IN THE HIGH COURT OF THE DOMINION OF CANADA

(On Appeal from the Federal Court of Appeal)

BETWEEN:

AYA MOREZ

APPELLANT
(Appellant)

- and –

CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION)

RESPONDENT
(Respondent)

FACTUM OF THE APPELLANT

Team #

Table of Contents

		Page
Part I:	**Overview**	1
Part II:	**Statement of Facts**	3
Part III:	**Points in Issue**	6
Part IV:	**Statement of Argument**	7
	A. Sections 11(1.1), 20.2, 24(5), 25(1.01) and 31.1 of the *Immigration and Refugee Protection Act* violate section 15(1) of the *Charter*	7
	B. The infringement is not justified by section 1 of the *Charter*	16
	C. Remedy	28
Part V:	**Order Sought**	30
Part VI:	**Table of Authorities**	31

PART I: OVERVIEW

[1] This case is about legislation that victimizes the very people most in need of its protection – Convention refugees ("refugees"). Ms. Aya Morez is a twenty-one year old refugee who fled to Canada to escape the totalitarian state of Mucno after her family was murdered by its leader. After searching for four and a half years, she located her only living relative, her brother Ano. He is hospitalized in France and has less than two years to live. This dispute arises out of Ms. Morez's request to secure travel documents to visit her brother before he dies.

> *Official Problem* at 3, 5, paras 1, 3, 21, 24.
> *Official Clarifications* at para 2.

[2] Ms. Morez was denied travel documents because she is a "Designated Foreign National" ("DFN"). Under the 2007 amendments to the *Immigration Refugee Protection Act* ("*IRPA*"), anyone who arrives in Canada in an "irregular" manner and without the requisite documents is declared a DFN. Arriving by way of human smuggling falls within the definition of irregular.

> *Official Problem* at 3.
> *Immigration Refugee Protection Act,* SC 2001, c 27 at ss 20.1(1), 20.1(2), 117 [*IRPA*].

[3] Section 31.1 of *IRPA* provides that for the purposes of Article 28 of the United Nations *Convention Relating to the Status of Refugees* ("*Refugee Convention*"), DFNs are not considered "lawfully" in Canada – and so are not entitled to travel documents – until five years after their refugee status has been determined. *IRPA* also prohibits DFNs from applying for either permanent or temporary residence until after this five year period. The effect of these provisions is to prohibit Ms. Morez from receiving travel documents before the end of 2013. Her brother is not expected to live that long. Under s. 25(1.01) of *IRPA*, DFNs are also denied access to a hearing seeking an order on Humanitarian and Compassionate grounds.

> *IRPA*, *supra* para 2 at ss 11(1.1), 20.2(1), 24(5), 25(1.01), 31.1.
> *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137, Can TS

1969 No 29 (entered into force 22 April 1954, accession by Canada 04 June 1969) [CRSR], art 28 [*Refugee Convention*].

[4] At the Federal Court of Appeal, a majority of the Court found that there was no violation of s. 15(1) of the *Canadian Charter of Rights and Freedoms* ["*Charter*"] because the legislative distinction was not made on an enumerated or analogous ground. Ms. Morez submits that the Federal Court of Appeal erred in taking an overly restrictive approach to the s. 15(1) analysis.

Official Problem at 7.
Canadian Charter of Rights and Freedoms, s 15(1), Part I of the *Constitution Act*, 1982, being schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

[5] Ms. Morez asks the High Court of the Dominion of Canada to overturn the decision of the Federal Court of Appeal. She brings this application seeking a declaration that sections 11(1.1), 20.2(1), 24.(5), 25 (1.01), and 31.1 of *IRPA* violate the right to equality under section 15(1) of the *Charter*, are not justifiable under section 1 and are, as a result, invalid and of no force and effect. Ms. Morez also seeks an order in the nature of *mandamus* requiring the Government of Canada to issue her travel documents immediately.

IRPA, *supra* para 2 at ss 11(1.1), 20.2(1), 24.(5), 25 (1.01), and 31.1.

[6] Ms. Morez argues that the impugned provisions violate s. 15(1) by discriminating on the intersecting grounds of citizenship and national origin and are not justified under section 1 because they function in an irrational, excessive, and punitive manner. The Government has led no evidence to show that the impugned provisions will have their desired effects. While the harms of the legislation are patent, any benefits are purely speculative.

[7] A declaration of invalidity will ensure that these provisions do not violate the rights of others like Ms. Morez. A *mandamus* order recognizes the exigency of the circumstances – the need to allow Ms. Morez to see her brother before he dies.

PART II: STATEMENT OF FACTS

[8] Mucno is a totalitarian state with an extremely poor human rights record. Its citizens are not issued identification documents, nor are they permitted to travel outside the country.

Official Problem at 3, para 1.

[9] In March 2007, Ms. Morez's parents, younger sister, uncle, aunt, paternal grandparents and four cousins were murdered by the state. Her brother Ano's whereabouts were unknown.

Official Problem at 3, para 3.

[10] Ms. Morez fled, grabbing what remained of her mother's jewelry. She walked for almost two months until she reached the neighbouring country of Aflot, Mucno's chief ally. The bounty Mucno had placed on her life was well known in Aflot.

Official Problem at 3, paras 4, 5, 6.

[11] There is no place in Aflot to make a refugee claim. Mucno is not on the list of countries for which Canada has exempted visa requirements.

Official Clarifications at paras 4, 5.

[12] Eventually, Ms. Morez made contact with a local man in Aflot who promised her a spot on a boat he was taking to Canada in exchange for her mother's jewelry and performing domestic services in his home.

Official Problem at 3, para 7.

[13] After a grueling one month journey, Ms. Morez arrived in Canada on July 31, 2007. The Minister designated the arrival as "irregular" on the basis that there were reasonable grounds to suspect human smuggling. Since Mucno does not issue identification documents to its citizens, Ms. Morez had no way to avoid being labeled a DFN. As a result, she was detained.

Official Problem at 4 paras 10, 11.
IRPA, supra para 2 at s 20.1(1), (2).

[14] In mid-August 2007, while in detention, Ms. Morez made a refugee claim. She remained in custody for a year and a half until the Government recognized her status as a Convention refugee in December, 2008. She was not released until February 5th, 2009.

Official Problem at 4 paras 9, 12, 13, 14.

[15] Upon her release, Ms. Morez moved into a women's shelter and was hired at a retirement home. By all accounts she thrived in her paid employment as well as in her volunteer work. Ms. Morez testified that she wanted to become a Canadian citizen as soon as possible.

Official Problem at 4, paras 15-18.

