IMMIGRATION DIVISION FILE #: A8-00558

IMMIGRATION AND REFUGEE BOARD OF CANADA

(IMMIGRATION DIVISION)

BETWEEN:

PETER ROGAN

Applicant

AND

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

NOTICE OF CONSTITUTIONAL QUESTION

The Applicant, Peter Rogan, intends to challenge the constitutionality of sections 36(1)(c) and 36(2)(c) of the *Immigration and Refugee Protection Act,* S.C. 2001, C.27 [the "impugned provisions"] generally, and as applied in the circumstances of this case, and to seek a declaration pursuant to section 52(1) of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11, that the impugned provisions are of no force and effect for violation of s. 7 of the *Charter of Rights and Freedoms*, or alternatively, if it is found that the Immigration Division lacks jurisdiction to make a general declaration of invalidity, then a declaration that the impugned provisions ought not to be applied in the circumstances of this case.

The constitutional question is to be argued on Tuesday, June 8, 2010 at 09:00 a.m. in the forenoon at the Immigration and Refugee Board of Canada, Immigration Division, 16th Floor – 300 West Georgia Street, Vancouver, British Columbia.

The following are the material facts giving rise to the constitutional question:

1. The Applicant is a citizen of the United States. His application for permanent residency

in Canada is pending. The Respondent alleges that he is inadmissible under sections 36(1)(c) and 36(2)(c) of the *Immigration and Refugee Protection Act (*the "IRPA") for committing acts outside of Canada that are offences in the place they were committed and that, if committed in Canada, would constitute offences under an Act of Parliament. The Applicant denies having committed such offences.

2. On April 16, 2008, Gerald F. Downes, Assistant Legal Attache of the U.S. Consulate wrote the Chief Superintendent of the Royal Canadian Mounted Police ("the RCMP") regarding the Applicant who U.S. Authorities believed to be residing in the Vancouver area at the time. Mr. Downes advised the RCMP that the Applicant held a PhD in Hospital and Health Administration and that he had at one time served as the Chief Executive Officer of Edgewater Medical Center, a hospital located in Chicago, Illinois. In May 2001, U.S. authorities charged a number of doctors and other employees of Edgewater Medical Center with the criminal offences of fraud and conspiracy to defraud the False Claims Act. The Applicant was never charged criminally in relation to these matters; instead he was sued civilly by the same U.S. Justice Department Office responsible for the criminal prosecutions of Edgewater employees. As a result of this civil action, on September 29, 2006, the Applicant was adjudged to be civilly liable to pay U.S. $64.25 M. As of their letter of April 16, 2008, the U.S. Consulate's stated singular interest in the Applicant is "in conjunction with these Civil judgment liabilities." The U.S. request of the RCMP is simple and direct:

> "Determine if he is violation of Canadian Immigration laws and can be deported to the U.S. **or if extradition proceedings will be required to return him to the U.S.**" [Emphasis added]

3. By May 8, 2008, the Canadian Border Services Agency (the "CBSA") had determined that the Applicant was a lawful visitor to Canada with a pending permanent residence application. On May 8, 2008, a conference call was organized between members of the U.S. Attorney's Office, members of the Federal Bureau of Investigation (the "FBI"), and members of the CBSA. The CBSA officers briefed the U.S. officials as to the various means by which the Applicant could be deported, including what an *IRPA* s. 36(1)(c) "act or omission" inadmissibility case would require in terms of dual criminality and evidence.

At the conclusion of the CBSA briefing an unidentified U.S. person "asked if perjury/obstruction are possible for an act or omission IRPA allegation." The CBSA responded affirmatively, and the U.S. agent "stated they would discuss this and get back..."

4. On May 23, 2008, a criminal complaint and arrest warrant was sought by the U.S. Attorneys and issued by the U.S. District Court. These documents were faxed to the CBSA the same morning. The criminal complaint charged the Applicant with perjury and obstruction of justice in relation to assertions made by the Applicant in an affidavit he had sworn approximately 17 months earlier during the collection proceedings phase of the civil litigation.

5. On May 26, 2008, the Applicant was detained at the Vancouver international airport having just returned to Canada from a vacation with his wife in China. His passport was seized by the CBSA who had in hand a letter written by the U.S. Consulate issued on May 23, 2008 advising Mr. Rogan that his passport was being revoked; the legal effect of this of course being that had the Applicant chose not to proceed with his application to enter Canada or was directed to deportation adjudication, then the only country into which he could be deported to would be the United States. In the result the Applicant was directed to inquiry and was detained at the North Fraser Pretrial Centre until his release on conditions by Member Shaw Dyke of the Immigration Division on June 3, 2008.

