CROWN COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF CANADA)

BETWEEN:

NIAHL DENG

APPELLANT

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

RESPONDENT

RESPONDENT'S MEMORANDUM OF ARGUMENT

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Counsel for the Respondent

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OVERVIEW

1. Releasing violent foreign nationals from detention when they pose a danger to the public is against public interest and detrimental to the integrity of Canadian immigration law. Mr. Niahl Deng (the "**Appellant**") is a danger to the public. He has committed several violent offences with increasing severity against random members of the public since his arrival in Canada. Canadian citizens should not be forced to bear the consequences of the Appellant's violent behaviour merely because his country of citizenship refuses to cooperate with his removal.

2. Parliament intended danger to the public to be a standalone ground for immigration detention pending removal, even where there is no possibility of removal, to preserve national security and safeguard Canadian citizens from violent foreign nationals. To find otherwise would misinterpret Parliament's clear statutory language under s. 58(1) of the *Immigration and Refugee Protection Act* ("***IRPA***").

3. Further, when assessing a nexus to removal sufficient to ground a foreign national's detention, the Federal Court ("**FC**") reasonably determined "any active efforts" to be the appropriate test. This standard best reflects the *IRPA*'s statutory objectives while accounting for the practical challenges of the removal process.

4. The Appellant's continued detention on the standalone ground of danger to the public complies with ss. 7 and 9 of the *Charter*. Any limitation on the Appellant's *Charter* protections as a result of his detention is proportionately balanced with the *IRPA*'s statutory objectives. Therefore, the appeal should be dismissed.

PART I: FACTS

A. Immigration history

5. The Appellant claimed refugee protection in Canada with no identity documents besides a non-genuine passport allegedly obtained in Kenya.[1]

6. The Appellant's claim for refugee protection was rejected by the Refugee Protection Division ("**RPD**") and the Refugee Appeal Division ("**RAD**"). The RPD denied the Appellant's claim because he failed to establish his identity. On appeal, the RAD affirmed the RPD's decision. The Appellant chose not to seek judicial review.[2]

B. Criminal history

7. From July 2021 to August 2022, the Appellant was arrested at least seven times. The arrests, as reported by the Toronto Police Service, involved violence against strangers who the Appellant encountered in public while he was unhoused and intoxicated. From these arrests, the Appellant was convicted of several increasingly violent crimes, including:

1) Assault causing bodily harm (November 17, 2021), contrary to s. 267(b) of the *Criminal Code*;
2) Assault with a weapon (March 1, 2022), contrary to s. 267(a) of the *Criminal Code*; and
3) Sexual assault with a weapon (August 10, 2022), contrary to s. 272(1)(a) of the *Criminal Code*.[3]

[1] *Immigration Division Decision*, IRC Law Moot 2025 at para 2 [*ID Decision*].
[2] *Ibid* at para 3.
[3] *Ibid* at para 5.

8. There is no evidence that the Appellant has relied on the defence of mental disorder or extreme intoxication for any of the offences he has committed. For his last conviction, the Appellant was sentenced to one year imprisonment.[4]

C. Procedural history

1) Detention review history

9. The Appellant was released from his criminal sentence on July 10, 2023. Following his release, the CBSA arrested the Appellant on the grounds that he posed a danger to the public and was unlikely to appear for removal. He has remained in immigration detention at Maplehurst Correctional Complex since then.[5]

10. Since July 2023, the Immigration Division ("**ID**") has reviewed the Appellant's continued detention 14 times. During this time, the CBSA has made continued efforts to establish the Appellant's identity, including contacting South Sudanese consular authorities and locating the Appellant's non-immediate family members. However, despite their tireless efforts, CBSA has been consistently thwarted by South Sudanese officials.[6]

2) The ID's decision

11. On July 11, 2024, the ID ordered the Appellant's release pursuant to s. 58 of the *IRPA*. During the detention review hearing, the Minister conceded they were at an impasse and no

[4] *Ibid* at para 5.
[5] *Ibid* at para 6.
[6] *Ibid* at para 7.

progress was being made to obtain a travel document from the South Sudanese authorities. Consequently, the ID held that the Appellant's removal was no longer reasonably foreseeable.[7]

12. The ID also held that while s. 58(1)(a) identifies danger to the public as a standalone ground of detention, when read in conjunction with the Federal Court of Appeal's ("**FCA**") judgement in *Brown*, the public safety ground can only be exercised where removal is still a possibility.[8] As the ID found there was no possibility of removal, it determined that the Appellant's detention was no longer lawful and ordered his release without conditions.[9]

3) The FC's decision

13. The FC granted the Minister's judicial review application and set the ID's decision aside.[10]

14. First, the FC held that a reasonable foreseeability standard was rejected by the FCA in *Brown*. The FC found this to be "a nebulous and speculative standard that leads to inconsistent results" and noted that the SCC did not reference a foreseeability test in *Charkaoui*.[11]

15. In rejecting the ID's application of the reasonable foreseeability standard, the FC held that a country's inability to confirm identity or travel documents cannot become a free pass for dangerous individuals to be released from detention. The FC affirmed that while removal is an objective of detention as per *Brown*, Canada does not have complete control over its realization.