[16] Even so, the memory of her family instilled in Ms. Morez a deep sense of loneliness, loss and sadness. Not knowing what happened to her brother Ano caused her particular heartache. She spent long hours each week searching for any news about Ano's fate.

Official Problem at 4, 5, paras 19, 20.

[17] On February 7, 2011 - four and a half years after she first arrived on Canada's shores - Ms. Morez stumbled upon a French newspaper article decrying the "unwelcome" influx of refugees from Mucno. The article referenced a hospitalized local man, Ano Morez.

Official Problem at 5, para 21.

[18] When Ms. Morez called the hospital in France, she learned that Ano had been diagnosed with a rare medical condition and had less than two years to live. Ms. Morez promised her brother that she would find a way to get to him.

Official Problem at 5, paras 22-23

[19] As a DFN, Ms. Morez is barred from applying for residency or travel documents until December 2013 - over six years after her arrival in Canada. She cannot apply for an exception.

IRPA, supra para 2 at ss 11(1.1), 20.2(1), 24(5), 25(1.01), 31.1.

[20] Nonetheless, Ms. Morez wrote to the Minister of Citizenship and Immigration, setting out her brother's situation, and requesting that he exempt her from the challenged provisions. Her request was denied on the basis that she was a DFN.

Official Clarifications at para 2.

[21] Following this rejection, Ms. Morez challenged ss. 11(1.1), 20.2(1), 24(5), 25(1.01) and 31.1 of *IRPA* on the ground that they infringe s. 15(1) of the *Charter*.

Official Problem at 3.

[22] At trial, Justice Kiere found that the provisions did not violate s. 15(1). She rejected that they create a distinction on an enumerated or analogous ground. However, she went on to say that if she was incorrect, the provisions could not be saved by section 1. At the Federal Court of Appeal, Justice Sharma and Justice Tanasee endorsed the reasons of Justice Kiere. In dissent, Justice Fujiwara found a violation of s. 15(1) on intersecting grounds.

Official Problem at 7-8.

[23] Of note, the Government only adduced evidence as to the state of refugee claims in Canada between 2004 and 2006. No evidence regarding the effect of the 2007 amendments was adduced. Furthermore, Justice Keire found that there was no evidence of a correlation between group arrival and merits of a refugee claim.

Official Problem at 5, para 25.
Official Clarifications at para 6.

PART III: POINTS AT ISSUE

[24] This appeal raises the following issues:

Issue #1: Do ss. 11(1.1), 20.2(1), 24(5), 25(1.01) and 31.1 of *IRPA* violate Ms. Morez's right to equality under s. 15(1) of the *Charter*?

Issue #2: If so, is this breach justified under s. 1 of the *Charter*?

Issue #3: What is the appropriate remedy in the circumstances?

[25] Ms. Morez submits that these questions should be answered as follows:

Issue #1: Sections 11(1.1), 20.2(1), 24(5), 25(1.01) and 31.1 violate section 15(1) of the *Charter* by discriminating on the intersecting grounds of citizenship and national origin.

Issue #2: The breach is not justified under s. 1 of the *Charter*. The provisions are irrational, excessive, and punitive.

Issue #3: The appropriate remedy is to declare the provisions invalid and of no force and effect. Additionally, a writ of *mandamus* is required due to the exigency of the circumstances.

PART IV: STATEMENT OF ARGUMENT

ISSUE #1: Do ss. 11(1.1), 20.2(1), 24(5), 25(1.01) and 31.1 of *IRPA* infringe Ms. Morez's right to equality under s. 15(1) of the *Charter*?

Sections 11(1.1), 20.2(1), 24(5), 25(1.01) and 31.1 of *IRPA* infringe s. 15(1)

[26] Equality is a foundational *Charter* right; it supports all other guarantees in the *Charter*. The purpose of s. 15 is to ensure the protection of *substantive* equality by focusing on whether the law creates or perpetuates disadvantage. Section 15 eschews mechanical application and requires an examination of the broader social, political, and historical context of the claim.

> *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at p 44, 56 DLR (4th) 1, McIntyre J [*Andrews]*
> *Withler v Canada (Attorney General)*, 2011 SCC 12 at para 2, [2011] 1 SCR 396, 329 DLR (4th) [*Withler*]

[27] In *Withler*, the Court affirmed the two-part test to determine a violation of s. 15(1):

1. Does the law draw a distinction on the basis of an enumerated or analogous ground?
2. Does the distinction create disadvantage by perpetuating prejudice or stereotype?

Withler, supra para 26 at para 30.

[28] The challenged provisions draw a distinction on the basis of citizenship and national origin and create disadvantage by perpetuating prejudice and stereotype on these grounds. Accordingly, they violate Ms. Morez's right to substantive equality.

The impugned provisions create a distinction based on citizenship and national origin

[29] Citizenship and national origin are inherently bound up in refugee status. By creating a distinction that disproportionately affects refugees, the distinction is one based on a national origin and citizenship.

1. The provisions create a distinction by disproportionately attaching to refugees

[30] The challenged provisions create a distinction by imposing consequences only on DFNs. The DFN label is attached to individuals who arrive via human smuggling and do not possess the requisite documentation. By definition, refugees are escaping persecution and are therefore more likely to have no alternative but to use human smuggling than non-refugees. Similarly, they are less likely to possess the requisite documentation. As such, the legislation creates an inter-group distinction: refugees are more likely than non-refugees to be labeled DFN and therefore are more likely to be burdened by the consequences of the challenged provisions.

> *IRPA, supra* para 2 at ss 20.1(1), 20.1(2), 117.
> *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3 at paras 2, 3, 176 DLR (4th), [*Meiorin*].

[31] This is not to suggest that *all* refugees will be labeled DFN. Refugees fortunate enough to arrive "regularly" will not suffer the consequences of this label. As a result, the legislative consequences will be imposed on a sub-set of refugees. The legislation, therefore, also creates an intra-group distinction: only those refugees who arrive "irregularly" will be exposed to the DFN label and the impending consequences. In penalizing refugees that arrive via smuggling, the legislation punishes the most vulnerable of an already vulnerable group.

> *IRPA supra* para 2 at ss 20.1(1), 20.1(2), 11.
> Canadian Association of Refugee Lawyers*, The Unconstitutionality of Bill C-4* (2011), online: <http://www.refugeelawyersgroup.ca/unconstitutionality> at 9. [*Canadian Association of Refugee Lawyers*].

[32] Once an individual is declared a DFN, the legislative consequences are activated by the determination of her refugee claim. If the claim is unsuccessful the removal process begins.

Crucially, then, the consequences *will only affect successful refugee claimants* - those whose Convention refugee status is recognized by the Government.

> *IRPA*, *supra* para 2 at ss 11(1.1), 20.2(1), 24(5), 25(1.01) and 31.1.

