FACTUM

The Preventative Function of Section 15 of the *Charter* and the Danger Certificate System

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I. INTRODUCTION

PERMANENT RESIDENTS OF CANADA who have never taken Canadian citizenship are subject to being declared a "danger to the public" by the Minister of Immigration when convicted of a crime for which the maximum penalty is five or more years in prison. The result may be deportation, even decades after the crime was committed. This "danger to the public" certificate system breaches s. 15 of the *Canadian Charter of Rights and Freedoms*[1] by creating an unreasonable risk that members of vulnerable groups will be the victims of discrimination by government officials. The following factum proposes that s. 15, like other sections of the *Charter*, has a *preventative* function.

II. THE FACTUM

THE APPLICANT SUBMITS that there is sufficient evidence in the instant case for this honourable Court to conclude that the danger opinion system in the *Can-*

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Editor's note: this factum was submitted while the instant case, *Onganda* v. *Canada (Minister of Citizenship and Immigration)* (1998), 154 F.T.R. 115 was before the Federal Court Trial Division. The argument contained herein has been put forward in several other cases, but as yet has not been adopted.

[1] Part I of the *Constitution Act, 1982*, being schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

ada Immigration Act[2] is, in fact, often applied in a manner that discriminates on the basis of race, ethnicity, and national origin. When it is demonstrated that a statute is being administered in such a fashion, the appropriate remedy is to strike it down. In the alternative, the applicant submits that the danger opinion system breaches s. 15 of the *Charter* because it creates an unreasonable risk of discrimination on the basis of race and ethnicity. Other sections of the *Charter*, including sections 8 and 11(d), have been construed by the Supreme Court of Canada as having a *preventative* function against unreasonable searches and seizure, and government interference with judicial independence, respectively. The Supreme Court of Canada has insisted with these sections that reasonable safeguards be put in place to prevent *Charter* breaches. It is respectfully submitted that it is now time for the courts to recognise that s. 15 of the *Charter* has a role in *preventing* discrimination.

S. 15 of the *Charter* speaks of the equal protection and equal benefit of the law. Members of vulnerable minorities should not be placed in a position where they have a serious and well-founded concern that the law will be applied against them in a discriminatory manner. Vulnerable minorities, and the Canadian public generally, should have reasonable grounds for confidence that a law will be administered without discrimination. A statutory scheme should not, to the contrary, create anxiety that discrimination is taking place. After discrimination occurs, it may be difficult or even impossible in practice for an individual victim to prove that discrimination has occurred. Even if a tribunal or court rules in favour of the victim, it may then be impossible to adequately remedy the harm done. For example, how could the state ever compensate people for years of forced separation from their Canadian homes and families, and even their children?

Viewed in its social, political, and economic context, the danger certification procedure is a paradigmatic example of a governmental program that leaves reasonable and serious concern that individuals will be singled out and subjected to harsh treatment by government officials on account of their race and national origin.

If Parliament was determined to create a system whereby certain permanent residents of Canada can be summarily removed, it was obliged to do so in a manner that provided reasonable safeguards against discrimination. The history of racism in the administration of Canadian immigration policy, and contemporary studies establishing the existence of racism in the administration of justice in Canada, require that any new scheme protect members of vulnerable minorities against racial discrimination. Instead, the current scheme creates a real and substantial risk that discrimination will take place.

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2 R.S.C. 1985, c.I–2 [hereinafter *Immigration Act*].

S. 15 of the *Charter* speaks of the equal protection of the law and equal benefit of the law for every individual. S. 15(1) reads:

> Every individual is equal before and under the *law* and has the right to the *equal protection and equal benefit of the law* without discrimination, and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. [emphasis added]

The applicant submits that the danger certificate provisions of the *Immigration Act* breach s. 15 of the *Charter* for the following reasons:

(i) S. 15(1), like other provisions of the *Charter*, must be interpreted in a broad and generous manner, reflecting the fact that they are not easily repealed or amended, but are intended to provide a continuing framework for the legitimate exercise of government power and, at the same time, for the unremitting protection of equality rights;

(ii) The letter and purpose of s. 15 of the *Charter* includes the protection of individuals against discrimination. To that end, government must provide adequate legal safeguards that protect individuals against the risk that officials will interpret and apply the law in a discriminatory manner. The circumstances in the instant case include a history of discrimination against minorities in the application of Canadian immigration law, and compelling evidence that prejudice remains a part of the administration of justice in Canada. As well, discrimination in the context of removal proceedings may result in injustice that is difficult to prove and harm that is impossible to remedy;

(iii) The absence of adequate safeguards leaves such groups without the equal protection and equal benefit of the law. Members of vulnerable groups will face an unreasonable risk of actual discrimination and have to live with the associated anxiety and insecurity. Canadians generally will not be able to have a reasonable measure of confidence that the law is being administered and applied in a non-discriminatory and constitutionally valid manner;

(iv) There is a need for adequate safeguards that is twofold: to prevent the infliction of actual discrimination by government, and to assure both vulnerable groups and the wider public that government is not engaged in discrimination;

(v) In order to enforce the requirement of adequate legal safeguards against discrimination, it is not necessary for the courts to find actual discrimination. A good analogy is the administrative law doctrine of the "reasonable apprehension of bias." A decision-maker will be disqualified when those affected by the decision, or the public generally, have a well-founded concern that the decision-maker is liable to be biased. No one is required to

meet the near-impossible task of proving that the decision-maker actually is prejudiced. Justice must be seen to be done, and when there are grounds for substantial reason to doubt that it is taking place, the courts must intervene. The concept of "equal protection of the law ... without discrimination" in s. 15 of the *Charter* entails this. Where there would otherwise be good reason for minorities and the public to fear conscious or effective bias in the administration of a government program on the basis of race, colour, national origin, and alienage, there must be sufficient legal safeguards to dispel that concern;

(vi) The requirements for search and seizure cases are analogous. In *Hunter* v. *Southam* it was emphasised that systems must be put in place to *prevent* the unreasonable act, rather than to merely remedy the situation after the fact.[3] This preventative approach to the *Charter* is what should now be applied to s. 15;

(vii) The jurisprudence on s. 15 of the *Charter* emphasises the need, when interpreting the concept of "discrimination" in s. 15, to examine the wider social, political, and historical context in which a law operates. Similarly, the need for adequate legal safeguards must be viewed in a sweeping social, political, and historical context;

(viii) Members of vulnerable immigrant groups do not have reasonable confidence that the danger certification process is operating in an unbiased manner. Canadian immigration policy was, for a century, openly contaminated by racial discrimination. The process is now officially race-free. Many individuals, however, who arrive from places such as Jamaica, find that discrimination continues to arise in the delivery of government programs and services. Indeed, a recent report by the Ontario government confirms the exercise of discrimination by police and other officials in the administration of justice. An earlier study in Nova Scotia by the Marshall Inquiry similarly found prejudiced attitudes among the community and police in that province with respect to black persons;[4]

(ix) Groups such as Jamaican Canadians are particularly vulnerable in the current political and economic climate. Throughout Western democracies, there is a rising tide of anti-immigrant anxiety. Recent immigrants are seen by some as a source of social trouble, including the areas of law-breaking and welfare provision;

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3 [1984] 2 S.C.R. 145.

