How the *Charter* Has Failed Non-citizens in Canada: Reviewing Thirty Years of Supreme Court of Canada Jurisprudence

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Volume 58, Number 3, March 2013

URI: https://id.erudit.org/iderudit/1018393ar
DOI: https://doi.org/10.7202/1018393ar

Article abstract

This article reviews the Supreme Court of Canada’s treatment of claims by non-citizens since the introduction of the *Canadian Charter of Rights and Freedoms*. While the early decisions in *Singh* and *Andrews* were strongly supportive of rights for non-citizens, the subsequent jurisprudence has been strikingly disappointing. This study shows that the decline in rights protections for non-citizens is a predictable consequence of some of the Court’s early interpretative positions about the *Charter*. This study considers all Supreme Court of Canada decisions in the thirty-year time frame. The analysis is rounded out by a consideration of cases that were not granted leave and cases that engage directly with an issue of non-citizens’ rights even where a non-citizen was not a party. The concluding section shows that non-citizens in Canada now have less access to rights protections than do non-citizens in some key comparator countries.

Cite this article

HOW THE CHARTER HAS FAILED NON-CITIZENS IN CANADA: REVIEWING THIRTY YEARS OF SUPREME COURT OF CANADA JURISPRUDENCE

Catherine Dauvergne*

This article reviews the Supreme Court of Canada’s treatment of claims by non-citizens since the introduction of the Canadian Charter of Rights and Freedoms. While the early decisions in Singh and Andrews were strongly supportive of rights for non-citizens, the subsequent jurisprudence has been strikingly disappointing. This study shows that the decline in rights protections for non-citizens is a predictable consequence of some of the Court’s early interpretative positions about the Charter. This study considers all Supreme Court of Canada decisions in the thirty-year time frame. The analysis is rounded out by a consideration of cases that were not granted leave and cases that engage directly with an issue of non-citizens’ rights even where a non-citizen was not a party. The concluding section shows that non-citizens in Canada now have less access to rights protections than do non-citizens in some key comparator countries.

* This work was supported by a Standard Research Grant from the Social Sciences and Humanities Research Council of Canada. I am grateful to Robert Russo for his excellent research work over the past two years and to Daphne Chu for her work in the home stretch. I am also grateful to the Trudeau Foundation for the award of a fellowship as this article was being prepared for print.

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Citation: (2013) 58:3 McGill LJ 663 ~ Référence : (2013) 58 : 3 RD McGill 663
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Introduction

After thirty years of decision making under the Canadian Charter of Rights and Freedoms,1 it is now clear that the Charter has been a disappointment for non-citizens in Canada. What is worse, during the Charter era, Canada has fallen behind many other Western democracies in providing access for non-citizens to international human rights protections. This conclusion is not a surprise to anyone who has been working in the migrant advocacy trenches over the past quarter century, but it is a jarring contrast to the reputation that Canada has sought for itself as an immigrant-welcoming international human rights leader, and it flies in the face of scholarship asserting that human rights have eclipsed citizenship rights.

On the face of it, Canada ought to be as good as it gets for non-citizens’ human rights protections. Canada is a party to most of the major international human rights conventions2 and is among a handful of states that

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Of the nine core instruments, the two in which Canada does not participate are the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (18 December 1990, 2220 UNTS 3, 30 ILM 1517 (entered into force 1 July 2003)) [Migrant Workers Convention] and the International Convention for the Protection of All Persons from Enforced Disappearance (GA Res 61/177, UNGAOR,
have committed themselves to a series of optional protocols allowing individuals to bring complaints against it.\(^3\) Canada has a long-standing program for permanent immigration, and immigration is embedded in its national mythology. It is one of the few Western states where survey data continue to show that the population is supportive of immigrants.\(^4\) Indeed, Canada has recently celebrated the twenty-fifth anniversary of the award to “The People of Canada” of the United Nations High Commissioner for Refugee’s Nansen Medal for service to refugees.\(^5\) In addition to all of this, Canada has a strong and contemporary constitutional statement of rights. For all of these reasons, the failure of the Charter to deliver on its promise of human rights protections for non-citizens is counterintuitive.

This paper presents a study of all of the Supreme Court of Canada’s Charter-era jurisprudence addressing the rights of non-citizens. It traces the jurisprudential evolution from early decisions strongly supportive of non-citizens’ rights claims to more recent rulings where non-citizens’ rights claims are rejected, sidelined, or even ignored. Patterns in decision making are discernible, and the decline in protections for non-citizens fol-

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\(^4\) The population survey conducted by Transatlantic Trends (“Transatlantic Trends: Immigration”, Key Findings (2010), online: Transatlantic Trends <http://trends.gmfus.org/files/archived/immigration/docTTI2010_English_Key.pdf>), showed that Canada was still more supportive of immigration across a range of indicators than all other countries in North America and Europe. The study also shows that the Canadian population is less supportive of immigration than in earlier years. See also Nicholas Keung, “Immigrants Fitting In Well (Mostly), Canadians Say: But Survey Shows Split over How Successfully Muslims Integrating into Society”, The Toronto Star (4 February 2011) A16.

\(^5\) The Nansen Medal, now called the Nansen Refugee Award, is named after the first League of Nations High Commissioner for Refugees and is awarded annually by the United Nations High Commissioner for Refugees. The Canadian people received the award in 1986 in recognition of their support for refugees fleeing the Indochinese crisis: see generally UNHCR, Nansen Refugee Award (2012), online: UNHCR: The UN Refugee Agency <http://www.unhcr.org/nansen/50374de66.html>.
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lows logically enough from a series of interpretive stances made relatively early on. There is evidence here of what I have termed “Charter hubris”. This is a leading factor in explaining the current state of affairs, and it works alongside other explanations such as the traditionally broad ambit of discretion in immigration matters and the securitization of all immigration matters in the early twenty-first century. The Supreme Court of Canada is not, of course, the entire story for non-citizens’ rights in Canada. Very few cases ever make it to this pinnacle venue and disproportionately fewer involving non-citizens. But focusing on the Supreme Court is always justified because of its leadership role. To complement this analysis, I have also completed a companion study of international human rights norms in the jurisprudence of Immigration and Refugee Board of Canada (Immigration and Refugee Board), which makes approximately fifty thousand decisions annually concerning non-citizens.6

The paper begins by outlining the early promise of the Singh and Andrews decisions, setting them in the context of scholarship on globalization, citizenship rights, and human rights. I then turn to a brief explanation of the methodology for the rest of the study. The next section presents the Supreme Court of Canada’s Charter-era non-citizen jurisprudence in three thematic groups: cases treated by the Court as rights cases, cases treated as non-rights cases, and refugee rulings. The analysis is rounded out by a brief look at the issue of extradition, some highlights of the unsuccessful applications for leave to appeal, and two cases that do not technically address non-citizens but that have had important implications for non-citizen advocacy. This presentation lays the groundwork for the concluding section, which offers explanations for the trajectory of the jurisprudence and contrasts this trajectory with leading decisions elsewhere.

The argument that the Charter has failed to deliver on its early promise for non-citizens is made out at several levels. Most directly, non-citizens’ Charter claims have rarely been successful. Second, the Supreme Court of Canada has relied exclusively on the Charter even in cases where applicable international human rights may have provided stronger protections for non-citizens. Third, a number of cases that were argued in human rights terms have not been treated as rights claims by the Court. Finally, very few non-citizens’ rights claims have reached the Supreme Court of Canada. In sum, during the Charter era, non-citizens have had

6 Catherine Dauvergne, “International Human Rights in Canadian Immigration Law: The Case of the Immigration and Refugee Board of Canada” (2012) 19:1 Ind J Global Legal Stud 305 [Dauvergne, “International Human Rights”]. The Immigration and Refugee Board’s “total number of decisions annually has ranged from 34,673 to 62,301 over the nine years ... [surveyed in the article], 2002 to 2010. The annual average during this period was 48,752” (ibid at 309, n 16).
little success in making Charter rights claims and even less success in accessing alternative sources of rights protections, the most important and logical of which is international human rights law. This result is especially disappointing as other jurisdictions have made some important advancements in international human rights for non-citizens during this thirty-year time frame.

I. In the Beginning: Singh and Andrews

The Charter era opened with two rulings that made vitally important statements for the rights of non-citizens. The Charter came into force on April 17, 1982. The section 15 equality provisions were delayed to give governments time to bring their legislation into compliance and took effect three years later, on April 17, 1985. In the case of both the generally applicable rights and the equality provisions in particular, the first decision to fully grapple with non-citizens’ rights claims marked an important victory.

This first ruling came in Singh v. Canada (Minister of Employment and Immigration),7 which challenged the existing refugee status determination procedure on the grounds that it did not provide refugee claimants an oral hearing by a decision maker at any point during the multi-layered process. The Court ruled that this was a breach of principles of fundamental justice, and the government responded with a complete overhaul of the refugee determination process and the introduction of a tribunal process for first-instance refugee determination that was, for two decades, widely regarded as one of the fairest refugee determination processes in the world.8 From a Charter point of view, the key holding was that the Charter’s section 7 protections apply to “every human being who is physically present in Canada.”9 The Court explicitly rejected a distinction that would have hinged Charter protection to citizenship and similarly rejected a distinction, based on US law, between those present in the country and those seeking entry.10

Singh has become part of the mythic foundation of Canadian refugee law. The anniversary of its handing down is celebrated annually as Refu-
gee Rights Day in Canada by the advocacy community. And for those who feel that refugees have too much legal protection in Canadian law, the Singh ruling is the emblem of all that is wrong with the law. In situating Singh as the starting point of the Court’s Charter-era engagement with non-citizens, I must scrutinize the ruling in a way that is discomfiting for mythology but that I hope will affirm the strength of the ruling nonetheless.

The most important observation about Singh—lost in its mythology—is that only three of the six members of the panel used the Charter in coming to their conclusions. Justice Beetz, with whom Justices Estey and McIntyre concurred, decided Singh on the basis of the Canadian Bill of Rights. This undoubtedly came as a great surprise to many, given that by 1985, the Bill of Rights was widely regarded as almost entirely ineffectual. Counsel had not argued the case on the basis of the Bill of Rights, but seven months after the initial hearing, the Court contacted the parties and requested written submissions regarding how the Bill of Rights would apply to the matter at hand. Justice Beetz “refrain[ed] from expressing any views on the question of whether the Canadian Charter of Rights and Freedoms is applicable at all.” But aside from this, he offered little to explain this puzzling choice. He limited himself to stating that other rights instruments ought not to fall into disuse, especially when “almost tailor-made for certain factual situations such as those in the cases at bar.”

12 See e.g. Jeffrey Simpson, “Solutions Exist to Overhaul the Cumbrous Refugee Process”, The Globe and Mail (7 January 1998) A14 (stating that “[e]ver since the Supreme Court’s Singh decision, which requires an oral hearing upon entry into Canada for claimants, the system is too layered, time-consuming and legalistic”).
13 Justice Ritchie heard the appeal but retired from the Court before the decision was handed down and before the request for arguments addressing the Bill of Rights was made.
16 Singh, supra note 7 at 223-24.
17 Ibid at 224. In full, Justice Beetz wrote:

Section 26 of the Canadian Charter of Rights and Freedoms should be kept in mind. It provides:

26. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.
response, Justice Wilson (writing on behalf of Chief Justice Dickson and Justice Lamer) stated simply, “[S]ince I believe that the present situation falls within the constitutional protection afforded by the Canadian Charter of Rights and Freedoms, I prefer to base my decision upon the Charter.” Justice Beetz’s stance did not lead to a resurgence of Bill of Rights decision making by the Supreme Court of Canada, nor did it lead to a different result. It faded into the background as Singh became a cornerstone of Charter mythology, undoubtedly aided by the leading roles played by Justices Wilson and Lamer, and Chief Justice Dickson in the early years of Charter jurisprudence. However, in looking back at Singh in light of the subsequent trajectory of decision making regarding non-citizens, it is useful to remember that only three members of the Court ever signed on to the strong position taken.

It is Justice Wilson’s judgment that has stood the test of time and crystallized into what Singh stands for. In addition to the vital holding that the Charter applies to every person physically in Canada, she also concluded that the rights and interests at stake in refugee determination were sufficiently serious that deprivation of those rights “must amount to deprivation of security of the person within the meaning of s. 7.” She further stated that, as a principle of fundamental justice, serious issues of credibility must be determined on the basis of an oral hearing. It was this requirement for an oral hearing (with which Justice Beetz agreed, but without comment on the question of “security of the person”) that meant the existing procedure failed scrutiny. Justice Wilson also sharply dismissed the government’s section 1 argument that oral hearings would be too resource intensive to be practicable.

Thus, the Canadian Bill of Rights retains all its force and effect, together with the various provincial charters of rights. Because these constitutional or quasi-constitutional instruments are drafted differently, they are susceptible of producing cumulative effects for the better protection of rights and freedoms. But this beneficial result will be lost if these instruments fall into neglect. It is particularly so where they contain provisions not to be found in the Canadian Charter of Rights and Freedoms and almost tailor-made for certain factual situations such as those in the cases at bar (ibid).

18 Ibid at 185.
19 Ibid at 207.
20 Ibid at 213-14.
21 Ibid at 229.
22 Ibid at 218-19. Section 1 of the Charter states, “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”
Importantly, in terms of how non-citizens in Canada access international human rights norms, Justice Wilson drew on international standards in two ways. While there was no issue of interpretation of the *Refugee Convention* at stake, she did turn to the *Refugee Convention* and cited its preamble in assessing the importance of the rights at stake.23 In developing this reasoning, she relied explicitly on the *Immigration Act*’s objective of fulfilling Canada’s international legal obligations.24 Even more importantly, in developing her understanding of the substance of “security of the person”, she turned to the *Universal Declaration of Human Rights*, concerning article 25’s statement regarding the necessaries of life.25 This interpretive move is important because it draws a direct linkage between international human rights and the *Charter* and, in a different way, because it establishes a very expansive paradigm for security of the person. Justice Wilson did acknowledge that this breadth of interpretation was not necessary on the facts in *Singh*, but she introduced the broad parameters nonetheless.26 In sum, the *Singh* decision brought non-citizens, regardless of immigration status, within the protection of the *Charter* and linked that protection in the broadest possible way to international human rights law, even the unenforceable *Universal Declaration*.

The second *Charter* decision that addressed the rights of non-citizens went even further. *Andrews v. Law Society of British Columbia*27 was the Supreme Court of Canada’s first ruling on the section 15 equality rights, and its lore is even greater than that of *Singh* because of the broad applicability of equality rights.28 The core of this ruling was to mark out the


24 *Singh*, supra note 7 at 192; *Immigration Act*, RSC 1985, c I-2, s 3(g), as repealed by *Immigration and Refugee Protection Act*, SC 2001, c 27, s 274 [IRPA].

25 *Singh*, supra note 7 at 207; *Universal Declaration*, supra note 2 at 76. Article 25, paragraph 1 of the *Universal Declaration* states:

1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.


27 [1989] 1 SCR 143, 56 DLR (4th) 1 [*Andrews* cited to SCR].

28 See e.g. Anne F Bayefsky, “A Case Comment on the First Three Equality Rights Cases Under the Canadian Charter of Rights and Freedoms: Andrews, Workers’ Compensa-
Court’s “substantive” approach to equality and to clearly establish that grounds of discrimination “analogous” to those enumerated in section 15 could receive Charter protection.29 The very first analogous ground of protection to be recognized was that of non-citizenship. Mr. Andrews was a permanent resident of Canada and a British citizen, who had been barred from practising law in British Columbia because he was not a Canadian citizen. While the dissentients found this limitation to be a reasonable one and thus would have seen it saved by section 1 of the Charter, all members of the panel agreed that equality protections must protect non-citizens.30

Unlike the Singh ruling, there is no reference in the Andrews reasons to international human right standards. The Court did look beyond Canadian borders, to engage seriously with the American constitutional equality jurisprudence, but did not adopt an American approach in full. Importantly for this analysis of non-citizens’ rights, the ruling commented directly on the vulnerability of non-citizens. In Justice Wilson’s words:

Relative to citizens, non-citizens are a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated. They are among “those groups in society to whose needs and wishes elected officials have no apparent interest in attending.” Non-citizens, to take only the most obvious example, do not have the right to vote. Their vulnerability to becoming a disadvantaged group in our society is captured by John Stuart Mill’s observation in Book III of Considerations on Representative Government that “in the absence of its natural defenders, the interests [sic] of the excluded is always in danger of being overlooked . . . .” I would conclude therefore that non-citizens fall into an analogous category to those specifically enumerated in s. 15. I emphasize, moreover, that this is a determination which is not to be made only in the context of the law which is subject to challenge but rather in the context of the place of the group in the entire social, political and legal fabric of our society. While legislatures must inevitably draw distinctions among the governed, such distinctions should not bring about or reinforce the disadvantage of non-citizens.

