

**The Canadian Charter of Rights and Freedoms, Canadian Citizenship and the
International Transfer of Offenders Act (2004) - Implementing the related
International Bi-lateral and Multilateral Treaties and Conventions on
The Transfer of Offenders**

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In the late nineties I was consulted by a prisoner serving some 55 years in the USA for various robberies who happened to be Canadian with family in BC and Ontario and a bit of a criminal history as well. He had been trying to get back to Canada under the bi-lateral treaty between our respective countries but kept getting the run around from Canada (the International Transfer of Offenders section of the Correctional Service of Canada) no matter whom he managed to get to assist him and no matter whom he spoke to. He already had USA approval for many years before contacting me. In addition he had been told there was a warrant out for him in Canada for a sexual offence so he advised the powers that be that he was prepared to consent to his surrender back to Canada to face that case and continue to serve the rest of his sentence in Canada subject to our laws and legal system. My initial investigation led me to discover that a support group for the then alleged victim of the sexual offence had been able to exert some influence on the investigating police, who withdrew the outstanding warrant from the police computer system (CPIC) to make that case look as if it had disappeared. They were also able to exert some influence on the local Crown prosecutors office (With the Ministry of the Attorney General for Ontario), who in turn were able to exercise some influence on the International Transfer Division of the CSC and the Canadian Minister responsible, the then Solicitor General in the Mulroney Progressive Conservative government, Douglas Lewis.

In the result it turned out that this man had been given the run around for approximately ten years before he came to me and I filed for judicial review in Federal Court on his behalf. This resulted in his return to Canada in about 2 weeks followed by a government effort to strike out or have the application for judicial review dismissed as moot. But first the Ontario support group, having enjoyed considerable success in keeping him in the USA, was now happy to revive the sexual offence by getting the police to put the warrant back out and by getting the Crown to prosecute, notwithstanding a more than ten year delay caused by the Canadian government. Ultimately the man pled guilty to get it over with, notwithstanding the strongest 'unreasonable delay' argument I have ever seen, and local counsel let him do it. To make things worse the local judge sentenced him to another ten years consecutive. He then transferred to BC where he remains and a civil suit for ten years of bad faith by the government is still in process.

The Federal Court decision is reported as ***VanVlymen v. Canada (Solicitor General)(F.C.)***, 2004 FC 1054 (CanLII) and the full text can be viewed online at <http://www.canlii.org/en/ca/fct/doc/2004/2004fc1054/2004fc1054.html>

The Court found ten years of bad faith and conducted a thorough review of the record in these proceedings as well as the entire International Treaty Transfer process as it stood at that time. The Act in effect at the time of that case was repealed while that case was pending and replaced by the current Act. The court declined to strike down certain provisions of the new Act as unconstitutional as the Minister had acted under the old legislation. The court also declined to convert the rest of the proceedings into a civil suit thereby necessitating a separate civil suit.

The new Act is called the ***International Transfer of Offender's Act*** and was given Royal assent on May 14th, 2004. The full text of this **Act** can be viewed online at <http://laws.justice.gc.ca/en/ShowFullDoc/cs/I-20.6///en>. Like the previous Act, the new Act sets out its purpose in s.3 as to contribute to the administration of justice and the rehabilitation of offenders and their reintegration into the community by enabling offenders to serve their sentences in the country of which they are citizens or nationals. The applicant has to be a Canadian citizen and the conduct would have to have constituted a criminal offence if it had occurred in Canada (to meet the principle of double or dual criminality), unless the person applying is a child within the meaning of our ***Youth Criminal Justice Act***. The consent of the offender, the foreign entity and Canada is required. Unlike the previous **Act**, the current **Act** in s.10 directs the Minister in determining whether to consent to the transfer to consider the following factors:

10. (1) In determining whether to consent to the transfer of a Canadian offender, the Minister shall consider the following factors:

(a) whether the offender's return to Canada would constitute a threat to the security of Canada;

(b) whether the offender left or remained outside Canada with the intention of abandoning Canada as their place of permanent residence;

(c) whether the offender has social or family ties in Canada; and

(d) whether the foreign entity or its prison system presents a serious threat to the offender's security or human rights.