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[7] *Ibid* at paras 9-18.
[8] *Brown v Canada (Citizenship and Immigration)***,** 2020 FCA 130 [*Brown*]; *ID Decision* at para 14.
[9] *ID Decision* at para 17.
[10] *Deng v Canada (Citizenship and Immigration)*, 2024 FC 97450 at paras 2, 17 [*Deng*].
[11] *Ibid* at paras 7-8.

Canada's ability to facilitate the Appellant's removal is reliant on South Sudan's cooperation and is bound by their inability to confirm the Appellant's identity and alleged travel documents.[12]

16. The FC held that removal remains a possibility "so long as Canada continues any efforts to pursue [it]." The FC found that using a reasonable foreseeability standard implies Parliament intended the *IRPA* to have no capacity to protect the public from violent criminals.[13]

17. Second, the FC ruled that danger to the public is a standalone ground of detention.[14] Relying on *Taino*, the FC held that there is no implicit requirement that detention is only lawful where removal is possible. Instead, detention must always be connected, on the evidence, to an enumerated statutory purpose. Where removal is not the primary purpose of detention, the gap can be filled by the purpose of protecting the public safety and security of Canadians as per s. 3(1)(h) of the *IRPA* and *Brown*.[15]

18. The FC certified two questions:

1) Can a foreign national or permanent resident of Canada be detained on the basis of danger to the public pursuant to s. 58(1)(a) of the *IRPA* where there is no longer a nexus to removal?
2) Is there a nexus to removal sufficient to ground the detention of a foreign national or permanent resident of Canada under the *IRPA* so long as the state is making any active efforts to pursue removal?[16]

[12] *Ibid* at paras 9, 12.
[13] *Ibid* at paras 10-12.
[14] *Ibid* at para 14.
[15] *Ibid* at paras 13-17.
[16] *Ibid* at para 13.

PART II: POINTS IN ISSUE

19. The Appellant can be detained on the standalone ground of danger to the public pursuant to s. 58(1)(a) of the *IRPA* where there is no longer a nexus to removal.

20. There is a nexus to removal sufficient to ground the detention of the Appellant under the *IRPA* so long as the state is making any active efforts to pursue removal.

21. The Appellant's detention under the *IRPA* does not violate the *Charter*.

PART III: ARGUMENT

A. Statutory framework and Jurisprudence

22. Paragraphs 58(1)(a) and (b) of the *IRPA* provide that the ID must order the release of a permanent resident or foreign national unless it is satisfied that they are a danger to the public or they are unlikely to appear for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order by the Minister under s. 44(2).[17]

23. Pursuant to s. 248 of the *Immigration and Refugee Protection Regulations* ("***Regulations***"), if the ID has determined that there are grounds for detention, it must consider the following non-exhaustive factors before a decision is made on detention or release:

a) the reason for the detention;

b) the length of time in detention;

c) whether there are any elements that can assist in determining the length of time that detention is likely to continue and, if so, that length of time;

[17] *Immigration and Refugee Protection Act,* SC 2001, c 27, ss 58(1)(a), (b) [*IRPA*].

d) any unexplained delays or unexplained lack of diligence caused by the Department, the CBSA or the person concerned;

e) the existence of alternatives to detention; and

f) the best interests of a directly affected child who is under 18 years of age.[18]

24. In *Brown*, the FCA considered these legislative provisions in the *IRPA* and the *Regulations* to determine whether they were constitutionally compliant.[19] The appellant, Brown, was deemed inadmissible to Canada due to a series of criminal convictions.[20] Following his release from imprisonment, Brown was detained pending removal on the basis that he was both a danger to the public and a flight risk.[21] CBSA made repeated efforts to obtain travel documents from Jamaica in order to facilitate Brown's removal, but was unable to do so from September 2011 to September 2016. At each of his detention reviews, the ID ordered a continuation of his detention.[22]

[18] *Immigration and Refugee Protection Regulations*, SOR/2002-227, s 248 [*Regulations*].
[19] *Brown* at para 44.
[20] *Ibid* at para 4.
[21] *Ibid*.
[22] *Ibid* at para 5.

25. At the FC, Brown challenged the constitutionality of the detention regime under ss. 57 and 58 of the *IRPA* and ss. 244 to 248 of the *Regulations*.[23] Brown argued that the detention regime violated his ss. 7, 9, 12 and 15 *Charter* rights.[24] The FC dismissed Brown's *Charter* challenge.[25] At the FCA, the court considered the following certified question: Does the *Charter* impose a requirement that detention for immigration purposes not exceed a prescribed period of time, after which it is presumptively unconstitutional, or a maximum period, after which release is mandatory?[26]

26. The FCA confirmed that the detention provisions in the *IRPA* comply with ss. 7 and 9 of the *Charter*.[27] As long as there are regular and timely detention reviews including review of the reasons for detention, the length of detention, the reasons for delay, and the anticipated future length of detention, these extended periods of detention do not contravene *Charter* rights.[28] Providing the ID with discretion at each detention review ensures that they give full and fair consideration in light of a detainee's particular circumstances.[29]

[23] *Ibid* at para 6.
[24] *Ibid*.
[25] *Ibid* at para 8.
[26] *Ibid*.
[27] *Ibid* at para 14.
[28] *Ibid*.
[29] *Ibid* at para 74.

