Registry No.

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

B E T W E E N :

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

Applicants
(Respondents)

-and-

**HER MAJESTY THE QUEEN**

Respondent
(Appellant)

---

# APPLICANTS' MEMORANDUM OF ARGUMENT

---

## OVERVIEW

"I believe therefore that a Convention refugee who does not have a safe haven elsewhere is entitled to rely on this country's willingness to live up to the obligations it has undertaken as a signatory to the United Nations Convention Relating to the Status of Refugees."

- *Singh v. Canada (MEI)*, [1985] 1 S.C.R. 185, per Wilson J at para. 20

1. Under the *Agreement between the Government of Canada and the Government of the United States of America for cooperation in the examination of refugee status claims from nationals of third countries*, commonly known as the Safe Third Country Agreement (STCA), between Canada and the United States, individuals who seek to enter Canada across the US land border may no longer apply for refugee status here. The premise of the agreement is that refugees do not need to make refugee claims in Canada because they have access to the US asylum system instead. The Governor in Council designated the US a "safe third country" for refugees – a designation that Canadian law only permits if the US complies with its international obligations to prevent *refoulement* of refugees under the Refugee Convention and Convention Against Torture.

2. Based on a series of affidavits from leading US academics and practitioners, the Federal Court made extensive findings that the US does not comply with many of its obligations to prevent *refoulement* as there are significant gaps in protection in the US asylum system. The applications judge concluded that, by denying admission to Canada's eligibility procedures, the STCA exposes refugees to a real risk of *refoulement*. The Court of Appeal overturned the Federal Court decision, but left its factual findings and conclusions of US non-compliance untouched. The Court of Appeal took a technical approach to its review of every aspect of the decision, and found it did not need to consider any evidence of US law and practice. Neither the majority nor the concurrence of Evans J.A. addressed the fundamental question of whether the STCA exposes refugees to a real risk of *refoulement* to persecution or torture – a question that Noël J.A. deemed "irrelevant."

3. In the result, the Court of Appeal has insulated the designation of the US as a "safe third country" from review, in the face of clear evidence and a judicial determination that refugees who are denied access to Canada's refugee determination system face a real risk of *refoulement* from the US. This case raises an issue of national importance as to whether the courts may rely on technical grounds to block substantive review of violations of international human rights and refugee law and ss. 7 and 15 of the Charter. Fundamentally, then, this case raises an issue of national importance about the role of the courts when human rights are at stake.

4. The Applicants submit that the Supreme Court of Canada should grant leave to hear this case for the following reasons:

    a. The question of compliance with international human rights norms regarding persecution and torture is always one of national importance. Similar pacts in Europe have been reviewed by the House of Lords and the European Court of Human Rights.

    b. The Court of Appeal has found the Governor in Council has the authority to designate another country as one that complies with the international prohibition against *refoulement* despite clear evidence to the contrary.

    c. The Federal Court found serious Charter breaches, which the Court of Appeal has found technical reasons not to address.

    d. The Court of Appeal has denied standing to all the parties in the face of the evidence

that no refugee would be able to bring this challenge from within Canada.

e. The standard of review for GIC decisions involving a significant evidentiary record requires clarification following this Court's decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9.

f. The Court of Appeal ruling contains serious errors of law and of fact which there is no other opportunity to address. This concern is heightened given the leave procedure and certified question procedure which govern immigration matters in lower courts.

## PART I - THE FACTS

### A. Background

5. A "safe third country" clause first appeared in the 1988 amendments to the *Immigration Act*, 1976. In a constitutional challenge by the Canadian Council of Churches and others to this and other amendments, the Federal Court of Appeal determined that litigation of the STCA provision was premature as no country had yet been designated as "safe".

*Canadian Council of Churches v. M.E.I., [1990] 2 FC 534 at para. 55-57, dismissed on other grounds, [1992] 1 S.C.R. 236*

6. The 2002 *Immigration and Refugee Protection Act* (IRPA) grants the GIC authority to designate as "safe" a country that complies with Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture (CAT), the core *non-refoulement* provisions of the treaties. Section 102 of IRPA stipulates that in assessing compliance, 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.

*Immigration and Refugee Protection Act [IRPA] , S.C. 2001, c. 27, s. 102; Convention relating to the Status of Refugees, CTS 1969/6 [Refugee Convention]; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/RES/39/46 (1984) [CAT]*

7. The STCA was signed December 5, 2002, following review by the GIC of a report on US asylum law and policy dated September 24, 2002. On October 12, 2004, the GIC designated the US. 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 land border are ineligible for refugee determination in Canada,

unless they meet an enumerated exception. Decisions on eligibility are made by officers at the port of entry, and upon refusal claimants are immediately returned to the US. There is no discretion to admit those who do not meet a listed exception.

*Regulations Amending the Immigration and Refugee Protection Regulations, SOR/2004-217, P.C. 2004-1157 [STCA Regulations], s. 159.3, 159.4; Memorandum to Cabinet, Sept. 24, 2002, Heinze Affidavit, AB vol. 12, Tab 34, Ex. TH1, p. 3294-3301; Scoffield Affidavit, AB vol. 11, Tab 33, Ex. B-11; Giantonio Affidavit, AB vol. 3, Tab 11; Koelsch Affidavit, AB vol. 3, Tab 14; A Partnership for Protection, Heinze Affidavit, AB vol. 12, Tab 34, Ex. TH2*

8. Section 102(3) of IRPA requires the GIC to ensure the continuing review of the s. 102(2) factors. 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.

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

**B. Application for judicial review**

9. On December 29, 2005, the Applicants sought a declaration in Federal Court that, *inter alia,* the designation of the US under s. 102 and resulting application of the ineligibility provision are *ultra vires* the GIC and in breach of s. 7 and 15 of the Charter.

10. The Applicants filed expert affidavits from leading American academics and practitioners of refugee law and representatives of US agencies that assist refugee claimants at the border. The Applicants also filed an expert legal opinion from Prof. James Hathaway. The record highlighted a real risk of *refoulement* of refugees from the US contrary to Article 33 of the Refugee Convention due to aspects of US law and practice including:

a. A bar against asylum claims filed more than one year after arrival in the US

*Georgetown Affidavit, AB vol. 3*

b. Exclusion of individuals for providing even minimal amounts of "material support" to terrorist organizations like the FARC or the LTTE with no provision for a defense of coercion or duress

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

c. Exclusion of individuals on security grounds without a requirement of individual responsibility, requiring only that they should have known they supported a terrorist group

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

d. A lack of guiding jurisprudence or policy on whether a particular social group based on gender has a nexus to the Refugee Convention, resulting in arbitrary refusals of gender claims

*Musalo Affidavit, AB vol. 3, Tab 15*

e. Statutory provisions that explicitly deny 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."

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

11. The evidence also showed that the US violates its obligations under Article 3 of CAT both by *refouling* asylum-seekers to torture and engaging in extraordinary renditions to torture, restricting its definition of torture and practicing and condoning torture.

*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*

12. The Respondent chose not to cross examine any of the Applicants' witnesses, but provided rebuttal affidavits, including that of David Martin on US asylum law and practice. The Respondent filed no evidence on whether any Charter breach would be saved by s. 1.

*Martin Affidavit, AB, vol. 6, tab 24*

**C. The decision of the Federal Court**

13. Phelan J. granted public interest standing to the public interest organizations, finding that individuals directly affected by the STCA provisions would be removed from Canada prior to being able to bring a challenge to the ineligibility determination. He determined that John Doe, a Colombian without status in the US, also had standing since he could not approach the border and make a claim without exposing himself to risk of *refoulement* from the US.