[33] To summarize, Ms. Morez submits that the legislation creates a distinction by disproportionately attaching the DFN label and its consequences to refugees. She submits the following to support this claim.

(a) Refugees are more likely to arrive "irregularly" than non-refugees

[34] As a result of their particular vulnerability, refugees are less likely to have any meaningful choice over how they flee persecution. This lack of choice often renders human smuggling the only available means of escape. This vulnerability can be inferred from the various domestic and international protections created specifically for refugees.

[35] Canadian legislation already recognizes refugees as a vulnerable group. Section 96 of *IRPA* defines a refugee as a person with a "*well-founded fear of persecution* for reasons of race, religion, nationality, or membership in a particular social group or political opinion", and who is unwilling or unable to avail herself of any protection offered by her home state [emphasis added]. Similarly, s. 133 of *IRPA* prohibits the prosecution of refugees in relation to the "regularity" of their arrival.

> *IRPA, supra* para 2 at ss 96, 133.
> *Refugee Convention, supra* para 3 at art(1)(A)(2).

[36] Likewise, international law confirms that the extreme risks faced by refugees create an absolute and urgent need to escape that will force refugees into the hands of human smugglers. The *Refugee Convention* emphasizes in Article 31(1) that refugees should not be penalized for an

"illegal" arrival. Likewise, Article 14(1) of the *Universal Declaration of Human Rights* states that, "Everyone has the right to seek and to enjoy in other countries asylum from persecution".

> *Refugee Convention, supra* para 3 at art 31(1).
> *Universal Declaration of Human Rights*, GA Res 217 (III), UN GAOR, 3d Sess, Supp. No 13, UN Doc A/810 (1948) [*UDHR*] at art 14(1).

[37] As well, a large body of scholarship affirms the vulnerability of refugees.

[38] Eileen Pittaway and Linda Batolomei state that in authoritarian regimes, individuals are denied access to education, health care, legal redress, and political representation and may be subject to forced labour, torture, genocide and execution

> Pittaway Eileen & Linda Bartolomei, "Refugees, Race, and Gender: The Multiple Discrimination Against Refugee Women" (2001) 19 Refuge at 21, [Pittaway & Bartolomei].

[39] Similarly, Amnesty International asserts that migration has become a survival strategy. Groups facing extreme disadvantage are the most desperate to leave.

> Amnesty International "Living in the Shadows: A Primer on the Rights of Migrants", (2006) <http://www.amnesty.org/en/library/asset/POL33/006/2006/en/f8aa4dfe-d3fd-11dd-8743-d305bea2b2c7/pol330062006en.html>. [*Amnesty International*].

[40] Finally, in her book *Making People Illegal,* Catherine Dauvergne argues that legislation which seeks to limit "illegal" ("irregular") migration will have a particularly punitive effect on refugees because, by definition, their need to flee is acute. Refugees often lack the resources, or have been cut off from resources, needed to escape through legal means.

> Dauvergne Catherine, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge: Cambridge University Press, 2008), [*Dauvergne*].

[41] It is reasonable to infer from the above sources that when faced with unbearable abuses of rights and dignity, refugees will often be forced to escape persecution via human smuggling.

Conversely, because non-refugees do not face these same hardships, it is reasonable to expect them to arrive in Canada in a “regular” manner.

[42] Accordingly, Ms. Morez asks the Court to recognize that refugees are more likely than non-refugees to arrive in an “irregular” manner, be labeled DFN, and suffer the consequences of the challenged provisions.

(b) The disproportionate effect will be felt by a subset of refugees

[43] As noted, not all refugees will arrive “irregularly”. This, however, does not make the distinction any less discriminatory. It is well-established that a law can discriminate against a subset of a marginalized group.

> *Corbiere v. Canada (Minister of Indian and Northern Affairs),* [1999] 2 SCR 203 at para 15, 173 DLR (4th) 1, 61 CRR (2d) 189, [*Corbiere*].

(c) The DFN consequences will only be felt by successful refugee claimants

[44] The challenged provisions state that the delays will not take effect until an individual’s refugee claim has been determined. Therefore, as noted, only successful refugee claimants will face the burdens of these provisions because failed refugee claimants will be subject to removal proceedings. In s. 31.1, the effect on only successful refugee claimants is made explicit because it applies expressly to “a designated foreign national whose claim for refugee protection … is accepted.”

> *IRPA*, *supra* para 2 at ss 11(1.1), 20.2(1), 24(5), 25(1.01), 31.1, 44-71, 112-114.

2. The distinction is based on citizenship and national origin

[45] The jurisprudence clearly recognizes the possibility of intersecting grounds as a basis for discrimination. In both *Law v Canada (Minister of Employment and Immigration)* and *Withler*, the Court confirmed that, sometimes, discrimination can only be understood with reference to a

confluence of factors because focusing on any one factor alone would inadequately reveal the impact of the disadvantage.

> *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR. 497 at paras 93-94, 170 DLR (4th) 1, 43 CCEL (2d) 49.
> *Withler, supra* para 26 at para 58.

[46] Ms. Morez submits that in disproportionately affecting refugees, the distinction drawn by the challenged provisions is based on citizenship and national origin.

[47] Citizenship was recognized as an analogous ground in *Andrews*. It is activated in this case because refugees are a sub-set of non-citizens. National origin is an enumerated ground listed in s. 15(1) and protects an individual from being treated less favourably because she is from a certain place. In this case, national origin is triggered because refugees tend to come from certain nations - those that are repressive. This is evidenced by the very definition of refugees in s. 96 of *IRPA*, which states that refugees are individuals who are *unwilling or unable to avail themselves of any protection offered in their home country*. Refugees, therefore, are forced to flee because they face persecution and *lack protection in their home country*.

> *Andrews, supra* para 26 at 13.
> *IRPA*, *supra* para 2 at s 96.

[48] Mucno, for example, systematically violates its citizens' human rights, does not provide identification documents, and prohibits its citizens from leaving the country. Ms. Morez submits that it is appropriate for the Court to recognize that certain kinds of states – those that are repressive like Mucno - will produce refugees

> *Official Problem* at 3, para 1.

[49] Therefore, Ms. Morez submits that the legislation contravenes the first branch of the *Withler* test. In disproportionately affecting refugees, the legislation distinguishes on the basis of citizenship and national origin.

Withler, supra para 26 at para 30.

The impugned provisions create disadvantage by perpetuating prejudice and stereotype

[50] In *Withler,* the Court outlined two factors that can be used to establish prejudice and stereotype. Prejudice can be established through an analysis of the pre-existing or historical discrimination suffered by the claimant group, and through an examination of the nature of the interest affected by the challenged provisions. Stereotype occurs where the legislation is aimed at assumed or attributed group characteristics that do not correspond with the claimant's circumstances, merit, or worth.

