



SUPREME COURT OF CANADA

CITATION: *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47

DATE: 20130919
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BETWEEN:

Pierino Divito

Appellant
and

Minister of Public Safety and Emergency Preparedness

Respondent

- and -

Canadian Civil Liberties Association, David Asper Centre for Constitutional Rights

and British Columbia Civil Liberties Association

Interveners

CORAM: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 52)

Abella J. (Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ. concurring)

CONCURRING REASONS:
(paras. 53 to 88)

LeBel and Fish JJ. (McLachlin C.J. concurring)

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DIVITO v. CANADA

Pierino Divito

Appellant

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Minister of Public Safety and Emergency Preparedness

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**Canadian Civil Liberties Association,
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British Columbia Civil Liberties Association**

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Indexed as: Divito v. Canada (Public Safety and Emergency Preparedness)

2013 SCC 47

File No.: 34128.

2013: February 18; 2013: September 19.

Present: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver,
Karakatsanis and Wagner JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Constitutional law — Charter of Rights — Mobility rights — Right to enter Canada — Minister refusing offender transfer request by Canadian citizen imprisoned abroad, on basis of security concerns — Constitutional challenge of provisions governing international transfer of offenders made by Canadian citizen imprisoned abroad — Whether statutory provisions giving Minister discretion to grant or deny transfer request violate right to enter Canada and, if so, whether violation is justified — Canadian Charter of Rights and Freedoms, ss. 1 and 6(1) — International Transfer of Offenders Act, S.C. 2004, c. 21, ss. 8(1), 10(1)(a) and 10(2)(a).

D, a Canadian citizen, was extradited to the U.S. where he pleaded guilty to serious drug offences and was sentenced to seven and a half years in prison. He submitted a request under the *International Transfer of Offenders Act*, S.C. 2004, c. 21 (*ITOA*), to be transferred to Canada to serve the remainder of his American sentence. Under the *ITOA*, the consent of both the foreign state and the Canadian government are required before an offender can be returned to Canada. Sections 8(1), 10(1)(a) and 10(2)(a) of the *ITOA* give the Canadian Minister of Public Safety a discretion whether to consent to the transfer. D's request was approved by the U.S. but refused by the Minister on the basis that the nature of his offence and his affiliations suggested that D's return to Canada would constitute a potential threat to the safety of Canadians and the security of Canada. D sought judicial review of the Minister's decision, arguing that the existence of discretion under the *ITOA* to refuse to consent to the return of a Canadian in a foreign prison violated his right to enter

Canada protected by s. 6(1) of the *Canadian Charter of Rights and Freedoms*. Once it was confirmed that D was a Canadian citizen, he had the right to enter Canada and the Minister was required to consent to his return. The Federal Court dismissed D's application for judicial review of the Minister's refusal, concluding that the decision of the Minister was reasonable and that ss. 8(1), 10(1)(a) and 10(2)(a) of the *ITOA* did not violate D's right as a Canadian citizen to enter Canada under s. 6(1) of the *Charter*. D appealed only the issue of the constitutionality of the provisions, not the reasonableness of the Minister's decision. The Federal Court of Appeal dismissed the appeal.

Held: The appeal should be dismissed.

Per Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.: Mobility rights are protected by s. 6 of the *Charter*. These include the right in s. 6(1) of every citizen to enter, remain in, and leave Canada. The right of a Canadian citizen to enter and to remain in Canada is a fundamental right associated with citizenship. Without the ability to enter one's country of citizenship, the "right to have rights" within that country cannot be fully exercised. The right to enter should therefore be given a generous interpretation consistent with its purpose, the interests it was intended to protect and the broad construction of the right to enter in international law.

However, the mobility rights guaranteed by s. 6(1) of the *Charter* do not give a Canadian citizen an automatic right to serve a sentence in Canada. The *ITOA*

and the treaties which it implements provide a statutory mechanism to transfer the supervision of a prison sentence from a foreign jurisdiction to Canada, since as a matter of international law, Canada has no legal authority to require the return of a citizen who is lawfully incarcerated by a foreign state. Independent of the *ITOA*, there is no *right* to serve a foreign prison sentence in Canada. The *ITOA* was not intended to create a right for Canadian citizens to require Canada to administer their foreign sentence. Nor does it impose a duty on the Canadian government to permit all such citizens to serve their foreign sentences in Canada. D's submission would result in a positive obligation on Canada to administer the sentences imposed upon Canadian citizens by foreign jurisdictions. This misconstrues what s. 6(1) protects. Although the *ITOA* contemplates a mechanism by which a citizen may return to Canada in the limited context of continuing incarceration for the purpose of serving their foreign sentence, s. 6(1) does not confer *a right* on Canadian citizens to serve their foreign sentences in Canada. The impugned provisions of the *ITOA*, which make a transfer possible, do not, as a result, represent a breach of s. 6(1). Once a foreign jurisdiction consents to a transfer under s. 8(1) of the *ITOA*, however, the Minister's discretion under ss. 10(1)(a) and 10(2)(a) is fully engaged and must be exercised reasonably, including in compliance with relevant *Charter* values. D's argument that the Minister *must* consent to the transfer of a Canadian citizen once a foreign state has provided its consent, calls into constitutional question not the impugned provisions, but the way the discretion is exercised. This calls for scrutiny of the reasonableness of the exercise of discretion, an issue that has not been appealed to this Court.

Per McLachlin C.J. and LeBel and Fish JJ.: Section 6(1) should be interpreted generously, in a manner that is consistent with the broad protection of mobility rights under international law and gives full effect to the provision's expansive breadth. Effective exercise of the rights conferred by s. 6(1) will often require the state's active cooperation, in part because of the extra-territorial application of the rights and the principle of sovereignty of nations. The *ITOA* was precisely designed to safeguard and facilitate the exercise of these s. 6(1) rights. Under that regime, once the foreign state has consented to the transfer, the sole impediment to the exercise of the citizen's s. 6(1) right is the Minister's discretion under ss. 8(1), 10(1)(a) and 10(2)(a) of the *ITOA*. Hence the provisions constitute a limitation on the rights protected by s. 6(1) of the *Charter*.

