SCC Court File No. 37770

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA)

B E T W E E N:

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS AND ATTORNEY GENERAL OF CANADA

APPELLANTS
(Respondents)

and

TUSIF UR REHMAN CHHINA

RESPONDENT
(Appellant)

and

END IMMIGRATION DETENTION NETWORK, THE CANADIAN ASSOCIATION OF REFUGEE LAWYERS, DEFENCE FOR CHILDREN INTERNATIONAL CANADA, AMNESTY INTERNATIONAL CANADA, THE COMMUNITY & LEGAL AID SERVICES PROGRAMME, THE CANADIAN COUNCIL FOR REFUGEES, THE QUEEN'S PRISON LAW CLINIC, THE EGALE CANADA HUMAN RIGHTS TRUST, THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, THE CANADIAN CIVIL LIBERTIES ASSOCIATION, AND THE CANADIAN PRISON LAW ASSOCIATION

INTERVENERS

FACTUM OF THE INTERVENER, CANADIAN PRISON LAW ASSOCIATION

(Pursuant to rule 42 of the Rules of the *Supreme Court of Canada*)

BORYS LAW
106-348 Bagot Street
Kingston, ON
K7K 3B7

Simon Borys
T: 613-777-6262
F: 613-777-6263
E: simon@boryslaw.ca

MCCARTEN WALLACE
1900-439 University Ave.
Toronto, ON
M5G 1Y8

SUPREME ADVOCACY LLP
340 Gilmour St., Suite 100
Ottawa, ON K2P 0R3

Marie-France Major
Tel.: (613) 695-8855 ext 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Agent for Counsel for the Intervenor, Canadian Prison Law Association

Simon Wallace
T: 416 363.1696
F: 416 363.4089
E: simon@mccartenwallace.com

Counsel for the Intervenor, Canadian Prison Law Association

ATTORNEY GENERAL OF CANADA
Department of Justice
British Columbia Regional Office
900-840 Howe Street
Vancouver, British Columbia V6Z 2S9

Donaree Nygard
Liliane Bantourakis
Tel: 604-666-3049
Fax: 604-775-5942
Email: donnaree.nygard@justice.gc.ca
liliane.bantourakis@justice.gc.ca

Counsel for the Appellants, Minister of Public Safety & Emergency Preparedness and Attorney General of Canada

DEPARTMENT OF JUSTICE CANADA
National Litigation Sector
50 O'Connor Street, Suite 500
Ottawa ON K1A 0H8

Christopher Rupar
Tel: 613-670-6290
Fax: 613-954-1920
Email:christopher.rupar@justice.gc.ca

Ottawa Agent for the Appellants, Minister of Public Safety & Emergency Preparedness and Attorney General of Canada

NOTA BENE LAW GROUP INC.
Suite 300, 404 - 6th Avenue S.W.
Calgary, Alberta
T2P 0R9

Barbara Jackman
Nico G.J Breed
Tel : (403) 444-6484
Fax : (403) 444-6485
Email: nico@nblawgroup.ca

Counsel for the Respondent, Tusif Ur Rehman Chhina

COMMUNITY LEGAL SERVICES OF OTTAWA-SOUTH OFFICE
406 - 1355 Bank Street
Ottawa, ON
K1H 8K7

Jaime Lefebvre
Tel: (613) 733-0140
Fax: (613) 733-0401
Email lefebvj@lao.on.ca

Agent for the Respondent, Tusif Ur Rehman Chhina

SWATHI V. SEKHAR
IMMIGRATION AND REFUGEE LAWYER
1040 Eglinton Avenue West
2nd floor
Toronto, Ontario
M6C 2C5

Swathi Sekhar
Maija Martin
Tel: (416) 885-8534
FAX: (416) 352-5830
E-mail: swathi@sekharlawoffice.com

Counsel for the Intervener, End Immigration Detention Network

SHANBAUM SEMANYK PROFESSIONAL CORPORATION
150 Isabella Street, Suite 305
Ottawa, Ontario
K1S 1V7

Terri H. Semanyk
Tel: (613) 238-6969 Ext: 2
Fax: (613) 238-9916
E-mail: tsemanyk@sspclaw.ca

