SCC File number: _____

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

Applicants
(Appellants)

and

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

Respondents
(Respondents)

MEMORANDUM OF ARGUMENT OF THE APPLICANTS

(Pursuant to Rule 25 of the *Rules of the Supreme Court of Canada*)

Andrew Brouwer, Michael Bossin
Heather Neufeld, Leigh Salsberg,
Erin Simpson, Kate Webster
c/o Refugee Law Office
201-20 Dundas Street West
Toronto, ON, M5G 2H1
Tel (A. Brouwer): 416-435-3269
Fax: 416-977-5567
Email: Andrew.Brouwer@lao.on.ca

(Continued on next page)

Goldblatt Partners LLP
500-30 Metcalfe Street
Ottawa, ON K1P 5L4

Colleen Bauman
Tel: 613-482-2463
Fax: 613-235-3041
Email: cbauman@goldblattpartners.com

Ottawa Agent for the Applicants

Colleen Bauman
Goldblatt Partners
500-30 Metcalfe Street
Ottawa, ON K1P 5L4
Tel: 613-482-2463
Fax: 613-235-3041
Email: cbauman@goldblattpartners.com

**Counsel for the Applicants (Appellants)
Canadian Council for Refugees, Amnesty
International and the Canadian Council
of Churches**

Prasanna Balasundaram
Downtown Legal Services
655 Spadina Avenue
Toronto, ON M5S 2H9
Tel: 416-9345-4535
Fax: 416-934-4536
Email: law.dls@utoronto.ca

**Counsel for the Applicants (Appellents)
ABC, DE, FG and Nedira Jemal Mustefa**

Jared Will and Joshua Blum
Jared Will & Associates
226 Bathurst Street, Suite 200
Toronto, ON M5T 2R9
Tel: 416-657-1472
Fax: 416-657-1511
Email: jared@jwlaw.ca; joshua@jwlaw.ca

**Counsel for the Applicants (Appellants)
Mohammad Majd Maher Homsi,
Hala Maher Homsi, Karam Maher Homsi
and Reda Yassin Al Nahass**

TABLE OF CONTENTS

OVERVIEW

1. This case raises foundational questions of constitutional law relating to the accessibility of remedies for violations of ss. 7 and 15(1) of the *Charter of Rights and Freedoms*.[1]

2. In *Singh,* this Court held that those seeking refugee protection in Canada have a right under s. 7 of the *Charter* to a fair determination of their claim before being returned to a country where they have a well-founded fear of persecution.[2] The legislation implementing the *Canada-U.S. Safe Third Country Agreement* ("*STCA*") is a severe limitation on that right.[3] Subject to narrow exceptions,[4] it requires Canadian immigration officials at the land border to return refugee claimants to the United States without a hearing of their claim. These returns take place without any assessment of whether claimants risk being treated by U.S. authorities in ways that violate their rights under international refugee law.

3. This legislative scheme is based on an assumption that the U.S. will fulfill Canada's international obligations to refugee claimants. Since the provisions came into force, however, the Federal Court has twice found as fact that by returning refugee claimants to the U.S., Canada exposes them to treatment that falls short of the requirements of international refugee law and thereby violates their *Charter* rights. First, in 2007, the Federal Court ruled that the *STCA* regime violates ss. 7 and 15(1) *Charter* rights because claimants who had been in the U.S. for more than one year and female survivors of domestic violence faced unjustified

---

[1] *Canadian Charter of Rights and Freedoms*, ss. 7, 15(1), Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982 (UK)*, 1982, c11 [*Charter*].

[2] *Singh v. Canada (Minister of Employment & Immigration)*, [1985] 1 SCR 177, [1985] 1 RCS 177 (SCC) at para 74 [*Singh*]; *Charter*, s. 7.

[3] *Agreement between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries*, 5 December 2002, [2004] Can. T.S. No. 2*,; Immigration and Refugee Protection Act,* SC 2001, c 27, ss. 101(1)(e), 102(1) [*IRPA*]; *Immigration and Refugee Protection Regulations,* SOR/2002-227, as amended, s. 159.3 [*IRPR*].

[4] The *IRPR* contain exemptions for U.S. citizens (159.2); stateless habitual residents of the U.S. (159.3); and exceptions for individuals with certain close family members in Canada (159.5(a)-(d)); unaccompanied minors (159.5(e)); individuals who require a visa for the U.S. but do not require it for Canada (159.5(g)); and individuals facing the death penalty (159.6).

barriers to refugee protection there. In 2020, in the present case, the Federal Court ruled that the regime violates the *Charter* rights of refugee claimants returned to the U.S. as a result of immigration detention practices there.

4. The Federal Court of Appeal reversed both decisions, both times declining to engage with the substantive merits of the cases. In 2008, it held that the case lacked a party with standing to raise the *Charter* issues. In the present case, it has denied a causal link between the regulations that designate the U.S. as a "safe third country" and the *Charter* breaches that may result for those summarily denied protection in Canada pursuant to that designation. The reasons of Stratas JA, writing for a unanimous panel, rely on an unprecedented interpretation of this Court's judgment in *PHS* that shifts the focus from the effects of the legislative regime to the Applicants' failure to challenge the process that enables the Governor in Council ("GIC") to review and revoke the designation.[5] Further, contrary to *Singh* and settled principles of international refugee law, the Federal Court of Appeal has held that the legislative regime is *Charter* compliant unless the treatment of those returned to the U.S. can be shown to "shock the conscience". Finally, the combined effect of the first instance and appeal decisions has left the Applicants' fully argued s. 15(1) claim undecided.

5. The effect of this judgment is to insulate, if not immunize, Canada's "safe third country" regime from constitutional review and to erect major obstacles to constitutional scrutiny of federal legislation generally. These obstacles offend the access to justice imperative and the principle of legality, which requires "practical and effective ways to challenge the legality of state action".[6]

6. The Applicants raise three questions of public importance regarding the Federal Court of Appeal's justification of these obstacles and their implications: (1) To obtain a *Charter* remedy, in what circumstances are claimants required to challenge the failure of legislative "safety valves" rather than the offending provision, and, in particular, is the government's obligation to review the offending provision a "safety valve"? (2) How does the principle of

---

[5] *Canada v Canadian Council for Refugees*, 2021 FCA 72 at paras 58ff [CCR 2021], citing, *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at paras 107-115 [*PHS*] (in Applicants' Record [AR], Vol I, Tab 2(B), pp 87-132).

[6] *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at para 31 [*Downtown Eastside*].

judicial restraint apply to courts hearing multiple *Charter* claims? (3) In assessing the constitutionality of legislation authorizing the removal of refugee claimants under s. 7, is "shocks the conscience" the only applicable principle of fundamental justice?