6. At his detention review hearing on May 28, 2008, the Board heard from Katherine Wellburn, a Vancouver lawyer, who advised that she had been acting for the Applicant in the civil collection proceedings and that he had been co-operating with all requests made of him by the Plaintiff U.S. Government during collection proceedings. There was an ongoing legal dispute between the parties as to the true nature of the trust fund that the U.S. now alleges that the Applicant perjured himself in relation to when he avered that it was an irrevocable trust that he did not control. Ms. Wellburn noted that the U.S. Government had not moved to set aside this disputed trust, nor had it taken any steps to enforce their civil judgment in Canada.

7. On July 10, 2008, the CBSA issued two further reports under s.44(1) of the *IRPA* alleging that the Applicant was inadmissible to Canada pursuant to s.36(2)(c) of the *IRPA* on the grounds that he had had committed perjury during his civil trial in 2006 and that he had obstructed justice during the federal investigation related to the affairs of Edgewater. These allegations appear to be based on *obiter dicta* comments made by the trial judge in concluding that the Applicant was civilly liable. The Applicant has not been charged criminally with these allegations by U.S. authorities.

8. On January 7, 2010, Mr. Mark Tessler, Board Member of the Immigration Division of the Immigration and Refugee Board dismissed the Applicant's application for disclosure of additional documents related to the Applicant's allegation that the U.S. Government and CBSA were acting in a manner that was ultra vires the impugned provision or otherwise constituted an abuse of process or a violation of s. 7 of the *Canadian Charter of Rights and Freedoms* (the *Charter*). In so doing, Mr. Tessler held that the Tribunal did not have jurisdiction to rule on an Application for a stay of proceedings based on an abuse of process or *Charter* s. 7 violation, arising from the conduct of the U.S. authorities and the CBSA in orchestrating an *ultra vires* use of the impugned provisions, sometimes colloquially described as a "disguised extradition operation".

9. Such further facts as may be proved and this Honourable Board may deem relevant and material.

The following is the legal basis for the constitutional question:

10. The Applicant seeks remedies under section 52(1) of the *Constitution Act* to safeguard his right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice as protected by section 7 of the *Canadian Charter of Rights and Freedoms*. The Applicant asserts that sections 36(1)(c) and 36(2)(c) of the *IRPA* are unconstitutional to the extent that they purport to allow for the deportation of permanent residents and foreign nationals to foreign states where they face criminal prosecution and a loss of liberty, without affording them the substantive and procedural safeguards afforded to similarly situated persons proceeded

against under the *Extradition Act.*

11. The law of Canada clearly prohibits the use of the impugned provisions in the Applicants circumstances. In *R. v. Brixton Prison (Governor),* [1962] 3 All E.R. 641 (C.A.), at p. 664, Lord Denning outlined the general principle and then said that when one regime (IRPA) conflicts with another (EA 1999) then:

> How are we to decide between these two principles? **It seems to me that it depends on the purpose with which the act is done.** If it was done for an authorized purpose, it was lawful. If it was done professedly for an authorized purpose, but in fact for a different purpose with an ulterior object it was unlawful.

In Canada, in *Halm v. Canada (Minister of Employment and Immigration),* [1996] 1 F.C. 547 (TD), Mr. Justice Rothstein, as he then was, expressed the same principles and said, at para. 21:

> ..."if the purpose is to surrender the person as a fugitive criminal to a state because it asked for him, that is not a legitimate exercise of the power of deportation."

More recently, in *U.S.A. v. Tollman* (2006) 212 C.C.C. (3d) 511, Madam Justice Molloy considered all of these issues and summarized, at para. 24 to 26:

> 24. For present purposes, the issue is not whether Mr. Tollman might technically be said to fall within this provision by virtue of the fact that tax evasion charges had been filed against him in the United States. Assuming there was jurisdiction to deny entry to Mr. Tollman under the IRPA, the question is whether that jurisdiction was validly exercised. It is an abuse of process to exercise a statutory power for a reason that is unrelated to the purpose for which that power was granted: *Roncarelli v. Duplessis*, [1959] S.C.R. 121; *Enterprises Sibeca Inc. v. Frelighsburg (Municipality)*, [2004] 3 S.C.R. 304, 243 D.L.R. (4th) 513. More specifically, it is an improper use of the IRPA power to remove a foreign national to another country for the purpose of enabling that foreign state to prosecute him or her for offences allegedly committed there.
>
> **25** The power under the IRPA to refuse a foreign national entry to Canada on the grounds of serious criminality is a discretionary one. This is to be contrasted with the scheme under the *Extradition Act.* Both that Act and the international treaties which it implements contemplate that a foreign state wishing to have a person returned to it from Canada to face

charges must proceed under the *Extradition Act*. It sets out the exclusive and mandatory process for extradition. For example:

- Section 11 of the Act states that a request by an extradition partner for the provisional arrest or extradition of a person "shall" be made to the Minister.

