SCC File No. 30762

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

BETWEEN:

ADIL CHARKAOUI

Appellant

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION, et al.

Respondents

- and -

CANADIAN ARAB FEDERATION; AMNESTY INTERNATIONAL; ATTORNEY GENERAL OF ONTARIO; CANADIAN BAR ASSOCIATION; CANADIAN COUNCIL ON AMERICAN-ISLAMIC RELATIONS AND CANADIAN MUSLIM CIVIL LIBERTIES ASSOCIATION; UNIVERSITY OF TORONTO, FACULTY OF LAW - INTERNATIONAL HUMAN RIGHTS CLINIC AND HUMAN RIGHTS WATCH; CANADIAN CIVIL LIBERTIES ASSOCIATION; CRIMINAL LAWYERS' ASSOCIATION (ONTARIO); CANADIAN COUNCIL FOR REFUGEES, AFRICAN CANADIAN LEGAL CLINIC, INTERNATIONAL CIVIL LIBERTIES MONITORING GROUP AND NATIONAL ANTI-RACISM COUNCIL OF CANADA; FEDERATION OF LAW SOCIETIES OF CANADA; BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Interveners

FACTUM OF THE OF THE INTERVENER
CANADIAN ARAB FEDERATION
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

R. DOUGLAS ELLIOTT **GABRIEL R. FAHEL** **ROY ELLIOTT KIM O'CONNOR LLP**	**MARIE-FRANCE MAJOR** **LANG MICHENER**

10 Bay Street, Suite 1400 Toronto, Ontario M5J 2R8 Tel: (416) 362-1989 Fax: (416) 362-6204 **Counsel for the Intervener, Canadian Arab Federation**	300 - 50 O'Connor Street Ottawa, Ontario K1P 6L2 Tel: (613) 232-7171 Fax: (613) 231-3191 **Agent for the Intervener, Canadian Arab Federation**
JOHANNE DOYON **DOYON MORIN** 6337, rue Saint-Denis Montréal, Quebec H2S 2R8 Tel: (514) 277-4077 Fax: (514) 277-2019 **Counsel for the Appellant, Adil Charkaoui**	**YAVAR HAMEED** **BARRISTER & SOLICITOR** 43 Florence Street Ottawa, Ontario K2P 0W6 Tel: (613) 232-2688 Fax: (613) 232-2680 **Agent for the Appellant, Adil Charkaoui**
BERNARD LAPRADE **ATTORNEY GENERAL OF CANADA** Department of Justice 284, rue Wellington Ottawa, Ontario K1A 0H8 Tel: (613) 957-4761 Fax: (613) 941-7865 **Counsel for the Respondents, Minister of Citizenship and Immigration, and Minister of Public Safety and Emergency Preparedness**	**BERNARD LAPRADE** **ATTORNEY GENERAL OF CANADA** Department of Justice 284, rue Wellington Ottawa, Ontario K1A 0H8 Tel: (613) 957-4761 Fax: (613) 941-7865 **Agent for the Respondents, Minister of Citizenship and Immigration, and Minister of Public Safety and Emergency Preparedness**
JOHN CORELLI **ATTORNEY GENERAL OF ONTARIO** 720 Bay Street, 10th Floor Toronto, Ontario M5G 2K1 Tel: (416) 326-2618 Fax: (414) 326-4656	**ROBERT E. HOUSTON, Q.C.** **BURKE-ROBERTSON** 70 Gloucester Street Ottawa, Ontario K2P 0A2 Tel: (613) 236-9665 Fax: (613) 235-4430

Counsel for the Intervener, **Attorney General of Ontario**	**Agent for the Intervener,** **Attorney General of Ontario**
LORNE WALDMAN **WALDMAN & ASSOCIATES** 281 Eglinton Avenue East Toronto, Ontario M4P 1L3 Tel: (416) 482-6501 Fax: (416) 489-9618	**HENRY S. BROWN, Q.C.** **GOWLING LAFLEUR HENDERSON** 2600 - 160 Elgin StP.O. Box 466, Stn "D" Ottawa, Ontario K1P 1C3 Tel: (613) 233-1781 Fax: (613) 563-9869
Counsel for the Intervener, **Canadian Bar Association**	**Agent for the Intervener,** **Canadian Bar Association**
DAVID BAKER **BAKERLAW** 672 Dupont Street Suite 400 Toronto, Ontario M6G 1Z6 Tel: (416) 533-0040 Fax: (416) 533-0050	**MICHELLE FLAHERTY** **SACK GOLDBLATT MITCHELL** 30 Metcalfe Street, Suite 500 Ottawa, Ontario K1P 5L4 Tel: (613) 235-5327 Fax: (613) 235-3041
Counsel for the Interveners, **Canadian Council on American-Islamic Relations and Canadian Muslim Civil Liberties Association**	**Agent for the Interveners,** **Canadian Council on American-Islamic Relations and Canadian Muslim Civil Liberties Association**
ROBERT A. CENTA **PALIARE, ROLAND, ROSENBERG, ROTHSTEIN** Suite 501, 250 University Avenue Toronto, Ontario M5H 3E5 Tel: (416) 646-4314 Fax: (416) 646-4301	**BRIAN A. CRANE, Q.C.** **GOWLING LAFLEUR HENDERSON LLP** 2600 - 160 Elgin St. Ottawa, Ontario K1P 1C3 Tel: (613) 786-0107 Fax: (613) 788-3500
Counsel for the Interveners, **University of Toronto, Faculty of Law - International Human Rights Clinic and Human Rights Watch**	**Agent for the Interveners,** **University of Toronto, Faculty of Law - International Human Rights Clinic and Human Rights Watch**
EDWARD L. GREENSPAN, Q.C.	**RICHARD W. AUGER**

