

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

Between:

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

APPELLANTS/RESPONDENTS
(Respondents in the Court below)

-and-

MOHAMED HARKAT

RESPONDENT/APPELLANT
(Appellant in the Court below)

MEMORANDUM OF ARGUMENT FOR LEAVE TO INTERVENE
(Rule 56(b) of the *Rules of the Supreme Court of Canada*)

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PART I – FACTS

Overview

1. Amnesty International (Canadian Section, English Branch) (hereinafter Amnesty International) seeks leave to intervene in this appeal with respect to the Canadian security certificate scheme's compliance with international law. Canada is bound by international human rights law, which informs the interpretation and application of domestic legislation and the *Canadian Charter of Rights and Freedoms* (*Charter*). Amnesty International has a strong record as an objective organization with a unique expertise in international human rights. The organization has a legitimate interest in this appeal, as it engages core legal principles relating to security and human rights. We submit that – notwithstanding the presence of Special Advocates – the *Immigration and Refugee Protection Act* (*IRPA*)'s security certificate regime violates Canada's international obligations.

Amnesty International and Amnesty Canada: The Organizations

2. Amnesty International (AI) is a worldwide voluntary movement founded in 1961 that works to prevent some of the gravest violations to people's fundamental human rights. It is impartial and independent of any government, political persuasion or religious creed. Amnesty Canada is the Canadian branch of the global AI movement. AI and Amnesty Canada are financed by subscriptions and donations from their membership, and receive no government funding. Currently, there are close to 3 million members of AI in over 150 countries. There are more than 7,500 AI groups, including local groups, youth or student groups and professional groups, in more than 90 countries and territories throughout the world. In 55 countries and territories, the work of these groups is coordinated by national sections like Amnesty Canada.¹

3. AI's vision is of a world in which every person enjoys all of the human rights enshrined in the *Universal Declaration of Human Rights* and other international instruments. In pursuit of this vision, AI's mission is to conduct research and take action to prevent and end grave abuses of all human rights – civil, political, economic, social and cultural.²

¹ Affidavit of Alex Neve, paras. 7-11 [Neve Affidavit].

² Neve Affidavit, *supra* note 1, paras. 12-13.

4. In 1977, AI was awarded the Nobel Peace Prize for its work in promoting international human rights.³

Amnesty International's expertise and experience

5. Amnesty International's research is recognized in Canada and globally as accurate, credible, and unbiased, and its reports are widely consulted by governments, intergovernmental organizations, journalists and scholars. AI's documentation of human rights abuses has been relied upon by the Canadian judiciary, including this Court and the Federal Court.⁴

6. Furthermore, Amnesty International has made oral and written submissions regarding international human rights to courts and legislatures around the world, as well as to international bodies.⁵ Domestically, for instance, Amnesty International has been granted intervener status at numerous inquiries and judicial proceedings at different levels of court, including this Court.⁶

7. In Canada, Amnesty International has also sought to advance international human rights directly through the legislative process. On numerous occasions, it has made written and oral submissions to Canadian government officials, legislators and House and Senate committees.⁷

PART II – QUESTION IN ISSUE

8. The question on this motion is whether Amnesty International should be granted leave to intervene in this appeal.

PART III – ARGUMENT

9. Leave to intervene may be granted where a party has an interest in the subject matter before the Court and will be able to make submissions that are useful to the Court and different from those of other parties.⁸ Any interest in an appeal is sufficient to support an application for intervener status, subject to the discretion of the judge hearing the motion.⁹

³ Neve Affidavit, *supra* note 1, para. 14.

⁴ Neve Affidavit, *supra* note 1, paras. 16-18.

⁵ Neve Affidavit, *supra* note 1, paras. 23, 26.

⁶ Neve Affidavit, *supra* note 1, paras. 19-22.

⁷ Neve Affidavit, *supra* note 1, para. 24.

⁸ *Rules of the Supreme Court of Canada*, SOR/2002-156, Rules 55-57; *Reference re Worker's Compensation Act*, [1989] 2 S.C.R. 335, at pp. 339, 340 [*Worker's Compensation*]; *R. v. Finta*, [1993] 1 S.C.R. 701, at p. 1139 [*Finta*].

⁹ *Workers Compensation*, *supra* at note 8; *Finta*, *supra* at note 8, at pp. 1143-44.

