Goodland Buckingham

Barristers & Solicitors

David P. Goodland, Q.C.
Direct + 1 (709) 722-4710
dgoodland@gbbarristers.com

16 Forest Road, Suite 200
St. John's, NL
Canada A1C 2B9
Tel + 1 (709) 722-4700 | Fax +1 (709) 722-4720

July 18, 2018

Via Courier

Newfoundland and Labrador
Board of Commissioners of Public Utilities
120 Torbay Road
P.O. Box 21040
St. John's, NL A1A 5B2

Attention: Sara Kean
Assistant Board Secretary

Dear Ms. Kean:

Re: 2017 Automobile Insurance Review – Application by Campaign to Protect Accident Victims – AVIVA Canada's Submission and Presentation – Comments Schedule

In relation to the above noted please find enclosed herewith the original, plus eight (8) copies of the Response of Aviva Canada Inc.

We trust the enclosed is satisfactory.

Yours very truly,

GOODLAND BUCKINGHAM

David Goodland, Q.C.
DPG/rs
Enc.

IN THE MATTER OF an Insurance Review Hearing before the Board of Commissioners of Public Utilities

AND IN THE MATTER OF an Application by the Campaign to Protect Accident Victims to question Aviva Canada Inc.

BETWEEN:

THE CAMPAIGN TO PROTECT ACCIDENT VICTIMS

APPLICANT

AND:

THE BOARD OF COMMISSIONERS OF PUBLIC UTILITIES

RESPONDENT

RESPONSE OF AVIVA CANADA INC.

IN THE MATTER OF an Insurance Review Hearing before the Board of Commissioners of Public Utilities

AND IN THE MATTER OF an Application by the Campaign to Protect Accident Victims to question Aviva Canada Inc.

BETWEEN:

THE CAMPAIGN TO PROTECT ACCIDENT VICTIMS

APPLICANT

AND:

THE BOARD OF COMMISSIONERS OF PUBLIC UTILITIES

RESPONDENT

RESPONSE OF AVIVA CANADA INC.

Background Facts

1. On August 9, 2017 the Minister of Service NL for the Government of Newfoundland and Labrador directed the Board Commissioners of Public Utilities (hereafter the "Board") "to conduct a review and provide a report of automobile insurance in the Province as stipulated in the attached Terms of Reference"

Tab #1

2. Pursuant to the aforementioned directive the Board posted on its website a Notice of Public Hearing – Invitation to Participate wherein the Board specifically advised the public:

> "You can participate in the public hearing by (i) becoming an Intervenor which will give you the opportunity to present evidence and ask questions of witnesses, or (ii) making a presentation to the Board during the hearing."

Tab #2

3. Also published on the Board's website are the Board's Hearing Procedures. Paragraph 1 of the Hearing Procedures states:

> "1. The Chair is responsible for the conduct of the hearing and decisions of the Chair are final."

Tab #3

4. The Board then published on its website a document titled "2017 Automobile Insurance Review Hearing Information". At paragraph 2 of the Hearing Information document the procedure/process to govern Presenters was confirmed as follows:

> "Presenters will not be sworn or subject to cross-examination. The Board's consultants and the parties' presenters may be questioned by the Board and the other parties. The Board may ask questions of all presenters".

Tab #4

5. The Board on June 6, 2018 provided an update listing of the Parties involved in the hearing and at that time a total five (5) groups were confirmed as having party status, one of which was the Applicant herein.

Tab #5

6. Also on the Board website the Board confirmed its list of Presenters along with the schedule of dates for presentations. One of the listed presenters was Aviva Canada Inc. (hereafter "Aviva").

Tab #6

7. The hearing commenced on June 5, 2018. Prior to the commencement of the hearing and in compliance with the filing deadlines set out by the Board on May 31, 2018, Aviva filed with the Board its presentation.

8. On Friday, June 8, 2018 as the hearing for that day was concluding counsel for the Applicant advised the Board that it was requesting the Board permit the Applicant to

question Aviva on Monday, June 11, 2018 (which was the time had been scheduled for Aviva's presentation). On that same date the Board advised Aviva of the Applicant's request and Aviva advised the Board that such a request was contrary to the rules established by the Board governing Presenters (which included Aviva) and as such Aviva would not be consenting to the Applicant's request.