PART I – FACTS

7. Under international law, Canada is prohibited from "the direct or indirect removal of refugees to a territory where they run a risk of being subjected to human rights violations."[7] Refugee claimants within and at Canada's borders have corresponding rights, recognized in both the *Immigration and Refugee Protection Act* ("*IRPA*") and under the *Charter,* to have their claims assessed in accordance with the principles of fundamental justice, and to be granted protection in Canada if they are determined to be refugees.[8]

8. A significant exception to this foundational principle of refugee law is found at s. 101(1)(e) of the *IRPA*. This provision deems refugee claimants who arrive from a country designated as a "safe third country" under s. 102(1)[9] ineligible to seek refugee protection in Canada. The U.S. was designated in 2004 under s. 159.3 of the *Immigration and Refugee Protection Regulations* ("the *Regulations*") and is the only designated country to date.[10] Ineligible claimants are returned to the U.S. forthwith, without any assessment of their prospects of protection or likely treatment there. Border officials have no authority to exempt claimants from the ineligibility.[11]

9. The justification and legality of this arrangement are contingent on the "safe third country" fulfilling Canada's obligations to affected refugee claimants under international law.[12] In

---

[7] *Németh v Canada (Minister of Justice),* 2010 SCC 56 at para 19 [*Németh*]; *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, Treaty Series, Vol 1465, p 85; *The 1951 Convention Relating to the Status of Refugees,* 28 July 1951, Treaty Series, Vol 189, p 137.
[8] *Singh,* at para 74; *IRPA* ss. 95-99.
[9] *IRPA*, s. 102(1).
[10] *IRPR,* s. 159.3.
[11] *IRPR,* s. 159; *Canadian Council for Refugees v Canada (Immigration, Refugees and Citizenship),* 2020 FC 770 at para 90 [CCR 2020] (in AR, Vol I, Tab 2(A), p 43).
[12] Aff of James C Hathaway at para 10 (in AR, Vol I, Tab 4(A), p 171); These guarantees must include (re)admitting the person; granting the person access to a fair and efficient procedure for determination of refugee status and other international protection needs; and, where she or he is determined to be a refugee, recognizing him/her as such and granting lawful stay.

contrast to the Canadian legislation, similar arrangements in the U.K. and Europe provide for individualized assessments of refugee claimants' prospects of accessing protection in the "safe third country". The U.K. House of Lords has found that these assessments call for "the most anxious scrutiny".[13]

10. The U.S. was designated by the GIC as "safe" in 2004. Since then, the GIC has been statutorily required to ensure continuing review of the U.S. human rights record and its "policies and practices with respect to claims under the *Refugee Convention* and with respect to obligations under the *Convention Against Torture*" so that it can "reassess the opportunity of maintaining the designation."[14] By way of a 2004 Order in Council ("OIC"), the GIC delegated the review obligation to the Minister of Citizenship and Immigration ("the Minister"), requiring the Minister to report to the GIC "on a regular basis". The first report was submitted to the GIC five years later, in 2009. In 2015, the OIC was amended to require reports to the GIC only when (undefined) "circumstances warrant."[15] The Minister has never determined that such circumstances existed, and the GIC has not received a report on the designation of the U.S. as a "safe third country" since 2009.[16]

---

[13] Aff. of James C. Hathaway at para 10 (in AR, Vol I, Tab 4(A), p 171), citing *R v Secretary of State for the Home Department, ex parte Yogathas*, [2002] UKHL 36 at 941 (58) per Lord Hope, adopting the language of Lord Bridge of Harwich in *R v. Secretary of State for the Home Department*; Ex parte *Bugdaycay*, [1987] AC 514, at 531 (UKHL, Feb. 19, 1987); *Directive 2013/32/EU of European Parliament and of the Council 26 June 2013 on common procedures for granting and withdrawing international protection*, 26 June 2013, Official Journal of the European Union, L 180/86, art. 38.

[14] *Canadian Council for Refugees v Canada,* 2008 FCA 229 at para 92 [*CCR 2008*], leave to appeal to SCC denied, 32820 (5 February 2009).

[15] *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; *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.

[16] Transcript of 22 August 2019 Cross-Examination of Andre Baril, p. 27-30, Q 71-84 (in AR, Vol II, Tab L, p 161); Exhibits 1 and 3-6 to the 22 August 2019 Cross-Examination of André Baril (in AR, Vol II, Tab L, p 161); see further Transcript of 10 January 2019 Cross-Examination of Andre Baril, p. 13, Q18 (in AR, Vol II, Tab K, p 128).

Litigation history and the current challenge

11. In 2007, the Federal Court found that the provisions implementing the *STCA* were *ultra vires* of the *IRPA* and unjustifiably breached ss. 7 and 15(1) of the *Charter*.[17] In 2008, the Federal Court of Appeal overturned this judgment, finding that a challenge could only "be assessed in a proper factual context … when advanced by a refugee who has been denied asylum in Canada pursuant to the *Regulations*..."[18]

12. In 2017, consistent with the 2008 judgment, three sets of individual applicants who had "been denied asylum in Canada pursuant to the *Regulations*" initiated the present challenge, with the same public interest parties who had challenged the regime in 2007.[19] They alleged that refugee claimants subject to the impugned provisions and returned to the U.S. face a risk of detention in circumstances that violate international refugee law. Further, many refugee claimants face a heightened risk of *refoulement* owing to gaps in U.S. asylum law, also contrary to international law. The Applicants alleged that these risks infringe their s. 7 *Charter* rights to liberty and security of the person, in a manner contrary to the principles of fundamental justice against overbreadth and gross disproportionality. They also alleged that these risks violate the s. 15(1) equality rights of women fleeing gender-based persecution, who face unique obstacles to accessing protection in the U.S.

13. The Applicants further alleged that the continuing designation of the U.S. under s. 159.3 of the *Regulations* is *ultra vires* the *IRPA* both because the ongoing designation is unreasonable and contrary to the purposes of the power to designate, and because the GIC has failed to fulfil its review obligation under s. 102(3) of the *IRPA*.

The record

14. The record amply supported these allegations, including evidence from:

---

[17] *Canadian Council for Refugees v Canada,* 2007 FC 1262 at para 338 [CCR 2007].
[18] CCR 2008 at para 103.
[19] Two families and an individual applicant applied separately. By order dated April 12, 2018, the Federal Court consolidated all three applications: *Canadian Council for Refugees v Canada (Citizenship and Immigration)*, 2018 FC 396 at para 39; and granted public interest standing: *Canadian Council for Refugees v. Canada (Citizenship and Immigration)*, 2017 FC 1131.