(2) In determining whether to consent to the transfer of a Canadian or foreign offender, the Minister shall consider the following factors:

(a) whether, in the Minister's opinion, the offender will, after the transfer, commit a terrorism offence or criminal organization offence within the meaning of section 2 of the *Criminal Code*; and

(b) whether the offender was previously transferred under this Act or the *Transfer of Offenders Act*, chapter T-15 of the Revised Statutes of Canada, 1985.

(3) In determining whether to consent to the transfer of a Canadian offender who is a young person within the meaning of the *Youth Criminal Justice Act*, the Minister and the relevant provincial authority shall consider the best interests of the young person.

(4) In determining whether to consent to the transfer of a Canadian offender who is a child within the meaning of the *Youth Criminal Justice Act*, the primary consideration of the Minister and the relevant provincial authority is to be the best interests of the child.

The question that arises is whether or not these provisions run afoul of the right of return of the Canadian citizen set out in s.6 of our ***Canadian Charter of Rights and Freedoms*** and if so, whether the ***International Transfer of Offenders Act*** provisions, and particularly those that the Minister is directed to consider as factors in giving his consent, are “reasonable limits prescribed by law that are demonstrably justified in a free and democratic society” within the meaning of s.1 of our ***Charter***. But first it is important to examine the importance of ‘Canadian Citizenship’ as a preferred right under our Charter.

Canadian Citizenship as a preferred right under the Charter and the interpretation of S.6 and other provisions of the Canadian Charter of Rights and Freedoms

Section 6 of the ***Canadian Charter of Rights and Freedom*** appears in the ***Charter*** under the heading “Mobility Rights” and the subheading “Mobility of Citizens”. It provides in s. 6 (1) as follows:

“Every citizen of Canada has the right to enter, remain in and leave Canada.

A word first about the interpretation of our ***Charter***. That a “structural approach” to the interpretation of the ***Charter*** should be taken was articulated by the Supreme Court of Canada in its unanimous decision ***In reference Re: Secession of Quebec*** [1998] 2 S.C.R. 217 as follows:

“Our Constitution has an internal architecture that the majority of this Court in ***O.P.S.E.U. v. Ontario (Attorney General)***, [1987] 2 S.C.R. 2 at p.57, called a “basic constitutional structure.” The individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole.

The structure of the ***Charter*** itself is a powerful interpretive tool because it represents the articulation of the underlying values of Canadian society. An examination of the mobility rights set out in s. 6 of the ***Charter*** in context of the overall structure of the ***Charter*** is important because it serves to influence the degree of deference to be given to the government position under s. 1 if it asserts a reasonable limitation on such right by virtue of ss.8 and/or 10 of the ***International Transfer of Offenders Act***. The isolation of s. 6 from the “notwithstanding clause” in s. 33 demonstrates that any breach

of s. 6 must be subject to a very high degree of judicial scrutiny under s. 1. Government interference with individual rights that are reasonable in one context may not be reasonable in the context of s. 6. Further, the specific use of the word “citizen” in s. 6 of the **Charter** provides strong support for the submission that it is unconstitutional to deny any citizen, even a bad citizen, their constitutional mobility rights. (See for example **Sauve v. Canada (Chief Electoral Officer)**, 2002 SCC 68 per McLachlin C.J. at paragraphs 34 – 37 (SCC)).

Section 33 of the **Charter** only applies to s. 2 and s. 7-15 and is not applicable to s. 6. Consequently, it is simply not possible for the federal or any provincial government to suspend these mobility rights of citizens.