29 The enumerated grounds are race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

30 The panel consisted of Chief Justice Dickson, as well as Justices McIntyre, Lamer, Wilson, La Forest, and L'Heureux-Dubé. Justice Le Dain heard the case but retired from the Court before the decision was handed down. The dissenting judges were Justices McIntyre and Lamer.
certain groups and individuals by denying them the rights freely ac-

Justice La Forest acknowledged the history in Canada of discrimination in employment on the basis of nationality and noted the close linkage between discrimination on the basis of citizenship and discrimination on the named Charter grounds of national or ethnic origin.\footnote{Ibid at 195.} He concluded in a commonsensical tone, “If we allow people to come to live in Canada, I cannot see why they should be treated differently from anyone else.”\footnote{Ibid at 201.}

There is nothing in the Andrews ruling to foreshadow anything other than a very promising rights environment for non-citizens in the Charter era. The absence of international norms as reference points here is not surprising given that international human rights law does in fact support a distinction on the basis of citizenship in the case of public sector employment, which might have been arguable on these facts.\footnote{The International Covenant on Civil and Political Rights (supra note 2, art 25) provides a right for citizens to have equal access to public service employment. See 690-92, below.} At the very most, we can remark that Andrews is not an immigration case; it has nothing at all to do with crossing borders, and so it is distinct from many of the types of claims to which citizenship becomes relevant. Indeed, the Court goes to some length to focus on the vulnerability and democratic exclusion of non-citizens, despite being presented with a claimant who had many markers of privilege.

The fact that the very first equality challenge of the Charter era involved the rights of a non-citizen, and especially a well-educated permanent resident with citizenship rights in another prosperous Western democracy, fits squarely within the trend—identified by a number of scholars—of human rights eclipsing citizenship rights as an aspect of contemporary globalization.\footnote{Chiarelli, whose case is discussed below at 680-83, was also an EU citizen, but this citizenship did not include full labour mobility rights until after the 1992 Maastricht Treaty came into effect in 1993: see EC, Treaty on European Union, [1992] OJ C 191/1 at 23, 31 ILM 253 [Maastricht Treaty], amending Treaty Establishing the European Economic Community, 25 March 1957, 298 UNTS 3, reprinted in European Union, Consolidated Versions of the Treaty on European Union and the Treaty Establishing the European Community (Luxembourg: Office for Official Publications of the European Communities, 2003) at 35.} Saskia Sassen has argued that the rise of human rights protections now means that the most meaningful distinction in
rights protections is not between citizens and non-citizens, but rather between those with a secure immigration status and those without status. Her analysis fits closely with Justice La Forest’s conclusion that he could not see any basis for treating permanent residents differently “from anyone else”. David Jacobson explored this argument in detail in *Rights Across Borders: Immigration and the Decline of Citizenship* and added empirical heft to this analysis with his study of judicial decision making.

In very broad terms, both Sassen and Jacobson can be cast as viewing this development positively. Assessing the same phenomenon, the success of non-citizens in making rights claims in national courts, Christian Joppke and Gary Freeman each concluded that the strength of human rights claims has risen to the extent that national immigration policy-making (although, in both cases, the authors are talking primarily about the United States) is constrained by the tendency of courts to extend rights protections to immigrants. With varying emphases, Joppke and Freeman both evaluate this turn negatively. Possibly, following the *Andrews* decision, the Law Society of British Columbia would have agreed.

From the perspective of non-citizens’ rights protections, the rulings in *Singh* and *Andrews* fit squarely within the trend of reducing the role of citizenship as an important rights marker. Justice Wilson in *Andrews* went so far as to state that citizenship “may not even be rationally connected” to the objective of ensuring that lawyers are familiar with Canadian institutions. And the *Singh* ruling extended the *Charter* to persons “physically present” in Canada in a way that eclipses even Sassen’s analysis of the importance of legal immigration status. But the trajectory since that time suggests that we are now a long way from this high-water mark. It is no coincidence that this scholarly trend peaked in the 1990s, shortly after the *Singh* and *Andrews* rulings. Since that time, citizenship has experienced a resurgence, including steps by a number of Western

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37 *(Baltimore: Johns Hopkins University Press, 1996).*
40 *Andrews*, supra note 27 at 156.
governments to ensure that the “rational connection” Justice Wilson was skeptical about will be strengthened.41

The primary objective of this paper is to examine and explain the experience of non-citizens before the Supreme Court of Canada in the time since these seminal rulings. In part, the Canadian experience fits into a worldwide trend driven forward by globalizing forces and the politics of securitization, but in some key areas, access to international human rights norms has been markedly worse for non-citizens in Canada than elsewhere. The explanation for this discrepancy is subtly rooted in the Charter jurisprudence itself, a point I explore after presenting an overview of the cases. Ultimately, what matters is that individuals’ rights claims are appropriately vindicated. The legal vehicle for achieving this goal is not important. In Canada, however, the key rights sources of the constitution and of international law are intertwined because of the Supreme Court’s early Charter jurisprudence.42 Non-citizens asserting rights claims are therefore required to make their arguments first and foremost in Charter terms and only secondarily in international human rights terms. This puts non-citizens in Canada in a different position than those in England, Australia, New Zealand, and even in some circumstances, the United States. This different position has become a worse position over time. The requirement that international rights claims must be heard through the vehicle of the Charter has reached the point at which the term “Charter hubris” is apt. This phenomenon can be observed in the relationship between Charter rights and international human rights in the non-citizens’ cases presented here.

II. Methodology: Which Cases Matter and Why

The data set for this study is all the Supreme Court of Canada decisions, since the Charter came into effect, that adjudicate rights claims made by non-citizens. I have selected decisions that deal with the claims made by non-citizens. I have selected decisions that deal with the claims made by non-citizens43 made in situations where non-citizenship is somehow relevant to the legal issues at stake. I have focused on non-citizenship because I am interested in the group of people who are not Canadian, rather than in distinctions that are made between non-Canadians (for example,


42 See discussion at 725, below.

43 I have not included corporations in the data set.
in refugee claims where one’s state of nationality is of primary importance). The focus on non-citizenship as legally relevant means that the majority of the decisions deal with issues originating in the former Immigration Act or the current Immigration and Refugee Protection Act.\(^{44}\)

There will certainly be any number of cases where the rights of a non-citizen are at stake but in which citizenship is irrelevant to the legal issue at hand. For example, I have not included cases where someone without Canadian citizenship was involved in a criminal matter or a family law matter and the issue of citizenship was not relevant to the case.\(^{45}\) I have taken a broad approach to the question of what counts as a “rights claim” and therefore have included any claim that could be cast in rights terms, whether or not the Court treated it either as a Charter case or as a rights case more generally. As rights are the basic building blocks of contemporary legal language, this criterion did not lead to any cases being eliminated from the set that would otherwise have been included.

With these parameters, and eliminating the double counting that arises because of companion cases, the data set includes twenty-four decisions, two of which are Singh and Andrews. I have included one decision that at first blush appears at the margin of my parameters. This is Ontario (Attorney General) v. Fraser,\(^{46}\) which I have included because an important issue of non-citizens’ rights was raised before the Court, although this is not reflected in the decision. During the time frame of this study, the Supreme Court of Canada made 2,755 decisions.\(^{47}\) It is difficult to get an accurate count of how many of these would be considered Charter decisions, although 490 is a reasonable estimate.\(^{48}\) In any case, the number of Charter cases would not be an appropriate comparator, because my data set includes a number of cases where the decision does not engage with

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\(^{44}\) The Immigration Act (supra note 24), was repealed by the Immigration and Refugee Protection Act (supra note 24), which came into effect on June 28, 2002.

\(^{45}\) An important qualifier here is that I have left this determination to the Court. While an individual non-citizen may have felt that their lack of Canadian citizenship was in some way relevant to the proceedings, if the Court did not comment on citizenship or stated that it was irrelevant, the case was not included.

\(^{46}\) 2011 SCC 20, [2011] 2 SCR 3 [Fraser].

\(^{47}\) This number was obtained from the Supreme Court Reports, beginning when the Charter came into force and concluding at the end of 2011.

\(^{48}\) This number is the result of combining two sources, the count provided by F.L. Morton, Peter H. Russell and Michael J. Withey (“The Supreme Court’s First One Hundred Charter of Rights Decisions: A Statistical Analysis” (1992) 30:1 Osgoode Hall LJ 1), supplemented by a manual count from the Judgments of the Supreme Court database’s Supreme Court bulletins: Resources (2013), online: Judgments of the Supreme Court <http://scc.lexum.org/decisia-scc-csc/scc-csc/bulletins/en/2013/nav_date.do>.
Charter rights in any way. This is helpful in understanding why I describe the case set as “rights claims by non-citizens during the Charter era.”

It is impossible to say precisely whether twenty-four cases is a “high” or “low” number of decisions. Non-citizens now face two important structural barriers in reaching the Supreme Court of Canada, in addition to the usual barriers of time, money, and a requirement to seek leave. The first of these is that, beginning in 1992, it became necessary to seek leave from the Federal Court, Trial Division (as it then was), in order to have most decisions under the Immigration Act judicially reviewed.49 The second is that appealing a judicial review from the Federal Court to the Federal Court of Appeal requires that the judge at first instance “certify” that the case raises a serious question of general importance.50 Some perspective on the twenty-four cases comes from looking at other jurisdictions. Between 1982 and 2011, the High Court of Australia decided 103 cases involving refugee law matters alone.51 My data set includes only four cases involving refugee law matters. The numbers are high in Australia, in part because the High Court of Australia has an original jurisdiction for judicial review,52 but by contrast, Australia’s population is thirty per cent smaller than Canada’s and Australia has received approximately one-fifth of the refugee claimants Canada has received over this time frame. It could be argued that the Australian government was more aggressive toward refugees during this time, but in light of the other factors, this is at best a partial explanation. An alternative comparator is the Supreme

49 On February 1, 1992, amendments to the Federal Courts Act (RSC 1985, c F-7) gave the trial division original jurisdiction in the judicial review procedure and created the leave provision: see Federal Court, History (31 December 2012), online: Federal Court <http://cas-ncr-nter03.cas-satj.gc.ca/portal/page/portal/fc_cf_en/History>. Over the most recent decade, leave has been granted in approximately fifteen per cent of cases: see Federal Court, Statistics (23 August 2012), online: Federal Court <http://cas-ncr-nter03.cas-satj.gc.ca/portal/page/portal/fc_cf_en/Statistics>.

50 See Federal Courts Immigration and Refugee Protection Rules, SOR/93-22, s 18.

51 Given the complexity of including or eliminating cases, for this quick comparison, I have selected only refugee cases, as those are the easiest to identify. The raw count of cases with “refugee” or “asylum” as keywords in the AustLII high court database for the relevant years was 141, which I reduced to 104 after screening headnotes for relevancy.

Court of the United States, which decided twenty-one refugee cases in the same time frame.53

There are three groups of cases that I have not included. The first of these is cases that have adjudicated the boundaries of Canadian citizenship. These cases have, in one way or another, focused on who should be considered a Canadian citizen. The focus is not on the rights that non-citizens have but rather on the boundaries of the category. As these cases do not speak to how non-citizens in Canada access rights, they are excluded.54 The second group is cases that address the reach of the Charter beyond Canadian borders. These cases are principally about the conduct of Canadian officials.55 While they do sometimes involve questions of how the Charter applies to non-citizens, they are not about how people in Canada can make rights claims. These cases are about things that happen outside of Canada, and on that basis, they have been excluded. Extradition cases are not included in the data set, as citizenship is not a central focus of these proceedings, but they are canvassed later in the paper because of the interesting counterpoint they raise.

III. Mapping the Jurisprudence

Apart from Singh and Andrews, the Supreme Court of Canada assessed a non-citizen’s rights claim on twenty-two occasions in the first thirty years of the Charter. Logically enough, the cases raise diverse issues and can be grouped together in any number of ways. Fifteen of the decisions deal with individuals facing removal from Canada, five deal with people seeking admission, and two have nothing to do with the border setting. Of the fifteen removal cases, four are cases involving refugees or refugee claimants and the central issue involves interpretation of the Refugee Convention. These cases form a distinct subset in that they are directly concerned with international law and they deal with the Charter only in passing. I discuss this distinct group separately. Of the remaining eighteen cases, nine could squarely be considered Charter cases.56 In six of

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53 The same method was used for the US Supreme Court, employing the LexisNexis database. Here again, given the complexity of counting cases involving non-citizens, I used only refugee cases as the basis for an approximate comparison.
54 See e.g. Benner v Canada (Secretary of State), [1997] 1 SCR 358, 143 DLR (4th) 577; Benner v Canada (Secretary of State), [1997] 3 SCR 389 (available on CanLII); Canada (Minister of Citizenship and Immigration) v Tobiass, [1997] 3 SCR 391, 151 DLR (4th) 119.
55 The current leading case in this category is R v Hape, 2007 SCC 26, [2007] 2 SCR 292.
the cases, there is at least some discussion of international human rights law. Most cases discussing international human rights law are also Charter cases. The one exception to this twinning is Baker v. Canada (Minister of Employment and Immigration),[57] which was emphatically not a Charter case. In only one case, Mugesera, the outcome relies directly on international law as a source of direct obligation rather than as an interpretive tool for the Charter. In two other cases, Lavoie and Baker, international law could fairly be said to influence the outcome, although this level of gradation is difficult to be precise about. It is possibly notable that, in both Mugesera and Lavoie, the non-citizen lost at the Supreme Court of Canada level.

With such a small group of cases, the numbers are not particularly meaningful and serve more to introduce the area than anything else. It is important to notice that non-citizens’ cases are most likely to reach the Supreme Court when there is a removal issue at stake. This core issue of a right to remain, on the one hand, pitted against the state’s right to expel, on the other, is at the heart of all immigration law. The right to remain is also central to international refugee law, because the Refugee Convention’s protection against non-refoulement is the oldest and most widely applied constraint, at international law, on a sovereign state’s power to expel non-citizens.[58] Interestingly, separating the removal cases

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[57] [1999] 2 SCR 817, 174 DLR (4th) 193 [Baker cited to SCR].

[58] The non-refoulement provision is set out in article 33 of the Refugee Convention (supra note 23):

Prohibition of Expulsion or Return (“Refoulement”)

1. No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

As states are only required to admit their own citizens, the non-refoulement provision translates into an effective but unstated right to remain for people who have refugee
into matters raised by permanent residents and those raised by foreign nationals without permanent status did not prove to be analytically helpful, as will become clear below. To address the substance of both Charter analysis and international human rights engagement, I will discuss three groups of cases. I will first present the ten nonrefugee cases where Charter or international human rights feature in the decision. Following this analysis, I will examine the eight nonrefugee cases where the Court’s response was not cast in rights terms. I will then turn to the group of four refugee law cases. These three groups comprise the data set for the study. Following this presentation, I consider briefly three sets that are outside my selection parameters: cases that were refused leave by the Supreme Court, extradition cases, and cases directly linked to non-citizens. These latter two groups merit a brief canvass in order to fill in the picture of non-citizens’ rights claims in the Charter era.

A. Rights Questions and Rights Answers

Following the ruling in Andrews, the next question of a non-citizen’s rights claim to reach the Supreme Court was Chiarelli in 1992. The central issue was the deportability of a permanent resident who had been convicted of serious crimes in Canada and who was suspected of involvement in organized crime. The Court’s unanimous ruling, and its approach, set in place key principles for non-citizens’ claims that have predominated since. The two most important of these principles were to draw attention to the distinction between citizens and others in section 6 of the Charter and to establish that the relevant context for interpreting section 7 principles of fundamental justice is an immigration context.

Given that the right of a state to deport non-citizens is unchallengeable except in cases of refugee status or a risk of torture, the Chiarelli argument focused on the procedural aspects of reaching a deportation decision. The facts in the case were ideal for raising the distinction between permanent residents and citizens that has been key to the human rights and globalization thesis. Giuseppe Chiarelli had come to Canada as a teenager. As an Italian citizen, he was facing deportation to a prosperous, Western country with a well-developed legal system and a standard of living.

status. The Torture Convention (supra note 2, art 3) also contains a non-refoulement provision. It came into force in 1987 and was ratified by Canada the same year.

59 As I was completing this paper, the Supreme Court of Canada had reserved judgment in one further non-citizen’s rights claim, Agraira v. Canada (Public Safety and Emergency Preparedness) (2011 FCA 103, 96 Imm LR (3d) 20). Until this decision becomes available, it is impossible to predict whether this ruling will fall into the first or the second group in my analysis.

