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Registry No. A-37-08

FEDERAL COURT OF APPEAL

Between:

HER MAJESTY THE QUEEN

Appellant

-and-

CANADIAN COUNCIL FOR REFUGEES, CANADIAN COUNCIL OF CHURCHES, AMNESTY INTERNATIONAL, and JOHN DOE

Respondents

RESPONDENTS' MEMORANDUM OF FACT AND LAW

Barbara Jackman
Andrew Brouwer
Leigh Salsberg
Jackman & Associates
596 St. Clair Avenue West, Unit 3
Toronto, Ontario
M6C 1A6
Tel: (416) 653-9964
Fax: (416) 653-1036

Solicitors for the Respondents Canadian Council for Refugees, Canadian Council of Churches, and John Doe

Lorne Waldman
Waldman & Associates
281 Eglinton Avenue East
Toronto, Ontario
M6P 1L3
Tel: (416) 482-6501
Fax: (416) 489-9618

Solicitor for the Respondent Amnesty International

John H. Sims, Q.C.
Deputy Attorney General of Canada
Per: David Lucas, Gregory George and Matina Karvellas
Department of Justice
Ontario Regional Office
The Exchange Tower
130 King St. West
Toronto, Ontario M5X 1K6

Tel: (416) 952-9631
Fax: (416) 954-8982

Solicitor for the Appellant

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RESPONDENTS' MEMORANDUM OF FACT AND LAW

OVERVIEW

1. This is an appeal of the Federal Court's decision declaring the US-Canada Safe Third Country Agreement (STCA) *ultra vires* and unconstitutional.

2. After a comprehensive review of a large and detailed record, Phelan J. found that the Governor in Council (GIC) exceeded its jurisdiction in designating the United States as a Safe Third Country for refugees and asylum seekers. He found it to be unreasonable for the GIC to conclude that the US complied with Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture (CAT); to the contrary, asylum seekers who are denied entry to Canada under the STCA are at ongoing risk of *refoulement* from the US. Phelan J. found that the regulations and operation of the STCA violate ss. 7 and 15 of the Charter of Rights and Freedoms in a manner that is not saved by s. 1. He also determined that the GIC had breached its obligation to ensure continuing review of US policies and practices.

3. The Appellant appeals the decision of the Federal Court. She seeks to impugn Phelan J.'s determination of the standard of review, his approach to the evidence, his findings of fact, and his findings of law and mixed fact and law. She argues that the GIC is

authorized to designate a country as one that complies with Article 33 of the Refugee Convention and Article 3 of the CAT without regard to whether or not it actually complies with those articles. In the alternative, she argues that Phelan J. should have paid less attention to the specific ways the US breaches its obligations under these Conventions, and should have relied instead on broad assertions of general compliance as well as the existence of a similar agreement in Europe. She also submits that Phelan J. erred in his findings of Charter violations.

4. The appeal must fail. The Appellant's argument regarding *vires* is plainly absurd; her submissions on standard of review are incorrect; she misconceives the nature of the declaratory remedy and therefore does not appreciate the relevance of Phelan J.'s finding with respect to the continuing review obligation; and she has failed to show that Phelan J. made any palpable and overriding error in respect of his findings of fact or that he erred in his legal findings. Overall, this appeal is an attempt to relitigate factual issues as if the Court of Appeal were a court of first instance.

PART ONE - THE FACTS[1]

A. Background

5. A "safe third country" clause first appeared in the1988 amendments to the *Immigration Act,* 1976. The provision allowed for the designation of another country as a "safe third country" such that refugee claimants seeking to enter Canada via such a country would not be permitted to claim protection in Canada. In a constitutional challenge by the Canadian Council of Churches (CCC) to this and other amendments, this Court determined that litigation of the provision was premature as no country had yet been designated, but that if a country was designated the CCC would be an appropriate public interest litigant.

   An Act to amend the Immigration Act, 1976 and the Criminal Code in consequence thereof, S.C. 1988, c. 36; An Act to amend the Immigration Act, 1976 and to amend other Acts in consequence thereof, S.C. 1988, c. 35; Canadian Council of Churches v. M.E.I., [1990] 2 FC 534, dismissed on other grounds, [1992] 1 S.C.R. 236

[1] The Respondents rely on the facts as set out in their Supplementary Memorandum of Fact and Law of December 4, 2006, and provide the herein summary of the facts in addition.

6. Through the 1990s, the Appellant engaged in negotiations with the US regarding a Memorandum of Understanding, later known as an Agreement, designating one another as safe third countries. Final agreement was not reached then and negotiations were suspended. On December 12, 2001, the US-Canada Smart Border Declaration was issued, setting out a 30 Point Action Plan that included a new commitment to negotiate an agreement.

   Dench Affidavit, AB vol. 2, Tab 4, para. 11(c)-(e); Scoffield Affidavit, AB vol. 11, Tab 33, para. 16-19

7. On June 28, 2002, the Immigration and Refugee Protection Act (IRPA) came into effect. Parliament granted the GIC authority to designate a country as "safe" as long as certain conditions were met: the country must comply with Article 33 of the 1951 *Convention relating to the Status of Refugees* and Article 3 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, the core *non-refoulement* provisions of the two treaties. Section 102 of IRPA stipulates that in designating a country as "safe", the GIC is required to consider: (*a*) whether the country is a party to the Refugee Convention and CAT; (*b*) its policies and practices with respect to claims under the Refugee Convention and obligations under CAT; and (*c*) its human rights record. The designation of a country as "safe" is not necessarily fixed or permanent, but is to be subject to continuing review.

8. A person entering Canada from a "designated country" is ineligible to have her claim for refugee protection considered by the Refugee Protection Division (RPD) of the Immigration and Refugee Board (IRB), nor is she eligible for a Pre-Removal Risk Assessment (PRRA).

   IRPA s. 101(1)(e), 112(2)(b)

9. The final text of the STCA was signed December 5, 2002, and the GIC formally designated the US two years later, on October 12, 2004. The Minister of Citizenship and Immigration was directed to undertake a review, on a continuous basis, of the factors set out in s. 102(2) and to report to Cabinet on a regular basis or more often if circumstances warrant.

Scoffield Affidavit, AB vol. 11, Tab 33, Ex. B-11

10. Regulations implementing the STCA were published November 3, 2004, and entered into force December 29, 2004. Pursuant to these regulations, refugee claimants who request protection at the US-Canada border are denied access to the refugee determination process in Canada, unless they meet one of the enumerated exceptions in the regulations. The STCA applies only at land ports of entry.
STCA Regulations 159.3, 159.4

11. Contrary to the Appellant's assertion, there is no STCA mechanism to ensure that refugees, ineligible to enter Canada, have access in the US to a full and fair refugee determination.

B. Application for judicial review

12. The Respondents launched an application for leave and judicial review of the Safe Third Country provisions on December 29, 2005, seeking a declaration that the designation of the US under s. 102 was unreasonable and *ultra vires* the GIC and that the ongoing operation of the agreement breached refugees' ss. 7 and 15 Charter rights. They further sought a declaration that the Appellant had erred by failing to meet her statutory continuing review obligation.

13. The Respondents provided the Court with affidavits from representatives of US-based agencies that assist asylum-seekers to make claims at the Canadian border as well as expert evidence from a number of leading academics and practitioners of refugee law:
    - Eleanor Acer, Director of Human Rights First's Asylum Legal Representation Program in New York City: risk of detention faced by refugees in the US.
    - Susan M. Akram, Associate Professor at Boston University and clinical supervisor: racial targeting of Arabs and Muslims in the US.
    - Deborah E. Anker, director of the Harvard Law School Immigration and Refugee Clinical Program, clinical professor of law, author of many respected publications on U.S. immigration and refugee law: corroboration requirements in US asylum law, the US interpretation of nexus and persecution, and exclusions from asylum.
    - James Hathaway, internationally renowned academic specializing in international and comparative refugee law, author of leading texts on international refugee law: international and comparative law on refugee responsibility sharing agreements; European safe third country agreements.
    - Don Kerwin, Executive Director of Catholic Legal Immigration Network, on

access to counsel and translators for detained asylum-seekers in the US.

- Karen Musalo, resident Scholar at the University of California, director of the Centre for Gender and Refugee Studies: gender based asylum claims.
- Victoria Neilson, Legal Director of Immigration Equality, a legal NGO focussing on lesbian, gay, bisexual, transgender and HIV immigration issues: claims based on sexual orientation and HIV status.
- Michele Pistone, Professor of Law at Villanova University School of Law and Director of the law school's refugee and immigration clinic: US practices regarding withholding of removal.
- Jaya Ramji-Nogales, Andrew Schoenholtz and Philip G. Schrag, Georgetown University (Professors Schoenholtz and Shragg are renowned scholars on immigration, refugee and human rights law): overview of the asylum process in the United States, the one-year bar.
- Morton Sklar, founding Executive Director of the World Organization for Human Rights USA, an organization which focuses on protecting refugees from deportation to torture: the Convention Against Torture.
- Steven Watt, senior attorney with the Human Rights Working Group of the American Civil Liberties Union: torture committed by the US and the practice of rendition.

See AB vol. 2-4; *Giantonio Affidavit, AB vol. 3, Tab 11; Koelsch Affidavit, AB vol. 3, Tab 14*

14. The Appellant provided affidavit evidence from scholars and government officials. The record was over 4000 pages of evidence and over 150 pages of legal argument. The hearing took place on two days in February 2007, with judgement issued November 29, 2007.

C. The decision under appeal

15. In his 123-page decision, Phelan J. analysed in detail the evidence and submissions. He found the *STCA Regulations* were *ultra vires* because the conditions precedent to the exercise of the designation authority of a country under s. 102(1) of IRPA had not been met: the GIC acted unreasonably in concluding the US complied with Art. 33 of the Refugee Convention and Art. 3 of CAT. The evidence showed the US breaches those provisions:

> **239**....[T]here are a series of issues, which individually, and more importantly, collectively, undermine the reasonableness of the GIC's conclusion of U.S. compliance. These include: the rigid application of the one-year bar to refugee claims; the provisions governing security issues and terrorism based on a lower standard, resulting in a broader sweep of those caught up as alleged security threats/terrorists; and the absence of the defence of duress and coercion. Lastly, there are the vagaries of U.S. law which put women, particularly those subject to domestic violence, at real risk of return to their home country.