Agent for Counsel for the Intervener, End Immigration Detention Network

JARED WILL & ASSOCIATES
226 Bathurst
Suite 200
Toronto, Ontario
M5T 2R9

Jared Will
Joshua Blum
Tel: (416) 657-1472
Fax: (416) 657-1511
E-mail: jared@jwlaw.ca

Counsel for the Intervener, Canadian Association of Refugee Lawyers

COMMUNITY LEGAL SERVICES-OTTAWA CARLETON
1 Nicholas Street, Suite 422
Ottawa, Ontario
K1N 7B7

Michael Bossin
Tel: (613) 241-7008 Ext: 224
Fax: (613) 241-8680
E-mail: bossinm@lao.on.ca

Agent for Counsel for the Intervener, Canadian Association of Refugee Lawyers

WILSON, CHRISTEN
137 Church Street
Toronto, Ontario
M5B 1Y4

Jeffery Wilson
Farrah Hudani
Tel: (416) 360-5952
Fax: (416) 360-1350
E-mail: jeffery@wilsonchristen.com

Counsel for the Intervener, Defence for Children International-Canada

GOWLING WLG (CANADA) LLP
2600 - 160 Elgin Street
P.O. Box 466, Stn. A
Ottawa, Ontario
K1P 1C3

Matthew Estabrooks
Tel: (613) 786-8695
Fax: (613) 563-9869
E-mail: matthew.estabrooks@gowlingwlg.com

Agent for Counsel for the Intervener, Defence for Children International-Canada

COMMUNITY LEGAL SERVICES-OTTAWA CARLETON
1 Nicholas Street, Suite 422
Ottawa, Ontario
K1N 7B7
Tel: (613) 241-7008 Ext: 224
Fax: (613) 241-8680
E-mail: bossinm@lao.on.ca

Counsel for the Intervener, Amnesty International Canada (English Branch)

COMMUNITY & LEGAL AID SERVICES PROGRAMME
York University, Osgoode Hall Law School
Ignat Kaneff Build
4700 Keele Street
Toronto, Ontario
M3J 1P3

Subodh Bharati
Tel: (416) 736-5029
Fax: (416) 736-5564
E-mail: sbharati@osgoode.yorku.ca

Counsel for the Intervener, Community & Legal Aid Services Programme

SUPREME ADVOCACY LLP
340 Gilmour St., Suite 100
Ottawa, ON K2P 0R3

Marie-France Major
Tel.: (613) 695-8855 ext 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Agent for Counsel for the Intervener, Community & Legal Aid Services Programme

EDELMANN & COMPANY LAW OFFICES
905 - 207 West Hastings Street
Vancouver, British Columbia
V6B 1H7

Peter H. Edelmann
Erica Olmstead
Molly Joeck
Tel: (604) 646-4684
Fax: (604) 648-8043
E-mail: peter@edelmann.ca

Counsel for the Intervener, Canadian Council for Refugees

STOCKWOODS LLP
77 King Street West, Suite 4130

POWER LAW
130 Albert Street

Toronto-Dominion Centre
Toronto, Ontario
M5K 1H1

Nader R. Hasan
Tel: (416) 593-7200
Fax: (416) 593-9345
E-mail: naderh@stockwoods.ca

Counsel for the Intervener, Queen's Prison Law Clinic

BATTISTA SMITH MIGRATION LAW GROUP
160 Bloor Street East
Suite 1000
Toronto, Ontario
M5W 1B9

Michael Battista
Tel: (416) 203-2899
Fax: (416) 203-7949
E-mail: battista@migrationlawgroup.com

Counsel for the Intervener, Egale Canada Human Rights Trusts

FRANCES MAHON LAW
402 West Pender Street
Vancouver, British Columbia
V6B 1T6

Frances Mahon
Tel: (604) 910-8479
Fax: (604) 608-3319
E-mail: frances@francesmahonlaw.com

Counsel for the Intervener, British Columbia Civil Liberties Association

BORDEN LADNER GERVAIS LLP
22 Adelaide Street West
Suite 3400
Toronto, Ontario
M5H 4E3

