Court File No. _____

FEDERAL COURT

B E T W E E N :

THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION and THE CANADIAN ASSOCIATION OF REFUGEE LAWYERS

Applicants

- and -

THE MINISTER OF IMMIGRATION REFUGEES AND CITIZENSHIP and THE ATTORNEY GENERAL OF CANADA

Respondents

NOTICE OF APPLICATION FOR LEAVE and for JUDICIAL REVIEW

TO THE RESPONDENT:

AN APPLICATION FOR LEAVE TO COMMENCE AN APPLICATION FOR JUDICIAL REVIEW has been commenced b the applicants under

[X] SUBSECTION 22.1(1) OF THE *CITIZENSHIP ACT*; or

[ ] SUBSECTION 72(1) OF THE *IMMIGRATION AND REFUGEE PROTECTION ACT*.

UNLESS A JUDGE OTHERWISE DIRECTS, THIS APPLICATION FOR LEAVE will be disposed of without personal appearance by the parties, in accordance with paragraph 22.1(2)(c) of the Citizenship Act.

IF YOU WISH TO OPPOSE THIS APPLICATION FOR LEAVE, you or a solicitor authorized to practice in Canada and acting for you must prepare a Notice of Appearance in Form IR-2 prescribed by the Federal Courts Citizenship, Immigration and Refugee Protection Rules, serve it on the tribunal and the applicant's solicitor or, if the applicant does not have a solicitor, serve it on the applicant, and file it, with proof after service, in the Registry, within 10 days after the day on which this application for leave is served.

IF YOU FAIL TO DO SO, the Court may nevertheless dispose of this application for leave and, if the leave is granted, of the subsequent application for judicial review without further notice to you.

Note: Copies of the relevant Rules of Court, information on the local office of the Court and other necessary information may be obtained from any local office of the Federal Court or the Registry in Ottawa, telephone: (613) 992-4238.

The applicant seeks leave of the Court to commence an application for judicial review of:

The Applicants are not seeking to review a decision.

The Applicants are seeking a writ of prohibition to prohibit the Minister of Citizenship and Immigration from applying section 10(1) of the *Citizenship Act* and for an order in the nature of a declaration that those provisions are inconsistent with section 7 of the *Charter of Rights and Freedoms* ("the *Charter*"), cannot be saved under s. 1, and are therefore of no force or effect pursuant to s. 52(1) of the *Constitution Act, 1982*, and further that the said provision is inconsistent with ss. 1(a) and 2(e) of the *Bill of Rights* and is therefore inoperable.

IF THE APPLICATION FOR LEAVE IS GRANTED, THE APPLICANTS SEEK THE FOLLOWING RELIEF BY WAY OF JUDICIAL REVIEW:

1. A declaration pursuant to s. 52(1) of the *Constitution Act, 1982* that section 10 of the *Citizenship Act*, R.S.C. 1985, c. C-29, as amended by the *Strengthening Canadian Citizenship Act*, S.C. 2014, c. 22 violates section 7 of the *Canadian Charter of Rights and Freedoms* in a manner that cannot be saved under section 1, and is therefore of no force or effect.

2. A declaration that section 10 of the *Citizenship Act*, R.S.C. 1985, c. C-29, as amended by the *Strengthening Canadian Citizenship Act*, S.C. 2014, c. 22 violates sections 1(a) and 2(e) of the *Canadian Bill of Rights*, S.C. 1960, c. 44, and is therefore inoperative.

3. An writ of prohibition prohibiting the Minister of Immigration, Refugees and Citizenship from applying s. 10 of the *Citizenship Act* because it is inconsistent with the *Canadian Charter of Rights and Freedoms* and/or the *Canadian Bill of Rights*.

4. Such further and other relief as counsel may advise and this Honourable Court may permit.

IF THE APPLICATION FOR LEAVE IS GRANTED, THE APPLICATION FOR JUDICIAL REVIEW IS TO BE BASED ON THE FOLLOWING GROUNDS:

A. THE APPLICANTS

i. The British Columbia Civil Liberties Association

1. The British Columbia Civil Liberties Association ("BCCLA") is a non-profit, non-partisan, unaffiliated advocacy group. It was incorporated in 1963 pursuant to the *British Columbia Society Act*. The objectives of the BCCLA include the promotion, defence, sustainment and extension of civil liberties and human rights throughout British Columbia and Canada. To that end, the BCCLA prepares position papers, engages in public education, assists individuals to address violations of their rights and takes legal action as both an intervener and a plaintiff.