240 These instances of non-compliance with Article 33 are sufficiently serious and fundamental to refugee protection that it was unreasonable for the GIC to conclude that the U.S. is a "safe country". Further, in the light of this evidence it was even more unreasonable for the GIC not to engage in the review of U.S. practices and policies required by s. 102(2) of IRPA.

16. With respect to US compliance with Article 3 of CAT, Phelan J. found:

262. ...[T]he Applicant's submissions and evidence that the U.S. does not comply with Article 3 are credible. Those submissions and evidence are supported by a real life example and therefore more credible than the Respondent's evidence. It was unreasonable, given the evidence, for the GIC to conclude that the U.S. meets the standards of Article 3 of CAT.

263 Further, but standing as a distinct matter, the Arar Report and the circumstances examined should have at the very least caused a thorough and comprehensive review of U.S. practices and policies. It is difficult to understand how or why the obligation to have a continuing review, mandated by s. 102(3), was not immediately put into operation on an urgent basis. There is no evidence of any such thing occurring.

17. Phelan J. further determined that the *STCA Regulations* and the operation thereof are in breach ss. 7 and 15 of the Charter and are not saved by s. 1. He found:

285 It is therefore quite clear that the life, liberty and security of refugees is put at risk when Canada returns them to the U.S. under the STCA if the U.S. is not in compliance with CAT and the Refugee Convention. The law in the U.S. with respect to gender claims and the material support bar, along with the other issues found to be contrary to the Convention, make it "entirely foreseeable" that genuine claimants would be *refouled*. The situation is potentially even more egregious in respect of *refoulement* to torture. A refugee, by his/her very nature, is fleeing a threat to his/her life, liberty or security, and a risk of return to such conditions would surely engage section 7. There is sufficient causal connection between Canada and the deprivation of those rights by virtue of Canada's participation in the STCA.

18. In addition, Phelan J. determined at para. 333 that "the designation of the US as a safe third country leads to a discriminatory result in that it has a much more severe impact on persons who fall into the areas where the U.S. is not compliant with the Refugee Convention or CAT as well as discriminating and exposing such people to risk based solely on the method of arrival in Canada, a wholly irrelevant *Charter* consideration."

PART II: ISSUES

19. Phelan J. certified the following questions:

    1. What is the appropriate standard of review in respect of the Governor-in-Council's decision to designate the United States of America as a "safe third country" pursuant to s. 102 of the *Immigration and Refugee Protection Act*?

2. Are paragraphs 159.1 to 159.7 (inclusive) of the *Immigration and Refugee Protection Regulations* and the Safe Third Country Agreement between Canada and the United States of America *ultra vires* and of no legal force and effect?

3. Does the designation of the United States of America as a "safe third country" alone or in combination with the ineligibility provision of clause 101(l)(e) of the *Immigration and Refugee Protection Act* violate sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* and is such violation justified under section 1?

PART III: ARGUMENT[2]

A. Standard of appellate review

20. The Respondents agree that the standards for appellate review are correctness for questions of law and "palpable and overriding error" for questions of fact. No distinction is to be made between factual findings and inferences drawn from those findings - these are to be afforded the highest deference. For mixed findings of fact and law, factual findings from which to draw legal conclusions are entitled to deference, while legal conclusions are reviewable on a correctness standard

Housen v. Nikolaisen, [2002] 2 SCR 235 at para. 23, 26-33

21. The Appellant relies on *General Motors Acceptance Corp. of Canada* (GMAC), where the Court of Appeal for Ontario concluded that although questions of foreign law are questions of fact before the trial judge they are reviewable on a correctness standard by an appeal court. This decision is inconsistent both with *Housen* and with binding dicta of this Court.

General Motors Acceptance Corp. of Canada v. Town and Country Chrysler Ltd, [2007] O.J. No. 5046

22. In *Saini v. MCI,* this Court noted:

> **26** The first matter to consider is the effect of the foreign pardon in the country where it was granted. Foreign law is a question of fact, which must be proved to the satisfaction of the Court. Judicial findings about foreign law, therefore, have always been considered on appeal as questions of fact (see Castel, Canadian Conflict of Laws 4th ed. 1997, at p. 155).

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2 The Respondents rely on their arguments before the Federal Court which are contained in their Supplementary Memorandum of Fact and Law of December 4, 2006.

Moreover, it is well settled that this Court will only interfere with a finding of fact, including a finding of fact with regard to expert evidence, if there has been a palpable and overriding error [citations omitted].

Saini v, MCI, [2001] FCJ No. 1577; Jeddore v. Canada, [2003] FCJ No. 1269

23. It is submitted that all of the factual findings of the Federal Court are reviewable on a palpable and overriding error standard, including all findings as to US asylum procedures. As the conclusions with respect to US compliance with the Refugee Convention and CAT have been incorporated into Canadian law, these issues raise questions of mixed fact and law. In so far as the conclusions involve either factual inferences or the application of the correct law to the facts, absent some error of law the standard of review is palpable and overriding error.

B. First certified question: Standard of review

24. In light of the Supreme Court's recent decision in *Dunsmuir*, the issue is: what is the proper standard of review for the evaluation by the Federal Court of compliance with conditions precedent – reasonableness or correctness? Phelan J. applied a reasonableness standard. The Respondents submit that a correctness standard is appropriate, or in the alternative, that Phelan J. properly chose reasonableness.

Dunsmuir v. New Brunswick, 2008 SCC 9

25. The first step in the *Dunsmuir* analysis is to consider if previous jurisprudence has established the standard of review. The Supreme Court found that GIC compliance with conditions precedent to the exercise of regulatory authority is a matter of jurisdiction, and is reviewable on a correctness standard. This Court held in *Sunshine Village:* "Reviewing whether subordinate legislation is authorized by its enabling statute does not require application of the pragmatic and functional approach. Rather, the *vires* of subordinate legislation is always to be reviewed on a correctness standard." This Court need go no further than this.

Sunshine Village Corp. v. Canada (Parks), [2004] 3 F.C.R. 600 (CA) at para. 10; Thorne's Hardware v. The Queen, [1983] 1 S.C.R. 106; United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City), [2004] 1 S.C.R. 485; Attorney General of Canada v. Inuit Tapirisat et al., [1980] 2 S.C.R. 735

26. In the alternative, since the assessment of compliance with conditions precedent involves questions of mixed fact and law, the Court may need to determine whether in the circumstances some very limited deference is warranted. If so, the Court must conduct an analysis, as Phelan J. did.[3]

27. Analysis of relevant factors suggests that the standard of review would be reasonableness with very limited deference given to the GIC's factual findings. While the Court emphasized the importance of deference in *Dunsmuir,* it also stated that this does not mean that the courts are "subservient to the determinations of tribunals" or that they must show "blind reverence" to a decision. Indeed, in *Dunsmuir*, the Court held that on a reasonableness standard, the adjudicator's decision should be quashed because his reasoning process was "deeply flawed" and fell outside of the range of "admissible statutory interpretations."

Dunsmuir v. New Brunswick, 2008 SCC 9 at paras. 48, 72

28. The factors to consider are:

a. *Privative clause:* In this case, there is no privative clause, although there is a requirement to obtain leave. The absence of a privative clause is generally neutral, but *Suresh* suggests the requirement to obtain leave indicates some deference. Here, IRPA uses mandatory language when setting out what the GIC is to consider in deciding whether to designate a country as safe. This language suggests less deference is owed

b. *Expertise of the decision-maker:* Ministers have no particular expertise in questions of international law or the application of international conventions. This case can be distinguished from *David Suzuki Foundation* and *Suresh* on the basis that the decisions at stake in those cases fell directly within the Minister's area of expertise, whereas this decision does not. As discussed further below, this decision involves the application of facts to legal norms, a function that is unquestionably within a court's realm of expertise.

   By its nature, the GIC makes politically motivated and consequential decisions. The STCA has a strong policy component: to control refugee flow into Canada. The closer the decision maker is to the political realm, the more vigilant courts must be to ensure that fundamental rights are not traded for political objectives, absent express language permitting this.

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3 Although the Appellant baldly asserts that Phelan J. erred in his pragmatic and functional analysis, she provides no jurisprudence to support this contention, nor does she demonstrate any actual error.

David Suzuki Foundation v. British Columbia (Attorney General), [2004] B.C.J. No. 943 (BCSC) (QL); *Suresh v M.C.I., [2002]S.C.J. No. 3*

c. *Purpose of the legislation and provisions:* As noted by Phelan J., IRPA and these provisions seek to accomplish policy goals, but also seek to protect fundamental values – individual, Charter and internationally protected human rights. Limited deference is appropriate.

This case can be distinguished from *Suresh*, where the Supreme Court found that a deferential standard of review would not prevent human rights issues from being fully addressed as long as procedural safeguards were in place. The STCA regulations prevent an asylum seeker from accessing any safeguards. For those denied entry into Canada due to the STCA, the regulations requiring that designated countries comply with the CAT and the Refugee Convention are the only safeguards that ensure their rights are respected. These provisions are similar in purpose to the exclusion clause considered in *Pushpanathan*, which the Supreme Court found was "intended to protect the vindication of a set of relatively static human rights and ensuring that those who fall within the prescribed categories are protected".
Pushpanathan v. MCI, [1998] 1 SCR 982, at para. 35

d. *Nature of the question: Dunsmuir* affirms that questions "of central importance to the legal system" as a whole and outside the adjudicator's specialized area of expertise are reviewed on a standard of correctness. Here, a question of law certified to the Court of Appeal, and which disqualifies numerous refugee claimants, must qualify as a "question of central importance to the legal system".

The decision that a country complies with Article 33 of the Refugee Convention and Article 3 of the CAT is a question of mixed fact and law. The factual aspects of the compliance question are inseparable from the legal questions of what is required by the Conventions. As Phelan J. pointed out, the factual analysis of the policy and practice and the application of those facts to the legal norms are integrally linked. And according to *Dunsmuir*, deference will apply to questions where the legal and factual issues "cannot be readily separated".
Dunsmuir v. New Brunswick, 2008 SCC 9 at para. 53; Reasons, para. 102

Finally, because the GIC is not finding "evidence of involvement" in legal concepts such as "war crimes" and "crimes against humanity," *but is actually "deciding as a matter of law"* whether or not a country is in compliance with the Conventions, less deference is owed to the GIC here than in *Oberlander*. Despite the factual analysis required in a designation decision, the condition precedent is a substantive and legal one.
Oberlander v. Canada (A.G.), [2004] F.C.J. No. 920 (C.A.)