Suite 1103
Ottawa, Ontario
K1P 5G4

Maxine Vincelette
Tel: (613) 702-5561
Fax: (613) 702-5561
E-mail: mvincelette@powerlaw.ca
Agent for Counsel for the Intervener, Queen's Prison Law Clinic

POWER LAW
1103 - 130 Albert Street
Ottawa, Ontario
K1P 5G4

Audrey Mayrand
Tel: (613) 702-5560
Fax: (613) 702-5560
E-mail: amayrand@juristespower.ca

Agent for Counsel for the Intervener, Egale Canada Human Rights Trusts

GOLDBLATT PARTNERS LLP
500-30 Metcalfe St.
Ottawa, Ontario
K1P 5L4

Colleen Bauman
Tel: (613) 482-2463
FAX: (613) 235-3041
E-mail: cbauman@goldblattpartners.com

Agent for Counsel for the Intervener, British Columbia Civil Liberties Association

BORDEN LADNER GERVAIS LLP
World Exchange Plaza
100 Queen Street, suite 1300
Ottawa, Ontario
K1P 1J9

Ewa Krajewska
Pierre N. Gemson
Tel: (416) 367-6244
Fax: (416) 367-6749
E-mail: ekrajewska@blg.com

Counsel for the Intervener, Canadian Civil Liberties Association

Nadia Effendi
Tel: (613) 237-5160
Fax: (613) 230-8842
E-mail: neffendi@blg.com

Agent for Counsel for the Intervener, Canadian Civil Liberties Association

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PART I: OVERVIEW

1. The submission of the parties in this case focus on whether the *IRPA* offers a complete, comprehensive, and expert review procedure, which would bar the granting of a writ of habeas corpus; however, the other threshold issue at play in this case is whether Mr. Tusif Ur Rehman Chhina has actually been deprived of his liberty in a manner that would engage habeas corpus. The Canadian Prison Law Association ("CPLA") is intervening with respect to this threshold issue.

2. Before habeas corpus can be granted, there must be a deprivation of liberty. All deprivations of liberty fit into one of the three categories described by this Court in *Dumas v Leclerc Institution of Laval*: (i) an initial deprivation of liberty; (ii) a substantial change in conditions amounting to a further deprivation of liberty; or (iii) the continuation of an initially valid deprivation of liberty that has become unlawful.[1]

3. Mr. Chhina's continuing immigration detention is an example of the third category of *Dumas*: a deprivation of liberty gone bad. The CPLA submissions focus on how to assess whether a continuing deprivation of liberty has become unlawful.

4. This issue arises frequently in lower courts—where it has been plagued by confusion and inconsistency—particularly in cases involving the refusal to transfer inmates in federal correctional facilities to lower security levels, which are the stock and trade of the lawyer members of the CPLA.

5. This case provides an opportunity for the Court to address this important issue, and resolve confusion in the case law, in an area that normally evades appellate review because of the temporary nature of a detainee's form of incarceration.

PART II: POSITION ON THE QUESTION IN ISSUE

6. The CPLA's position is that deprivations of liberty of the third category in *Dumas* are correctly assessed by examining whether the prisoner is being denied something they are legally entitled to, *not*, as some lower courts have held, whether the prisoner is seeking to gain a greater

[1] *Dumas v Leclerc Institution of Laval*, [1986] 2 S.C.R. 469 ("*Dumas*"), at p. 464-465.

level of liberty than they have previously enjoyed.

PART III: ARGUMENT

A. General Principles of Habeas Corpus

7. As the Court of Appeal in this case confirmed, habeas corpus is not a narrow or formalistic remedy. It is one of the cornerstones of liberty, and is essential in enforcing the protections under sections 7 and 9 of the *Charter*, and should therefore not be precluded lightly.[2]

8. Habeas corpus is also broad in its application. As the Ontario Court of Appeal stated in its most recent decision on habeas corpus, "the decision in *May* makes clear, habeas corpus potentially applies to any situation where the state restrains the liberty of the subject"[3]