Withler, *supra* para 26 at para 35-36, 38-39.

1. Prejudice

(a) Pre-existing disadvantage

[51] Canada's historic treatment of refugees is replete with exclusionary attitudes. Two notorious examples of this disposition are the 1914 Komagata Maru and 1939 SS St. Louis incidents. These episodes reflect the unfortunate way in which disadvantaged groups attempting to enter Canada have historically been "othered."

Hugh Johnston, *The Voyage of the Komagata Maru: The Sikh Challenge to Canada's Colour Bar* 2d ed (Vancouver: University of British Columbia Press, 1989).
Irving Abella & Harold Troper, *None Is Too Many: Canada and the Jews of Europe 1933-1948* 3d ed (Toronto: Key Porter, 2000).
Pittaway & Bartolomei, *supra* para 38, at 23.

[52] Since then, Canada has apologized for these dark chapters of our history. The challenged provisions, however, represent a step in the wrong direction; a return to the exclusionary and stigmatizing approach to those for whom Canada should be a refuge.

[53] Indeed, France has begun to express these exclusionary attitudes overtly, perpetuating the view that refugees are an "unwelcome" burden.

Official Problem at 5 para 21.

(b) Nature of the interest affected

[54] The purpose of a s. 15(1) analysis is to determine whether a law is denying a benefit or imposing a burden on a discriminatory basis. In this case, the challenged provisions impose two major burdens. First, refugees that have been declared DFN are not considered "lawful" members of the Canadian community and are prevented from attaining lawful membership for at least five years. This exclusion is both legally and symbolically significant. In *Andrews*, Justice McIntyre observed that citizenship is a "badge that identifies people as members of the Canadian polity." Through the challenged provisions, however, refugees are instead branded with the stigma of the DFN label.

Andrews, supra para 26 at 34, 55.
IRPA, supra para 2 at ss 11(1.1), 20.2(1), 24(5), 25(1.01), 31.1.

[55] Second, the legislation prevents family reunification. As the essential unit in society, the importance of protecting the family bond is emphasized domestically and internationally. At trial, Justice Kiere echoed Canada's commitment to protecting family ties articulated in s. 3(2)(f) of *IRPA*. She stated that the self-sufficiency, social and economic well-being of a refugee is facilitated by family-reunification.

IRPA, supra para 2 at s 3(2)(f).

[56] Likewise, Article 23(1) of the *International Covenant on Civil and Political Rights* states that, "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State". Additionally, Article 12 of *UDHR* states that no person "shall be subject to arbitrary interference with [her]…family."

> *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, arts 9-14, Can TS 1976 No 47, 6 ILM 368 (entered into force 23 March 1976, accession by Canada 19 May 1976) at art 23(1), [*ICCPR*].
> *UDHR, supra* para 36 at art 12.

[57] In this way, both national and international legislation recognize the exalted status of the family and afford it the utmost protection.

2. Stereotype

[58] The stereotype inquiry focuses on whether the law is based on assumed or attributed characteristics that do not correspond to the circumstances of the claimant.

> *Withler, supra* para 26 at 36.

[59] This legislation perpetuates the stereotype that "irregular" refugees are somehow less worthy of protection than "regular" refugees. Even once a DFN is recognized as a refugee, the provisions penalize her for arriving "irregularly." By ascribing moral value to the method of arrival, the legislation stigmatizes refugees, like Ms. Morez, and perpetuates the false idea that they have "jumped the queue." The provisions therefore create a two-tier system of refugees – those that arrive "regularly" and are not burdened with the DFN consequences and those that arrive "irregularly" and are.

> Audrey Macklin, "Disappearing Refugees: Reflections on the Canada-US Safe Third Country Agreement" (2005) 36 Columbia Human Rights Law Review 365 at 365-370.

Canadian Council for Refugees, "Bill C-4: Comment on a Bill that Punishes Refugees" online: Canadian Council for Refugees <http://ccrweb.ca/> at 7 [*Canadian Council for Refugees*].

[60] This perpetuation of stereotype is entirely inappropriate. Refugees, by definition, are those that escape *persecution*. It is unjust to insist that refugees can or should "wait their turn" when their lives are at risk. It is precisely because of this risk that refugees are forced into the hands of human smugglers – for many, this may be their only means of escape.

Canadian Council for Refugees, supra para 59 at 7.

[61] To summarize, Ms. Morez submits that the challenged provisions violate s. 15(1) because they draw a distinction on the basis of citizenship and national origin and perpetuate discrimination of refugees – a group whose vulnerability, need for protection, and need for inclusion has been recognized domestically and internationally.

ISSUE #2: Is the breach justified under s. 1 of the *Charter*?

The breach is not justified under s. 1 of the *Charter*

[62] The impugned sections are not saved by s. 1 of the *Charter*. Though aimed at a valid objective, the provisions are irrational, excessive and punitive. The Government has not discharged its burden to prove the effectiveness of the provisions on an evidentiary basis. Instead, it relies entirely on conjecture and speculation. At both the trial and Court of Appeal, each judge that undertook a s. 1 analysis of the provisions arrived at this conclusion.

[63] *R v Oakes* established the test for determining whether a limitation of a *Charter* right is justifiable under s. 1. The test has two main substantive components. First, it is necessary to determine whether the limitation has an objective that is pressing and substantial. If this threshold is met, the Court will then assess whether the *means* employed are proportional to the provisions' objective and effects. This proportionality analysis has three sub-tests: the "rational

connection" test, the "minimal impairment" test, and a balancing of the deleterious consequences against the objective and salutary effects of the provisions.

> *Charter*, *supra* para 4 at s 1.
> *R v Oakes*, [1986] 1 SCR 103 at paras 69-70, 26 DLR (4th) 200, 14 OAC 335 [*Oakes*].
> *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835, 20 OR (3d) 816, 120 DLR (4th) 12 [*Dagenais*].

[64] The Government bears the onus of proving that a *Charter* violation is justified throughout the section 1 analysis. In the context of a violation of the right to equality, the burden is especially high. As the Court proclaimed in *Andrews*,

> "Given that s. 15 is designed to protect those groups who suffer social, political and legal disadvantage in our society, the burden resting on government to justify the type of discrimination against such groups is appropriately an onerous one."

> *Oakes*, *supra* para 63 at para 66.
> *Andrews*, *supra* para 26 at 15.

1. Deterring false refugee claims and human smuggling are valid objectives

[65] At trial, the Government stated that two objectives underlie the provisions: reducing false refugee claims, and deterring human smuggling.