29. In conclusion, if this Court determines that a reasonableness standard of review is appropriate, the deference accorded to the GIC's determination of US compliance with the *non-refoulement* provisions of international conventions must be limited.

C. Second certified question: Ultra vires

30. Phelan J. determined that Parliament granted the GIC authority to enter into responsibility sharing agreements with other governments, subject to certain conditions being met. He found compliance with Art. 33 of the Refugee Convention and Art. 3 of CAT is a condition precedent. As well, in deciding designation, the GIC must consider s. 102(2) factors:

> (a) whether the country is a party to the Refugee Convention and to the CAT;
> (b) its policies and practices with respect to claims under the Refugee Convention and with respect to obligations under the Convention Against Torture;
> (c) its human rights record; and
> (d) whether it is party to an agreement with the Government of Canada for the purpose of sharing responsibility with respect to claims for refugee protection.

IRPA, 102(1), 102(1)(a), 102(2)
Reasons, para. 4, 15, 22, 55-57, 60, 79

31. The parties are ad idem with Phelan J. that the courts may review regulations, as an error of jurisdiction, where the GIC has failed to observe a condition precedent. The Appellant disputes Phelan J.'s identification of these conditions and his conclusion they were not met.

Canada (Attorney General) v. Inuit Tapirisat of Canada, [1980] 2 S.C.R. 735; Thorne's Hardware Ltd. v. Canada, [1983] 1 S.C.R. 106; Babcock v. Canada (Attorney General), [2002] 3 S.C.R. 3; David Suzuki Foundation v. British Columbia (Attorney General), [2004] B.C.J. No. 943 (BCSC) (QL); Algonquin Wildlands League v Ontario (Minister of Natural Resources), [1998] O.J. No. 419 (QL).

C1. Conditions precedent include compliance with the Refugee Convention and CAT

32. The Appellant asks this Court to determine that the only condition precedent to designation under s. 102(1) is that the GIC **consider** the s. 102(2) factors. The Respondents submit that this is an absurd interpretation. To hold, as the Appellant urges, that the statute permits the GIC to pass regulations explicitly "designating countries ...that comply with Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture" even if the designated countries do not **actually**

comply would be to find that Parliament granted the GIC the authority to perpetrate a fraud on the Canadian people and the international community.

33. The issue is one of statutory interpretation. "The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." Phelan J. properly applied these principles. He noted that, if the Appellant's approach were the intended one, there would be no need to consider under s. 102(2)(a) whether the designated country was a party to the Refugee Convention or the CAT. He further stated that such an interpretation would render meaningless the requirement under s. 102(2)(b) and (c) that the GIC consider the human rights record of the country, as well as its practices under the Refugee Convention and its obligations under CAT.

Reasons, para. 57; Driedger on the Construction of Statutes (2nd ed. 1983), p. 21; Rizzo & Rizzo Stores, [1998] 1 SCR 27 at 21

34. Phelan J.'s interpretation makes s. 102 internally consistent, consistent with the statutory scheme, and consistent with Canada's international obligations.

35. The statutory grant of authority to designate a Safe Third Country set out in s. 102(1) contains two parts – first, the Regulations "may...for the purpose of sharing responsibility with governments of foreign states for the consideration of refugee claims...include provisions...designating countries," and second, ones "that comply with Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture." On a plain reading of the provision, compliance with the Conventions is a mandatory condition precedent: before the GIC can exercise its discretionary power under the first part, the country must comply with the Refugee Convention and CAT.

IRPA, 102(1)

36. Interpreting s. 102(1) to create a mandatory requirement of compliance is consistent with other provisions of IRPA which reinforce the principle of *non-refoulement* and our obligations under the Refugee Convention and CAT, including the objectives and intended interpretation of the Act, such as ss. 96, 97 and 115.

37. Further, s. 102(1) specifically states that a designation may be made "for the purposes of this Act." The IRPA objectives with respect to refugees, as set out in s. 3, include:

> (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]
>
> (*d*) to offer safe haven to persons with a well-founded fear of persecution based on race, religion, nationality, political opinion or membership in a particular social group, as well as those at risk of torture or cruel and unusual treatment or punishment.

An interpretation of s. 102(1) that permitted designation of a country that does **not** comply with Convention obligations would be directly contrary to these objectives. *IRPA, 102(1)*

38. Finally, Phelan J's interpretation of s. 102(1)(a) as a condition precedent is consistent with Parliament's explicit requirement, pursuant to s. 3(3)(f), that the Act be construed and applied in a manner which "complies with international human rights instruments to which Canada is a signatory."
IRPA, 3(3)(f)

C2. Phelan J. reasonably found that the US does not meet the condition precedent of compliance with the *Refugee Convention* and CAT

39. Ultimately, the Appellant's main challenge is evidentiary: she disputes Phelan J.'s finding that the condition precedent of compliance with Art. 33 of the Refugee Convention and Art. 3 of CAT was not met and as a result the designation is *ultra vires*. Indeed, she wishes to litigate afresh in this Court all the facts and issues already decided.

40. The Appellant's approach is misguided. While Phelan J., as the review court, accorded some deference to the GIC, this Court may only intervene if it determines that Phelan J. made a "palpable or overriding error" in his assessment of the evidence.

41. The Respondents presented the Federal Court with substantial, relevant and highly

credible evidence that the core condition precedent to designation – compliance with the *non-refoulement* obligation – was not met. This evidence established, in Phelan J.'s determination, that some refugees in the US face a real risk of refoulement in breach of Art. 33 of the Refugee Convention and Art. 3 of CAT. The Respondents highlighted the following specific ways in which the US is non-compliant with its obligations:

a. *Legislated exclusions beyond those in the Convention*, specifically: the one-year bar; exclusions for danger to security and terrorism, including the "material support bar"; and exclusion for commission of particularly serious crimes in the US.

Applicants' Supplementary Memorandum, para. 40ff, AB, vol 1, tab 5, para. 40ff Anker Affidavit, AB, vol. 2, tab 9, para. 5, 29-50; Anker Affidavit II, AB, vol. 13, tab 36, paras. 4-10, 20-22; Georgetown Affidavit, AB, vol. 3, tab 19; Musalo Affidavit, AB, vol. 3, tab 15, para. 12-14; Hathaway Affidavit, AB, vol. 3, tab 12, para. 14; Nazami Affidavit, Ex. D, E, F, G, H; Neilson Affidavit, AB, vol. 3, tab 16, para. 3-7 See also Martin Affidavit, AB, vol. 6, tab 24, paras. 56, 62, 67, 76-77; 106-110; 114-118; Ex. B C; Cross-examination of D. Martin, Oct. 17, 2006, AB, vol. 13, tab 38, Q. 257; 290; 300-302, 322, 335-337, 343, 347-355; Scoffield Affidavit, AB, vol. 11, tab 33, Ex 4,5: Scoffield Crossexamination, AB, vol. 14, tab 42, Ex A2

b. *Fundamental deviations from the Convention in jurisprudence, policy or practice*, specifically: denial of gender as the basis of a "particular social group"; inconsistent recognition that nexus exists where the state fails to protect for a Convention reason against privately inflicted harm; rejection of claims based on peripheral credibility concerns and lack of corroboration; inconsistent recognition of nexus where the persecutor has mixed motives; and lack of a definition of persecution.

Applicants' Supplementary Memorandum, para. 40ff, AB, vol 1, tab 5, para. 45ff Hathaway Affidavit, AB, vol.3, tab 12, para. 14; Anker Affidavit, AB, vol.2 , tab 9, para. 8-13, 18-28; Musalo Affidavit, AB, vol.3 , tab 15, paras 3-11, 19-21; Neilson Affidavit, AB, vol.3 , tab 16, paras 8-9

c. *Obstacles to presenting claims that aggravate the risk of refoulement*, specifically: arbitrary detention and denial of access to legal assistance

Applicants' Supplementary Memorandum, para. 40ff, AB, vol 1, tab 5, para. 51-54 Hathaway Affidavit, AB, vol.3, tab 12, para. 14; Anker Affidavit, AB, vol.2 , tab 9, para. 8-13, 18-28; Musalo Affidavit, AB, vol.3 , tab 15, paras 3-11, 19-21; Neilson Affidavit, AB, vol.3 , tab 16, paras 8-9

42. The Respondents also provided evidence showing that the US fails to grant asylum-seekers many fundamental rights to which the Refugee Convention and other international human rights instruments entitle them, including freedom from discrimination; non-penalization for illegal entry; freedom of movement; and good-faith consideration of naturalization upon acceptance as a refugee.

Applicants' Supplementary Memorandum, para.74

43. Finally, the Respondents provided evidence to show that in addition to violating Article 3 of CAT by *refouling* both asylum-seekers to torture and engaging in extraordinary renditions to torture, the US also breaches its CAT obligations through restricting its definition of torture and practicing and condoning torture.

Applicants' Supplementary Memorandum, para. 74-82
Applicants' Supplementary Memorandum, para. 74-82; Watt Affidavit, AB vol. 4, Tab 21; Sklar Affidavit, AB vol. 3, Tab 20; Siemens Affidavit, AB vol. 4, Tab 22, Ex. B, Situation of Detainees at Guantanamo Bay, Report of the Rapporteurs, UN Commission on Human Rights, E/CN.4/2006/120, Feb. 15, 2006 at para. 55, 89

44. Phelan J. accepted some of the Respondents' positions and evidence and not others. While he found the Respondents' evidence to be generally more reliable than that of the Appellant, he nevertheless relied on the Appellant's evidence for many of his findings, and found the Respondent's evidence insufficient on a number of issues as well. Overall, he concluded that there was sufficient evidence to find a real risk of *refoulement.*

C2a. General concerns with the Appellant's approach

45. Before turning to the Appellant's challenges to the specific US laws and practices that Phelan J. considered, some general responses to the Appellant's approach are required.

46. First, the Appellant repeatedly takes issue with Phelan J. for identifying differences between US and Canadian approaches, arguing that Canadian law and practice have limited relevance to his proper task of comparing the US to an international benchmark. Phelan J. properly rejected this. His role was to assess US compliance with the Refugee Convention and the CAT from the perspective of Canadian law and the Charter. The Respondents' original challenge was at heart a review not of the

legality under international law of the bilateral agreement itself, but rather of the legality under Canadian law of the GIC's designation of the US under s. 102 of IRPA.