(1) Amnesty International's interest in this appeal

10. Amnesty International's interest in the issues raised in this appeal is legitimate and longstanding. The organization intervened in the two Supreme Court of Canada appeals concerning the previous security certificate regime and commented on this earlier regime's compliance with international law before several Parliamentary committees.¹⁰ Amnesty International also participated as an intervener or applicant in numerous cases related to security and human rights, at the Supreme Court of Canada and lower courts, as well as before the Arar and Iacobucci Inquiries.¹¹ Amnesty International has submitted briefs on security and human rights to treaty bodies such as the UN Committee Against Torture and the Universal Periodic Review.¹² Finally, both internationally and in jurisdictions such as the United Kingdom, AI has undertaken extensive legal and policy research on governments' invocation of the need to protect national security as a justification for abridging fundamental fair trial principles, particularly in the context of secret proceedings.¹³

(2) Amnesty International will make unique, useful submissions

11. Amnesty International has a strong record as a credible and objective organization, and brings a distinct approach to the issues that this appeal raises. The organization has a significant expertise in security and human rights in general, and in Canada's security certificate regime in particular. Amnesty International also has extensive knowledge of the key international instruments, such as the *Universal Declaration of Human Rights*, *International Covenant on Civil and Political Rights*, and *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, as well as these instruments' application in foreign jurisdictions.¹⁴ As an international non-governmental organization, it is uniquely positioned to assist this Court in determining whether the security certificate scheme complies with Canada's international human rights obligations.

¹⁰ Neve Affidavit, *supra* note 1, paras. 19, 24(e), (g), (h), (i).

¹¹ Neve Affidavit, *supra* note 1, paras. 19-22.

¹² Neve Affidavit, *supra* note 1, para. 26.

¹³ Neve Affidavit, *supra* note 1, para. 23; Amnesty International, *Left in the Dark: The Use of Secret Evidence in the United Kingdom*, AI Index EUR 45/014/2012 (2012) [*Left in the Dark*]; Amnesty International, *Submission to the Joint Committee on Human Rights: The Justice and Security Green Paper*, AI Index EUR 45/006/2012.

¹⁴ *Universal Declaration of Human Rights*, GA Res. 271 (III), UN GAOR, 3d. Sess., Supp. No. 3, UN Doc. A/810 (1948) [UDHR]; *International Covenant on Civil and Political Rights*, 19 December 1996, 99 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368 [ICCPR]; *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Can. T.S., 1987 No. 36 [CAT].

12. If granted leave to intervene, Amnesty International will be mindful of submissions made by the parties and other interveners in this appeal, and will seek to avoid duplication of argument and materials before the Court. We would not take a position on issues that are specific and personal to Mr Harkat. Rather, the submissions would pertain to the compliance of the Canadian security certificate regime with international human rights law.

13. We submit that the regime – notwithstanding the presence of Special Advocates – violates binding international due process protections. In particular, Amnesty International proposes to make the following submissions:

- (a) Canada is bound by international human rights law, which informs the interpretation and application of domestic legislation and the *Charter*;
- (b) The security certificate scheme denies named persons their due process rights;
- (c) National security considerations cannot provide a blanket justification for these infringements of named persons' fundamental freedoms;
- (d) Special Advocates are inherently compromised in their ability to remedy the due process defects in the security certificate process; and
- (e) The *IRPA*'s security certificate provisions should be struck down and replaced with a system that brings the Act in line with international human rights norms.

(a) Canada is bound by its international human rights obligations

14. Parliament affirmed its intention to abide by Canada's international commitments in section 3(3)(f) of the *IRPA*, which provides: "This Act is to be construed and applied in a manner that [...] complies with international human rights instruments to which Canada is signatory."¹⁵ International human rights instruments legally binding on Canada are, in the absence of contrary legislative intention, determinative of how the *IRPA* must be interpreted and applied.¹⁶

15. Moreover, it is well-established that Canada's international human rights obligations are an important interpretive aid in applying the *Charter*.¹⁷ As the Court explained in *Suresh*, the scope and content of the principles of fundamental justice expressed in section 7 of the *Charter* and the justifiable limits in section 1 are elucidated by international norms.¹⁸ Indeed, the

¹⁵ *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 3(3)(f) [*IRPA*].

¹⁶ *De Guzman v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436, para. 87.

¹⁷ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c. 11.