4 W. Head, *Discrimination against blacks in Nova Scotia: the investigation of the criminal justice system* (Halifax: Royal Commission on the Donald Marshall Jr. Inquiry, 1989) [hereinafter Nova Scotia Report].

(x) The political motivation behind the danger certification process was an incident of unlawful behaviour by a Canadian resident of Jamaican origin. There is a real risk of a knowing or unconscious bias in assessing the alleged dangerousness of Jamaican Canadians and black Canadians generally. Officials may personally tend to stereotype blacks, or they may respond to stereotypes and animosities existing in the wider population;

(xi) The need for legal safeguards is highlighted by the Tasse study. Commissioned by the Department of Immigration, Tasse interviewed lawyers and non-governmental organisers concerned with immigration. The Report found both the perception that Immigration officials often act in a manner lacking "ethics and humanity," and the uneven application of standards;[5]

(xii) When Tasse interviewed Immigration officials, they complained of a lack of consistency in administration. Tasse further found that Immigration officials complained that managers measured performance by the quantity of persons they removed, rather than by the application of ethical considerations;

(xiii) The reasonable concerns about bias against groups like Jamaicans and other blacks finds strong confirmation in reports such as the Dolin[6] complaint into racial bias by immigration officials in Winnipeg, and the Ontario Government's own study of police treatment of black persons;[7]

(xiv) The affidavit of Mr. Williams in the instant case[8] also speaks of the reasonable concerns regarding bias, specifically affirming his belief that the public danger opinion laws that exist in the *Immigration Act* are administered in a manner discriminatory to members of the black community; and

(xv) The current immigration certification process is not one in which members of vulnerable minorities, including Jamaicans and other Canadians, can have reasonable confidence. Its defects include the following:

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5 R. Tasse, *Removal Processes and People in Transition* (Ottawa: Department of Immigration, 1996) [hereinafter Tasse Report or Tasse].

6 Manitoba Advisory Council on the Status of Women, *Some Concerns of Rural and Farm Women: Information Provided to M. B. Dolin, Minister Responsible for the Status of Women, upon request (1984)* [hereinafter Dolin Complaint].

7 Ontario, Commission of Systemic Racism in the Ontario Criminal Justice System, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System (1995)* [hereinafter Ontario Report].

8 Mr. Williams is president of the National Coalition of Canada.

(a) Dangerousness is a vague concept, and s. 70(5) of the *Immigration Act* provides no definition. There is an enormous scope of subjectivity, and therefore conscious or effective bias, in the application of that standard.

(b) There is no statutory or regulatory procedure to ensure that potential deportees are adequately warned of the factual and legal case that they must meet. Potential deportees are not given sufficient time to prepare their responses.

(c) There is no statutory or regulatory provision to allow potential deportees to personally appear before the executive official actually making the decision. The lack of personal contact exacerbates the risk that the applicant will be viewed stereotypically or prejudicially, rather than being considered on the individual merits of the case.

(d) The application of the concept of "dangerousness" to particular cases is left to the executive branch of government, including the politically accountable Minister, rather than to an independent tribunal such as the Immigration Appeal Division.

(e) There is no requirement to give reasons, and therefore no means whereby the public or the courts can even begin to check for bias in any form, including both wilful and deliberate discrimination and adverse impact discrimination. Even when the legal standard is well-defined, assessing future dangerousness is a difficult matter. Decisions are liable to be influenced by extraneous biases. The ill-defined danger standard in the existing s. 70(5) of the Immigration Act provides almost unlimited scope for the operation of wilful or unintentional bias by the Minister and her officials.

(f) Even if reasons were provided, there would be no adequate means for the courts to supervise the Ministerial determination of danger. A person adversely affected by a determination has no right to an appeal, or even to judicial review without leave. Furthermore, even if leave is granted, the courts do not have adequate means to detect and remove the bias in determinations. The ill-defined danger standard leaves enormous discretion to the Minister. A reviewing court can only intervene if the Minister makes an error of law on the face of the record or makes a capricious finding of fact. Such a limited review cannot identify and eliminate real discrimination that may be taking place at the operational level.

According to such cases as *Hunter* v. *Southam* and *Schachter* v. *Canada*,[9] it is not the role of the courts to perform major surgery on legislation that is found to violate the *Charter*. While limited refinements may be read into legislation, substantial changes must be left to Parliament. The current system is so utterly lacking in proper safeguards that it cannot be rescued by the courts through reconstructive surgery. Rather, the courts ought to strike down s. 70(5) of the *Immigration Act*, and leave it to Parliament to rewrite the provision in a manner that provides the protection of the law.

In *Hunter* v. *Southam*, it was expressly held that the purpose of s. 8 of the *Charter* includes *preventing* unjustified searches before they happen, not simply determining after the fact whether they ought to have occurred in the first place. The Supreme Court itself emphasised the word *preventing*. Accordingly, it was stressed that a proper assessment of the competing interests could only be accomplished by a system of prior authorisation, not one of subsequent validation. It is submitted that the preventative approach that has been applied to s. 8 should be equally applied to s. 15 of the *Charter*. It is necessary to establish preventative measures against racial prejudice before a deportation order is made, not after.

Evidence of this preventative approach is also found in *Reference re: Remuneration of Judges*.[10] The appeals were united by the issue of whether and how the guarantee of judicial independence in s. 11(d) of the *Charter* restricts the extent to which the provincial governments and legislatures can reduce the salaries of provincial court judges. In order to avoid the possibility or appearance of political interference, it was held that a salary commission must be interposed between the judiciary and the other branches of government to depoliticise the process of determining such salary questions. The Supreme Court of Canada held that provinces are therefore under a constitutional obligation to establish bodies that are independent, effective, and objective. If the Court can insist on such extensive measures to assure judges and the general public that governments will not act impartially in setting judicial remuneration, should not a highly vulnerable segment of society, such as immigrants, also have the benefit of a statutory scheme that provides reasonable safeguards against racial discrimination?