- Article 8 of the treaty between Canada and the United States provides that extradition "shall" be made in accordance with the laws of the requested state and that the person sought "shall" have the right to use all remedies available under the law.

- Article 9 of the treaty states, "The request for extradition shall be made through diplomatic channels."

26. The mere fact that a person seeking to enter Canada is wanted for an offence in the United States is not a barrier to the immigration authorities' refusing him entry here, provided that the decision to deny entry is made for a legitimate Canadian immigration law purpose. However, if a foreign state seeks the assistance of Canada to have a fugitive returned there for prosecution, that foreign state must bring the appropriate extradition application through diplomatic channels pursuant to the treaty and the *Extradition Act*. It would be improper for Canadian immigration authorities to apprehend a person and return him to the United States solely because they were requested to do so by the United States, for to do so would be to completely circumvent the *Extradition Act* and the safeguards built into that legislative scheme.

12. *Inter alia*, and in addition to the Treaty obligations summarized by Molloy J. and as detailed *infra*, the impugned IRPA provisions deny the Applicant a Ministerial pre-detention double criminality review, pre-arrest judicial review, a fair hearing before a Superior Court judge, an assessment of whether or not a *prima facie* case has been shown by the requesting state based upon admissible evidence that has been certified by the requesting state to be available and sufficient to justify the prosecution of the criminal conduct alleged, the right to relief from abuse of process, the right to mandatory ministerial refusal of surrender to the requesting state in a wide variety of circumstances, the right to the imposition of Ministerial terms and preconditions to surrender necessary to the protection of the *Charter* rights of the person sought, unfettered rights of appeal in

relation to both of the committal and surrender orders, if made, and the entitlement to specialty protection in the event that surrender is effected. In contrast, *inter alia*, the impugned IRPA provisions purport to permit unconditional and un-circumscribed removal of a person sought to the requesting state on the basis of mere "reasonable grounds to believe" that an offence has been committed demonstrated pursuant to merely "credible and trustworthy" evidence. To illustrate, the impugned provisions would, *inter alia*, permit a person such as the Applicant to be removed even if his removal would be "unjust or oppressive" within the meaning of s. 44(1)(a) of the *Extradition Act*. Or by way of further illustration, the impugned provisions would purport to authorize the unconditional removal of a person sought for murder punishable by death contrary to *Charter* s. 7 and as prohibited by *U.S.A. v. Burns* [2001] 1 SCR 281.

13. The Applicant also asserts that the impugned provisions cannot be saved pursuant to s. 1 of the *Charter* in that, *inter alia*, their invocation in the particular circumstances of any case in lieu of *Extradition Act* proceedings is essentially arbitrary and capricious in that the attempted invocation of these provisions by officials of the requesting state will often depend upon the personal proclivities of such officials and whether they are prepared to breach their own policy guidelines described in para. 15, *infra*, and whether, in turn, CBSA officials in Canada are prepared to act in a manner that is *ultra vires* IRPA and contrary to the established Canadian jurisprudence described in para. 11, *supra*.

14. The Respondent seeks to deport the Applicant to the U.S. where his liberty and security interests are in serious jeopardy in light of the outstanding warrant and criminal complaint. There can be no question but that the U.S. authorities who have conspired with CBSA authorities to engineer these deportation proceedings would remand the Applicant into custody immediately upon his return to the U.S. While the deportation of a non-citizen in the immigration context may not *in itself* engage s.7 of the *Charter*, proceedings related to deportation are not immune from s.7 scrutiny where liberty interests are at stake such as the Applicant's are in the case at bar. *Charkaoui v. Canada (Citizenship and Immigration)* [2007] 1 S.C.J. No.9 at paras. 12-18.