60 Supra note 56.
ing broadly similar to Canada’s. Furthermore, given his age on emigration, the Court could assume that life in Italy would be familiar to him. Having pleaded guilty to a drug-trafficking charge, as well as a charge of uttering threats to cause injury, he was subject to clear societal condemnation. In short, there was nothing on the facts to cloud a straightforward consideration of the procedural steps required for his removal. An appeal against this order was then possible both on law and fact, as well as on compassionate grounds. The appeal could be suspended if a security review committee, which had the option of holding closed hearings and of keeping evidence secret, decided there were reasonable grounds to believe the person in question would engage in organized criminal activity.

Although the Federal Court of Appeal had split on its assessment of the constitutionality of the scheme, the Supreme Court had little difficulty in deciding that all aspects of the scheme were constitutional. Indeed, the Court did not need to address the question of whether there was any deprivation of life, liberty, or security of the person, because it decided that, in all respects, there was no breach of principles of fundamental justice. Drawing on earlier decisions that the principles of fundamental justice were to be determined by context, the Court considered the immigration context for the first time here. The core of that context was summarized this way: “The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country.”\(^{61}\) The Court supported this reasoning by looking to extradition jurisprudence, to the need to keep Canada from becoming a haven for criminals,\(^{62}\) and to the Charter’s distinction between citizens and non-citizens. With these framing principles in place, it was a short step to finding that “deportation is not imposed as a punishment.”\(^{63}\) While deportation may come within the scope of “treatment” in section 12 of the Charter’s protection against cruel and unusual treatment or punishment, it is not cruel and unusual. Indeed, the Court turned its test for the cruel and unusual standard on its head, stating that

\[\text{[t]he deportation of a permanent resident who has deliberately violated an essential condition of his or her being permitted to remain in Canada by committing a criminal offence punishable by imprisonment of five years or more, cannot be said to outrage standards of decency. On the contrary it would tend to outrage such standards if individuals granted conditional entry into Canada were} \]

\(^{61}\) *Ibid* at 733.

\(^{62}\) *Ibid*.

\(^{63}\) *Ibid* at 735.
permitted, without consequence, to violate those conditions deliber-
ately.\footnote{Ibid at 736.}

Chiarelli was therefore an important starting point for separating citi-
zens from non-citizens in Charter reasoning. The “immigration context”
language is important, as the data set shows that almost all Supreme
Court cases to which citizenship was relevant are linked in some way to
immigration. This step, more than any other, may be the key to under-
standing how the Court moved away from the promise of Singh and An-
drews: those cases are atypical in that they do not fall squarely in the
immigration context, as developed by the Court.

The Chiarelli decision is also notable for what it did not say. Im-
portantly, a potential equality rights argument was passed over very
quickly, in part because counsel had not made any submissions on the is-

\footnote{Ibid.}

\footnote{Ibid [emphasis added].}

\footnote{Section 6 of the Charter states:

\textit{Mobility of citizens}

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

\textit{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.

\textit{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.

\textit{Affirmative action programs}
dian approach to equality rights, the requirement of a “comparator group” analysis is challenging for any claim involving immigration legislation, as it is difficult to formulate a comparator group of citizens. In other jurisdictions, however, the fact that legislation applies solely to non-citizens has been an essential basis of a finding of discrimination. Chiarelli also makes no reference to international human rights standards, which could have been adduced to bolster arguments on either side of the central issue.

The Chiarelli approach flowed directly into the next decision to reach the Court, Dehghani. Here, the issue was whether a person who was required to undergo a “secondary” immigration examination upon entering Canada and claiming refugee status, was “detained” so as to trigger the right to counsel provisions of section 10(b) of the Charter. The case followed two high-profile decisions regarding detention and the right to counsel. Mr. Dehghani had been required to wait “approximately four hours” for his secondary interview. The interviewer made extensive notes that were later entered as evidence at what was then called a credible basis hearing. A key issue at that hearing was that Mr. Dehghani had not disclosed, at the airport, the facts this refugee claim would be based on but had instead said that he was making a refugee claim because he wanted to work in Canada and to provide for his children’s futures. Justice Iacobucci, writing for the Court, anchored his analysis with the Chiarelli decision (A v Secretary of State for the Home Department, [2004] UKHL 56, [2005] 2 AC 68 [Belmarsh]), the House of Lords found that a detention regime embedded in immigration legislation and applying only to non-citizens was impermissibly discriminatory.

The International Covenant on Civil and Political Rights (supra note 2, art 14) has a detailed provision relating to rights to a fair trial, which could have been used to dispute the secrecy provisions. The covenant also contains explicit protection against expulsion (ibid, art 13).

Supra note 56.

See R v Therens, [1985] 1 SCR 613, 18 DLR (4th) 655 (holding that subsection 235(1) of the Criminal Code (RSC 1970, c C-34), as it was then—allowing a police officer to demand a Breathalyzer test—violated the accused’s right to retain counsel under section 10(b) of the Charter); R v Simmons, [1988] 2 SCR 495, 55 DLR (4th) 673 (holding that a customs search conducted without notification of right to counsel according to section 10(b) violated the accused’s Charter rights, but that it would not necessarily lead to exclusion of evidence obtained through the search).

Dehghani, supra note 56 at 1057.
arelli principle that there is no right for non-citizens to enter Canada and that the “most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country.”73 From this starting point, it was a short journey to the conclusion that neither section 10(b) nor the more capacious section 7 was breached in this case.74

As in Chiarelli, no international human rights law appears in Dehghani. Here, however, this absence is more remarkable, as there is directly applicable international law on point. The Court’s reasoning in Dehghani merges refugee law and its international rights–based framework directly into the immigration context that began developing in Chiarelli. Unlike immigrants, however, refugee claimants do have a right to enter at international law.75 In Canada, refugee law and immigration law are linked together in one statutory framework. Refugee law comes directly from international human rights law, and immigration law does not. The Court viewed Dehghani as a case about routine procedure at airports rather than a case about refugee claimants.76 Beginning from the refugee law frame, however, leads in a completely different direction, as the dissenting voice in the court below demonstrated. Justice Heald stated, “In the case of a refugee claimant such as this claimant, assuming that even a portion of his factual assertions are true, the consequences of his enforced return to Iran could well include incarceration, torture and even death.”77 Dehghani was an important step in drawing procedural aspects of refugee claims into the evolving immigration context and away from international law. This manoeuvre also served to starkly limit the jurisprudential influ-

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73 Ibid at 1070-71, citing Chiarelli, supra note 56 at 733.
74 Dehghani, supra note 56 at 1074, 1078.
75 This right was contested for a number of years, but it is now generally considered to be settled law: see James C Hathaway, The Rights of Refugees Under International Law (Cambridge, UK: Cambridge University Press, 2005) at 279-370.
76 Dehghani, supra note 56 at 1072-73. Justice Iacobucci stated:

Clearly, there is no stigma associated with a referral to a secondary examination. For instance, Canadian citizens who are not able to demonstrate their identity are often referred to a secondary examination for confirmation of their citizenship. In addition, persons who are unable or unwilling to answer questions, applicants for permanent resident status, and Canadian citizens in possession of an emergency passport issued by a Canadian embassy official abroad to facilitate their return to Canada are habitually referred to a secondary examination (ibid).

77 Dehghani v Canada (Minister of Employment & Immigration), [1990] 3 FCR 587 at 600, 72 DLR (4th) 58 (FCA).
ence of the Singh decision, which had taken a very different approach to procedural matters involving refugees.  

The next case where the Court engaged directly with a rights claim by a non-citizen was the fabled Baker decision handed down in 1999. Baker is the anomaly in this first group of cases, as the decision does not rely directly on either the Charter or on international human rights to arrive at its conclusions. It does, however, fit the parameters of this first group of cases because of its forthright engagement with arguments on both of these grounds and because of the relationship it establishes between Canadian domestic law and international human rights law. The tension between the majority and minority views about this relationship may be partially responsible for the ensuing pattern of engagement with international human rights.

Mavis Baker was poor and mentally ill and had been living in Canada for many years without immigration status when she was ordered deported in 1992. She made an application on humanitarian and compassionate grounds to remain in Canada and to be exempted from various provisions of the Immigration Act. The immigration officer who reviewed her file wrote a negative recommendation about it to his supervisor in terms that can at best be called prejudicial and unprofessional. The Supreme Court’s response became the leading statement on the parameters of the duty of procedural fairness. Ms. Baker had eight children, four of who had been born in Canada, and these children became central to the international human rights arguments made in the case. Because Canada had ratified the Convention on the Right of the Child in 1991, counsel for Ms. Baker, as well as a number of intervenors, argued that the rights of Ms. Baker’s children ought to be taken into account in deciding how to respond to her application for exceptional treatment on humanitarian grounds. Despite its ratification, the Convention on the Rights of the Child had never been implemented into Canadian law and thus could not have any direct application to the case under the Canadian, dualist approach to international law.
Justice L’Heureux-Dubé, writing for the majority, fashioned a response that provided a role for the ratified international human rights provisions. She ruled that Canada’s ratification of the convention was a relevant consideration in the statutory determination exercise undertaken to determine the meaning of “humanitarianism and compassion” in the Immigration Act. Specifically, she wrote:

Another indicator of the importance of considering the interests of children when making a compassionate and humanitarian decision is the ratification by Canada of the Convention on the Rights of the Child, and the recognition of the importance of children’s rights and the best interests of children in other international instruments ratified by Canada. ... Its provisions therefore have no direct application within Canadian law.

Nevertheless, the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review. ...

The values and principles of the Convention recognize the importance of being attentive to the rights and best interests of children when decisions are made that relate to and affect their future. In addition, the preamble, recalling the Universal Declaration of Human Rights, recognizes that “childhood is entitled to special care and assistance”. A similar emphasis on the importance of placing considerable value on the protection of children and their needs and interests is also contained in other international instruments. The United Nations Declaration of the Rights of the Child (1959), in its preamble, states that the child “needs special safeguards and care”. The principles of the Convention and other international instruments place special importance on protections for children and childhood, and on particular consideration of their interests, needs, and rights. They help show the values that are central in determining whether this decision was a reasonable exercise of the H & C power.

This creative response was a key aspect of the Court’s favourable ruling on Ms. Baker’s behalf, and it provided an avenue for looking at international human rights law, even when it had not been implemented in domestic law. What it did not do, however, was create a rights platform, either within the Charter or within international law. Justice L’Heureux-Dubé opted not to respond to the Charter arguments put before the Court, stating “[As] the issues raised can be resolved under the principles of administrative law and statutory interpretation, I find it unnecessary to

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83 This was the point of disagreement between the majority and minority opinions.
consider the various Charter issues raised." While in other instances, such as Singh, core administrative law principles have found constitutional backbone in section 7’s principles of fundamental justice, in this case, constitutional rights arguments were raised but not answered. Ironically, in Baker, avoiding the constitution made it easier to engage directly with international law in a statutory interpretation context. However, because this engagement was necessarily indirect, it also meant that Baker was decided wholly on the murky terrain of administrative law and statutory interpretation, and did not lead to a hard, rights-based statement on behalf of non-citizens. Empirically, the Baker decision has been shown to have had little influence in the actual outcomes of applications based on humanitarian and compassionate grounds.

Coming a decade after Andrews, Baker was another high-water mark for non-citizens before the Supreme Court of Canada. And it was an undoubted win for Mavis Baker. But the substantive content of the decision meant that it was not a Charter victory for non-citizens. Indeed, Baker implicitly rejected what was, by 1999, an established paradigm of turning to international human rights statements to interpret Charter rights. The opportunity afforded by this paradigm was lost in this case. The statutory interpretation-based argument, which had such immense potential as penned in 1999, has not provided much traction, proving just as Justice L’Heureux-Dubé asserted, that this approach was hardly revolutionary in the Canadian paradigm of statutory interpretation. Justice Iacobucci, in his minority reasons, averred to the lost opportunity, but it is impossible to do any more than imagine what he would have done with it.

If Baker can still be read as a peak of sorts in the trajectory of non-citizen jurisprudence, Suresh, which came next chronologically in the first group, is definitely a trough. Manickavasagam Suresh came to Canada

84 Baker, supra note 57 at para 11.
86 Baker, supra note 57. Justice Iacobucci stated:
I am mindful that the result may well have been different had my colleague concluded that the appellant’s claim fell within the ambit of rights protected by the Canadian Charter of Rights and Freedoms. Had this been the case, the Court would have had an opportunity to consider the application of the interpretive presumption, established by the Court’s decision in Slaight Communications Inc v. Davidson, and confirmed in subsequent jurisprudence, that administrative discretion involving Charter rights be exercised in accordance with similar international human rights norms (ibid at para 81 [reference omitted]).
87 Suresh, supra note 56.
from Sri Lanka in 1990 and was granted refugee status in 1991. As most
refugees do, he applied for permanent residency. While this application
was being processed, the Canadian government discovered information
indicating that Mr. Suresh was associated with, or at least acted as a
fundraiser for, the Liberation Tigers of Tamil Eelam (LTTE). The gov-
ernment sought to deport him to Sri Lanka on security grounds. Mr.
Suresh argued against this deportation on the basis that he would likely
be tortured or killed by Sri Lankan authorities if he returned to Sri
Lanka. The facts were not disputed before the Supreme Court: the LTTE
was a terrorist organization, and the human rights record of the Sri
Lankan government included widespread use of torture, especially
against LTTE members and sympathizers.88

The central question in *Suresh* was whether the Canadian govern-
ment could deport a refugee to face a risk of torture. The answer, albeit
qualified, was yes. Because the *Suresh* Court spent little time interpreting
the *Refugee Convention*,89 I have included this case in the present group
rather than in the group of cases that are primarily about interpreting in-
ternational refugee law for Canada. *Suresh* is primarily about the *Torture
Convention* and how it is to be applied in Canada. Mr. Suresh’s own refu-
gee status was near to irrelevant at the Supreme Court level, given the
Court’s focus on the non-refoulement provision of the *Torture Conven-
tion*.90

The focus of the reasoning in *Suresh* was whether his deportation
would be a breach of the section 7 guarantee of no deprivation of life, lib-
erty, and security of the person save according to principles of fundamen-
tal justice. After finding that, while torture would not be carried out by
the Canadian government, the government would still bear responsibility,
the analysis focused on the content of the principles of fundamental jus-
tice. The Court articulated both a Canadian perspective and an interna-
tional perspective on the question of whether such deportation would
breach fundamental principles. This strategy draws a distinction between

88 The Court discusses the prima facie risk of torture *ibid* at paras 127-30.
90 The court below had concluded that article 33 of the *Refugee Convention* allows deportation
on national security grounds and thus that the *Torture Convention’s* prohibition on
deportation (*supra* note 2, art 3) must be derogable in the case of refugees. The Su-
preme Court clearly rejected this invidious reasoning, stating:

[T]he *Refugee Convention* itself expresses a “profound concern for refugees” and its
principal purpose is to “assure refugees the widest possible exercise of ... fundamen-
tal rights and freedoms.” This negates the suggestion that the provisions of the *Ref-
ugee Convention* should be used to deny rights that other legal instruments make
universally available to everyone” (*Suresh*, *supra* note 56 at para 72 [reference omit-
ted], citing *Refugee Convention*, *supra* note 23, Preamble).
the two and also ensures a useful focus on the relationship between international law and the *Charter*. Here, as in *Baker*, the Court was dealing with a ratified convention that had not been directly implemented into Canadian law. The Court described the relationship between the *Charter* and the international principles as follows:

> Insofar as Canada is unable to deport a person to torture where there are substantial grounds to believe he or she would be tortured on return, this is not because Article 3 of the [*Torture Convention*] ... directly constrains the actions of the Canadian government, but because the fundamental justice balance under s. 7 of the *Charter* generally precludes deportation to torture when applied on a case-by-case basis. We may predict that it will rarely be struck in favour of expulsion where there is a serious risk of torture. *However, as the matter is one of balance, precise prediction is elusive.*

While stopping short of pronouncing on whether a prohibition against deportation to a country where an individual will face torture has become a peremptory, or *jus cogens*, norm within international law, the Court did conclude “that international law rejects deportation to torture, even where national security interests are at stake. This is the norm which best informs the content of the principles of fundamental justice under s. 7 of the *Charter*.92

In *Suresh*, the Court followed its established method of using international human rights norms to discern the content of *Charter* rights, but it concluded that the two kinds of rights are not the same. While international law clearly, possibly even to the point of a *jus cogens* norm, rejects deportation to torture, the *Charter* will permit it under particular, if rare, circumstances. Accordingly, *Suresh* is a clear statement that protection against deportation to face torture is lesser in Canada than it is at international law. Non-citizens in Canada will be protected against deportation to a *prima facie* risk of torture when, on balance, the minister exercises her or his discretion accordingly.