In *Miron* v. *Trudel*[11] Gonthier J. provides a useful review of the Supreme Court of Canada judgments that emphasise the importance of examining social,

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9 [1992] 2 S.C.R. 679.

10 *Reference re:* Public Sector Pay Reduction Act (P.E.I.), s. 10; *Reference re:* Provincial Court Act (P.E.I.); *R. v. Campbell*; *R. v. Ekmecic*; *R. v. Wickman*; *Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice)* (1997), 150 D.L.R. 577 (S.C.C).

11 (1995), 124 D.L.R. (4th) 693 (S.C.C.) at 704.

political, and historical context when examining discrimination under s. 15 of the *Charter*. He quotes from the judgment of Wilson J. in *R* v. *Turpin:*

> In determining whether there is discrimination on grounds related to the personal characteristic of the individual or group, it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also to the larger social, political and legal context ... . Accordingly, it is only by examining the larger context that a court can determine whether differential treatment results in equality or whether, contrariwise, it would be identical treatment which would in the particular context result in inequality or foster disadvantage.[12]

Thus, notes Gonthier J.:

> Wilson J.'s words stress the importance of a contextual approach in order to prevent the s. 15 analysis from becoming a mechanical and sterile categorization process. This admission was most memorably issued by Dickson J., as he then was, in the landmark case of R. v. *Big M. Drug Mart*, where he stated that the "*Charter* was not enacted in a vacuum" and "it must be placed in its proper linguistic, philosophic and historical contexts."[13]

Gonthier J. also notes the reference in *Turpin* when examining the vulnerability of a group in terms of whether it is a "discrete and insular minority" that has suffered from "political, historical or legal disadvantage."[14]

Canadian immigration policy has been marred, for most of its history, by overt legislative and regulatory racism. David Matas pointed out Canada's failure in regard to refugee protection in 1989: "[r]acial intolerance first surfaced in the *Immigration Act* of 1910, which boldly gave Cabinet power to prohibit immigrants on racial grounds."[15] Matas went on to show that:

> In 1919, the law permitted the Governor in Council to bar from Canada immigrants who were considered undesirable "owing to their peculiar customs, habits, modes of life and methods of holding property and because of their probable inability to become readily assimilated." ... The federal government used its authority in 1919 to bar Dukhobors, Hutterites and Mennonites from coming to Canada.[16]

Asians were generally denied entry to Canada from 1913 until 1956. Special legislation relating to Chinese immigration existed until 1947: according to Professor C. J. Wydrzynski, "If Chinese were not possessed of lucrative finances,

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12 [1989] 1 S.C.R. 1296 [hereinafter *Turpin*].

13 *Ibid.*

14 *Ibid.*

15 D. Matas, *Closing the Doors: The Failure of Refugee Protection* (Toronto: Summerhill Press, 1989) at 28–30.

16 *Ibid.* at 29.

they were simply barred entry."[17] However, even those who had successfully entered Canada were not protected from discrimination. Matas points out that "[d]uring the Second World War, residents of Japanese origin, including Canadian-born citizens, were subject to internment and deportation."[18]

Immigration regulations were revised in 1954, but the Department continued to limit immigration to citizens of the U.K., Australia, New Zealand, South Africa, Ireland, the U.S., and France. Wrydzinski, quoting from Rawlyk, states that:

> [c]ontinuation of these policies [which discriminated against most countries of origin] was viewed as necessary because of the "strong prejudice against widespread coloured immigration."[19]

Matas writes that from 1956 to 1962 entry from various Asian countries, such as India, was limited to a tiny quota. The 1962 regulations extended preferential treatment to immigrants from Europe, the Middle East, and the Americas, furthering the discrimination against others.[20]

Finally, in 1978, Parliament enacted that a fundamental principle of the *Immigration Act* was that every applicant for admission to Canada had the right to standards of admission that did not discriminate on grounds of race, national or ethnic origin, colour, religion, or sex. The foregoing declaration of the principle and the elimination of obviously racist statutory sections and regulations did not necessarily mean the elimination of racism in Canada's immigration laws or their administration.

The guarantee of equality under the *Charter* protects against laws and regulations that may be neutral on their face. The *Charter* also protects against adverse impact discrimination. A law or regulation that is neutral on its face may be held unconstitutional because it has the *practical effect* of discriminating against groups protected by s. 15. In *Andrews* v. *Law Society of British Columbia*, a landmark case regarding s. 15, McIntyre J. adopted this general principle from human rights law:

> [N]o intent [is] required as an element of discrimination, for it is in essence the impact of the discriminatory act or provision upon the person affected which is decisive in considering any complaint.[21]

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17 C. J. Wydrzynski, *Canadian Immigration Law and Procedure* (Aurora: Canada Law Book, 1983) at 39–76.

18 Matas, *supra* note 15 at 32.

19 Rawlyk, "Canada's Immigration Policy, 1945–62" 42 Dal. L.J. 287 at 294.

20 Matas, *supra* note 15 at 30.

21 (1989), 2 W.W.R. 289 (S.C.C.).

Furthermore, the guarantee of equality in the *Charter* protects against the administration of laws by executive officials in a manner that is discriminatory, even if the laws are potentially neutral. S. 32 of the *Charter* states that it applies to Parliament and the government of Canada. Sometimes a law will be struck down because it is being administered in a manner that offends *Charter* values.[22]

The continuous passage rule is a notorious example of how a rule can be neutral on its face, but discriminatory in both intent and impact. As Matas recalls:

> Cabinet also exercised another power, which was neutral on the face of it, but discriminatory in intent. This was Cabinet's authority to impose a "continuous passage" rule, a power that survived until 1978.
>
> The only way to comply with the law was to produce a through-ticket purchased in [the country of origin] or prepaid in Canada. It is no coincidence that in those days it was impossible to purchase a ticket in India for a continuous journey from India to Canada, or to prepay for one in Canada.[23]

In the past, some of the most horrific forms of racial discrimination have taken place pursuant to Canadian immigration laws that are neutral on their face, but administered in a racist fashion. Matas writes:

> In *None is Too Many*, Harold Troper and Irving Abella recount in chilling detail the determination of Canadian immigration authorities to keep out every single Jew, fleeing first Nazi persecution, then the Holocaust, and finally the aftermath of the Holocaust.
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> Legally, Jews were not singled out for discrimination. There was no Jewish Immigration Act to prohibit Jews from entering Canada, no financial requirements, head tax or continuous passage rule. And yet, discrimination against Jews was incontestable. Jews who met all the normal immigration requirements were not admitted.
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> This discrimination was achieved not through the exercise of express powers, but through the abuse of powers. Canada's Immigration department was headed by Fred Blair, an avowed anti-Semite. Blair transferred responsibility for processing Jewish applicants from other government offices to his own, where he personally scrutinised each application, deciding its eligibility and virtually always turning them down.[24]

As Matas concludes:

> The Jewish experience is illuminating. *It shows that we do not need racist laws to have racial discrimination in immigration; all we need is unlimited discretion.* With an unsympathetic public, unmotivated public leadership, or racists in office, racism can make its way into the immigration process even with laws that appear neutral and fair.[25] [emphasis added]

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22 *R. v. Morgentaler* (1988), 44 D.L.R. (4th) 385 (S.C.C.).

23 Matas, *supra* note 15 at 32.

24 *Ibid.* at 33.

25 *Ibid.*

There is every reason for members of groups such as black residents of Canada to apprehend that the danger certificate program is likely to be administered in a manner deliberately or effectively tainted by racial discrimination. It offends the guarantee of s. 15 of the *Charter* that individuals do not have the equal protection of the law. Instead there is a well-founded fear that a program is being administered in a manner:

(i) that has a devastating effect on human lives; and

(ii) that is administered in a manner that is deliberately or effectively tainted by racial discrimination.

The human impact of danger certificates can be devastating. A certificate eliminates the possibility that the Immigration Appeal Division will use its equitable jurisdiction to decide that humanitarian considerations should weigh in favour of a person remaining in Canada. James Madison, the principal architect of the United States Constitution, observed:

> If banishment of an alien from a country into which he has been invited ... where he may have formed the most tender of connections, where he may have vested his entire property ... and where he may have nearly completed his probationary title to citizenship ... if banishment of this sort be not a punishment, and among the most severest of punishments, it will be difficult to imagine the doom to which the norms can be applied.[26]

In the instant case, the applicant is facing separation from not only what was his home for many years, but also his children.

For some immigrants to Canada, deportation means not only civil death, as in complete and permanent removal from the fabric of Canadian society, but the real possibility of physical death. A person who is deported after a drug conviction in Canada may be deported to a jurisdiction that treats drug offences as capital crimes.[27] This person faces the risk of injury and/or execution.

Black residents of Canada, and other similarly vulnerable groups, have well-founded reasons to fear that the law will be applied against members of their community in a discriminatory fashion. Experience has shown them that there can be a substantial amount of racism in the administration of justice. The Report of the Commission on Systemic Racism in the Ontario Criminal Justice system makes this point in the strongest possible terms:

> Blacks stand a shockingly disproportionate chance of being charged and imprisoned in Ontario compared to whites.[28]

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[26] J. Rosenfeld, "Deportation Proceedings and Due Process Of Law" (1995) 26 Colum. Human Rights Rev. 713.

[27] *Shayesteh* v. *Canada (Minister of Citizenship and Immigration* (1996), 112 F.T.R. 161.

[28] The Ontario Report, *supra* note 8.

> Over-representation of blacks in Ontario jails has skyrocketed during the past six years, with 204 percent more blacks jailed in 1994 than in 1986, compared with a 23 percent increase for whites.[29]
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> How could a biological link between race and crime explain this? Surely the genetic makeup of black Ontarians did not suddenly change during the late 1980s and 1990s. *The commission pins the lion's share of the blame on a series of subtle, discretionary decisions that permeate the administration of justice* .... [Emphasis added]
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> [P]olice, prosecutors and defence lawyers are frequently forced to make rapid decisions in private, using limited information, a scenario that fosters the use of pat assumptions and stereotypes...
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> [T]he police officer who stops more blacks than whites during a crime crackdowns or the white prosecutor who considers a black youth better served by a brush with the court system because his background is likely to be "less stable." Through the use of court transcripts, the report also reveals that many judges gratuitously refer to the racial origins of the accused or implicitly increase their sentences because of their apparent foreignness ... .
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> *[T]he belief that blacks are discriminated against in the justice system is widespread in the black community, rather than conforming to the popular theory that only a strident minority hold this view* ... .
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> [A] great many blacks imprisoned before their trials have their bail set so high it is tantamount to an outright denial of bail... .
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> [C]rown prosecutors frequently place undue emphasis on an accused person's "ties to the community" and immigration status at bail hearings, a practice that tends to fall more heavily on blacks.[30] [emphasis added]

There is also evidence to suggest that negative attitudes towards racial minorities have become further entrenched among Canadians generally. J. Mosher notes that in eight national surveys conducted between 1994 and 1996, approximately 50 percent of Canadians agreed that there are already too many immigrants in the country:

> Furthermore, a 1996 *Macleans*/CBC News survey found that almost half of the respondents felt that immigrants are responsible for taking jobs away from Canadians, and more than two-thirds thought that immigrants contribute to the crime rate.[31]

Members of the Jamaican community in Canada and Blacks generally have special reason to fear the racist application of the removal process, including the danger certification process. The danger certificate process was introduced by the government of Canada as a direct response to an incident involving a Jamaican in 1994. An individual charged in the shooting death of a woman in a

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[29] *Ibid.*

[30] The Ontario Report, *supra* note 8.

[31] C.J. Mosher, *Discrimination and Denial: Systemic Racism in Ontario's Legal and Criminal Justice Systems, 1892–1961* (Toronto: University of Toronto Press, 1998).

Toronto dessert café, Just Desserts, was a Jamaican who had been ordered deported but whose removal had been stayed pending an appeal. The highly-publicised nature of that incident may make immigration officers, including the Minister, more likely to either:

(i) personally view a young Jamaican man as a danger to the public; or

(ii) adopt the view that the public has a special fear of violence from Jamaican immigrants, and so respond to that perceived fear among the public.

To detect operational racism, or at least remove consequential anxiety, the Minister of Immigration should routinely publish statistics that explain who is being removed from Canada and to which countries. The Tasse Report recommends that "[s]tatistical data about removal activities should be collected and made available to the public."