GREENSPAN, WHITE 144 King Street East Toronto, Ontario M5C 1G8 Tel: (416) 366-3961 Fax: (416) 366-7994 **Counsel for the Intervener,** **Canadian Civil Liberties Association**	**AUGER, HOLLINGSWORTH** 200 Elgin Street, Suite 600 Ottawa, Ontario K2P 1L5 Tel: (613) 233-4529 Fax: (613) 237-0071 **Agent for the Intervener,** **Canadian Civil Liberties Association**
MICHAEL CODE **SACK GOLDBLATT MITCHELL** 1130 - 20 Dundas Street West Toronto, Ontario M5G 2G8 Tel: (416) 977-6070 Fax: (416) 591-7333 **Counsel for the Intervener,** **Criminal Lawyers' Association (Ontario)**	**BRIAN A. CRANE, Q.C.** **GOWLING LAFLEUR HENDERSON** 2600 - 160 Elgin St Ottawa, Ontario K1P 1C3 Tel: (613) 786-0107 Fax: (613) 788-3500 **Agent for the Interveners,** **Criminal Lawyers' Association (Ontario)**
MARIE CHEN **AFRICAN CANADIAN LEGAL CLINIC** 111 Richmond Street West, Suite 503 Toronto, Ontario M5H 2G4 Tel: (416) 214-4747 Fax: (416) 214-4748 **Counsel for the Interveners,** **Canadian Council for Refugees, African Canadian Legal Clinic, International Civil Liberties Monitoring Group and National Anti-Racism Council of Canada**	**MICHAEL BOSSIN** **COMMUNITY LEGAL SERVICES-OTTAWA CARLETON** 1 Nicholas Street, Suite 422 Ottawa, Ontario K1N 7B7 Tel: (613) 241-7008 Fax: (613) 241-8680 **Agent for the Interveners,** **Canadian Council for Refugees, African Canadian Legal Clinic, International Civil Liberties Monitoring Group and National Anti-Racism Council of Canada**
NEIL FINKELSTEIN **BLAKE, CASSELS & GRAYDON** P.O. Box 25, Commerce Court West 199 Bay Street Toronto, Ontario M5L 1A9	**BRIAN A. CRANE, Q.C.** **GOWLING LAFLEUR HENDERSON** 2600 - 160 Elgin StP.O. Box 466, Stn "D" Ottawa, Ontario K1P 1C3

Tel: (416) 863-2400 Fax: (416) 863-2653 **Counsel for the Interveners,** **Federation of Law Societies of Canada**	Tel: (613) 786-0107 Fax: (613) 788-3500 **Agent for the Interveners,** **Federation of Law Societies of Canada**
MICHAEL BOSSIN **COMMUNITY LEGAL SERVICES-OTTAWA CARLETON** 1 Nicholas Street, Suite 422 Ottawa, Ontario K1N 7B7 Tel: (613) 241-7008 Fax: (613) 241-8680 **Counsel for the Intervener,** **Amnesty International**	**MICHAEL BOSSIN** **COMMUNITY LEGAL SERVICES-OTTAWA CARLETON** 1 Nicholas Street, Suite 422 Ottawa, Ontario K1N 7B7 Tel: (613) 241-7008 Fax: (613) 241-8680 **Agent for the Intervener,** **Amnesty International**
GREGORY P. DELBIGIO **BARRISTER & SOLICITOR** 1720 - 355 Burrard Street Vancouver, British Columbia V6C 2G8 Tel: (604) 687-9831 Fax: (604) 687-7089 **Counsel for the Intervener,** **British Columbia Civil Liberties Association**	**HENRY S. BROWN, Q.C.** **GOWLING LAFLEUR HENDERSON** 2600 - 160 Elgin St Ottawa, Ontario K1P 1C3 Tel: (613) 233-1781 Fax: (613) 563-9869 **Agent for the Intervener,** **British Columbia Civil Liberties Association**

CAF
(Chodcaaui).

Table of Contents

PAGE

"Those who cannot remember the past are condemned to repeat it."

George Santayana.