*Canadian Council for Refugees v. Canada, [2007] F.C.J. No. 1583, paras. 43, 47, 48, 51*

14. Applying a reasonableness standard of review, Phelan J. determined that the designation of the US was *ultra vires* the GIC because the conditions precedent to the exercise of the designation authority of a country under s. 102(1) of IRPA had not been met. He determined that the GIC acted unreasonably in concluding the US complied with Art. 33 of the Refugee Convention, concluding at paras 239-240:

> **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.

15. He also found at para. 262 that the GIC had unreasonably concluded that the US complied with Article 3 of CAT.

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

> **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.

17. 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.”

18. Phelan J. certified three questions to the Court of Appeal regarding the appropriate standard of review, whether the Regulations are *ultra vires*, and whether the designation of the US violates ss. 7 and 15 of the Charter and is not saved by s. 1.

**D. The decision of the Court of Appeal**

19. Noël J.A., writing for himself and Richard C.J., dismissed the Respondent's appeal. He made the following findings:

    a. The standard of review for the *vires* challenge is correctness. (para. 51-63)

    b. Phelan J. erred in finding that in order for the GIC to designate countries under s. 102 as "countries…that comply with Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture", those countries *must actually comply* with those articles. The only conditions precedent to designation are that the GIC consider the four factors set out in s. 102(2) and be satisfied that the country at issue complies with the enumerated provisions: "Once it is accepted, as it must be in this case, that the GIC has given due consideration to these four factors, and formed the opinion that the candidate country is compliant with the relevant Articles of the Conventions, there is nothing left to be reviewed judicially." (paras. 78, 80)

    c. Phelan J. erred in considering evidence that postdated the date of promulgation of the *STCA Regulations*, as the Applicants' originating Notice of Application for Leave and Judicial Review did not explicitly state that they were challenging the *ongoing* designation and did not seek declaratory relief for the failure to ensure continuing review pursuant to s. 102(3) and the Cabinet. Phelan J. also erred in finding that the GIC had failed to undertake the required continuing review. (paras. 83-97)

    d. Phelan J. erred in granting standing to all the parties. The Court found there was no evidence to support Phelan J.'s determination that a refugee would have to bring a challenge from outside Canada. The Charter arguments should not have been entertained as they are only hypothetical, and must instead be brought by "a refugee who has been denied asylum in Canada pursuant to the Regulations and faces a real risk of *refoulement* in being sent back to the U.S. pursuant to the Safe Third Country Agreement." (para. 101-104)

20. In his concurrence, Evans J.A. did not adopt the majority's findings with respect to statutory interpretation and the scope of judicial review, but found that the litigation was premature and lacked "utility" in the absence of an individual litigant who had been denied eligibility and thereby exposed to a real risk of *refoulement* from the US. He considered that the remedy of invalidity was too broad as the alleged US non-compliance only affected *some categories* of refugees. He considered that Canada could avoid *refoulement* under the STCA through individualized assessments at ports of entry to determine whether claimants who seeking to enter Canada face *refoulement* from the US. (para. 106-130)

21. Neither Noël J.A. nor Evans J.A. disputed the accuracy of Phelan J.'s conclusions that the STCA exposes certain groups of refugees to a real risk of *refoulement*. Instead, the Court of

Appeal disposed of the appeal without any consideration of the evidence or the fundamental question of whether in fact the STCA exposes refugees to a real risk of *refoulement* to persecution or torture, a question described by Noël J.A. as "irrelevant."

## PART II: POINTS IN ISSUE

22. The Applicants submit that this case raises the following issues of national importance:
    a. Whether the designation of the US as a country that complies with Article 33 of the Refugee Convention and Article 3 of CAT is *ultra vires* the Governor in Council; and specifically whether the Court of Appeal erred in interpreting s. 102 of IRPA as permitting the GIC to designate a country that is not actually in compliance
    b. Whether the Applicants have standing to bring this challenge
    c. Whether the Court of Appeal erred in finding that the Applicants could not challenge the ongoing designation of the US or rely on evidence postdating the promulgation of the Regulations; and whether the Court of Appeal erred in finding that the GIC had conducted the continuing review required by s. 102(3) of IRPA

## PART III: STATEMENT OF ARGUMENT

### ISSUE A: Compliance as a condition precedent

### A1: Introduction and standard of review

23. It is settled law that the GIC is not exempt from judicial review because of the character of the decision-maker. Indeed, it is precisely because the GIC is composed of elected officials that its assessment of compliance with fundamental human rights affecting non-citizens who cannot vote warrants careful attention by an independent judiciary.

*Oberlander v. Canada (A.G.), [2004] F.C.J. No. 920 (C.A.)*
*Attorney General of Canada. v. Inuit Tapirisat et al., [1980] 2 S.C.R. 735*

24. The Court of Appeal found that it can review a GIC regulation cutting off access to protection from persecution and torture only to determine if a condition precedent has not been met or if there has been bad faith or improper purpose, and that correctness is the

standard of review. The Court went on to determine as a matter of statutory interpretation that the condition precedent in this case was that the GIC consider US policies and practices as set out in s. 102(2). In making this determination, the Court of Appeal rejected Phelan J.'s view that the GIC is required to determine that the US actually complies with Article 33 of the Refugee Convention and Article 3 of CAT, and that this determination must be based on a consideration of the factors set out at s. 102(2).

25. Only this Court can resolve the conflict between the two lower courts on this question – a question of national and indeed international importance that will have repercussions far beyond Canada's borders. If the GIC may designate a country that is not in fact "safe", refugees deflected by Canada to the US will face removal to persecution or torture in breach of international law. Moreover, such a finding would equally authorize the GIC to designate any number of other countries under s. 102 despite evidence of non-compliance, including countries with human rights records that are far worse than that of the US.

26. By finding that the condition precedent for the GIC's determination under s. 159.3 is only a procedural requirement to consider the factors listed in s. 102(2), the Court of Appeal avoided reviewing, on *any* standard, the evidence of US law, policies and practices with respect to refugee claims and CAT obligations. By contrast, Phelan J. found that because this case required a substantive evidentiary review, he should apply a reasonableness standard, even though he recognized that he would normally use a correctness standard for a *vires* challenge.

27. Section 159.3 is a regulation that imports a legal determination by the GIC that the US complies with the relevant *non-refoulement* provisions of international law. The s. 102(2) factors are sources of evidence of [non-]compliance under s. 102(1), and the content of that evidence is highly relevant to assessing whether the GIC exercised its power to designate the US in accordance with its authorizing statute. In other words, the regulation itself imports a conclusion requiring a firm evidentiary base, and this case indeed involves an elaborate evidentiary record. In these circumstances, this case raises an important issue as to whether

Phelan J. properly deviated from the traditional correctness standard by affording a degree of deference to the GIC's designation.

28. Even applying this more deferential standard of review, however, Phelan J. determined that the evidence does not support a conclusion of US compliance with its Refugee Convention and CAT obligations. In the result, even if the Court were to find that he erred by adopting a reasonableness standard, his factual findings – which were undisturbed by the Court of Appeal – are subject to review only for palpable and overriding errors.

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

**A2: Compliance as a condition precedent**

29. An issue of national importance is raised by Noël J.A.'s determination that "actual compliance" is not required when the GIC designates countries as ones that "that comply with Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture", and that the only condition precedent to designation is that the GIC consider the s. 102(2) factors.