The limitation is nonetheless justified under s. 1 of the *Charter*. Ensuring the security of Canada and the prevention of offences related to terrorism and organized crime are pressing and substantial objectives. Properly understood, the factors set out in ss. 10(1)(a) and 10(2)(a) of the *ITOA* relate to risks that arise upon the transfer of offenders before their release. Given that, in some cases, the objectives of the *ITOA* would be served by refusing a transfer based on those factors, the Minister's discretion to consider them on a case-by-case basis is rationally connected to the objectives. In addition, at least in some cases, refusing a transfer based on the factors will be the sole — and therefore the most minimally impairing — alternative open to the Minister. In light of both the binary nature of the Minister's decision and the citizen's continued incarceration, it is difficult to conceive

of a less drastic means of achieving Parliament's protective purpose. Finally, the impugned provisions are proportionate in their effect. The beneficial effects of permitting the Minister to consider threats to Canadian security in deciding whether to permit a transfer are self-evident, and the prejudicial effect of a refusal on the mobility rights of Canadian citizens incarcerated abroad is palliated by the fact that the citizens in question will be able to enter Canada after serving their sentence in the foreign jurisdiction.

Since D no longer challenges the reasonableness of the Minister's decision, it is unnecessary to consider whether the Minister's discretion under the *ITOA* was properly exercised in this case. However, while the Minister's discretion is broad and flexible and entitled to a large measure of deference given the complex social and political problems being tackled, it must be exercised with due regard for the s. 6(1) *Charter* rights at stake.

Cases Cited

By Abella J.

Applied: *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342; *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66; **distinguished:** *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469; **referred to:** *Divito v. Canada (Ministre de la Justice)*, 2004 CanLII 39111; *États-Unis d'Amérique v. Divito* (2004), 194 C.C.C. (3d) 148; *R. v. Gauvin* (1997), 187 N.B.R. (2d) 262; *R. v. Rumbaut*, [1998]

N.B.J. No. 381 (QL); *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76; *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292; *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391; *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 S.C.R. 519; *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134; *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761; *Sriskandarajah v. United States of America*, 2012 SCC 70, [2012] 3 S.C.R. 609; *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395.

By LeBel and Fish JJ.

Applied: *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469; *Sriskandarajah v. United States of America*, 2012 SCC 70, [2012] 3 S.C.R. 609; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; **referred to:** *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *Kamel v. Canada (Attorney General)*, 2008 FC 338, [2009] 1 F.C.R. 59, *aff'd* 2009 FCA 21, [2009] 4 F.C.R. 449; *Abdelrazik v.*

Canada (Minister of Foreign Affairs), 2009 FC 580, [2010] 1 F.C.R. 267; *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177; *McKay v. The Queen*, [1965] S.C.R. 798; *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999] 2 S.C.R. 961; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761; *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 6, 32, 33.

International Transfer of Offenders Act, S.C. 2004, c. 21, ss. 3, 8, 10(1), (2), 11(2), 31.

Safe Streets and Communities Act, S.C. 2012, c. 1, ss. 135, 136.

Transfer of Offenders Act, S.C. 1977-78, c. 9.

Treaties and Other International Instruments

International Covenant on Civil and Political Rights, Can. T.S. 1976 No. 47, art. 12, 21.

Treaty Between Canada and the United States of America on the Execution of Penal Sentences, Can. T.S. 1978 No. 12, arts. II, III, IV.

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APPEAL from a judgment of the Federal Court of Appeal (Nadon, Trudel and Mainville J.J.A.), 2011 FCA 39, [2012] 4 F.C.R. 31, 413 N.R. 134, 267 C.C.C. (3d) 370, 229 C.R.R. (3d) 142, 96 Imm. L.R. (3d) 85, [2011] F.C.J. No. 100 (QL), 2011 CarswellNat 238, affirming a decision of Harrington J., 2009 FC 983, [2009] F.C.J. No. 1158 (QL), 2009 CarswellNat 5283. Appeal dismissed.

Clemente Monterosso and Laurent Carignan, for the appellant.

Ginette Gobeil and *Claude Joyal*, for the respondent.

Lorne Waldman, *Clarisa Waldman* and *Tamara Morgenthau*, for the intervener the Canadian Civil Liberties Association.

Audrey Macklin and *Cheryl Milne*, for the intervener the David Asper Centre for Constitutional Rights.

Gib van Ert, *Michael Sobkin* and *Heather E. Cochran*, for the intervener the British Columbia Civil Liberties Association.

The judgment of Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ. was delivered by

ABELLA J. —

[1] Mobility rights are protected by s. 6 of the *Canadian Charter of Rights and Freedoms*. These include the right in s. 6(1) of every citizen to enter, remain in, and leave Canada. They are among the most cherished rights of citizenship.

[2] Pierino Divito, a Canadian citizen, was extradited to the United States where he pleaded guilty to serious drug offences and was sentenced to seven and a half years in prison. A few months later, he applied to the Canadian government to let him serve his American sentence in Canada. The Canadian government refused.

This refusal, Mr. Divito argued, was a violation of his right as a Canadian citizen to enter Canada.

[3] With respect, I do not share his view that the mobility rights guaranteed by s. 6(1) of the *Charter* give a Canadian citizen in his circumstances an automatic right to serve a sentence in Canada.

Background

[4] Pierino Divito was born in Italy in 1937. He immigrated to Canada when he was 16 and became a Canadian citizen in 1980.

[5] Since his arrival in Canada, Mr. Divito has been convicted of various offences dating back to 1962. In addition, a number of courts have found that Mr. Divito was involved in organized crime: *Divito v. Canada (Ministre de la Justice)*, 2004 Can LII 39111 (Que. C.A.), at para. 32; *États-Unis d'Amérique v. Divito* (2004), 194 C.C.C. (3d) 148 (Que. C.A.), at para. 5; *R. v. Gauvin* (1999), 187 N.B.R. (2d) 262 (C.A.), at paras. 4-5; and *R. v. Rumbaut*, [1998] N.B.J. No. 381 (QL) (Q.B.), at para. 19.