15. The U.S. and Canada are treaty parties on matters involving the reciprocal extradition of offenders. As such, pursuant to the provisions of the Canada/U.S. Extradition Treaty and

as a matter of established practice, when the US seeks assistance from Canada to have a person sought returned for prosecution, the US brings an appropriate extradition application pursuant to the *Extradition Act*. It is in fact the explicit policy of the U.S. Attorney's office as expressed in the United States Attorney's Manual at paras. 9-15.000 and following, entitled *International Extradition and Related Matters,* to only consider deportation and other alternatives to extradition, including so called "extraordinary rendition" apparently authorized by U.S. domestic law, if the person sought is not otherwise extraditable under the law of the requested state. The fact that AUSA officials involved in this matter are acting contrary to their own policy guidelines demonstrates that whether or not a person sought in Canada becomes entitled to the protections of the *Extradition Act,* or is subject to being exposed to the loss of those protections through IRPA proceedings based upon the impugned provisions, is primarily a function of the degree to which such officials arbitrarily elect not to abide by the Canada-U.S. Extradition Treaty and their own administrative policy.

16. As the liberty interests of a person facing appropriate extradition proceedings to a foreign state are at stake, the provisions of the *Extradition Act* have been the subject of much constitutional scrutiny to ensure that they accord with the principles of fundamental justice enshrined in s. 7 of the *Charter*. As such, a person facing extradition has:

    a. The right to the Minister's determination pursuant to s. 12 of the *Extradition Act*, having received a request by an extradition partner for a provisional arrest of a person sought, that the offence in respect of which the provisional arrest is requested is punishable in accordance with para. 3(1)(a) of the *Extradition Act* (the "pre-provisional arrest double criminality review" requirement).

    b. The right to a judicial determination pursuant to s. 13 of the *Extradition Act* that provisional arrest of a person sought is, *inter alia*, necessary in the public interest and that a warrant for the person's arrest in the requesting state has been issued (the "pre-provisional arrest judicial authorization review" requirement).

    c. The right, if provisionally arrested, to discharge if the requesting state does not deliver evidence in support of its request for extradition in a timely manner pursuant to s. 14 of the Extradition Act (the "discharge if no timely proceedings"

requirement).

d. The right to the Minister's determination pursuant to s. 15 of the *Extradition Act* that it is appropriate to issue an Authority to Proceed to the Attorney General to proceed on behalf of the extradition partner, after considering the requirements of s. 3(1)(a) and 3(3) of the *Extradition Act*, to seek a court order for the committal of the person sought to the custody of the requesting state (the "pre-authority to proceed double criminality review").

e. The right to a judicial determination pursuant to s. 24 through s. 29 of the *Extradition Act,* after a meaningful judicial hearing before an independent and impartial judge, to a determination of whether there is sufficient admissible evidence before the Court to permit a properly instructed jury to convict, before an order of committal for extradition can be issued (the "fair hearing and proof of a *prima facie* case" requirement).

f. The right to contest the admissibility of evidence at the committal hearing in accordance with the Rules of Evidence as set out in s. 31 through s. 37 of the *Extradition Act* (the "entitlement to discharge if evidence proffered is inadmissible").

g. The right to require the requesting state to certify that the evidence relied upon in support of extradition is both available to the requesting state to undertake the prosecution of the person sought for the requested offences and is sufficient under the laws of the requesting state to justify the specified prosecution as required by s. 33(3) of the *Extradition Act* and *U.S. v. Ferris* 2006 SCC 33: *U.S. v. Kwok* [2001] 1 S.C.R. 532; and *U.S. v. Cobb* [2001] 1 S.C.R. 587 (the "present availability and sufficiency of evidence certification requirement").

h. The right to the exclusion of evidence gathered in Canada not in accordance with the law of Canada including the *Charter* as required by s. 33(3)(a)(2)(ii) and *United States of America v. Anekwu*, [2009] 3 S.C.R. 3 (the "admissibility of Canadian sourced evidence" requirement).

i. The right to obtain relief from the extradition tribunal itself from abuses of

process engaged in by the requesting state as required by *U.S. v. Kwok* [2001] 1 S.C.R. 532; and *U.S. v. Cobb* [2001] 1 S.C.R. 587 and *U.S. v. Tollman* [2006] O.J. No. 3672 (the "absence of abuse of process" requirement).

j. The right to appeal the judicial committal order, as of right, to the Provincial Court of Appeal and the right to apply for judicial interim release pending the determination of the appeal as authorized by s. 49 of the *Extradition Act* (the "unfettered right to appeal and to apply for bail pending appeal").

k. The right to post committal ministerial review of the appropriateness of surrender, including the right to make submissions to the Minster related thereto, and to the benefits of the appropriate imposition of ministerial preconditions prior to surrender as authorized by s. 40 through s. 43 of the Extradition Act (the "pre-surrender ministerial review inclusive of a ministerial obligation to protect the *Charter* rights of the person sought prior to the authorization of surrender").