27. The language of s. 58(1) of the *IRPA* is clear: detention must cease unless a ground for detention exists that is tied to an immigration purpose.[30] The power of detention authorized by s. 58 of the *IRPA* is exercised principally, but not exclusively, pending removal.[31] Where there is no longer a nexus to an immigration purpose, the power of detention cannot be exercised by the state and the inquiry is at an end.[32] While the appellants argued that the test for a nexus to an immigration purpose is whether removal is reasonably foreseeable, the FCA affirms that it is a "possibility" test based on objective and credible facts.[33]

B. The standard of review is reasonableness

28. Reasonableness is the presumptive standard of review when reviewing administrative decisions on their merits.[34] None of the circumstances in this case warrant a departure from this presumption.

29. Reasonableness review entails a robust evaluation of administrative decisions, while keeping in mind that perfection is not the standard.[35] In deferential review, courts should respect the specialized expertise of administrative decision-makers.[36] A review of an administrative decision cannot be divorced from the "institutional context in which the decision was made nor from the history of the proceedings."[37]

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[30] *Ibid* at para 32.
[31] *Ibid* at para 44.
[32] *Ibid*.
[33] *Ibid* at para 95.
[34] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 10 [*Vavilov*].
[35] *Ibid* at paras 13, 91.
[36] *Ibid* at para 75.
[37] *Ibid* at para 91.

30. A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker.[38] In conducting a reasonableness review, the reviewing court must be able to trace the decision-maker's reasoning without encountering any fatal flaws in its overarching logic, and be satisfied that there is a line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived.[39] The Supreme Court of Canada ("**SCC**") states that "the reasonableness standard requires that a reviewing court defer to such a decision."[40]

C. Principles of statutory interpretation

31. The purpose of statutory interpretation is to ascertain legislative intent,[41] where the words of a provision must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[42] This approach, known as the "modern principle" of statutory interpretation, applies equally to acts and regulations.[43]

32. The "modern principle" requires an examination of three factors: a) the language of the provision, b) the context in which the language is used, and c) the purposes of the legislation or

[38] *Ibid* at paras 85, 101-105.
[39] *Ibid* at para 102.
[40] *Ibid* at para 85.
[41] *R v Dineley*, 2012 SCC 58 at para 44.
[42] *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21 [*Rizzo*]; *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 26 [*Bell*]; See also *R v JD*, 2022 SCC 15 at para 21.
[43] *Vavilov* at para 117; *2275518 Ontario Inc v The Toronto-Dominion Bank*, 2024 ONCA 343 at para 36.

statutory scheme in which the language is found.[44] Administrative decision-makers must demonstrate that they were alive to these elements in their reasons.[45]

33. In the federal legislative context, the "modern principle" is supported by s. 12 of the *Interpretation Act*, which provides that every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."[46] The *IRPA*'s immigration objectives are listed under s. 3(1).[47]

D. Paragraph 58(1)(a) of the *IRPA* justifies the Appellant's detention based on danger to the public when there is no nexus to removal

34. Non-citizens should not be permitted to knowingly use false documents to remain in Canada, especially when they pose a danger to the public. Canada cannot become a safe haven for criminal activity. Consistent with the statutory framework under s. 58(1) of the *IRPA*, the FC reasonably decided that the ID erred in finding that danger to the public requires a nexus to removal and is not a standalone ground of detention.

1) Danger to the public is a standalone ground of detention

35. The ID's interpretation of s. 58(1) of the *IRPA* is unreasonable. In finding that danger to the public is not a standalone ground of detention, the ID's analysis omitted consideration of the plain language of s. 58(1)(a), the scheme of the detention and release provisions of the *IRPA*, and the purpose of immigration detention.

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[44] *Vavilov* at paras 119-121.
[45] *Ibid*; See also *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 69.
[46] *Pearce v Canada (Staff of the Non-Public Funds, Canadian Forces)*, 2021 ONCA 65 at para 42, quoting *Bell* at para 26.
[47] *IRPA*, s 3(1).

(i) Textual analysis supports the FC's interpretation

36. A plain, grammatical, and ordinary reading of s. 58(1)(a) indicates that, as found by the FC, a permanent resident or foreign national can be held in immigration detention based on the standalone ground of being a danger to the public. Paragraphs (a)-(e) are not conjunctive; any one of the five enumerated circumstances are standalone grounds of detention.[48]

37. The process of statutory interpretation starts with analyzing the ordinary meaning of s. 58(1).[49] The ordinary meaning is "the natural meaning which appears when the provision is simply read through as a whole."[50] While the "grammatical and ordinary sense of a section is not determinative and does not constitute the end of the inquiry,"[51] it is presumed that the ordinary meaning of s. 58(1) is the legislature's intended meaning. In the absence of a reason to reject it, the ordinary meaning of s. 58(1) prevails.[52]