> In Canada, the balance struck by the Minister must conform to the principles of fundamental justice under s. 7 of the *Charter*. It follows that insofar as the *Immigration Act* leaves open the possibility of deportation to torture, the Minister should generally decline to deport refugees where on the evidence there is substantial risk of torture.93

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91 *Suresh*, *supra* note 56 at para 78 [emphasis added].
92 *Ibid* at para 75.
93 *Ibid* at para 77.
Following *Suresh*, ministerial discretion to deport is framed by the constitution, which itself looks to, but does not necessarily follow, international law.

Overall, this is a bad result for non-citizens in Canada. It is not the worst possible result, and Mr. Suresh himself “won” at the Supreme Court level because he had not been accorded sufficient procedural protections. But the principle it establishes—of possible deportation to torture—is damaging. And the method of establishing it—prising apart Charter rights and international rights, and introducing to immigration law the device of “constitutionalized” ministerial discretion—holds the promise of worse to come. It is notable that in the companion case, an Iranian citizen who raised the same argument was found to be deportable because he had been accorded adequate procedural rights and because the finding that he did not face a prima facie risk of torture was reasonable. It is legally irrelevant but impossible to ignore that *Suresh* was argued in May 2001 and the decision was handed down in January 2002. The Court deliberated throughout the horror of the 9/11 attacks and their aftermath. This was the worst possible time for an individual suspected of raising funds for terrorists to be before any court. Interestingly, despite its origins in the immigration legislation, the section 7 interpretation here did not make reference to an immigration context. Indeed, while the context here was unnamed, the decision shares much with the “security context” that emerged in subsequent immigration cases to come to the Court.

The next case to arise, however, was *Lavoie* one of only two in the data set dealing squarely with a rights claim by a non-citizen that has nothing to do with the border. *Lavoie* was handed down eight weeks following *Suresh* and settled a challenge to the provisions of the *Public Service Employment Act*, which establish a preference for Canadian citizens in some types of public-service employment competitions. The Court upheld this limitation, with four judges finding an equality rights infringement saved by the “reasonable limitation” analysis of section 1 of the

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94 See *ibid* at para 121.
95 *Ahani v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 2, [2002] 1 SCR 72. It is important to note that, to the best of my knowledge, the Canadian government has not used the discretion open to it under *Suresh* to deport anyone to face torture after having concluded that there was a prima facie risk.
96 *Supra* note 56.
97 RSC 1985, c P-33, as repealed by SC 2003, c 22.
The plurality judges differed sharply on the effect of the provisions. Justice Bastarache, with whom the larger group agreed, reasoned that the claimants in this case felt legitimately burdened by the idea that, having made their home in Canada, their professional development was stifled on the basis of their citizenship status. Their subjective reaction to the citizenship preference no doubt differed from their reaction to not being able to vote, sit in the Senate, serve on a jury, or remain in Canada unconditionally.100

Arguing from the proposition that “work and employment are fundamental aspects of this society,” he concluded that “[d]iscrimination in these areas has the potential to marginalize immigrants from the fabric of Canadian life and exacerbate their existing disadvantage in the Canadian labour market.”101 In assessing whether this limitation is justifiable, Justice Bastarache called attention both to the prevalence of similar provisions in the legislation of other jurisdictions and to the International Covenant on Civil and Political Rights, which protects the access of citizens to public-service employment.102 He also noted that the existing provision is a preference, not a bar, which applies only to open competitions. In contrast to this approach, Justices Arbour and LeBel, in separate opinions, would have found that there was no equality infringement. As Justice LeBel summarized, “The citizenship preference does not affect the essential dignity of non-citizens. It is but a stage in an open process of integration in a fully shared citizenship.”103

The dispute among the plurality judges was over the terrain of citizenship and equality. Justice Bastarache’s judgment elevates the importance of work to human dignity and social participation over the other

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98 Justice Bastarache, with whom Justices Gonthier, Iacobucci, and Major concurred.
99 Justices Arbour and LeBel.
100 Lavoie, supra note 56 at para 52.
101 Ibid.
102 Ibid at para 56. See International Covenant on Civil and Political Rights, supra note 2, art 25(c):
   Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
   ...
   (c) To have access, on general terms of equality, to public service in his country.
103 Lavoie, supra note 56 at para 124. Justice Arbour shared this view and argued strongly that equality rights infringements ought never to be saved by the section 1 provisions (ibid at paras 86-86).
citizenship privileges of formal political participation. This analysis is a strong endorsement of a robust social citizenship reminiscent of the classic T.H. Marshall conception. The reasoning is potentially further reaching than that in Andrews but has been lost because of the ultimate finding in the case. It is also instructive to see how the facts here are distinguished from the Andrews reasoning. It is clear that public-service employment is different from, and more publicly valuable to the state than, working as a lawyer. It is precisely on this point that the dissentients disagree with all of the plurality judges, finding instead that this case is “indistinguishable on the question of discrimination” from Andrews. In terms of access to international human rights norms, in Lavoie, the international instrument was not used in directly interpreting the content of Charter rights, but instead was marshalled—somewhat indirectly—as evidence against the non-citizen claim in the section 1 analysis.

Lavoie joins Andrews as one of only two cases that are centrally focused on the rights claims of permanent resident non-citizens and are distinct from the border-crossing context of immigration law. The other case that considers a nonborder situation, Fraser, does not address noncitizenship directly, but rather, it is relevant only because of the missed opportunity to do so.

The next non-citizen claim to reach the Supreme Court was Mugesera. The central issues before the court were the appropriate standard of review for Immigration and Refugee Board findings of fact and the standards to be met in issuing a deportation order, and thus they were almost entirely in the province of administrative law. As was the case in Baker, the Court did not use the Charter in framing its analysis. Indeed, the only reference to the Charter in the decision appears in the discussion of the Federal Court of Appeal’s decision below. What is notable, however, is that the Court responded to Mr. Mugesera’s arguments with a detailed engagement with international law.

Léon Mugesera was a Rwandan citizen who, along with his family, obtained permanent residency in Canada in 1993. Two years later, the Ca-

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105 Lavoie, supra note 56 at para 1, McLachlin CJC & L’Heureux-Dubé J.
106 Supra note 56.
107 The ruling in Mugesera shares much with that in Khosa (for a discussion of Khosa, see infra note 168-72 and accompanying text). The key distinction between these two is that Mugesera predated the Court’s important ruling in Dunsmuir v New Brunswick, 2008 SCC 9, [2008] 1 SCR 190 [Dunsmuir]. Thus, Khosa presented an opportunity to clarify the effect of Dunsmuir on the Immigration and Refugee Board.
108 Mugesera, supra note 56 at para 31.
nadian government became aware that he had delivered a speech at the outset of the Rwandan genocide that arguably incited murder, hatred, and genocide, and was therefore a crime against humanity. The Supreme Court ultimately upheld the Immigration and Refugee Board’s finding that Mr. Mugesera was inadmissible because reasonable grounds existed to believe that he had committed a crime against humanity prior to entering Canada.\textsuperscript{109}

The Court in \textit{Mugesera} issued a unanimous judgment, attributed jointly to all eight members of the panel, and this ruling was the Court’s first opportunity to comment on subsection 318(1) of the \textit{Criminal Code}, which implements the \textit{Genocide Convention}.\textsuperscript{110} As well, it was a rare opportunity to interpret the 2000 \textit{Crimes Against Humanity and War Crimes Act}.\textsuperscript{111} As befits this context, the reasoning was meticulous, including a brief summary of Rwanda’s history and a full reproduction of a translated version of Mr. Mugesera’s speech. The Court echoed \textit{Baker}’s reasoning, despite the distinction that here the international standards in question had been explicitly implemented:

\begin{flushright}
The importance of interpreting domestic law in a manner that accords with the principles of customary international law and with Canada’s treaty obligations was emphasized in \textit{Baker v. Canada}. In this context, international sources like the recent jurisprudence of international criminal courts are highly relevant to the analysis.\textsuperscript{112}
\end{flushright}

The result is the most thorough and nuanced engagement with international law in any Supreme Court case involving the claim of a non-citizen. There is some irony in this fact, given that the international standards are here used \textit{against} the claims of the non-citizen, but the Court’s approach is wholly admirable in its detailed use of a range of domestic, foreign, and international sources. \textit{Mugesera} is also distinguishable from many cases in this data set in that the \textit{Charter} argument that had been influential below was based on section 2(b) free speech protections, and thus this was not a case of turning to international law to interpret the \textit{Charter} itself. These features make the \textit{Mugesera} decision stand out de-

\textsuperscript{109} Mr. Mugesera lost his final bid to avoid deportation when the Federal Court dismissed a last-minute motion for a stay of deportation: \textit{Mugesera v Canada (Minister of Citizenship and Immigration)}, 2012 FC 32, 7 Imm LR (4th) 316. On January 23, 2012, he was put on a plane headed for Kigali, Rwanda.


\textsuperscript{111} SC 2000, c 24. This was the first case in which this act was interpreted by the Supreme Court of Canada.

\textsuperscript{112} \textit{Mugesera}, supra note 56 at para 82 [reference omitted].
spite its commonality with the majority of the cases in the set: at its core, it is an argument by a non-citizen for a right to remain in Canada.

A few months later, the Court ruled in Medovarski.113 The reach of this decision is limited because it interpreted a transitional provision of the 2002 Immigration and Refugee Protection Act, and thus its specific holding can only apply to other non-citizens whose circumstances overlap the time frames of two pieces of legislation, the Immigration and Refugee Protection Act and its predecessor, the Immigration Act. What the Medovarski decision did do, however, was reiterate and extend the Court's approach to section 7 of the Charter. Two individuals stand behind the Medovarski ruling. Both were non-citizens who had been convicted of crimes in Canada and sentenced to more than two years in jail. As such, under the Immigration and Refugee Protection Act, they were not entitled to a merits appeal to the Immigration and Refugee Board of their deportation orders.114 Both appellants argued that Charter rights were engaged because deportation threatens liberty and security of the person. This argument was dismissed with a brief reference to Chiarelli's ruling that deportation “in itself cannot implicate the liberty and security interests protected by s. 7 of the Canadian Charter of Rights and Freedoms.”115 The Court further held that, even if liberty and security interests were engaged and even if the transition between the two statutes operated unfairly, “any unfairness ... [did] not reach the level of a Charter violation.”116 Writing for the Court, Chief Justice McLachlin also found that the new legislation indicated an “intent to prioritize security” and that “[t]his [marked] ... a change from the focus in the predecessor statute, which emphasized the successful integration of applicants more than security.”117 This is, therefore, the first ruling that explicitly names security as an immigration objective. As such, it foreshadows directly the ruling in Charkaoui v. Canada (Citizenship and Immigration) (Charkaoui),118 which came seventeen months later.

The Supreme Court of Canada's ruling in Charkaoui is the most important case postdating Singh and Andrews because of the range of rights it dealt with and because those rights are at the core of democratic governance and the rule of law. While both Singh and Andrews set unique

113 Supra note 56.
114 See IRPA, supra note 24, s 64. Under the former Immigration Act, such an appeal was available to those who, like the appellants, were sentenced to more than two years.
115 Medovarski, supra note 56 at para 46.
116 Ibid at para 47.
117 Ibid at para 10.
118 Charkaoui (2007), supra note 56.
and vital precedents for non-citizens before the courts in Canada, Char-
kaoui strongly delineated the limits of both equality and liberty, as well as
the limits of the rule of law as applied to non-citizens. At issue in Char-
kaoui were the provisions of the Immigration and Refugee Protection Act
that allow for the long-term detention without trial of some non-citizens
awaiting deportation on the basis of evidence that the state is entitled to
keep secret. Adil Charkaoui had been detained in 2003 and, at the time
of the hearing, had been recently released on very strict conditions.
Hassan Almrei and Mohamed Harkat, whose appeals were joined with
Mr. Charkaoui’s, had been jailed even longer. All three men were sus-
pected of terrorist links and activities. Reflecting the importance of the
issues at stake, the Court heard the case over three full hearing days, a
rare departure from its half-day-per-matter norm and comparable to the
four-day hearing for the Quebec secession reference in 1998. Furthermore,
eighteen parties were granted intervenor status, which is similarly
exceptional.

Charkaoui raised two interrelated issues. The first was to what extent
the state is entitled to rely on evidence that it is not willing to make
available to the individual concerned because of concerns about national
security and to security arrangements shared with other countries. The

119 Not surprisingly, the ruling has attracted extensive commentary: see e.g. Christiane
Wilke & Paula Willis, “The Exploitation of Vulnerability: Dimensions of Citizenship
and Rightlessness in Canada’s Security Certificate Legislation” (2008) 26:1 Windsor YB
Access Just 25; Alex Schwartz, “The Rule of Unwritten Law: A Cautious Critique of
ing Against Non-citizens Under the Charter: Charkaoui and Section 15” (2009) 34:2
Queen’s LJ 669.

120 The relevant provisions make up division 9 of the IRPA (supra note 24, ss 76-87.2).

121 Mr. Charkaoui was released on February 18, 2005, on $50,000 bail. The conditions of
his release included a daily curfew beginning at 8:00 p.m. and lasting to 8:30 a.m.; re-
strictions on movement outside of his residence during the permitted hours (i.e., accom-
paniment by one of his parents or his wife for any movement outside of his residence);
prohibition on any movement outside of the Island of Montreal; surrender of his pass-
port; monitoring through the use of an electronic bracelet; police access to his residence
at all times and without a warrant; and complete prohibitions on the use of any com-
puter, fax machine, cellular telephone, or any other electronic communication device,
with the exception of a single residential telephone: see Charkaoui (Re), 2005 FC 248 at
para 86, 252 DLR (4th) 601.

122 Mr. Harkat had been detained in 2002 and was released on May 23, 2006, on conditions
that the Court considered to be harsher than those applied to Charkaoui: see Char-
kaoui (2007), supra note 56 at paras 103-104). Mr. Almrei was detained in 2001 and
had not been released at the time of the hearing.

123 As the evidence on which the certificates were based has never been publicly aired,
there is little more that can be said about the basis for detention.

second is what to do with individuals who cannot be deported because they face a risk of torture, death, or other forms of severe harm if returned to their country of nationality (and, of course, no other country will take them). The second issue picks up directly from the Suressh ruling and examines the consequences of a decision that a person is not deportable. If that person is considered to be dangerous, states have limited options. The provisions challenged in Charkaoui provided for long-term—arguably indefinite—detention in Canada, without trial, for the rare individual who would fall within these provisions and would therefore be subject to what Canadian immigration law calls a “security certificate”. These two issues are not faced by Canada alone, and in the final section of the paper, I will consider the varying responses in other common law jurisdictions. It is worth pointing out that there was never (at least publicly) any serious discussion of prosecuting any of these three men, leaving open the distinct possibility that the government had evaluated the evidence and concluded that it would not withstand the level of scrutiny required by a criminal trial.

The most remarkable observation about Charkaoui, in assessing access for non-citizens in Canada to international human rights protections, is that the unanimous ruling penned by the Chief Justice did not make reference to a single international human rights instrument that is applicable in Canada. This is particularly important in light of the fact that the core liberty rights at issue here are reflected in the most well-established and long-standing international instruments and, as such, have also been interpreted and commented upon by a range of courts and international bodies. This interpretive stance indicates that, by 2007, the Court viewed the content of Charter rights as being fully “domesticated”, capable of being interpreted and adapted on the basis of Canadian insights alone. There are some references to jurisprudence elsewhere, for example, in discussing the United Kingdom’s special advocate procedure as a potential model for Canada, in referencing US and UK decisions concerning indefinite detention of non-nationals, and in commenting on the European Court of Human Rights’ landmark ruling regarding cruel

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125 The basic framework for security certificates was introduced into Canadian law in 1991: see Immigration Act, supra note 24, s 40. Since that time, thirty-one certificates have been issued, concerning twenty-seven individuals.

126 Reference was made, in discussing UK jurisprudence, to the Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950, Eur TS 5).

127 See e.g. International Covenant on Civil and Political Rights, supra note 2, art 9 (which also stipulates the right to know the case against oneself). See also Universal Declaration, supra note 2 at 73.