*Reasons, para. 66-82*

30. It is submitted that Phelan J. properly applied well-established principles of statutory interpretation; Noël J.A. did not (and Evans J.A. declared himself unconvinced by Noël J.A.'s reasoning). Recognizing compliance with Article 33 of the Refugee Convention and Article 3 of CAT as a precondition to designation as a country that complies with those provisions makes s. 102 internally consistent, consistent with the statutory scheme, and consistent with Canada's international obligations.

*Reasons of Phelan J., para. 55-60*
*Reasons of Noël J.A., para. 66-82; Reasons of Evans J.A., para. 108*
*Rizzo & Rizzo Shoes, [1998] 1 S.C.R. 27 at para. 21*

31. 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, the countries that may be designated are

those "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: in order for the GIC to exercise its discretionary power to designate under the first part, the country to be designated must be one that complies with Article 33 of the Refugee Convention and Article 3 of CAT.

32. Interpreting the provision to require compliance makes the provision internally coherent; interpreting it as not requiring compliance – i.e. allowing the designation of countries that do not in fact comply – renders the provision incoherent and internally inconsistent. On that interpretation 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, and 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 would be meaningless. Further, if actual compliance is not required, the ongoing review requirement in s. 102(3) has no purpose.

33. By contrast, interpreting s. 102(1) to create a mandatory requirement of compliance is consistent with ss. 7 and 15 of the Charter, provisions of IRPA which reinforce the principle of *non-refoulement,* and Canada's obligations under the Refugee Convention and CAT, including the objectives and intended interpretation of the Act, such as ss. 3(3)(d) and (f), 96, 97 and 115.

*R. v. Hape, [2007] SCJ No. 26*

34. It is beyond dispute that s. 102(1) must be interpreted and applied in a manner that complies with the Charter. Indeed, the legislature underlined the importance of this interpretive principle by specifically requiring consistency with the Charter, "including its principles of equality and freedom from discrimination," in respect of any decision taken under the Act. An interpretation of s. 102(1) that fails to ensure actual protection for refugees, including the categories of particularly disadvantaged refugees identified by Phelan J. on the basis of the evidence before him, is inconsistent with these fundamental principles.

*IRPA, s. 3(3)(d)*

*R. v. Golden, [2001] 3 SCR 679 at para 83; R. v. Kapp, 2008 SCC 41 at paras. 14-26; Law v. MEI, [1999] 1 S.C.R. 497, at para. 40, 42, 44, 46-48, 51, 72, 81, 88; New Brunswick v. G. (J.), [1999] 3 S.C.R. 46, at para. 115; Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143 at paras. 32, 34, 52; Eaton v. Brant County Board of Education, [1997] 1 S.C.R. 241; Singh v. M.E.I., [1985] 1 S.C.R. 177; Canada (M.E.I.) v. Chiarelli, [1992] 1 S.C.R. 711; A and others v. Secretary of State for the Home Department [2004] HL 56 (H.L.) ["Belmarsh"]; R. v. Golden, [2001] 3 SCR 679 at para 83; Lavoie v. Canada, [2002] 1 S.C.R. 769, at para. 45*

35. 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 fulfilling Canada's international legal obligations with respect to refugees and offering safe haven. Noël J.A. acknowledges that the objective of s. 102 is "the sharing of responsibility for the consideration of refugee claims with countries that are signatory to and comply with the relevant Articles of the Conventions and have an acceptable human rights record." Yet his interpretation of s. 102(1)(a) – one that does not actually require compliance – is directly contrary to these objectives.

*IRPA, s. 102(1), s. 3(b), (d)*

36. Likewise, s. 102(1)(a) must be interpreted as requiring compliance in order to be 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" and which "ensures that decisions …." It is well-established law that the prohibition of *refoulement* includes a prohibition of indirect *refoulement*. A state party does not absolve itself of responsibility for a refugee by refusing entry to its territory, when such refusal places the refugee at risk of *refoulement* from the neighbouring country. An interpretation of s. 102 that makes actual protection from *refoulement* irrelevant is clearly inconsistent with Canada's international human rights obligations.

*IRPA, 3(3)(f)*
*See also Reasons of Evans J.A. at para. 122*
*Singh v. MEI, [1985] 1 S.C.R. 177; United States v. Burns, [2001] 1 S.C.R. 283; Suresh v. MCI, [2002] 1 S.C.R. 3; Canada (Justice) v. Khadr, 2008 SCC 28 at para. 18-19; TI v. UK, [2000] INLR 211, 12 IJRL 244 (2000); Adan v. Secretary of State for Home Department, [1999] E.W.J. No. 3793 (H.L.); R. v. Secretary of State for the Home Department, ex parte Yogathas, [2002] 4 All ER 800 (UK HL, Oct. 17, 2002); Haitian Centre for Human Rights et al. v. United States, Case No. 10.675, Report No. 51/96, Inter AmCHR Doc. OEA/Ser.L/V/II.95 Doc. 7 rev.*

37. Underlying the Court of Appeal's approach is its view that compliance under s. 102(1) is a matter of the subjective discretion of the GIC. Noël J.A. disregards the clear objective language of s. 102(1), which authorizes Cabinet to designate countries *that comply* with Article 33 of the Refugee Convention and Article 3 of the CAT, not countries that comply *in the opinion of the GIC.*

*Reasons, para. 64-80; see especially para. 76, 78 ("the GIC could not designate a country if it was not satisfied that the country's policies, practices and record indicate compliance"; "the GIC has given due consideration to these four factors, and formed the opinion that the candidate country is compliant with the relevant Articles of the Conventions")*
*Reasons of Phelan J., para. 56*

38. In conclusion, notwithstanding the Court of Appeal's 'correctness' language, its approach to statutory interpretation is marked by extreme deference. By reducing the condition precedent for designation of the US as a safe country to a procedural requirement and a matter of subjective discretion, the Court effectively closes off any legitimate avenue of review of the *vires* of the designation. In the civil law context, this Court has recognized that the severity of the consequences of a decision to be made informs the degree of cogency required of the evidence to support an adverse conclusion. Here, the consequences are persecution and torture. The Applicants submit that the extremely deferential posture of the Court of Appeal toward the designation under s. 102(1) is at odds with the approach commended by this Court.

*Continental Insurance Co. v. Dalton Cartage Co., [1982] 1 S.C.R. 164; Jaballah v. Canada (Minister of Citizenship and Immigration), (2004), 247 F.T.R. 6; Smith v. Smith and Smedman, [1952] 2 S.C.R. 312, at p. 317,* 331

39. The question of the proper construction of s. 102 has far-reaching consequences not only for refugees directly affected by the US-Canada agreement, but also for the GIC's ability to designate other countries under s. 102. Noël J.A.'s exceedingly deferential approach to review of the GIC's jurisdiction would allow the GIC to designate countries that, unlike the US, are not even parties to the Refugee Convention and CAT, since according to Noël J.A., the sole condition precedent to the designation of countries as ones that comply with the *non-refoulement* provisions is that the GIC "consider" the s. 102(2) factors.

**ISSUE B. Standing**

40. The Court of Appeal's finding that none of the Applicants have standing to bring this challenge is an issue of national importance. This finding – made without notice to the parties that standing was even a live issue – effectively bars review by the courts of the Safe Third Country Agreement.

41. It is not in dispute that to be granted public interest standing, a party must establish: a serious issue to be tried; the party is directly affected or has a genuine interest; no other reasonable or effective manner to bring the issue to court. The only dispute is regarding the third prong.