The statistics submitted by the applicant in the instant case demonstrate that with respect to removals pursuant to danger opinions there is a very high representation of persons from countries that have majority non-white populations. Indeed, in their affidavits, Mr. Matas and Mr. Dolin find that removals in this province have been executed almost exclusively against such persons. The federal government has not released any statistics that justify the apparent targeting of immigrants from non-white countries.[32]

Even without precise statistics, however, there is rational cause for special concern by Jamaican and other black residents of Canada, as evidenced by the following:

(i) the report of the Commission on Systemic Racism in the Ontario Justice system which found a "shocking" degree of anti-black racism in the administration of justice;[33]

(ii) the fact that the Royal Commission on Discrimination Against Blacks in Nova Scotia found widespread agreement among both blacks and non-blacks surveyed in Nova Scotia that, "Blacks face prejudice and discrimination in social, economic and political institutions, as well as in the criminal justice system;[34]

(iii) the affidavits of Mr. Matas, Mr. Dolin, and Mr. Williams;

(iv) the fact that an incident involving a Jamaican resident of Canada triggered the danger certificate legislation;

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[32] Unpublished affidavits of Mr. Matas and Mr. Dolin.

[33] The Ontario Report, *supra* note 8.

[34] The Nova Scotia Report, *supra* note 4 at 26.

(v) the fact that there is an anti-immigrant sentiment within a significant proportion of the Canadian population; and

(vi) the conference presentation by Falconer on "Colour Profiling, The Ultimate Just Desserts," a paper presented at an American Bar Association meeting in August 1998, which specifically finds racial bias in the origin and operation of the danger certificate system.[35]

To these causes for the apprehension should be added the additional consideration that official Canadian immigration policy puts a premium on the ability to generate a large income, and immigrants from third-world nations may be seen as low earners or even potential welfare recipients.

At the core of current immigration policy is the admission of independent immigrants who are judged on their potential economic contribution to the country.[36] Canada even has an immigrant investor program whereby wealthy persons from abroad can receive a huge boost in gaining entry by virtue of their investment. Immigrants from third-world countries, such as Jamaica, have reasonable cause to be concerned that their tendency to come from humble circumstances will be taken as evidence that they will never be major economic contributors. In the context of deportation, they have cause for concern that the pro-affluence bias of general immigration policy will be consciously or unconsciously extended to dangerousness determinations.

The absence of adequate legal safeguards in the deportation system leaves black residents of Canada, and members of other vulnerable groups, with a well-founded fear that they will be the victims of prejudice on the basis of race, colour, or national origin. The applicant submits that s. 15 will not tolerate a situation in which persons protected by the *Charter* have a reasonable apprehension of operational racism on the part of government. Rather, s. 15 requires that the administration of government programs contain safeguards that provide a reasonable level of assurance that racism will generally be avoided, and where it occurs, will generally be detected and corrected.

In *R. v. Williams*,[37] the Supreme Court of Canada ordered a new trial when an aboriginal person's motion to question potential jurors for racial bias under section 638 of the *Criminal Code*[38] was denied. Madame Justice McLachlin emphasised the point that prejudice is deep within the human psyche and therefore hard to identify and put aside:

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35 Falconer, "Colour Profiling—The Ultimate Just Desserts" (1998) [unpublished].

36 Matas, *supra* note 15 at 39.

37 (1998), 124 C.C.C. (3d) 481 (S.C.C.) [hereinafter *Williams*].

38 R.S.C. 1985, c. C–46 [hereinafter *Criminal Code*].

> To suggest that all persons who possess racial prejudices will erase those prejudices from the mind when serving as jurors is to underestimate the insidious nature of racial prejudice and the stereotyping that underlies it.
>
> Where doubts are raised the better policy is to err on the side of caution and permit prejudices to be examined. Only then can we know with any certainty whether they exist and whether they can be set aside or not.[39]

The current public danger removal provisions create a subjective, discretionary, and poorly defined standard, and thereby result in an unreasonable risk that officials will be influenced by conscious or unconscious prejudices. These prejudices may be deep within the officials' psyche, or be present in the community generally whereby the official may be influenced by public opinion.

The Supreme Court in *Williams* stresses that proving that discrimination has occurred in a particular jury, after the trial, is extremely difficult. Therefore, it is necessary to employ preventative measures:

> Racial prejudice and its effects are as invasive and elusive as they are corrosive. We should not assume that instructions from the judge or other safeguards will eliminate biases that may be deeply ingrained in the subconscious psyches of jurors. Rather, we should acknowledge the destructive potential of subconscious racial prejudice by recognizing that the post-jury selection safeguards may not suffice ... . It is better to risk allowing what are in fact unnecessary challenges, than to risk prohibiting challenges which are necessary.[40]

The *Charter* should equally apply to the immigration system. Safeguards are needed to prevent discrimination, and to facilitate its detection and correction, rather than creating the extremely difficult task of proving that the particular officer in the case was actually, consciously or unconsciously, prejudiced. The lack of precision in the definition of public danger, the absence of any requirement for reasons from the decision-maker, and the limited scope of judicial review, make it extremely difficult to prove after a danger opinion has been issued that the officials involved were influenced, consciously or unconsciously, by prejudices within themselves and the community. It is submitted that where a reasonable risk of racism exists adequate safeguards should be put in place to identify and prevent it, not just to correct it after the fact.

In *Williams,* Madame Justice McLachlin stated that widespread racial prejudice may sometimes be the subject of judicial notice, if it is either so notorious as not to be the subject of dispute among reasonable persons or if there are events and documents of indisputable accuracy which support the fact. [41] The applicant asks that the court take judicial notice of the fact that there is racism against blacks in Canadian society. McLachlin J. also notes that the existence of

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[39] *Williams, supra* note 48 at paras. 21 & 22.

[40] *Ibid.* at para. 22.

[41] *Ibid.* at para. 54.

prejudice may be established by evidence, and with respect to discrimination against aboriginal peoples, cites such studies as the Marshall Inquiry and *Williams*.[42] The applicant has already cited studies from Ontario and Nova Scotia that have found widespread prejudice against Blacks.

There is also a significant danger in casting such a wide net in the proceedings. There is enormous scope in which administrative discretion can operate. Deportation proceedings, and the accompanying danger certificate, can be invoked against persons whose offences range from minor to horrendous. Removal proceedings can certainly be invoked against a person who has committed serious crimes of violence. However, they can also be invoked against persons who committed non-violent crimes and were given light sentences (including absolute discharges), or who have long since been rehabilitated. The requirement that a person be convicted of a crime for which ten years imprisonment is a potential punishment[43] could apply to a person whose only offence was stealing a car worth $5,000[44] or selling a small package of marijuana to a friend.[45]

Ordinarily, an individual facing deportation would have access to an independent tribunal, namely the Immigration Appeal Division, which has the authority to determine that, "having regard to all the circumstances," a person should not be deported. However, access to the equitable jurisdiction of an impartial and independent tribunal is denied when the Minister issues a danger certificate under s. 70(5). Decision-making is effectively transferred from an independent and quasi-judicial tribunal to the discretion of the Minister of Immigration, who is a political official.