¹⁸ *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, para. 59.

“*Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.”¹⁹

(b) Denial of due process

16. Due process is a foundational legal principle in Canada and internationally. Domestically, as the Supreme Court of Canada held in *Charkaoui 1*, due process is “fundamental to our modern conception of liberty.”²⁰ This principle of fundamental justice under s.7 of the *Charter* is also an integral element of the broader concept of the rule of law,²¹ which has long been recognized in Canadian law as “a fundamental postulate of our constitutional structure.”²² Likewise, international human rights law provides for a range of safeguards designed to ensure that people’s fundamental freedoms can be compromised only if basic minimum due process and guarantees of fairness are observed.

17. For the principle of due process to be respected, the person concerned must know the nature and details of the allegations against him or her, have an effective opportunity to refute them, including through examination of witnesses and/or other materials that may be the source of those allegations, and have a real chance to put forward an alternative explanation in response to those allegations. In judicial proceedings, the person concerned must also have effective access to independent legal counsel of choice and meaningful legal representation throughout the process. These rights are necessary to ensuring an equality of arms between the parties, which is a minimum requirement for any proceeding to be considered fair.²³

18. Due process rights have been enshrined in a number of international human rights instruments, most notably the *Universal Declaration of Human Rights (UDHR)* and the *International Covenant on Civil and Political Rights (ICCPR)*. Article 9 of the *UDHR* affirms: “No one shall be subjected to arbitrary arrest, detention or exile” and Article 10 declares: “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”²⁴ Article 9(1) of the *ICCPR* affirms: “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his

¹⁹ *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, per Dickson C.J.C. (dissenting).

²⁰ *Charkaoui v. Canada (Minister of Citizenship and Immigration)*, [2007] 1 S.C.R. 350 [*Charkaoui 1*], para. 28.

²¹ *Charkaoui 1*, *supra* note 20, para. 28.

²² *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 142.

²³ Amnesty International, *Left in the Dark*, *supra* note 13, at p. 29.

²⁴ *UDHR*, *supra* note 14, Arts. 9, 10.

liberty except on such grounds and in accordance with such procedure as are established by law.”²⁵ Article 14 contains a number of due process protections, including the following:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.²⁶

Article 13 of the *ICCPR*, to which Article 14 applies, prohibits arbitrary deportation:

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.²⁷

19. Expert commentary by the Human Rights Committee (HRC), which is the body responsible for overseeing the implementation of the *ICCPR*, sheds light on the appropriate interpretation and application of these inter-related due process protections. The HRC has discussed the intrinsic connection between Articles 13 and 14, affirming that

The procedural guarantees of article 13 of the Covenant incorporate notions of due process also reflected in article 14 and thus should be interpreted in the light of this latter provision. Insofar as domestic law entrusts a judicial body with the task of deciding about expulsions or deportations, the guarantee of equality of all persons before the courts and tribunals as enshrined in article 14, paragraph 1, and the principles of impartiality, fairness and equality of arms implicit in this guarantee are applicable.²⁸

20. Practically speaking, procedural fairness requirements will vary depending on the context; in security certificate proceedings, which can have grave consequences for named individuals, these measures must be especially strong. Under Canadian law, and contrary to the *Convention Against Torture*, individuals can in some circumstances be deported to a risk of torture.²⁹ This result is more severe than could result from criminal convictions in this country. As the Supreme Court of Canada recognized in *Charkaoui 2*, the scope of fundamental rights “does not turn on a formal distinction between the different areas of law. Rather, it depends on the severity of the consequences of the state’s actions for the individual’s fundamental interests

²⁵ *ICCPR*, *supra* note 14, Art. 9(1).

²⁶ *ICCPR*, *supra* note 14, Art. 14(1).

²⁷ *ICCPR*, *supra* note 14, Art. 13.

²⁸ Human Rights Committee, *General Comment No. 32: Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial*, CCPR/C/GC/32 (23 August 2007), para. 62.

²⁹ *CAT*, *supra* note 14, Art. 3; *Suresh*, *supra* note 18, para. 118; Committee Against Torture, *Concluding Observations: Canada*, CAT/C/CAN/CO/6 (25 June 2012), para. 9; *IRPA*, *supra* note 15, s. 115.

of liberty and security and, in some cases, the right to life.”³⁰ Where the result can be extremely grave, as in security certificate cases, the procedural protections must be correspondingly robust.