Further, s. 6 Mobility Rights apply only to “citizens”. A focus on the importance of citizenship is also grounded on a structural approach to **Charter** interpretation. Most **Charter** rights are held by “everyone” or “any person”. The right to enter Canada in s. 6 is only accorded to “every citizen of Canada”. Only s. 3 of the **Charter** that gives a citizen a right to vote and s. 23, which protects minority language education rights, are held by “citizens”. In **Singh vs. Minister of Employment** [1985] 1 S.C.R. 177 (SCC), the Supreme Court of Canada held that a person was entitled to a right held by “everyone” merely by virtue of their physical presence within Canadian territory, even if they had entered the country illegally. A Canadian citizen, however, has a special status conferred on them by s. 3, 6 and 23 of the **Charter**, a status that is not enjoyed by foreigners or permanent residents. A Canadian citizen who becomes a prisoner does not lose his or her citizenship because of their conviction or sentence.

In **Chiarelli v. Canada** (1992), 90 D.L.R. 289 at 303-4 (SCC), the Court held that non-citizens only have qualified rights and that as a holder of **Charter** rights there is a clear distinction between a citizen and non-citizen. While the legal definitions as to what constitutes ‘Citizenship’ is a federal statutory creation governed by the **Citizenship Act**, R.S.C. 1985, c. C-29, as passed by the Parliament of Canada the status itself once acquired has constitutional status. A person is either born into citizenship or acquires it by meeting the conditions set out in that Act. There is no “common-law” concept of citizenship. The distinction between citizens and non-citizens is the constitutional source for the government’s authority to deport illegal immigrants, permanent residents and other non-citizens. The Courts have refused to extend the definition of citizenship beyond that contained in the **Citizenship Act**. In **Solis v. Canada**, (1998) 47 F.T.R. 272 at 279-80 (F.C.T.D.). [Affirmed by (2000), 186 D.L.R. (4th) 512 [F.C.A.] a landed immigrant facing deportation argued an entitlement to s. 6 Mobility Rights. The Court rejected the argument holding that citizenship has always been a statutory matter and that to attempt to give any meaning to the word “citizen” outside of the definition in the **Citizenship Act** would render it meaningless.

It follows that while the Minister may relax certain requirements in an application for citizenship on compassionate or other grounds, only the discovery of fraud in such an application might result in the loss of citizenship status. Once citizenship exists by birth, or has been officially acquired in accordance with the Act, it cannot be lost or taken away. It is enjoyed thereafter as an essentially static as opposed to a dynamic concept.

Canadian citizenship acquired by birth is not based on any personal characteristic. Once lawfully acquired, by birth or otherwise, it is not subject to deprivation on any ground, let alone on the basis of any personal characteristic such as bad conduct. Citizenship is strictly a consequence of the statutory definition. It is not granted for esoteric reasons of citizenship theory nor can it be taken away for similar reasons.

In *Lavoie v. Canada* (1999), 174 D.L.R. (4th) 588 (F.C.A) (leave to appeal granted to the SCC, [2002] 1 S.C.R. 769) per Marceau J. A. at p. 604 and 608; per Desjardins J. A. at p. 614, 616-619, 621, the Federal Court of Appeal addressed the distinction between the rights, duties, responsibilities and interests of citizens versus those of permanent residents in the context of s. 15 of the *Charter* (the equality before and under the law provision). According to Marceau J. A., the Canadian Constitution “recognizes the concept of citizenship as lying at the very foundation of the national political community.” He found that citizenship is “universally held within a democratic context to be of value to both the citizen and the state, and inherently distinctive based as it is on the idea that certain rights, privileges, and obligations will be ascribed exclusively to citizens as attributes of their status.” Desjardins J. A. similarly agreed that the notion of citizenship depends on political entitlement. She specifically noted the link between the concept of citizenship and the *Charter* and how the *Charter* embodies a number of important rights which only citizens are entitled to. She also notes the corresponding responsibilities that attach to citizenship.