38. The use of the term 'or' under s. 58(1) demonstrates that Parliament intended paragraphs 58(1)(a)-(e) to be standalone grounds for detention. While a court conducting a statutory interpretation exercise must read the text in its entire context and consider the purpose of the provision, the interpretation ultimately adopted "must nevertheless be consistent with the words chosen by Parliament."[53] The ID "cannot wish away the statutory language" or "disregard the

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[48] *Canada (Public Safety and Emergency Preparedness) v Taino*, 2020 FC 427 at para 45 [*Taino*].
[49] *ATCO Gas & Pipelines Ltd v Alberta (Energy & Utilities Board)*, 2006 SCC 4 at para 41 [*ATCO Gas*]; see also Ruth Sullivan, *The Construction of Statutes*, 7th ed (Toronto, Ontario: LexisNexis Canada, 2022) at 28 [Sullivan].
[50] *Canadian Pacific Air Lines Ltd v Canadian Air Line Pilots Assn*, [1993] 3 SCR 724 at 735.
[51] *ATCO Gas* at para 48.
[52] Sullivan at 28; *Zhang v Canada (Minister of Citizenship and Immigration) (FC)*, 2007 FC 593 at para 11.
[53] *Re: Sound v Motion Picture Theatre Associations of Canada*, 2012 SCC 38 at para 33.

actual words chosen by Parliament…"[54] Therefore, a plain textual reading of s. 58(1) demonstrates that danger to the public is a standalone ground for detention.

(ii) Contextual analysis supports the FC's interpretation

39. A contextual analysis of s. 58(1) supports the FC's finding that danger to the public is a standalone ground of detention. A contextual analysis of a statutory provision considers the surrounding language and broader context of the related provisions and statute as a whole.[55]

40. The ID's interpretation of ss. 58(1) and (2) of the *IRPA* was unreasonable. In *Samuels*, the FC held that the *IRPA* does not require a removal order to be enforceable to justify detention under ss. 58(1) and (2). It further held that stayed removal orders are not void.[56] The FC in *Taino* supported this interpretation.[57] The Appellant's removal order is not stayed and remains valid even though it cannot be executed before his identity is confirmed.

41. When the words of s. 58(1) are read in their grammatical and ordinary sense, as well as harmoniously with the scheme and object of the *IRPA*, one cannot read in the word 'enforceable' before 'removal order.'[58] Subsections 58(1) and (2) unambiguously authorize continued detention on the basis of danger to the public, even when removal is not possible. Conversely, subsection

[54] *Saulnier v Royal Bank of Canada*, 2008 SCC 58 at para 15; *Canada (Information Commissioner) v Canada (Minister of National Defence)*, 2011 SCC 25 at para 40.
[55] *Canada v Bezan Cattle Corporation*, 2023 FCA 95 at para 61.
[56] *Canada (Public Safety and Emergency Preparedness) v Samuels*, 2009 FC 1152 at paras 27-31 [*Samuels*].
[57] *Taino* at paras 54-55.
[58] *Vavilov* at para 117; see also *Rizzo* at para 21.

48(1) states that a "removal order is enforceable if it has come into force and is not stayed."[59] Parliament's choice not to make such a delineation under s. 58 must be understood as deliberate.

42. The Appellant is, in effect, asking the Court to read the exclusion of stayed removal orders into s. 58(2), which would then provide that "[t]he [ID] may order the detention of a permanent resident or a foreign national if it is satisfied that the permanent resident or the foreign national … is subject to an *enforceable* removal order and that the permanent resident or the foreign national is a danger to the public…"[60] However, the enforceability of a removal order is not a prerequisite to detention, particularly when s. 58(2) is contrasted with s. 48.[61]

43. Parliament did not include a requirement in s. 58(2) that a removal order be enforceable to effect detention. Detention under s. 58(2) only requires the existence of a valid removal order. Detention is permitted, and sometimes occurs, in other contexts where removal orders are not enforceable such as for pending refugee and pre-removal risk assessment claimants, if there are underlying concerns, including identity, flight risk, or danger to the public.[62] The Government in Council could have – but did not – write 'enforceable' in the *IRPA*'s detention provision,[63] whereas it did in other provisions like ss. 206, 209, 215, 222, 224, 250, 273, 274, and 276 of the *Regulations*.

44. Public protection is an enumerated objective of the *IRPA*.[64] In applying protective legislation like the *IRPA* and the *Regulations*, interpretations that would interfere or frustrate the

[59] *IRPA*, s 48(1).
[60] *Samuels* at paras 27-31.
[61] *IRPA*, s 48.
[62] *Taino* at paras 38-39.
[63] *Ibid* at para 55.
[64] *IRPA*, s 3(1)(h).

legislature's public welfare objectives must be avoided.[65] The combined effect of s. 58(1)(a) and s. 58(2) is that a foreign national may be detained if subject to a removal order, and remain detained if declared a danger to the public. In other words, assuming a valid removal order exists, any of the circumstances in paragraphs (a)-(e) of s. 58(1) justify refusing the Appellant's release. To interpret s. 58(1) as not permitting detention on the standalone ground of danger to the public would interfere with the *IRPA*'s objective of protecting the public and national security.