PART I – STATEMENT OF FACTS

Overview

1. The intervener the Canadian Arab Federation (CAF) is the largest non-profit organization representing the interests of Arabs in Canada, a diverse community of Christians, Muslims and Druze whose ethnic heritages can be traced back to 22 Arab states from Mauritania to Oman. More than half of the Arab community in Canada is Christian, but since the events of September 11, 2001 there has been a "Muslimification of Arabs" and an "Arabification of Muslims".[1]

2. CAF was granted intervener status by Order of Justice Lebel on May 4, 2006.

3. CAF takes no position on the ajudicative facts of Mr. Charkaoui's individual case.

4. The intervention of CAF is limited to commenting on the application of section 15 of the *Charter of Rights and Freedoms*. The concerns of CAF centre on the potential or actual unequal application of Canada's anti-terrorism laws against Arabs in Canada, including the technique of deploying Canada's immigration laws against perceived terrorists.

5. There is nothing improper about Canada enacting valid legislation to protect our country and its inhabitants from the threat of terrorism. However, Canadians should not have to sacrifice the fundamental values

---

[1] R. Bahdi, "No exit: Racial profiling and Canada's war against terrorism" (2003) 41 Osgoode Hall L.J. 293 at 296 [Bahdi].

enshrined in the supreme law of the land -- the *Charter* -- in order to achieve those goals.

6. Moreover, the war on terror at its heart is a battle of ideas. In the current context, in particular, from the perspective of Western states, it is a battle for the hearts and minds of the overwhelming majority of Arabs and Muslims who reject terrorism. Resort to unjustifiably draconian measures will defeat this desired goal by bringing Canada, its commitment to democratic values and its judiciary into disrepute.

7. In times of actual or perceived crisis, there is a tendency to populist authoritarianism, and to scapegoating of unpopular minorities. Regrettably, in the past, Canadians have resorted to racist laws and policies ostensibly to achieve laudable social goals such as the protection of national security. Canada's immigration laws and practices have not been immune from either systemic racism or "scapegoating". In the pre-*Charter* era, even this Court sanctioned racist laws and practices by resort to laudable and ostensibly "neutral" legal theories and public policies.

8. Racism cannot be justified by concerns about terrorism. Arabs have historically been stereotyped as bloodthirsty and uncivilized in Western culture, and in current popular culture, as terrorists with no respect for human life.[2] It was foreseeable that Arabs, especially those who are not yet Canadian citizens, would be adversely affected by this law. However, no safeguards exist to prevent or even monitor such adverse effects. There is some evidence to suggest that racial profiling is occurring, and no assurance that it is not.[3]

---

[2] Bahdi at 305; S. M. Akram & M. Karmely, "Immigration and Constitutional Consequences of Post-9/11 Policies involving Arabs and Muslims in the United States: Is Alienage a Distinction without a Difference?" (2005) 38 U.C. Davis Law Review 609 at 304-306 [Akram].
[3] Bahdi.

9. The legislation in issue creates a system without the traditional safeguards of an open and adversarial process, with clear rules for the admissibility and reliability of evidence, and where the object of state action knows the case he or she must meet. Although some attenuation of the open process may be justified in the interests of national security, given the risk of systemic racism covertly undermining the process and the need for the process to enjoy the confidence of the community, such restrictions must be minimized to be in compliance with the *Charter*.

10. Only the Courts can serve as guardians of the rights of vulnerable minorities and individuals. Blind deference to assertions of national security and noble intentions by the executive branch would amount to an abdication of the judicial role, and support for incipient authoritarianism over true democracy.

11. The legislative regime adversely affects permanent residents in general, and Arabs in particular. The adverse effect is not demonstrably justified under section 1, as Parliament might have achieved its goals through more balanced legislation. The legislation should be struck with a short suspension with guidance from this Court on the minimum content for *Charter* compliant legislation.

PART II – STATEMENT OF ISSUES

12. This appeal concerns whether the provisions of the *Immigration and Refugee Protection Act* infringe the *Charter of Rights and Freedoms*.

PART III – STATEMENT OF ARGUMENT

Section 15

13. All legislation in Canada is subject to the *Charter*, including section 15. The fact that the legislation in issue expressly invokes the *Charter* does

not trigger the *Charter's* applicability.[4] However, it reinforces Parliament's desire to create a Charter compliant regime, as opposed to invoking section 33 to shield the law from *Charter* scrutiny.

14. Section 15 considerations may arise in four possible circumstances:

(a) where the law in issue is impugned as it directly discriminates against a protected group;
(b) where the law in issue is impugned as it indirectly discriminates by failing to take into account actual disadvantage of a protected group;[5]
(c) where the law itself neither directly nor indirectly discriminates, but is being administered in a discriminatory fashion;[6] and
(d) as an interpretive lens to guide the proper interpretation of other sections of the Charter.[7]

15. At the section 15 stages of the analysis, it is important not to elide the distinction with section 1. Considerations of balancing state or collective interests do not enter into this part of the inquiry, but are considered under section 1.[8]

The Purposive and Contextual Analysis of Section 15

16. The section 15 analysis is purposive and contextual. The object is to enhance human dignity and to achieve substantive equality in light of the actual circumstances of the rights claimants.[9]