2. The BCCLA has a long-standing interest in matters of immigrant and refugee rights, and has been extensively involved in advocacy and education in respect of a wide range of issues affecting immigrants and refugees in Canada. The BCCLA has an extensive history of making submissions to courts and government bodies with respect to the impacts of laws and policies on the constitutional rights of non-citizens in Canada.

3. The BCCLA has a strong interest in the issues raised in this proceeding, having been active in its opposition to the changes made by the *Strengthening Canadian Citizenship Act*, including those at issue in this proceeding. When the *Strengthening Canadian Citizenship Act* was first proposed as Bill C-24 in February 2014, the BCCLA, together with the Canadian Association of Refugee Lawyers issued a petition calling for the bill's withdrawal. The over 800 page petition, with over 25,000 signatures, was delivered to the office of Citizenship and Immigration Canada in Vancouver on June 3, 2014. Since the Bill's introduction, the BCCLA

has engaged in numerous public education initiatives aimed at informing Canadians about the bill and its impacts through publishing blogs and giving public talks and media interviews.

4. The BCCLA has extensive experience litigating complex constitutional issues before the courts. It most commonly appears as an intervener before the Supreme Court of Canada as well as other Canadian courts. It also has experience as an applicant or plaintiff, having been a full party in the following proceedings:

a. *British Columbia Civil Liberties Association v. British Columbia (Attorney General)* (1988), 49 D.L.R. (4th) 493 (B.C.S.C.);

b. *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2007 FC 901;

c. *British Columbia Civil Liberties Association v. Royal Canadian Mounted Police*, 2008 FC 49;

d. *Amnesty International Canada and British Columbia Civil Liberties Association v. Canada (Chief of the Defence Staff)*, 2008 FCA 401;

e. *John Dixon and British Columbia Civil Liberties Association v. Powell River (City)*, 2009 BCSC 406;

f. *Abdelrazik et al. v. Canada (Attorney General)*, Federal Court File T-889-10;

g. *British Columbia Civil Liberties Association v. Regina*, 2012 BCPC 406;

h. *British Columbia Civil Liberties Association v. University of Victoria*, 2015 BCSC 39;

i. *Carter et al. v. Canada (Attorney General)*, [2015] 1 S.C.R. 331;

j. *British Columbia Civil Liberties Association v. Canada (Attorney General)*, Federal Court File T-2201-14; and

k. *British Columbia Civil Liberties Association and the John Howard Society of Canada v. Canada (Attorney General)*, British Columbia Supreme Court File No. S150415.

ii. The Canadian Association of Refugee Lawyers

5. The Canadian Association of Refugee Lawyers ("CARL") was formed and incorporated in September 2011 as a non-profit and non-partisan association of lawyers and academics with an interest in legal issues related to refugees, asylum seekers, and the rights of immigrants. Its purposes include legal advocacy on behalf of those groups. CARL serves as an informed national voice on refugee law and human rights and promotes just and consistent practices in the treatment of refugees in Canada.

6. Relying on the broad experience of this membership, CARL has a mandate to research, litigate and advocate on refugee rights and related issues. CARL carries out this mandate in the courts, before parliamentary committees, in the media, among its membership *via* bi-annual conferences, and elsewhere in the public sphere. In particular, the association actively engages in public interest litigation, including interventions, on behalf of vulnerable refugees, asylum seekers, permanent residents and other migrants.

7. CARL has a strong interest in the issues raised by this litigation, and has publically expressed its fundamental concern with the new revocation process introduced by the *Strengthening Canadian Citizenship Act*. After Bill C-24 was tabled, CARL submitted a brief to the Parliamentary subcommittee studying the bill, engaged in public education activities, published op-eds, and organized and presented at legal education fora. As well, CARL worked with the BCCLA to issue a petition calling for the withdrawal of the legislation.