l. The right to the Minister's affirmative statutory duty to refuse to make a surrender order if the Minister is satisfied that surrender would be "unjust or oppressive" as required by s. 44(1)(a) of the *Extradition Act* (the "over arching fairness" requirement).

m. The right to the Minister's affirmative statutory duty to refuse to make a surrender order if the Minister is satisfied that the request for extradition is made for a diverse variety of prohibited reasons as required by s. 44(1)(b), s. 44(2), and s. 46 of the *Extradition Act* (the "prohibited and mandatory grounds for refusal" entitlement).

n. The right to the Minister's discretionary refusal to make a surrender order if the Minister is satisfied that a diverse list of specified legal conditions exist as required by s. 46 and s. 47 of the Extradition Act (the "qualified grounds for refusal" entitlement).

o. The right to appeal the Minister's committal order, as of right, to the Provincial Court of Appeal, if such is made, pursuant to s. 57 of the Extradition Act (the "unfettered right to appeal the surrender order" requirement).

p. The right to apply for leave to appeal to the Supreme Court of Canada from both the committal and surrender orders(the "right of access to a final appeal" entitlement).

q. The right, if surrendered, to be immune in the requesting state from prosecution for offences that have not been identified in the surrender order pursuant to s. 40(3) of the *Extradition Act* and the common law (the "specialty protection" entitlement).

17. This panoply of constitutionally enshrined protections available to a person sought who is subject to the *Extradition Act* stands in sharp contrast with the lack of protections offered to a similarly situated person, such as the Applicant, subject to an IRPA admissibility hearing based upon allegations made pursuant to the impugned provisions, including:

a. *IRPA* s.55(2) sanctions the warrantless arrest of foreign nationals without prior ministerial or judicial review;

b. *IRPA* sections 15 through 19, compel any person making an application to enter or remain in Canada to truthfully answer all questions posed by an immigration officer, including inquiries about the alleged serious criminality, without guaranteeing use or derivative use immunity respecting such inquiries. There is of course similarly no statutory assurance that if this compelled evidence is self-incriminating it will not be shared with the foreign state for use in a subsequent criminal prosecution in that jurisdiction where it is the case that use and derivative use protections will not be available to the Applicant all contrary to the constitutional requirements described in *Application under s.83.28 of the Criminal Code (Re)* [2004] 2 S.C.R. 248.

c. *IRPA* sections 33 and 173(d) permit a Tribunal to make a finding of inadmissibility on the basis of any evidence that the adjudicator deems to be "credible and trustworthy" that establishes "reasonable grounds to believe" that an offence has been committed;

d. *IRPA* section 173(c) expressly suspends the application of "any legal and technical

rules of evidence" during admissibility hearings.

e. *IRPA* permits the Minister to compel the foreign national to testify at his admissibility hearing without explicitly providing for use and derivative use immunity protections prohibiting the foreign state from using this compelled testimony at a subsequent criminal trial pursuant to the procedures described in *Bowen v. Canada (Minister of Employment and Immigration)* [1984] 2 F.C. 507 (C.A.) and contrary to *Application under s. 83.28, supra*;

f. The impugned provisions do not require the State to establish that reliable evidence capable of proving the alleged offences is available for trial in the foreign state.

g. The Adjudicator herein has found that the *IRPA* does not provide him with the jurisdiction to adjudicate an Application for a stay of proceedings based upon an abuse of process or a violation of *Charter* s. 7.

h. *IRPA* s. 64(1) does not allow foreign nationals an unfettered right to appeal a finding of inadmissibility on the grounds of serious criminality. Asymmetrically, the Minister, on the other hand, does however have an automatic right of appeal pursuant to IRPA s. 63(5) from a decision of the Immigration Division that is favourable to the foreign national.

18. For all these reasons, and others to be specified at the Application, it is the Applicant's position that to the extent that the impugned provisions permit the deportation of permanent residents and foreign nationals to a foreign state where their liberty and security interests are at stake, these sections are unconstitutional of no force and effect to the extent of that inconsistency pursuant to s.52(1) of the *Constitution Act*, or alternatively, that they ought not to be applied in the circumstances of this case.

19. In addition to the above-noted remedies sought, such further and other relief as the Applicants may seek and this Tribunal may deem appropriate and just.

Dated at Vancouver, British Columbia this 28th day of May, 2010.

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AND TO: **CANADA BORDER SERVICES AGENCY**
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