[6] In March 1995, a Canadian court convicted Mr. Divito of conspiring to import and traffic over 5,400 kg of cocaine in Nova Scotia and New Brunswick. The court sentenced Mr. Divito to 18 years in prison. While he was serving his sentence,

the United States requested his extradition from Canada on charges of conspiracy to possess over 300 kg of cocaine with the intent to distribute in the state of Florida.

[7] In June 2005, after serving almost two-thirds of his Canadian sentence, Mr. Divito was extradited to the United States where he pleaded guilty in Florida to the American charges. In March 2006, he was sentenced to seven and a half years in prison. In sentencing Mr. Divito, the American court took his Canadian sentence into account and gave him credit for 145 months of time served.

[8] In December 2006, Mr. Divito submitted a request under the *International Transfer of Offenders Act*, S.C. 2004, c. 21 (“*ITOA*”) to be transferred to Canada to serve the remainder of his American sentence. Under s. 8 of the *ITOA*, the consent of both the foreign state and the Canadian government are required before an offender can be returned to Canada. Mr. Divito’s request was approved by the United States, but was refused by the Canadian Minister of Public Safety and Emergency Preparedness in October 2007.

[9] Mr. Divito did not challenge the Minister’s refusal. Instead, shortly after the first request was refused, he submitted a second transfer request. The American authorities again agreed. And again the Minister denied Mr. Divito’s request, relying on s. 10(1)(a) of the *ITOA* because Mr. Divito was identified as an organized crime member and the offence involved a significant quantity of drugs:

The nature of his offence and his affiliations suggest that the offender's return to Canada would constitute a potential threat to the safety of Canadians and the security of Canada.

[10] Mr. Divito sought judicial review of the Minister's second refusal on two grounds. The first was that the decision was unreasonable. The second was, essentially, that the existence of a discretion in ss. 8(1), 10(1)(a) and 10(2)(a) of the *ITOA* to refuse to consent to the return of a Canadian in a foreign prison violated his right to enter Canada protected by s. 6(1) of the *Charter*. Once it was confirmed that Mr. Divito was a Canadian citizen, he had the right to enter Canada and the Minister was required to consent to his return.

[11] The Federal Court dismissed the application for judicial review (2009 FC 983 (CanLII)). Applying a reasonableness standard of review, the court concluded that, in light of Mr. Divito's history of criminal activity, the decision of the Minister to deny a transfer in this case was reasonable. The court also held that the impugned provisions of the *ITOA* did not violate s. 6(1).

[12] Mr. Divito appealed only the issue of the constitutionality of the provisions of the *ITOA*, not the reasonableness of the Minister's decision. The Federal Court of Appeal dismissed the appeal (2011 FCA 39, [2012] 4 F.C.R. 31). The majority held that ss. 8(1), 10(1)(a) and 10(2)(a) of the *ITOA* did not infringe s. 6(1) of the *Charter*. The concurring judge found that the impugned provisions constituted *prima facie* infringements of s. 6(1) of the *Charter* but were justified under s. 1.

[13] On appeal to this Court, the Chief Justice stated the following constitutional questions:

- (1) Do ss. 10(1)(a) and 10(2)(a), read in conjunction with s. 8(1), of the *International Transfer of Offenders Act*, S.C. 2004, c. 21, infringe the right guaranteed by s. 6(1) of the *Canadian Charter of Rights and Freedoms*?
- (2) If so, is the infringement a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

Analysis

[14] Mr. Divito claims that once a foreign jurisdiction consents to a transfer, he has an absolute right as a citizen to enter Canada. The Canadian government has no discretion to refuse the transfer of a Canadian citizen who is lawfully incarcerated by a foreign state. In this Court, he is not challenging the reasonableness of the Minister's refusal. Nor is there any suggestion that he was denied due process or that there were any human rights abuses in the foreign jurisdiction.

[15] It is helpful to start with the context of the provisions at issue under both the *Charter* and the *ITOA*.

[16] Section 6 of the *Charter* states:

MOBILITY RIGHTS

Mobility of Citizens

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

Rights to move and gain livelihood

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

- (a) to move to and take up residence in any province; and
- (b) to pursue the gaining of a livelihood in any province.

Limitation

(3) The rights specified in subsection (2) are subject to

- (a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and
- (b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

Affirmative action programs

(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

[17] There are therefore two sets of mobility rights. The first set, found in s. 6(1), is the right of every Canadian citizen to enter, remain in, and leave Canada. The second set, outlined in ss. 6(2) to (4), gives citizens *and* permanent residents the right to move to, live in, and work in any province subject to certain limitations.

[18] The focus of this appeal is on s. 6(1). There are three rights found in s. 6(1): the right to enter, remain in, and leave Canada. Only the right to enter is at issue in this appeal.

[19] We must first consider the scope of the s. 6(1) right. We start with this Court's primordial direction that rights be defined generously in light of the interests the *Charter* was intended to protect: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at p. 156; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 53. In *Big M Drug Mart Ltd.*, Dickson J. summarized the requisite approach as follows:

In *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, this Court expressed the view that the proper approach to the definition of the rights and freedoms guaranteed by the *Charter* was a purposive one. The meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the purpose of such a guarantee; *it was to be understood, in other words, in the light of the interests it was meant to protect.*

In my view this analysis 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*. The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter's* protection. *At the same time it is important not to overshoot the actual purpose of the right or freedom in question*, but to recall that the *Charter* was not enacted in a vacuum, and must therefore, as this Court's decision in *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, illustrates, be placed in its proper linguistic, philosophic and historical contexts. [Emphasis added; emphasis in original deleted; p. 344.]

[20] Accordingly, the inquiry necessarily begins with an analysis of the purpose of the guarantee in s. 6(1) and a consideration of what the right of citizens to enter Canada was intended to protect.