The discretion of the Minister of Immigration is *not* constrained by a reasonably well-defined legal standard. Nowhere does the *Immigration Act* define danger to the public. There is no definition of how high that risk must be. Does a modestly-above-normal risk of committing some kind of offence qualify? If so, the Minister can certify almost anyone. "Danger certificates" apply only to persons who have committed a crime, and arguably anyone in that category is at least slightly more likely to commit another one. There is a lack of clarity with respect to a number of questions. For example:

(i) what category of wrong constitutes a danger to the public? Obviously the concept includes committing wilful acts of severe violence. But what about:

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42 *Williams, supra* note 48 at 504.

43 *Supra* note 38 s. 27(1)(d).

44 *Ibid.* at s.334(a).

45 *Narcotics Control Act*, R.S.C. 1985, c. N-1, s. 4.

(a) crimes of violence: a person who has a modest propensity for brawling in bars;

(b) non-violent crimes: a person who occasionally distributes marijuana to friends, or deals with a bookie;

(c) non-criminal offences: a person with a bad driving record?

(ii) civil wrongs: a person who might not honour family law orders for spousal support or who tends to engage in high-risk business that may leave him bankrupt and his creditors short?

(iii) anti-social conduct that is not criminal: fathering children out of wedlock without being able to support them?

(iv) social dependency: a person who is likely to require social assistance or whose poor health habits may make her a drain on the health system?

(v) What level of risk of committing the wrong is meant? If the level of risk is merely modestly above average, the danger certificate could be freely issued. After all, removal proceedings contemplate that a person has already committed a crime. Arguably, such persons tend to be, at least marginally, more likely than others to commit a crime in the future.

(vi) How serious must be the apprehended level of harm if a wrong is committed?

Parliament could, and should, have defined danger in a reasonably specific manner. The dangerous offender section of the *Criminal Code* does just this. S. 752 gives some real guidance on issues such as the kind of wrong, the level of apprehended harm and the magnitude of risk that is contemplated. Furthermore, Parliament has provided a careful set of procedural safeguards:

(i) the person must have been convicted of an offence, and the dangerousness determination must precede sentencing, whereas danger certificates against an immigrant can be issued decades after the offence;

(ii) the court must hear the evidence of at least two psychiatrists, whereas danger certificates can be based on the determination of one immigration officer, who may have no training in any science related to predictions of dangerousness;

(iii) the accused must be present at the hearing. Danger certificates may be issued without giving the immigrant the opportunity to personally address the decision-maker. How can a person have a fair chance to make a credible case that he or she is not dangerous without such an opportunity?

(iv) there is a right of appeal on any ground of law or fact or mixed law or fact, whereas the issuance of a danger certificate removes the right of an immi-

> grant to access the equitable jurisdiction of the Immigration Appeal Division and to appeal a removal determination on any question of fact, mixed law or fact, or law. The immigrant's only recourse is to judicial review, which is by leave only and confined in its scope.

The applicant in this case does not suggest that the procedural safeguards for danger certificates must mirror those contained in the *Criminal Code* in all respects. What counts as reasonable safeguards must be judged in context. Parliament, however, has not provided procedural safeguards in the context of danger certificates that are remotely commensurate with the risk of racist decision-making and the potentially devastating human consequences of an adverse finding. Parliament has not even attempted to define a set of reasonable safeguards. Instead, in its hasty response to the Just Desserts restaurant tragedy in Toronto, it has inserted a danger certification process that was inadequately reviewed from a standpoint of equality and civil liberties. The Supreme Court of Canada has tended to rule against the government when it has completely failed to even attempt to take into account *Charter* considerations and provide for some reasonable balance between social interests and individual rights.[46]

It is no answer for the Minister of Immigration to say that he has established his own internal policy guidelines on what danger to the public means. In *Re Ontario Film and Video Appreciation Society*,[47] the Ontario Court of Appeal held that a censorship board's internal criteria did not replace the requirement that limits on *Charter* rights be prescribed by law. Internal directives are not law as they can be freely revised or ignored by officers without violating the law.

The possibility of judicial review is not a remotely satisfactory substitute for an adequate statutory definition of danger to the public, for reasons that will be set out.

Firstly, judicial review can only correct decisions where the Minister has certified a person to be a danger. It will never be used to correct decisions *not* to certify a person. Massively preferential treatment in favour of such groups as white immigrants may never surface in the courts.

A person who is certified a danger does not have a right to judicial review without first obtaining the leave of the Federal Court. Leave is required even if the person has already been deported. Mistakes happen in the judicial process. This is why appeals are usually available. Inevitably, the leave requirement will sometimes result in the premature dismissal of meritorious complaints.[48]

A person who has been deported may be unable to pursue judicial review. Some potential deportees may lack the legal sophistication or financial re-

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[46] *RJR-MacDonald Inc.* v. *Canada (Attorney General)*, [1995] 3 S.C.R. 199.

[47] (1984), 45 O.R. (2d) 80.

[48] *Charter*, *supra* note 1 at s. 13(4).

sources to take the urgent steps needed to present a persuasive stay application before they are deported. Others may seek a stay, but be denied on the basis of the balance of convenience rather than any underlying lack of merit in their case. Once removed from Canada, it may be too difficult or expensive for many individuals to pursue, from a distance, a demanding legal process such as judicial review.

Judicial review under the *Federal Court Act*[49] is essentially confined to correcting errors of law or capricious findings of fact. It does not permit a court to intervene merely because it disagrees with how the Minister or his officials interpreted and applied a loosely worded test such as "danger to the public." Parliament has left the Minister the broad discretion to determine whether a person is a danger to the public. The application of that broad standard to the facts of a particular case is a question of mixed fact and law. In *Casiano* v. *Canada (Minister of Citizenship and Immigration)*, Dubé J. wrote in connection with a leave application in a danger certificate case:

> Consequently, the applicant has failed to demonstrate that there is an arguable issue of law upon which his proposed application for judicial review might succeed. And there was sufficient evidence before the Minister to issue his opinion with which the Court ought not to interfere, even if it might render a different opinion based on the same evidence.[50]

Given the limited scope of review that is available in danger certificate cases and the vast administrative discretion conveyed by the term danger to the public, it is inconceivable that court actions will eventually result in a system in which the standard is reasonably precise and administrative discretion is reasonable controlled.

