

**IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal for Ontario)**

BETWEEN:

**PIRATHEEPAN NADARAJAH, SURESH SRISKANDARAJAH
and MOHAMMAD MOMIN KHAWAJA**

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File No. 34009 / 34013 / 34103

**IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal for Ontario)**

BETWEEN:

**PIRATHEEPAN NADARAJAH, SURESH SRISKANDARAJAH
and MOHAMMAD MOMIN KHAWAJA**

APPELLANTS

- and -

**UNITED STATES OF AMERICA, MINISTER OF JUSTICE,
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INTERVENERS

**MEMORANDUM OF ARGUMENT OF THE INTERVENER
THE CANADIAN CIVIL LIBERTIES ASSOCIATION**

PART I – STATEMENT OF FACTS**Overview**

1. Pursuant to Justice Karakatsanis' Order dated April 20, 2012, the CCLA is granted leave to file one memorandum of argument in all three above-referenced appeals. The CCLA will address the constitutional questions posed by the Chief Justice, and the s. 6 and s.7 *Charter* issues arising in the context of extradition in both the Nadarajah and Sriskandarajah appeals.

2. At issue for this Honourable Court is consideration of the government's legislated response¹ to the "war on terror", in particular the relationship between ss.83.03, 83.18, and 83.21 of the *Criminal Code*, and s.2 of the *Charter*. These provisions reference certain enumerated kinds of prohibited criminal behavior, and further criminalize such conduct when undertaken for a prohibited purpose, that is for ideological, political and religious reasons. However, such conduct may be perfectly legitimate and as such, be conduct that ought not to be proscribed. The legislation creates the real possibility of attaching criminal liability to and stigmatizing certain belief systems and associations, with no discernable benefit to public safety and security, but with a corresponding detriment to the free exchange of ideas. A chilling effect will ensue whereby the rational actor, who harbors beliefs that question the established orders including the political and economic order, will be forced to carefully select how and to whom these beliefs are spread. Such restrictions upon fundamental freedoms are incompatible with the laws and values of Canada, a free and democratic society.

3. Further, s.83.18, the participation provision, does not satisfy minimal s.7 *Charter* requirements in that it fails to require a proximate relationship between intention to effect a prohibited outcome and the prohibited outcome itself. This is apparent when one considers that the provision criminalizes intention with no corresponding requirement that there be a connection to a prohibited outcome, namely terrorist activity². This provision is not sufficiently narrowly prescribed to capture those whose conduct is *actually* a threat to the state, rather the provision captures those whose conduct *may or may not* be a threat to the state. Given the potential criminal liability and actual stigma associated with this provision, (i.e. being labeled a "terrorist"), the *Charter* demands a closer connection between intention and the prohibited conduct to satisfy constitutional fault requirements.

¹ *Criminal Code*, RSC 1985, c C-46, Part II.1, ss. 83.01, 83.03, 83.18, 83.21

² As defined in s.83.01(1) *Criminal Code*.

4. Turning to the extradition cases, the CCLA respectfully submits that where the facts giving rise to the request for extradition occurred solely within Canada³ s.6 of the *Charter* properly understood serves to preclude extradition to a foreign state for prosecution. To the extent that it is necessary, the CCLA respectfully submits that this Honourable Court ought to reconsider its decision in *Cotroni*⁴. Further, the CCLA submits that, as a constitutional matter, the Minister owes a duty of fairness in exercising discretion regarding the surrender decision, pursuant to s.7 of the *Charter*. At a minimum, this includes providing disclosure of the material available to the Minister, whether or not in their direct possession, including the *Cotroni* assessment. Such disclosure would provide the infrastructure necessary pursuant to s.7, to allow for meaningful submissions by the person sought on the question of surrender.

³ This relates to the Nadarajah (file no. 34009) and Sriskandarajah (file no. 34013) appeals.