*Thorson v. Canada (Attorney General), [1975] 1 S.C.R. 138, Borowski v. Canada (Attorney General) et. al., [1989] 1 S.C.R. 342, Finlay v. Canada (Minister of Finance), [1986] 2 S.C.R. 607*

42. Phelan J. determined that in light of "the speed with which Canadian authorities are mandated to act in returning the person to the U.S.," no refugee would be able to bring the claim from within Canada. He found on the evidence that "most claimants in the U.S. who might be caught by the STCA would be unwilling to undertake this litigation," fearing that "becoming involved in litigation might bring their presence to the attention of U.S. authorities and put them at risk of being deported or detained and put in the very position in the U.S. of *refoulement* which forms the basis of this Court challenge." (paras. 43, 46)

43. After Phelan J. declined to certify the Respondent's proposed question on standing, the Respondent abandoned the issue. It was without putting the parties on notice that the Court considered standing to remain a live issue, and without submissions on the issue, that the Court on its own initiative reviewed Phelan J.'s decision to grant public interest standing.

*Applicants' Record, Affidavit of G. Nafziger, para. 5*

44. Aside from the unfairness of the manner by which the Court of Appeal decided the issue of standing, Noël J.A. made palpable and overriding errors in finding that "there is no evidence that a refugee would have to bring a challenge from outside Canada". This finding has no evidentiary basis, and entirely disregards the evidence in the UNHCR-Canada-US tripartite report on the first year of the STCA that: persons found ineligible are returned "promptly" to

the U.S. and removals are in most cases the same day. Indeed, the Government explicitly contemplated that refused claimants would apply for judicial review from outside of Canada:

> When a refugee claimant disagrees with an officer's finding of eligibility, the formal mechanism to correct errors is to file a request for leave to seek judicial review with the Federal Court of Canada. A claimant does not have to be physically present in Canada to pursue a judicial review application before the Federal Court.

*UNHCR Monitoring Report, Heinze Affidavit, AB vol. 12, Tab 34, Ex. TH2 (see Objective 6) Canada-US Safe Third Agreement, Year One Review, AB vol. 12, Tab 34, Ex. TH2 (see Canada chapter, "Removal procedures" and "Judicial Review")*

45. The speedy return to the US of persons deemed ineligible under the STCA was confirmed by one of the Applicants' affiants, David Koelsch of the border NGO Freedom House. He noted that those found ineligible under the STCA at the Detroit-Windsor port of entry are returned to the US by force if necessary, and are not allowed to contact counsel.

*Koelsch Affidavit, AB vol. 3, Tab 14, para 15*
*Applicants' Record, Affidavit of G. Nafziger, Ex. A: Affidavit of Esly Moreno*

46. Noël J.A. does not comment on this evidence, relying instead on irrelevant findings that claimants are allowed to remain at the port of entry during their eligibility assessment and may be represented by counsel (para. 101). These findings, even if accurate, do not lead to a conclusion that there is a viable alternative to public interest standing here: the evidence shows there is no opportunity to bring a Charter challenge in the Federal Court and have it heard prior to removal. Nor is there any evidence to suggest that refugees have in fact been bringing individual challenges to the STCA regulations in the 44 months since implementation. This is clearly distinct from the situation facing this Court in the *CCC* case, wherein the public interest group was seeking standing in relation to provisions that were already under attack by individual litigants.

*Canadian Council of Churches v. M.E.I., [1990] 2 FC 534, dismissed on other grounds, [1992] 1 S.C.R. 236*

47. Having determined that Phelan J. erred in granting standing to the public interest organizations, the Court of Appeal summarily dismissed Phelan J.'s decision to recognize John Doe as a party. Phelan J. had recognized that to require John Doe to expose himself to risk by actually approaching the border was pointless, unfair and contrary to this Court's finding in *Vriend v. Alberta*, [1998] 1 S.C.R. 493. The Court of Appeal not only found John

Doe undeserving of standing, but found that his Charter challenge was "mounted on the basis of hypothetical situations" (para. 102). That doing do would entail exposing oneself to the certainty of return to the US and a real risk of *refoulement* to persecution and torture is not addressed by the Court of Appeal.

48. Not only does the Court of Appeal provide no cogent reasons for its decision that this Charter challenge is hypothetical and abstract, but the finding is rooted in the same palpable and overriding error underlying his determination that public interest standing was inappropriate – i.e. that Phelan J. erred in finding that no refugee who had been found ineligible under the STCA regulations would be able to bring the claim from within Canada.

49. By stripping the Applicant organizations of public interest standing while also denying standing to John Doe, the Court of Appeal has immunized the STCA from Charter review. And it has done so without disturbing the clear findings of Phelan J. that the STCA exposes refugees to a real risk of *refoulement* to persecution and torture and in violation of ss .7 and 15 of the Charter, a finding illustrated by the case of Denis Asuncion, the Honduran asylum seeker who was denied entry to Canada under the STCA, detained on return to the US, deported to Honduras, and killed.

*Applicants' Record, Affidavit of Gloria Nafziger, Ex. A.: Affidavit of Esly Moreno*

**ISSUE C: Continuing review and the ongoing designation**

50. Under the heading "The failure to conduct the ongoing review", Noël J.A. conflates two separate issues. He addresses the GIC's compliance with s. 102(3) to ensure a *continuing review* of the designation of the US as a safe country, as the section title indicates. But he also folds in another finding that undermines the nature of *vires* analysis as a whole. He holds that on challenges on *vires* grounds, courts are restricted to investigating whether laws or provisions were *ultra vires* at the time they are promulgated:

> There is one key date that the Applications judge had to be mindful of: December 29, 2004, when the Regulations came into force, the last relevant date for the assessment of the *vires* issue. Regardless of the conditions precedent which one wishes to apply, the *vires* of the Regulation could not be assessed on the basis of facts, events or developments that are subsequent to the date of the promulgation.

*Reasons, para. 88-90*

51. Specifically, Noël J.A. finds that the Applicants' *vires* challenge could not encompass a challenge to the *ongoing designation* of the US as a safe country, but had to be directed solely to the initial designation. This was not an issue that had been raised by the Respondent. Noël J.A. takes the view that evidence that post-dated promulgation should not have been before the Court, and that the Applications judge erred by relying on this evidence (filed by both parties) "indiscriminately".

*Reasons, para. 83-90; see also para. 70, Appendix 2*
*Reasons of Phelan J., para. 91*

52. The Court of Appeal has severely limited the scope of *vires* challenges without any grounding in legal principle or precedent. Courts have long considered whether a law is *ultra vires* by looking at the ongoing surrounding circumstances. For example, in the cases where Parliament enacted laws that were only *intra vires* its peace, order and good government powers due to national emergency situations, the courts always contemplated that the laws would *become ultra vires* once the emergency had passed.

53. In the *Anti-Inflation Reference,* this Court upheld the legislation and found it did not invade provincial jurisdiction, but noted that it would fall to the Court in the future to determine "that a statutory provision valid in its application under circumstances envisaged at the time of its enactment" had become *ultra vires* due to changed circumstances.

*Reference re: Anti-Inflation Act (Canada), [1976] 2 S.C.R. 373*

54. This Court cited the *Fort Frances* case, where the courts had to determine whether federal newsprint controls that had justifiably encroached onto provincial powers during the First World War were still justified after the war. Viscount Haldane wrote:

> It may be that it has become clear that the crisis which arose is wholly at an end and that there is no justification for the continued exercise of an exceptional interference which becomes ultra vires when it is no longer called for….At what date did the disturbed state of Canada which the war had produced so entirely pass away that the legislative measures relied on in the present case became ultra vires?