- Nine experts, among them renowned Prof. James C. Hathaway of the University of Michigan, Prof. Deborah Anker of Harvard University, Prof. Karen Musalo of UC Hastings College of the Law, and Anwen Hughes of Human Rights First. The expert evidence addressed, *inter alia*: international standards for "safe third country" regimes; the widespread detention of asylum seekers in the U.S; the impact of detention on their ability to pursue asylum claims; the conditions of detention; and the treatment of gender-based claims in the U.S. All but three of the experts were cross-examined, to a total of 10 days of cross-examination and 1,444 pages of transcripts for the experts alone;[20]
- Six U.S. attorneys who represent individuals returned to the U.S. under the *STCA* regime;
- The individual Applicants; and
- Ten individuals (anonymized) who were detained in the U.S. following attempts to seek refugee protection in Canada.[21]

15. Among the Respondents' witnesses was André Baril, a senior civil servant responsible for the s. 102(3) reviews of the designation of the U.S. as a "safe third country". The completion of Mr. Baril's cross-examination was delayed by eight months as the Federal Court adjudicated multiple motions regarding his evidence.[22] During this period, over the objections of the Respondents, the Applicants demanded complete records of the statutorily required reviews overseen by Mr. Baril. On motion by the Applicants, the Federal Court found that the documents and information sought were relevant and ordered their release, subject to any assertions of privilege.[23] As the Respondents did in fact assert privileges, the records disclosed contained significant redactions, and some were withheld in their entirety.[24] In the result, the Applicants obtained as much evidence of the reviews as the law would allow.

---

[20] *Canadian Council for Refugees v. Canada (Citizenship and immigration),* 2018 FC 829; Index to the Appeal Book in the Federal Court of Appeal (in AR, Vol III, 4(W), pp 110-145).
[21] *CCR 2020*, at paras 30-32 (in AR, Vol I, Tab 2(A), pp 18-21).
[22] *Canadian Council for Refugees v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 285 [*Motion for Directions*]; *Canadian Council for Refugees v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 637; *CCR 2020* at para 33 (in AR, Vol I, Tab 2(A), p 21).
[23] *Motion for Directions*
[24] Department of Justice Table re: Redactions, (in AR, Vol III, Tab 4(S), p 69); Certificate of the Clerk of the Privy Council re: protection of documents from disclosure under s. 39 of the *Canada*

Reasons of the Federal Court

16. After five days of oral argument and eight months of deliberation, the Federal Court found that refugee claimants returned to the U.S. under s. 101(1)(e) of the *IRPA* are routinely detained without consideration of their individual circumstances.[25] The Court found that detainees face: limited access to release from detention; serious obstacles in obtaining legal assistance; and harsh and often inhumane detention conditions, e.g. solitary confinement, freezing temperatures, inadequate and/or delayed medical care, inadequate/unsafe food/water and lack of accommodation of religious dietary customs.[26] The Court found that the conditions of detention create obstacles to mounting an effective asylum claim and therefore expose refugee claimants to a risk of *refoulement*.[27]

17. The Federal Court concluded that refugee claimants returned to the U.S. by Canada and detained there face infringements of their s. 7 rights to liberty and security of the person. It found that these infringements have no connection to the legislative purpose of "sharing of responsibility for the consideration of refugee claims with countries that are signatory to and comply with the relevant Articles of the Conventions".[28] Thus, the regime was found to be overbroad and its effects grossly disproportionate,[29] infringements that were not justified under s. 1.[30] Having granted relief under s. 7, the Federal Court declined to address the s. 15(1) challenge.[31] The Court also found that it was bound by the 2008 Federal Court of Appeal decision and rejected the Applicants' challenge to the *vires* of s. 159.3 of the *Regulations*.[32]

Reasons of the Federal Court of Appeal

Evidence Act; Exhibit 3 to the August 22, 2019 cross-examination of Andre Baril (in AR, Vol III, Tab 4(O), p 3) See further at para 44 below.

[25] *CCR 2020* at paras 94-99 (in AR, Vol I, Tab 2(A), pp 44-46).

[26] *CCR 2020* at paras 93-114 to and 135 (in AR, Vol I, Tab 2(A), pp 43-50 and 56).

[27] *CCR 2020* at paras 94, 106-108, 114, 136 (in AR, Vol I, Tab 2(A), pp 44, 48-49, 50, 57-58).

[28] *CCR 2020* at paras 119-122, citing *CCR 2007* and *CCR 2008* at para 75 (in AR, Vol 1, Tab 2(A), pp 51-52).

[29] *CCR 2020* at paras 103, 115 (in AR, Vol I, Tab 2(A), pp 47, 50).

[30] *CCR 2020* at para 150 (in AR, Vol I, Tab 2(A), p 61).

[31] *CCR 2020* at para 154 (in AR, Vol I, Tab 2(A), p 62).

[32] *CCR 2020* at para 80 (in AR, Vol I, Tab 2(A), p 40).

18. The Respondents appealed the Federal Court's s. 7 finding. The Applicants cross-appealed the Federal Court's decision not to address s. 15 and to reject the *vires* challenge.[33] The Federal Court of Appeal granted the appeal and dismissed the cross-appeal.[34]

19. In a striking departure from the arguments of both parties and the decision of the Federal Court, the Federal Court of Appeal refused to decide the *Charter* claims. Stratas JA determined that, per *PHS*, the challenge was improperly constituted and the Federal Court erred as it focused on the operative provisions: *IRPA* s. 101(1)(e) and the regulation designating the U.S. Instead, the Applicants were required to seek judicial review of the administrative conduct associated with what the panel called a "safety valve" in the legislative scheme: the GIC's obligation to review the designation.[35] He went on to find the evidentiary record pertaining to the review process was "too incomplete" for responsible adjudication of the issues as he had reframed them.[36]

20. By way of "guidance" for future *Charter* litigants, the Federal Court of Appeal held that Canadian courts will "respond" to the removal of individuals to foreign legal systems only where they suffer effects that "shock the conscience" of Canadians.[37]

21. The Federal Court of Appeal left the s. 15(1) *Charter* issue undecided, finding both that the Federal Court had not erred in declining to decide s. 15(1) and that the Applicants were not permitted to cross-appeal on s. 15(1) because they were successful on their s. 7 claim.[38] Finally, it upheld the Federal Court's finding that the designation of the U.S. is not *ultra vires* because *vires* review is limited to conformity with legislative purpose at the time of promulgation.[39]

PART II – QUESTIONS IN ISSUE

22. The case raises three questions of public importance requiring this Court's intervention:

---

[33] *CCR 2021* at para 1 (in AR, Vol I, Tab 2(B), p 69)
[34] *CCR 2021* at para 1 (in AR, Vol I, Tab 2(B), p 69)
[35] *CCR 2021* at paras 55, 61-83, 70 (in AR, Vol I, Tab 2(B), pp 86, 89-97, 91)
[36] *CCR 2021* at paras 76-83, 90, 107-122 (in AR, Vol I, Tab 2(B), pp 94-97, 99, 106-112)
[37] *CCR 2021* at para 158 (in AR, Vol I, Tab 2(B), p 124)
[38] *CCR 2021* at paras 169-174 (in AR, Vol I, Tab 2(B), pp 128-129)
[39] *CCR 2021* at paras 176-179 (in AR, Vol I, Tab 2(B), pp 130-131)

I. To obtain a *Charter* remedy, in what circumstances are claimants required to challenge the failure of legislative "safety valves" rather than the offending provision, and, in particular, is the government's obligation to review the offending provision a "safety valve"?