[21] The protection for citizens in s. 6(1), like most modern human rights protections, had its origins in the cataclysmic rights violations of WWII. Writing in the aftermath of that war about her own experience, Hannah Arendt observed that a “right to have rights” flows from citizenship and belonging to a distinct national community: *The Origins of Totalitarianism* (new ed. 1967), at p. 296; Alison Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* (2012), at p. 5. Without the ability to enter one’s country of citizenship, the “right to have rights” cannot be fully exercised. The right of a Canadian citizen to enter and to remain in Canada is therefore a fundamental right associated with citizenship.

[22] Canada’s international obligations and relevant principles of international law are also instructive in defining the right: *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76; *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292. In *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, Dickson C.J., dissenting, described the template for considering the international legal context as follows:

The content of Canada’s international human rights obligations is, in my view, an important indicia of the meaning of “the full benefit of the *Charter’s* protection”. I believe that the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified. [p. 349]

[23] More recently, in *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, McLachlin C.J. and LeBel J. confirmed that, “the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified” (para. 70). This helps frame the interpretive scope of s. 6(1).

[24] The international law inspiration for s. 6(1) of the *Charter* is generally considered to be art. 12 of the *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47 (“ICCPR”), which has been ratified by 167 states, including Canada: John B. Laskin, “Mobility Rights Under the Charter” (1982), 4 *S.C.L.R.* 89, at p. 89; Robert J. Sharpe and Kent Roach, *The Charter of Rights and Freedoms* (4th ed. 2009), at p. 212.

[25] As a treaty to which Canada is a signatory, the ICCPR is binding. As a result, the rights protected by the ICCPR provide a minimum level of protection in interpreting the mobility rights under the *Charter*. Article 12 of the ICCPR states:

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. *No one shall be arbitrarily deprived of the right to enter his own country.*

[26] In 1999, the U.N. Human Rights Committee issued guidelines for the interpretation of art. 12 of the ICCPR in its “General Comment No. 27: Freedom of Movement”. Paragraph 19 of the General Comment states, in part, that “[t]he right of a person to enter his or her own country recognizes the special relationship of a person to that country”. The General Comment also provides some guidance on the interpretation of “arbitrarily” in art. 12(4):

In no case may a person be *arbitrarily deprived* of the right to enter his or her own country. The reference to the concept of arbitrariness in this context is intended to emphasize that it applies to all State action, legislative, administrative and judicial; it guarantees that even interference provided for by law *should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one’s own country could be reasonable.* A State party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country. [Emphasis added; para. 21.]

[27] Although art. 12(4) protects against *arbitrary* interference with the right to enter, the U.N. Human Rights Committee’s interpretation of the scope of the right suggests that there are in fact “few, if any” limitations on the right to enter that would be considered reasonable. The right to enter protected by s. 6(1) of the *Charter* should therefore be interpreted in a way that is consistent with the broad protection under international law.

[28] The expansive breadth of the protection is also consistent with the fact that s. 6(1) of the *Charter* is exempt from the legislative override in s. 33: *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 S.C.R. 519, at para. 11. Moreover, the other rights conferred by s. 6 of the *Charter* in s. 6(2) are subject to express limitations within the provision itself in ss. 6(3) and 6(4). The fact that s. 6(1) is not subject to such limitations also confirms its plenitude.

[29] And, finally in *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469, a case involving extradition, this Court recognized that the “intimate relation between a citizen and his country” invited a generous interpretation of a related right in s. 6(1), namely the right to remain in Canada (p. 1480).

[30] This brings us to the provisions dealing with the international transfer of prisoners.

[31] In 1977, Canada and the United States signed the *Treaty Between Canada and the United States of America on the Execution of Penal Sentences*, Can. T.S. 1978 No. 12, a bilateral treaty to facilitate international prisoner transfer between Canada and the United States. Under the treaty, offenders sentenced to imprisonment in either country may be transferred to the country of which they are a citizen if the sending state, the receiving state, and the offender all provide their consent.

[32] The application of the treaty is subject to a number of conditions set out in art. II: that the offence for which the offender was convicted and sentenced is one

which would also be punishable as a crime in the receiving state; that the offender is a citizen of the receiving state; that the offence is not an offence under immigration laws or military laws; that there is at least six months of the offender's sentence remaining to be served; and that no proceeding by way of an appeal or collateral attack upon the conviction or sentence is pending in the sending state and the prescribed time for an appeal has expired.

[33] Under art. IV of the treaty, the completion of a transferred offender's sentence is to be carried out according to the laws and procedures of the receiving country, including the application of any provisions for reduction of the term of imprisonment by parole, conditional release, or otherwise.

[34] Pursuant to art. III of the treaty, both Canada and the United States made a commitment to giving legal effect to the treaty within their territory. Accordingly, in 1978, Parliament adopted the *Transfer of Offenders Act*, S.C. 1977-78, c. 9, which implemented the treaty with the United States as well as a similar treaty with Mexico. Under this legislation, the Minister was granted an unfettered discretion to approve or refuse the transfer of a Canadian citizen. Canada has since concluded numerous bilateral and multilateral treaties dealing with international prisoner transfers.

[35] In 2004, the *Transfer of Offenders Act* was replaced by the *ITOA*. The purpose of the *ITOA* was set out in s. 3 as being:

. . . 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.

[36] The *ITOA* included several important modifications of the legislative scheme, namely new provisions setting out the purposes of the legislation and a requirement that reasons be provided when the Minister’s consent is refused (s. 11(2)). Notably, a section was added that listed the factors which the Minister must consider in determining whether to consent to the transfer of Canadian and foreign offenders. ¹

[37] The relevant provisions of the *ITOA* are ss. 8(1) and 10(1) and (2). At the time of Mr. Divito’s request, they stated:

8. (1) *The consent of the three parties to a transfer — the offender, the foreign entity and Canada — is required.*

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*

¹ In 2012, the *ITOA* was further amended, including the addition of “enhance[ing] public safety” as one of the purposes of the Act, by changing “shall” to “may” in ss. 10(1) and 10(2), and by adding factors for the Minister to consider in exercising his or her discretion under ss. 10(1) and 10(2). These amendments were not in force at the time of Mr. Divito’s transfer request.