128 Charkaoui (2007), supra note 56 at paras 80-84.

129 Ibid at paras 124-27.
and unusual punishment in the case of the “death row phenomenon” in the United States.\textsuperscript{130} These references make up only 10 of the judgment’s 143 paragraphs, and none of them engage with the contents of particular rights. The US and UK cases on indefinite detention are those that would be potentially applicable in \textit{Charkaoui}, but the Court both distinguishes them\textsuperscript{131} and asserts that its ruling is consistent with them.\textsuperscript{132} The ruling does not consider the \textit{Refugee Convention}, despite both Mr. Harkat and Mr. Almrei having refugee status.

The \textit{Charkaoui} argument comprised an array of \textit{Charter} challenges to all aspects of the security certificate procedure.\textsuperscript{133} The Court found for the appellants on two points: first, allowing no access to the central evidence was a breach of fundamental principles of justice (section 7) that was not justifiable because it was neither minimally impairing nor the least intrusive option; and second, that allowing no review of detention for 120 days for foreign nationals was a breach of protections against arbitrary detention (sections 9 and 10(c)) and should be brought in line with the forty-eight-hour review provision applicable to permanent residents. Overall, the ruling is disappointing for non-citizens. Most importantly, the Court found that, because regular reviews of detention are provided for in the legislation and because guidelines have been developed by the courts, the detention is constitutional, despite the fact that it can continue for an indeterminate amount of time. Reaching this conclusion without reference to international law is doubly surprising.

The \textit{Charkaoui} ruling made several important statements that may flow into other rulings related to non-citizens. While the issues in \textit{Charkaoui} were firmly in the province of immigration law, the Court described the context for section 7 rights analysis as a security context rather than an immigration context.\textsuperscript{134} This context is a marked departure from that

\textsuperscript{130} \textit{Ibid} at para 98. The case in question is \textit{Soering v United Kingdom} (1989), 161 ECHR (Ser A) 4, 11 EHRR 439.

\textsuperscript{131} “The IRPA, unlike the UK legislation under consideration in \textit{Re A}, does not authorize indefinite detention and, interpreted as suggested above, provides an effective review process that meets the requirements of Canadian law” (\textit{Charkaoui} (2007), \textit{supra} note 56 at para 127).

\textsuperscript{132} “These conclusions are consistent with English and American authority” (\textit{ibid} at para 124).

\textsuperscript{133} The Court answered twelve “constitutional questions”: see \textit{ibid} at para 143.

\textsuperscript{134} \textit{Ibid} at paras 19 ff. The tone is clearly set by the opening paragraph of the judgment:

One of the most fundamental responsibilities of a government is to ensure the security of its citizens. This may require it to act on information that it cannot disclose and to detain people who threaten national security. Yet in a constitutional democracy, governments must act accountably and in conformity with the Constitution and the rights and liberties it guarantees.
described in Chiarelli. Whether all immigration issues have become security issues remains to be seen, but this possibility was certainly signalled in Medovarski. In quickly dismissing the equality rights arguments about differential treatment of non-citizen terror suspects, the Court stated that “s. 6 of the Charter specifically allows for differential treatment of citizens and non-citizens in deportation matters.” This is a broad stretch from the wording of section 6, which says nothing about deportation and is primarily directed to entry rights for citizens and mobility rights between provinces for citizens and permanent residents. Such an extension of the content of what might previously have been argued to be a statement of a straightforward positive right does not augur well for future distinctions between citizens and non-citizens and cuts directly against the inclusive interpretive spirit of Singh. Indeed, in the UK, the distinction between citizen and non-citizen terror suspects has been found impermissible once deportation is seen as a remote possibility. In Charkaoui, the Court instead found that, despite the lengthy detention and no evidence of impending deportation, the provisions remained meaningfully tied to deportation and therefore permissible. In addition, while the Court found that foreign nationals ought to benefit from the same detention review

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These two propositions describe a tension that lies at the heart of modern democratic governance. It is a tension that must be resolved in a way that respects the imperatives both of security and of accountable constitutional governance (ibid at para 1).

135 Ibid at para 129

136 Section 6 of the Charter says in full:

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

(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.

(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.

(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.

137 See Belmarsh, supra note 68.

provisions as permanent residents, the heft of the decision—right from the joining of the cases of two foreign nationals with that of one permanent resident—puts permanent residents firmly on the side of “outsiders” and thus cuts against what might have been read into Andrews.\textsuperscript{139}

The most positive statement for non-citizens in Charkaoui may prove to be the clarification that, despite Medovarski and even Chiarelli, the conditions surrounding deportation may engage section 7 rights:

\textit{Medovarski} thus does not stand for the proposition that proceedings related to deportation in the immigration context are immune from s. 7 scrutiny. While the deportation of a non-citizen in the immigration context may not \textit{in itself} engage s. 7 of the Charter, some features associated with deportation, such as detention in the course of the certificate process or the prospect of deportation to torture, may do so.\textsuperscript{140}

Following Charkaoui, the government altered the legislation to introduce a special advocate procedure and to bring both the review schedule and the burden of proof for foreign nationals in line with those for permanent residents. What remains in Canadian law is a procedure whereby non-citizens can be detained for an indeterminate amount of time on the basis of evidence that they can never see.\textsuperscript{141} While it is too soon to see what the full reach of Charkaoui will be, the next opportunity is looming,

\textsuperscript{139} “Foreign national” is defined in IRPA (\textit{supra} note 24, s 2(1)) as a person who is neither a citizen nor a permanent resident. Mr. Charkaoui had permanent resident status; the others did not, but were refugees.

\textsuperscript{140} Charkaoui (2007), \textit{supra} note 56 at para 17.

\textsuperscript{141} As for the three appellants themselves, none of them have been deported from Canada. The security certificate against Mr. Charkaoui was quashed by a federal judge in October 2009 (\textit{Charkaoui (Re)}, 2009 FC 1030, [2010] 4 FCR 448), following the federal government’s refusal to disclose certain information allegedly relating to him on the grounds that it would endanger national security. After his security certificate was quashed, Mr. Charkaoui called on the government to apologize and to compensate him for time spent in detention. In 2010, he sued the government for damages, and litigation is in process with the government denying any claim for compensation. His application for citizenship, filed in 1999, is still under review. As of April 2012, the federal government has neither apologized nor offered any compensation.

Mr. Almrei’s security certificate was quashed by the Federal Court in December 2009: \textit{Almrei (Re)}, 2009 FC 1263, [2011] 1 FCR 163. He is currently suing the federal government for false imprisonment, negligent investigation, negligence, misfeasance in public office, and breach of his section 7, 9, and 12 \textit{Charter} rights. Mr. Harkat is still fighting his deportation order. In February 2012, he appealed from a December 2010 Federal Court decision upholding the security certificate against him. The Federal Court of Appeal allowed this appeal in part and returned the matter to the Federal Court for a new assessment of the reasonableness of the certificate in light of the appellate ruling on evidentiary questions: \textit{Harkat v Canada (Citizenship and Immigration)}, 2012 FCA 122, 429 NR 1.
with the introduction of a new detention scheme that proposes to sharply reduce detention review rights for some refugee claimants.\(^{142}\)

A follow-up matter, also styled *Charkaoui v. Canada (Citizenship and Immigration)*,\(^{143}\) was argued two years after the first hearing. This time, the narrow issues before the Court were the questions of appropriate remedy for destruction and late disclosure of information by the Canadian Security Intelligence Service. The Court held that liberty and security interests protected by the *Charter* were engaged because of the seriousness of the security certificate procedure.\(^{144}\) This conclusion follows logically from the first *Charkaoui* ruling. The Court distinguished the duty of disclosure required in this setting from that in a criminal trial and used the *Charter* as a guide to develop the duty.\(^{145}\) In regard to the policy of destroying original notes, the Court stated that “the destruction by CSIS officers of their operational notes compromises the very function of judicial review.”\(^{146}\) Despite this, however, there was no additional remedy for Mr. Charkaoui beyond the postponement that he had already been granted. The Court rejected the application for a stay that would have brought the security certificate proceedings to an end, on the basis that what was at issue was an interlocutory, rather than a final, ruling and that a stay would only be appropriate in the clearest of cases. Instead, the Court ruled that the designated judge would need to take the *Charter* breach into account in ultimately ruling on the reasonableness of the certificate.\(^{147}\)

The final case in this section is *Fraser*.\(^{148}\) This was a challenge to the 2002 Ontario *Agricultural Employees Protection Act*, which established a separate labour-relations regime for farm workers in Ontario who were excluded from the *Labour Relations Act*.\(^{149}\) The new legislation was challenged on the basis that it infringed association rights by restricting bargaining and on equality grounds for treating agricultural workers differently from other workers. The case raised an important non-citizens’ rights claim because of the high number of non-citizens in the agricultural sector in Ontario and because of the role of Canada’s Seasonal Agricultur-

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\(^{142}\) See *Protecting Canada’s Immigration System Act*, supra note 8.

\(^{143}\) *Charkaoui* (2008), supra note 56.

\(^{144}\) *Ibid* at para 50.

\(^{145}\) *Ibid* at para 53.

\(^{146}\) *Ibid* at para 62.

\(^{147}\) *Ibid* at para 77.

\(^{148}\) *Supra* note 46.

al Worker Program (SAWP). The non-governmental organization Justicia for Migrant Workers was granted intervenor status in the case. In its joint factum with the Industrial Accident Victims Group of Ontario, Justicia for Migrant Workers summarized its argument by saying “that the interests of migrant agricultural workers, other temporary foreign workers and undocumented workers should be further considered and contextualized in the interpretation of these Charter rights.” Its argument directly addressed the vulnerabilities of non-citizen workers and the high levels of risk involved in agricultural work. The ruling in Fraser was a clear statement that rights were breached, but without a clear statement on remedy, its impact is considerably weakened.

Fraser differs from the other cases in the data set because its rights claim was not brought exclusively by non-citizens. Despite this, however, the case must be counted here for two reasons. First, the effect of the impugned provisions on non-citizens was put directly before the Court, and second, it will be difficult for non-citizen agricultural workers to bring a separate challenge to the Court given this ruling. The role of foreign workers in the agricultural sector is well-known, and the facts and arguments on this ground would not have been a surprise to the Court. Nevertheless, all four sets of reasons were silent with regard to non-citizen farm workers. The non-citizenship status of many agricultural workers appears only in Justice Abella’s dissenting reasons in a citation from David Beaty’s work. The majority judges overturned the decision of the Ontario Court of Appeal and upheld the legislation. The ruling draws explicitly on international rights statements in some detail, including two International Labour Organization conventions, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. In short, there is a greater engagement with international human rights in this case than in the more recent cases that explicitly concern non-citizens. Justice Deschamps, in her separate opinion, concurring in the result, did voice the concern of many advocates that it

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150 The total number of SAWP workers in Ontario for 2010 was 18,325: see Human Resources and Skills Development Canada, Temporary Foreign Worker Program: Labour Market Opinion (LMO) Statistics; Annual Statistics, 2007-2010 (30 June 2011), table 9 (annual), online: Human Resources and Skills Development Canada <http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/stats/annual/table9a.shtml>. Approximately the same number of migrant workers on Ontario farms came from outside the SAWP, through the agricultural or low-skilled stream of the Temporary Foreign Workers Program.

151 Fraser, supra note 46 (Factum of the Intervener, Justicia for Migrant Workers and Industrial Accident Victims Group of Ontario at para 1).

had become very difficult to have “new” grounds of discrimination recognized under section 15.153 As non-citizenship was recognized as a protected ground as long ago as Andrews, it is perhaps, in hindsight, unfortunate for migrant agricultural workers that the challenge arose in this setting, where the interests of citizens and non-citizens were combined as the interests of “agricultural workers”.

Fraser is the final case where non-citizens’ rights claims were presented to the Court and where the Court responded in rights terms, drawing on the Charter, international standards, or both. Over a thirty-year period, the majority of cases that fit within this framework involved a question of deportation. In a deportation setting, rights language is often ineffectual for individuals, as the right of a sovereign state to control its borders typically emerges as the ultimate “trump” right.154 This trend is apparent in this data set. Equally, the argument of a number of scholars that permanent residents have rights protections equivalent to those of citizens was less apparent over time in this data set. Permanent residency was a failing argument in Lavoie and Medovarski, and it was irrelevant as a distinction in Charkaoui. Ironically, only in Fraser were citizens and non-citizens treated similarly, to the likely detriment of a discrete non-citizens’ claim. In sum, then, the Supreme Court of Canada rights jurisprudence shows either that the trend toward human rights overwhelming citizen rights has ended or that it was never observable in Canada, Singh and Andrews notwithstanding. This group of cases also demonstrates that the jurisprudence has sharply departed from the promise of Singh and Andrews. None of the subsequent non-citizens cases feature a successful equality analysis, in part because of the difficulty of framing a comparator group affected by the Immigration and Refugee Protection Act. In the case of section 7 rights, the broad reach of Singh to extend these rights to everyone and the importance of procedural rights for meaningful refugee protection have vanished into what is now a security context.

These cases, as a group, are the measure of non-citizens’ rights claims before the Supreme Court of Canada in the Charter era. They demonstrate both the extent of rights protections developed explicitly for non-citizens and the capacity of non-citizens to benefit from the protection of international human rights norms. They do not, however, provide the full picture of how non-citizens have fared before the Supreme Court of Canada during the Charter era. To complete the picture, I next address the remaining case groups, before turning to consider what might explain

153 Fraser, supra note 46 at para 319.
these outcomes, which in important ways, put international human rights protections out of reach for non-citizens in Canada.

**B. Cases Without Rights: Making Sense of Rights Claims in the Province of Administrative Law**

The second group of cases is where a rights claim of some sort was presented to the Supreme Court of Canada and the Court responded without relying on either the *Charter* or international human rights law. All of these cases began with a claim related to Canada’s immigration legislation, and thus the terrain covered here is that of administrative law, with its rich array of procedural rights. It is, of course, the case that some procedural claims, such as the one in *Singh*, have been considered as principles of fundamental justice under section 7 of the *Charter*. This set of cases, therefore, serves to illustrate the types of claims that have neither become *Charter* claims nor have triggered an engagement with international human rights. There is a *Charter* story to be told by noting which potential *Charter* arguments fail to have any resonance at all.

There is, of course, much shared terrain between this group and the first one. Seven of the nine cases above were challenges to immigration provisions. One of those cases, *Baker*, has become a cornerstone of Canadian administrative law and is very much part of the landscape of administrative rights protections. Beyond *Baker*, a number of the non-citizens’ right claims that the Court did respond to in human rights terms also include significant administrative law implications. My explicit focus on investigating whether international human rights norms serve as an alternative to *Charter* rights does tend to exaggerate the distinction between these two groups, making a hard line appear where a blurred and porous border is more appropriate.

The dominant theme in this group is the ambit of discretion for bureaucratic immigration decision makers at various levels. Chronologically, the first case involving the discretion of immigration officers was the *Jiminez-Perez* ruling, where the Court affirmed the duty to consider applications made on humanitarian and compassionate grounds and that such consideration could be compelled by the courts.155 This brief decision predates all of those in the first set, including *Singh*. The second decision was *Prassad*, where the Court ruled that an adjudicator conducting an inquiry leading to a deportation order was not required to adjourn and wait

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155 *Canada (Minister of Employment and Immigration) v Jiminez-Perez*, [1984] 2 SCR 565, 14 DLR (4th) 609 [*Jiminez-Perez*].
for the conclusion of other applications under the *Immigration Act*. The majority held that whether to adjourn was a matter completely in the hands of the adjudicator. In the 1995 *Chen* ruling, the Court endorsed the dissentient below in a one-paragraph ruling. At issue was the range of permissible considerations for a visa officer when assessing whether the “points system” score adequately reflects an economic migrant’s likelihood of successful establishment in Canada. The result confined the relevant factors to those connected to making a living in Canada. In the final decision concerning bureaucratic decision makers, *Hilewitz v. Canada (Minister of Citizenship and Immigration)*, the Court ruled in 2005 that it was permissible to consider the personal wealth of an economic-class permanent residency applicant when assessing a question of health inadmissibility on the grounds of anticipated high demand on social services. Intervenors in this case had argued that the statute must be interpreted in light of both the *Charter* and international human rights, but neither majority nor dissenting judgments approached the case in this way.

A second cluster of cases concerns the roles of immigration tribunals. The first of these, *Kwiatkowsky*, was argued within weeks of the *Charter* coming into effect in 1982. Neither party made *Charter* arguments, and the appellant’s factum was filed before the *Charter* was in force. The issue was the standard of proof on a preliminary assessment of a refugee re-determination proceeding, and the analysis was a brief and tightly struc-

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156 *Prasad v Canada (Minister of Employment and Immigration)*, [1989] 1 SCR 560, 57 DLR (4th) 663 [*Prasad cited to SCR*]. The applicant had applied for a minister’s permit under section 37 of the former *Immigration Act* ([supra note 24]) and also for permanent residence on humanitarian grounds.