21. To respect the principle of due process, the security certificate regime must meet at least two crucial standards. As the Supreme Court of Canada held in *Charkaoui 1*, the named person must know the case s/he has to meet, and must have the opportunity to meet the case.³¹ Clearly, these two elements go hand in hand; as Chief Justice McLachlin asked in *Charkaoui 1*, “How can one meet a case one does not know?”³² In *Charkaoui 1*, the Supreme Court of Canada held that the *IRPA*’s security certificate provisions denied named individuals these two procedural safeguards.³³

22. The current legislation continues to deny these rights to named persons. The Supreme Court of Canada, in *Charkaoui 1*, made it clear that the beneficiary of the right to know the case was the *affected person*.³⁴ However, under the *IRPA*, a named person is only privy to summaries of evidence that “enables [him/her] to be reasonably informed of the case but that does not include anything that, in the Minister’s opinion, would be injurious to national security or endanger the safety of any person if disclosed.”³⁵ Without full knowledge of the case against oneself, it is impossible to meet that case. Furthermore, the revised *IRPA* continues to allow for a decision to be made based on evidence that is neither summarized nor disclosed to named persons or their lawyers.³⁶ In other words, people might be the subject of a decision without ever fully knowing the case against them. That decision can have severe – and even fatal – consequences.

23. The fact that designated judges have access to all the non-disclosed evidence does not alleviate concerns about the state of ignorance of the named person and his or her lawyer. In an adversarial judicial system, evidence and information must be both tested and contested by opposing counsel. Lord Kerr discussed this point in detail in *Al-Rawi* at the UK Supreme Court:

[W]hat, the appellants imply, could be fairer than an independent arbiter having access to all the evidence germane to the dispute between the parties? The central fallacy of the argument lies in the unspoken assumption that, because the judge sees everything, he is bound to be in a better position to reach a fair result. That assumption is misplaced. To be truly valuable, evidence must be capable of withstanding challenge. I go further.

³⁰ *Charkaoui v. Canada (Minister of Citizenship and Immigration) No. 2*, [2008] 2 S.C.R. 326, para. 53.

³¹ *Charkaoui 1*, *supra* note 20, para. 29.

³² *Charkaoui 1*, *supra* note 20, para. 64.

³³ *Charkaoui 1*, *supra* note 20, para. 64.

³⁴ *Charkaoui 1*, *supra* note 20, paras. 53, 63, 64.

³⁵ *IRPA*, *supra* note 15, s. 77(2).

³⁶ *IRPA*, *supra* note 15, s. 83(1)(i).

Evidence which has been insulated from challenge may positively mislead. It is precisely because of this that the right to know the case that one's opponent makes and to have the opportunity to challenge it occupies such a central place in the concept of a fair trial. However astute and assiduous the judge, the proposed procedure hands over to one party considerable control over the production of relevant material and the manner in which it is to be presented. The peril that such a procedure presents to the fair trial of contentious litigation is both obvious and undeniable.³⁷

(c) National security does not provide blanket justification

24. Although there are some circumstances in which the government could legitimately restrict disclosure of certain information, this must be done in a way that respects basic standards of fairness. National security is an express limitation built into several provisions of the *ICCPR*. However, for the limitation to be permissible, the State bears the burden of demonstrating that the limitation is necessary and proportionate. The Human Rights Committee explains:

Any restrictions on [*ICCPR*] rights must be permissible under the relevant provisions of the Covenant. Where such limitations are permitted, States must in any case demonstrate their necessity and only take measures which are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights.³⁸

In light of the further exploration of these issues provided in the *Siracusa Principles*, we submit that the *ICCPR* requires that “[t]he burden of justifying a limitation upon a right guaranteed under the Covenant lies with the state.”³⁹

25. The *IRPA*'s security certificate scheme continues to fall short of these international standards. International human rights law might allow for certain restrictions on the right to due process in some kinds of cases, including for national security. However, the burden is on the government, which must demonstrate that such restrictions are strictly necessary and proportionate to safeguard national security. Moreover, non-disclosure cannot impair the *essence* of a right to a fair hearing.⁴⁰ This right is not adequately safeguarded by the Canadian security certificate system. The legislation places the onerous burden of seeking and justifying disclosure of relevant information and evidence entirely on the shoulders of the person least able to do so –

³⁷ *Al-Rawi & Ors v. The Security Service & Ors*, [2011] UKSC 23, para. 93.