Currently the *Citizenship Act* does not allow for the revocation of citizenship once obtained, except if acquired on the basis of fraud. Neither the simple conviction for a criminal offence, the imposition of a federal sentence, nor simply being a “bad citizen”, can result in the loss of citizenship. While a person seeking to obtain citizenship maybe denied such status on grounds relating to bad character, once citizenship status has been acquired, such conduct becomes irrelevant to their status as “citizen”. A successful attempt by government to revoke citizenship for bad conduct would render that person “stateless” and amount to a serious breach of international law. One’s nationality of citizenship defines one as a legal person. It is the primary link between an individual and international law and creates an identity that can be supported by diplomatic protection. It is “the right, in fact, to have rights.” According to the Convention of Stateless Persons, a person is stateless if they are “not considered as a national by any state under the operation of its law” (In this regard see Carol Batchelor, “Statelessness and the problem of Resolving Nationality Status,” (1998) 10 *Int’l Journal of Refugee Law* 156 at 159; and *Convention on Stateless Persons*, 360 U.N.T.S. 117, Article 1.

Canada is a signatory to the *International Convention on the Reduction of Statelessness* and has been since 1978. The Convention provides a few narrow circumstances in which citizenship could be revoked. Article 8 of the Convention arguably provides a basis for the removal of the citizenship of a prisoner. However, it requires the contracting State to reserve that right at the time of accession. Canada did not enter such a reservation at that time. Current scholarship on “statelessness” suggests that citizenship is a legitimate, albeit fledgling human right, and that its deprivation as a result of the imposition of a sentence, would not likely pass the

developing international standards on “statelessness”.(see Chan J., “The Right to a Nationality as a Human Right: the Current Trend Towards Recognition”, 12 Human Rights Law Journal 1 at p.8)

In **USA v. Cotroni et al** (1989) 48 CCC (3d) 193 (SCC) per La Forest J, pp. 211-212 La Forest J., for the Court, in the context of extradition, said:

“In approaching the matter, I begin by observing that a constitution must be approached from a broad perspective. In particular, this Court has on several occasions underlined that the rights under the **Charter** must be interpreted generously so as to fulfill its purpose of securing for the individual the full benefit of the **Charter’s** protection: see the remarks of Dickson C.J.C. in **Hunter v. Southam Inc.** 14 CCC (3d) 97 at pp. 105-6, 11 D.L.R. (4th) 641, [1984] 2 SCR 145 (SCC); **R. v. Big M Drug Mart Ltd.** (1985), 18 CCC 93d 985 at pp. 423-4, 18 D.L.R. 94th) 321, [1985] 1 S.C.R. 295 (SCC). The intimate relationship between a citizen and his country invites this approach in this context. The right to remain in one’s country is of such a character that if it is to be interfered with, such interference must be justified as being required to meet a reasonable state purpose.”

La Forest J. then went on to consider the *Canadian Bill of Rights, R.S.C. 1970, App. III* that protects a person from exile in s. 2 (a), and the *European Convention on Human Rights, 4th Protocol, Article 3, paragraph 1* to the same effect and the *International Covenant on Political Rights Article 12* as well as the *4th Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (1971)*. He then says at p.213:

“Like the international and constitutional documents I have referred to, the central thrust of s. 6 (1) is against exile and banishment, the purpose of which is the exclusion of membership in the national community.”

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“An accused may return to Canada following his trial and acquittal or, if he has been convicted, after he has served his sentence. The impact of extradition on the rights of a citizen to remain in Canada appears to me to be of secondary importance. In fact, so far as Canada and the United States are concerned, a person convicted may, in some case, be permitted to serve his sentence in Canada.”

See also **United States v. Burns** 2001 SCC 7. File No. 26129(SCC) para’s 39 – 49. for a more recent statement from the court to the same effect.

