelle Foster, *The Law of Refugee Status*, 2nd ed (Cambridge: Cambridge University Press, 2014) c 1.2, p. 49, Ex B to the Aff of James C. Hathaway, in AB, Vol 35, p 14981.
[175] *CCR 2021* at para 178, citing *CCR 2008* at para 89; *CCR 2020* at paras 74, 79-80.
[176] *CCR 2008* at paras 83-90.
[177] *IRPA* s 102(1)(a)(b)(c); *IRPR* s 159.7(2), and see note 11 *supra*.

not affect the validity of a regulation.[178] In choosing not to include such a provision here, Parliament made clear that the validity of the regulation is in fact contingent on ongoing compliance and the ongoing review requirement.

[100] Finally and crucially, both s. 102 and the *IRPA* as a whole are to be interpreted and applied in a manner that respects Canada's binding international obligations.[179] Interpreting the *IRPA* as granting the GIC the statutory power to maintain the designation of a country that can no longer be relied upon to provide effective protection to refugees would be to interpret it as authorizing Canada to breach its international obligations, contrary to both the express terms of the *IRPA*[180] and the canons of statutory interpretation.[181]

[101] Therefore, for a designation to remain valid, the GIC must reasonably execute its review obligation and the ongoing designation of a country that does not offer effective protection to *STCA* returnees is *ultra vires*.

D3. The designation exceeds the legal and factual constraints imposed on the GIC and is inconsistent with the statutory purpose

D3a. Barriers to effective protection for STCA returnees and other forms of systemic non-compliance

[102] As explained above, the *STCA* scheme applies without regard to claimants' actual prospects of protection in the US. In light of the evidence that was before the government that many classes of claimants will not have access to effective protection there, its designation as a country that complies with the *Conventions* for all *STCA* returnees is unreasonable.

[103] Many *STCA* returnees do not have access to effective protection in the US as a result of: (a) the widespread practice of detaining them, often in harsh and cruel conditions,[182] in a manner

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[178] *Secure Air Travel Act,* SC 2015, c 20, s 11, s 8(2); *State Immunity Act,* RSC 1985, c S-18, s 6.1(7)(8).
[179] *IRPA*, ss 3(2)(a)-(e), (3)(f); *B010* at paras 47-49.
[180] *IRPA* s 3(3)(f).
[181] *IRPA* s 3(3)(f); *B010* at paras 47-49; *Vavilov* at para 182.
[182] See notes 18-20, 25-30, *supra*.

that increases the risk of *refoulement*;[183] (b) the barriers to asylum in the US for women fleeing gender-based persecution;[184] and (c) the one-year bar on asylum claims.[185]

[104] In addition to the practices that most directly affect *STCA* returnees, there are further aspects of US policy and practice that place it outside the realm of any reasonable interpretation of a country that complies with the *Conventions* and maintains an acceptable human rights record. In particular, there is ample and uncontradicted evidence of: (a) the prosecution and mandatory detention of asylum-seekers who enter the US illegally, contrary to Article 31 of the *Refugee Convention*;[186] (b) conditions of detention for asylum seekers that contravene international law;[187] (c) the "unconscionable" practice of separating refugee children from their parents and detaining them under atrocious conditions as a policy of deterrence;[188] and (d) restrictive credible fear screenings and unlawful pushbacks on the US-Mexico border.[189]

[105] These are longstanding laws and practices that violate the *Conventions* and international human rights standards for broad classes of refugees in wide-ranging circumstances.[190] There is no reasonable interpretation of s. 102 that would authorize the GIC to maintain the designation in these circumstances. Section 159.3 of the *IRPR* is therefore *ultra vires*.

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[183] See note 31, *supra*; *CCR 2020* at paras 104-106.
[184] See para 14(c);Ex 20, 22-24 and 52 to the 22 Aug 2019 CXE of André Baril (AB, Vol 40, pp 16928, 16950, 16986, 19687 and Vol 41, p 17559).
[185] See para 14(b); Ex 10 to the 10 Jan 2019 CXE of André Baril at p 7-8, (AB, Vol 38, pp 16289-90); Ex 10 to the 22 Aug. 2019 CXE of André Baril at p 15-19 (AB, Vol 39, p 16761-65).
[186] Transcript of 10 January 2019 CXE of André Baril, Q 781-83, 849-52,864-866, 875 (AB, Vol 37, p 15894-95, 15911-12, 15915-17, 15919); Transcript of 22 August 2019 CXE of André Baril, Q 214-18 (AB, Vol 39, p 16462-64); and Ex 32 and 35 to the 22 Aug 2019 CXE of André Baril (AB, Vol 40, pp 17120, 17129).
[187] See, e.g., Ex 10 to the 10 Jan 2019 CXE of André Baril at p 6 (AB, Vol 38, p 16288); E x 10 (p 31-45) and 30 to the 22 August 2019 CXE of André Baril (AB, Vol 39, p 16777-91, and Vol 40, pp 17034 ff).
[188] Ex 8 (pp 14-15), 35 and 38 to the 22-23 August 2019 CXE of André Baril at p 14-15 (AB, Vol 39, pp 16720-21, AB, Vol 40, pp 17129-31 and 17276-79).
[189] See Ex 10 to the 22 August 2019 CXE of André Baril at p 21-31 (AB, Vol 39, p16767-77); Ex B.34-B.38 to the Aff of Deborah Anker (AB, Vol 20, p 8331, 8371, 8402, 8414, 8419).
[190] See *CCR 2007* at para 161; and see note 14, *supra*.