> *Official Problem* at 7.

[66] To ensure a proper analysis at the proportionality stage of the *Oakes* test, it is important to critically analyze the legislative purpose. For the stated objectives to be valid, they must be motivated by the desire to protect refugees. In this way, the reduction of *false* refugee claims and deterring human smuggling would constitute valid objectives for the purposes of the first stage of the Oakes analysis.

> *Thomson Newspapers Co v Canada (Attorney General)*, [1998] 1 SCR 877 at para 98, 67 DLR (4th) 161 [*Thomson Newspapers*].

Singh v. Minister of Employment and Immigration, [1985] 1 SCR. 177 at para 70, DLR (4th) 422, [*Singh*].

[67] Ultimately, however, these objectives are not served by the legislation. Instead, the provisions affect the rights and interests of refugees in a particularly harsh manner.

2. The provisions are arbitrary and irrational

[68] In *Oakes*, Chief Justice Dickson described the "rational connection" test in terms of arbitrary, unfair, or irrational considerations. The impugned provisions are all of the above. In fact, they create perverse incentives that are likely to result in a *greater* occurrence of human smuggling.

Oakes, *supra* para 63 at 70.

[69] First, the provisions are arbitrary. The denial of residency and travel documents is not directed at those who advance false claims, but at all those whose arrival is designated "irregular" and lack the requisite documents. In this regard, s. 31.1 is particularly illogical since it is *explicitly* triggered by an individual successfully attaining refugee status. This targeting is arbitrary because there is no correlation between whether a person arrives "irregularly" and the likelihood that they will launch a false claim. Justice Keire was explicit on this point at trial,

> "[The Government] was not able to demonstrate, however, that such mass arrivals have materially impacted the total number of refugee claims in a given year. *There was no evidence that refugee claimants who arrived en masse were more likely to have their refugee claim denied than those who did not arrive en masse*" (emphasis added).

IRPA, *supra* para 2 at ss 20.1(2), 31.1.
Official Problem at 6, para 29.

[70] In *R v Morgentaler*, Justice Beetz explained that, "A rule which is unnecessary in respect of Parliament's objectives cannot be said to be 'rationally connected' thereto." Since

Parliament's objective is only to deter false claimants, the use of indiscriminate deterrents that apply to successful and false claimants alike is inconsistent with the provisions' objectives.

> *R v Morgentaler* [1988] 1 SCR 30 at para 164, 44 DLR (4th) 385, Beetz J. [*Morgentaler*].
> *Official Problem* at 7.

[71] Second, the legislation is under inclusive. The provisions actually permit the use of human smugglers free of the DFN consequences by creating loopholes. There are two ways in which this could occur. First, because only individuals without proper documentation suffer the burdens associated with the DFN label, a group of individuals could use a human smuggler and face no consequences should they possess the requisite documents. Second, because s. 20.1 applies only to "groups," a sole individual who used a human smuggler would also avoid the burdens accompanying being declared a DFN. The challenged provisions then, are both unfair and irrational to the extent that not all persons engaging in the same conduct (human smuggling) will be burdened by the DFN consequences.

> *IRPA*, *supra* para 2 at s 20.1(1), (2).

[72] Citing *Morgentaler*, Justice McLachlin (as she then was), dissenting in *R v Keegstra*, observed that "legislation designed to promote an objective may in fact impede that objective." Such is the reality in the case at bar. In *Morgentaler*, the Court found that the *actual* effect of the legislation was to undermine pregnant women's lives and health by imposing unreasonable procedural requirements and delays.

> *Morgentaler*, *supra* para 70 at paras 91, 164.
> *R v Keegstra*, [1990] 3 SCR 697 at 159, [1991] 2 WWR 1, 61 CCC (3d) 1, McLachlin J.

[73] Similarly, in this case, the impugned *IRPA* provisions are likely to result in a greater occurrence of human smuggling by shutting off all legal channels for family reunification. Family sponsorship is not permitted until permanent or temporary resident status has been

obtained. Accordingly, the provisions leave DFN refugees with no means short of human smuggling to bring their families to Canada. Given the exalted status the family unit enjoys in both Canadian and international law, it is entirely reasonable to assume an individual would go to such lengths to reunify their family.

> *Canadian Association of Refugee Lawyers*, *supra* para 31, at 16.
> *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 68, 72, 175 DLR (4th) 193, 14 Admin LR 173 [*Baker*].
> *ICCPR, supra* para 56 at Art 23(1).
> *IRPA*, *supra* para 2 at s 3(2)(f).

3. The violations are excessive

[74] To be justified, a limitation on a *Charter* right must impair the right “as little as possible.” The determinative question is whether the legislation has been carefully tailored so that rights are impaired no more than is necessary.

> *Oakes*, *supra* para 63 at 70
> *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 at para 160, 127 DLR (4th) 1, 100 CCC (3d) 449.

[75] In determining whether a right has been minimally impaired, courts are prepared to show deference to Parliament where the legislature is merely attempting to mediate the competing claims of different societal groups. Conversely, no deference is owed where Parliament is acting as the “singular antagonist of the individual whose right has been infringed.”

> *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at 70, 58 DLR (4th) 577, 25 CPR (3d) 417, 39 CRR 193.

[76] In this case, no deference is owed. The state is a singular antagonist where it acts on behalf of a united community. Parliament’s control over its borders is a paradigmatic exercise of sovereignty; a paradigmatic exercise of a united nation against those that wish to enter it. Accordingly, the state is acting as the singular antagonist of Ms. Morez. The desire to deter

human smuggling should not be confused with the mediation of competing claims of different groups in Canadian society.

[77] Having asserted that no deference is owed, Ms. Morez submits that the violating provisions are excessively punitive and are lacking in any meaningful discretion that might otherwise makeup for their overly inclusive nature. The enactment of a mandatory delay on residency and travel documents that cannot be rebutted by an individual through a successful refugee claim is excessive in light of the legislative goal of protecting refugees.

[78] The existence of meaningful discretion to allow the recognition of individual circumstances is crucial in the context of a violation of s. 15(1), where the existence of arbitrary generalizations and stereotypes has already been established. The Government has adduced no evidence showing that the inclusion of meaningful discretion would undermine the achievement of the legislative objective.

[79] On its face, the legislation seems to incorporate a degree of discretion into the scheme. Section 25.1(1) stipulates that the Minister may grant an exemption, "from any applicable criteria or obligations of [the] *Act* if the Minister is of the opinion that it is justified by Humanitarian and Compassionate considerations relating to the foreign national." Section 25.2(2) extends this discretion to include situations where the Minister feels an exemption is warranted on public policy grounds. In reality, however, this does not result in any *meaningful* discretion.