In **VanVlymen v. Canada (Solicitor General)** [2004] F.C.J. No. 1288, Russell, J. of the Federal Court of Canada held as follows at paragraphs 95 – 100:

“While he remained incarcerated in the U.S., the applicant's section 6 rights remained unenforceable until such time as the U.S. approved his transfer. But they did not cease to exist and, once a transfer was possible and the applicant decided to exercise them in the limited fashion available to him, they came to the fore and the Minister was required to recognize them in whatever action, or inaction, he engaged in concerning the applicant's transfer. In my opinion, the international regime for the transfer of prisoners back to Canada does not displace mobility rights under the Charter. The regime exists to allow those Charter rights to be exercised, albeit in the limited context of continuing incarceration.”

VanVlymen v. Canada (Solicitor General) [2004] F.C.J. No. 1288, paras. 95-100

It follows that an applicant for transfer, as a Canadian citizen has a constitutional right to enter Canada by virtue 6(1) of the ***Canadian Charter of Rights and Freedoms***. Once approved by the United States of America pursuant to the Treaty between our countries and in compliance with the provisions of the ***International Transfer of Offenders Act*** (except those sections held to be unconstitutional), the applicant has a constitutional right to enter Canada and this right should be given prompt effect so that the individual can be given the opportunity to return to Canada at the next available reasonable time. Failure to do so would appear to violate such an applicant's constitutional right to enter Canada and arguably any provisions of the ***International Transfer of Offenders Act*** to the contrary would violate s.6 of the ***Charter*** and the question would be whether or not they are saved by s.1 of the ***Charter*** as being reasonable limits prescribed by law that are demonstrably justified in a free and democratic society.

The *International Transfer of Offenders Act* – Are the provisions of ss.8-10 unconstitutional as being inconsistent with s.6(1) of the *Canadian Charter of Rights and Freedoms* and are they capable of being upheld as a “reasonable limit” on the s.6 mobility rights of citizens?

The ***International Transfer of Offenders Act*** provisions in s.8 – s.10, require the Respondent Minister to take into account factors other than an Applicant's Canadian citizenship. In the writer's opinion, to the extent that these sections purport to allow the Minister to not approve an application for transfer by a Canadian citizen, they are inconsistent with s. 6(1) of the ***Canadian Charter of Rights and Freedoms*** and by virtue of s. 52 thereof are of no force and effect.

From s.6(1) of the ***Charter*** it seems clear that an applicant has a right of return to his country of citizenship and the real question is whether or not the factors that the Minister is directed to consider can provide the basis for a denial of consent or a refusal to grant consent to a Canadian citizen, bearing in mind that the citizen, unless a dual citizen or having some other special status outside of Canada, will be deported back to Canada at the end of the sentence served in a foreign country. In other words, a refusal to consent by the Minister will only operate so long as the person is serving their sentence in the

foreign jurisdiction, as there would be no right of refusal of return once deported back to one's country of origin at the end of the sentence..

If a treaty transfer is refused, the Canadian citizen offender will be deported back to Canada by the country in which the Canadian citizen is serving his sentence and at that time Canada could not refuse to take him back. Also, a person accepted for treaty transfer has that sentence translated into a Canadian sentence and becomes a known offender within the Canadian criminal justice system, is assigned an FPS number, is subject to classification, placement, assessment and ultimately parole supervision until warrant expiry in Canada. A person denied transfer who returns to Canada by way of deportation returns to Canada with no such restraints, assessments or supervision whatsoever. In my opinion the security of Canada and its citizens are thus better protected by approving the transfer than otherwise and that therefore the factors set out in ss.8 and 10 of the **International Transfer of Offenders Act**, except the requirement of Canadian citizenship, are not only inconsistent with the purpose and intent of the International Treaty between US and Canada and other multilateral conventions and treaties, and the implementing International Transfer of Offenders Act itself, but are also inconsistent with the protection and security of Canada and its citizens and are therefore contrary to the public interest. If the transfer is denied for economic or administrative reasons, such reasons are not sufficient to override a **Charter** right. What purpose is served other than an economic one apart from perhaps a Ministers personal emotional or political response to the situation? Further, the factors set out in s.10 are so broad and undefined that they give the Minister a broad discretion to refuse a transfer based on vague and insufficiently defined criteria or facts that simply postpone the citizens inevitable return, in a manner contrary to s.7 of the **Charter**. In addition, these factors purport to enable the Minister to essentially banish a citizen from returning to Canada until he is deported back. It is submitted that even temporary banishment is inconsistent with s.6 of the **Charter** and the spirit and intent of Canada's International obligations as reflected by the international treaty transfer agreements entered into.