---

[4] *Immigration and Refugee Protection Act* 2001, c. 27, section 3 (3) (d).
[5] *Eldridge* v. *British Columbia (Attorney General)* [1997] 3 S.C.R. 624 [*Eldridge*]; *Vriend* v. *Alberta* [1998] 1 S.C.R. 493.
[6] *Little Sisters Book and Art Emporium* v. *Canada (Minister of Justice)* [2000] 2 S.C.R. 1120; *Multani v. Commission scolaire Marguerite-Bourgeoys* [2006] S.C.J. No. 6., although decided on section 2(a) grounds.
[7] *R. v. Big M Drug Mart* [1985] 1 S.C.R. 295 [*Big M*]; *New Brunswick (Minister of Health and Community Services)* v. *J.G.* [1999] 3 S.C.R. 46 [*J.G.*].
[8] *Lavoie* v. *Canada* [2002] 1 S.C.R. 769 at para. 59.
[9] *Law Society British Columbia* v. *Andrews* [1989] 1 S.C.R. 143 [*Andrews*].

17. This legislation exists in historical, social and political context that must be considered.[10]

18. In establishing a framework, Canada and Ontario invite this Court to consider almost exclusively the terrorist threat to Canada. This is important context, but it is not the only context. To suggest otherwise is to attempt to stifle debate by implying, as President Bush once asserted, that all those who question the actions of the executive are on the side of the terrorists.[11]

19. CAF invites this Court to also consider the context of the nature and history of racism in Canada, and how our laws have been enlisted to support racism in our society. It will be seen at once that such laws have always been explained based on broader public policy concerns, including national security and Canada's need to control entry to this country. Moreover, in contemporary Canada, racism tends to operate "below the radar" at the subconscious level.[12] Next, it is important to examine the particular situation of Arabs in Canada as a "community at risk" in a post 9/11 environment in order to identify the "disadvantage" for purposes of the first branch of the *Law* test. This analysis must take place in the light of our society's unwavering commitment to the values of equality, multiculturalism, to protecting communities at risk and fostering harmonious social relations.

Racism and the law in Canada

---

[10] *Big M* at paras. 117-124; *Eldridge* at para. 55.
[11] S.J. Toope, "Fallout from '9-11': Will a security culture undermine human rights?" (2002) 65 Sask. L. Rev. 281 – 298 at para. 19 [Toope].
[12] [1998] 1 S.C.R. 1128 at para. 22 [*Williams*].

20. Although Canada has a long tradition of respect for minorities that was an unwritten constitutional principle prior to the enactment of section 15, our country has often fallen short of the ideal of equality.[13]

21. Racism is an ancient and persistent social problem in Canada. Racism has at times been systemic, and supported by our statutes, by those charged with administering our statutes, and sadly, even by our courts.[14]

22. Racist laws have frequently been politically and socially justified at the time based on laudable and racially neutral social concerns. Laws that forbade Chinese employers to employ white women were said to be necessary to protect both vulnerable women and public morality.[15] The practice of racial segregation was at times in the past upheld by courts, including this Court, based on theories of property rights, public order, freedom of choice and free enterprise.[16]

23. Canada's immigration laws have not been immune from racism. For example, Chinese immigrants to Canada were targets of discrimination in the past. Chinese immigration to Canada was completely barred for many years. Eventually the complete bar was replaced with a deterrent in the form of the head tax.[17] Canada was not alone in its discriminatory treatment of Chinese immigrants, as its sister dominions have similarly

---

[13] B. McLachlin, "Racism and the law: The Canadian experience" (2002) 1 J.L. & Equality. [McLachlin]
[14] McLachlin at 7 – 24; C. Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900-1950* (Toronto: The Osgoode Society for Canadian Legal History and University of Toronto Press, 1999) [Backhouse]; J.W.St.G. Walker, *Reviews of "Race," Rights and the Law in the Supreme Court of Canada* (Toronto: The Osgoode Society for Canadian Legal History and Wilfred Laurier University Press, 1997) [Walker].
[15] McLachlin; Backhouse; *R. v. Quong-Wing* (1914), 49 S.C.R. 440.
[16] McLachlin; Backhouse; *Christie v. York Corp.* [1940] S.C.R. 139.
[17] McLachlin; *Mack v. Canada (Attorney General)* (2002) 60 O.R. (3d) 737.

shameful histories. There was a consensus among our sister nations at the time that such measures were justified in the public interest.[18]

24. Even in the absence of direct discrimination, racism has tainted the discretionary enforcement of Canada's immigration laws. Perhaps one of the most notorious examples was our nation's disgraceful refusal to admit Jewish refugees from Hitler's holocaust, secretively refused entry with the infamous observation that "none is too many."[19]

25. Moreover, in times of difficulty our nation has not been immune from the tendency to scapegoat and to demonize minorities who are perceived to be a threat, particularly those who share group characteristics with the "enemy." In the Second World War, facially neutral legislation[20] was used to unfairly curtail the rights of Canadians of Japanese origin.[21] Guilt or public danger was presumed based on membership in a group, and the social consensus supported drastic measures to protect the public from the perceived danger.[22]