45. The *IRPA* places a stronger emphasis on the safety of Canadian citizens than the *Immigration Act* ("**former Act**"), prioritizing security as a key aim through its s. 3 objectives.[66] Newer statutes and provisions prevail,[67] and while the former Act emphasized the successful integration of applicants, the focus has shifted to protecting Canadian security.[68] Viewed collectively, the scheme, objectives, and provisions of the *IRPA* and the *Regulations* communicate a strong desire to treat criminals and security threats more strictly than under the former Act.

(iii) Purposive analysis supports the FC's interpretation

46. The FC's interpretation of s. 58(1) of the *IRPA* is consistent with a purposive analysis, which reveals Parliament's intention to closely tie the CBSA's detention authority under the *IRPA* to public safety and security, as mandated by s. 3(1)(h).

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[65] *Ontario (Ministry of Labour) v Hamilton (City)*, 2002 CanLII 16893 (ON CA) at para 16, 58 OR (3d) 37, leave to appeal refused, [2002] SCCA No 146; see also *Ontario (Labour) v Quinton Steel (Wellington) Limited*, 2017 ONCA 1006 at para 19.
[66] *Medovarski v Canada (Minister of Citizenship and Immigration*); *Esteban v Canada (Minister of Citizenship and Immigration*, 2005 SCC 51 at para 10 [*Esteban*].
[67] *Lévis (City) v Fraternité des policiers de Lévis Inc*, 2007 SCC 14 at para 59.
[68] *Esteban* at para 10; see *IRPA*, ss 3(1)(e), (h), (i) versus *Immigration Act*, 1976, SC 1976-77, c 52, s 27, ss 3(d), (i), (j).

47. Detention must always be tethered to an enumerated statutory purpose,[69] and the *IRPA* authorizes detention for multiple purposes, including pending determination of identity, admissibility, or on grounds of public safety.[70] In *Brown*, the FCA explicitly tied the grounds of detention under s. 58 of the *IRPA* to the purpose of protecting public safety and security of Canadians.[71] Through its enactment of paragraphs 58(1)(a) and 3(1)(h), Parliament intended foreign nationals or permanent residents to be held in immigration detention on the basis of being a danger to the public.

48. Based on an ordinary reading of the *IRPA*, the ID can maintain an individual's detention, having taken into account the prescribed factors under the *Regulations*, if they are a danger to the public.[72] Removal, and the existence of a removal order, "is one hinge in the machinery of immigration control."[73] However, so too is danger to the public, which acts as a second hinge necessitating detention.[74] As the FC stated in *Sahin*, "[...] there is a stronger case for continuing a long detention when an individual is considered a danger to the public."[75]

49. While the Appellant's detention may be unhinged from removal, it is not unhinged from an enumerated immigration purpose. There is no question that the Appellant is a danger to the public,[76] and as the FC reasonably determined,[77] ensuring public protection is an immigration

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[69] *Brown* at para 42.
[70] *IRPA*, s 58.
[71] *Brown* at para 44; *Deng* at para 17.
[72] *Taino* at para 40.
[73] *Ibid* at para 52.
[74] *Ibid*.
[75] *Sahin v Canada (Minister of Citizenship and Immigration) (TD)*, 1994 CanLII 3521 (FC) at 23, [1995] 1 FC 214 [*Sahin*].
[76] *ID Decision* at para 16; *Deng* at para 17.
[77] *Deng* at paras 14-17.

purpose quite apart from removal and remains a basis for detention.[78] The ID had jurisdiction to order the Appellant's continued detention if it was satisfied that he was a danger to the public.[79]

2) The Appellant is a danger to the public

50. The public should not be forced to bear the burden of the Appellant's violent behaviour when he has no right to be in Canada. The FC's decision to overturn the ID's unconditional release of the Appellant was reasonable, especially given the danger that he poses to everyday citizens.

51. In *Lunyamila*, the FC found Lunyamila's release order "completely unreasonable."[80] Like the Appellant, Lunyamila was convicted of assault, sexual assault, possession of a weapon for a dangerous purpose, and for assaulting strangers on the street without provocation.[81] The FC held that it was "somewhat disconcerting that an individual who has been held in detention for more than two years as being a danger to the public can be ordered released with immediate effect."[82]

52. In *Smith*, Smith was transferred to immigration detention pursuant to the *IRPA* after completing his criminal sentence. Like the Appellant, Smith's behaviour was increasingly violent and his criminal history included assault and carrying weapons.[83] Although the FC noted that Smith's "mental health [was] deteriorat[ing]," it maintained his detention because "[t]he right of the public to be protected cannot be sacrificed…"[84]

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[78] *Taino* at para 51.
[79] *Ibid* at paras 54-55, quoting *Samuels* at paras 27-31.
[80] *Canada (Public Safety and Emergency Preparedness) v Lunyamila*, 2016 FC 289 at para 19 [*Lunyamila*].
[81] *Ibid* at para 10.
[82] *Ibid* at para 21.
[83] *Canada (Public Safety and Emergency Preparedness) v Smith*, 2019 FC 1454 at paras 9, 33 [*Smith*].
[84] *Ibid* at paras 76, 103.