(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.

[38] Only ss. 8(1), 10(1)(a) and 10(2)(a), which have been italicized for ease of reference, have been challenged by Mr. Divito. The essence of the challenge is that these provisions operate in a way that violates Mr. Divito's right to enter Canada under s. 6(1) of the *Charter*, a right he says is automatic once the foreign jurisdiction consents to the transfer.

[39] These provisions provide the Minister with a discretion whether to consent to the transfer of a Canadian offender. Mr. Divito argues that there should be no discretion — once an incarcerated citizen's transfer is consented to by a foreign jurisdiction, the citizen's right to enter under s. 6(1) of the *Charter* requires that the Minister consent. In essence, Mr. Divito argues that s. 6(1) includes an automatic right to serve a foreign prison sentence in Canada if the foreign state consents. His submission would result in a positive obligation on Canada to administer the sentences imposed upon Canadian citizens by foreign jurisdictions. This, in my respectful view, misconstrues what s. 6(1) protects.

[40] In international law, requiring the return of an offender to his or her home state infringes the doctrine of state sovereignty: it violates the territoriality of the criminal law and the exclusive right of the state to administer criminal justice: Michal Plachta, *Transfer of Prisoners under International Instruments and Domestic Legislation* (1993), at pp. 134-149; United Nations Office on Drugs and Crime, *Handbook on the International Transfer of Sentenced Persons* (2012), at pp. 14 and 17. Accordingly, prior to the implementation of bilateral and multilateral treaties for the transfer of prisoners, “[i]t was firmly believed that States had the authority to enforce the criminal sentences of their own courts only, making it impossible for them to enforce the sentences of other States” (p. 17). In other words, as a matter of international law, Canada has no legal authority to *require* the return of a citizen who is lawfully incarcerated by a foreign state.

[41] The question then becomes what effect the *Treaty Between Canada and the United States of America on the Execution of Penal Sentences* and the *ITOA* have on an imprisoned citizen’s ability to enter Canada for the purpose of serving his or her sentence in Canada.

[42] The *Treaty Between Canada and the United States of America on the Execution of Penal Sentences* and other similar treaties were entered into to facilitate the return of offenders serving a penal sentence in a foreign country in order to permit them to serve the remainder of their sentence in their home country. The purpose of these treaties was to promote the social rehabilitation and reintegration of prisoners

by permitting offenders imprisoned in a foreign jurisdiction to serve their sentence in their home country closer to their families and where the culture, language and customs would be more familiar: United Nations Office on Drugs and Crime, at pp. 9-15; Sylvia Royce, “International Prisoner Transfer” (2009), 21 *Federal Sentencing Reporter* 186, at p. 186.

[43] Underlying the creation of these treaties was the understanding that, absent a treaty, Canada was without a meaningful legal mechanism to administer the sentences imposed upon Canadian citizens who are lawfully incarcerated in a foreign state.² The *ITOA* and the treaties it implements provide a statutory mechanism to transfer the supervision of a prison sentence from a foreign jurisdiction to Canada.

[44] The *ITOA* requires the consent of the foreign jurisdiction since, as a matter of international law, Canada has no meaningful legal authority to *require* the return of an imprisoned citizen. As the provisions of the treaty make clear, the consent of the foreign state to transfer an offender is premised on Canada undertaking to administer the offender’s foreign sentence. The *ITOA* and the treaties which it implements therefore provide an exception to the doctrine of state sovereignty in international law: a statutory mechanism under which Canada may, in certain circumstances, assume legal obligations towards a foreign state. The *ITOA* was not intended to create a right for Canadian citizens to *require* Canada to administer their foreign sentence.

² There is also a discretion in s. 31 of the *ITOA* for the Minister to allow the Minister of Foreign Affairs to enter into an “administrative arrangement” with a foreign country for the transfer of an offender in accordance with the *ITOA* where no treaty mechanism exists.

[45] The ability of prisoners to serve their sentence in Canada is therefore a creation of legislation. Independent of the *ITOA*, there is no right to serve a foreign prison sentence in Canada. In my view, although the *ITOA* contemplates a mechanism by which a citizen may return to Canada in the limited context of continuing incarceration for the purpose of serving their foreign sentence, s. 6(1) does not confer a right on Canadian citizens to serve their foreign sentences in Canada.

[46] Nor is *Cotroni* of assistance. La Forest J. noted for the majority that “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. While I would not wish to trivialize the effects of extradition on the individual, it is clear that extradition is not directed to the purpose” (p. 1482). Notably, he also made the following particularly relevant concession:

[I]t seems to me. . . . that the infringement to s. 6(1) that results from extradition *lies at the outer edges of the core values sought to be protected by that provision*. European authorities . . . make a sharp distinction between expulsion and extradition . . . [Emphasis added; p. 1481.]

[47] In the case of extradition, the Canadian government permits the removal from Canada of a Canadian citizen who has not been convicted, to face charges in a foreign jurisdiction. Yet *Cotroni* found this to be only at the outer edges of the s. 6(1) right. In the case of a prisoner transfer, the Canadian citizen has been convicted in a foreign jurisdiction, is lawfully incarcerated there, and is seeking the Canadian government’s permission to serve his or her foreign sentence in Canada. If the forcible

removal of a presumed innocent Canadian citizen by extradition is at the *outer edges* of the core values sought to be protected by s. 6(1), the request of a convicted one to serve a foreign sentence in Canada falls off the edge. I have difficulty seeing how legislative provisions which facilitate the possibility of re-entry for a Canadian citizen lawfully convicted in a foreign jurisdiction, are analogous to the forced removal of a Canadian citizen by the state.