26. Similarly, during the Cold War, homosexuals were barred from immigrating to Canada based on the perception that they were allied with or vulnerable to recruitment to Soviet espionage, and were thus a threat to national security.[23]

27. The regime in issue was enacted in this historic context of systemic racism and the occasional use of executive power to enforce racism or social

---

[18] P.M. Smith, *A Concise History of New Zealand* (Melbourne: Cambridge University Press, 2005) at p. 82.
[19] I.M. Abella and H. Troper, *None is too many: Canada and the Jews of Europe, 1933-1948* (Toronto: Lester and Orpen Dennys, 1982).
[20] *War Measures Act*, 1914, c.2.
[21] See for *e.g.*, B. Baines, "When is Past Discrimination Un/Constitutional?" (2002) 65 Sask.. L.R. 573.
[22] McLachlin; Bahdi; Toope.
[23] G. Kinsman, *The Regulation of Desire: Homo and Hetero Sexualities* (Montreal: Black Rose Books, 1996) at p. 170.

prejudice about perceived threats to society by racialized groups and other unpopular minorities. As Professor Roach has noted, "[I]t is important that we be conscious of past overreactions in times of crisis. Historical analogies can help provide a sense of perspective in times of crisis and a counter-narrative to the powerful narrative of victimization and fear that resulted from September 11."[24] Racial profiling fuels the conviction that Arabs and Muslims represent the dangerous foreigner within.[25]

28. Shortly after the enactment of the legislation, the events of September 11, 2001 occurred. Canada responded with the quick enactment of anti-terrorism legislation. Despite the risk to Western nations from homegrown terrorists, Canada and other Western nations became focused on the threat posed by foreign nationals especially those from Arab states. It is a notorious fact that Arabs and Muslims throughout the Western world immediately fell under a cloud of suspicion as "potential terrorists" that has endured since that time.[26]

29. It would be apparent to any objective and well-informed lawmaker that Arabs would be likely the victims of stereotyping and selective enforcement of facially neutral laws. Although the Maher Arar case demonstrates that even Canadian citizenship is no guarantee against human rights violations, it was foreseeable that Arabs who were not yet Canadian citizens would be particularly vulnerable. However, Canada did not enact any safeguards in the legislation or regulations to guard against the probability of those adverse effects. There is also no evidence of any administrative measures taken to guard against racial profiling, such as cultural sensitivity training.

---

[24] K. Roach, "Did September 11 Change Everything? Struggling to Preserve Canadian Values in the Face of Terrorism," (2002) 47 McGill L.J. 893 at 942 [Roach] .
[25] Bahdi.
[26] Bahdi.

30. Our antipathy to secret processes is well founded based on the long history of abuses by the executive branch of government of such secret tribunals, such as those of the Court of Star Chamber.[27] As Justice Jackson observed, "the plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome and the corrupt to play the role of informer undetected and uncorrected."[28] Professor Toope notes how a secret inquisitorial process used in response to the Gouzenko affair implicated two Justices of this Honourable Court in a report that smeared the names of a number of persons as traitors who were subsequently acquitted of such charges.[29]

31. Secret processes are particularly dangerous where there is a potential for racism to contaminate the fairness of proceedings. As this court observed in *R. v. Williams,*[30] racism is a pernicious, often invisible and even subconscious force that can distort justice in the absence of appropriate procedural safeguards. Racism thrives in secrecy. In *Williams* Justice McLachlin (as she then was) noted:

> Racial prejudice and its effects are as invasive and elusive as they are corrosive. We should not assume that instructions from the judge or other safeguards will eliminate biases that may be deeply ingrained in the subconscious psyches of jurors. Rather, we should acknowledge the destructive potential of subconscious racial prejudice by recognizing that the post-jury selection safeguards may not suffice. Where doubts are raised, the better policy is to err on the side of caution and permit prejudices to be examined. Only then can we know with any certainty whether they exist and whether they can be set aside or not. It is better to risk allowing what are in fact unnecessary challenges, than to risk prohibiting challenges which are necessary.[31]

---

[27] Roach at 933.
[28] *Knauff v. Shaugnessy* (1950) 338 U.S. 537 (dissent).
[29] R. Whitaker, "Keeping up with the Neighbours? Canadian Responses to 9/11 in Historical and Comparative Context" (2003) 41 Osgoode Hall L.J. 241 at 243-248.
[30] *R. v. Williams* [1998] 1 S.C.R. 1128.
[31] *Williams* at para. 22.

32. In the context of the "war on terrorism", the racial profiling debate centers on whether or not race should substitute for real knowledge about an individual's connection to, or propensity for, terrorist activity.[32] The substitution of race in place of facts or real knowledge is problematic because it merges with long-standing and deeply held stereotypes about Arabs and Muslims. These threaten to warp rational decision making because of a "failure to appreciate that racial profiling can be a subconscious factor impacting on the exercise of a discretionary power in a multicultural society."[33]

33. Section 15 guarantees equality to all individuals in Canada, including Arabs and Muslims, as well as those "appearing" to be Arab or Muslim.