53. The ID did not impose any terms and conditions on the Appellant's release despite establishing he was a danger to the public.[85] As noted in *Thavagnanathiruchelvam*, "Parliament has conferred upon the [ID], not [the FC], the task of balancing the risk factors and the effectiveness of the release conditions to mitigate the risk."[86] In ordering the Appellant's release, the ID failed to sufficiently consider conditions of release, unlike in *Suleiman* where the FC held that Suleiman's release was reasonable because appropriate conditions were considered.[87]

54. Any alternatives to detention are unlikely to sufficiently address the Appellant's violent behaviour. In *Suleiman,* Suleiman was released in "exceptional circumstances" largely based on the rehabilitation programs he had already attended at Circles of Support and Accountability Ottawa and Royal's Sexual Behaviours Clinic.[88] In comparison, the Appellant is an unrehabilitated recidivist who has not participated in any rehabilitation or additional programming while in criminal or immigration detention. There is no evidence demonstrating that he will no longer pose a threat to public safety upon release.

55. Ultimately, the Appellant's continued detention on the standalone ground of danger to the public is reasonable when factors like his increasingly violent behaviour and pattern of attacking strangers are considered holistically. While the Appellant's liberty is paramount, "so too is the safety of the public."[89]

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[85] *ID Decision* at para 18.
[86] *Canada (Public Safety and Emergency Preparedness) v Thavagnanathiruchelvam*, 2021 FC 592 at para 32.
[87] *Canada (Public Safety and Emergency Preparedness) v Suleiman*, 2022 FC 286 at para 85.
[88] *Ibid* at paras 16, 85.
[89] *Lunyamila* at para 21.

E. <u>There is a nexus to removal sufficient to ground the detention of the Appellant under the *IRPA* so long as the state is making any active efforts to pursue removal</u>

56. The "any active efforts" standard adopted by the FC is a reasonable test in finding a nexus to removal and should be adopted.[90] The FC defines this standard as any efforts or steps of the state to effect removal.[91] This standard is met even when the state's efforts remain unchanged. The "any active efforts" test is the appropriate test because it best reflects the *IRPA*'s statutory objectives and one of the fundamental principles of Canadian immigration law, namely, ensuring the safety and protection of Canadian citizens.

57. In *Brown*, the FCA considered both the "reasonable foreseeability" test and the "possibility" test to find a nexus to an immigration purpose. As held in *Brown*, the "reasonable foreseeability" test, or whether removal is reasonably foreseeable, should not be the test.[92] Without clear guidance, this leaves unanswered questions, such as "foreseeable by whom?" and "reasonable according to whom?", which can lead to inconsistent results.[93] The SCC also makes no mention of a test of reasonable foreseeability in *Charkaoui*.[94]

58. The FCA in *Brown* stated that the "possibility" test is the appropriate standard.[95] This standard is whether removal is a possibility based on objective, credible facts. The decision-maker must be satisfied that removal remains a realistic possibility. However, when considering the challenges of the removal process, this should not be the test. It is too high of a standard which

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[90] *Deng* at para 10.
[91] *Ibid.*
[92] *Brown* at para 93.
[93] *Ibid* at paras 93-94.
[94] *Ibid*.
[95] *Ibid* at para 95.

allows for too much reliance on the receiving state. Where a receiving state is uncooperative and removal is delayed, the "possibility" test allows for violent non-citizens to be released into society too easily.

59. Instead, the "any active efforts" standard should be adopted when finding a nexus to removal. Unlike the "possibility" test, a lower threshold standard eliminates the issue of an uncooperative receiving state. This standard takes into consideration the reality that Canada does not have complete control over the removal of foreign nationals. In these circumstances, it allows for Canada to enforce its detention regime and carry out the *IRPA*'s statutory objectives without leaving removal in the hands of the receiving state.

1) The intentions of Parliament support the test of "any active efforts"

60. One of the main objectives of the *IRPA* is to ensure the safety and security of Canadian citizens.[96] In *Chiarelli,* the SCC stated that the most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or to remain in Canada.[97] Underlying this principle, courts have reiterated the importance of Canada avoiding becoming a "haven for criminals and others whom we legitimately do not wish to have among us."[98] The objective to ensure the safety and security of Canadian citizens is given effect by removing non-citizens who have engaged in criminality from Canada and by preventing their entry into Canada.

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[96] *IRPA*, s 3(1)(h).
[97] *Chiarelli v Canada (Minister of Employment and Immigration)*, 1992 CanLII 87 (SCC) at 733, [1992] 1 SCR 711.
[98] *Alam v Canada (Citizenship and Immigration)*, 2014 FC 556 at para 1.

61. Not only should these principles apply when establishing a foreign national's admissibility to remain in the country, but also when contemplating their detention or release during the removal process. To ensure this, Parliament provides the power to detain under the *IRPA* as a tool in order to carry out these objectives.[99]

62. A reasonable approach in finding a nexus to removal is one that would emphasize Parliament's intentions, such as the "any active efforts" test. The *IRPA*'s statutory objectives make clear that Parliament did not intend for the "possibility" test to be the appropriate standard because it is too strict of a standard. This standard allows for violent non-citizens to be released too easily which poses serious threats to society. Adopting "any active efforts" as the standard provides the state the power to detain foreign nationals when necessary and better reflects Parliament's legislative intent.