47. While this question necessarily entails careful consideration of international legal standards, it is submitted – as Phelan J. accepted – that Canadian courts and legislators must interpret these standards in a manner that is consistent with Canadian law. This is trite law; neither the legislature nor the GIC are beyond the constraints of the Constitution or Canadian law, and therefore they lack the authority to apply s. 102(1)(a) of IRPA in a manner that is inconsistent with it. Where the Conventions themselves are ambiguous or appear to permit more than one interpretation, the interpretation or standard that has been adopted in Canadian law is the one against which the US must be assessed. In light of these principles, the European minimum standards approach to asylum-sharing agreements, to the extent that this approach allows for practices that fall below what is required under the Canadian Charter, is simply irrelevant to the issues before the Court in the case at bar.

Federal Courts Act, s. 4; IRPA, s. 3(3)(d); Adan v. Secretary of State for Home Department, [1999] E.W.J. No. 3793 (H.L.); De Guzman v. MCI,[2005] FCJ No. 2119 (CA); Cross-examination of K. Hailbronner, Oct. 18, 2006, pp. 17-18, 134-135

48. Second, the Appellant vehemently takes issue with Phelan J.'s preference of the Respondents' evidence over that of Prof. Martin, even though this was within his domain. She criticized but did not cross-examine the Respondents' experts, on either their credentials or the substance of their affidavits. Many of the Respondents' experts have extensive and recent practical experience, which Prof. Martin lacks; and many specialize in or have studied specific areas of law, while Prof. Martin's expertise was general. The Appellant criticizes Phelan J. for noting Prof. Martin's former employment with the US government, but she herself highlighted his role in designing changes to the US system and that his opinions are found in the Asylum Officer Training Manual (at para. 125 of her Further Memorandum). She has not shown that Phelan J. rejected any of Prof. Martin's evidence due to any potential bias. In fact, in his reasons, Phelan J. relies repeatedly on Prof. Martin's evidence, and rejects a considerable amount of the Respondents' expert evidence.

Cross-examination of Prof. Martin, Oct. 16, 2006, AB vol. 13, Tab 38, Q. 1-31

49. Third, the Appellant relied before Phelan J., and argues here that Phelan J. failed to consider, global US acceptance rates as proof that the US system provides protection to those who deserve it. These general rates do not cure the specific failings and gaps in protection, or the resulting exposure to *refoulement* faced by some refugees in that country. Canada's Charter and the IRPA designation requirements impose on the GIC an obligation to consider the risk of *refoulement*. The point is not whether the US has a higher or lower acceptance rate than Canada; it is whether a refugee who is barred from entry to Canada because of the STCA faces a real risk of *refoulement* from the US. Phelan J. found that evidence established that the US is in breach.

50. Fourth, the Appellant's insistence that the Court should have relied on broad statements by a UNHCR representative in 2006 is misguided. The Respondents accept that UNHCR has been designated as the main supervisory body in relation to the Refugee Convention and therefore has some expertise in the interpretation of the terms of the Convention. However, as Prof. Hathaway has explained, the degree of reliability or authority of UNHCR's doctrinal statements depends on the type and author of statement. At the high end of authoritativeness or persuasiveness are the Conclusions on International Protection of the Executive Committee (ExCom Conclusions); the UNHCR Refugee Handbook, while lacking the formal authority of ExCom Conclusions have nevertheless come to be recognized as a source of "significant guidance" or "high persuasive authority" on the interpretation of refugee law. Formal Guidelines issued by the High Commissioner's Office have received a more mixed reception, however, especially where they conflict with the Handbook or ExCom Conclusions.

Hathaway Affidavit 2, AB, vol 13, tab 35, para 15
Hathaway, James C., The Rights of Refugees Under International Law, Cambridge: CUP, 2005, 2.5.2, pp112-118. For the legal effect of UNHCR Executive Committee Conclusions, see Rahaman v. M.C.I., [2002] F.C.J. No.302 (FCA); Attorney General v. E, [2000] 3 NZLR 257 (NZCA) at 269, and Excom Conclusion 55 (1989), para (p), and 81 (1997) para (g). For the legal effect of the UNHCR Handbook, see: INS v. Cardoza Fonseca, (1987) 480 US 421 (US SC) at 439, n.22; R. v. Secretary of State for the Home

Department, ex parte Adan and Aitseguer, [2001] 2 WLR 142 (UK HL) per Lord Steyn; R. (Hoxha) v. Secretary of State for the Home Department, [2002] EWCA Civ 1403 (Eng. CA) at para. 36.

51. In this light, general and broadly positive statements by an individual UNHCR representative responding to questions from Canadian legislators not about the proper interpretation of the Refugee Convention but about the general asylum system of the country that is their primary funder – the US - cannot be seriously considered as evidence of US compliance with its specific obligations under the Refugee Convention.4

52. Likewise the quoted statement in the UNHCR one-year report on implementation of the STCA does not address the specifics of the US asylum system, and does not address the question of the impact of the agreement on those who are denied entry to Canada as a result of its implementation. Pursuant to UNHCR's limited terms of reference, the report only addresses the implementation of the agreement according to its own terms, and therefore is of no assistance to the Court in the determination of US compliance with Article 33 of the Refugee Convention or Article 3 of CAT. Further, Phelan J. did acknowledge that the UNHCR report had been issued; he simply did not make the error of relying on it for a determination of compliance with the Refugee Convention or CAT.

53. Fifth, the Appellant submits that Phelan J. overstated and misconstrued the facts regarding John Doe. In attempting to impugn Phelan J.'s findings, the Appellant herself has misstated the facts. Contrary to her allegation, the evidence establishes that:

a. Basis of refusal: Doe was barred from asylum because he had failed to apply within one year of arrival in the USA. His application for withholding of removal was likewise refused because he had failed to establish his claim on the higher standard of "a clear probability of persecution" required for withholding to be granted.

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4 It is also worth noting that the UNHCR representative clearly indicated that his comments were fundamentally comparative – i.e. Canada and the US have "rather developed refugee systems" sufficiently established that UNHCR was willing to participate in the review, whereas "there are places in the world where we have clearly said that country X is not safe and therefore we would not go along with a safe third country agreement." In addition, the representative was not even purporting to comment on compliance with CAT. A far more authoritative and relevant UN report on US policy and practice in relation to its obligations under Article 33 of the Refugee Convention and other international law is the March 5, 2008, Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamente, based on his official visit to that country between April 30 and May 8, 2007. (UN doc. A//7/12/Add.1)

b. Reconsideration: Until he learned of the disappearance of his brother in early 2007, which provided a basis for seeking reconsideration on changed circumstances, Doe had no ground for seeking reconsideration of his asylum claim. (Phelan J. appears to have misstated the reason that Doe had been in hiding, but this is a minor point and is irrelevant to the decision as a whole.)

c. Impact of the STCA litigation on Doe's situation: After his arrest on February 1, 2007, Doe's spouse was advised by their US counsel that removal to Colombia was imminent and that interim release was not possible. The Respondents brought a motion for an injunction to admit Doe and his spouse to Canada pending the application. On February 5, 2007, prior to hearing the motion, the Court issued an order enjoining the Appellant from denying entry to Canada to Doe, were he to arrive, reiterating the oral order the following day and issuing a written order on February 7, 2007. On February 5, Phelan J. instructed the Respondents' counsel to request the US authorities not to remove Doe to Colombia prior to the Court's determination of his motion. These orders and instructions were communicated to US immigration authorities. In the meantime the Respondents were able to obtain pro bono counsel for Doe and his spouse, who assisted him to bring an application to reopen his asylum claim. Because of the high profile of the case and of Doe's pro bono counsel (Prof. Anker), the Department of Homeland Security did not oppose the reopening application, and once the request was granted Doe was released from detention. It is clear that but for his involvement in this application, Doe would have been *refouled* . *Injunction Motion, correspondence, and orders, AB, Vol 15, Tabs 51-62*

C2b. Non-compliance with the Refugee Convention

C2b(i) Legislated exclusions

54. Phelan J. found that U.S. law categorically excludes broad classes of refugees, without individual consideration or balancing of any kind, and without reference to the criteria set by Art. 1(D)-(F), s. 31(1) or s. 33(2) of the *Convention.* There is no palpable or overriding error in his findings.

The one-year bar:

55. Phelan J. found, and there is no dispute, that US legislation bars asylum claims filed later than one year after arrival, with discretionary exceptions. He found, and there is no dispute, that those barred may be considered for withholding of removal in Immigration Court, where they face a "more likely than not" risk standard rather than the "well-founded fear" risk standard. He found, and there is now no dispute, that the "more likely than not" risk standard is in both law and practice a higher standard than

the "well-founded fear" or "reasonable possibility of persecution" standard.

Reasons, paras. 144-154

56. He concluded:

> [154] Thus, the weight of the expert evidence is that the higher standard for withholding combined with the one-year bar may put some refugees returned to the U.S. in danger of *refoulement*. This creates a real risk. Although the Canadian system allows the decision maker to consider delay as a factor in determining subjective fear, it cannot alone result in a denial of status. If an adjudicator believed that the claimant had a reasonable fear of persecution, there would be no legal basis for the adjudicator to reject the claim in Canadian law. Canadian law is consistent with the Refugee Convention; the U.S. law, practice and policies are not.

57. Before Phelan J., the Appellant relied heavily on Prof. Martin's argument that there was no actual difference between the two risk standards. Phelan J. rejected this argument. He relied on the US Supreme Court's 1986 holding that the two standards have "significantly different meanings" and that this was Congress' intent. He found that the expert evidence was that this decision represents the current state of the law.

Reasons, para. 146-153; INS v. Cardoza-Fonseca, 480 U.S. 421 (1986) at 431, 440-41; Matter of Mogharrabi, 19 I&N Dec. 439, 441 (BIA 1987). The difference between the standards has been affirmed by this Court in Li v. MCI, [2005] F.C.J. No. 1 (C.A.).

58. The Appellant has now reasonably abandoned its former position that there is no real difference between the risk standards. Instead, she limits her challenge to the reasonableness of Phelan J.'s conclusion that the different standards result in a real risk of denial of protection to some refugees. The thrust of the Appellant's submission is a challenge to the statistics that, it is claimed, were the basis of Phelan J.'s conclusion.

59. The only statistical evidence on the impact of the one-year bar came from the Respondents. The Georgetown experts summarized their study – which was based on government statistics and whose methodology was unchallenged – finding that approximately 35,000 claims were refused by Asylum Officers between 1999 and 2005 due solely to the one-year filing deadline. Applying the uncontroversial asylum grant rate to this number, the study estimated that 16,000 claims that should have been successful were refused and referred to Immigration Court due solely to the bar.