It is also worth noting that the definition of a "sentence" in the **Corrections and Conditional Release Act** 1992, c.20 is:

"a sentence of imprisonment and includes a sentence imposed by a foreign entity on a Canadian offender who has been transferred to Canada under the **International Transfer of Offenders Act** and a youth sentence imposed under the **Youth Criminal Justice Act**."

S. 125 of the same Act provides for accelerated parole reviews for those offenders sentenced, committed or transferred to a penitentiary for the first time, provided they meet other specific criteria. A Canadian citizen who offends in another country and is deported back to Canada and then re-offends in Canada and is sentenced to a penitentiary term of two years and up would qualify as a first time federal offender for accelerated parole. The Canadian citizen offender in another country who is transferred back to Canada pursuant to the **International Transfer of Offenders Act** would not qualify for accelerated parole and would be treated as a second time federal offender.

(See **Corrections and Conditional Release Act** 1992, c. 20, ss.125 – 126.1 and **Corrections and Conditional Release Act Regulations**, s.159)

I return then to the question of whether or not ss.8-10 of the **International Transfer of Offenders Act** can be upheld as “reasonable limits prescribed by law that are demonstrably justified in a free and democratic society” under s. 1 of our **Charter**. That the provisions are “prescribed by law” is clear in that they are contained in the statute itself. The question is are they “reasonable limits” and can they be “demonstrably justified” by the Government that has the onus of proof under s.1.

The first consideration is the object of the **Act**, which, as noted above, is set out in s.3 of the **International Transfer of Offenders Act** “...to contribute to the administration of justice and the rehabilitation of offenders and their reintegration into the community by enabling offenders to serve their sentences in the country of which they are citizens or nationals”.

It is conceded that s.8(1) requiring the consent of Canada is reasonable if for no other reason than to ensure that the person applying is indeed a Canadian citizen and not a dual citizen seeking to simply circumvent consequences in the country of conviction. It is of course unlikely that the country in which the offence occurred would consent to a transfer of such a person if that person is also a citizen of their country.

The real issues are with respect to the factors set out in s.10(1) in particular and s.10(2). This paper will not address the further issues that may arise with respect to ss.10(3) and (4) pertaining to young persons, which expressly requires that the “best interests of the young person” is the underlying important factor.

Further, in considering the provisions of s.10, it must always be remembered that a denial is only temporary because the citizen will be deported back to Canada at the conclusion of the sentence according to the rules of the sending country. Consequently, if the Minister decides to deny a person on the basis of s.10(1)(a) to the effect that the offender’s “return to Canada would constitute a threat to the security of Canada”, it seems incumbent upon the Minister to decide that question, not only with respect to the current circumstances of the offender, but also how long it will be before the offender is deported back, whether the offender will be a greater or lesser threat to Canada if left in the foreign country and therefore, what is in the best interests of Canada overall. Indeed, under that section, it is hard to imagine a circumstance where a particular offender would constitute a threat to the “security of Canada” whatsoever, but if such a person exists, it is questionable that it is “reasonable” to leave them in the foreign jurisdiction to be deported back at the end of their sentence free and clear from any Canadian restrictions and without the benefit of our own particular approach to the reformation and rehabilitation of offenders.