*Fort Frances Pulp and Power Co. Ltd. v. Manitoba Free Press Co. Ltd., [1923] A.C. 695; Co-operative Committee on Japanese Canadians v. Attorney General of Canada, [1947] A.C. 87 at para. 2; Canadian Federation of Agriculture v. Attorney-General of Quebec, [1951] A.C. 179.*

55. In these situations, it is necessarily evidence that postdates the promulgation of the law that is used to determine the law's *vires*. This is the only way to ensure that the *vires* analysis does not become outdated. In reaching the opposite conclusion, Noël J.A. erroneously treats the *vires* challenge like a judicial review of a decision – the very approach he had rejected in his standard of review findings.

56. Contrary to Noël J.A.'s assertion, new evidence is normally admissible to demonstrate an excess of jurisdiction. Similarly, it is not controversial that evidence of the consequential effects of a law is considered acceptable to determine its pith and substance for a *vires* analysis.

*Texada Mines Ltd. v. A.G. (British Columbia), [1960] SCR 713; McFadyen v. Canada (Attorney General) 2005 FCA 360 at para. 15*

57. The Court of Appeal's findings on the continuing review itself are also in error. The Court erroneously held that the Applicants were required to move for a formal amendment to the originating notice in order to raise this issue – despite full written and oral argument by both sides, explicit clarification by counsel before Phelan J. that the Applicants were seeking review of the ongoing designation and operation of the Regulations, no objection by the Respondent, and Rules and case law placing it in the Court's discretion to allow parties to raise issues in written argument or even on appeal for the first time.

*Reasons of Noël J.A., para. 83, 85-86, 90; but see argument on the issue of the continuing review raised in Applicants' Memorandum of Fact and Law, para. 84-85; Applicants' Supplementary Memorandum, paras. 19-22, 38, 89-98; Respondent's Further Memorandum, Section H)*
*Co-operative Committee on Japanese Canadians v. Attorney General of Canada, [1947] 1 D.L.R. 577 at para. 2 (P.C.)[1]; Native Women's Assn. of Canada v. Canada, [1994] 3 S.C.R. 627; Stumf v. MCI, [2002] FCJ No. 590 at para. 5 (C.A.); Rodrigues v. MCI, [2008] FCJ No. 108 at para. 19-23 and see cases cited therein*
*Federal Courts Rules, SOR/2004-283, s. 2, Rules 56-60*
*Applicants' Record, Affidavit of G. Nafziger, para. 4*

---

1 The Privy Council stated:

> No cross-appeal was lodged. This in the circumstances was only the absence of a formality. A determination on the legal effect of the orders as a whole is necessary to arrive at a conclusion on the matters in respect of which the appellants appealed. The whole matter was fully debated before their Lordships and their Lordships accordingly propose to deal with the orders in their entirety.

58. This approach exemplifies the Court of Appeal's reliance on technicality to avoid substantive review of the human rights issues raised by this case.

59. Taking a similarly technical approach, the Court also erred in finding that the Applicants had to request that the GIC carry out its statutorily mandated ongoing review and seek mandamus as the only way to challenge the GIC's failure to comply with its required review obligations. Again, the Court has relied on a technical approach to avoid addressing a substantive issue. Not only do the Applicants dispute that they are required to bring a mandamus application when the Respondent lies in breach of a statute, but it was also within the Court's discretion to grant different relief that that sought in the court below, so long as there is no prejudice to the parties. As stated earlier, the Respondent was fully aware of the Applicants' submissions on this issue and defended against them fully.

*Canada (MEI) v. Jiminez-Perez, [1984] 2 S.C.R. 565, Co-operative Committee on Japanese Canadians v. Attorney General of Canada, [1947] 1 D.L.R. 577 at para. 2 (P.C.), Native Women's Assn. of Canada v. Canada, [1994] 3 S.C.R. 627*

60. Finally, the Court's finding that, in any case, the GIC had met its review obligation, is factually wrong. Section 8(3) of the STCA requires Canada and the US to jointly review the **implementation** of the STCA within 12 months of its entry into force, and requires them to invite the UNHCR to participate in this review. In spring 2006, the UNHCR representative stated that the US was a safe country and released a report on the implementation of the STCA; and in November 2006, Canada released a report to comply with s. 8(3) addressing **implementation** of the STCA. Neither of these reports purported to review the s. 102(2) factors, and the Respondent never argued that they constituted the on-going review required under s. 102(3) (instead, she acknowledged that to date there had been no review of the s. 102(2) factors and no report to the GIC, but contended that "preparations for a report to the GIC are ongoing.) On this evidence, Phelan J. properly found that the report "is not the review mandated by Parliament nor is it sufficient to meet the obligation of continuous review to ensure ongoing compliance." The Court of Appeal disregarded the nature of the review obligation in order to find that UNHCR's statement and report (clearly not prepared by the GIC) and the Canadian report satisfied the ongoing review mandated by s. 102(3).

*Reasons of Court of Appeal, para. 95-97*
*Reasons of Phelan J., para. 271*
*Respondent's Supplementary Memorandum, Section H; Appellant's Memorandum of Fact and Law, para. 134*

61. The result is to exclude all the evidence since 2004 of highly relevant changes in the US, despite the evidence that the GIC itself was not reviewing the changes in the US in any systematic way, and despite the fact that both parties and the judge were clearly ad idem on what the issue was and that it should be argued. There was no suggestion of prejudice to any side. The Court's approach places technical requirements over justice.

**Conclusion**

62. The STCA operates in violation of fundamental human rights, as found by the Federal Court, and the Court of Appeal has failed to address Canada's participation in these violations. The Applicants submit that this case raises issues of national importance that call for resolution by this Court.

## PART IV: COSTS

63. The parties have agreed that each will bear their own costs of the proceedings.

## PART V: ORDER REQUESTED

64. The Applicants seek leave to appeal the decision of the Court of Appeal. On appeal they will seek an order quashing the decision of the Court of Appeal and restoring the Order of Justice Phelan.

Dated at Toronto this 26th day of September, 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

## PART VI: AUTHORITIES

| | **Case name** | **Cited at para** |
|---|---|---|
| | | |
| 1 | *Singh v. Canada (MEI),* [1985] 1 S.C.R. 185 | Introduction, 34, 36 |
| 2 | *Dunsmuir v. New Brunswick*, 2008 SCC 9 | 4 |
| 3 | *Canadian Council of Churches v. M.E.I., [1990] 2 FC 534, dismissed on other grounds, [1992] 1 S.C.R. 236* | 5, 46 |
| 4 | *Oberlander v. Canada (A.G.),* [2004] F.C.J. No. 920 (C.A.) | 23 |
| 5 | *Attorney General of Canada. v. Inuit Tapirisat et al*., [1980] 2 S.C.R. 735 | 23 |
| 6 | *Housen v. Nikolaisen,* [2002] 2 SCR 235 | 28 |
| 7 | *Rizzo & Rizzo Shoes*, [1998] 1 S.C.R. 27 at para. 21 | 30 |
| 8 | *R. v. Golden*, [2001] 3 SCR 679 at para 83 | 34 |
| 9 | *R. v. Kapp*, 2008 SCC 41 at paras. 14-26 | 34 |
| 10 | *Law v. MEI*, [1999] 1 S.C.R. 497, at para. 40, 42, 44, 46-48, 51, 72, 81, 88 | 34 |
| 11 | *New Brunswick v. G. (J.),* [1999] 3 S.C.R. 46, at para. 115 | 34 |
| 12 | *Andrews v. Law Society of British Columbia,* [1989] 1 S.C.R. 143 at paras. 32 , 34, 52 | 34 |
| 13 | *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 | 34 |
| 14 | *Canada (M.E.I.) v. Chiarelli*, [1992] 1 S.C.R. 711; | 34 |
| 15 | *A and others v. Secretary of State for the Home Department [2004] HL 56 (H.L.)* | 34 |
| 16 | *R. v. Golden*, [2001] 3 SCR 679 at para 83; | 34 |
| 17 | *Lavoie v. Canada, [2002] 1 S.C.R. 769, at para. 45* | 34 |
| 18 | *United States v. Burns, [2001] 1 S.C.R. 283* | 36 |
| 19 | *Suresh v. MCI, [2002] 1 S.C.R. 3* | 36 |
| 20 | *Canada (Justice) v. Khadr, 2008 SCC 28 at para. 18-19* | 36 |
| 21 | *TI v. UK, [2000] INLR 211, 12 IJRL 244 (2000)* | 36 |
| 22 | *Adan v. Secretary of State for Home Department, [1999] E.W.J. No.* | 36 |