II. How does the principle of judicial restraint apply to courts hearing multiple *Charter* claims?

III. In assessing the constitutionality of legislation authorizing the removal of refugee claimants under s. 7, is "shocks the conscience" the only applicable principle of fundamental justice?

PART III – STATEMENT OF ARGUMENT

23. In its judgment, the court below stretched this Court's analysis in *PHS* to the point of effectively immunizing the operative legislative provisions from *Charter* scrutiny, applied the principle of judicial restraint to deny a remedy for the violation of the gender equality rights of women refugee claimants, and denied the protection of the principles of fundamental justice to refugee claimants under s. 7 in all but the most extreme circumstances. This Court's guidance is crucial, both to resolve the ambiguities and tensions in the jurisprudence that led the court below to render a decision so fundamentally at odds with the principles of legality and access to justice, and to ensure that future litigants are not denied meaningful access to remedies for breaches of their *Charter* rights – in the impugned legislative scheme and beyond.

QUESTION 1: To obtain a *Charter* remedy, in what circumstances are claimants required to challenge the failure of legislative "safety valves" rather than the offending provision, and, in particular, is the government's obligation to review the offending provision a "safety valve"?

24. The court below has fundamentally undermined the right to challenge unconstitutional laws. Its expansion of this Court's holding in *PHS* exacerbates ambiguities and tensions in the concept of "safety valves" and their role in *Charter* litigation, creating uncertainty for rights claimants and frustrating the feasibility of *Charter* review of federal legislation. Following the decision of the Federal Court Appeal, there is an undefined array of administrative and legislative mechanisms that may be deemed to be "safety valves" to rights-infringing legislation, requiring litigants to judicially review the failure of a "safety valve" rather than challenge the rights-offending provisions. According to the court below, this includes judicial review of the GIC's failure to review and revoke a *Charter*-offending regulation.

25. This case therefore raises issues of national importance: it provides an important opportunity for this Court to clarify the role of "safety valves" in *Charter* litigation, and to reconcile its holding in *PHS* with its other jurisprudence on the fundamentals of *Charter*-compliant laws. These issues are particularly pressing in light of the expansion of the court's role in the judicial review of regulations, the inherently secretive nature of Cabinet decision-making, and the imperative of accessible remedies for *Charter* breaches.

i) Clarifying the principles in PHS

26. In *PHS*, this Court found that a statutory mechanism to seek Ministerial exemptions acted "as a safety valve" to ensure that s. 4(1) of the *Controlled Drugs and Substances Act* would not produce "arbitrary, overbroad or grossly disproportionate … effects."[40] This was predicated on the requirement that the Minister's discretion be exercised in a *Charter*-compliant manner. Finding that an exemption was the only *Charter*-compliant outcome, this Court issued a *mandamus* order compelling the Minister to grant the exemption.

27. Neither *PHS* nor this Court's subsequent caselaw have, however, addressed the question of how the principle in *PHS* is to be reconciled with this Court's repeated findings that the possibility of a discretionary cure is no remedy to an otherwise unconstitutional statutory power.[41] This unresolved issue has split this Court on at least one occasion.[42]

28. Notwithstanding this tension, the application of the *PHS* principle in the s. 7 jurisprudence of the Federal Courts has further expanded the scope and role of discretionary "safety valves" in *Charter* review. In a series of cases, the Federal Courts have upheld legislation on the premise that the availability of other discretionary recourses under the IRPA and access to the Federal Court to seek individualized *Charter* relief are sufficient "safety valves" to protect s. 7 rights.

---

[40] *Controlled Drugs and Substances Act*, SC 1996, c 19; *PHS* at para 113.

[41] See *R v Smith*, [1987] 1 SCR 1045, 1987 CarswellBC 198 SCC at para 68; *R v Goltz*, [1991] 3 SCR 485, 1991 CarswellBC 280 (SCC) at paras 92-98; *Montréal (City) v 2952-1366 Québec Inc*, 2005 SCC 62 at para 169; *R v Seaboyer; R v Gayme,* [1991] 2 SCR 577, 1991 CarswellOnt 109 (SCC) at paras 83-88; *Canada (Human Rights Commission) v Taylor*, [1990] 3 SCR 892, 1990 CarswellNat 1030 at para 150 (per McLachlin J. in dissent); *R v Zundel,* [1992] 2 SCR 731, 1992 CarswellOnt 109 (SCC) at paras 62-64 and *Osborne v Canada (Treasury Board)*, [1991] 2 SCR 69, 1991 CarswellNat 348 (SCC) at paras 1-2 (per Wilson and L'HeureuxDubé- JJ, concurring). See further *R v Appulonappa*, 2015 SCC 59 at para 74.

[42] *R v Nur*, 2015 SCC 15 at paras 85-98 (per McLachlin CJ, for the majority) and 175ff (per Moldaver J, dissenting).

These findings have been made even though, unlike in *PHS*, the recourses in issue do not provide for exemptions from the statutory regime.[43] In this now-dominant approach, marginalized *Charter* litigants in the Federal Courts frequently find that the remedy is to be found not in the provision they have attacked, but elsewhere. Rather than strike a harmful provision, the courts leave it untouched and instead instruct litigants to rely on the discretion of government officials to alleviate the harm.

29. The application of *PHS* in the present case both reflects and exacerbates this lack of clarity around what constitutes a "safety valve". According to the judgement below, the statutory requirement for the GIC to "ensure ongoing review" of the impugned regulation is the "safety valve" against breaches of *Charter* rights. As such, <u>any</u> challenge to the unconstitutional effects of the legislation <u>must</u> be directed to the failure of this "safety valve." Individuals whose rights are violated by the *STCA* regime cannot impugn the constitutionality of the legislative provisions themselves; instead, they must seek judicial review of the process and rationale under which a regulation was <u>not</u> revoked, and must seek a *mandamus* order compelling the GIC to exercise its legislative power to repeal or amend a regulation.[44]

30. This marks a troubling expansion of the *PHS* ratio in at least three respects. First, whereas the "action or inaction" in the operation of the "safety valve" in *PHS* was administrative (the Minister's refusal of the exemption), here it is both administrative (the failure to properly

---

[43] See *Revell v Canada (Citizenship and Immigration),* 2019 FCA 262 at paras 47-52, leave to appeal to SCC refused, 38891 (2 April 2020); *Tapambwa v Canada (Citizenship and Immigration),* 2019 FCA 34 at para 88, leave to appeal to SCC refused, 38589 (11 July 2019); *Atawnah v Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 144 at para 23, leave to appeal to SCC refused, 37122 (1 December 2016). See also *Brown v Canada (Citizenship and Immigration),* 2020 FCA 130 at paras 66ff, leave to appeal to SCC refused, 39408 (11 March 2021), and *Canadian Civil Liberties Association v Canada (Attorney General)*, 2019 ONCA 243 at paras 102ff, appeals to this Court withdrawn following leave to appeal to SCC granted, 38574 (13 February 2020).