[48] The mobility rights in s. 6(1) should be construed generously, not literally, and, absent a literal interpretation, I am unable to see how s. 6(1) is breached in the circumstances of this case. Canadian citizens undoubtedly have a right to enter Canada, but Canadian citizens who are lawfully incarcerated in a foreign jurisdiction cannot leave their prison, let alone leave to come to Canada. What makes the entry to Canada possible is the *ITOA*. But this possibility does not thereby create a constitutionally protected right to leave a foreign prison and enter Canada whenever a foreign jurisdiction consents to the transfer. Nor does it impose a duty on the Canadian government to permit all such citizens to serve their foreign sentences in Canada. The impugned provisions of the *ITOA*, which make a transfer possible, do not, as a result, represent a breach of s. 6(1).

[49] What *is* engaged by these provisions, however, is the discretion of the Minister. As this Court noted in *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134, at para. 114, “[i]f there is a *Charter* problem, it lies not in the statute but in the Minister’s exercise of the power

the statute gives him . . .”. At its core, Mr. Divito’s argument that the Minister *must* consent to the transfer of a Canadian citizen once a foreign state has provided its consent calls into constitutional question not the impugned provisions, but the way the discretion is exercised. This calls for scrutiny of the reasonableness of the exercise of discretion, an issue Mr. Divito has not appealed to this Court. Notwithstanding that we have not been asked to review the reasonableness of the Minister’s decision in this case, there is no doubt that once a foreign jurisdiction consents to a transfer under s. 8(1) of the *ITOA*, the Minister’s discretion under ss. 10(1)(a) and 10(2)(a) is fully engaged and must be exercised reasonably, including in compliance with relevant *Charter* values: *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761; *Sriskandarajah v. United States of America*, 2012 SCC 70, [2012] 3 S.C.R. 609; *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395. As this Court explained in *Doré*, “[o]n judicial review, the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play” (para. 57).

[50] A final issue: the Crown argued that the appeal was moot because Mr. Divito completed his American sentence. He has now returned to Canada and completed the balance of his Canadian sentence.

[51] The Court nonetheless retains a residual discretion to decide the merits of a moot appeal if the issues raised are of public importance: *Borowski v. Canada*

(*Attorney General*), [1989] 1 S.C.R. 342; *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66, at para. 2. In my view, this is such a case. The issues are likely to recur in the future and there is some uncertainty resulting from conflicting decisions in the Federal Court.

[52] I would therefore dismiss the appeal and answer the constitutional questions as follows:

(1) Do ss. 10(1)(a) and 10(2)(a), read in conjunction with s. 8(1), of the *International Transfer of Offenders Act*, S.C. 2004, c. 21, infringe the right guaranteed by s. 6(1) of the *Canadian Charter of Rights and Freedoms*?

No.

(2) If so, is the infringement a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

It is unnecessary to answer this question.

The reasons of Chief Justice McLachlin and LeBel and Fish JJ. were delivered by

LEBEL AND FISH JJ. —

I. Introduction

[53] We have had the benefit of reading the reasons of our colleague, Justice Abella, and agree with her proposed disposition of this appeal. With respect, however, we cannot share her conclusion that the appellant's mobility rights are not engaged in the case at bar.

[54] In our view, when the Minister's refusal of consent constitutes the sole impediment to a Canadian citizen's entry into Canada, this refusal limits the citizen's right to enter Canada guaranteed by s. 6(1) of the *Canadian Charter of Rights and Freedoms*. For that reason and the reasons that follow, we find that ss. 8(1), 10(1)(a) and 10(2)(a) of the *International Transfer of Offenders Act*, S.C. 2004, c. 21 ("*ITOA*"), constitute a limitation on the rights protected by s. 6(1) of the *Charter*. We are satisfied, however, that this limitation is justified under s. 1.

[55] We adopt our colleague's summary of the facts and thorough review of the legislative history of the *ITOA* and the treaties it implements. We also subscribe to her conclusion in respect of the mootness argument raised by the Crown. Finally, we share our colleague's view (at paras. 27-29) that s. 6(1) should be interpreted generously, in a manner that is consistent with the broad protection of mobility rights under international law and which gives full effect to the provision's "expansive breadth" and "plenitude". In this regard, see *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469, at p. 1480; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 156.

[56] In the two leading cases on s. 6(1) of the *Charter* — *Cotroni* and *Sriskandarajah v. United States of America*, 2012 SCC 70, [2012] 3 S.C.R. 609 — this Court found the “core” of s. 6(1) to be a protection against exile and banishment, or “exclusion of membership in the national community”: *Cotroni*, at pp. 1481-82; *Sriskandarajah*, at para. 9.

II. Section 6(1) of the *Charter*: Its Core

[57] The Court thus read the s. 6(1) rights to “enter” and “remain in” Canada together. Indeed, in considering the extent to which s. 6(1) mobility rights are infringed by extradition, the Court specifically contemplated the prospect of an international prisoner transfer. For instance, in *Cotroni*, at p. 1482, La Forest J. stated:

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 cases, be permitted to serve his sentence in Canada; see *Transfer of Offenders Act*, S.C. 1977-78, c. 9.

See also *Sriskandarajah*, at para. 20.

[58] It is inconsistent to find that an international prisoner transfer has constitutional significance with respect to the right to remain in Canada, but does not engage the constitutional right to enter Canada. Our colleague suggests (at para. 47) that if — as was held in *Cotroni* — extradition lies at the outer edges of the core

values protected by s. 6(1), an international prisoner transfer request “falls off the edge”. With respect, *Cotroni* supports the opposite conclusion. The *only reason* extradition lies so far from the “central thrust of s. 6(1) . . . against exile and banishment” (*Cotroni*, at p. 1482) *is* the prospect of returning to Canada by means of, *inter alia*, an international prison transfer. In other words, if the prospect of a prisoner transfer mitigates the violence done by extradition to the right to *remain* in Canada, this must be because it enables citizens to exercise their right to *enter* Canada once the country demanding the extradition consents to their repatriation.

[59] In our colleague’s view, the issue on this appeal is whether the mobility rights guaranteed by s. 6(1) of the *Charter* give Canadian citizens incarcerated abroad the right to require Canada to administer their foreign prison sentences whenever the foreign jurisdiction consents to the transfer (paras. 3, 44, 45 and 48).