63. Whether the Appellant poses a continuing violent risk to the public is not at issue. His extensive criminal record demonstrates his violent behaviour and that he poses a danger to the public. If detention under the *IRPA* cannot be exercised on the standalone ground of danger to the public, adopting the "possibility test" has harmful implications since it may result in the Appellant's release given the impasse between CBSA and South Sudan.

64. The ongoing inaction of South Sudan should not have repercussions that negatively impact Canadian citizens. If released, the Appellant is likely to return to his previous circumstances of being unhoused and suffering from substance abuse, both of which will increase his risk of recidivism. The Appellant may continue his pattern of criminal behaviour and without a

[99] *Brown* at paras 40-44.

comprehensive plan for rehabilitation, there is a substantial likelihood that he will commit violent crimes against Canadian citizens if he is released.

2) The state does not have complete control over the Appellant's removal

65. The removal of a foreign national is dependent on the cooperation of the receiving state. Canada does not have complete control over a foreign national's removal, and therefore, its facilitation may be frustrated by external factors within the receiving state and/or by a lack of evidence as to the detainee's identity. Removal may be disrupted by several external factors, such as political turmoil in the receiving state or environmental disasters.[100] However, Canadian citizens should not be burdened with violent non-citizens as a result of these external factors beyond Canada's control. The receiving state's failure to cooperate has detrimental consequences to the public interest. In this case, Canada does not have the ability to circumvent the delays caused by the South Sudanese officials and their own administrative processes. Merely because the Appellant does not have a country to return to cannot mean that the state is required to release him. This would be contrary to Parliament's legislative intent.

66. Given the challenges of the removal process, the "any active efforts" test adopted by the FC is reasonable and should be adopted. This test acknowledges the lack of control that Canada has and allows for Canada to continue carrying out the objectives which Parliament intended. In the last 13 detention reviews, the ID found the Appellant to be a danger to the public, and the Appellant did not furnish sufficient evidence to the contrary.[101] Granting the state the power to

[100] *Brown* at para 53.
[101] *ID Decision* at para 6.

detain the Appellant while facilitating his removal ensures that Canadian citizens are protected from the inaction of the receiving state.

67. The Appellant has cooperated with CBSA's efforts to establish his identity and to obtain a travel document. However, there is a risk that some detainees may be uncooperative, rendering removal not possible. The "possibility" test enables detainees to be less forthcoming in establishing their identity or even manipulate the removal process in order to avoid detention. This cannot have been Parliament's legislative intent in enacting the detention scheme. However, the "any active efforts" test ensures the state has an appropriate mechanism to deal with lack of cooperation whether it's by the receiving state or the detainee. In these circumstances, Parliament intended the state to effect removal while accounting for their lack of complete control over this process.

F. The Appellant's detention under the *IRPA* does not violate the *Charter*

68. The immigration detention scheme under the *IRPA* is lawful. The SCC in *Charkaoui* and the FCA in *Brown* have affirmed that extended periods of detention are compliant with the *Charter* as long as it includes robust and timely reviews of the continued need for detention.[102] For detention under s. 58(1) of the *IRPA*, these periods may be lengthy and indeterminate, but there is nonetheless a meaningful process by the ID which takes into account the circumstances of the detainee. At each detention review, the ID takes into consideration any factors that may be relevant to a detainee's release or detention.[103] Therefore, it is not the constitutionality of the immigration detention scheme that is at issue, but instead, the constitutionality of the Appellant's detention.

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[102] *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at paras 109-110 [*Charkaoui*]; *Brown* at para 22.
[103] *Charkaoui* at para 109.

69. The SCC in *Doré* and *Loyola* held that where an administrative decision engages the *Charter*, the reviewing court should apply a framework consistent with administrative law principles instead of the traditional *Oakes* s. 1 test.[104] When assessing the constitutionality of an adjudicated decision, in essence, it is conceptually similar to the s. 1 *Oakes* test, since both involve a balancing of *Charter* values against broader objectives.[105]

70. Under the *Doré* approach, a reviewing court begins by determining whether the administrative decision at issue engages an individual's rights under the *Charter*.[106] Then, the reviewing court assesses whether the decision-maker balanced the *Charter* values with the statutory objectives.[107] If the decision-maker has proportionately balanced the *Charter* values with the statutory objectives and factual context, the decision is reasonable.[108]

1) The Appellant's detention does not violate his s. 7 *Charter* rights

71. The Appellant's detention engages his right to liberty and security of the person. However, any deprivation of the Appellant's s. 7 *Charter* rights is in accordance with the principles of fundamental justice. The principles of fundamental justice include principles against arbitrariness, overbreadth, and gross disproportionality.[109]

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[104] *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 at para 3 [*Loyola*]; *Doré v Barreau du Québec*, 2012 SCC 12 at paras 3-6 [*Doré*].
[105] *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para 79.
[106] *Ibid* at para 61.
[107] *Ibid* at para 56.
[108] *Ibid* at para 58.
[109] *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 125 [*Bedford*].