Georgetown Affidavit, AB vol. 3, Tab 19, para. 8

60. The Respondents did not claim that all 16,000 of these claimants were subject to *refoulement*, as the Appellant suggests. These claims were all referred to Immigration Court, where the grant rate for asylum is about 38% and for withholding about 13 %. The Immigration Courts do not keep statistics that specifically track one-year barred cases. Thus, it had to be a matter of expert opinion whether some of these otherwise meritorious cases are ultimately successful or unsuccessful in the Courts.

Applicants' Supplementary Memorandum, AB vol 1, Tab 7, para. 53; Martin Affidavit, AB, vol. 26, Tab 24, para. 108-109 and Ex. B, EOIR Statistical Yearbook 2005, pp. K2, K5; Cross-exam. of Prof. Martin, Oct. 16, 2006, AB vol. 13, Tab 38, Q. 300-302

61. Phelan J. did not engage in a calculation of what proportion of one-year barred refuges are ultimately accepted or refused. He did not need to do so in order to accept the Respondents' experts' unequivocal opinion that some refugees who are one-year barred do not obtain withholding protection. The Georgetown Affidavit was drafted by three experts in the field who had extensively studied the one-year bar. Three of the Respondents' other experts also referred to the impact in practice of the one-year bar (Prof. Anker, Prof. Musalo, and Victoria Neilson). The alternative presented to Phelan J. was the evidence of Prof. Martin, whose main line of defense had been to deny any difference between the asylum and withholding standards in the first place. The Appellant chose not to cross-examine the Respondents' experts and filed no statistical or other evidence demonstrating the outcomes of one-year barred cases. Phelan J. did not commit a palpable and overriding error by preferring the Respondents' experts.

Georgetown Affidavit, AB vol. 3, Tab 19; Supplementary Anker Affidavit, AB vol. 13, Tab 36, para. 18-23; Musalo Affidavit, AB vol. 3, Tab 15, para. 12-14; Neilson Affidavit, AB vol. 3, Tab 16, para. 3-7

62. The Appellant's arguments may have some merit in showing that not all barred applicants are denied withholding, but this was not what Phelan J. found, nor was it ever argued. The arguments go no further than that. Further, the Appellant's specific arguments request that this Court reweigh all the evidence (and more) rather than identifying a palpable and overriding error in his approach:

a. Phelan J. does not ignore the fact that eligibility for an exception to the one-year bar is determined *de novo* by the Immigration Judge, such that some barred applicants may actually receive an asylum determination by a Judge. Prof. Martin acknowledged the lack of evidence that initial one-year bar determinations are overturned in appreciable numbers. In addition, the Appellant fails to address the other side of this coin: that Immigration Judges also **apply** the bar for the first time to defensive asylum applications, further **raising** the numbers of barred applicants.

Georgetown Affidavit, AB vol. 3, Tab 19, footnote 18; Martin Affidavit, AB vol. 6, Tab 24, paras. 108-9; Cross-examination of Prof. Martin, Oct. 16, 2006, AB vol. 13, Tab 38, Q. 285-287, 307

b. Phelan J. did not err by relying on the lower grant rates for withholding (13%) as compared to asylum (38 %) in Immigration Court, which he cited to support the finding that the different risk standards make a difference in practice. The Appellant argues that the 13% statistic inaccurately lumps one-year barred applicants in with applicants who are excluded from asylum due to criminality. The Appellant asserts that criminally excluded applicants can reasonably be expected to have a "far lower success rate" than the one-year barred applicants, thereby unfairly lowering the overall grant rate for withholding for time-barred claims. This is pure speculation. There was no evidence for the Appellant's "reasonable" expectation of a "far lower success rate", nor was this argued before Phelan J. The withholding pool also includes those who face the material support bar. There was no evidence that individuals with criminal records or who provided material support face less persecution or torture than others. This is an after-the-fact effort by the Appellant to dispute what the grant rate makes obvious: the higher risk standard is harder to meet.

Martin Affidavit, AB, vol. 26, Tab 24, para. 108-109 and Ex. B, EOIR Statistical Yearbook 2005, pp. K2, K5

c. Phelan. J. took into account the impact of delay on the merits of one-year barred cases. He properly found that the way to account for this (as shown in Canadian jurisprudence cited) is to consider delay as one of various factors, rather than as a categorical bar. The Appellant argues that Phelan J. failed to consider that the exceptions to the one-year bar serve the same purpose as the discretion of Canadian decision-makers to consider

explanations for delay. The US exceptions do not permit consideration of all reasonable explanations; explanations are considered without regard to the merits of the case, and not as part of an overall credibility determination; and the granting of exceptions has drastically decreased since the bar went into effect (with exceptions granted to two thirds of late applicants in 1998 but only to one third in 2003). In any case, Phelan J. found – accepting the Appellant's evidence over that of the Respondents – that the exceptions are "applied generously", but properly focused on the crux of the problem: "the principal distinction is that delay is never determinative of an asylum claim."

Reasons, paras. 145, 155; Georgetown Affidavit, AB vol. 3, Tab 19, paras. 8, 14-16; Cross-examination of Prof. Martin, Oct. 16, 2006, AB vol. 13, Tab 38, Q. 290

d. Phelan J. did not ignore the US regulation stating that proof of past persecution creates a presumption of future persecution. The presumption cannot offset the effects of the higher risk standard. It has no impact on the claims of those who flee before they actually suffer persecution, because they recognize the signs around them of imminent danger, (e.g. in war or genocide contexts). The presumption also has no impact on *sur place* claims. And even for those who have proven past persecution (on a balance of probabilities standard), the presumption is of course rebuttable. As such, the different standards risk standards continue to affect key aspects of the claim.

Martin Affidavit, AB vol. 6, tab 24, para. 71

63. The Appellant argues that Phelan J.'s finding that the one-year bar disproportionately affects minority groups was based on "no evidence". Three of the Respondents' experts (the Georgetown professors, Prof. Musalo and Victoria Neilson) provided sworn evidence that the one year bar has a disproportionate adverse impact on gender and sexual minority claims. Even the Appellant's own expert, Prof. Martin, took no issue with the disproportionate impact of the one-year bar. The Appellant points only to the Asylum Officer manual; but this proves nothing about disproportionate impact, which is an issue of practice rather than procedure on paper. Phelan J. was certainly entitled to rely on the Respondents' unchallenged evidence.

Reasons, para. 162-164; Georgetown Affidavit, AB vol. 3, Tab 19, para. 12-13; Musalo Affidavit, AB vol. 3, Tab 15, para. 12-14; Neilson Affidavit, AB vol. 3, Tab 16, para. 3-

7; Martin Affidavit, AB vol. 6, tab 24, para. 103-110 (where issue is not mentioned)

Danger to security:

64. The *Convention* and Canadian law allow *refoulement* of a refugee if "reasonable grounds" exist for regarding the refugee as a danger to a country's security. Phelan J. found the US maintains the "reasonable grounds" wording, but actually interprets the standard as "probable grounds". Phelan J. expressly based his finding on the expert evidence of Prof. Martin and a 2005 precedential decision by the Attorney General (his only error was to refer to this as a BIA decision).

Re A.H., 23 I&N Dec. 774 (A.G. 2005); Refugee Convention, Art. 33(2); Anker Affidavit, AB vol. 2, Tab 9, paras. 39-41; Martin Affidavit, AB vol. 6, tab 24, para. 114; Suresh v. MCI, 1 SCR 3

65. The Appellant argues that Phelan J. erred by considering the US interpretation of "reasonable grounds" (as explained by her expert), rather than limiting his examination to just the wording of US law. While the Appellant claims that Phelan J. misconstrued evidence, the evidence he allegedly misconstrued is a Third Circuit Court of Appeals case (at footnote 65) that postdates Phelan J.'s decision. This 2008 decision in any case affirms that "reasonable grounds" is determined on a "probable cause" standard.

Yusupov v. Attorney General, 2008 WL 681 851 (3rd Cir. 2008)

Material support bar:

66. Phelan J. found (para. 167-191) that the US bars applicants from receiving asylum if they provided "material support" (financial or other) to terrorist organizations, even if they did not know they were doing so or did so involuntarily. Experts on both sides agreed US law does not require individual responsibility, required by international law, but only that applicants **should have known** they supported a terrorist group. Experts on both sides agreed on the lack of a duress defense in US law.

Anker Affidavit, AB vol. 2, Tab 9, paras. 43-48; Martin Affidavit, AB vol. 6, tab 24, para. 115-118

67. Phelan J. concluded (para. 191) that the US denies protection to refugees who provided support to terrorist groups under duress:

It is difficult to imagine how the GIC could have reasonably concluded that the U.S. complies with the Refugee Convention when the law allows the exclusion of claimants who

involuntarily provided support to terrorist groups. The terrorist exclusions are extremely harsh, and cast a wide net which will catch many who never posed a threat. In returning claimants to the U.S. under these circumstances, the weight of the evidence is that Canada is exposing refugees to a serious risk of *refoulement* and torture which is contrary to the applicable articles of the Refugee Convention and CAT.

68. The Appellant accepts Phelan J.'s findings that the terrorism provisions may deny protection to those who did not know they were providing material support or were coerced to provide material support to groups like the LTTE or the FARC.

69. The Appellant's challenge, however, claims that Phelan J. did not properly consider the saving effects of a waiver provision. Phelan J. discussed the waiver in detail (para. 183-186). He noted Prof. Martin's evidence that the waiver had only been used twice (in overseas resettlement cases) and that DHS was still developing its policy on the waiver, and concluded that there was insufficient evidence that the waiver, "either in principle or in practice, ameliorates the unusually harsh provisions of U.S. law." What the Appellant is really arguing is not that Phelan J. made a palpable or overriding error, but that the situation has changed since his decision.