B. Steps in a Habeas Corpus Application

9. Habeas corpus has often been used, by all levels of court, including this Court, without specific reference to the seminal cases that set out the framework for a habeas corpus application, specifically *Dumas*[4] (three types of deprivation of liberty) and *May*[5]*/Khela*[6] (two-step procedure for habeas corpus—including assessing whether there has been a deprivation of liberty).[7]

10. This Court clearly stated in *May*,[8] and again in *Khela*,[9] that the first step of a habeas corpus application is for the Applicant to (a) establish that there has been a deprivation of liberty, and (b) raise a legitimate ground upon which to question the legality of that deprivation. If the Applicant passes this threshold, then the onus shifts to the Respondent to establish the lawfulness

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[2] *Chhina v Canada (Public Safety and Emergency Preparedness*, 2017 ABCA 248 ("*Chhina*"), at paras 22-27.
[3] *Wang v Canada*, 2018 ONCA 798 ("*Wang*"), at para 28 [emphasis added].
[4] *Dumas*, [1986] 2 S.C.R. 469.
[5] *May v Ferndale Institution*, 2005 SCC 82 ("*May*").
[6] *Mission Institution v Khela*, 2014 SCC 24 ("*Khela*").
[7] See e.g. *Khadr v Edmonton Institution*, 2014 ABCA 225, aff'd 2015 SCC 26; *Canada (Attorney General) v Whaling*, 2014 SCC 20; *Liang v Canada (Attorney General)*, 2014 BCCA 190; *Canada (Attorney General) v Lewis*, 2015 ONCA 379; *Chaudhary v Canada (Minister of Public Safety & Emergency Preparedness)*, 2015 ONCA 700; *Parent v Guimond*, 2016 QCCA 159.
[8] *May*, 2005 SCC 82, at para 71.
[9] *Khela*, 2014 SCC 24, at para 86.

of that deprivation of liberty.[10]

11. As indicated by the Ontario Court of Appeal twice in the past two months, the first stage of a habeas corpus application (establishing a deprivation of liberty) is a low threshold.[11]

12. Regardless of whether *Dumas* and *May*/*Khela* are specifically cited, a deprivation of liberty is always a threshold for seeking habeas corpus, and this issue was, therefore, before the lower courts in this case—it was just dealt with implicitly by the parties. Notably, the Department of Justice did not attempt to argue that the court did not have jurisdiction in this case just because the Applicant was seeking to gain a greater level of liberty than he had previously enjoyed (namely, bail).

C. The Three Types of Deprivation of Liberty

13. Habeas corpus only applies where there has been a deprivation of liberty. A deprivation of liberty can take three forms:

> (i) an initial deprivation of liberty;
> (ii) a substantial change in conditions amounting to a further deprivation of liberty; or
> (iii) a continuation of the deprivation of liberty.[12]

14. The most common category is the second (a substantial change in conditions). This category is applied most often to situations where a prisoner is transferred to a higher security level, or from general population to segregation, and thus loses some of the residual liberty they enjoyed in the less restrictive setting. With this category, the deprivation of liberty is easy to conceptualize: it is the loss of something the prisoner once had—specifically loss of the freedom they enjoyed in the less restrictive setting. This was the factual situation in both *May* and *Khela*.

15. However, nothing in *May* or *Khela* suggests that the loss of something a prisoner once had is the only way to conceptualize a deprivation of liberty. This is important when looking at

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[10] The Appellants acknowledge this framework at para 76 of their factum, and do not appear to take issue with it.
[11] *Toure v Canada (Public Safety & Emergency Preparedness,* 2018 ONCA 681 ("*Toure*"), at para 51; *Wang*, 2018 ONCA 798, at para 25.
[12] *Dumas*, [1986] 2 S.C.R. 469, at p, 464.

habeas corpus situations in the first or third categories of *Dumas*.