[44] *CCR 2021* at paras 54, 58, 70 and 96, (in AR, Vol I, Tab 2(B), pp 85, 87, 91, 102); applying *PHS* at para 109. The court below also relied on *Little Sisters Book and Art Emporium v Canada (Minister of Justice),* 2000 SCC 69 at paras 133-139 [*Little Sisters*] which, in the Applicants' respectfully submissions, is simply wrong. *Little Sisters* is about the unconstitutional misapplication of broadly drafted legislation by government agents; this case is about the conduct of the government itself in enacting the impugned regulation.

review) and legislative (the failure to repeal or amend the regulation). Second, unlike in *PHS,* the "safety valve" identified by the Federal Court of Appeal does not provide a mechanism to seek relief, as there is no provision in the *IRPA* under which a refugee claimant seeking entry to Canada can request the GIC to review the designation. Third, the "safety valve" at issue here was held to be determinative not just of the s. 7 overbreadth and gross disproportionality issues, as in *PHS*, but also of any other *Charter* breaches caused by the ongoing designation.[45]

31. The effects of applying the *PHS* principle in the manner dictated by the court below are far-reaching. Review obligations[46] and avenues for discretionary reprieve[47] are common features of Canadian legislation. Including all such mechanisms in an expansive definition of a "safety valve" has significant implications for scrutiny of the *Charter* compliance of those schemes and the accessibility of *Charter* remedies. In the present case, it has effectively barred access to *Charter* remedies for affected refugee claimants (as set out in sections iii) and iv) below).

ii) Tensions between "safety valves" and the standards for legislative *Charter* compliance

32. Having concluded that the GIC's regulatory review process was a "safety valve" in the legislative scheme, the court below rejected the Federal Court's finding that the operation of the legislative scheme itself caused the *Charter* breach and decided that the only "real causes of the infringement" were the failures of the safety valve: the deficient regulatory review and the GIC's failure to revoke the regulation.[48]

33. This conclusion is illustrative of a tension between an expansive application of *PHS* and the law of causation. As clarified in *Bedford*, a law is subject to *Charter* scrutiny wherever it has a sufficient causal connection to the effects in issue, even if there are other contributing

---

[45] *CCR 2021* at para 58, (in AR, Vol I, Tab 2(B), p 87).
[46] See, for example, *Criminal Code*, RSC 1985, c C-46, s. 83.05(8.1); *Emergencies Act,* RSC, 1985, c 22 (4th Supp), ss. 12 and 23; *State Immunity Act*, RSC 1985, c S-18, s. 6.1(7) and (8); *Canada Labour Code*, RSC, 1985, c L-2, s. 139.2(1); *Accessible Canada Act*, SC 2019, c 10, s. 132; *National Security Act*, 2017, SC 2019, c 13, ss. 168(1) and (1.1).
[47] *IRPA*, ss 24, 25(1), 42.1 and 65; C*orrections and Conditional Release Act,* SC 1992, c 20, ss. 119 and 122; *Controlled Drugs and Substances Act*, SC 1996, c 19, ss. 55-56.1; *Citizenship Act*, RSC, 1985, c C-29, s. 5(4); and *Quarantine Act*, SC 2005, c 20, s. 62(m).
[48] *CCR 2021* at paras 55, 74, 90 and 131, (in AR, Vol I, Tab 2(B), pp 86, 93, 99, 115).

causes.[49] While the failure of a "safety valve" may in some circumstances contribute to a *Charter* breach, treating it as the sole cause of the breach effectively immunizes the law that is the primary cause of the breach from *Charter* scrutiny.

34. Further, treating the failure of a "safety valve" as the only cause of the infringement effectively shifts the burden for justifying a *Charter* violation under s. 1. This Court has repeatedly emphasized that the state bears the s. 1 burden, which must include the burden to demonstrate the adequacy of any safety valves in order to prove minimal impairment and proportionality.[50] If rights claimants are expected to prove the inadequacy or failure of an ever-expanding array of "safety valves" to obtain a remedy, the state in all such cases will be *de facto* relieved of its s. 1 burden. This Court's post-*PHS* caselaw has also clarified that the balancing of the issues considered in *PHS* as part of the s. 7 analysis should in fact be considered under s. 1 precisely to ensure that the state's burden of proof is not displaced.[51] While this Court has not yet had occasion to address this tension between *PHS* and this subsequent caselaw, the judgment below endorses an expansive application of *PHS* that undermines the more recent caselaw on the s. 1 burden. These foundational issues warrant consideration by this Court.

iii) Inaccessible remedies

35. Having shifted the object of *Charter* litigation from the operative provision to the failure of the "safety valve," the court below recognized that claimants would need to seek a *mandamus*

---

[49] *Canada (Attorney General) v Bedford,* 2013 SCC 72 at paras 75-76), and see also *Fraser v Canada (Attorney General),* 2020 SCC 28 at para 30 on effects-based discrimination under s. 15(1) of the *Charter*, for example., *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1 at paras 72-77 with respect to *Charter* review more generally being concerned with both the purpose and *effects* of legislation.

[50] *Canada (Attorney General) v Bedford*, 2013 SCC 72 at paras 127-128; *Carter v Canada (Attorney General),* 2015 SCC 5 at paras 80-82 and 102-121; *R v Appulonappa*, 2015 SCC 59 at paras 81-82. See further Hamish Stewart, "*Bedford* and the Structure of Section 7" (2015) 60:3 McGill LJ 575 at pp 588-593.

[51] *Bedford*, paras 113 and 123-129; and see *Carter* at paras 79-82; *R. v. Smith*, 2015 SCC 34 (CanLII), [2015] 2 SCR 602, para 29.

order requiring the GIC to exercise its legislative power to repeal or amend a regulation rather than a remedy against the regulation under s. 52 of the *Charter.*[52]

36. Any framework that requires claimants to seek a *mandamus* order, however, imposes legal and evidentiary burdens that surpass what is required to obtain a s. 52 *Charter* remedy. Where a statutory power is discretionary (as it is here), the settled law on *mandamus* precludes courts from compelling any particular exercise of that discretion unless there is only one *Charter*-compliant outcome.[53] Under the framework mandated by the Federal Court of Appeal, rights claimants must therefore both demonstrate that the regulation is in fact contrary to the *Charter* and satisfy the remaining conjunctive *mandamus* criteria.[54] Whether it is justified to impose these further requirements to obtain a *Charter* remedy raises issues of national importance.