70. The Respondents have sought to exclude this new evidence for the reasons set out in their motion record. However, if this Court agrees to consider it, then it must be noted that waivers are only available to those who gave material support to certain listed groups, and only available in duress cases for two groups, the FARC and the ELN. Waivers are not available for those who were forced to contribute under duress by numerous organizations, leaving intact Phelan J.'s findings on the risk of *refoulement.* [5]

C2b(ii) Gender claims

71. Phelan J. reviewed US law, policy and practice on whether gender-based particular social groups (PSGs) create a nexus to the Convention (para. 198-206). He noted the parties agreed that US law remained unsettled, and that even one of the Appellant's

5 Indeed, the on-going risk of refoulement is clear from the BIA's March 2008 redetermination of Matter of S-K-. While the Appellant points to this decision as exemplifying the universality of the protection offered by waivers, the BIA in fact states that for those who provided "material support" to non-listed organizations, "our decision in *Matter of S-K-* [2006] still applies to determinations involving the applicability and interpretation of the material support provisions". *Matter of S-K-,* 24 I&N Dec. 475 (BIA 2008) at 477-78

main pieces of evidence (a government brief) acknowledged that US court decisions on the issue are inconsistent. Finding that the real dispute between the parties was not about whether the law was in flux but about the effects of the uncertainty, he concluded that the prevailing uncertainty results in a real risk of *refoulement* for gender claimants.

72. The Appellant now challenges Phelan J.'s finding of uncertainty in the US approach to gender claims and his conclusion from this of a real risk of denial of protection. She argues he made a palpable and overriding error since the uncertainty finding was not based on cases articulating a "doctrine" of non-protection of gender claimants. She alleges he ignored evidence on the "traditional position of the US" to accept a nexus.
Appellant's Memorandum, para. 108, 109

73. Phelan J.'s reasons demonstrate that he fully grasped the various aspects of the US gender claim landscape and considered the interplay between the many agencies that deal with these claims at various levels of policy and litigation (the Attorney General, DHS, DOJ, the Asylum Office, the Immigration Courts, federal appeals courts).

74. The fact that Phelan J. and the Respondents could cite no BIA or Federal Court decision to show a "doctrine" of failure to protect gender claimants does not undermine Phelan J.'s decision, but instead proves the point. Indeed, it was one of the Respondents' allegations at the Federal Court that there is uncertainty **for the very reason that** the US has failed to produce a single BIA or Federal Court decision on the issue since 1996 (other than *Matter of R-A-*, which was vacated). Prof. Musalo referred to the "dearth of federal court precedent on the issue" as the result of strategies by government lawyers to prevent courts from deciding the issue on its merits, pending final regulations that have been in the works for nearly a decade. If the issue were resolved one way or the other, there would be decisions saying so. Instead, there is confusion and arbitrary decision-making.
Musalo Affidavit, AB vol. 3, Tab 15, para. 11; Cross-examination of Prof. Martin, Oct. 17, 2006, AB vol. 13, Tab 38, Q. 376, 388, 393-5

75. The Appellant points to the Draft Regulations and a DHS brief as positive "proof" of the

US system's support for gender claims. This argument asks this Court to reweigh evidence properly assessed by Phelan J. (para. 203):

> Even if the draft regulations and the DHS Brief demonstrate a movement towards recognition of gender claims in a manner consistent with Canada, this is not the current state of the law. Further, although the DHS Brief recognizes that membership in a PSG should be defined as immutable and innate characteristics, it goes on to state at pages 18-24 that the court's application of the law has been inconsistent.

76. The Appellant also argues that Phelan J. ignored evidence that DHS decisions are diverted to headquarters to ensure consistency. This is misleading: only Asylum Office cases are under DHS' jurisdiction and subject to review. The Respondents have always acknowledged that Asylum Office policy generally favours acceptance of a gender-based PSG (as the DHS brief and Asylum Officer manual suggest). However, Immigration Courts continue to hear cases – including all one-year barred cases – and reject many of them. These cases are the main basis for Phelan J.'s justified concern.

Cross-examination of Prof. Martin, Oct. 17, 2006, AB vol. 13, Tab 38, Q. 393-7

77. The Appellant's final assertion – that domestic violence claims are an "evolving" area of law – implies that denial of these claims may in fact be acceptable under the *Convention.* Phelan J. rejected the argument that gender claims are still novel by quoting the evidence of the Appellant's expert, Prof. Hailbronner, that "where domestic violence achieves a certain intensity you will find that most [European] states – one way or the other…will grant some kind of protection" out of a sense of legal obligation.

Reasons, para. 204; Cross-examination of K. Hailbronner, Transcript, Oct. 19, 2006, pp. 156-8, Q. 662-671

78. The argument that the US deserves latitude in this "evolving" area also contradicts the Appellant's earlier assertion that it is the "traditional" position of the US to accept gender cases. Further, what is most relevant is the interpretation of the nexus and PSG tests through the eyes of Canadian courts and the Charter, which certainly value gender equality. Finally, given the expert evidence that the UNHCR and numerous countries (including Canada, most of Europe, the United Kingdom, Australia, New Zealand and South Africa) recognize these cases in one way or another, it seems that the only reason the Appellant labels them as "evolving" – and less worthy of protection – is the fact that

they are based on gender.

See Musalo Affidavit, AB vol. 3, Tab 15, para. 20-21 [6]

C2b(iii) Mixed motives

79. Phelan J. found that US practice only inconsistently grants protection to refugees who are persecuted based on mixed motives. He found that despite the leading BIA case, in practice the Immigration Courts and the BIA itself are inconsistent in granting protection where there is evidence that the persecution was "on account of" both a Convention ground and another reason. Prof. Martin did not challenge the Respondents' evidence on practice, which Phelan J. was entitled to accept.

Reasons, para. 212-216; Anker Affidavit, AB vol. 2, Tab 9, para. 18-21, 23-24; Supplementary Anker Affidavit, AB vol. 13, Tab 36, paras. 14-17

80. Contrary to the Appellant's claim that Phelan J. erred by finding that the Real ID Act restricts protection to a single motive, Phelan J.'s concern with the Real ID Act is that it "seems to make the requirement stricter, in that although it recognizes that persecution for mixed motives can exist, there must be a *central* focus on the enumerated grounds of persecution." (para. 214) Phelan J. properly rejected Prof. Martin's evidence that the Real ID Act would have no impact as speculative.

81. The Appellant (at para. 122 of her Memorandum) seems to read Phelan J.'s decision as a challenge to the concept of nexus itself, citing *Ward* and other case law affirming the nexus requirement in Canada. Clearly, this was never argued nor found by the Federal Court. Phelan J.'s finding was that US practice is out of line with what the *Convention* requires: the existence of a nexus, regardless of whether this nexus is the sole or central reason for the claimant's persecution.

C2b(iv) Credibility

82. There is no dispute that amendments introduced through the Real ID Act explicitly deny

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6 Prof. Musalo writes: "The US is left completely out of step with international views on the issue. Domestic violence claims are not internationally considered as being a special and unique category of claims which pose exceptional challenges to protection. To the contrary, they are analyzed within the jurisprudential framework applicable to all claims."

any presumption of credibility, and allow decision-makers to reject asylum applicants' credibility "without regard to whether an inconsistency, inaccuracy or falsehood goes to the heart of the applicant's claim." Phelan J. found that this approach leads to a risk of denial of protection.

Reasons, para. 217-219; Anker Affidavit, AB vol. 2, Tab 9, para. 8-13; Supplementary Anker Affidavit, AB vol. 13, Tab 36, paras. 11-13

83. While the Appellant minimizes the import of these provisions, in reality they depart from the approach to credibility that Canadian courts have considered fundamental in interpreting the Convention. Phelan J. recognized this.

UNHCR Handbook, para. 196, 203-204; Maldonado v. M.E.I., [1980] 2 F.C. 302 (C.A.); Matter of S-B-, 24 I&N Dec. 42 (BIA 2006); Daljit Singh v M.E.I. [1983] F.C.J. No. 1130 (C.A.)

C2b(v) Detention

84. Phelan J. found in practice, detained asylum applicants in the US are subject to inconsistent parole criteria, have no access to an independent review, and are harder hit by these violations of international law if they are of Arab and/or Muslim origin. He concluded that the US uses detention as a penalty, in breach of Art. 31(1) of the Refugee Convention.

85. The Appellant asks this Court to reweigh the evidence and prefer her expert, without citing any instances of misconstrued evidence. But as with many other aspects of Prof. Martin's evidence, he failed to refute the evidence of practice that grounded Phelan J.'s major concerns. Prof. Martin gave no evidence to refute the evidence that US parole criteria are arbitrarily applied, both within individual offices and across the country. He agreed that detention and release decisions are not made by an independent decision-maker, pointing weakly to a "bond redetermination" application available only to a minority of detainees as his only evidence of access to an independent decision-maker (and even this is not a review procedure). Prof. Martin agreed with the Respondents' expert, Eleanor Acer, that detention programs targeting Arabs and Muslims had ended on paper – but he did not refute her evidence and that of four other experts that the race- and religion-based targeting continued in practice.

Acer Affidavit, AB vol. 2, Tab 7, para. 6-11; and Ex. B, Eleanor Acer, "Living up to America's Values", Refuge, Vol. 20 No. 3 (2002); and Ex. C, Human Rights First, In Liberty's Shadow: U.S. Detention of Asylum Seekers in the Era of Homeland Security (2004); Watt Affidavit, AB vol. 4, Tab 21, para. 3; Koelsch Affidavit, AB vol. 3, Tab 14, para. 17-24; Giantonio Affidavit, AB vol. 3, Tab 11, para. 7, 9-11; Akram Affidavit, AB vol. 2, Tab 8, para. 13; Supplementary Anker Affidavit, AB vol. 13, Tab 36, para. 30-35

86. The Respondents maintain that the combination of US detention practices and its refusal to provide any form of state-funded legal assistance leads to a real risk of *refoulement*. The fact that access to counsel is not required under international law is itself not the point, when the evidence is a lack of access to counsel places applicants at significantly greater risk of having their claims denied. Unlike Canada, the US withholds and forbids funding to represent asylum claimants as a matter of policy.

Applicants' Further Memorandum, para. 67-72; Kerwin Affidavit, AB vol. 3, Tab 13;; Acer Affidavit, AB vol. 2, Tab 7, para. 14-17; Supplementary Anker Affidavit, AB vol. 13, Tab 36, paras. 25-29

87. Given his findings on the other problem areas in the US system, Phelan J. realized that many asylum applicants have to rely on the BIA and Federal Courts to try to save themselves. He erred by failing to take the next logical step: recognizing that without access to counsel, these appeals are too expensive for many refugees, who then must face *refoulement.*

C2c US noncompliance with CAT

88. Phelan J. found that "neither U.S. law, nor certainly its practice, considers that deportation to a country where torture is a likely occurrence to be an absolute bar to deportation." He noted the US reservations to CAT, and took judicial notice of the Arar case as well as US statements to the Arar Commission (despite its practices) that it complies with the CAT. He also had before him significant evidence demonstrating that the Arar case was not exceptional, including the detailed affidavit of Steven Watt.