34. The test for an infringement of section 15 is a three part test set out in *Law* v. *Canada (Minister of Employment and Immigration)*[34]. This Court has subsequently confirmed in cases such as *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*[35] and *Granovsky* v. *Canada (Minister of Employment and Immigration)*[36] that the *Law* test applies in cases of adverse effects discrimination.

35. At the first stage of the analysis the question is whether the law makes a formal distinction, in the case of direct discrimination, or, in a case of indirect or adverse effects discrimination, the Court determines whether there is a failure by the law to take into account the circumstances of disadvantage of a group.

---

[32] Bahdi at 295.
[33] *R. v. Brown*, 2003 CarswellOnt 1312, 64 O.R. (3d) 161 (C.A.) at para. 81, per Morden J.A.; *Williams.*
[34] [1999] 1 S.C.R. 497 [*Law*].
[35] [2004] 3 S.C.R. 657.
[36] [2000] 1 S.C.R. 703.

36. The analysis under the first limb of the *Law* test is a comparative one, and requires the selection of an appropriate comparator group.

37. In this case, the law expressly makes distinctions between permanent residents of Canada and citizens of Canada. Citizens of Canada are the appropriate comparator group. This meets the first limb of the test as direct discrimination.

38. This Court has held in *Andrews* that citizenship is an analogous ground. Moreover, this Court in *Singh* held that even persons in Canada without permanent resident status were entitled to the protection of the *Charter*.[37] Although immigration law may make legitimate distinctions between citizens and permanent residents, the terse and overly broad section 15 analysis in *Chiarelli* should not be followed in the context of this case.[38]

39. This law fails to take into account the disadvantage suffered by persons of colour in general, and Arabs and Muslims in particular. The fact that the detainee in this case and in related appeals all appear to be Arab Muslims can hardly be coincidental, given that Arabs and Muslims form a small minority in the Canadian population.

40. Professor Bahdi describes the discrimination experienced since September 11, 2001 by Arabs and Muslims (two groups wrongly conflated by the popular stereotypes). She notes that even having a common Arab name can result in devastating consequences for an individual that are difficult if not impossible to correct. With respect to the question of the existence of racial profiling, she notes the following:

> However, the lack of explicit endorsement of racial profiling in

---

[37] *Singh v. Canada (Minister of Employment and Immigration)* [1985] 1 S.C.R. 177 [*Singh*].
[38] *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711.

> the anti-terrorism legislation does not mean that racial profiling does not take place in Canada. Canadian law no longer targets individuals explicitly on the basis of race but tends to exclude equality-seeking groups through its application. As it currently stands in Canada, it is virtually impossible to gauge the extent to which racial profiling is practised in the War against Terrorism. This is in part because racial profiling takes place "on the ground" and is often the product of discretionary decision-making that is not well-documented. Yet, several indicators suggest that Canadian Arabs and Muslims are subject to racial profiling. First, the silence of the legislature regarding the practice, at best, fails to effectively check racial profiling and, at worst, creates opportunities for racial profiling. Second, a number of high profile cases suggest that racial profiling does take place in Canada's War against Terrorism. Finally, while enacted laws do not explicitly endorse or encourage racial profiling, the same cannot be said of policies and directives developed by the institutions entrusted with fighting the War against Terrorism.[39] [Footnotes omitted]

41. Nothing in the current legislation expressly provides any safeguards against racial profiling or other targeting of Arabs and Muslims in general. On the contrary, the sweeping powers and broad discretion conferred under the statute make it entirely foreseeable that this law will be abused. Parliament's refusal to include an express ban on racial profiling in the related anti-terrorism legislation sent a chilling message to administrators. This aspect involves a case of indirect or adverse effects discrimination.

42. At the second stage, the question is whether the distinction is based on an enumerated or analogous ground. Race is an enumerated ground.

43. Citizenship is an analogous ground.[40] Non-citizens are entitled to the protection of the *Charter.*[41] While some distinctions based on citizenship are inevitable in the immigration context, their validity is best assessed at the third stage of the section 15 analysis and under section 1.

---

[39] Bahdi at p. 297.
[40] *Andrews.*
[41] *Singh v. Canada (Minister of Employment and Immigration)* [1985] 1 S.C.R. 177 [*Singh*].

44. The third stage is whether there is discrimination. The fatal flaw that runs through the analysis of the federal government and its supporting interveners is that the statute is viewed solely from the perspective of government and in the sole context of the "war on terror."

45. The correct perspective is not that of the government, but rather that of a "reasonable person, dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under similar circumstances as, the group to which the rights claimant is a member."[42] From that perspective, this law is directly discriminatory based on citizenship and indirectly discriminatory based on race.