37. This is, moreover, wholly uncharted territory. The law is at best unclear as to whether courts can ever compel a Governor In Council to exercise its legislative power to make, amend, suspend or repeal regulations. Such an order would be unprecedented.[55]

38. Even if a *mandamus* order of this sort could be made, the settled law on the criteria for *mandamus* would have to be re-written to allow for it. For example, while those seeking *mandamus* must establish that a public law duty is owed to them personally, it is, at best, a strain to characterize the GIC's legislative duties as owed to any particular applicant. Further, those seeking *mandamus* must establish that they made a demand for the performance of the

---

[52] *CCR 2021* at para 96 (in AR, Vol I, Tab 2(B), p 102).

[53] *PHS* at para 150; *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 at paras 164-165 (per McLachlin CJC and Moldaver J, concurring); Halsbury's Laws of Canada (online), Administrative Law (2018 Reissue), "Remedies: Prerogative Remedies: Mandamus" (V1.3(3)) at HAD-123 "Compelling performance of statutory duty" (Cum Supp Release 49).

[54] *Apotex Inc. v. Canada (Attorney General)* 1993 CarswellNat 820 (FCA), [1994] 1 F.C. 742 (Fed. C.A.), affirmed [1994] 3 S.C.R. 1100 (S.C.C.)

[55] 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); *Amalgamated Transit Union Local 1374 v Saskatchewan (Minister of Finance),* 2017 SKQB 152 at paras 46-49; *Brown v Newfoundland (Minister of Environment and Lands),* 1993 109 Nfld & PEIR 11, 342 APR 11 at para 11; *Canada (Governor General in Council) v Mikisew Cree First Nation*, 2016 FCA 311 at paras 26-27 and 38, aff'd 2018 SCC 40; *Canadian Union of Public Employees 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).

duty which was denied – yet none of the federal statutes with review obligations include a mechanism through which the public can demand a review.[56] The judgment below thus creates uncertainty and impedes access to *Charter* remedies in ways that warrant this Court's attention.

(iv) Inaccessible records

39. The identification of a "safety valve" also dictates the record required for and available to *Charter* litigants. In the case at bar, the identification of internal Ministerial reviews and the GIC's failure to exercise its legislative power as a "safety valve" erected substantial obstacles to judicial scrutiny.

40. First, while a court assessing a s. 52 *Charter* application would consider any admissible evidence on the effects of the impugned law, a court seized of an application for judicial review of a regulatory review process could normally consider only the materials already in the record before the relevant "tribunal".[57] Curtailing the record in this manner unjustifiably restricts *Charter* claimants.

41. Second, the records at issue in cases involving regulatory review would invariably be subject to various claims of privilege. Rights claimants' scarce resources would be consumed with trying to obtain the evidence necessary to impugn the GIC's and Minister's decision-making processes, as opposed to (or as well as) proving that the effect of the law breaches their *Charter* rights. The problem is particularly acute where claimants are required to attack the GIC's failure to revoke a regulation, as was the case here. Litigants will be required to try to wrest the relevant records from the "black box" of decision-making of the federal Cabinet,[58] which

---

[56] *R v Newfoundland Association of Provincial Court Judge*, 2000 NFCA 46 at paras 214-218; *Prosper Petroleum Ltd v Her Majesty the Queen in Right of Alberta*, 2020 ABQB 127, 2020 CarswellAtla 336 (SCC) at para 74. See note 46 above and s. 102(3) of the *IPRA*.
[57] *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 19-20; *Delios v. Canada (Attorney General)*, 2015 FCA 117 at paragraphs 41-42.
[58] *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at paras 605-606 (per Rowe J, dissenting but not on this point).

would present a virtually impassible hurdle whenever Cabinet confidences are invoked in good faith under s. 39 of the *Canada Evidence Act*.[59]

42. Third, the court below held that negative inferences from non-disclosure are available only if applicants have made "constant and firm" objections to assertions of privilege—requiring them to litigate asserted privileges in order to benefit from negative inferences.[60] This is a significant development in the law that warrants this Court's attention both as a matter of principle and as a further impediment to access to justice.[61]

43. The case at bar provides an apt illustration of the challenges posed. The Applicants in fact impugned both the reasonableness of the ongoing designation under s. 159.3 of the *Regulations* and the sufficiency of the reviews that were conducted under s. 102(3) of the *IRPA*. To that end, they sought all of the records relating to the Ministerial reviews and Cabinet's consideration of the issue. They conducted a three-day cross-examination of the public servant in charge of the reviews. After successfully litigating the Respondents' claim that the evidence sought was not relevant,[62] substantial portions of the evidence were nonetheless redacted on grounds of cabinet confidence, international relations privilege, solicitor-client privilege, and other public interest privileges. The Applicants – public interest litigants and refugee claimants with limited resources – presumed the Respondents applied the redactions in good faith and elected not to challenge them further.[63] However, despite the fact that the only relevant evidence that was <u>not</u> adduced was that which was redacted by the government, the Federal

---

[59] See *Babcock v Canada (Attorney General),* 2002 SCC 57 at paras 37-44; *R v Ahmad,* 2011 SCC 6 at para 50; and see further *British Columbia (Attorney General) v Provincial Court Judges' Association of British Columbia,* 2020 SCC 20 at paras 97-100.
[60] *CCR 2021* at paras 111-112 (in AR, Vol I, Tab 2(B), p 108).
[61] *Downtown Eastside* at para 31; *BCGEU v British Columbia (Attorney General),* [1988] 2 SCR 214, 1988 CarswellBC 363 at paras 24-25; *Hryniak v Mauldin*, 2014 SCC 7 at para 26; *Nevsun Resources Ltd v Araya,* 2020 SCC 5 at para 145.
[62] *Motion for Directions*.
[63] See the table prepared by counsel for the Respondents setting out the basis of their redactions (in AR, Vol III, Tab S, p 69).

Court of Appeal found the record insufficient and declined to draw adverse inferences from the government's non-disclosure.[64]

QUESTION 2: How does the principle of judicial restraint apply to courts hearing multiple *Charter* claims?

44. This case highlights the need for guidance on how courts of first instance and courts of appeal should balance the competing principles of judicial restraint and access to justice in cases raising multiple *Charter* claims.

45. The Applicants in this case put forward substantial evidence of breaches of two *Charter* rights – the s. 7 rights to liberty and security of the person and the s. 15(1) right to gender equality. Both issues were fully argued by both sides. The applications judge, finding a violation of s. 7, found it "unnecessary" to make findings on s. 15(1). The Federal Court of Appeal confirmed it was appropriate for the applications judge to have proceeded this way – then itself proceeded to quash the s. 7 finding while declining either to decide or remit the s. 15(1) issue.[65] As a result, the Applicants were denied a determination of the second *Charter* ground.

46. In the name of judicial restraint, the combined approach of both courts has insulated from s. 15(1) scrutiny a law with devastating consequences for women fearing gender-based persecution, whom the U.S. routinely fails in its protection obligations.[66]

---

[64] *CCR 2021* at paras 74, 83 and 106-120 (in AR, Vol I, Tab 2(B), pp 93, 96, 106-111). Contrary to the statement of the Court below (*CCR 2021* at para 83 (in AR, Vol I, Tab 2(B), p 96)), "the reports of the reviews, the reviews themselves and the information relied upon by officials involved in the reviews and, if relevant, by the Governor in Council…. subject to privilege and other valid objection" did in fact "form the record placed before the Court". The record was "hobbled" not by the way the Applicants "cast their challenge" but *only* by the Respondents' invocations of privilege (*CCR 2021* at para 74 (in AR, Vol I, Tab 2(B), p 93)).