IRPA, *supra* para 2 at ss 25.1(1), 25.2(1).

[80] Section 25(1.01) explicitly removes the ability of a DFN to make an application under ss. 25.1(1) and 25.2(1). As such, the vindication of an individual's *Charter* rights exists at the complete discretion of the Minister. In the analogous case of *Worthington v Canada*, Justice

O'Keefe found that leaving individuals "completely at the mercy of the Minister" was not minimally impairing. In that case, the Court went on to hold that a more appropriate scheme would mandate the Minister to exercise his power once certain requirements were met.

> *IRPA*, *supra* para 2 at s 25.1(1.01)(a).
> *Worthington v Canada*, 2008 FC 409, [2009] 1 FCR 311 at para 103-104, 292 DLR (4th) 513, 170 CRR (2d) [*Worthington*].

[81] An examination of Ms. Morez's circumstances illustrates the concerns alluded to in *Worthington*. Subsequent to her designation, Ms. Morez made a written request to the Minister of Citizenship and Immigration that he exercise his discretion to issue her travel documentation on Humanitarian and Compassionate grounds. Her request was denied, *not on the merits of her claim, but on the basis that she was a DFN*. This is not an exercise of discretion, but rather the application of blunt criteria that fails to distinguish between individual circumstances and treats all applicants alike, regardless of their particular situation. It is the opposite of discretion.

> *Official Problem* at 2.
> *Official Clarifications* at para 2.

[82] In the circumstances, leaving the Minister as the only party able to initiate the exercise of discretion is not minimally impairing. In *Abdelrazik v Canada (Minister of Foreign Affairs)*, the Court acknowledged the challenges inherent in getting a Minister to exercise his discretion. As a Canadian citizen, Mr. Abdelrazik was entitled to the mobility rights in s. 6 of the *Charter*. That a *Canadian citizen* was unable to access the Minister's discretion suggests how difficult it would be for a refugee declared not "lawfully" a member of the Canadian community to do so.

> *Abdelrazik v Canada (Minister of Foreign Affairs)*, 2009 FC 580, [2010] 1 FCR 267 at para 40.
> *Charter*, *supra* para 4 at s 6.

[83] As regards the lack of meaningful discretion, a second flaw in the scheme results from the lack of guidelines clarifying how the Minister will exercise his discretion. In *Baker*, the Supreme

Court of Canada extolled the importance of guidelines to steer the exercise of Ministerial discretion. The inclusion of such directives would render the provisions less excessive as both individuals and Courts would be better placed to assess whether and under what conditions the Minister would exercise his discretion. In turn, this would reduce the powerlessness of refugees by allowing for the recognition and validation of individual circumstances. It would also provide the Court with meaningful protective oversight.

Baker, *supra* para 73 at para 72.

[84] The appellant further submits that the Minister's decision not to exercise his discretion in Ms. Morez's case is indicative of the hollow nature of ss. 25.1(1) and 25.2(1). In *Suresh v Canada (Minister of Citizenship and Immigration)*, the Court noted that a Minister must exercise his discretion in a manner that conforms to the "values of the *Charter*." Surely, allowing Ms. Morez to visit her brother before he passes is deserving of an exception on Humanitarian and Compassionate grounds. Likewise, family reunification and the just exercise of discretionary power are surely *Charter* values.

IRPA, *supra* para 2 at ss 25.1(1), 25.2(1).
Suresh v Canada (Minister of Citizenship and Immigration), 2002 SCC 1 at para 106, [2002] 1 SCR 3, 208 DLR (4th) 1.

[85] That the provisions already include a degree of discretion means that the Government accepts that the inclusion of discretion does not unduly undermine the achievement of the legislative objectives. Ms. Morez submits that if there is room for discretion, it should be meaningful.

[86] Therefore, in its current form, the legislative scheme is not minimally impairing. First, it removes the ability for a refugee who has been caught by the provisions to rebut the accompanying delays by attaining Convention refugee status. Second, it renders refugees

powerless to initiate their own claims and lays control squarely at the feet of the Minister without directives on when and how it will be used.

[87] In addition to including a more meaningful discretionary clause, the legislative objectives could be accomplished in a myriad of other, less impairing ways. These include harsher punishments for actual smugglers, punishing *false* claimants, or, if imposing consequences on successful claimants is absolutely necessary, ensuring that these consequences do not violate international law.

[88] The Government bears the burden of proving that each of these options would be less effective than the measures employed by the impugned provisions. In light of their excessive nature, the Government has not discharged its burden to establish that the provisions achieve their objectives or that a less excessive system would hinder the achievement of those objectives.

4. The violations are punitive

[89] In *Oakes*, Chief Justice Dickson explained:,

> "Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve."

In *Dagenais*, the Court clarified that the final stage of *Oakes* requires a comparison of the deleterious consequences of the legislation with both the objective of the legislation, and *actual* salutary benefits.

> *Oakes*, *supra* para 63 at para 71.
> *Dagenais*, *supra* para 63 at para 95.

[90] In this case, the provisions punish the very people they seek to protect - refugees. The symbolic, practical, legal and policy consequences that result from the provisions far outweigh

any salutary benefits created by the legislation and are diametrically opposed to its objectives. Again, the Government has not provided any *evidence* to demonstrate that the objectives will produce any salutary benefits.

[91] Perhaps the most insidious result of the impugned provisions is the message they send to refugees labeled DFNs. This reality is embodied first and foremost in the language of the provisions themselves. The very term "*Designated* Foreign National" rings of the "us versus them" mentality that underlay the darker chapters of Canada's immigration history. By explicitly categorizing individuals whom the Government has already deemed to be deserving of protection (refugees) as DFN's, they create the quintessential "other" and perpetuate the stigma described above.

IRPA, *supra* para 2 at s 20.1(2).

[92] Likewise, with regard to s. 31.1 of the *Act*, the clarification that refugees are not "lawfully staying in Canada" sends a message which is unjust, and fundamentally un-Canadian. It is submitted that individuals like Ms. Morez, who contribute to society economically, give back a tremendous amount to the community through volunteer work, and most of all, *want* to be a Canadian, should be recognized as a member of the Canadian community. Currently, the provisions condemn Ms. Morez to an unforgiving limbo, unable to reunify with family, held hostage within Canadian borders, and publicly denied formal entrance to the Canadian community.

IRPA, *supra* para 2 at s 31.1.

[93] Beyond the harsh symbolic message the provisions send, they also create a myriad of negative practical consequences. These consequences revolve primarily around barriers to family reunification. *IRPA* provides two main ways for refugees to reunite with their family members.