D3(b). The review obligation has been breached

[106] The s. 102(3) review obligation has been unreasonably interpreted and applied by the government and the obligation has therefore been breached. The breach of the review obligation further demonstrates that the ongoing designation is unreasonable.

D3b(i). Background: delegation of review obligation and reporting to the Minister and GIC

[107] *IRPA* s. 102(3) requires the GIC to ensure ongoing review of the designated country's human rights record and its "policies and practices with respect to claims under the *Refugee Convention* and obligations under the *Convention Against Torture*" (factors set out at s. 102(2)) in order to assess ongoing compliance (s. 102(1)(a)).

[108] Through a 2004 Order in Council ("OIC"), the GIC delegated the review obligation to the Minister, who is required to report to the GIC "on a regular basis".[191] The GIC received its first and only report five years later, in 2009.[192] A 2014 report prepared for the GIC was delivered to the Minister, but rather than submitting that report to the GIC, the Minister recommended that the GIC amend the OIC to remove the requirement to report regularly.[193]

[109] As a result, the 2014 report was not provided to the GIC and instead the OIC was amended in 2015 such that the Minister now reports to the GIC only when (undefined) "circumstances warrant."[194] Under a new "Monitoring Framework", IRCC civil servants conduct the monitoring and prepare reports for IRCC management, who report to the Associate Assistant Deputy Minister (AADM) or the Assistant Deputy Minister (ADM) annually, or more often if "the circumstances warrant". The (A)ADM determines whether a report to the Minister is warranted, and if so, recommends as such to the Deputy Minister. If the Deputy Minister then determines that a report to the Minister is warranted, the report will be provided to the Minister. If the Minister ever

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[191] *Directives for ensuring a continuing review of factors set out in subsection 102(2) of the Immigration and Refugee Protection Act with respect to countries designated under paragraph 102(1)(a) of that Act*, Order in Council (2004) 2004-1158 [2004 OIC].
[192] See Ex C to the Aff of Andre Baril (AB, Vol 37, p 15646).
[193] See transcript of 22 August 2019 CXE of André Baril, Q 40-42 (AB, Vol 39, p 16407-8).
[194] 2004 OIC; *Directives for ensuring a continuing review of factors set out in subsection 102(2) of the Immigration and Refugee Protection Act with respect to countries designated under paragraph 102(1)(a) of that Act*, Order in Council (2015) 2015-0809.

receives a report, it is the Minister who ultimately decides whether "circumstances warrant" a report to the GIC.[195]

[110] Neither IRCC nor the Minister have ever determined that circumstances warrant a report to the GIC. The GIC has not received a report since 2009.[196]

D3b(ii). The Minister and IRCC misinterpreted s. 102(3): Failure to monitor for compliance and access to effective protection

[111] As argued above, the core purpose of the monitoring requirement is to ensure that those returned to the US under the *STCA* have access to effective protection.

[112] Under international law, the monitoring requirement is rigorous. It requires states both to apply "anxious scrutiny" to the policies and practices of the "safe third country" in advance of any transfers; and to monitor the treatment of returnees to ensure their rights under the *Conventions*.[197] Given that s. 102(3) implements Canada's international obligations, it must be interpreted and applied in conformity with those obligations. Because Canada's *non-refoulement* obligation with respect to *STCA* returnees remains joint and several with the receiving state, it must exhibit due diligence in ensuring that returnees have access to effective protection.[198]

[113] However, in conducting the review on behalf of the Minister, IRCC neither monitored the US for *Convention* compliance nor considered whether *STCA* returnees have access to effective protection. Instead, the metric adopted by IRCC was to assess the degree to which US policy and

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[195] See Ex E to the Aff of André Baril (AB, Vol 37, p 15665); see also Transcript of 10 January 2019 CXE of Andre Baril, Q 17 (AB, Vol 37, p 15680); Transcript of 23 August 2019 CXE of Andre Baril, Q310 (AB, Vol 40, p 17238-9).