³⁸ Human Rights Committee, *General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), para 5.

³⁹ *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc. E/CN.4/1985/4, Annex (1984), Art. 12.

⁴⁰ Amnesty International, *Left in the Dark*, *supra* note 13, at p. 30.

the person who is the subject of the security certificate, and who may be only aware of a portion of the case against him or her.⁴¹

(d) Special Advocates cannot remedy the due process defects

26. Special Advocates cannot compensate for the procedural defects of the security certificate regime. In *Charkaoui 1*, this Court tentatively suggested that introducing a Special Advocate system might render the regime constitutionally compliant. However, the revised *IRPA* places such limitations on Special Advocates that they are rendered incapable of meaningfully protecting the interests of named persons. First, Special Advocates are not permitted to present evidence.⁴² Second, although they are granted access to the same evidence and information that is provided to the judge, they cannot communicate with a named person after reviewing classified information unless they obtain prior judicial authorization.⁴³ The decision to grant these requests is discretionary. If partial or conditional authorization is granted, or if authorization is denied, the named person will remain ignorant of the complete case. Third, the presence of Special Advocates has no effect on the due process violations associated with the fact that decisions can be made based on evidence that is neither summarized nor disclosed.⁴⁴

27. These types of restrictions prevent Special Advocates from adequately protecting the interests of named persons, as mandated by the *IRPA*.⁴⁵ In other words, their ability to make oral and written submissions, to cross-examine witnesses, and to exercise any other powers, is inherently compromised. Despite the Special Advocates' best efforts, the named person whose interests they are protecting may remain in ignorance of the complete case against him or her. The resulting violation of the principle of equality of arms between the parties is not only a due process concern. Anything other than equality of arms will result in proceedings in which the presiding judge may be deprived of vital information, the absence of which may lead the decision-maker into error.

⁴¹ *IRPA*, *supra* note 15, ss. 77(2), 83(1), 85.1, 85.4.

⁴² *IRPA*, *supra* note 15, s. 85.2

⁴³ *IRPA*, *supra* note 15, s. 85.4.

⁴⁴ *IRPA*, *supra* note 15, s. 83(1)(i).

⁴⁵ *IRPA*, *supra* note 15, s. 85.1, 85.2.

(e) The security certificate provisions must be replaced

28. According to this Court's assessment of the previous security certificate system in *Charkaoui I*, "The issue is whether the process is fundamentally unfair to the affected person."⁴⁶ In Amnesty International's submission, the regime remains fundamentally unjust, and must be replaced with a system that is compliant with international human rights law. In our submission, it is impossible to tweak the relevant *IRPA* provisions in such a way as to uphold fundamental freedoms; the potential consequences of a negative decision for the named individual are too severe and the gap between the current system and the standard required by international law is too large. Due process protections, along with other vital fair hearing rights, must be the central consideration in any deportation proceeding.

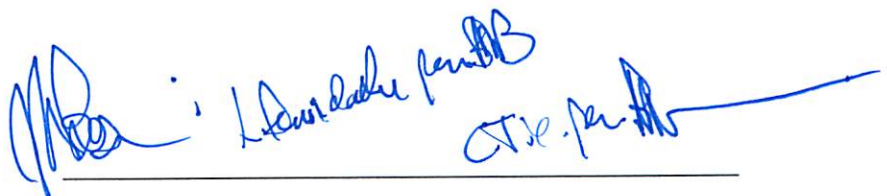
PART IV – SUBMISSIONS ON COSTS

29. Amnesty International does not seek or expect to pay costs.

PART V – ORDER SOUGHT

30. Amnesty International requests an order
- (a) granting leave to intervene in this appeal;
 - (b) granting leave to present oral and written arguments at the hearing of the appeal;
and
 - (c) such further and other order as this Court may deem appropriate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 25th DAY OF JUNE, 2013 BY:



Solicitors for Amnesty International

⁴⁶ *Charkaoui I*, *supra* note 20, para. 22.