The first is through travel documents, which allow refugees to visit family members abroad. The second is through sponsorship, which allows reunification to occur in Canada. For refugees declared DFN, the challenged provisions erect barriers to both of these methods of reunification.

[94] The intrinsic and inalienable right to family reunification is reflected by the broad international consensus on the matter, articulated in the international covenants referred to above. In turn, the denial of family reunification created by the provisions produces another negative consequence of significance: serious, state-imposed psychological harm.

> *UDHR*, *supra* para 36 at art 14(1).
> *Refugee Convention*, *supra* para 3 at art 31(1).
> *ICCPR*, *supra* para 56 at art 23(1).

[95] A third consequence of the provisions is that they violate international law. In this case, the violating provisions penalize Convention refugees in a way that is inconsistent with Canada's obligations from the *Refugee Convention*, the *ICCPR*, and the *UDHR*. These violations of international law inhibit the international cooperation necessary to tackle a global problem like human smuggling in a meaningful way.

> *UDHR*, *supra* para 36 at art 14(1).
> *Refugee Convention*, *supra* para 3 at art 31(1).
> *ICCPR*, *supra* para 56 at art 23(1).

[96] Furthermore, Canadian law expressly reflects both the letter and spirit of these obligations to the international community. This is evident from ss. 3(2) and 3(3) of *IRPA*. s. 3(2) of *IRPA* proclaims the following objectives in the context of refugees:

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

(*f*) to support the self-sufficiency and the social and economic well-being of refugees by facilitating reunification with their family members in Canada.

Likewise, s. 3(3) of *IRPA* proclaims that the *Act* is to be applied in a manner which,

(*c*) facilitates cooperation between the Government of Canada, provincial governments, foreign states, international organizations and non-governmental organizations;

(*d*) ensures that decisions taken under this Act are consistent with the *Canadian Charter of Rights and Freedoms*, including its principles of equality and freedom from discrimination and of the equality of English and French as the official languages of Canada; and

(*f*) complies with international human rights instruments to which Canada is signatory.

IRPA, *supra* para 2 at ss 3(2)(b), (f) & 3(3)(c), (d), (f).

[97] The denial of residency status and "lawful membership" stemming from ss. 11(1.1), 20.2(1), 24(5), 25(1.01), and s. 31.1 are at odds with the general protections provided to refugees in *IRPA*, with the specific objective of family reunification, and with Canada's obligations at international law.

IRPA, *supra* para 2 at ss 11(1.1)(1)(a), 20.2(1)(a), 24(5)(a), 25(1.01)(a), 31.1.

[98] What is at stake, therefore, is not just the ability of refugees to reunite with their families in a reasonable time, but the integrity of Canada's refugee protection system and, more broadly, Canada's international reputation.

[99] The Government has not proven any salutary benefits that rival these deleterious consequences. In *Lavoie v Canada*, the Court explained that,

> "If the costs of the legislation are significant enough, and the legislation only partially achieves its objectives, greater evidence of its benefits may be necessary in order to survive s. 1."

In this case, the cost of the legislation is particularly high, and the consequences it produces are directly at odds with both its objective, and Canadian obligations to the international community. Accordingly, there exists an obligation on the Government to show greater evidence of any benefits.

Lavoie v Canada, 2002 SCC 23 at para 70, [2002] 1 SCR 769, 210 DLR (4th) 193.

[100] However, the Government has not adduced *any* evidence of the provisions' effect on the rate of false claims or human smuggling. It provided specific details on the state of refugee claims and human smuggling from 2004-2006. Now that the provisions have been in effect for over five years, it is not sufficient for the Government merely to assert the existence of possible salutary benefits without statistical corroboration.

Official Problem at 5 at para 25.

[101] Finally, on a philosophical level, Ms. Morez submits that it simply is not justified to use individuals as vulnerable as refugees as a means to effect the desired objectives. In *R v Hess* and *R v Nguyen*, Justice Wilson noted the unjust nature of treating a person as a means to an end and sacrificing their *Charter* rights in the process. The wrong of human smuggling rests not with refugees, but with those who take advantage of their vulnerability. And yet, under the current provisions, it is refugees that are punished.

R v Hess; R v Nguyen, [1990] 2 SCR 906 at 18, [1990] 6 WWR 289, 59 CCC (3d) 161.

[102] Therefore, the provisions are not justified under s. 1 of the *Charter*. Though reducing false refugee claims and deterring human smuggling are valid objectives in the abstract, the

specific provisions chosen to achieve those objectives are irrational, excessive and punish the very people they should protect. Additionally, the Government has failed to adduce sufficient evidence to discharge its legal burden. Accordingly, the provisions cannot be said to be "demonstrably justified in a free and democratic society."

Part III: Remedy

ISSUE #3: What is an Appropriate Remedy?

The appropriate remedy is a declaration of invalidity and an order of *mandamus*

[103] If a law violates the *Charter* in a manner that cannot be justified under s. 1, the appropriate remedy is a declaration that the law is of no force or effect. Because a *right* has been infringed there exists an obligation to issue a remedy that is appropriate and just. In *Doucet-Boudreau v Nova-Scotia (Minister of Education)*, the Court explained that "an appropriate and just remedy" is one that "meaningfully vindicates the rights and freedoms of the claimants." To meaningfully vindicate the rights of a claimant, the Court held, a remedy must "address the circumstances in which the right was infringed or denied" and not be "smothered in procedural delays and difficulties."

> *Charter*, *supra* para 4 at s 52(1).
> *Re Manitoba Language Rights*, [1985] 1 SCR 721 at paras 48 and 72, 19 DLR (4th) 1.
> *Charter*, supra para 4 at s 24(1).
> *Doucet-Boudreau v Nova-Scotia (Minister of Education),* 2003 SCC 62 at para 55, [2003] 3 SCR 3, [*Doucet-Boudreau*].

[104] In this case, Ms. Morez submits that the challenged provisions should be declared of no force or effect. This would allow Parliament the opportunity to re-craft the provisions in a manner that complies with the *Charter*. She further submits that for a remedy to be meaningful in the circumstances, it must include an order of *mandamus* forcing the Minister to issue Ms. Morez travel documents immediately.

[105] The leading case on the issuance of *mandamus* pursuant to s. 24(1) of the *Charter* is *Canada (Attorney General) v PHS Community Services Society* ("*Insite*"). In *Insite*, the Court issued an order of *mandamus*, citing as sufficient justification the exigency of the circumstances and the concern that without such an order the claimants would be "cast back into the application process they [had] tried and failed at, and made to await the Minister's decision based on reconsideration of the same facts." The Court also noted a corresponding fear that without *mandamus*, "litigation might break out anew." For that reason, a simple declaration that the claimants' rights had been violated was insufficient.