46. There are four categories of contextual factors to be examined identified in the *Law* case.

47. The first contextual factor is pre-existing disadvantage stereotyping or vulnerability. Justice Iacobucci in *Law* describes this as "probably the most compelling factor."[43]

48. As noted above, immigrants have historically been stereotyped as threats to society. The denunciation of stereotyping represents one of the constants in an otherwise complex section 15 Charter jurisprudence. Canadian courts have recognized that stereotyping pollutes rational decision making.[44] The security certificate regime as it presently stands permits racial discrimination to go unchecked which sacrifices minority liberty for purported majority security. As Professor Spann notes, it is not "we" who sacrifice our rights for perceived security, but "others."[45]

---

[42] *Egan* v. *Canada* [1995] 2 S.C.R. 513 at para. 56, *Law*
[43] *Law* at para. 63.
[44] See for example *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, L'Heureux-Dube & Gonthier, JJ.
[45] G. A. Spann, "Terror and Race", (2005) 45 Washburn L.J. 89 at 90 [Spann].

49. This tendency to blame the "other" has been accentuated in the current era where concern focuses on terrorism. For example, the initial response in the USA to the 1995 Oklahoma bombings was to blame foreigners and tighten immigration rules, even after the terrorists proved to be white American citizens.[46]

50. As Professor Bahdi notes, studies have shown a long history of stereotyping of Arabs in Western culture as bloodthirsty fanatics.[47] The "shadow of the World trade Center", as Professor Toope characterizes it, has underlined that stereotype.[48] Even Arab children have been victims of this vicious prejudice and the use of epithets such as "sand nigger" and "camel jockey."[49] In this context not only are the *Charter* rights of the targeted individual impacted, but it also stigmatizes the Arab community as a whole. The harms caused are manifested in all sectors of the community that is targeted, cutting across the boundaries of legal status and extending beyond the commonplace of racial slurs to loss of liberty.

51. There is no correspondence between the grounds and the claimant's actual needs, capabilities or circumstances.

52. There is no ameliorative effect on any other disadvantaged group.

53. The nature of the interest affected is profound: the denial of liberty and the right to remain a permanent resident in Canada in the absence of conviction for any crime. In addition, there appear to be none of the

---

[46] For additional examples see Spann and Akram.
[47] Bahdi; Akram.
[48] Toope at para. 5.
[49] Bahdi at 311.

safeguards against the return to torture required by this court in *Suresh v. Canada (Minister of Employment and Immigration)*.[50]

Section 1

54. There is no justification under section 1.

55. Section 1 involves a process of "demonstration." The onus is on the government and it is a heavy one.[51] In the present case, as noted in the Court of Appeal, the federal government has, for reasons known only to it, apparently chosen not to file any section 1 evidence. This hampers the Court's ability to conduct the section 1 analysis and to select the appropriate remedy. However, the absence of any such evidence cannot be supplanted with inference or speculation about the type of evidence that might have been tendered to the Court.

56. There is a pressing and substantial objective for the legislation in general. However, there is no pressing and substantial objective for focusing on the threat posed by permanent residents as opposed to Canadian citizens. There is no pressing and substantial objective to permitting racial profiling or other adverse effects on Arabs.

57. The curtailment of some procedural rights may be rationally connected to public safety, but in the circumstances, inherent "racial profiling does not expose potential terrorists and fails to increase national security. On the contrary, it undermines long-term national security while harming Arabs, Muslims, and other racialized groups by heightening their vulnerability and reinforcing their exclusion from Canadian society."[52] Racial profiling in the

---

[50] [2002] 1 S.C.R. 3.
[51] *R. v. Oakes* [1986] 1 S.C.R. 103 at para. 66.
[52] Bahdi.

circumstances thus "entails the use of race as a proxy for risk either in whole or in part."[53]

58. Moreover, there is no minimal impairment. The measures are sweeping and over broad rather than carefully tailored. They place both the detainee and the designated judge in an unfair position. The protection against selective enforcement and systemic racism amounts to complete reliance on blind trust in comforting assertions by the federal government that cannot be effectively challenged or overseen.

59. There is a lack of proportionality. The interests of the detainee and of the Arab community at large are profoundly affected. Since real terrorists and ordinary persons are caught in the same net, there is no corresponding beneficial effect that could not be better achieved by well tailored legislation.

Interpretive lens

60. Since its earliest jurisprudence, this Court has stressed that the Charter is to be read as an interconnected whole. In *Big M,* Chief Justice Dickson wrote:

> In my view this analysis [of the freedom of conscience and religion] is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, *to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter.* [emphasis added]][54]

---

[53] Bahdi.
[54] [1985] 1 S.C.R. 295 at para 117.