[60] With respect, framing the issue this way unduly constricts the breadth of the mobility rights guaranteed under the *Charter*. A correct interpretation of the right to enter Canada — one informed by the “intimate relation between a citizen and his country” (*Cotroni*, at p. 1480) — demands an acknowledgment that effective exercise of the rights conferred by s. 6(1) will often require the state’s active cooperation. This is due, in part, to the rights’ extraterritorial application and the principle of sovereignty of nations: P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp. (loose-leaf)), vol. 2, at p. 37-41.

[61] Indeed, Canadian courts have recognized that s. 6(1) obliges the state to give effect to its citizens' mobility rights. For instance, in *Kamel v. Canada (Attorney General)*, 2009 FCA 21, [2009] 4 F.C.R. 449, at para. 14, the Federal Court of Appeal affirmed Noël J.'s finding that s. 6(1) imposes a duty on the state to issue a citizen a Canadian passport (2008 FC 338, [2009] 1 F.C.R. 59). At paragraphs 103-4 of his Federal Court decision, Noël J. explained the basis of that duty:

In order for mobility rights respecting travel outside Canada to be truly meaningful, it seems to me that more is needed than the right to enter or leave, because entering means coming back from somewhere, and leaving means going to a foreign destination. In both cases, returning and leaving imply a foreign destination where a passport is required. This mobility right cannot be exercised without a passport.

That is not all, however. By its own actions, the Canadian government recognizes and encourages the use of passports for travel abroad.

[62] Similarly, in *Abdelrazik v. Canada (Minister of Foreign Affairs)*, 2009 FC 580, [2010] 1 F.C.R. 267, at para. 152, Zinn J. held that

where a citizen is outside Canada, the Government of Canada has a positive obligation to issue an emergency passport to that citizen to permit him or her to enter Canada; otherwise, the right guaranteed by the Government of Canada in subsection 6(1) of the Charter is illusory. Where the Government refuses to issue that emergency passport, it is a *prima facie* breach of the citizen's Charter rights unless the Government justifies its refusal pursuant to section 1 of the Charter. [Emphasis added.]

[63] Just as neither *Kamel* nor *Abdelrazik* were about a constitutional right to a passport *per se*, this appeal is not about the right to a prisoner transfer. By its enactment of the *ITOA* and signature of the treaties the *ITOA* implements, Parliament

and the Canadian government have recognized and encouraged the use of international prisoner transfers as a means of enabling Canadian citizens incarcerated abroad to enter and remain in Canada. The *ITOA* was precisely designed to safeguard and facilitate the exercise of these s. 6(1) rights. As stated in s. 3 of the *ITOA*:

The purpose of this Act is 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.³

[64] Parliament has crafted a regime whereby once the foreign state has consented to a transfer — thus removing the practical restrictions on an incarcerated citizen's ability to return to Canada — the sole impediment to the exercise of the citizen's s. 6(1) right is the Minister's discretion. A statutory regime that grants a Minister the discretion to determine whether or not citizens can exercise their *Charter*-protected right to enter Canada constitutes, *prima facie*, a limit on the s. 6(1) right of the citizens in question.

[65] We hasten to add that, in the absence of the *ITOA* and the treaties that it implements, the minimum of state action required by s. 32 of the *Charter* for the *Charter* to apply would not be met. Clearly, all citizens abroad cannot rely on their *Charter*-guaranteed right to enter Canada in order to demand that the Canadian government actively facilitate their repatriation by, for instance, paying for their airline tickets.

³ As it read at the relevant time. On March 13, 2012, a number of provisions in the *ITOA*, including s. 3, were amended by the *Safe Streets and Communities Act*, S.C. 2012, c. 1, ss. 135-136.

[66] Moreover, the greater administrative and financial costs occasioned by a prisoner transfer, as compared to the issuance of a passport, may be relevant at the s. 1 justification stage but are irrelevant to the s. 6(1) inquiry. “[T]he guarantees of the *Charter* would be illusory if they could be ignored because it was administratively convenient to do so”: *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, at p. 218 (*per* Wilson J.).

[67] Accordingly, we find that ss. 8(1), 10(1)(a) and 10(2)(a) of the *ITOA* constitute a limitation on the rights protected by s. 6(1) of the *Charter*. We turn now to consider whether this limitation is nonetheless justified under s. 1 of the *Charter*.

III. Justification Under Section 1

[68] To pass constitutional muster under s. 1, the impugned provisions must constitute “reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. This will be the case where the party invoking s. 1 demonstrates (1) that the infringing provisions relate to a pressing and substantial objective, (2) that there is a rational connection between the objective and the infringement of the right, (3) that the chosen means interfere as little as possible with the protected right, and (4) that the salutary effects of the measures outweigh their deleterious effects: *R. v. Oakes*, [1986] 1 S.C.R. 103; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 889; Hogg, at pp. 38-17 and 38-18.

[69] For the following reasons, we believe that ss. 8(1), 10(1)(a) and 10(2)(a) of the *ITOA* satisfy this standard of justification.

[70] It is important to note, at the outset, that the issue here is *not* whether the respondent Minister's discretion was reasonably exercised *in this case* in light of the appellant's *Charter* rights. The appellant expressly abandoned his argument on the reasonableness of the Minister's decision before the Court of Appeal and did not raise it before this Court: 2011 FCA 39, [2012] 4 F.C.R. 31, at paras. 14 and 71 (*per* Mainville J.A.); para. 74 (*per* Nadon J.A.).

[71] At the time of the Minister's decision in the present case, ss. 10(1)(a) and 10(2)(a) of the *ITOA* provided that:

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;

...

(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*; . . .

[72] There is no dispute that ensuring the security of Canada and the prevention of offences related to terrorism and organized crime are pressing and substantial objectives.

[73] The appellant contends, however, that there is no rational link between the Minister's discretion to refuse a transfer on the basis of the factors set out in ss. 10(1)(a) and 10(2)(a) of the *ITOA* and the pressing and substantial objectives of the impugned provisions. He submits two arguments to this end: first, that the Minister's discretionary power does no more than delay the citizen's return to Canadian soil; second, that the legislation's pressing and substantial objectives would be better served by Canada taking charge of the sentence. In our view, neither argument can succeed.