⁴ *R. v Cotroni*, [1989] S.C.J. No. 56

PART II – QUESTIONS IN ISSUE

5. The CCLA intervenes on the following issues stated by the Chief Justice, and summarized below:
- (a) Do ss.83.03, 83.18, 83.19 or 83.21 of the *Criminal Code*, which incorporate the definition of “terrorist activity” in s. 83.01(1), infringe s. 2 of the *Charter*?
 - (b) Does s.83.18 of the *Criminal Code*, which incorporates the definition of “terrorist activity” in s. 83.01(1), infringe s.7 of the *Charter*?
6. With respect to the issues raised in the Nadarajah and Sriskandarajah appeals:
- (a) Did the Court of Appeal err in failing to find that the Minister denied the Appellants procedural fairness?
 - (b) Did the Court of Appeal err in concluding that the Minister’s decision, that surrender would not unjustifiably limit the Appellant’s s.6(1) *Charter* rights, was reasonable?

PART III – STATEMENT OF ARGUMENT**A. Do ss.83.03, 83.18, 83.19 or 83.21 of the *Criminal Code*, which incorporate the definition of “terrorist activity” in s. 83.01(1), infringe s. 2 of the *Charter*?⁵**

7. The CCLA relies upon the submissions of the BCCLA with respect to the s.2 *Charter* infringement.

8. With respect to remedy the CCLA submits that the only proper and just remedy is to strike down s.83.01(1) and the provisions which incorporate the definition, namely ss.83.03, 83.18, 83.19 and 83.21. The essence of these provisions is the prohibited motivation, namely to carry out activities for a political, religious or ideological purpose. Parliament’s purpose was to pass legislation to deal with terrorist acts, which the legislature sought to mark by the actors’ motivations distinguishing it from any other crime⁶ despite the fact that virtually all the prohibited activities constitute crimes under the *Criminal Code* quite apart from the prohibited purpose. Removing any reference to the prohibited motivation is effectively legislating a brand new provision that Parliament specifically rejected⁷. In such circumstances, the Court’s role is to strike the legislation. Simply put, the prohibited motivation clause is unconstitutional and so the aforementioned implementing provisions must be struck.

B. Does s.83.18 of the *Criminal Code*, which incorporates the definition of “terrorist activity” in s. 83.01(1), infringe s.7 of the *Charter*?

9. The participation provision of the *Code*, s.83.18, is unconstitutional because it fails to provide a sufficient nexus between the prohibited purpose (intention) and the prohibited act (enabling a terrorist activity). An actor is criminally liable regardless of the impact of their conduct, for example when solely providing financial contribution to

⁵ See the Chief Justice’s Order stating the Constitutional Questions, dated November 8, 2011.

⁶ See *R v. Khawaja*, [2006] O.J. No. 4245 (ONCA) at ¶66

⁷ See the submissions of Irwin Cotler before the House Standing Committee recommending that this prohibited motivation provision be removed, these submissions can be contained in “Terrorism, Security and Rights: The Dilemma of Democracies” (2002) 14 Nat’l J. Const. L. 13 at 35 - 36

humanitarian efforts undertaken by a group which has been branded as a “terrorist group”.

10. In the law of attempt, it is possible to be convicted even if the attempted crime could not be undertaken. But there exists a substantive requirement that there be a connection between the overt acts and the prohibited result. Namely, the overt acts must go beyond mere preparation to constitute an attempt, this serves the doctrinal purpose of connecting the overt acts with the prohibited result. It is a question of proximity, namely the prohibited intent is present as is the actus reus, albeit in an incomplete form, but sufficient for liability as it is beyond mere preparation.

11. The participation provisions at issue fail to provide any form of adequate proximity requirement to satisfy s.7 of the *Charter*. Under these provisions, a contribution to a charity run by a terrorist group is insufficiently connected to the purpose of enhancing the ability to facilitate a terrorist activity. In other words, the innocent effect of donating to a legitimate charity allegedly connected to a terrorist group is so far removed from enhancing terrorist activity, that to impose criminal liability in such circumstances is to impose criminal liability where it should not be imposed.⁸

C. Did the Court of Appeal err in failing to find that the Minister denied the Appellants, Nadarajah and Sriskandarajah, procedural fairness?