8. CARL has participated in a number of cases raising important issues respecting the rights of non-citizens, including numerous interventions before the Federal Courts and the Supreme Court of Canada. CARL has also litigated as a full applicant before this Court in:

a. *Canadian Doctors for Refugee Healthcare v. Canada (Attorney General)*, 2014 FC 651; and

b. *Y.Z. and the Canadian Association of Refugee Lawyers v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 892.

B. THE LEGISLATION

9. On June 19, 2014 Royal Assent was given to the *Strengthening Canadian Citizenship Act*. The *Act* amended various provisions of the *Citizenship Act* including, as relevant to this application, expanding the grounds upon which a person may have their citizenship revoked and amending the procedures that lead to revocation (the "revocation provisions").

10. Prior to the passage of C-24, section 10 of the *Citizenship Act* provided that an individual's citizenship could be revoked only if it were established that their citizenship was obtained "by false representation or fraud or by knowingly concealing material circumstances," in effect removing the grant of citizenship when improperly made *ab initio*. A finding of fraud could be made only by the Governor in Council on a report prepared by the Minister. Prior to issuing a report, the Minister was required to notify the affected individual, who had a right to require that the matter be referred to the Federal Court for adjudication. The Court would make a determination as to whether or not the Minister had established on a balance of probabilities that the applicant had obtained his or her citizenship by fraud.

11. C-24 both expanded the grounds upon which citizenship could be revoked, and changed the applicable procedure for revocations.

12. The decision to revoke citizenship is now taken by the Minister directly, not by the Governor in Council. The subject no longer has the right to have the matter referred to Court for adjudication. In reality, decisions on citizenship revocation are delegated to public servants within the Department's Case Management Branch. Decision-makers are not independent of

either Departmental officials who investigate and pursue revocation, nor are they independent of the Minister himself.

13. There is no right to disclosure of relevant materials in the possession of the Minister. The Minister need only set out the grounds on which he is relying to make his decision. The Minister is not required to disclose either the evidence upon which he is relying, or any other relevant evidence – including exculpatory evidence – in his possession or control.

14. Under the new revocation procedure, there is no right to an oral hearing. The amended *Citizenship Act* states that the Minister may hold an oral hearing if, pursuant to prescribed factors, he is of the view that a hearing is required. Both the *Act* and the associated regulations use the permissive "may" to describe the authority to hold an oral hearing.

15. As opposed to the previous procedure, cases are not referred to the Governor in Council for final determination. Individuals facing revocation have lost the right to make submissions to the Governor in Council. The Governor in Council could consider equitable circumstances. This right to make submissions on these points has been lost.

16. There is no right of appeal against the decision of the Minister. The sole recourse against a decision by the Minister to revoke citizenship under the new grounds of revocation is an application for leave for judicial review pursuant to s. 22.1 of the *Citizenship Act*.

C. THE REVOCATION PROVISIONS ARE UNCONSTITUTIONAL

i. Engagement of section 7 of the *Charter*

17. Section 7 of the *Charter* provides that "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice".

18. Revocation of citizenship restricts an individual's liberty interest. It removes their mobility and voting rights, which are inherent aspects of liberty. Revocation engages the security of the person interest as well because of the serious and prolonged psychological suffering it may impose on individuals facing revocation proceedings.

ii. Procedural fundamental justice

19. Because revocation engages s. 7 of the *Charter* and may result in extreme consequences, individuals subject to revocation are entitled to a high degree of procedural fairness. The need for procedural fairness is all the more acute given the absence of any right of appeal from a decision of the Minister to revoke.

20. The *Act* establishes a discretionary regime that lacks basic procedural protections for persons at risk of revocation. This is not consistent with fundamental justice.

21. With the exception of revocation for engaging in armed conflict with Canada, which requires the Minister to bring a proceeding in the Federal Court, the extent of the procedural protections are: (1) the person is given notice of the grounds on which the Minister is relying to make a decision and (2) is informed of their right to make written representations within a specified period of time: s. 10(3).