[74] We agree that considering security risks that may arise only upon an offender's *release* is not rationally connected to the objectives of the impugned provisions since, once liberated abroad, Canadian citizens can enter Canada simply by proving their status at the border. But considering risks that could arise *during* incarceration is not "arbitrary, unfair or based on irrational considerations": *Oakes*, at p. 139. This distinction was highlighted by the respondent, at para. 94 of its factum:

[TRANSLATION] The Minister's decision relates to the management of the sentence and to the place where it will be served, bearing in mind that the offender will be able to return to Canada once his sentence has been served. It is therefore perfectly logical that what the Minister must consider relates to the risks the offender's return to Canada would entail at the time of the transfer request rather than to those it would entail, if any remain, once the sentence has been served. [Emphasis added.]

[75] The challenged factors must be interpreted contextually and in a manner consistent with the purpose of the *ITOA*. Phrases such as “whether the offender’s return” (s. 10(1)(a)) and “after the transfer” (s. 10(2)(a)) may be wide in the abstract, but they “are more or less elastic, and admit of restriction or expansion to suit the subject-matter. . . . [I]t is necessary to give them the meaning which best suits the scope and object of the statute without extending to ground foreign to the intention”: R. Wilson and B. Golpin, eds., *Maxwell on the Interpretation of Statutes* (11th ed.), at pp. 58-59, quoted in *McKay v. The Queen*, [1965] S.C.R. 798, at p. 803. See also *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999] 2 S.C.R. 961, at para 25; R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008) at pp. 284-87.

[76] Manifestly, the factors set out in ss. 10(1)(a) and 10(2)(a) relate to risks that arise upon the transfer of offenders, *before* their release. Denying a prisoner transfer request based on security risks that may arise only *after* an offender’s release would be an unreasonable exercise of discretion grounded in an erroneous interpretation of the *ITOA*. A Minister’s exercise of discretion in such an unreasonable manner, however, does not render the factors themselves irrational. Properly understood, the factors and the Minister’s discretion are rationally connected to Parliament’s pressing and substantial objectives.

[77] Moreover, the pressing and substantial objectives of the impugned provisions would not be better served in *all cases* by Canada taking charge of the sentence. As Mainville J.A. explained in his concurring reasons in the court below:

I do not find it irrational for Parliament to empower the Minister to refuse the transfer of a convicted terrorist if it is reasonable to believe that the incarceration of that terrorist in Canada would result in retaliatory terrorist attacks on Canadian citizens. Likewise, I do not find it irrational for Parliament to empower the Minister to refuse the transfer of an international drug cartel kingpin if it is reasonable to believe that such a transfer would result in attacks on Canadian prison guards or would facilitate the criminal operations of that offender or of his criminal organization. These are clear cases where the Minister could properly refuse a transfer to Canada. [par. 56]

[78] Given that in some cases the objectives of the *ITOA* would be served by refusing a transfer based on the factors set out in ss. 10(1)(a) and 10(2)(a), the Minister's discretion to consider these factors on a case-by-case basis is rationally connected to the pressing and substantial objectives of these provisions.

[79] In addition, at least in some cases, refusing a transfer based on the challenged factors will be the sole — and therefore the most minimally impairing — alternative open to the Minister. In light of both the binary nature of the Minister's decision and the citizen's continued incarceration, it is difficult to conceive of a less drastic means of achieving Parliament's protective purpose.

[80] Finally, in our view, the impugned provisions are proportionate in their effect — that is their effects do “not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgement of rights”: *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 768.

[81] The beneficial effects of permitting the Minister to consider threats to Canadian security and threats of terrorism or organized crime in deciding whether to permit a transfer are, as the respondent asserts, [TRANSLATION] “self-evident” (R.F., at para. 106).

[82] To the extent that the impugned provisions engage the rights guaranteed by s. 6(1) of the *Charter*, they — like extradition — “li[e] at the outer edges of the core values [being] protected by [s. 6(1)]”: *Cotroni*, at p. 1481. Again, as Mainville J.A. put it:

These offenders have committed offences in foreign jurisdictions. Barring exceptional circumstances, there is nothing unfair or unreasonable in the fact that these offenders are subject to the incarceration systems of the foreign jurisdictions in which they committed their offences. Canada’s entire extradition system is in fact based on this premise. [para. 63]

[83] The prejudicial effect of a transfer refusal on the mobility rights of Canadian citizens incarcerated abroad is further palliated by the fact that the citizens in question will be able to enter Canada after serving their sentences in the foreign jurisdiction.

[84] We conclude that ss. 8(1), 10(1)(a) and 10(2)(a) of the *ITOA* constitute a reasonable limit on the mobility rights of Canadian citizens incarcerated abroad.

IV. Ministerial Discretion

[85] The Minister's discretion to grant or refuse prisoner transfer requests under the *ITOA* is broad and flexible. A large measure of deference is appropriate in the circumstances, given the complex social and political problems being tackled, such as security and terrorism: *Kamel* (F.C.A.), at paras. 57-59; *Cotroni*, at p. 1489; *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761, at paras. 37-39.

[86] Each individual decision by the Minister must nonetheless respect the governing principles of administrative law and, of course, remains subject to judicial review. Moreover, the Minister's discretion must be exercised with due regard for the s. 6(1) *Charter* rights at stake: *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395.

[87] But, as we indicated above, the appellant no longer challenges the reasonableness of the Minister's decision in this case. In these circumstances, we need not consider whether the Minister's discretion was properly exercised.

V. Conclusion

[88] Accordingly, we would dismiss the appeal and answer the constitutional questions as follows:

- (1) Do ss. 10(1)(a) and 10(2)(a), read in conjunction with s. 8(1), of the *International Transfer of Offenders Act*, S.C. 2004, c. 21,

infringe the right guaranteed by s. 6(1) of the *Canadian Charter of Rights and Freedoms*?

Yes.

- (2) If so, is the infringement a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

Yes.

Appeal dismissed.

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