157 *Prasad*, supra note 156 at 578. Justice L’Heureux-Dubé penned a strongly worded dissenting opinion reasoning that, since the minister is not allowed to issue a permit under section 37 once a deportation order has been made, allowing the inquiry to go ahead would have the effect of ending the section 37 application without examining its merits.

158 *Chen v Canada (Minister of Employment and Immigration)*, [1995] 1 SCR 725, 123 DLR (4th) 536, rev’d [1994] 1 FC 639, 109 DLR (4th) 560 [*Chen*]. The dissenting opinion from the Federal Court of Appeal judgment that carried the day in the Supreme Court was written by Justice Robertson.

159 This test has been overtaken by the “adaptability” provisions of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, ss 83, 104-105.


161 *Ibid* (Factum of the Intervener, Canadian Association for Community Living and Ethno-Racial People with Disabilities Coalition) [unpublished, archived at the Supreme Court of Canada Registry].

162 *Kwiatkowsky v Canada (Minister of Employment and Immigration)*, [1982] 2 SCR 856, ([sub nom Re Kwiatkowsky and Minister of Manpower & Immigration]) 142 DLR (3d) 385 [*Kwiatkowsky*].
tured statutory interpretation.\textsuperscript{163} Interestingly, Justice Wilson drew on this decision in building her Charter argument in Singh.\textsuperscript{164} The next case involving immigration tribunals’ roles came twenty years later in the 2002 \textit{Chieu} ruling. Here, the Court examined the scope of the discretionary jurisdiction of the Immigration Appeal Division (IAD) of the Immigration and Refugee Board.\textsuperscript{165} Under both the former and the current legislation, the IAD has the power to allow a permanent resident who is faced with removal from Canada to remain in the country even though the removal order is correct in both fact and law. This capacity to take other factors into account has become known as the IAD’s “equitable” jurisdiction, in recognition of its fundamental, nonlegal basis.\textsuperscript{166} The specific issue was whether the IAD could consider hardships an individual would face in the place to which they would be returned, or whether there was a requirement to limit consideration to “domestic” hardships. The Court upheld the broader view of this provision.\textsuperscript{167} In 2009, this equitable jurisdiction was again considered by the Court in \textit{Khosa}.\textsuperscript{168} The key differences were that the legislative description of the power had been changed\textsuperscript{169} and that the crucial \textit{Dunsmuir} ruling concerning standards of review had been handed

\textsuperscript{163} Mr. Kwiatkowsky had argued that the redetermination procedure was unfair because of the differences that resulted when the refugee claim originated in an inadmissibility inquiry rather than as an original claim. His argument was rejected. Factums from the case are on file with the author.

\textsuperscript{164} Justice Wilson wrote:

I agree with these remarks. The issue directly before this Court in Kwiatkowsky was not whether there had been a denial of natural justice but whether the Immigration Appeal Board had applied the wrong test in exercising its power under s. 71(1). It is implicit in the Court’s decision, however, that the Act imposes limitations on the scope of the hearing afforded to refugee claimants which it is difficult to reconcile with the principles of natural justice (Singh, supra note 7 at 200).

\textsuperscript{165} \textit{Chieu v Canada (Minister of Citizenship and Immigration)}, 2002 SCC 3, [2002] 1 SCR 84. This case was handed down with its companion ruling \textit{Al Sagban v Canada (Minister of Citizenship and Immigration)}, 2002 SCC 4, [2002] 1 SCR 133.

\textsuperscript{166} See \textit{Immigration Act}, supra note 24, s 70(1); \textit{IRPA}, supra note 24, s 67(c). The former provision referred to the consideration of “all the circumstances” of the case. The present provision refers to “humanitarian and compassionate considerations” and “the best interests of a child directly affected by the decision,” as well as “all the circumstances of the case.”

\textsuperscript{167} The Court also specifically addressed the argument that considering foreign hardship would amount to creating a backdoor to refugee status and explicitly rejected this view: \textit{Chieu}, supra note 165 at paras 84-86.

\textsuperscript{168} \textit{Canada (Citizenship and Immigration) v Khosa}, 2009 SCC 12, [2009] 1 SCR 339 [\textit{Khosa}].

\textsuperscript{169} See the description of the new \textit{Immigration and Refugee Protection Act} provision supra note 166.
down in 2008.\textsuperscript{170} In \textit{Khosa}, the Court ruled that IAD decision makers were entitled to a high degree of deference, so need not be “correct” when exercising their equitable jurisdiction.\textsuperscript{171} The plurality judgment authored by Justice Binnie chided the Federal Court of Appeal for retrying the case: “[C]learly, the majority felt that the IAD disposition was unjust to Khosa. However, Parliament saw fit to confide that particular decision to the IAD, not to the judges.”\textsuperscript{172} Substantively and procedurally, \textit{Chieu} and \textit{Khosa} cement the breadth of the IAD’s discretion under both legislative formulations.

The final decision in this group is not about the breadth of discretion but shares a theme with \textit{Khosa} as the central issue was who got to decide. The 1994 ruling in \textit{Reza} originated with a refugee claimant who was rejected at an early stage in the process on the basis that his claim had no “credible basis”.\textsuperscript{173} Mr. Reza was ordered deported, and he sought leave for judicial review (under the pre-1992 procedure\textsuperscript{174}) by the Federal Court of Appeal. When the Federal Court of Appeal denied his application for leave, Mr. Reza turned to the Ontario courts, arguing that deportation would breach his \textit{Charter} rights. He also sought unique \textit{Charter} remedies. The Supreme Court ruled that the Ontario courts could not rehear what the Federal Court of Appeal had denied leave to hear. The ruling notes the \textit{Charter} arguments raised, but does not address them.\textsuperscript{175}

This group of cases illustrates that the range of crucial decisions for non-citizens in Canada extends beyond the frameworks of the \textit{Charter} and international human rights. This observation leads to a number of conclusions. Paramount among these is that discretionary decision making, which occurs outside a legal framework, is enormously important for non-citizens. Several of these cases point directly to key aspects of immigration discretion. For example, the “humanitarian and compassionate” requests at issue in \textit{Jiminez-Perez} account for approximately ten thousand admissions annually over the past five years.\textsuperscript{176} There is no legal standard

\textsuperscript{170} Dunsmuir, supra note 107.

\textsuperscript{171} The majority judges differed considerably in their standard of review analyses, but a standard of “reasonableness” was the consensus. Justice Fish, in dissent, agreed with the reasonableness standard but found the IAD’s conclusion to be unreasonable.

\textsuperscript{172} Khosa, supra note 168 at para 17.

\textsuperscript{173} Reza v Canada, [1994] 2 SCR 394, 116 DLR (4th) 61 [Reza].

\textsuperscript{174} For a description of the changes made in 1992, see supra note 49.

\textsuperscript{175} Reza, supra note 173 at 398-99.

for these admissions, and the criteria are highly malleable. Similarly, the so-called equitable jurisdiction of the IAD is outside of legal parameters. While there is more shape to this jurisdiction in the *Immigration and Refugee Protection Act* than under the earlier legislation, a decision maker still has recourse to “all the circumstances” of the case. The only decision in this set where the Court ruled to restrict discretionary decision making in any way was *Chen*, where the Court confined itself to endorsing the dissentient below. While in some circumstances, such as *Suresh* and *Baker*, the scope of discretion has been shaped by *Charter* or international rights, this did not occur in any of these cases.

While all bureaucratic decision makers have some measure of discretion, a number of studies have confirmed that the ambit of discretion is broader in immigration law and have traced this executive power to the strong role for the executive in admission to the state generally. This discretionary space is in turn linked to potential weaknesses of rights claims: once discretionary space is asserted, a rights claim cannot gain any traction. It becomes irrelevant. This is the shift described by Justice Iacobucci, writing for a unanimous Court in *Chieu*:

> In my view, this appeal can be decided by applying principles of administrative law and statutory interpretation, as was the case in this Court’s decision in *Baker v. Canada*. It is not necessary to address directly the scope and content of ss. 7 and 12 of the *Canadian Charter of Rights and Freedoms*.179

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177 See Citizenship and Immigration Canada, *IP 5: Immigrant Applications in Canada Made on Humanitarian or Compassionate Grounds at 7*, online: Citizenship and Immigration Canada <http://www.cic.gc.ca/english/resources/manuals/ip/ip05-eng.pdf>: The purpose of H&C discretion is to allow flexibility to approve deserving cases not covered by the legislation. This discretionary tool is intended to uphold Canada’s humanitarian tradition. Use of this discretion should not be seen as conflicting with other parts of the *Act or Regulations* but rather as a complementary provision enhancing the attainment of the objectives of the Act.

The humanitarian or compassionate grounds decision-making process is a highly discretionary one that considers whether a special grant of an exemption from a requirement of the *Act* is warranted. It is widely understood that invoking subsection 25(1) is an exceptional measure and not simply an alternate means of applying for permanent resident status in Canada. I have analyzed this discretionary provision in detail in Dauvergne, *Humanitarianism, Identity, and Nation*, supra note 154, ch 6.


179 *Chieu*, supra note 165 at para 19 [reference omitted].
It is therefore true that this set of cases establishes that Charter and human rights concerns will not be relevant for this range of concerns. Charter principles have, however, extended their reach into some areas of administrative law, and thus these responses from the Court could not have been a foregone conclusion.180

Finally, while these cases show areas where explicit rights arguments will not take root, it is important not to overlook the powerful remedy provided by procedural rights. A number of these cases were important “wins” for non-citizens. They also serve to confirm the access of non-citizens to the courts and to rule of law principles, both of which are enshrined in important international human rights documents.181

C. Refugee Law: An International Human Rights Claim

The third group of cases is those where the Court’s principal ruling involved an interpretation of the Refugee Convention.182 There are four decisions in the group (with one additional companion ruling). This group is distinct for two reasons. The first is because the central provision of the Refugee Convention, the definition of a refugee, has been incorporated directly into Canadian legislation.183 This means that access to the international norm is not mediated by Charter interpretation. The second distinction is the uneasy relationship of the Refugee Convention to international human rights law.184 Refugee law has grown closer to the core of international human rights law over the past two decades, but there is still a gap between the two paradigms.185 For these reasons, the way the Court ap-

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181 See International Covenant on Civil and Political Rights, supra note 2, art 9; Refugee Convention, supra note 23, art 16; International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, supra note 2, art 16. See also the unenforceable provisions in articles 6–8 of the Universal Declaration, supra note 2 at 73.

182 Supra note 23.

183 For IRPA, supra note24, ss 95-96; Immigration Act, supra note 24, s 2(1), “Convention refugee”.


185 The Refugee Convention is still not listed by the UN as a core human rights instrument: see Core International Human Rights Treaties, supra note 2.
proaches refugee law cannot be taken as a proxy for the Court’s approach to international human rights.

It is also important to point out that these cases are not the only cases in the data set to concern refugees. The group is based on an engagement with the Refugee Convention. A number of key cases discussed above did, of course, concern refugees, refugee claimants, or permanent residents who were originally refugees. In one of the cases in the first group, Suresh, the Court did engage with the Refugee Convention in some detail. This engagement, however, was not determinative, and the centerpiece of the rights analysis there was the Convention Against Torture. Justice Wilson’s opinion in Singh did make use of the Refugee Convention but was not a ruling on its interpretation. Singh demonstrated how the Refugee Convention could influence the interpretation of Charter rights, a jurisprudential feat that has not been repeated.

The first refugee case was Ward, handed down in 1993. Ward remains the most important Canadian ruling on interpretation of the refugee definition, and over the intervening two decades, it has been applied almost daily in first-instance refugee decision making at the Immigration and Refugee Board. Ward has also influenced refugee decision makers throughout the common law world.

The Ward Court explicitly embraced an international law approach to interpreting the definition contained in the then Immigration Act. Justice La Forest considered the Refugee Convention’s travaux préparatoires, the views of publicists, the United Nations High Commissioner for Refugees Handbook, and decisions from both within and outside Canada. Most importantly, Justice La Forest began his reasoning with a clear commitment to international law, stating that, “[a]t the outset, it is useful to ex-

186 These cases are Singh, Dehghani, Suresh, Mugesera, Reza, Kwiatkowski, and two of the appellants in Charkaoui.


188 Ward established an influential approach to the interpretation of “particular social group” in the Refugee Convention definition (supra note 23, art 1A(2)). It was also the first high-level appellate decision to clarify that the risk of being persecuted by private actors could bring an individual within the ambit of the Refugee Convention’s protection.

plore the rationale underlying the international refugee protection regime.” He concluded with a clear statement about the object and purpose of the Refugee Convention, stating that “[u]nderlying the Convention is the international community’s commitment to the assurance of basic human rights without discrimination.” Justice La Forest did not refer to international instruments beyond the Refugee Convention, but his interpretive approach followed established treaty-interpretation rules. Charter arguments were only briefly addressed in the Ward reasons in response to the intervening Canadian Council for Refugees’ argument that section 15 equality jurisprudence ought to determine the interpretation of “particular social groups” in the refugee definition. Justice La Forest found it unnecessary to engage with this argument, given that he had rejected the narrow approach of the court below for other reasons. Despite this explicit ruling, he did turn to Charter reasoning to guide his antidiscrimination approach, drawn from international law and applied to the “particular social group” standard.

The Ward decision set a clear direction for the Supreme Court’s engagement with the Refugee Convention. Undoubtedly influenced by the refugee definition’s direct incorporation into Canadian domestic law, the Court looked to international sources and methods in interpreting the definition. This approach did not include looking at human rights instruments beyond the Refugee Convention, but this international trend in refugee law interpretation was not nearly so well established in 1993 as it is now. The Charter atmosphere of the early 1990s provided a close parallel to Justice La Forest’s view of the Refugee Convention’s purpose as an assurance of “basic human rights without discrimination,” and the idea of an influential atmosphere probably best describes how he turns to Charter jurisprudence without directly engaging the Charter. This is not a case of access to international standards mediated by the Charter. This decision established a pattern in Canadian refugee law of direct access to international interpretations. This approach has shown considerable endurance, in part because the Supreme Court has taken so few opportunities to engage with the Refugee Convention.

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190 Ward, supra note 187 at 709.

191 Ibid at 733.

192 Ibid at 738. Justice La Forest turns to the “analogous grounds” approach to section 15 of the Charter, as outlined in Andrews.

193 Direct recourse to international materials and methods is less common at the Immigration and Refugee Board, the Federal Court, and the Federal Court of Appeal. An analysis of the tribunal-level jurisprudence is presented in Dauvergne, “International Human Rights”, supra note 6.
The next Refugee Convention case to reach the Court illustrates this point. With only four rulings that hinged on interpreting the Convention over the thirty-year period, Chan v Canada (Minister of Employment and Immigration) is most notable for what it did not do.\textsuperscript{194} The appellant in this case was a Chinese national, allegedly fleeing persecution in the form of forced sterilization as a consequence of breaching the PRC’s notorious one-child policy. The majority judges decided on the basis of what they identified as an evidentiary shortcoming at the first instance.\textsuperscript{195} In sum, Justice Major wrote that “[t]he appellant failed to adduce any evidence to establish on a balance of probabilities that his alleged fear of forced sterilization was objectively well-founded.”\textsuperscript{196} The majority reasons focused entirely on the evidentiary question. Justice Major did make use of the UNHCR Handbook in his reasons, but he did not interpret key aspects of the refugee definition that were potentially at issue. Indeed, the Refugee Convention is silent on evidentiary matters. On the key questions of whether forced sterilization fit within the interpretation of “persecution” and whether the appellant was a member of a “particular social group”, Justice Major assumed, without deciding, that a related case in the Federal Court of Appeal was correct on these points.\textsuperscript{197} This approach meant that the Supreme Court of Canada never ruled on these questions, which were key issues for refugee decision makers around the world.\textsuperscript{198}

Justice La Forest penned a strongly worded dissent in which he emphasized that “the consideration of basic human rights [is] the appropriate focus of a refugee inquiry.”\textsuperscript{199} He followed the interpretive approach he had elaborated in Ward and explored definitions of both “persecution” and “particular social group”.\textsuperscript{200}

\textsuperscript{194} [1995] 3 SCR 593, 128 DLR (4th) 213 [Chan cited to SCR].
\textsuperscript{195} Justice Major wrote for a majority that included Justices Sopinka, Cory, and Iacobucci.
\textsuperscript{196} Chan, supra note 194 at 672.
\textsuperscript{197} Justice Major wrote:

For the purpose of this appeal I am assuming (without deciding) that Cheung [involving a woman fleeing forced sterilization] was rightly decided and that the appellant is a member of a particular social group within the meaning of s. 2(1). However, the appellant cannot attempt to rely upon the Cheung decision unless he has established that he has a well-founded fear of sterilization (ibid at 658).