72. A decision is arbitrary when it fails to target the purpose of the enabling legislation.[110] The FC's decision is not arbitrary as there is a rational connection between the impugned decision and the statutory purpose of maintaining the safety of Canadian citizens pursuant to s. 3(1)(h) of the *IRPA*. The effect of ordering the Appellant's detention is aligned with these objectives because the Appellant is a danger to the public and poses a risk to the safety of Canadian citizens.

73. A decision is overbroad when it goes too far by denying the rights of an individual in a way that bears no relation to the objective.[111] The FC's decision does not overreach in its effect as the effect on the Appellant is rationally connected to the *IRPA*'s purpose of protecting Canadian citizens from violent non-citizens.

74. Gross disproportionality is only relevant in extreme circumstances where the seriousness of the deprivation is completely misaligned with the objective of the measure.[112] It cannot be said that the FC decision constitutes such an extreme circumstance as the Appellant's detention does not go beyond what is necessary. It is appropriately aligned with Parliament's objective of keeping Canadian citizens safe from violent criminals.

2) The Appellant's detention does not violate his s. 9 *Charter* rights

75. In assessing whether the Appellant's detention is lawful, the detention "must be authorized by law; the authorizing law itself must not be arbitrary; and the manner in which the detention is carried out must be reasonable."[113]

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[110] *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at para 129 [*PHS*].
[111] *Bedford* at paras 101, 112-113.
[112] *Ibid* at para 120.
[113] *R v Le*, 2019 SCC 34 at para 124.

76. The Appellant's detention is authorized by s. 58(2) of the *IRPA*, which states that the ID may order detention if an individual is subject to a removal order and is a danger to the public and/or is unlikely to appear for removal.

77. The authorizing law is not arbitrary as s. 246 of the *Regulations* sets out clear criteria that the Minister must take into consideration when assessing the level of danger that the individual poses to society.[114] This includes:

> 246 For the purposes of paragraph 244(b), the factors are the following:
>
> […]
>
> (d) conviction in Canada under an Act of Parliament for
>
> (i) a sexual offence, or
>
> (ii) an offence involving violence or weapons.[115]

78. Lastly, the Appellant's detention is carried out in a reasonable manner. Although lengthy and indeterminate, the Appellant's detention has been reviewed 14 times in the last year. There is no evidence that the Appellant has been subjected to unreasonable circumstances during his detention. If the Appellant is dissatisfied with the conditions of his detention, the FCA in *Brown* held that he may bring a judicial review application in the FC using the *Judicial Review Procedure Act*, RSO 1990, c J 1.[116]

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[114] *Regulations*, s 246.
[115] *Ibid* at s 246(d).
[116] *Brown* at para 36.

3) The FC's judgement to set aside the ID's decision is reasonable

79. The ID did not proportionately balance the Appellant's *Charter* values with the *IRPA*'s statutory objectives as *Doré* requires. The ID's finding that a *Charter* breach trumps public safety ignores that *Charter* rights are subject to reasonable limits.[117] The ID states that it would raise serious issues if non-citizens could be detained solely for public safety reasons, but there is no mention of the *IRPA*'s statutory objective to maintain public safety.[118] The ID's decision is unreasonable.

80. The *Doré* approach to reviewing administrative decisions implicating the *Charter* "responds to the diverse set of statutory and procedural contexts in which administrative decision-makers operate [...]."[119] The SCC in *Charkaoui* noted the importance of protecting the public. Chief Justice McLachlin stated "[o]ne of the most fundamental responsibilities of a government is to ensure the security of its citizens."[120] The state has a legitimate interest in ensuring that Canadian citizens are protected and safe from violent non-citizens who have no right to be in Canada. Parliament designed s. 58(1)(a) to achieve this aim and the FC's decision advances these statutory objectives by maintaining the Appellant's detention. Where the Appellant's *Charter* rights are balanced against the state's pressing objective, it cannot be said that the FC's decision disproportionately impairs the Appellant's *Charter* guarantee. Considering the statutory context, the FC's decision is a reasonable one.

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[117] *ID Decision* at para 16; *Smith* at para 100.
[118] *ID Decision* at para 16.
[119] *Ibid* at para 42.
[120] *Charkaoui* at para 1; *Taino* at para 74.

G. Conclusion

81. Mr. Niahl Deng has engaged in serious criminality against members of the public at random. The public interest is at risk and must be taken into consideration. In these circumstances, Parliament has specifically equipped the state with the obligation to enforce immigration laws consistent with clear statutory language. This obligation includes enforcing a detention regime against violent non-citizens who have no right to be in Canada. Both certified questions must be answered in the affirmative. Any breach of the Appellant's *Charter* rights has been proportionately balanced with the *IRPA*'s statutory objectives.

PART IV: ORDERS SOUGHT

82. The appeal should be dismissed, and the certified questions answered in the positive.

All of which is respectfully submitted this 7th day of February 2025.

Team 80R
Counsel for the Respondent

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