PART VI – TABLE OF AUTHORITIES

	AUTHORITY	PARA.
1	<i>Al-Rawi & Ors v. The Security Service & Ors</i> , [2011] UKSC 23	23
2	Amnesty International, <i>Left in the Dark: The Use of Secret Evidence in the United Kingdom</i> , AI Index EUR 45/014/2012 (2012)	10, 17, 25
3	Amnesty International, <i>Submission to the Joint Committee on Human Rights: The Justice and Security Green Paper</i> , AI Index EUR 45/006/2012	10
4	<i>Charkaoui v. Canada (Minister of Citizenship and Immigration)</i> , [2007] 1 S.C.R. 350	16, 21, 28
5	<i>Charkaoui v. Canada (Minister of Citizenship and Immigration) No. 2</i> , [2008] 2 S.C.R. 326	20
6	<i>De Guzman v. Canada (Minister of Citizenship and Immigration)</i> , 2005 FCA 436	14
7	Committee Against Torture, <i>Concluding Observations: Canada</i> , CAT/C/CAN/CO/6 (25 June 2012)	20
8	Human Rights Committee, <i>General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant</i> , UN Doc. CCPR/C/21/Rev.1/Add.13 (2004)	24
9	Human Rights Committee, <i>General Comment No. 32: Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial</i> , CCPR/C/GC/32 (23 August 2007)	19
10	<i>R. v. Finta</i> , [1993] 1 S.C.R. 1139	9
11	<i>Reference re Public Service Employee Relations Act (Alta.)</i> , [1987] 1 S.C.R. 313	15
12	<i>Reference re Worker's Compensation Act</i> , [1989] 2 S.C.R. 335	9
13	<i>Roncarelli v. Duplessis</i> , [1959] S.C.R. 121	16
14	<i>Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights</i> , UN Doc. E/CN.4/1985/4, Annex (1984)	24
15	<i>Suresh v. Canada (Minister of Citizenship and Immigration)</i> , [2002] 1 S.C.R. 3	15, 20

PART VII – STATUTORY PROVISIONS

	STATUTORY PROVISION	PARA.
1	<i>Canadian Charter of Rights and Freedoms</i> , Part I of the <i>Constitution Act, 1982</i> , being Schedule B to the <i>Canada Act 1982</i> (UK), 1982, c. 11	15
2	<i>Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</i> , Can. T.S., 1987 No. 36	11, 20
3	<i>Immigration and Refugee Protection Act</i> (S.C. 2001, c. 27)	14, 20, 22, 25, 26, 27
4	<i>International Covenant on Civil and Political Rights</i> , 19 December 1996, 99 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368	11, 18
5	<i>Rules of the Supreme Court of Canada</i> , SOR/2002-156	9
6	<i>Universal Declaration of Human Rights</i> , GA Res. 271 (III), UN GAOR, 3d. Sess., Supp. No. 3, UN Doc. A/810 (1948)	11, 18

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Can. T.S., 1987 No. 36

Article 3

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

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

77. (2) When the certificate is referred, the Minister shall file with the Court the information and other evidence on which the certificate is based, and a summary of information and other evidence that enables the person who is named in the certificate to be reasonably informed of the case made by the Minister but that does not include anything that, in the Minister's opinion, would be injurious to national security or endanger the safety of any person if disclosed.

83. (1) The following provisions apply to proceedings under any of sections 78 and 82 to 82.2:

- (a) the judge shall proceed as informally and expeditiously as the circumstances and considerations of fairness and natural justice permit;
- (b) the judge shall appoint a person from the list referred to in subsection 85(1) to act as a special advocate in the proceeding after hearing representations from the permanent resident or foreign national and the Minister and after giving particular consideration and weight to the preferences of the permanent resident or foreign national;
- (c) at any time during a proceeding, the judge may, on the judge's own motion — and shall, on each request of the Minister — hear information or other evidence in the absence of the public and of the permanent resident or foreign national and their counsel if, in the judge's opinion, its disclosure could be injurious to national security or endanger the safety of any person;
- (d) the judge shall ensure the confidentiality of information and other evidence provided by the Minister if, in the judge's opinion, its disclosure would be injurious to national security or endanger the safety of any person;
- (e) throughout the proceeding, the judge shall ensure that the permanent resident or foreign national is provided with a summary of information and other evidence that enables them to be reasonably informed of the case made by the Minister in the proceeding but that does not include anything that, in the judge's opinion, would be injurious to national security or endanger the safety of any person if disclosed;
- (f) the judge shall ensure the confidentiality of all information or other evidence that is withdrawn by the Minister;
- (g) the judge shall provide the permanent resident or foreign national and the Minister with an opportunity to be heard;
- (h) the judge may receive into evidence anything that, in the judge's opinion, is reliable and appropriate, even if it is inadmissible in a court of law, and may base a decision on that evidence;
- (i) the judge may base a decision on information or other evidence even if a summary of that information or other evidence is not provided to the permanent resident or foreign national; and
- (j) the judge shall not base a decision on information or other evidence provided by the Minister, and shall return it to the Minister, if the judge determines that it is not relevant or if the Minister withdraws it.