61. It has been suggested that the equality rights enshrined in section 15 are of critical importance to understanding all other *Charter* rights. In *Andrews,* Justice Wilson wrote:

> The section 15(1) guarantee is the broadest of all guarantees. It applies to and supports all other rights guaranteed by the *Charter.*[55]

62. In its subsequent jurisprudence, this Court has used the analogy of a "lens" that sees the equality guarantee guiding the analysis and understanding of other *Charter* rights. For example, *Justice* L'Heureux-Dubé in *J.G.*, a 1999 decision of the Supreme Court of Canada, wrote this:

> *The interpretive lens of the equality guarantee should therefore influence the interpretation of other constitutional rights* where applicable, and in my opinion, principles of equality, guaranteed by both s.15 and s.28, are a significant influence on interpreting the scope of protection offered by s.7. [Emphasis added][56]

PART IV – SUBMISSIONS ON COSTS

63. None.

PART V – ORDER SOUGHT

Remedy

64. The legislative regime might pass muster if additional safeguards were put in place. For example, the appointment of an *amicus curiae* to represent the detainee or detainees in *ex parte* hearings would not compromise national security and would enhance the impartiality of the designated judge. Oversight and statistical reporting to an appellate or oversight body committee would allow for safeguards against selective enforcement. As well as the reading in of provision similar to s. 4(b) of the *Emergencies*

---

[55] *Andrews* at para. 52.
[56] *J.G.* at para. 112.

Act, S.C. 1988, c. 29 that profiling is not acceptable, especially in times of crisis. The range of policy options is wide and complex. As a result, the appropriate remedy is to strike the regime in its entirety with a suspension of six months to allow Parliament an opportunity to enact *Charter* compliant legislation.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 25TH DAY OF MAY, 2006.

R. DOUGLAS ELLIOTT

GABRIEL R. FAHEL

PART VI – TABLE OF AUTHORITIES

Authorities	Cited at Paragraph
Auton (Guardian ad litem of) v. British Columbia (Attorney General) [2004] 3 S.C.R. 657	34
Canada (Minister of Employment and Immigration) v. Chiarelli [1992] 1 S.C.R. 711	38
Christie v. York Corp. [1940] S.C.R. 139	22
Egan v. Canada [1995] 2 S.C.R. 513	45
Eldridge v. British Columbia (Attorney General) [1997] 3 S.C.R. 624	14, 17
Granovsky v. Canada (Minister of Employment and Immigration) [2000] 1 S.C.R. 703	34
Knauff v. Shaugnessy (1950) 338 U.S. 537	30
Lavoie v. Canada [2002] 1 S.C.R. 769	15
Law v. Canada (Minister of Employment and Immigration) [1999] 1 S.C.R. 497	34, 45, 47
Law Society British Columbia v. Andrews [1989] 1 S.C.R. 143	16, 43, 61
Little Sisters Book and Art Emporium v. Canada (Minister of Justice) [2000] 2 S.C.R. 1120	14
M. v. H. [1999] 2 S.C.R. 3	14
Mack v. Canada (Attorney General) (2002) 60 O.R. (3d) 737	23
Multani v. Commission scolaire Marguerite-Bourgeoys [2006] S.C.J. No. 6	14
New Brunswick (Minister of Health and Community Services) v. J.G. [1999] 3 S.C.R. 46	14, 63
R. v. Big M Drug Mart [1985] 1 S.C.R. 295	14, 17, 60
R. v. Brown 64 O.R. (3d) 161 (C.A.)	32
R. v. Ewanchuk, [1999] 1 S.C.R. 330	48
R. v. Oakes [1986] 1 S.C.R. 103	55
R. v. Quong-Wing (1914), 49 S.C.R. 440	22
R. v. Williams [1998] 1 S.C.R. 1128	19, 31, 32
Singh v. Canada (Minister of Employment and Immigration) [1985] 1 S.C.R. 177	38, 43
Suresh v. Canada (Minister of Employment and Immigration) [2002] 1 S.C.R. 3	53

PART VII – STATUTORY PROVISIONS

Canadian Charter of Rights and Freedoms, Part 1 of the *Constitution Act*, 1982, being Schedule B of the *Canada Act* 1982 (U.K.), c.11

Immigration and Refugee Protection Act, 2001, c. 27

PART VII: STATUTES RELIED ON

Immigration and Refugee Protection Act, 2001, c. 27

3(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 French as the official languages of Canada	3(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 protection contre la discrimination et, d'autre part, d'égalité du français et de l'anglais à titre de langues officielles du Canada;

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

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.	1. La Charte canadienne des droits et libertés garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.
15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.	15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.
33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature,	33. (1) Le Parlement ou la législature d'une province peut adopter une loi où il est expressément déclaré que celle-ci

as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter. (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration. (3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration. (4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1). (5) Subsection (3) applies in respect of a re-enactment made under subsection (4).	ou une de ses dispositions a effet indépendamment d'une disposition donnée de l'article 2 ou des articles 7 à 15 de la présente charte. (2) La loi ou la disposition qui fait l'objet d'une déclaration conforme au présent article et en vigueur a l'effet qu'elle aurait sauf la disposition en cause de la charte. (3) La déclaration visée au paragraphe (1) cesse d'avoir effet à la date qui y est précisée ou, au plus tard, cinq ans après son entrée en vigueur. (4) Le Parlement ou une législature peut adopter de nouveau une déclaration visée au paragraphe (1). (5) Le paragraphe (3) s'applique à toute déclaration adoptée sous le régime du paragraphe (4).