It is true that in *Williams* v. *Canada*,[51] which reversed the decision of the trial judge, the Court held that s. 70(5) of the *Immigration Act* was not "void for vagueness" under s. 7 of the *Charter*. It is not the applicant's submission however, that the "public danger standard" is so vague as to violate s. 7 of the *Charter per se*; it is submitted that in the context of a *Charter* s. 15 challenge, it is not sufficiently precise to adequately prevent, or to permit the detection and correction of, racial and ethnic bias. Furthermore, the Federal Court of Appeal decision in *Williams* v. *Canada* was decided before the Supreme Court of Canada decision in *Williams*, which establishes notions about the deep-seated nature of bias and the difficulty in detecting it in a particular case after the harm has allegedly been done. It is submitted that the court should consider these factors in the instant case.

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[49] R.S.C. 1985, F–7.

[50] (1996), 35 Imm. L.R. (2d) 25 (S.C.C.).

[51] (1997), 147 D.L.R. (4th) 93 (F. C. A.) rev'g (1996), 139 D.L.R. (4th) 658 (F.C. T.D.).

Even if the prospect of years of litigation held out some hope of eventually defining danger to the public, it would be intolerable for the courts to delay justice that long. The lives of thousands of individuals might be devastated while the courts work on various legal questions. In the meantime, a system that raises well-founded concerns of racial bias would remain in effect.

It is true that some *Charter* s. 7 cases on the void for vagueness problem have held that a statutory standard may be reasonably flexible. But these cases have emphasised that the issue of vagueness must be evaluated in context. Contrast the case of *Ontario* v. *Canadian Pacific Ltd.*[52] with the immigration situation:

(i) In the *Canadian Pacific* case, there was no cause for concern that the system was being administered in a racially biased way. There are profound and rational reasons to fear that the danger certificate process is liable to be interpreted in a racist manner;

(ii) *Canadian Pacific* found that the public interest required a flexible definition of pollution standards and that more precision could not reasonably be expected;

(iii) With the danger certificate process, it would be easy for Parliament to supply a reasonable measure of precision, as it has done in the context of dangerous offenders under the *Criminal Code*;

(iv) In the *Canadian Pacific* case, enforcement required formal prosecution before the ordinary courts of Canada. An independent and impartial decision maker, the court was entrusted with the task of developing and applying the legal standard in question. At trial, the Court would initially decide whether conduct was contrary to the standard, and appeal would be available to higher courts. The public expectation is that judges will be individuals of high integrity, and experts at considering and weighing evidence. Furthermore, judicial discretion is exercised in a visible and open manner. Court proceedings are open, and reasons for judgment are routinely given and subject to the scrutiny of the bar, academic experts, and the wider public. With respect to the danger certificate process, by contrast, the task of interpretation is left to immigration officials who are not experts in legal interpretation, and who may be consciously or unconsciously biased, or who may be responding to biases in the wider public;

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[52] [1995] 2 S.C.R. 1031 [hereinafter *Canadian Pacific*].

(v) The option of obtaining judicial review is practically meaningless if the Minister of Immigration does not provide reasons for interpreting and applying the danger to the public standard in a particular way; and

(vi) Even if the meaning of danger to the public could be adequately constrained by a course of judicial review decisions, and it *cannot*, it would take years of litigation for the courts to provide much guidance. In the meantime, thousands of people would be deported, some of them wrongly. The reasonable apprehension that the system is being administered in a racially biased manner will continue in many minority communities and among concerned members of the wider public, until change is effected.

The fact that the s. 70(5) of the *Immigration Act* contains no definition of danger to the public makes it impossible for a person to ever be given adequate notice of the case he or she must meet and a reasonable opportunity to prepare a response. Even if a definition existed, however, the danger certificate process would be fundamentally defective inasmuch as it does not address fair notice concerns in any way. There is no provision in the *Immigration Act* or accompanying regulations:

i) that the potential deportee must be informed that the Minister is considering the decision, and the legal and evidentiary grounds upon which the Minister proposes to proceed; or

ii) that the potential deportee must be given reasonable opportunity to prepare.

By contrast, the dangerous offender provisions of the *Criminal Code* expressly guarantee notice. The absence of notice in the deportation context is particularly insidious in light of the fact that dangerous determinations are based on a review of past history that may stretch over decades. How can the offender gather records, information, and evidence about events in the past without substantial notice? Many potential deportees may wish to bring favourable findings of non-dangerousness to the Minister. For example, the potential deportee may wish to bring a decision by a judge that a conviction required little or no jail time, or by a parole board that a person's non-dangerousness justified release. Many will want to bring forward evidence from people who have witnessed their rehabilitation, such as employers or leaders of their religious community. The threat of rush to judgment exacerbates the risk that decisions will be made on the basis of knowing or unconsciousness prejudice based on race, ethnicity, or national origin.

The danger certificate process is further flawed by the fact that the potential deportee has no right to provide sworn *viva voce* evidence to the decision-maker. The credibility of a potential deportee concerning future plans may be

crucial to a rational decision maker who must decide whether that person is a danger to the public. Furthermore, in an area in which there is such a high risk of stereotyping and other forms of prejudice, it is crucial that a person have the opportunity to personally address the decision-maker. Direct interpersonal contact may contribute significantly to having the decision-maker see each person as an individual who must be assessed on the basis of personal history and prospects, rather than merely as an example of a particular group.

The lack of a substantive definition and procedural safeguards must be assessed in light of the fact that predictions of future dangerousness are notoriously difficult to make. A recent law journal article comments:

> Among those who believe that preventive detention cannot be justified, some, like Alan Dershowitz, hold that while it might be justifiable if predictions of dangerousness could be made with relative certainty, such predictions are by their very nature unreliable. It is of course notoriously difficult to predict who will commit a violent crime. Using current methods, the best estimate is that there would be at least one false positive for every true positive; that is, we would preventively detain at least one person who would never commit a future crime for every person we detain correctly. That rate of error would seem to many to be unacceptably high; it is much higher, for example, than the rate of error that we would find acceptable in convicting people of crimes.[53]

The best current methods of predicting dangerousness, which still have a very high error rate, involve using either clinical experts or actuarial evidence or both. Clinical evidence is the expert opinion of psychological or psychiatric experts who are familiar with the individual case. Actuarial evidence is based on studying a large number of previous offenders, and identifying risk factors including the type of offence, length of sentence, age of offender, etc. The actuarial expert then makes a statistical prediction about the likelihood that an individual offender with the corresponding risk factors will repeat. The danger certificate process does not require the decision maker to use either clinical or actuarial evidence. So the immigration official falls back on his or her own expertise. An immigration officer, however, has no professional training in predicting dangerousness.