[65] *CCR 2021* at para 171 (in AR, Vol I, Tab 2(B), p 128)

[66] See, e.g., Aff of Karen Musalo (in AR, Vol 2, Tab 4F, pp 45-58); Supp Aff of Karen Musalo (in AR, Vol 2, Tab 4G, pp 59-82); Aff of Deborah Anker at para 62 (in AR, Vol 1, Tab 4B, p 208); and Supp Aff of Deborah Anker at paras 7-14 (in AR, Vol 2, Tab 4C, pp 4-8).

47. While the policy of judicial restraint regarding constitutional cases is widely accepted and applied by appellate courts,[67] its application by courts of first instance – a practice endorsed here by the Federal Court of Appeal – raises distinct issues that may curtail access to justice for disadvantaged litigants.

48. A key role of the court of first instance is to establish "the record on which subsequent appeals are founded".[68] But where, as here, an applications judge limits her factual and legal findings to just one of the alleged violations, and that decision is overturned on appeal, the appellate court will not be in a position to adjudicate the other *Charter* claim(s). Already disadvantaged litigants must then undertake the cost and delay of re-determination at first instance or simply be denied access to justice for rights violations.

49. Therefore, notwithstanding the strong policy reasons underlying appellate judicial restraint, there are equally strong access to justice and rule of law rationales that favour adjudication of all properly raised *Charter* claims at first instance. This appeal offers an opportunity to provide guidance to first instance courts on how to balance those competing priorities.

50. Further, if courts of first instance are expected to limit their *Charter* findings to what is necessary to grant relief, then appellate courts require guidance on whether and when they should (a) remit the remaining *Charter* issues or (b) step into the shoes of the trier of fact and make their own determinations. Principled guidance is needed to avoid the outcome here – where disadvantaged litigants have been denied consideration of the breach of their equality rights, despite having fully argued the issue before both the Federal Court and Court of Appeal.

QUESTION 3: In assessing the constitutionality of legislation that authorizes removal of refugee claimants under s. 7, is "shocks the conscience" the only applicable principle of fundamental justice?

51. Finally, this case raises questions of public importance about the scope and application of the "shocks the conscience" standard in the context of *Charter* scrutiny of legislation authorizing the removal of refugee claimants.

---

[67] *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 SCR 97, 124 DLR (4th) 129 (SCC) at para 6ff; Peter W Hogg, *Constitutional Law*, 5th ed (Toronto: Thomson Carswell, 2007), ch 59.5; *Carter*; *Bedford* at paras 48-56.
[68] *Bedford* at para 49.

52. Having decided that the Applicants had effectively brought the wrong case, the Federal Court of Appeal still proceeded to provide "guidance [to] those advancing section 7 claims in this area in the future".[69] This guidance includes the holding that "Canadian courts will respond to the removal of individuals to foreign legal systems and administrations only where they will suffer effects that are so deplorable they 'shock the conscience' of Canadians", which the Court emphasized is so high a threshold that it covers only extreme treatment such as torture, stoning, mutilation or the death penalty.[70]

53. This application of the "shocks the conscience" standard in the context of a challenge to legislation creates significant uncertainty for Federal Courts hearing challenges to any provisions authorizing the removal of refugees and refugee claimants to foreign legal systems.[71]

54. It is well established that the Minister must exercise discretion to decline extradition to face criminal proceedings in a foreign legal system if it would "shock the conscience" to proceed.[72] The jurisprudence to date, however, has applied the "shocks the conscience" standard specifically to the review of individual exercises of Ministerial discretion under otherwise constitutionally sound extradition legislation; challenges to the underlying statutory provisions have not been limited to this standard.[73] Thus, in *Suresh*, this Court applied the "shocks the conscience" test to circumscribe Ministerial discretion to remove a refugee to the risk of torture, but not as the only applicable principle of fundamental justice for evaluating the constitutionality of the law itself.[74]

55. Moreover, in *Németh*, this Court held that while "shocks the conscience" may apply to Ministerial decisions under s. 44(1)(a) of the *Extradition Act* (where a surrender would be "unjust or oppressive"), a different standard applies to surrenders under s. 44(1)(b) (which

---

[69] *CCR 2021* at para 132 (in AR, Vol I, Tab 2(B), p 115)
[70] *CCR 2021* at paras 158-159 (citation removed) (in AR, Vol I, Tab 2(B), pp 124-125)
[71] See *United States v Burns*, 2001 SCC 7 at para 68.
[72] See, e.g., *Lake v Canada (Minister of Justice),* 2008 SCC 23 at paras 31-32; *United States v Burns*, 2001 SCC 7 at paras 66-69; *Canada (Attorney General) v Barnaby*, 2015 SCC 31 at para 2.
[73] *United States of America v Ferras; United States of America v Latty,* [2006] SCJ No 33, 268 DLR (4th) 1 (SCC), at para 27*ff; s*ee also *United States v Burns*, 2001 SCC 7 at para 67.
[74] *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 27.

refers to requests for extradition "made for the purpose of prosecuting or punishing the person by reason of their race, religion, nationality, etc.").[75] When acting under s. 44(1)(b), the Minister must refuse to surrender the person if doing so would violate Canada's non-*refoulement* obligations under the *Refugee Convention*.[76]

56. The Federal Court of Appeal's approach unjustifiably extends the "shocks the conscience" standard from constraining the exercise of discretion under a constitutional regime to being the only standard for constitutional review of legislation that authorizes removal from Canada. Contrary to *Németh,* the effect of the judgment below is to deny refugee claimants access to the protection that Canada is bound to provide. This Court's intervention is needed to ensure the preservation and application of principles of fundamental justice and to hold Canada to its obligations under international law.