\textsuperscript{198} See the High Court of Australia’s ruling in Applicant A v Minister for Immigration and Ethnic Affairs, [1997] HCA 4, 190 CLR 225. In the United States, there has been specific statutory recognition that forced abortion and sterilization can constitute persecution in US law: 8 USC §1101(a)(42) (2006).
\textsuperscript{199} Chan, supra note 194 at 635. See also generally ibid 634-36.
\textsuperscript{200} Ibid at 637-46. Justices L’Heureux-Dubé and Gonthier concurred in the dissent.
Three years later, the Court ruled in *Pushpanathan*, a case interpreting the provisions of the *Refugee Convention* that exclude people from refugee protection based on categories of bad behaviour. Mr. Pushpanathan was facing deportation because of a drug-trafficking conviction, and the Court was asked to determine whether drug trafficking was “contrary to the purposes and principles of the United Nations” so as to exclude him from refugee protection. Writing for the majority, Justice Bastarche began his substantive discussion of the *Refugee Convention* with a review of the principles of treaty interpretation. This approach is, therefore, even more explicit regarding reliance on international law than was *Ward*, but Justice Bastarche also carefully illustrated that his approach is consonant with *Ward* on this point. Justice Bastarche discussed the antecedents of the *Refugee Convention*, the *travaux préparatoires*, and a range of other international treaties in considerable detail. He concluded that the court below erred because it did not take the correct approach to treaty interpretation. His analysis followed the *Vienna Convention*’s interpretation rules and focused closely on the object and purpose of both the *Refugee Convention* and the explicit exclusion provision at issue. This analysis led to a focus on the human rights purpose of the *Refugee Convention*, as stipulated in *Ward*, and to the conclusion that drug trafficking, while the subject of serious international condemnation, is not central to the purposes of the United Nations. Leaving open the possibility of a future shift in this positioning, he concluded by saying:

> Until the international community makes clear its view that drug trafficking, in one form or another, is a serious violation of funda-

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201 *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982, 160 DLR (4th) 193 [*Pushpanathan* cited to SCR]. The refugee exclusions are set out in article 1F of the *Refugee Convention* (supra note 23):

> The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

> (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

202 Justices L’Heureux-Dubé, Gonthier, and McLachlin concurred in this judgment.

203 *Pushpanathan, supra* note 201 at paras 51-54.

204 *Ibid* at para 55.

mental human rights amounting to persecution, then there can be no rationale for counting it among the grounds of exclusion.206

Justice Cory, in dissent, would have found that drug trafficking was a central purpose of the United Nations but did not disagree with Justice Bastarache regarding either the interpretive principles at issue or the purposes of the Refugee Convention.207 Pushpanathan affirmed Ward’s approach to interpreting aspects of the Refugee Convention implemented in Canada’s domestic immigration law as belonging firmly to the international treaty-interpretation framework. It also reaffirmed the Court’s view that the Refugee Convention has a human rights purpose.

It would be twelve years before the Court returned to Refugee Convention as a central issue.208 Early in 2010, the Court ruled in Németh, addressing the possibility of extraditing refugees. The decision was handed down with a companion ruling, Gavrila.209 Both Mr. Németh and Mr. Gavrila had obtained refugee protection in Canada because of their risk of being persecuted as ethnic Roma in their respective home countries, Hungary and Romania. In each case, the country of nationality sought extradition on the basis of low-level fraud offences (sums of less than $5,000 were involved in each case) committed prior to departure from the home country, and which included, in Mr. Gavrila’s case, a conviction in absentia.210 The result in each case was a “win” for the refugee, as the extradition order was found to have been improperly made. But the reasoning draws away from the Ward and Pushpanathan approach, especially by drawing away from international law and from treaty-interpretation principles.

While the Refugee Convention establishes a comprehensive reply to the question of when a refugee can be extradited,211 in its decision, the

206 Pushpanathan, supra note 201 at para 74.
207 Ibid at paras 78-158. See ibid at para 128 (regarding the purpose of the Refugee Convention). Justice Major concurred with Justice Cory.
208 As mentioned, the Court did briefly interpret the Refugee Convention in Suresh in 2002. There, the Court concluded that refugee status was not a bar to deporting some individuals to face a risk of torture. The decision was primarily concerned with the Convention Against Torture and canvassed international law reasonably well in that analysis: see discussion at 688-90, above.
210 Mr. Németh (along with his wife and co-accused) had become a law-abiding permanent resident in Canada. His experience in Hungary included a series of violent crimes against him. Mr. Gavrila had not been able to become a permanent resident in Canada because of a series of criminal convictions (all property crimes) in Canada.
211 This framework is set out in articles 32 and 33 of the Refugee Convention (supra note 23).
Court gave primacy to Canada’s *Extradition Act* over the international framework.\(^{212}\) Having decided that Canada’s *non-refoulement* obligation toward refugees is met through the *Extradition Act* rather than by applying provisions of the *Immigration and Refugee Protection Act*,\(^ {213}\) the Court proceeded to analyze the extradition question with only brief engagement with the *Refugee Convention*. Justice Cromwell stated that the grounds of protection in the domestic legislation implemented those in the *Refugee Convention* despite the fact that the two lists are not the same.\(^ {214}\) The Court referenced *Pushpanathan* and its embrace of the human rights purpose of the *Refugee Convention*, but did not follow *Pushpanathan*’s methodology.\(^ {215}\) Instead, interpretation of the Convention’s provisions was guided primarily by domestic Canadian decision making. Most importantly, Justice Cromwell concluded that the question of whether a person is, in his words, “entitled” to refugee status is to be re-asked at the point of considering an extradition request. This procedure therefore upends the *Refugee Convention*’s approach and puts the article 1F provisions ahead of the article 33 provisions explicitly directed at expulsion of those with refugee status.\(^ {216}\) In addition to being the Court’s most recent statement on how to approach the *Refugee Convention*, *Németh* is also the only case in this group that was heard by the full, nine-member Court.\(^ {217}\)

These four cases mark a unique subset of the Supreme Court’s engagement with the international human rights of non-citizens during the *Charter* era. The refugee cases have been decided with scant reference to the *Charter*. And cases involving refugees but not the refugee definition have scarcely looked at the *Refugee Convention* since the *Singh* ruling, despite the convention’s rich refugee-rights text, which extends well beyond the core definition of a refugee. The early approach was to turn directly to international law and international treaty-interpretation meth-

\(^{212}\) In *Németh*, Justice Cromwell wrote:

> In the next section I will explain why in my view, the appellants’ central contention — that the power to surrender for extradition is subject to the refugee process under the IRPA — cannot be accepted. In the following section, I will address the respondent’s position, which I largely accept, that protection against refoulement is addressed in the extradition context by the mandatory and discretionary bars of surrender in the EA [Extradition Act] (*Németh*, supra note 209 at para 12, citing *Extradition Act*, SC 1999, c 18).

\(^{213}\) *Németh*, supra note 209 at para 41.

\(^{214}\) *Ibid* at para 83.

\(^{215}\) *Ibid* at para 86.


\(^{217}\) Justice Cromwell wrote the reasons for the unanimous Court.
ods. The Court departed from this direction in Németh, but it is too soon to tell whether this direction will be sustained outside the extradition context. While Németh is a regrettable departure from international legal standards, it is too soon to judge whether it indicates that the refugee law cases are following the pattern of the first group, where a strong start at the outset of Charter determination has given way, in more recent cases, to an insular, domestic focus on rights interpretation. As this paper was in its final preparation in the spring of 2012, the Court granted leave in Ezo-kola v Canada.218 Thus the Court’s next opportunity to interpret the Refugee Convention is on the near horizon.

This group of cases concludes the picture of the Court’s treatment of rights claims by non-citizens during the thirty-year life of the Canadian Charter of Rights and Freedoms. Before stepping back and offering some possible explanations of this worrisome jurisprudence, there are three more clusters of rulings to mention briefly, which complete the story of the Court’s approach to non-citizens. These clusters concern cases in which the Court refused leave, extradition (outside the refugee context), and two cases where the claims brought by citizens were directly linked to those of non-citizens: Canadian Council of Churches219 and Mavi.220

D. Choosing Not to Decide

The Supreme Court does not give reasons for declining to grant leave, and leave is denied in close to ninety per cent of cases.221 Nor is it possible to make meaningful comparisons in grant rates in varying areas of law.222 Finally, it is difficult to accurately count the number of applications for leave that would correspond to my data set in this paper, in part because of the methodological considerations discussed above and in part because

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218 2011 FCA 224, leave to appeal to SCC granted, [2012] 1 SCR viii (available on CanLII).
222 A greater number of criminal law cases are heard by the Supreme Court because of the provision in the Criminal Code for an appeal as of right to the Supreme Court when there is a dissent in a provincial court of appeal: Criminal Code, supra note 110, s 691(1)(a). Between 2001 and 2011, the average number of appeals as of right per year was fifteen: see SCC Statistics, 2001 to 2011, supra note 221 at 4.
of unevenness in how the information is made available.223 In short, it is important not to make too much of this group of cases.224 It helps complete the picture, however, to look briefly at matters that the Court has deliberately chosen not to hear, as these cases are indicators both of issues that are unlikely to come before the Court in the short term and of issues that received considerable attention in the advocacy community.

Since the advent of the Immigration and Refugee Protection Act, the Supreme Court has denied leave in two cases that were directly tied to the question of non-citizens’ access to international human rights norms. In De Guzman,225 the argument involved the Immigration and Refugee Protection Act’s provision for interpretation “in a manner that ... complies with international human rights instruments to which Canada is signatory.”226 Advocates had high aspirations for this provision, which the Federal Court of Appeal interpreted as a codification of the Supreme Court’s Baker approach and nothing more.227 In 2007, the Canadian Council for

223 See infra note 236 and accompanying text.

224 For a thoughtful discussion of Supreme Court of Canada decisions not to grant leave, see Kent Roach, “The Supreme Court of Canada at the Bar of Politics: The Afghan Detainee and Omar Khadr Cases” (2010) 28:1 NJCL 115.


226 IRPA, supra note 24, s 3(3)(f).

227 De Guzman, supra note 225 at paras 87-89. Justice Evans, for a unanimous court, wrote:

Paragraph 3(3)(f) should be interpreted in light of the modern developments in courts’ use of international human rights law as interpretative aids. Thus, like other statutes, IRPA must be interpreted and applied in a manner that complies with “international human rights instruments to which Canada is signatory” that are binding because they do not require ratification or Canada has signed and ratified them. These include the two instruments on which counsel for Ms de Guzman relied heavily in this appeal, namely, the International Covenant on Civil and Political Rights, and the Convention on the Rights of the Child. Thus, a legally binding international human rights instrument to which Canada is signatory is determinative of how IRPA must be interpreted and applied, in the absence of a contrary legislative intention.

However, paragraph 3(3)(f) also applies to non-binding instruments to which Canada is signatory. Because the only international instruments relevant to this case are legally binding on Canada, it is not necessary to decide here the effect of paragraph 3(3)(f) with respect to non-binding international human rights instruments.

However, in view of the considerations outlined above regarding such instruments, I am inclined to think that Parliament intended them to be used as persuasive and contextual factors in the interpretation and application of IRPA, and not as determinative. Moreover, of these non-binding instruments, not all will necessarily be equally persuasive. This view of paragraph 3(3)(f) also derives support from the Supreme Court of Canada’s jurisprudence, to the extent that in the Public Service Employee Relations,
Refugees, the Canadian Council of Churches, and Amnesty International brought a challenge to Canada’s Safe Third Country Agreement with the United States to the Federal Court. At the trial level, this challenge was successful, and the judgment involved a detailed engagement with both the Charter and international law. The Federal Court of Appeal, however, circumvented the rights questions raised and instead overturned the ruling primarily on the basis of what it called the absence of a “factual basis upon which to assess the alleged Charter breaches.” A Supreme Court of Canada ruling on one or both of these cases would have contributed significantly to the picture of non-citizens’ access to international human rights protections during the Charter era.

Other high-profile cases that did not make it to the Supreme Court include Satiacum, in which an American citizen and hereditary chief of the Puyallup Indians had been found at first instance to be a refugee; Thamotharem, a challenge to significant procedural changes in refugee determinations; Hinzman, where a member of the US military sought, and was denied, refugee status on the basis of his objections to the American role in Iraq; Villafranca, which set the standard for “state protec-
tion” analysis in refugee determinations;233 Langner, affirming that deporting the parents of citizen children did not raise any Charter issues;234 and most recently, Toussaint, a challenge to fee provisions for humanitarian and compassionate applications.235 This list is partial, and it is difficult to develop a complete list as the publicly available databases only have a complete list of leaves denied from 1997 onward.236

E. Extradition: One Story Worth Telling

The Supreme Court of Canada’s extradition jurisprudence is not part of the data set, because citizenship is not a central criterion in most extradition matters.237 Factually, of course, because extradition involves alleged criminal activity in another country, the targets of extradition proceedings are frequently non-citizens. Since 1982, thirty-five extradition matters have come before the Supreme Court of Canada. Two of these rulings, Németh and Gavrila, discussed above, raised the question of when a refugee can be extradited and thus involved analysis of the Refugee Convention.238 Of the remaining thirty-three rulings, fourteen concerned Canadian citizens, four concerned non-citizens, and fifteen judgments did not mention the citizenship of the individual.239

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233 Canada (Minister of Employment and Immigration) v Villafranca (1992), 99 DLR (4th) 334, (sub nom Minister of Employment and Immigration v Villafranca) 150 NR 232 (FCA) [Villafranca], leave to appeal to SCC refused, [1993] 2 SCR xi.
236 This list is derived from the Supreme Court Bulletin, which is complete from 1997 onward. The most recent edition of Lorne Waldman’s Canadian Immigration & Refugee Law Practice, 2012 (Markham, Ont: LexisNexis, 2011) comments on thirty-five cases in which leave to appeal was denied by the Supreme Court of Canada.
237 It is established law that the Charter’s section 6 protection of the right of citizens to remain in Canada is not a bar to extradition: United States of America v Cotroni; United States of America v El Zein, [1989] 1 SCR 1469, 96 NR 321 [Cotroni].
238 See discussion at 713-14, above. In one further case, the person concerned had been granted refugee status in Canada, but perhaps surprisingly, refugee law was not discussed in the judgment: Argentina v Mellino, [1987] 1 SCR 536, 40 DLR (4th) 74.
The Supreme Court’s work on extradition has, however, produced one important story that provides a fitting counterpoint in my narrative of non-citizens, the Charter, and international human rights norms. The most important extradition case in the Charter era to date is Burns.240 Burns is important because of its forthright reversal of the Court’s ruling in Kindler, a mere ten years earlier.241 The ruling is a courageous and unified stance by the Court, directly confronting the possibility of extraditing an individual to face capital punishment in the United States. The Court concluded that assurances that an extradited individual will not be put to death “are constitutionally required in all but exceptional cases.”242 The Court explicitly rejected the easy route of deviating from the Kindler conclusion because Mr. Burns and his co-accused, Mr. Rafay, were Canadian citizens and Messrs. Kindler and Ng were not.243 In reaching its conclusion, the Court considered an array of sources, including international law and foreign law from several jurisdictions, and drew particular attention

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240 Supra note 239.
241 Kindler, supra note 239. This case was handed down with the companion case Ng, supra note 239.
242 Burns, supra note 239 at para 8. The judgment was issued per curiam.
243 Ibid at paras 39-49.
to shifting international initiatives over the preceding decade.244 In this regard, the Burns decision in 2001 is a paradigmatic reflection of the thesis that international human rights have become more important than citizen rights. This ruling is a strong reflection of the Supreme Court of Canada’s embrace of international human rights law and shows an extensive reliance on an international framework for interpreting the Charter and on shifts within that framework, almost twenty years into the Charter era.245

From the point of view of my central argument here, however, the decision in Burns is deeply ironic. It is impossible not to remark the embrace of international human rights in a case where citizenship rights could have led to the same conclusion and equally impossible not to remark that citizenship was the key factual distinction in this high-profile and direct reversal. The Kindler Court had been marked by a strong dissent, with opposing judgments deploying competing rhetoric about Canadian values and Canadian identity.246 The decision in Burns, while standing staunchly for identical rights and treatment for citizens and non-citizens, provides a hint, to which I shall return in the concluding analysis, that this may not generally be the case before the Supreme Court of Canada.