The leading case from the Supreme Court of Canada on the interpretation of s.1 is **R. v. Oakes** [1986] 1 S.C.R. 103 (S.C.C.) and the test there under has more recently been stated in the decision of the Supreme Court of Canada in **Newfoundland (Treasury Board) v. N.A.P.E.** [2004] 3 S.C.R. 381 at paragraph 53 as follows:

53 *Oakes* itself cautioned that “rights and freedoms guaranteed by the *Charter* are not, however, absolute” (p. 136). Section 1 permits a law to limit a *Charter* right provided it is a “reasonable” measure that “can be demonstrably justified in a free and democratic society”. Demonstration of a reasonable limit involves consideration of five related questions with close attention to the factual context:

1. Does the law address a sufficiently important legislative objective? “It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial.” (*Oakes*, at pp. 138-39)
2. Is the substance of the law “rationally connected to the objective”? (*Oakes*, at p. 139)
3. Does the law impair the right no more than is reasonably necessary to accomplish the legislative objective, i.e., impair “as little as possible the right or freedom in question”? (*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 352)
4. Is there proportionality between the effects of the legislation and the objective which has been identified as of “sufficient importance”? (*Oakes*, at p. 139)
5. Even if the importance of the objective outweighs the adverse effect of the measure on protected rights, do the adverse effects of the measure outweigh its “actual salutary effects”? (*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 888 (emphasis deleted))

In addition, because the facts of the case involved a severe Provincial budgetary crisis resulting in legislation violating the ***Charter*** the Court said at paragraph 63-64:

63 The appellant union says that these cost savings should not be recognized as sufficiently important to justify the limitation of *Charter* rights. It relies on the statement of Lamer C.J. in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 (“*PEI Provincial Court Judges Reference*”), at para. 284:

Three main principles emerge from this discussion. First, a measure whose sole purpose is financial, and which infringes *Charter* rights, can never be justified under s. 1 (*Singh* and *Schachter*). Second, financial considerations are relevant to tailoring the standard of review under minimal impairment (*Irwin Toy*, *McKinney* and *Egan*). Third, financial considerations are relevant to the exercise of the

court's remedial discretion, when s. 52 is engaged (*Schachter*). [Emphasis added.]

64 It seems to me that these and other similar statements have to be read in context. It is true, as the Court recently affirmed in *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54, that “[b]udgetary considerations in and of themselves cannot normally be invoked as a free-standing pressing and substantial objective for the purposes of s. 1 of the *Charter*” (para. 109 (emphasis added)). The spring of 1991 was not a “normal” time in the finances of the provincial government. At some point, a financial crisis can attain a dimension that elected governments must be accorded significant scope to take remedial measures, even if the measures taken have an adverse effect on a *Charter* right, subject, of course, to the measures being proportional both to the fiscal crisis and to their impact on the affected *Charter* interests. In this case, the fiscal crisis was severe and the cost of putting into effect pay equity according to the original timetable was a large expenditure (\$24 million) relative even to the size of the fiscal crisis.

It is beyond the scope of this paper to examine each of the provisions and sub-provisions in s.10 and to measure them against the s.1 test in great detail. The objective of the statute, as previously mentioned, is set out in s.3. The question then is whether or not the provisions of s.10 are reasonable limits on that objective and that in turn raises a consideration of the objective of the limitations themselves. S.10(1)(a) no doubt is designed to prevent somebody from coming to Canada who may be a “threat to the security of Canada.” While it is hard to imagine an individual falling within that definition, it is difficult to understand how simply delaying their return to Canada for a short or long period of time will accomplish that objective in the long run. Turning to s.10(1)(b), one can envisage a situation where a person has left Canada for many, many years and then offends in another country and decides they want to come back here because the imprisonment regime in Canada is more progressive and perhaps more comfortable than the place in which the offence occurred. Again, the person will ultimately be coming back to Canada. Is the purpose cost savings so that the country in which the offence occurred should pay the tab? Is it to punish the citizen for being away so long? There may be many reasons why a Canadian citizen may remain abroad for long periods of time, but if they maintain their citizenship and allegiance to their country of origin and make no efforts to take out citizenship of the country in which they are located, is this a reasonable ground for denying a transfer? Under s.10(1)(c), the question is whether the offender has social or family ties in Canada. At first glance it may seem reasonable to let a person languish in the prison in which they were convicted if there was no one here to give them support to assist in their reformation and rehabilitation. On the other hand, why should a Canadian citizen who is sentenced abroad who just happens to no longer have any family remaining alive in Canada, be treated differently to a Canadian citizen who has lots of relatives. This seems to be inconsistent with the purpose set out in s.3 of the **Act**. S.10(1)(d) on the other hand is a positive provision because it requires the Minister to take into account whether or not