12. The process of extraditing a person from Canada to another State for criminal prosecution, including the Minister’s decision on whether to surrender, engages s.7 of the *Charter*. This is so because the liberty interest of the subject is in peril.⁹ Consequently, as the State and its Ministers are bound by the Constitution, they must carry out their functions in accordance with the principles of fundamental justice.

⁸ For a related discussion on liability for an attempt to commit a crime which was impossible to commit please see *United States v. Dynar* [1997] 2 S.C.R. 462 at ¶74 and for a discussion on the importance of proximity please see *R. v. Déry*, [2006] 2 S.C.R. 669 at paras. 37, 47-50.

⁹ See *Németh v. Canada (Justice)*, 2010 SCC 56, at para. 70 and also in albeit in a national security context *Charkaoui v. Minister of Citizenship and Immigration and Minister of Public Safety and Emergency Preparedness*, [2007] 1 S.C.R. 350 at ¶ 18

13. A core principle of fundamental justice is the right to know the case to meet, and to be given an opportunity to meet that case.¹⁰ This applies at the judicial extradition hearing, *and* this principle applies at the Ministerial stage because, ultimately, the fate of the person sought is in the Ministers' hands. It is the Minister who retains power to refuse extradition, following the extradition judge's order for committal. Given that the Ministers' decision determines the liberty of the person sought, that person must be afforded the opportunity to make meaningful submissions to the Minister. Accordingly, a legal infrastructure must be in place, that affords the person sought, disclosure to the material that the Minister has access to, including the *Cotroni* analysis.

14. While it is accepted that s.7 *Charter* rights can be protected by a variety of means to suit the particular context, where a citizen is about to be turned over to a foreign State, our Constitution must afford the protection of disclosure of information to allow for meaningful participation in the process by which the person's liberty will be determined.

D. Did the Court of Appeal err in concluding that the Minister's decision, that surrender would not unjustifiably limit the Appellant's s.6(1) Charter rights, was reasonable?

15. The CCLA acknowledges that in the correct circumstances, extradition can be a justifiable s.1 limit upon the s.6 *Charter* right. However, the CCLA submits that s.6(1) of the *Charter* has to be read in conjunction with all other rights of the *Charter*. In particular the "right to remain" in Canada is a core mobility right and freedom, constitutionally guaranteed to residents of Canada.

16. The content of the right to remain in Canada minimally includes an expectation that a legal resident can rely upon Canadian constitutional and legal structures for governance and protection. The CCLA submits that where alleged criminal activity, and alleged impact of criminal activity is not found in the requesting State, but within

¹⁰ The jurisprudence is replete with support for this principle but one recent example in the national security context is *Charkaoui v. Minister of Citizenship and Immigration and Minister of Public Safety and Emergency Preparedness* [2007] 1 S.C.R. 350 at ¶ 53 – 65.

Canada, then pursuant to s.6 of the Charter, there is an expectation and right to be tried by Canadian courts pursuant to Canadian laws and legal protections.

17. None of this is to derogate from the fact that extradition can be a reasonable limit on s.6(1) *Charter* rights, when the justifications of s.1 are met, unlike in the cases at bar.

18. In *Cotroni*¹¹ this Honourable Court dealt with a situation where there was a transnational crime on the facts.¹² In that circumstance, extradition was a reasonable limit on the right to remain in Canada. Where however the entirety of the crime takes place within Canada, and there is no harm contemplated in the requesting state, different considerations apply such that extradition should be barred. The CCLA respectfully submits that in *Cotroni* in so far as the conception of the right to remain was somewhat limited in scope in that decision due largely to the facts of the case.