85.1 (1) A special advocate's role is to protect the interests of the permanent resident or foreign national in a proceeding under any of sections 78 and 82 to 82.2 when information or other evidence is heard in the absence of the public and of the permanent resident or foreign national and their counsel.

(2) A special advocate may challenge

- (a) the Minister's claim that the disclosure of information or other evidence would be injurious to national security or endanger the safety of any person; and

(b) the relevance, reliability and sufficiency of information or other evidence that is provided by the Minister and is not disclosed to the permanent resident or foreign national and their counsel, and the weight to be given to it.

(3) For greater certainty, the special advocate is not a party to the proceeding and the relationship between the special advocate and the permanent resident or foreign national is not that of solicitor and client.

(4) However, a communication between the permanent resident or foreign national or their counsel and the special advocate that would be subject to solicitor-client privilege if the relationship were one of solicitor and client is deemed to be subject to solicitor-client privilege. For greater certainty, in respect of that communication, the special advocate is not a compellable witness in any proceeding.

85.2 A special advocate may

(a) make oral and written submissions with respect to the information and other evidence that is provided by the Minister and is not disclosed to the permanent resident or foreign national and their counsel;

(b) participate in, and cross-examine witnesses who testify during, any part of the proceeding that is held in the absence of the public and of the permanent resident or foreign national and their counsel; and

(c) exercise, with the judge's authorization, any other powers that are necessary to protect the interests of the permanent resident or foreign national.

85.4 (1) The Minister shall, within a period set by the judge, provide the special advocate with a copy of all information and other evidence that is provided to the judge but that is not disclosed to the permanent resident or foreign national and their counsel.

(2) After that information or other evidence is received by the special advocate, the special advocate may, during the remainder of the proceeding, communicate with another person about the proceeding only with the judge's authorization and subject to any conditions that the judge considers appropriate.

(3) If the special advocate is authorized to communicate with a person, the judge may prohibit that person from communicating with anyone else about the proceeding during the remainder of the proceeding or may impose conditions with respect to such a communication during that period.

115. (1) A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment.

(2) Subsection (1) does not apply in the case of a person

(a) who is inadmissible on grounds of serious criminality and who constitutes, in the opinion of the Minister, a danger to the public in Canada; or

(b) who is inadmissible on grounds of security, violating human or international rights or organized criminality if, in the opinion of the Minister, the person should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of Canada.

***International Covenant on Civil and Political Rights, 19 December 1996, 99 U.N.T.S. 171,
Can. T.S. 1976 No. 47, 6 I.L.M. 368***

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

Article 13

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

Rules of the Supreme Court of Canada, SOR/2002-156

55. Any person interested in an application for leave to appeal, an appeal or a reference may make a motion for intervention to a judge.

56. A motion for intervention shall be made in the case of

(a) an application for leave to appeal, within 30 days after the filing of the application for leave to appeal;

(b) an appeal, within four weeks after the filing of the factum of the appellant; and

(c) a reference, within four weeks after the filing of the Governor in Council's factum.

57. (1) The affidavit in support of a motion for intervention shall identify the person interested in the proceeding and describe that person's interest in the proceeding, including any prejudice that the person interested in the proceeding would suffer if the intervention were denied.

(2) A motion for intervention shall

(a) identify the position the person interested in the proceeding intends to take in the proceeding; and

(b) set out the submissions to be advanced by the person interested in the proceeding, their relevance to the proceeding and the reasons for believing that the submissions will be useful to the Court and different from those of the other parties.

***Universal Declaration of Human Rights*, GA Res. 271 (III), UN GAOR, 3d. Sess., Supp. No. 3, UN Doc. A/810 (1948)**

Article 9

No one shall be subjected to arbitrary arrest, detention or exile.

Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.