Reasons, para. 241-263; Watt Affidavit, AB vol. 4, Tab 21; see Applicants' Supplementary Memorandum, AB vol. 1, Tab 7, para. 27, 79-81 and sources cited therein, including the Committee against Torture's 2006 Conclusions and Recommendation on the US, AB vol. 13, Tab 37, Ex. M; and a report by four UN Special Rapporteurs and the Chair of the Working Group on Arbitrary Detention condemning, inter alia, the US use of extraordinary rendition, AB vol. 4, Tab 22, Ex. B

89. The Appellant does not dispute that Art. 3 is absolute and permits no derogation or exceptions for any reason, nor does she dispute the evidence of US practices. Instead, she questions Phelan J.'s finding that the US' violation of Art. 3 in rendering Maher Arar to Syria (just "one administrative decision") is relevant to this case. She would have preferred that Phelan J. limit his assessment to the "the US protection system".

90. This challenge is fundamentally problematic. The US violates Art. 3 of the CAT when it sends anyone to face torture – not just refugee claimants. The Convention does not distinguish between types of *refoulements*.

91. Nor does IRPA. S. 102(1) permits designation of countries that comply with Art. 3 of CAT, not countries that comply with Art. 3 specifically in their refugee determination systems. S. 102(2) requires the GIC to consider a country's practices with respect to "claims" under the *Refugee Convention* and "obligations" under the CAT, and further requires consideration of a country's human rights record. The GIC itself considered US human rights concerns well outside the protection system, including police brutality and capital punishment. There is no legal basis for the Appellant to sideline Phelan J.'s concerns about US practices outside the asylum or withholding context.

    Memorandun to Cabinet, Sept. 24, 2002, Heinze Affidavit, AB vol. 12, Tab 34, Ex. TH1, p. 3294-3301

92. Finally, the Appellant's distinction between torture in the protection and non-protection contexts is artificial. When the US restricts the definition of torture and engages directly and indirectly in acts widely considered to be torture, it creates both definitions and a climate that necessarily influence decision-makers in the protection system. Canadian case law has rejected reliance on diplomatic assurances from countries that use torture precisely because their human rights records make their assurances inherently unreliable. In effect, Phelan J. has found that given US practices, Canada cannot rely on its assurances that applicants for CAT protection will be protected.

    Suresh v. MCI, 1 SCR 3

C2d Conclusion on the evidentiary challenge

93. The Appellant has not established a palpable or overriding error in Phelan J.'s findings on the US protection system and human rights record. His conclusion stands that the various "instances of non-compliance with Art. 33 [and Art. 3] are sufficiently serious and fundamental to refugee protection that it was unreasonable for the GIC to conclude that the U.S. is a 'safe country'."

C3 The failure to review

94. The Appellant argues that the GIC's failure to conduct the continuing review of conditions in the US, as mandated by s. 102(3) and the Cabinet directive of October 12, 2004, is irrelevant to the vires of the designation of the US. She argues this should have been separately challenged through a mandamus application. She also disagrees with Phelan J.'s factual finding that the Minister had not established a review procedure (though she does not dispute his finding that no report has ever been made to Cabinet). These arguments have no merit.

95. The Respondents originally sought a declaration that both the original and the **ongoing** designation of the US as a safe third country via the continuing operation of the *Regulations* was unconstitutional and *ultra vires*. Reading s. 102 contextually in a manner that conforms to its plain meaning and legislative intent, ongoing designation is statutorily permitted only if there is ongoing review, with the purpose (as Phelan J. found) of being able to suspend or terminate the STCA if conditions in the third country worsen. The issue was properly before the Court on judicial review.

    Driedger on the Construction of Statutes (2nd ed. 1983), p. 21; Rizzo & Rizzo Stores, [1998] 1 SCR 27

96. The GIC not only breached its statutory obligation to undertake a **continuing** review, but in fact failed to do **any** review after 2002. The Respondents submit that, by failing to exercise its authority to designate third countries as "safe" in the manner stipulated by Parliament, the GIC exceeded its jurisdiction. Moreover it is submitted that this jurisdictional error is what led the GIC into the further and directly related jurisdictional

error of maintaining the designation despite shifts in US asylum policies and practices between 2004 and 2007 that were in clear breach of Article 33 of the Refugee Convention and Article 3 of CAT.

97. On the question of evidence of any review, the Appellant does not challenge Phelan J.'s finding that there has been no review by the GIC. Her only complaint is that, in her view, Phelan J. erred by failing to find that "preparations for a report to the GIC were ongoing." Even were this submission accurate (which is disputed), s. 102(3) requires not "preparations" but actual, continuing review of US compliance with the requisite factors – and not by the Minister but by the GIC. The role of the Minister, per the Cabinet directive of October 12, 2004, was simply to facilitate this review by providing reports to the GIC on a regular basis or more often if warranted.

98. The evidence before Phelan J. clearly and unequivocally established that at no point from the implementation of the STCA up to the time of the hearing did the GIC undertake even a single review of US compliance with the requisite factors. The Appellant's witness, Bruce Scoffield, failed to provide any evidence as to what that allegedly ongoing process entailed and when the purported report would be presented to the GIC, despite repeated questioning about the issue. It was open to Phelan J. to find that in fact there was no process, and that this failure breached s. 102(3).

Scoffield Affidavit, AB vol. 11, Tab 33, Ex. B-11; Cross-examination of B. Scoffield, AB vol. 14, Tab 42, pp. 4245-5, 428-89; Further answers of B. Scoffield dated November 23, 2006, AB vol. 15, Tab 45

D. Third certified question: Charter breaches

D1. Section 7

99. Phelan J. concluded that s. 7 *Charter* interests of refugees are engaged at a Canadian port of entry and that the principles of fundamental justice are breached by the STCA in that it fails to give port of entry officers a discretion to permit entry to claimants who would be placed at risk of *refoulement* in the US, characterizing the effect of this as arbitrary or overbroad. He added that another aspect of the arbitrary nature of the STCA is its application only to land borders: Access to protection is dependant on the

person's mode of travel to Canada. (para. 277-314)

100. The Appellant argue that Phelan J. erred in finding it 'entirely foreseeable' that an asylum seeker returned to the US would be subject to *refoulement* because of US practices and policies; in concluding that the STCA scheme is arbitrary or overbroad, because of the lack of discretion to decide turn backs on a case by case basis; in applying jurisprudence concerning arbitrary detention contrary to s. 9 of the *Charter* to his s. 7 analysis; and erred in concluding that the application of the STCA to land borders alone is arbitrary, because he ignored the explanation given for this.

D1a. Reasonably foreseeable

101. The Respondents have addressed the factual conclusions of Justice Phelan above, and would only note in respect of this part of their submissions, that his conclusion (at para. 285) that it is entirely foreseeable that genuine claimants would be *refouled*, given the US gender and material support bar jurisprudence and evidence and other such factors, was a conclusion open to him on the evidence he was obliged to assess. He did not find all claimants at risk of *refoulement*, but certainly, on the evidence, those legally disadvantaged by US statutory or judicial impediments face a foreseeable risk of this occurring. If there is any error, it is one which favours the Respondents because the test is not one of certainty or even of foreseeability. The foreseeability which the Supreme Court noted in *Suresh*, was the causation between harm and Canada's actions, not the risk of harm itself. This is apparent from the Court's adoption of its reasoning in *Burns*. In *Burns* the Court determined s. 7 was engaged notwithstanding that the imposition of the death penalty was not likely or probable, but rather was only one of a number of 'possibilities'.

USA v Burns, , [1999] S.C.J. No. At para. 28, 48, 57, 59-60; Suresh v M.C.I., [2002] S.C.J. No. 3, at para. 54

D1b. Arbitrary

102. The Appellant argues that a law is not arbitrary unless 'bears no relation to, or is inconsistent with, the objective that lies behind [it].' The Supreme Court in *Chaoulli* concluded that there was no evidence to establish a connection between prohibiting private insurance and maintaining quality public health care, such that the prohibition

was arbitrary. However, this is not the sole consideration for determining if a law is arbitrary.

Chaoulli v Quebec AG, [2005] S.C.J. No. 33, at para. 129-133, 152; Morgantaler v R, [1988] S.C.J. No. 1, at para. 48; Rodriguez v BC AG, [1993] S.C.J. No. 94, at para. 147

103. A law may be arbitrary where it goes beyond the purpose sought to be advanced by the legislature. It may be arbitrary where *per se* it breaches an independent principle of fundamental justice. The Supreme Court did not limit the concept of 'arbitrary' to instances where the law is unrelated to its objective. Had it done so, it would not have decided *Swain* as it did. The detention of persons who have committed serious crimes for which they are not criminally responsible because of a mental impairment is related to the purpose for which the legislation was enacted - protection of the public. Nevertheless, the law was determined to be arbitrary and in breach of s. 7 of the *Charter* because it failed to provide for an individualized determination of the need to detain. It is implicit in a number of the Court's judgements that the principles of fundamental justice require an individualized determination before a significant s. 7 interest can be infringed.

Charkaoui v M.C.I., [2007] S.C.J. No. 9, at para. 96,106-107; R v Swain, [1991] S.C.J. No. 32, at para. 122; R v Heywood, [1994] S.C.J. No. 101, at para. 48-50, 53; Reference Re S. 94(2) of the Motor Vehicle Act (BC) (1985), 23 CCC (3d) 289 (S.C.C.)

104. Phelan J. properly concluded that the absence of discretion under the STCA for a port of entry officer to permit a claimant to enter Canada was a breach of the principles of fundamental justice. Canada's international legal obligation with respect to Convention refugees is to ensure that they are not subjected to *refoulement.* With respect to 'turn backs' at the US border, the issue is indirect *refoulement* as it would be effected by US authorities. Canadian officials are obligated to ensure that claimants returned to the US are not in danger of being *refouled.* As Lord Scott noted in the House of Lords judgement in *Yogathas*:

> "The member state which originally received the application must... if it wishes to avail itself of the Dublin Convention right to require some other member state to deal with the application, satisfy itself that that member state will deal with the applicant in a manner consistent with the [Refugee] Convention..."