16. As stated recently by Ontario Court of Appeal in *Wang*, "the most common use [of habeas corpus] should neither eclipse nor exclude other possible uses." The Court of Appeal also stated that habeas corpus is intended to be a broad remedy that applies to any restraint on a person's liberty, and "[w]here the state acts to restrict the liberty of the individual, then the individual must have the right to seek a review of the legitimacy of those restrictions."[13]

17. The broad language throughout the judgement in *Wang* supports the proposition that habeas corpus should not be restricted to situations where the prisoner lost something they once had—*Wang* states clearly that habeas corpus applies to *any* restraint on a person's liberty[14]

18. The idea that a deprivation of liberty is not limited to situations where a prisoner has lost some liberty they once had is consistent with the purpose of habeas corpus, which protects against capricious, arbitrary, and erroneous detention. The law promises that the courts will not permit unlawful detentions.

19. This is important when we return to examining situations such as Mr. Chhina's (category three), where the prisoner has not lost something he once had, but, rather, is attempting to gain a greater level of liberty than they had previously enjoyed (for Mr. Chhina, bail).

D. The Proper Way to Assess Category Three Deprivations of Liberty

20. The two-step framework from *May* and *Khela*—which asks whether there has been a deprivation of liberty, as a threshold issue—is appropriate for all three of the *Dumas* categories. In each category, however, the issue of the deprivation of liberty needs to be assessed differently.

21. A category three case, which involves the continuation of a deprivation of liberty that has become unlawful, cannot, by definition, be about losing something the prisoner once had. That is the way to assess a deprivation of liberty in the second category.

22. This may seem obvious, however, there are numerous third category habeas corpus cases where courts have addressed the deprivation of liberty issue was assessed as though it were a

[13] *Wang*, 2018 ONCA 798, at paras 11, 14, 22, 23.
[14] *Wang*, 2018 ONCA 798, at para 14.

second category. In these cases, prisoners who were claiming that their continuing deprivation of liberty had become unlawful were denied access to habeas corpus review on the basis that they were seeking a greater level of liberty than they had previously enjoyed.[15] This obviously conflates the second category with the third.

23. The CPLA submits that the proper way to address a third category deprivation of liberty, such as Mr. Chhina's, is to look at whether the Applicant is being denied a state of liberty they are legally entitled to. This necessarily involves a superficial assessment of the merits of the Applicant's claim about their legal entitlement, in order to assess whether they have raised a legitimate ground upon which to question the legality of the deprivation of their liberty.

24. This is akin to establishing a prima facie case. The judge need not do a full assessment of the reasonableness of the ultimate decision (that is reserved for the second stage of the habeas corpus procedure, with the onus on the Respondent); however, the judge cannot dispense with the Applicant's claim at the first stage on the basis that a deprivation of liberty has not been established, simply because the judge refuses to do any assessment of whether the Applicant has a legal claim to a greater liberty than they currently enjoy.

25. In this case, the Alberta Court of Appeal stated:

> Where, as here, an applicant claims that the decision to detain him is the continuation of a lengthy detention of uncertain duration, so that his detention has become unlawful as in violation of ss 7 and 9 of the *Charter*, he is entitled to bring an application for *habeas corpus* under s 10 of the *Charter*. On the hearing of the application, the applicant must show that reasonable grounds exist for his complaint that the detention is exceptionally lengthy and uncertain. The onus will then shift to the respondent Minister to establish that the continuing detention is, nevertheless, justified for immigration purposes and therefore lawful.[16]

26. This is consistent with the approach the CPLA is advocating, if you consider, as the

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[15] *Pallagi v Canada (Attorney General)*, 2011 QCCS 2423, at paras 7-9; *Mapara v Ferndale Institution (Warden)*, 2012 BCCA 127, at paras 13-16; *Moldovan v. Canada (Attorney General)*, 2012 ONSC 2682 Intervener Canadian Prison Law Association's Book of Authorities ("CPLA BOA"), Tab 2, at paras 28-29; *Robinson v Canada (Attorney General)*, 2013 ONSC 7992, at para 13; *Wood v Canada (Atlantic Institution)*, 2014 NBQB 135, at para 35; *Canada (Attorney General) v White*, 2015 ONSC 6994, at para 21; *Lao v Canada (Attorney General)*, 2016 ONSC 1273, CPLA BOA, Tab 1**,** at paras 3-11.

[16] *Chhina*, 2017 ABCA 248, at para 68.