## PART VII: LEGISLATION

*Immigration and Refugee Protection Act*

3 (2) The objectives of this Act with respect to refugees are …

(*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;

…

(*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;

3 (2) S'agissant des réfugiés, la présente loi a pour objet : …

*b*) de remplir les obligations en droit international du Canada relatives aux réfugiés et aux personnes déplacées et d'affirmer la volonté du Canada de participer aux efforts de la communauté internationale pour venir en aide aux personnes qui doivent se réinstaller;

…

*d*) d'offrir l'asile à ceux qui craignent avec raison d'être persécutés du fait de leur race, leur religion, leur nationalité, leurs opinions politiques, leur appartenance à un groupe social en particulier, ainsi qu'à ceux qui risquent la torture ou des traitements ou peines cruels et inusités;

(3) This Act is to be construed and applied in a manner that …

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

(3) L'interprétation et la mise en oeuvre de la présente loi doivent avoir pour effet : …

*d*) d'assurer que les décisions prises en vertu de la présente loi sont conformes à *la Charte canadienne des droits et libertés*, notamment en ce qui touche les principes, d'une part, d'égalité et de

French as the official languages of Canada;

…

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

protection contre la discrimination et, d'autre part, d'égalité du français et de l'anglais à titre de langues officielles du Canada;

…

*(f*) de se conformer aux instruments internationaux portant sur les droits de l'homme dont le Canada est signataire.

**101.** (1) A claim is ineligible to be referred to the Refugee Protection Division if

[...]

(*e*) the claimant came directly or indirectly to Canada from a country designated by the regulations, other than a country of their nationality or their former habitual residence

**101.** (1) La demande est irrecevable dans les cas suivants :

[...]

*e*) arrivée, directement ou indirectement, d'un pays désigné par règlement autre que celui dont il a la nationalité ou dans lequel il avait sa résidence habituelle

**102.** (1) The regulations may govern matters relating to the application of sections 100 and 101, may, for the purposes of this Act, define the terms used in those sections and, for the purpose of sharing responsibility with governments of foreign states for the consideration of refugee claims, may include provisions

(*a*) designating countries that comply with Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture;

**102.** (1) Les règlements régissent l'application des articles 100 et 101, définissent, pour l'application de la présente loi, les termes qui y sont employés et, en vue du partage avec d'autres pays de la responsabilité de l'examen des demandes d'asile, prévoient notamment :

*a*) la désignation des pays qui se conforment à l'article 33 de la Convention sur les réfugiés et à l'article 3 de la Convention contre la torture;

*b*) l'établissement de la liste de ces

(*b*) making a list of those countries and amending it as necessary; and

(*c*) respecting the circumstances and criteria for the application of paragraph 101(1)(e).

pays, laquelle est renouvelée en tant que de besoin;

*c*) les cas et les critères d'application de l'alinéa 101(1)e).

(2) The following factors are to be considered in designating a country under paragraph (1)(*a*):

(*a*) whether the country is a party to the Refugee Convention and to the Convention Against Torture;

(*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.

(2) Il est tenu compte des facteurs suivants en vue de la désignation des pays :

*a*) le fait que ces pays sont parties à la Convention sur les réfugiés et à la Convention contre la torture;

*b*) leurs politique et usages en ce qui touche la revendication du statut de réfugié au sens de la Convention sur les réfugiés et les obligations découlant de la Convention contre la torture;

*c*) leurs antécédents en matière de respect des droits de la personne;

*d*) le fait qu'ils sont ou non parties à un accord avec le Canada concernant le partage de la responsabilité de l'examen des demandes d'asile.

(3) The Governor in Council must ensure the continuing review of factors set out in subsection (2) with respect to each designated country.

(3) Le gouverneur en conseil assure le suivi de l’examen des facteurs à l’égard de chacun des pays désignés.

*Immigration and Refugee Protection Regulations*

**159.1** The following definitions apply in this section and sections 159.2 to 159.7.

**159.1** Les définitions qui suivent s’appliquent au présent article et aux articles 159.2 à 159.7.

“Agreement”
*« Accord »*
“Agreement” means the Agreement dated December 5, 2002 between the Government of Canada and the

« Accord »
“ *Agreement* ”
« Accord » L’Entente entre le gouvernement du Canada et le gouvernement des États-Unis

Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries. (*Accord*)

“claimant”
*« demandeur »*
“claimant” means a claimant referred to in paragraph 101(1)(*e*) of the Act. (*demandeur*)

“designated country”
*« pays désigné »*
“designated country” means a country designated by section 159.3. (*pays désigné*)

“family member”
*« membre de la famille »*
“family member”, in respect of a claimant, means their spouse or common-law partner, their legal guardian, and any of the following persons, namely, their child, father, mother, brother, sister, grandfather, grandmother, grandchild, uncle, aunt, nephew or niece. (*membre de la famille*)

“legal guardian”
*« tuteur légal »*
“legal guardian”, in respect of a claimant who has not attained the age of 18 years, means a person who has custody of the claimant or who is empowered to act on the claimant's behalf by virtue of a court order or written agreement or by operation of law. (*tuteur légal*)

“United States”
*« États-Unis »*
“United States” means the United States of America, but does not

d’Amérique pour la coopération en matière d’examen des demandes d’asile présentées par des ressortissants de tiers pays en date du 5 décembre 2002. (*Agreement*)

« demandeur »
*“ claimant ”*
« demandeur » Demandeur visé par l’alinéa 101(1)*e*) de la Loi. (*claimant*)

« États-Unis »
*“ United States ”*
« États-Unis » Les États-Unis d’Amérique, à l’exclusion de Porto Rico, des Îles Vierges, de Guam et des autres possessions et territoires de ce pays. (*United States*)

« membre de la famille »
*“ family member ”*
« membre de la famille » À l’égard du demandeur, son époux ou conjoint de fait, son tuteur légal, ou l’une ou l’autre des personnes suivantes : son enfant, son père, sa mère, son frère, sa soeur, son grand-père, sa grand-mère, son petit-fils, sa petite-fille, son oncle, sa tante, son neveu et sa nièce. (*family member*)

« pays désigné »
*“ designated country ”*
« pays désigné » Pays qui est désigné aux termes de l’article 159.3. (*designated country*)

« tuteur légal »
*“ legal guardian ”*
« tuteur légal » À l’égard du demandeur qui a moins de dix-huit ans, la personne qui en a la garde ou est habilitée à agir en son nom en vertu d’une ordonnance judiciaire ou d’un accord écrit ou par l’effet de la loi. (*legal guardian*)

include Puerto Rico, the Virgin Islands, Guam or any other United States of America possession or territory. (*États-Unis*)

**159.2** .Paragraph 101(1)(*e*) of the Act does not apply to a claimant who is a stateless person who comes directly or indirectly to Canada from a designated country that is their country of former habitual residence.