[196] Transcript of 22 August 2019 CXE of Andre Baril, Q 71-84 (AB, Vol 39, p 16415-18); Ex 1, 3-6 to the 22 August 2019 CXE of André Baril (AB, Vol 39, p16633, 16638-16703); and see further Transcript of 10 January 2019 CXE of Andre Baril, Q 18 (AB, Vol 37, p 15680).

[197] See notes 173 and 174, *supra;* and see Ex A to the 10 January 2019 CXE of Andre Baril (AB, Vol 38, p 15933).

[198] Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, 4th ed. (Oxford: Oxford UP, 2021), pp. 328-329.

practice had changed *as compared to its prior record.*[199] It did so without *any* intelligible standard for determining when such changes would amount to non-compliance with the *Conventions*.[200]

[114] Notably, between the adoption of the 2015 OIC and the close of the record in this matter in 2019, IRCC produced three "Monitoring Framework Reports". Despite having identified them as issues "of concern", IRCC did not assess whether US detention practices, the one-year bar, or the treatment of gender-based claims were consistent with its obligations under the *Conventions.* None of the 2009, 2016, 2017, or 2018 reports even considered the issues relating to gender-based claims.[201] Further, IRCC failed to report the UNHCR's position that these practices are inconsistent with the *Conventions*,[202] despite acknowledging that the opinion of the UNHCR (the "guardians of the *Convention*") would be of great significance.[203]

[115] Moreover, IRCC did not monitor what happens to *STCA* returnees[204] despite the availability of information about their treatment through both open-source materials and under the

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[199] Aff of Andre Baril at paras 16, 18 and Ex E (AB, Vol 37, p 15637-38, 15664); transcript of 10 January 2019 CXE of Andre Baril, Q 413-15, 555-57, 629-30 (AB, Vol 37, pp 15789-90, 15821-22, 15848); transcript of 22 August 2019 CXE of Andre Baril, Q 635-636 (AB, Vol 39, pp 16623-24); Ex 9 to the 22 August 2019 CXE of Andre Baril, second bullet point (AB, Vol 39, p 16723).

[200] Transcript of 10 January 2019 CXE of André Baril, Q11-12, 22, 442, 449-456, 706, 849 (AB, Vol 37, pp 15679, 15682, 15797, 15798-800, 15869-70, 15911); transcript of 22 August 2019 CXE of André Baril at Q 342-343, 452, 475, 501-506 (AB, Vol 39, p 16504, 16543, 16550-51, 16565-67); transcript of 23 August 2019 CXE of André Baril at Q 102-106 (AB, Vol 40, p 17173-74).

[201] See Ex C to Aff of Andre Baril (AB, Vol 37, p 15647); Ex 9 to the 22 August 2019 CXE of Andre Baril (AB, Vol 39, p 16722); Ex 17 to the 22 August 2019 CXE of Andre Baril (AB, Vol 40, p 16847); Ex 34 to the 22 August 2019 CXE of Andre Baril (AB, Vol 40, p 17124).

[202] Transcript of 10 January 2019 CXE of Andre Baril, Q 783, 852, 868, 875 (in Vol 37, p 15894-95, 15911-12, 15917, 15919); transcript of 22 August 2019 CXE of Andre Baril, Q 129, (AB, Vol 39 p 16433). transcript of 23 August 2019 CXE of Andre Baril, Q 248-254 (AB, Vol 40, pp 17220-23). See also Ex E, F to Aff of Bruce A Scoffield (AB, Vol 35, pp 15054-55, 15059, 15063, 15064, 15067); Ex 33 and 38 to 22-23 August 2019 CXE of Andre Baril (AB, Vol 40, p 17121, 17276).

[203] Transcript of 10 January 2019 CXE of Andre Baril, Q 94, 99, 426 (AB, Vol 37, pp 15702, 15792).

[204] Transcript of 10 January 2019 CXE of Andre Baril, Q 290-293, 708-709, 713, 716, 733, (AB, Vol 37, p 15758-15759, 15872-15874, 15880); transcript of 23 August 2019 CXE of Andre Baril, Q 338 (AB, Vol 40, p 17249).

terms of the *STCA* itself.[205] In fact, when presented with evidence of the mistreatment of *STCA* returnees in this litigation, IRCC effectively ignored it.[206]

[116] Rather than assessing whether all *STCA* returnees have access to effective protection, IRCC's approach was to ask whether "on balance" any instances of non-compliance were sufficiently serious to impugn the US asylum system as a whole.[207] IRCC elected not to "grapple with the consequences" for those individuals without effective protection in the US who nevertheless continued to be returned there under the *STCA*.[208]

[117] In failing to monitor for compliance and access to effective protection, IRCC and the Minister unreasonably interpreted and applied s. 102(3) and so breached the GIC's delegated review obligation.