> *Canada (Attorney General) v PHS Community Services Society* 2011 SCC 44, at para 148 [2011] 3 S.C.R. 134 [*Insite*].

[106] In this case, a *mandamus* order is entirely appropriate for many of the same reasons. The appellant requires relief *immediately*. By the time the appeal is heard, her brother will have less than nine months to live. Without the *mandamus* order, the appellant would be "cast back into the application process [she] [had] already tried and failed at, and made to await the Minister's discretion." There is a very real potential that litigation might break out anew.

> *Insite*, *supra* para 104 at 148.

[107] Additionally, *mandamus* is necessary because of the significant backlog, shortage of resources, and "strain on the system" which the Government has continually asserted. In light of this backlog, there is no guarantee that Ms. Morez would receive travel documents in a timely manner without *mandamus*.

> *Official Problem* at 1.

PART V: Order Sought

[108] Ms. Morez, respectfully requests,

(a) An order declaring ss. 11(1.1), 20.2(1), 24.(5), 25 (1.01), and 31.1 of *IRPA* unconstitutional

to the extent that it violates the right to equality of refugees declared Designated Foreign Nationals.

(b) An Order in the nature of *mandamus* requiring the Minister of Citizenship and Immigration to issue the requisite travel documents to the appellant immediately.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated February 10, 2012

………………..…………………

Team #

TABLE OF AUTHORITIES

LEGISLATION

Canadian Charter of Rights and Freedoms, s15, Part I of the *Constitution Act*, 1982, being schedule B to the *Canada Act 1982* (UK), 1982, c11.

Immigration and Refugee Protection Act, SC 2001, c27.

JURISPRUDENCE

Abdelrazik v Canada (Minister of Foreign Affairs), 2009 FC 580, [2010] 1 FCR 267.

Andrews v Law Society of British Columbia, [1989] 1 SCR 143, 56 DLR (4th) 1.

Baker v Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817, 175 DLR (4th) 193, 14 Admin LR 173.

British Columbia (Public Service Employee Relations Commission) v BCGSEU, [1999] 3 SCR 3 at para 2, 3, 176 DLR (4th

Canada (Attorney General) v PHS Community Services Society, 2011 SCC 44, [2011] 3 SCR 134.

Corbiere v Canada (Minister of Indian and Northern Affairs), [1999] 2 SCR 203, 173 DLR (4th) 1, 61 CRR (2d) 189.

Dagenais v Canadian Broadcasting Corp, [1994] 3 SCR 835, 20 OR (3d) 816, 120 DLR (4th) 12.

Doucet-Boudreau v Nova-Scotia (Minister of Education), 2003 SCC 62 at para 55, [2003] 3 SCR 3.

Irwin Toy Ltd v Quebec (Attorney General), [1989] 1 SCR 927, 58 DLR (4th) 577, 25 CPR (3d) 417, 39 CRR 193.

Lavoie v Canada, 2002 SCC 23, [2002] 1 SCR 769, 210 DLR (4th) 193.

Law v Canada (Minister of Employment and Immigration), [1999] 1 SCR 497, 170 DLR (4th) 1, 43 CCEL (2d) 49.

R c Langlois, [1993] 54 QAC 87, 80 CCC (3d) 28.

Reference Re Manitoba Language Rights, [1992] 1 SCR 212, 88 DLR (4th) 385.

Reference Re Public Service Employee Relations Act, [1987] 1 SCR 313, 38 DLR (4th) 161.

RJR-MacDonald Inc v Canada (AG), [1995] 3 SCR 199, 127 DLR (4th) 100 CCC (3d) 449.

R v Hess; R v Nguyen, [1990] 2 SCR 906 at 18, [1990] 6 WWR 289, 59 CCC (3d) 161.

R v Keegstra, [1990] 3 SCR 697, [1991] 2 WWR, 161 CCC (3d) 1.

R v Morgentaler, [1988] 1 SCR 30, 44 DLR (4th) 385.

R v Oakes, [1986] 1 SCR 103, 26 DLR (4th) 200, 14 OAC 335.

Schachter v Canada, [1992] 2 SCR 679, 93 DLR (4th) 1.

Singh v Canada (Minister of Employment and Immigration), [1985] 1 SCR 177, 17 DLR (4th) 422.

Suresh v Canada (Minister of Citizenship and Immigration), 2002 SCC 1, [2002] 1 SCR 3, 208 DLR (4th) 1.

Thomson Newspapers Ltd v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission), [1990] 1 SCR 425, 67 DLR (4th) 161.

Withler v Canada (Attorney General), 2008 FC 409, [2009] 1 FCR 311, 292 DLR (4th) 513, 170 CRR (2d)

Worthington v Canada (Minister of Citizenship and Immigration), 2008 FC 626, 170 ACWS (3d) 19.

SECONDARY SOURCES

Audrey Macklin, "Disappearing Refugees: Reflections on the Canada-US Safe Third Country Agreement" (2005) 36 Columbia Human Rights Law Review 365

Amnesty International “Living in the Shadows: A Primer on the Rights of Migrants”, (2006) <http://www.amnesty.org/en/library/asset/POL33/006/2006/en/f8aa4dfe-d3fd-11dd-8743-d305bea2b2c7/pol330062006en.html>.

Canadian Association of Refugee Lawyers, “The Unconstitutionality of Bill C-4”, (2011), online: <http://www.refugeelawyersgroup.ca/unconstitutionality>, [*Canadian Association of Refugee Lawyers*].

Canadian Council for Refugees, “Bill C-4: Comment on a Bill that Punishes Refugees”, (2011), online: Canadian Council for Refugees http://ccrweb.ca/

Dauvergne Catherine, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge: Cambridge University Press, 2008).

Hugh Johnston, *The Voyage of the Komagata Maru: The Sikh Challenge to Canada's Colour Bar* 2d ed (Vancouver: University of British Columbia Press, 1989).

Irving Abella & Harold Troper, *None Is Too Many: Canada and the Jews of Europe 1933-1948* 3d ed (Toronto: Key Porter, 2000).

Pittaway Eileen & Linda Bartolomei, "Refugees, Race, and Gender: The Multiple Discrimination Against Refugee Women" (2001) 19 Refuge 21.

INTERNATIONAL MATERIALS

Convention Relating to the Status of Refugees, 28 July 1951, 189 UNTS 137, Can TS 1969 No 29 (entered into force 22 April 1954, accession by Canada 04 June 1969) [CRSR].

International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171, arts 9-14, Can TS 1976 No 47, 6 ILM 368 (entered into force 23 March 1976, accession by Canada 19 May 1976) [ICCPR].

Universal Declaration of Human Rights, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. No 13, UN Doc. A/810 (1948).