Cited in Hathaway Affidavit II, para. 17-21, Yogathas, per Lord Scott, at para. 85 Hathaway Affidavit, para. 11-12

105. The Appellant argues that the above obligation is met because the GIC designated the US as a country which complies with its Refugee Convention and CAT obligations. Canada cannot fulfill its protection obligation to the individual by relying on the existence of a system effecting general compliance, even if this were the case on the facts. Deferring to the US to determine the person's refugee character, does not relieve Canada of its obligation to consider whether the asylum seeker will have access to the US determination system and will have her claim fully and fairly assessed in accordance with international law requirements. An individualized determination to ascertain this is simply not permitted by the STCA. Further, as noted above, it matters not whether the US and European states retain an individualized discretion under 'safe third country' agreements, because Canadian law must be in compliance with the *Charter.*

Convention relating to the Status of Refugees, Art.33(1); Sir E. Lauterpacht and D. Bethlehem, "The scope and content of the principle of non-refoulement" in Refugee Protection in International Law, E. Feller, V. Turk and F. Nicholson, Eds., Cambridge: CUP, 2003,, at paras. 171, 172, 176, 218 (d) and (e); R. Bruin and K. Wouters, "Terrorism and the Non-derogability of Non-refoulement," (Jan. 2003) 15 IJRL 1, at pp. 18, 20; V. Turk, "Forced Migration and Security," (January 2003) 15 IJRL 1, at p.120; Statute of the International Court of Justice, Art. 38(1)d; Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, HCR/IP/4/Eng/REV.1, Reedited, Geneva, January 1992, UNHCR 1979 [3]*; Hathaway Affidavit, para. 9-12; UNHCR Summary Conclusions: the principle of non-refoulement, Global Consultations on International Protection, 9-10 July 2001, in Feller et al, pp. 178-179*

106. Aside from the fact that the Supreme Court determined the procedural fairness issue in *Swain* under s. 7 and not s. 9 of the *Charter,* the Appellant is in error in

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[3] For the legal effect of the UNHCR Handbook, see: INS v. Cardoza Fonseca, (1987) 480 US 421 (US SC) at 439, n.22; R. v. Secretary of State for the Home Department, ex parte Adan and Aitseguer, [2001] 2 WLR 142 (UK HL) per Lord Steyn; R. (Hoxha) v. Secretary of State for the Home Department, [2002] EWCA Civ 1403 (Eng. CA) at para. 36. For the legal effect of UNHCR Executive Committee Conclusions, see Rahaman v. M.C.I., [2002] F.C.J. No.302 (FCA); Attorney General v. E, [2000] 3 NZLR 257 (NZCA) at 269, and Excom Conclusion 55 (1989), para (p), and 81 (1997) para (g).

arguing that Phelan J erred in applying a s. 9 analysis to s. 7 of the *Charter*. Early in its Charter jurisprudence Lamer J. recognized the interrelatedness of s. 7 with s. 8 to 14 of the *Charter,* stating:

> It would mean that the right to liberty would be narrower than the right not to be arbitrarily detained or imprisoned (s. 9), that the right to security of the person would have less content than the right to be secure against unreasonable search or seizure (s. 8). Such an interpretation would give the specific expressions of the "right to life, liberty and security of the person" which are set forth in ss. 8 to 14 greater content than the general concept from which they originate. Sections 8 to 14, on other words, address specific deprivations of the "right" of life, liberty and security of the person in breach of the principles of fundamental justice, and as such, violations of s. 7.

Reference Re s. 94(2) of the Motor Vehicle Act (BC) , at p. 301

107. Finally, the Appellant is in error in asserting that Phelan J. failed to consider the explanation of Mr. Scoffield as to why only land border claimants were denied access to the Canadian refugee determination system under the STCA. Phelan J. was aware of the explanation, but noted that while there may be solid practical considerations for the distinction, no s. 1 justification was advanced by the Appellant to justify the breach.

D1c *Nonrefoulement* as a principle of fundamental justice

108. Phelan J. found that he did not need to determine whether non-*refoulement* stands on its own as a principle as fundamental justice, since he had already found a s. 7 breach in violation of the arbitrariness principle. However, based on the submissions in the Further Memorandum and the above submissions on the foreseeability of harm, the Respondents urge this Court to find that the *non-refoulement* principle of fundamental justice is also breached in this case.

D2. Breach of Section 15

109. Phelan J. determined that the STCA violates the equality guarantee under s. 15 of the Charter because it has "a much more severe impact on persons who fall into areas where the US is not compliant with the Refugee Convention or CAT as well as discriminating and exposing such people to risk based solely on the method of arrival in Canada, a wholly irrelevant Charter consideration."

Reasons, para. 333

110. The Appellant argues, at paras 144-148, that Phelan J erred in his selection of a comparator group, and that this has irreparably tainted his finding of a s. 15 breach. Specifically, the Appellant argues that the proper comparison must be between refugee claimants arriving at land borders and refugee claimants arriving at inland posts or airports, and that since place of making a refugee claim is not an enumerated or analogous ground, there is no s. 15 breach.

111. The Respondents submit, with respect, that the Appellant's arguments are founded in a blunt, archaic, formulaic and overly simplistic approach to the equality guarantee. The Supreme Court has repeatedly stated that the s. 15 equality analysis must proceed in purposive and contextual manner, and that s. 15 is first and foremost about the protection and enhancement of essential human dignity and the remedy of inequality and discrimination. The equality guarantee is therefore not limited to protection from overt and direct discrimination, but also protects people from facially neutral measures that nevertheless have a disproportionate adverse impact on them as members of disadvantaged groups. Adverse impact discrimination can be found regardless of whether there is an intent to discriminate.

Law v. M.E.I., [1999] 1 SCR 497,headnote; para 42, 47-53,58, 88; Law Society of BC v. Andrews, [1989] 1 SCR 143; Hodge v. Canada (MHRD), 2004 SCC 65 at 21-23; BC v. BCGSEU, [1999] 3 SCR 3; Lavoie v. Canada, [2002] 1 S.C.R. 769; Corbiere v. Canada (MINA), [1999] 2 SCR 203; Ont. Human Rights Comm. v. Simpsons-Sears, [1985] 2 S.C.R. 536; Janzen v. Platy Enterprises Ltd., [1989] 1 S.C.R. 1252; Ontario Human Rights Commission, "An Intersectional Approach to Discrimination: Addressing Multiple Grounds in Human Rights Claims" Discussion Paper, (2001)

112. Phelan J. had before him evidence that the STCA has an adverse impact on certain asylum seekers (an already disadvantaged group) on the basis of intersecting enumerated and analogous grounds such as citizenship status, national origin, race, religion, gender, and sexual orientation.

- *Women making gender-based claims* are disproportionately affected by the one-year bar; by inconsistency in the law on gender as a social group and on nexus to state protection for persecution by private actors; by the restrictive interpretation

of CAT; and by strict credibility and corroboration requirements.

- *Sexual orientation claimants* are disproportionately affected by the one-year bar and by strict credibility and corroboration requirements. Those who are accepted despite these obstacles have no way to reunite with same-sex partners through sponsorship or equivalent applications, as US federal agencies are prohibited from recognizing same-sex relationships.

- *Arabs and Muslims* are disproportionately affected by detention practices specifically targeting them by country of origin, race and religion; and the associated difficulties of obtaining counsel and prosecuting their claims.

- *Haitians* are disproportionately affected by detention practices specifically targeting them by country of origin.

- *Colombians* are disproportionately affected by the material support bar as their country of origin predisposes them to have been extorted by a terrorist organization.

113. He found that there was insufficient evidence before him to ground a finding that the STCA has a disproportionate adverse impact on the basis of race or religion, but found that the evidence did establish that the STCA has a disproportionate impact on certain groups on the basis of gender and/or national origin.
Reasons, para. 324

114. It is submitted that the Appellant has not established that Phelan J. made any error in his interpretation or application of s. 15 or in his factual finding that the STCA has a disproportionate adverse impact on the basis of gender and/or national origin, and his determination of a s.15 breach must stand.

115. The Respondents maintain further, however, that contrary to Phelan J.'s finding, the evidence does establish that the STCA also has an adverse impact on the basis of intersecting grounds of race and religion, and they rely on their written submissions to the federal court for this argument.

116. Further, while the Respondents fully agree with Phelan J.'s finding that the STCA has a discriminatory impact on the bases of gender and national origin, they maintain

their previous argument that a broader approach to the selection of the appropriate comparator group would be more appropriate given the fundamental interests at stake.

117. It is submitted that the most appropriate comparison remains that between noncitizens seeking a legal remedy for the serious violation of their basic human rights (i.e. refugee protection, which is the only remedy available to them in the circumstances), and Canadian citizens seeking a remedy for violations of their human rights, who may seek the protection of the Canadian judicial system. Refugees form a discrete group within this broader class of non-citizens. A subgroup of these refugees – those subject to the STCA – are arbitrarily denied access to protection of their fundamental human rights. This approach is, it is submitted, fully consistent with the dignity-based, purposive and contextual approach to s. 15 required by the Supreme Court.

118. It is difficult to conceive of a more direct and overt violation of the human dignity of an already disadvantaged group than to deny access to safe haven to those who are fleeing persecution or torture, and who have no meaningful access to protection in the country to which they are being deflected. That some of these persons face additional pre-existing disadvantages due to their gender, race, national origin or sexual orientation, or face the probability of detention in the US on the basis of discriminatory grounds, serves only to exacerbate the already clear violation of their human dignity. The Respondents rely on their previous written submissions in respect of this issue.

Acer Affidavit; Anker Affidavit, para. 22; Deborah Anker, Refugee Status and Violence Against Women in the "Domestic" Sphere: The Non-State Actor Question, 15 Geo. Immigr. L.J. 391 (2001); Georgetown Affidavit, para. 13, 15; Hathaway Affidavit, para. 14, 21(a), (d); Kerwin Affidavit, para. 2-4, 16; Musalo Affidavit, para. 3-11, 12-14, 19-21; Neilson Affidavit, para. 3-9; Watt Affidavit, para. 3. Applicants' Supplementary Memorandum of Fact and Law of December 4, 2006, AB, vol. 1, tab 7, pp. 261-271

PART IV: ORDER SOUGHT

119. The Respondents seek an order that the appeal be dismissed.

Dated at Toronto this 25th day of April, 2008.

Barbara Jackman

Andrew Brouwer

Leigh Salsberg

JACKMAN & ASSOCIATES
Solicitors for the applicants Canadian Council for Refugees, Canadian Council of Churches, and John Doe

Lorne Waldman

WALDMAN & ASSOCIATES
Solicitor for the applicant Amnesty International