D3b(iii). The Minister and IRCC unreasonably failed to report to the GIC

[118] The purpose of s. 102(3) is to ensure that the GIC remains in a position to revoke or amend the designation "as necessary".[209] While it could delegate the monitoring function, it could not and did not delegate the authority to make or amend the *STCA* regulations,[210] and it is the GIC that remains the only body with the authority to re-assess the designation.

[119] However, after the initial 2009 report, the GIC received no further reports on the designation. This unreasonable outcome flows in part from the failure to monitor for compliance and effective protection, but also from IRCC's unreasonable interpretation of the 2015 OIC. The OIC must be interpreted in light of the statutory purpose of ensuring that the GIC remains in a

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[205] *STCA*, Article 7; Transcript of 10 January 2019 CXE of Andre Baril, Q 294, 708-712, 716 (AB, Vol 37, p 15759 15872-15874); Ex 28 to the 22 August 2019 CXE of Andre Baril (AB, Vol 40, p 17024).
[206] Transcript of 22 August CXE of Andre Baril, Q576-590 (AB, Vol 39, Tab 171, p 16596-16602); Ex 29 to 22 August CXE of Andre Baril (AB, Vol 40, Tab 171, p 17030).
[207] Transcript to 10 January 2019 CXE of Andre Baril, Q 437, 453-455, 523, 549, 660, 842-849, 906 (AB, Vol 37, p 15796, 15799-15800, 15814, 15819-15820, 15857, 15909-15911, 15926-15927); Transcript to 22 August 2019 CXE of Andre Baril, Q124-127, 380 (AB, Vol 39, p 16431-16432, 16516); Ex 8 to 22 Aug 2019 CXE of Andre Baril (AB, Vol 39, p 16707-16708).
[208] *Vavilov* at paras 134-135.
[209] *IRPA*, s 102(1)(b).
[210] In fact, it could not have so delegated that authority: *IRPA* s 5(1).

position to review the designation.[211] IRCC and the Minister however adopted the unreasonable position that reports to the GIC are warranted only where it is found, *by them*, that de-designation or suspension may be required.[212] In other words, IRCC and the Minister have taken for themselves a decisional authority that Parliament conferred exclusively on the GIC and thus deprived the GIC of the information necessary to make the decisions that only it can make.[213]

D4. Conclusion on vires

[120] It is not difficult to imagine a regulatory framework that exempts those who do not have access to effective protection in the US from the application of s. 101(1)(e) ineligibility. However, because the current framework maintains a blanket designation without exception for claimants who do not have access to effective protection in the US, and because the GIC has failed to ensure the monitoring of conditions in the US against any meaningful standard, the current framework is *ultra vires*.

PARTS IV AND V – COSTS AND ORDERS SOUGHT

[121] The Appellants move for orders allowing the appeal and:

a. Declaring, pursuant to s. 52 of the *Constitution Act, 1982*, that *IRPR* s. 159.3 is contrary to s. 7 of the *Charter* and therefore of no force or effect, or, in the alternative, remitting the Appellants' s. 15 claim to the Federal Court;

b. Declaring that *IRPR* s. 159.3 is *ultra vires*, or, in the alternative, remitting the Appellants' *vires* claim to the Federal Court;

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[211] *Katz* at para 25; *Bristol-Myers Squibb Co v Canada (Attorney General)*, 2005 SCC 26, [2005] 1 SCR 533; Ruth Sullivan, *Sullivan on Construction of Statutes*, 6th ed (Lexis Nexis, 2014) at 413.

[212] Transcript of 10 January 2019 CXE of Andre Baril, Q 19-25, 207, 263-264, and 576-577 (AB, Vol 37, p 15680-15682, p 15736-37, p 15749-15750, and p 15827-15828); Ex B to 10 January 2019 CXE of Andre Baril (AB, Vol 37, p 15665); Ex 2 to the 22 August 2019 CXE of Andre Baril (AB, Vol 39, p 16634); Transcript of 23 August 2019 CXE of Andre Baril, Q 310 (AB, Vol 40, p 17238).

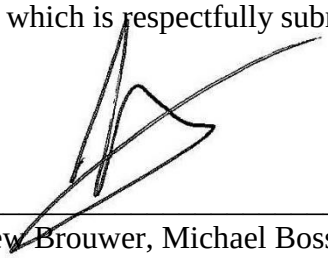
[213] See in particular Ex 17 to 22 August 2019 CXE of Andre Baril, p 3 (AB, Vol 40, p 16849), where IRCC found that "on balance" the US continues to meet the criteria. The authority to "balance" was conferred on the GIC alone.

c. The whole without costs.

PART VI: IMPACT OF SEALING AND CONFIDENTIALITY ORDERS

[122] The decision should not reference any of the names or identifying information of the individuals whose affidavits and written interrogatories re contained Sealed Volumes 5-12.

All of which is respectfully submitted this 14th day of March, 2022.



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