57. Moreover, in insisting that the conscience of Canadians would only be shocked by removal of refugees to the gravest of harms such as "torture, stoning, mutilation or the death penalty," the Federal Court of Appeal has placed Canada firmly outside the bounds of international law and practice. Leading jurisprudence and opinion from the U.K. and E.U. call not for heightened harm thresholds or deference, but for "most anxious scrutiny" prior to transfer to ensure that receiving states will respect the rights of refugees under international law.[77]

PART IV – SUBMISSIONS ON COSTS

58. The Applicants do not seek costs and request that none be ordered against them.

PART V – ORDER SOUGHT

59. The Applicants respectfully request that leave to appeal be granted.

---

[75] *Németh* at para 73.
[76] *Németh* at paras 73-77 and 114.2.
[77] *R v Secretary of State for the Home Department, ex parte Yogathas*, [2002] UKHL 36 at para 58 (per Lord Hope) and at para 74 (per Lord Hutton); *R v Secretary of State for the Home Department, ex parte Bugdaycay,*[1987] AC 514 (per Lord Bridge of Harwich); James C Hathaway, *The Rights of Refugees Under International Law*, 2d ed (Cambridge University Press, 2021) at p 373-374.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14th day of June, 2021.


for
Andrew Brouwer, Michael Bossin
Heather Neufeld, Leigh Salsberg,
Erin Simpson, Kate Webster, Colleen Bauman,
Prasanna Balasundaram, Jared Will and Joshua Blum
Counsel for the Appellants

PART VI – TABLE OF AUTHORITIES

CASELAW	PARAGRAPH REFERENCE
Amalgamated Transit Union Local 1374 v Saskatchewan (Minister of Finance), 2017 SKQB 152	37
Apotex Inc. v. Canada (Attorney General) 1993 CarswellNat 820 (FCA), [1994] 1 F.C. 742 (Fed. C.A.), affirmed [1994] 3 S.C.R. 1100 (S.C.C.)	36
Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright), 2012 FCA 22	41
Atawnah v Canada (Public Safety and Emergency Preparedness), 2016 FCA 144, leave to appeal to SCC refused, 37122 (1 December 2016)	28
Babcock v Canada (Attorney General), 2002 SCC 57	41
BCGEU v British Columbia (Attorney General), [1988] 2 SCR 214, 1988 CarswellBC 363	42
British Columbia (Attorney General) v Provincial Court Judges' Association of British Columbia, 2020 SCC 20	41
Brown v Canada (Citizenship and Immigration), 2020 FCA 130, leave to appeal to SCC refused, 39408 (11 March 2021)	28
Brown v Newfoundland (Minister of Environment and Lands), 109 Nfld & PEIR 11, 342 APR 11	37
Canada (Attorney General) v Barnaby, 2015 SCC 31	54
Canada (Attorney General) v Bedford, 2013 SCC 72	33, 34, 47, 48
Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society, 2012 SCC 45	5, 42
Canada (Attorney General) v PHS Community Services Society, 2011 SCC 44	4, 26, 29, 36
Canada v Canadian Council for Refugees, 2021 FCA 72	4, 18-21, 29-30, 32, 35, 42, 43, 45, 52
Canada (Human Rights Commission) v Taylor, [1990] 3 SCR 892, 1990 CarswellNat 1030	27

The 1951 Convention Relating to the Status of Refugees, 28 July 1951, Treaty Series, Vol 189, p 137	10

SECONDARY MATERIALS	PARAGRAPH REFERENCE
Halsbury's Laws of Canada (online), *Administrative Law (2018 Reissue),* "Remedies: Prerogative Remedies: Mandamus" (V1.3(3)) at HAD-123 "Compelling performance of statutory duty" (Cum Supp Release 49)	36
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"	37
James C Hathaway, *The Rights of Refugees Under International Law,* 2d ed (Cambridge: Cambridge University Press, 2021)	57
Peter W Hogg, *Constitutional Law*, 5th ed (Toronto: Thomson Carswell, 2007)	47
Hamish Stewart, "*Bedford* and the Structure of Section 7" (2015) 60:3 McGill LJ 575	34

PART VII – STATUTORY PROVISIONS

LEGISLATION	CITED AT PARAS
Accessible Canada Act, SC 2019, c 10, s. 132 *Loi canadienne sur l'Accessibilité,* LC 2019, c 10, art 132	31
Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act,* 1982, being Sch B to the *Canada Act 1982* (UK), 1982, c 11, ss 1, 7, 15(1) *Charte Canadienne des Droits et Libertés,* Parti I, *Loi constitutionelle de 1982,*Annexe B de la *Loi de 1982 sur le Canada* (R-U), 1982, c 11, arts 1, 7, 15(1)	1, 2
Canada Evidence Act, RSC 1985, c C-5, ss 37, 38, 39 *Loi sur la preuve au Canada,* LRC 1985, c C-5, arts 37, 38, 39	15
Canada Labour Code, RSC, 1985, c L-2, s. 139.2(1) *Code canadien du travail,* LRC 1985, c L-2, art 139.2(1)	31
Citizenship Act, RSC 1985, c C-29, s 5(4) *Loi sur la citoyenneté,* LRC 1985, c C-29, art 5(4)	31
Controlled Drugs and Substances Act, SC 1996, c 19, ss 4(1), 55, 56.1 *Loi réglementant certaines drogues et autres substances*, LC 1996, c 19, arts 4(1), 55, 56, 56.1	26, 31
Corrections and Conditional Release Act, SC 1992, c 20, ss 119, 122 *Loi sur le système correctionnel et la mise en liberté sous condition*, LC 1992, c 20, ss 119, 122	31
Criminal Code, RSC 1985, c C-46, s 83.05(8.1) *Code criminel*, LRC 1985, c C-46, art 83.05(8.1)	31
Emergencies Act, RSC 1985, c 22 (4th Supp.), ss 12, 23 *Loi sur les mesures d'urgence*, LRC 1985, c 22 (4th suppl.), arts 12, 23	31
Immigration and Refugee Protection Act, SC 2001, c 27, ss 24, 25(1), 42.1, 65, 95, 96, 97, 98, 99, 101(1)(e), 102(1), 102(2), 102(3) *Loi sur l'immigration et la protection des réfugiés,* LC 2001, c 27, arts 24, 25(1), 42.1, 65, 101(1)(e), 102(1), 102(2), 102(3)	2, 7, 8, 31, 38
Immigration and Refugee Protection Regulations, SOR/2002-227, s 159.3, 159.5, 159.6 *Règlement sur l'immigration et la protection des réfugiés,* DORS/2002-227, art 159.3, 159.5, 159.6	2, 8
National Security Act, 2017, SC 2019, c 13, ss. 168(1)-(1.1) *Loi de 2017 sur la sécurité nationale,* LC 2019, c 13, arts 168(1)-(1.1)	31
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 *Directives visant à assurer le suivi de l'examen des facteurs prévus au paragraphe 102(2) de la loi sur l'immigration et la protection des*	10

réfugiés à l'égard des pays désignés en vertu de l'alinéa 102(1)a) de cette loi, Decre (2004) 2004-1158	
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 Directives visant à assurer le suivi de l'examen des facteurs prévus au paragraphe 102(2) de la loi sur l'immigration et la protection des réfugiés à l'égard des pays désignés en vertu de l'alinéa 102(1)a) de cette loi, *Decre*, (2015) 2015-0809	10
Quarantine Act, SC 2005, c 20, s 62(m) *Loi sur la mise en quarantaine*, LC 2005, c 20, art 62(m)	31
State Immunity Act, RSC 1985, c S-18, s 6.1(7)-(8) *Loi sur l'immunité des États*, LRC 1985, c S-18, arts 6.1(7)-(8)	31