**159.2** L'alinéa 101(1)*e*) de la Loi ne s'applique pas au demandeur apatride qui arrive directement ou indirectement au Canada d'un pays désigné dans lequel il avait sa résidence habituelle.

**159.3** The United States is designated under paragraph 102(1)(*a*) of the Act as a country that complies with Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture, and is a designated country for the purpose of the application of paragraph 101(1)(*e*) of the Act.

**159.3** Les États-Unis sont un pays désigné au titre de l'alinéa 102(1)*a*) de la Loi à titre de pays qui se conforme à l'article 33 de la Convention sur les réfugiés et à l'article 3 de la Convention contre la torture et sont un pays désigné pour l'application de l'alinéa 101(1)*e*) de la Loi.

**159.4** (1) Paragraph 101(1)(*e*) of the Act does not apply to a claimant who seeks to enter Canada at

(*a*) a location that is not a port of entry;

(*b*) a port of entry that is a harbour port, including a ferry landing; or

(*c*) subject to subsection (2), a port of entry that is an airport.

In transit exception

(2) Paragraph 101(1)(*e*) of the Act applies to a claimant who has been ordered removed from the United States and who seeks to enter Canada at a port of entry that is an airport while they are in transit through Canada from the United States in the course of the enforcement of that

**159.4** (1) L'alinéa 101(1)*e*) de la Loi ne s'applique pas au demandeur qui cherche à entrer au Canada à l'un ou l'autre des endroits suivants :

*a*) un endroit autre qu'un point d'entrée;

*b*) un port, notamment un débarcadère de traversier, qui est un point d'entrée;

*c*) sous réserve du paragraphe (2), un aéroport qui est un point d'entrée.

Exception — transit

(2) Dans le cas où le demandeur cherche à entrer au Canada à un aéroport qui est un point d'entrée, l'alinéa 101(1)*e*) de la Loi s'applique s'il est en transit au Canada en

order.

provenance des États-Unis suite à l’exécution d’une mesure prise par les États-Unis en vue de son renvoi de ce pays.

**159.5** Paragraph 101(1)(*e*) of the Act does not apply if a claimant who seeks to enter Canada at a location other than one identified in paragraphs 159.4(1)(*a*) to (*c*) establishes, in accordance with subsection 100(4) of the Act, that

(*a*) a family member of the claimant is in Canada and is a Canadian citizen;

(*b*) a family member of the claimant is in Canada and is

(i) a protected person within the meaning of subsection 95(2) of the Act,

(ii) a permanent resident under the Act, or

(iii) a person in favour of whom a removal order has been stayed in accordance with section 233;

(*c*) a family member of the claimant who has attained the age of 18 years is in Canada and has made a claim for refugee protection that has been referred to the Board for determination, unless

(i) the claim has been withdrawn by the family member,

(ii) the claim has been abandoned by the family member,

(iii) the claim has been rejected, or

(iv) any pending proceedings or proceedings respecting the claim

**159.5** L’alinéa 101(1)*e*) de la Loi ne s’applique pas si le demandeur qui cherche à entrer au Canada à un endroit autre que l’un de ceux visés aux alinéas 159.4(1)*a*) à *c*) démontre, conformément au paragraphe 100(4) de la Loi, qu’il se trouve dans l’une ou l’autre des situations suivantes :

*a*) un membre de sa famille qui est un citoyen canadien est au Canada;

*b*) un membre de sa famille est au Canada et est, selon le cas :

(i) une personne protégée au sens du paragraphe 95(2) de la Loi,

(ii) un résident permanent sous le régime de la Loi,

(iii) une personne à l’égard de laquelle la décision du ministre emporte sursis de la mesure de renvoi la visant conformément à l’article 233;

*c*) un membre de sa famille âgé d’au moins dix-huit ans est au Canada et a fait une demande d’asile qui a été déférée à la Commission sauf si, selon le cas :

(i) celui-ci a retiré sa demande,

(ii) celui-ci s’est désisté de sa

have been terminated under subsection 104(2) of the Act or any decision respecting the claim has been nullified under that subsection;

(*d*) a family member of the claimant who has attained the age of 18 years is in Canada and is the holder of a work permit or study permit other than

(i) a work permit that was issued under paragraph 206(*b*) or that has become invalid as a result of the application of section 209, or

(ii) a study permit that has become invalid as a result of the application of section 222;

(*e*) the claimant is a person who

(i) has not attained the age of 18 years and is not accompanied by their mother, father or legal guardian,

(ii) has neither a spouse nor a common-law partner, and

(iii) has neither a mother or father nor a legal guardian in Canada or the United States;

(*f*) the claimant is the holder of any of the following documents, excluding any document issued for the sole purpose of transit through Canada, namely,

(i) a permanent resident visa or a temporary resident visa referred to in section 6 and subsection 7(1), respectively,

(ii) a temporary resident permit issued under subsection 24(1) of the Act,

(iii) a status document referred to in subsection 31(3) of the Act,

demande,

(iii) sa demande a été rejetée,

(iv) il a été mis fin à l'affaire en cours ou la décision a été annulée aux termes du paragraphe 104(2) de la Loi;

*d*) un membre de sa famille âgé d'au moins dix-huit ans est au Canada et est titulaire d'un permis de travail ou d'un permis d'études autre que l'un des suivants :

(i) un permis de travail qui a été délivré en vertu de l'alinéa 206*b*) ou qui est devenu invalide du fait de l'application de l'article 209,

(ii) un permis d'études qui est devenu invalide du fait de l'application de l'article 222;

*e*) le demandeur satisfait aux exigences suivantes :

(i) il a moins de dix-huit ans et n'est pas accompagné par son père, sa mère ou son tuteur légal,

(ii) il n'a ni époux ni conjoint de fait,

(iii) il n'a ni père, ni mère, ni tuteur légal au Canada ou aux États-Unis;

*f*) le demandeur est titulaire de l'un ou l'autre des documents ci-après, à l'exclusion d'un document délivré aux seules fins de transit au Canada :

(i) un visa de résident permanent ou un visa de résident temporaire visés respectivement à l'article 6

(iv) refugee travel papers issued by the Minister of Foreign Affairs, or

(v) a temporary travel document referred to in section 151;

(*g*) the claimant is a person

(i) who may, under the Act or these Regulations, enter Canada without being required to hold a visa, and

(ii) who would, if the claimant were entering the United States, be required to hold a visa; or

(*h*) the claimant is

(i) a foreign national who is seeking to re-enter Canada in circumstances where they have been refused entry to the United States without having a refugee claim adjudicated there, or

(ii) a permanent resident who has been ordered removed from the United States and is being returned to Canada.

et au paragraphe 7(1),

(ii) un permis de séjour temporaire délivré au titre du paragraphe 24(1) de la Loi,

(iii) un titre de voyage visé au paragraphe 31(3) de la Loi,

(iv) un titre de voyage de réfugié délivré par le ministre des Affaires étrangères,

(v) un titre de voyage temporaire visé à l'article 151;

*g*) le demandeur :

(i) peut, sous le régime de la Loi, entrer au Canada sans avoir à obtenir un visa,

(ii) ne pourrait, s'il voulait entrer aux États-Unis, y entrer sans avoir obtenu un visa;

*h*) le demandeur est :

(i) soit un étranger qui cherche à rentrer au Canada parce que sa demande d'admission aux États-Unis a été refusée sans qu'il ait eu l'occasion d'y faire étudier sa demande d'asile,

(ii) soit un résident permanent qui fait l'objet d'une mesure prise par les États-Unis visant sa rentrée au Canada.