22. The new regime fails to afford sufficient protections to meet the requirements of natural justice because:

a. The *Act* does not require the Minister to disclose relevant information in his possession to the individual;

b. By requiring that the minister notify an individual of the grounds upon which he is relying to render his decision, but not necessarily the evidence supporting those grounds, the *Act* does not guarantee the right to know the case put against one and to answer that case;

c. The *Act* does not guarantee a hearing before an independent and impartial magistrate; and

d. The *Act* does not guarantee an oral hearing in all circumstances where such a hearing is necessary.

23. Under the previous regime, in which all revocation actions could be referred to the Federal Court for adjudication, courts had adopted a requirement for full disclosure and production of all relevant information within the party's possession. Under the SCCA's approach, in which there is no judicial proceeding, there is no general disclosure requirement placed on the government.

24. The Minister is under no obligation to disclose information in his possession that, while not being relied upon, is nevertheless relevant to that proceeding. In particular, the Minister has no obligation to disclose information to the individual that tends to undermine the basis for the revocation, even if the Minister were in possession of it and aware of its relevance.

25. The Minister is, in fact, under no obligation to disclose any relevant evidence. The *Act* merely requires the Minister to disclose the "grounds" on which he is relying, not the evidence that he believes supports those grounds.

26. With the exception of those revocation proceedings that fall under s. 10.1 of the *Act*, the *Act* does not provide for a fair hearing before an independent and impartial magistrate. The proceedings are purely administrative, with the Minister both initiating and adjudicating the revocation process. In practice, both the investigative and adjudicative functions under the *Act* are delegated to officials within Citizenship and Immigration Canada's Case Management Branch, who are not independent from one another or from the Minister himself.

27. The *Act* is furthermore unconstitutional because it does not guarantee a right to an oral hearing. Procedural fairness requires an oral hearing where credibility is at stake, and serious issues of credibility will often arise during revocation proceedings.

28. The *Act* does not even require that the Minister grant an oral hearing when prescribed factors point to the need for one. Rather than use the mandatory term "shall", s. 10(4) uses the permissive "may", clearly indicating a purely discretionary regime. Establishing a discretionary regime in which the decision maker determines whether or not to conduct an oral hearing cannot replace a right to an oral hearing in circumstances where s. 7 is engaged.

D. THE REVOCATION PROVISIONS ARE INCONSISTENT WITH THE BILL OF RIGHTS

29. The citizenship revocation procedures under section 10(3) and 10(4) of the *Citizenship Act* violates the rights to right to life, liberty, security of the person under s. 1(a) and the right to a fair hearing under s. 2(e) of the *Bill of Rights.*

30. Section 1(a) of the *Bill of Rights* provides that all individuals have the right to life, liberty and security of the person and the right not to be deprived thereof except by due process of law.

31. As noted above, citizenship revocation engages individuals' liberty and security of the person interests.

32. Section 2(e) of the *Bill of Rights* guarantees a right to a fair hearing in accordance with the principles of fundamental justice for the determination of rights and obligations. The revocation procedure under s. 10 of the *Citizenship Act* is therefore required to comply with this provision.

33. The revocation process does not comply with either due process or the principles of fundamental justice, and is therefore inoperative.

34. As noted above, under the previous regime, in which all revocation actions could be referred to the Federal Court for adjudication, courts had adopted a requirement for full disclosure and production of all relevant information within the party's possession. Under the procedure introduced by C-24, there is no judicial proceeding and no general disclosure requirement placed on the government.

35. Furthermore, with the exception of those revocation proceedings that fall under s. 10.1 of the *Act*, the *Act* does not provide for a fair hearing before an independent and impartial decision-maker.

36. Moreover, the *Act* does not even require that the Minister grant an oral hearing when prescribed factors point to the need for one. Within the context of citizenship revocation, establishing a discretionary regime in which the decision maker determines whether or not to conduct an oral hearing violates the *Bill of Rights*.

IF LEAVE IS GRANTED, THIS APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:

1. The affidavit of Laura Track, to be sworn;

2. The affidavit of Mitchell Goldberg, to be sworn;

3. Affidavits from experts and other witnesses prepared in support of the application, to be sworn; and

4. Such further material as this Honourable Court may permit

September 23, 2016

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