It does not appear that the Department as a whole is likely to learn from its mistakes. It has no clear idea of what constitutes a danger to the public. Furthermore, does not appear to have attempted to study the success of its predictions in any systematic or scientific manner.

The current danger certificate process contains practically every conceivable ingredient that would be needed to create a reasonable apprehension that government decisions of fundamental human importance are being made in a manner that is consciously or effectively influenced by rolling dice based on racism. The decision that must be made concerning future dangerousness is one

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[53] M. Corrado, "Punishment and Preventative Detention" (1996) 86 J. Crim. L. & Criminology.

which is always difficult, and in which uncontrolled discretion is likely to be not only mistaken, but consciously or unconsciously influenced by stereotypes and prejudice.

The risk of bias is increased by the lack of any precise definition of the danger to the public label. The potential targets of the deportation are not guaranteed adequate notice or opportunity to respond, even though the person in jeopardy may reasonably wish to compile evidence relating to an extensive personal past. Personal contact between the person in jeopardy and the decision maker may help the latter to see the case on its individual merits, rather than in terms of stereotypes, but no personal contact is guaranteed or permitted. No reasons for decision need be given. Judicial review is only available by leave, and is of limited scope. The courts cannot reverse a decision by an immigration official merely because they disagree with it. The ultimate decision is made by an official who may have his or her own conscious or unconscious prejudices and stereotypes, or who may be responding to such biased opinions among some members of the wider public. The consequence of that decision may be to uproot a person from a place in which he or she has lived since childhood, separate the person from his or her family, friends, community, job, and physical surroundings, and forcibly transport him to a place with which he or she has lost all contacts. The situation is clearly in need of redress.

It has been recognised by the Supreme Court of the United States that inadequately controlled administrative discretion with respect to vague laws is likely to lead to the targeting of minorities. When striking down as unconstitutionally vague a state statute targeted at "vagrancy" in *Papachristou* v. *City of Jacksonville*, Douglas J., for a unanimous Court, concluded as follows:

> The implicit presumption in these generalized vagrancy standards, that crime is being nipped in the bud, is too extravagant to deserve extended treatment. Of course, vagrancy statutes are useful to the police. Of course, they are nets making easy the roundup of so-called undesirables. But the rule of law implies equality and justice in its application. Vagrancy laws of the Jacksonville type teach that the scales of justice are so tipped that even-handed administration of the law is not possible. The rule of law, evenly applied to minorities as well as majorities, to the poor as well as the rich, is the great mucilage that holds society together.[54]

The rule of law is such a fundamental notion in the Canadian constitution that it is mentioned in the preamble of the *Charter*. That preambular reference was relied upon heavily by the Supreme Court of Canada in *Re Manitoba Language Rights*.[55] One meaning of the rule of law is that individuals and groups are not subjected to uncontrolled executive discretion, with its accompanying potential for arbitrariness and discrimination. In the context of s. 15 of the *Char-*

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[54] 405 U.S. 156.

[55] [1985] 1 S.C.R. 721.

ter, the rule of law requires that the phrase equal protection of the law, without discrimination be given full effect. A minority does not enjoy the equal protection of the law when it has a reasonable apprehension that uncontrolled executive discretion may be used in a manner that will deliberately or effectively discriminate against members of that group.

It is impossible to justify s. 70(5) of the *Immigration Act* under the "reasonable limits" test. S. 70(5) represents a hasty response to one particular incident, namely the "Just Desserts" shooting, not a well considered effort to balance civil liberties concerns against the public interest. There are no considerations of public safety or convenience that justify the extraordinary arbitrariness built into the system. It is not asking much of Parliament that it should:

i) Define "danger to the public" in a reasonably specific manner. Doing so would actually facilitate the administration of the system. Immigration officials could focus on a narrow class of potential deportees, and providing that smaller group with adequate process rights would not be especially inconvenient; and

ii) Put in place a process for adjudicating dangerousness claims that would give the individual fair notice of the grounds for a potential deportation, and allow the individual reasonable opportunity to prepare a case and present it before the impartial and independent adjudicator.

The Supreme Court of Canada has repeatedly insisted, under the *Charter*, that administrative discretion be carefully constrained in the context of dangerousness determinations. The protection of the law against executive arbitrariness is provided in a variety of other contexts: pre-trial detention, findings that a person is a dangerous offender, parole proceedings, and orders of internal exile with respect to certain sexual offenders. Viewed in this context, the complete failure of Parliament to provide legal safeguards for immigrations facing deportation smacks of discrimination on the basis of race, colour, ethnic origin, and alienage.

It is true, of course, that immigrants who have not acquired citizenship are in a legally different situation under s. 6 of the *Charter* than Canadian citizens, who have an express constitutional right to remain within Canada. Accordingly, the mere fact that immigrants are subject to deportation is not necessarily a violation of s. 15 of the *Charter*.[56] However, the federal law of Canada does provide *reasonable* safeguards with respect to dangerousness determinations that affect Canadian residents generally. Reasonable safeguard conditions are found in all of the following cases:

i) in the context of dangerous offender provisions of the *Criminal Code*;

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[56] *Chiarelli v. Canada (Min. Of Employment & Immigration)*, [1992] 1 S.C.R. 711.

ii) when dangerousness is an issue in a hearing for *judicial interim release;*

iii) When dangerousness is an issue in the context of a person who has been found not guilty by reason of insanity; and

iv) When dangerousness is an issue in the context of convicted offenders who are ordered to stay away from areas frequented by children.

It is submitted that in light of the recent preventative approach to the *Charter*, s. 70(5) of the *Immigration Act* fails utterly to fulfil the need to protect against such serious misuse of the Minister's discretion. All reasonable steps must be taken to prevent the conscious or unconscious racial prejudice that is so well documented in Canadian society.

The applicant therefore submits that s. 70(5) of the *Immigration Act* violates s. 15 of the *Charter*, cannot be saved by s. 1 of the *Charter*, and accordingly should be rendered of no force and effect.