19. A broader understanding of the right to remain follows from the benefits and responsibilities of naturalization, one of which is being governed by and being able to seek the protection of Canada's laws and constitution. When the State alleges criminal conduct in Canada, by its adoption of an extradition partners' factual rendering of a crime, the Citizen has a constitutional right to remain in Canada to face the allegation in a Canadian court and not be subject to an "out sourced" criminal prosecution. There is no danger of impunity as Canada is free to prosecute and punish such alleged criminal activity which has occurred solely within Canadian jurisdiction.¹³ In fact in keeping with our international obligations Canada ought to investigate and prosecute alleged terrorists who conduct their affairs within Canada.¹⁴

¹¹ *Supra* note 4.

¹² *Supra* note 4 at ¶ 46 per La Forest J.

¹³ See *United States of America v. Khadr*, [2011] O.J. No. 2060 (ONCA)

¹⁴ Also see United Nations Resolution 1373, S/RES, 1373 (September 28, 2001)

20. In the *United Kingdom* by operation of Article 8 of the European Convention on Human Rights¹⁵, persons sought can resist extradition where the conduct took place entirely within the U.K.¹⁶ We respectfully ask the Court to consider the example of a requesting State exercising “exorbitant jurisdiction”¹⁷; in that circumstance *The Baker Report* concludes “where it appears that the request has such a tenuous connection to the requesting State, so that it amounts to the exercise of exorbitant jurisdiction, the court is able to take this into account under the human rights bars in considering Article 8 of the Human Rights Convention and can refuse the request on this basis.”¹⁸

21. Similarly, it is respectfully submitted that the right to remain within Canada serves as a protective shield against extradition of citizens where the alleged offence takes place within Canada. To borrow the U.K. phrase, where a foreign state criminalizes conduct which takes place entirely within Canada, that amounts to exorbitant jurisdiction, Canadians ought to not to be subject to that foreign process. They have the right to remain in Canada.

¹⁵ Article 8 provides:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

¹⁶ While loosely analogous to s.6(1) of the *Charter*, Article 8 employs different language and speaks to different considerations it has been interpreted as providing the protection from extradition where the offence took place in the U.K. see *R (Birmingham) v. Director of the Serious Fraud Office* [2007] QB 727 at ¶121 where Laws L.J. noted that the possibility of a trial in the U.K. might tip “the balance of judgment in favour of a conclusion that the defendants’ extradition would amount to a disproportionate interference with his Article 8 rights.” In the result the persons sought were extradited to the United States.

¹⁷ A term used by the Baker report to describe extradition to a State to which the offence had only a peripheral if any connection, see *The Baker Report: A Review of the United Kingdom’s Extradition Arrangements* available online at <http://www.homeoffice.gov.uk> at ¶6.44 – 6.46

¹⁸ *ibid* at ¶6.51, see more generally the topic of exorbitant jurisdiction at ¶6.44 – 6.51. While *The Baker Report* rejected a forum bar to extradition, they accepted that Article 8 of ECHR *could* fund a refusal to extradite. Moreover, the forum bar in question was analytically distinct from the operation of human rights laws which may serve to bar an extradition.

PART IV – SUBMISSIONS ON COSTS

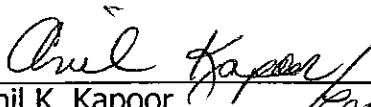
22. The CCLA does not seek costs on this Appeal and asks that no costs be awarded against it.


PART V – ORDERS SOUGHT

23. The CCLA respectfully seeks leave to present oral argument at the hearing of the appeal and takes no position on the outcome of the Appeals.

ALL OF WHICH is respectfully submitted.

Dated at Toronto, Ontario this 23rd day of May, 2012.


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PART VI – TABLE OF AUTHORITIES

	<u>Paragraph(s)</u>
<i><u>Jurisprudence</u></i>	
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PIRATHEEPAN NADARAJAH,
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MOHAMMAD MOMIN KHAWAJA and

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USA, MINISTER OF JUSTICE, AG
OF CANADA and HER MAJESTY
THE QUEEN

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AG OF ONTARIO, CCLA,
BCCLA, CANADIAN COALITION
AGAINST TERROR et al

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**MEMORANDUM OF ARGUMENT
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