**159.6** Paragraph 101(1)(*e*) of the Act does not apply if a claimant establishes, in accordance with

**159.6** L'alinéa 101(1)*e*) de la Loi ne s'applique pas si le demandeur démontre, conformément au

subsection 100(4) of the Act, that the claimant

(*a*) is charged in the United States with, or has been convicted there of, an offence that is punishable with the death penalty in the United States;

(*b*) is charged in a country other than the United States with, or has been convicted there of, an offence that is punishable with the death penalty in that country; or

(*c*) is a national of a country with respect to which the Minister has imposed a stay on removal orders under subsection 230(1) or a stateless person who is a former habitual resident of a country or place with respect to which such a stay has been imposed, and if

(i) the stay has not been cancelled under subsection 230(2), and

(ii) the claimant is not identified in subsection 230(3).

paragraphe 100(4) de la Loi, que, selon le cas :

*a*) il est mis en accusation, aux États-Unis, pour une infraction qui pourrait lui valoir la peine de mort dans ce pays, ou y a été déclaré coupable d'une telle infraction;

*b*) il est mis en accusation dans un pays autre que les États-Unis pour une infraction qui pourrait lui valoir la peine de mort dans ce pays, ou y a été déclaré coupable d'une telle infraction;

*c*) il a la nationalité d'un pays — ou, s'il est apatride, avait sa résidence habituelle dans un pays ou un lieu donné — à l'égard duquel le ministre a imposé un sursis aux mesures de renvoi aux termes du paragraphe 230(1) dans la mesure où :

(i) le sursis n'a pas été révoqué en vertu du paragraphe 230(2),

(ii) le demandeur n'est pas visé par le paragraphe 230(3).

**159.7** (1) For the purposes of paragraph 101(1)(*e*) of the Act, the application of all or part of sections 159.1 to 159.6 and this section is discontinued, in accordance with subsections (2) to (6), if

(*a*) a notice of suspension of the Agreement setting out the period of suspension is publicized broadly in the various regions of Canada by the Minister via information media and on the website of the

**159.7** (1) Pour l'application de l'alinéa 101(1)*e*) de la Loi, il est sursis à l'application de l'ensemble ou de toute partie des articles 159.1 à 159.6 et du présent article, conformément aux paragraphes (2) à (6), dans l'un ou l'autre des cas suivants :

*a*) un avis de suspension de l'Accord prévoyant la période de suspension est diffusé par le ministre sur l'ensemble du territoire

Department;

(*b*) a notice of renewal of the suspension of the Agreement setting out the period of renewal of suspension is published in accordance with subsection (6);

(*c*) a notice of suspension of a part of the Agreement is issued by the Government of Canada and the Government of the United States; or

(*d*) a notice of termination of the Agreement is issued by the Government of Canada or the Government of the United States.

Paragraph (1)(*a*) — notice of suspension of Agreement

(2) Subject to subsection (3), if a notice of suspension of the Agreement is publicized under paragraph (1)(*a*), sections 159.2 to 159.6 are rendered inoperative for a period of up to three months that shall be set out in the notice, which period shall begin on the day after the day on which the notice is publicized.

Paragraph (1)(*b*) — notice of renewal of suspension of Agreement

(3) If a notice of renewal of the suspension of the Agreement is published under paragraph (1)(*b*), sections 159.2 to 159.6 are rendered inoperative for the further period of up to three months set out in the notice.

Paragraph (1)(*c*) — suspension of part of Agreement

(4) If a notice of suspension of part of the Agreement is issued under paragraph (1)(*c*), those provisions of these Regulations relating to the application of the Agreement that are referred to in the notice are rendered inoperative for a period that shall be set out in the notice. All other

canadien par le truchement des médias d'information et du site Web du ministère;

*b*) un avis de continuation de la suspension de l'Accord prévoyant la période de suspension est publié conformément au paragraphe (6);

*c*) un avis de suspension partielle de l'Accord est délivré par le gouvernement du Canada et le gouvernement des États-Unis;

*d*) un avis de dénonciation de l'Accord est délivré par le gouvernement du Canada ou le gouvernement des États-Unis.

Alinéa (1)*a*) : avis de suspension de l'Accord

(2) Sous réserve du paragraphe (3), dans le cas où un avis de suspension de l'Accord est diffusé aux termes de l'alinéa (1)*a*), les articles 159.2 à 159.6 sont inopérants à compter du jour suivant la diffusion de l'avis, et ce pour la période d'au plus trois mois prévue dans l'avis.

Alinéa (1)*b*) : avis de continuation de la suspension de l'Accord

(3) Dans le cas où un avis de continuation de la suspension de l'Accord est publié aux termes de l'alinéa (1)*b*), les articles 159.2 à 159.6 sont inopérants pour la période supplémentaire d'au plus trois mois prévue dans l'avis.

Alinéa (1)*c*) : avis de suspension partielle ou totale de l'Accord

(4) Dans le cas où un avis de

provisions of these Regulations continue to apply.

Paragraph (1)(*d*) — termination of Agreement

(5) If a notice of termination of the Agreement is issued under paragraph (1)(*d*), sections 159.1 to 159.6 and this section cease to have effect on the day set out in the notice.

Publication requirement — *Canada Gazette*

(6) Any notice referred to in paragraph (1)(*b*), (*c*) or (*d*) shall be published in the *Canada Gazette*, Part I, not less than seven days before the day on which the renewal, suspension in part or termination provided for in the notice is effective.

suspension partielle de l'Accord est délivré aux termes de l'alinéa (1)*c*), les dispositions du présent règlement portant sur l'application de l'Accord qui sont mentionnées dans l'avis sont inopérantes pour la période qui y est prévue. Les autres dispositions du présent règlement continuent de s'appliquer.

Alinéa (1)*d*) : avis de dénonciation de l'Accord

(5) Dans le cas où un avis de dénonciation de l'Accord est délivré aux termes de l'alinéa (1)*d*), les articles 159.1 à 159.6 et le présent article cessent d'avoir effet à la date prévue dans l'avis.

Exigence de publication — *Gazette du Canada*

(6) Tout avis visé aux alinéas (1)*b*), *c*) ou *d*) est publié dans la *Gazette du Canada* Partie I au moins sept jours avant la date de prise d'effet de la mesure en cause.

**Refugee Convention, Article 33**

***Prohibition of expulsion or return ("refoulement")***

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or

***Convention et protocole relatifs au statut des réfugiers, Article 33***

***Défense d'expulsion et de refoulement***

1. Aucun des Etats Contractants n'expulsera ou ne refoulera, de quelque
manière que ce soit, un réfugié sur les frontières des territoires où sa vie ou sa liberté serait menacée en raison de sa race, de sa religion, de sa nationalité,

political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

de son appartenance à un certain groupe social ou de ses opinions politiques.

2. Le bénéfice de la présente disposition ne pourra toutefois être invoqué par
un réfugié qu'il y aura des raisons sérieuses de considérer comme un danger
pour la sécurité du pays où il se trouve ou qui, ayant été l'objet d'une condamnation
définitive pour un crime ou délit particulièrement grave, constitue une menace pour la communauté dudit pays.

**Convention against Torture**
**Article 3**

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

**Convention contre la torture**

**Article 3**

1. Aucun Etat partie n'expulsera, ne refoulera, ni n'extradera une personne vers un autre Etat où il y a des motifs sérieux de croire qu'elle risque d'être soumise à la torture.

2. Pour déterminer s'il y a de tels motifs, les autorités compétentes tiendront compte de toutes les considérations pertinentes, y compris, le cas échéant, de l'existence, dans l'Etat intéressé, d'un ensemble de violations systématiques des droits de l'homme, graves, flagrantes ou massives.