the foreign entity or prison system presents a serious threat to the offender's security or human rights. While this provision appears imminently reasonable, it is unnecessary if the sole criteria for return is Canadian citizenship. In s.10(2)(a), the Minister is required to predict whether or not a Canadian citizen transferred back to Canada will commit a terrorism offence or a criminal organization offence within the meaning of s.2 of the ***Criminal Code of Canada***. The definition of a "criminal organization" in our ***Code*** requires nothing more than three people getting together to commit an offence, so long as it did not arise on an impromptu basis. This could include a family that decides to grow marihuana in their basement. This sub-section seems to clearly raise a question of fact, but still fails to take into account the citizen's right of return and that that will occur at some point in the future. Again, it would seem that security reasons and the best interests of the Canadian public would be to enable the person to transfer so that they are within our system and subject to our supervision, assessment and treatment. With respect to s.10(2)(b), it is hard to understand why simply because a person has been transferred before that a second transfer should be turned down. Why should the citizen's right of return be limited and the citizen punished by delaying their return simply because they have transferred before?

It is unknown at this point what justifications will be put forward by the Federal government in the cases that are pending to justify these sections under s.1. It is anticipated that this is where the battle will take place.

Politics and the Transfer Process

Prior to ***VanVlymen (supra)***, the outright denial to a Canadian citizen of their right of return was unheard of, where the country in which the person has offended and is serving their sentence has consented to the return. After ***VanVlymen***, the consent appears to have always been given until recently when the "New Government of Canada" was formed after the 2004 election. The current Minister, now called the Minister of Public Safety and Emergency Preparedness" (formerly the Solicitor General of Canada) is the Honourable Stockwell Day and that Minister made his perspective in relation to these transfers clear by publishing an article on his blog and the local newspaper (see Appendix "A" attached hereto). Since the publication of that note on his web blog, he has apparently turned down two Canadian citizens pursuant to s.10(1)(a) indicating that their return to Canada would constitute "a threat to the security of Canada". One of these citizens is charged with attempt murder and the other with aggravated child molestation. He has also turned down individuals on the basis that they left or remained outside of Canada with the intention of abandoning Canada as their place of permanent residence and that they have no social or family ties to Canada even though they always maintained their Canadian citizenship and never applied for other citizenship. The latter grounds are under s.10(1)(b) and (e) and will be the subject of a Federal Court hearing on August 14th, 2007 to determine whether those provisions are valid s.1 reasonable limits on a s.6 right of return. This case involves a drug offender who will be deported to Canada within 1 and ½ years. Litigation has also been

commenced in relation to one of the offenders turned down under 10(1)(a), but that matter, unless settled, will not likely reach the Court before the late Fall or Winter.

Conclusion

The conduct of the previous Conservative government Minister and that of the current new Conservative government Minister displays the clear insertion of politics into the international transfer process and the consideration of factors not set out in the **Act** along with the misuse or abuse of the factors currently required to be considered by the **Act**. In this writer's view this is both unfortunate and undesirable and undermines Canada's international agreements and obligations. Limiting the right of a transfer return to the holding of Canadian citizenship, and not dual citizenship with the country in which the offence was committed, is one way to ensure compliance with the spirit and intention of the Treaties and the **Act**. Indeed, it would be preferable if the decision-makers in both the sending and receiving countries were simply representatives of the respective countries correctional or imprisonment system as opposed to anyone holding public office or anyone holding a position where they may be in a conflict of interest because they are part of the prosecution or defence or government department so involved.