F. Two Cases Directly Adjacent

There are two additional cases that require some brief comment. Neither case directly involved a non-citizen’s rights claim before the Court, but both are closely linked to non-citizens’ rights, and were supported by the immigration and refugee advocacy community in Canada for that reason. The first of these cases is Canadian Council of Churches, handed down in 1992.247 The Canadian Council of Churches sought to challenge new legislative provisions introducing changes to Canada’s refugee determination system on the first day that the legislation was in force, arguing that public interest standing was appropriate given the potential harms of the legislation and the time it would take for an affected individual to bring a claim. The government challenged the council’s standing to bring such a claim, and the Supreme Court upheld that challenge. This ruling endured as the limit line for public interest standing throughout

244 Ibid at paras 79-92.
245 The crux of the decision relied on section 7 of the Charter: see Burns, supra note 239 at para 132.
246 I have written about this decision at more length in Dauvergne, Humanitarianism, Identity, and Nation, supra note 154 at 203-206.
247 Canadian Council of Churches, supra note 219.
most of the Charter era, until late 2012. It has proven a particularly important line for those who are outside of the country and thus is arguably more important for non-citizens than for citizens.

The second case is Mavi, handed down in 2011. Mavi was a challenge brought on behalf of a group of individuals who had sponsored family members to immigrate to Canada, and those family members had later received a variety of social-assistance payments. The payments resulted in “sponsorship debt” obligations. The facts underlying the eight joined cases were compelling, including sponsors who had not known that the payments had been received, sponsors who had become destitute themselves, and sponsors who had actively tried to prevent the payments to their relatives. The Court ruled that the debt was partially contractual and partially statutory. As such, debt collection attracted some measure of procedural fairness but could not be waived.

Canadian Council of Churches and Mavi each tell part of the story of advocacy on behalf of non-citizens before the Supreme Court of Canada.

This completes the review of the Supreme Court of Canada’s engagement with non-citizens’ rights claims over the past thirty years. Overall, the arc of this jurisprudence is disappointing. Despite the strong statements at the outset, in Singh and Andrews, non-citizens have had few victories at the Supreme Court of Canada, and crucially, these victories have relied on very few strong statements of Charter rights and even fewer assertions of international human rights. The protection of section 7’s principles of fundamental justice has been limited by an immigration, and most recently a security, context, and the reach of the Refugee Convention has, post-Singh, been narrowed to the refugee definition only. The inclusion of non-citizen status as an analogous ground of equality protection has not led to any successful arguments following Andrews. What remains, then, is to consider what factors might explain this outcome.

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248 As I was completing final revisions on this paper, the Court handed down its ruling in Downtown Eastside Sex Workers United Against Violence Society v Canada (AG) (2012 SCC 45, 352 DLR (4th) 587), which broadened the public interest standing test.

249 This was a key issue for the Canadian Council for Refugees in its bid to challenge the Safe Third Country Agreement: see Canadian Council for Refugees, supra note 228 (in which a John Doe applicant was found for the proceedings).

250 Mavi, supra note 220.

251 Citizens and permanent residents may sponsor family members. The judgment does not say whether the eight sponsors in the case were citizens or not.

252 Mavi, supra note 220 at paras 72, 79.
IV. Trends, Explanations, Conclusions

Several possible explanations for this trajectory in the jurisprudence come to mind on quick reading. One argument that has had some traction elsewhere is Legomsky’s seminal work, demonstrating that the highest courts of the United States and the United Kingdom have been extraordinarily deferential to executive decision making in matters of immigration.253 In the same vein, Aleinikoff has argued, in the American context, that immigration is one of the areas that the Supreme Court has viewed as being a particular repository of sovereignty.254 This is an analysis that I have developed and tested in the Canadian and Australian contexts in earlier work.255 Another argument that has recently held sway is that law and policy directed toward non-citizens has been influenced by the security turn in global politics following the terrorist attacks of 9/11.256 It is largely since the security turn that the argument that human rights have overtaken citizenship rights has become less prevalent. The Supreme Court of Canada’s jurisprudence reflects this argument in part, particularly in the shift from an immigration context to a security context for section 7 analyses.

Both of these arguments do contribute part of the explanation for the observable trends in the Supreme Court of Canada’s jurisprudence. For example, the Court, on several occasions, issued a response that “constitutionalized” a space for discretionary decision making, rather than make a hard, rights-based response (Suresh, Baker, Chieu, Charkaoui). This device fits squarely into the exceptional deference pattern. It is certainly the case that the Suresh ruling, as well as Charkaoui and Medovarski, do contain strong security discourses, corresponding to a global swing toward regarding non-citizens through a securitized lens. But neither of these accounts offers a fully satisfying explanation for the Canadian jurisprudence. In the first case, the deference argument was most clearly articulated elsewhere in the mid-1980s, as the Court was penning Singh and Andrews. These rulings that launched the Charter era were not at all deferential. The security argument has been most persuasive elsewhere in explaining executive, rather than judicial, actions, whereas if this argument is to have explanatory power for the Supreme Court of Canada’s rulings, it would need to be adapted to a judicial setting. In the United States

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253 Legomsky, supra note 178.
255 Dauvergne, Humanitarianism, Identity, and Nation, supra note 154.
and the United Kingdom, however, the contours of this argument point to tensions between the executive and the judiciary. Adding these familiar explanations together can give an account of a number of the cases, but not of a majority of the data set.

It is also the case that the jurisprudence shows some traces of the argument that the distinction between citizenship and permanent residency is waning in importance. In Andrews and Burns, this pattern was discernible. But, as with the first two points, this is not a clear trend. Charkaoui and Lavoie cut in precisely the opposite direction.

What is most striking in this jurisprudence, however, is the ways in which the Canadian Court is out of step with leading decisions on very closely parallel decisions in other, similar jurisdictions. In addition, looking more closely at this dissonance, it appears to be attributable to a different approach to international human rights standards. These two trends are closely interrelated and can be explained at least in part by the Court’s jurisprudential stance toward international human rights norms in the Charter era. It is the explanatory value of how the Court has used the Charter to translate international human rights that emerges most clearly when looking at the whole body of this jurisprudence over the thirty-year period. Broadly speaking, the more recent decisions have less “space” for international law, and this seems to impoverish their reasoning in some ways. All of this requires more detailed attention, to which I now turn to conclude this analysis.

First is the observation that, on some key issues, the Supreme Court has been out of step with other similar jurisdictions. Two vital examples are the questions of deportation to a risk of torture and indefinite detention. The Suresh conclusion that Canada can, in some limited circumstances, deport individuals to torture varies from the conclusion of the [then] House of Lords and the Supreme Court of New Zealand. Both of these courts held themselves bound by the international law. The Supreme Court of Canada clearly agreed about the effect of the international law, but nonetheless left a space for Canadian decision makers to depart from it. On the question of indefinite detention, the House of Lords ruled that once deportation could no longer reasonably be viewed as “imminent”, detention was impermissible. The Supreme Court of the United States made an almost identical ruling on the question of indefinite de-

257 Belmarsh (supra note 68 at para 9) affirmed the judgment of the European Court of Human Rights Chahal v. United Kingdom ((1996), 22 Eur Comm’n HR DR 1832, 23 EHRR 413) and applied its holding to the United Kingdom. For New Zealand, see Zaoui v Attorney-General (No 2), [2005] NZSC 38 ¶90-93, [2006] 1 NZLR 289.

258 See Belmarsh, supra note 68.
tention, albeit in a case where a risk of torture had not been established. The Supreme Court of New Zealand went even further, hinging its condemnation of indefinite detention to the provisions of the Refugee Convention. Each of these rulings differs from Charkaoui, where the Court held that a review of detention once every six months ensures that detention will not be indefinite, but stopped short of limiting detention to a particular time or to the feasibility of deportation.

This is not to say that, in every instance or on every issue, non-citizens have encountered more favourable outcomes in the United Kingdom and New Zealand. Such a conclusion would require a detailed consideration of those courts, paralleling the work of this study. Rather, my point is that in two key, high-profile issues, the outcomes differed markedly.

It is also the case that, in issues concerning non-citizens, other courts have tended to draw more directly on international law. This is certainly in the case with the House of Lords and Supreme Court of New Zealand judgments discussed above. Similarly, in a key ruling addressing treatment of non-citizens detained at Guantánamo Bay, the US Supreme Court drew directly on international law in support of rulings against the special military tribunals initially established. All of these rulings depended directly on international human rights norms to assess the rights of non-citizens. This turn toward international human rights is something that the Supreme Court of Canada has not done, aside from in interpreting the Refugee Convention. It is no coincidence that these decisions of the House of Lords, the Supreme Court of New Zealand, and the US Supreme Court have all been recognized as significant rights victories for non-citizens. They have also advanced the international law jurisprudence to new circumstances.

Aside from the Refugee Convention cases, the Supreme Court of Canada has not made a single ruling in the Charter era that directly applies an international human rights norm to a non-citizen in Canada. This would be important, but not legally relevant, if Canada were not a state party to key international human rights instruments. But it is. This would not be important if the Charter were being used to reach the results that in-

259 See Clark v Martinez, 543 US 371, 125 S Ct 716 (2005) (holding that indefinite detention of inadmissible aliens cannot be justified, including for those considered to be a risk to the community).


262 Notably, Canada is not a party to the Migrant Workers Convention, supra note 2. If it were, there would be an even greater array of cases in which international human rights norms would potentially be applicable.
ternational norms would provide. But it is not. As I stated at the outset, if
rights are vindicated, the precise legal tool used is far less important than
the outcome. In essence, this principle is reflected in the paradigm for
Charter rights interpretation: international law will inform Charter rights
interpretation, and thus Charter protection will be at least equal to, and
possibly better than, what is provided at international law.

This approach was clearly elaborated in early Charter rulings, begin-
ning with Reference Re Public Service Employee Relations Act in 1987,
where Chief Justice Dickson wrote, “The content of Canada’s interna-
tional 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.”\(^{263}\) In the Slaight Communications
ruling two years later, Chief Justice Dickson reiterated this point and
went further, saying, “Canada’s international human rights obligations
should inform not only the interpretation of the content of the rights guar-
anteed by the Charter but also the interpretation of what can constitute
pressing and substantial s. 1 objectives which may justify restrictions upon
those rights.”\(^{264}\) The Court has not deviated from this commitment over
time, reiterating, in 2010, in the specific context of section 7 rights, “The
principles of fundamental justice ‘are to be found in the basic tenets of our
legal system’: … [t]hey are informed by Canadian experience and juris-
prudence, and take into account Canada’s obligations and values, as ex-
pressed in the various sources of international human rights law by which
Canada is bound.”\(^{265}\)

But this review of the non-citizens cases shows that, at least in this
setting, the Court’s interpretative paradigm is not delivering on its prom-
ise. It also demonstrates that non-citizens’ attempts to make arguments
directly based on international human rights have not had any traction
whatsoever.\(^{266}\) The more recent cases tend to have shorter discussions of
international human rights norms (Charkaoui, Fraser) or depart overtly
from what international law would mandate (Suresh, Németh). Earlier

\(^{263}\) Supra note 26 at 349 [underlining added, italics in original], citing R v Big M Drug

\(^{264}\) Slaight Communications Inc v Davidson, [1989] 1 SCR 1038 at 1056-57, 59 DLR (4th)
416 [Slaight Communications].

\(^{265}\) Canada (Prime Minister) v Khadr, 2010 SCC 3 at para 23, [2010] 1 SCR 44, citing Ref-

\(^{266}\) My conclusions would be quite different if international human rights law and Charter
rights were simply running on separate tracks and non-citizens had opportunities to ac-
cess both. This is not the case, however.
decisions did tend to refer somewhat more routinely to international norms (Singh, Baker).267 One possible explanation of the current state of affairs is that, in the early years of Charter interpretation, the Court was working out the contents of Charter rights and therefore needed to draw more directly on international standards. As the Charter matured, therefore, less engagement with international human rights would be anticipated. As logical as this may seem, this theory of the linkage between Charter rights and international rights would isolate non-citizens in Canada from progressive developments in international law. This trend is observable in even my brief canvass of high-profile decisions in parallel jurisdictions, but it cannot be doctrinally desirable. By contrast with the non-citizen cases, in some of the rulings “adjacent” to the data set, we find examples of missed opportunities. In Burns, there was a robust engagement with international law to interpret and update the Charter. In Canadian Council for Refugees (the Safe Third Country Agreement decision), the Federal Court had fully canvassed international sources at first instance.

What is observable in this analysis of the non-citizens’ rights claims in the Charter era is a kind of Charter hubris: a jurisprudence that implicitly takes the position that the Charter delivers all the human rights protections that any individual could need. This would be fine, even ideal, if it seemed to be working. That is, if the Charter rights did include, at a minimum, to any new advance in the international sphere, both the law and the range of venues that an individual would need to approach would be simplified. (Indeed, as difficult as it is to reach the Supreme Court of Canada, the hurdles pale in comparison to those involved in getting an implementable outcome from an international body.) Importantly, this progressive incorporation may be precisely how Charter rights and international human rights fit together in other areas—the majority—of the Court’s decision making.268 This study has not attempted to look beyond

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267 This is not uniformly the case. International human rights law had a limited role in Andrews: see discussion at 671-73, above.

268 Although other assessments suggest that this is not the case and that the conclusion that international human rights are not fully reflected in Charter jurisprudence is indeed generalizable: see e.g. Anne Warner La Forest, “Domestic Application of International Law in Charter Cases: Are We There Yet?” (2004) 37:1 UBC L Rev 157; Louise Arbour & Fannie Lafontaine, “Beyond Self-Congratulation: The Charter at 25 in an International Perspective” (2007) 45:2 Osgoode Hall LJ 239. William A Schabas and Stéphane Beaulac state that, “although the Supreme Court has referred to international human rights law sources in scores of cases, the theoretical approach set out by the Chief Justice in 1987 has been largely ignored” (International Human Rights and Canadian Law: Legal Commitment, Implementation and the “Charter”, 3d ed (Toronto: Thomson Carswell, 2007) at 436). They go on to argue that abandoning this approach opens other avenues for international human rights law to influence domestic law.
the claims brought by non-citizens, and therefore, it has focused on a tiny fraction of the Court’s jurisprudence. A key impetus for this inquiry was to assess and document the extent to which non-citizens in Canada have been able to make use of international human rights. At least at the Supreme Court of Canada level, this study shows that the ability to make arguments drawing on international rights is starkly limited. This conclusion is bolstered by some recent victories in international forums holding that Canada has breached international human rights commitments to non-citizens.269 It also dovetails with my study of Immigration and Refugee Board decision making, which showed scant attention to international human rights law in that tribunal.270

There is certainly more work to be done to fully theorize what this jurisprudence demonstrates and to push forward the consequences of this analysis. But regardless of where the work drawing on these data will lead, it is provocative and doctrinally important to set the cases end to end and to define the terms of the Supreme Court of Canada’s engagement with rights claims made by non-citizens.

Rights protection for non-citizens in Canada is more important now than at any other time in the Charter era. The Canadian government has moved to tighten the boundaries of citizenship, inscribing strong distinctions between citizens and permanent residents.271 Since the 2002 Immigration and Refugee Protection Act, permanent residents have been more vulnerable to deportation, and new legislation introduced in June 2012 will increase this vulnerability.272 Beginning in 2009, there has been a marked increase in the number of temporary foreign workers admitted to Canada—individuals who will not have the protections of permanent res-

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271 The Canadian government amended the Citizenship Act (RSC 1985, c C-29) with Bill C-37 of 2007, which made it harder to pass on citizenship to children born outside the country: Bill C-37, An Act to amend the Citizenship Act, 2nd Sess, 39th Parl, 2007-2008 (assented to 17 April 2008), SC 2008, c 14. In 2010, the government introduced a new Bill C-37 that would have brought into effect the Strengthening the Value of Canadian Citizenship Act: Bill C-37, An Act to Amend the Citizenship Act and to make consequential amendments to another Act, 3rd Sess, 40th Parl, 2010. This bill died on the Order Paper prior to the last election, but there is some indication that the re-elected government, which is now in a majority position, will reintroduce it.

idency. In 2012, the decision-making framework for refugee protection in Canada was fundamentally altered. All of these shifts mean that non-citizens in Canada are more vulnerable to rights abuses than at any point in the previous thirty years. Non-citizens need the robust protection of both the Charter and international human rights norms. It is time to bring these two bodies of law back into harmony.

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274 See Protecting Canada’s Immigration System Act, supra note 8; Senate, Standing Committee on Social Affairs, Science and Technology, Thirteenth Report (21 June 2012) (Chair: Kelvin K Ogilvie).