Alberta Court of Appeal clearly did, that Mr. Chhina's legal entitlement was to be free from arbitrary detention. Infringements of *Charter* rights are one way to establish a legal entitlement within the third category of *Dumas*, but not the only way. A prisoner could also rely on statute, case law, or policy directives, for example.

27. It would not make sense to claim that Mr. Chhina's habeas corpus application should be dismissed simply because he was asking for a greater level of liberty than he had previously enjoyed (namely, bail). Indeed, the parties have not argued that at any level in this case—they have accepted that liberty is engaged on these facts.

28. However, this erroneous argument continues to be raised in third category cases and, where it is accepted, it causes confusion and conflict in the case law. For example, this argument was advanced by the Department of Justice in the Superior Court in *Wang*. The application judge stated, "I agree with the AG that the applicants are now seeking to have less restrictive terms substituted for the ones to which they are currently subjected. There has been no deprivation of liberty."[17] But nowhere in that case did the Ontario Court of Appeal acknowledge that this was a legitimate basis upon which to decide that there had been no deprivation of liberty. In fact, the court was critical of the application judge for unduly restricting the scope of habeas corpus and found that it *did* apply.

29. This issue is a narrow point of law. It needs to be settled, and can be, in this case, without the need for fulsome argument by the opposing parties, because the CPLA's position is not a departure from established law; it is simply a clarification.

30. What is needed is for the Court to simply affirm that the two-step framework set out in *May* and *Khela* applies to all three of the categories in *Dumas*, but the issue of the deprivation of liberty needs to be assessed differently for each of the three categories. For the third category, a deprivation of liberty is established where the applicant is denied a state of liberty they are legally entitled to, which requires the judge, at the first stage of habeas corpus procedure, to examine whether the Applicant has made out a prima facie case.

PART IV: SUBMISSIONS CONCERNING COSTS

[17] *Wang*, 2017 ONSC 2841, at para 55.

31. The Prison Law Association does not seek costs and asks that none be ordered against it.

PART V: ORDER SOUGHT

32. The Prison Law Association has been granted leave to intervene and present oral submissions not exceeding five minutes. No other order is requested.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at Kingston, Ontario, October 20, 2018.

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Simon Borys
Simon Wallace

Counsel for the Intervener, Canadian Prison Law Association

PART VI: TABLE OF AUTHORITIES

Case law

Case	Paragraph Numbers
Bowden Institution v Khadr, 2015 SCC 26	12 (footnote)
Canada (Attorney General) v Lewis, 2015 ONCA 379	12 (footnote)
Canada (Attorney General) v Whaling, 2014 SCC 20	12 (footnote)
Canada (Attorney General) v White, 2015 ONSC 6994	25 (footnote)
Chaudhary v Canada (Minister of Public Safety & Emergency Preparedness), 2015 ONCA 700	12 (footnote)
Chhina v Canada (Public Safety and Emergency Preparedness), 2017 ABCA 248	10, 28
Dumas v Leclerc Institution of Laval. [1986] 2 S.C.R. 469	4, 5, 16
Khadr v Edmonton Institution, 2014 ABCA 225	12 (footnote)
Lao v Canada (Attorney General), 2016 ONSC 1273	25 (footnote)
Liang v Canada (Attorney General), 2014 BCCA 190	12 (footnote)
Mapara v Ferndale Institution (Warden), 2012 BCCA 127	25 (footnote)
May v Ferndale Institution, 2005 SCC 82	12, 13
Mission Institution v Khela, 2014 SCC 24	12, 13
Moldovan v. Canada (Attorney General), 2012 ONSC 2682	25 (footnote)
Pallagi v Canada (Attorney General), 2011 QCCS 2423	25 (footnote)
Parent v Guimond, 2016 QCCA 159	12 (footnote)
Robinson v Canada (Attorney General), 2013 ONSC 7992	25 (footnote)
Toure v Canada (Public Safety & Emergency Preparedness), 2018 ONCA 681	14
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Legislation

Canadian Charter of Rights and Freedoms, Part 1 of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11
ss. 7, 9,10(c)

Loi constitutionnelle de 1982, Annexe B de la Loi de 1982 sur le Canada (R-U), 1982, c 11
ss. 7, 9, 10(c)