The Law

Procedural Fairness – Duty to act Fairly

9. Nicholson v. Haldimand-Norfolk (Regional Municipality) Commissioners of Police [1979] 1 *S.C.R. 311.*

Nicholson, supra, established in Canada that Public authorities have a duty to act fairly when making decisions. The threshold for triggering the duty of procedural fairness was and remains quite low, requiring only that an individuals' "rights, privileges or interests" be at issue.

Tab #7

10. Regarding the present Automobile Insurance Review hearing Aviva submits the Board provided a procedure to the public for participation which allowed persons to choose whether to be (i) an Intervenor or (ii) a Presenter or (iii) to provide comment to the Board Review. The Board outlined the various types of participation in the hearing.

11. The Applicant is now seeking an order from the Board which would effectively force Aviva to be a party and deny Aviva its right to choose how Aviva participates in the Automobile Insurance Review. Aviva has the right to be treated fairly under the stated and established procedures of the Board. If the Board orders the relief the Applicant seeks, then Aviva's right to choose how it participates in the public Board Review is being denied and this treatment of Aviva would be of a differential nature than the other parties granted Presenter status. Such an order would be contrary to the Board's duty to act fairly when making decisions.

Procedural Fairness – Test

12. Baker v. Canada (Minister of Citizenship & Immigration) 2 S.C.R. 817 6.

Baker, *supra*, remains the leading case on procedural fairness in Canada (in the administrative law context).

Tab #8

13. The SCC emphasized that procedural fairness is flexible and entirely dependent on context. In order to determine the degree of procedural fairness owed in a given in case, the court set out five factors to be considered:

(1) the nature of the decision;
(2) the nature of the statutory scheme;
(3) the importance of the decision to the affected person;
(4) the presence of any legitimate expectations; [emphasis added] and
(5) the choice of procedure made by the decision-maker.

14. In many of the cases, one or two of these factors become dominant in determining the degree of procedural fairness owed.

Procedural Fairness – Right to be heard/freedom to put forward case in manner person choses

15. In some contexts, the right to be heard requires that an individual or group have the freedom to put forward their case in the manner in which they choose to. In the normal course of things, an administrative body would not tell a party what witnesses they are required to tender or provide statements for.

16. For example, in ***International Labourers Union of North America Local 183 v. Ontario* (Human Rights Commission) [2006] O.J. No. 50 (Div. Ct.)** an employee and union

steward, Mr. Tubbs, made comments during a union meeting about the treatment of minority union members, such as himself. Mr. Tubbs was black. On the night of the meeting, Mr. Tubbs comments were challenged by other Union members. The attack was a personal one. As a result, Mr. Tubbs filed a complaint under the Ontario Human Rights Code10 alleging discrimination on the basis of race and color. The Commission investigated and was of the view that Mr. Tubbs' rights under the Code had been violated. The matter was referred to the Tribunal. During the hearing and despite the objections of the Union, the Tribunal permitted Mr. Tubbs to amend his complaint and plead seven occasions of reprisal in addition to the original grounds. In granting the amendments, the Tribunal rendered an interim order requiring the Union to present evidence, including will-say statements for 10 witnesses, some of whom the Union had no intention of calling. The Union appealed and argued that the decision was procedurally unfair. Upon reviewing the Code and in distinguishing between the inquisitorial function of the Commission, and the adjudicative function of the tribunal, the Court held that the tribunal had breached the principles of procedural justice by not allowing the Union to conduct their case in the manner they saw fit. In result, the interim order of the Tribunal was set aside.

Tab #9

17. *International Labourers Union, supra*, can be applied as analogous to Aviva's situation as the Applicant is seeking to force Aviva to become involved in the hearing in a role/manner in which Aviva has specifically chosen not to pursue and in a manner that would see Aviva treated differently than all other Presenters. The Applicant now requests the Board make an order which would interfere with Aviva's decision to participate as a presenter *only*.

Procedural Fairness - The violation of the legitimate expectation of Aviva

18. One of the primary factors in the *Baker* test for procedural fairness in administrative decision making is the legitimate expectations of the parties. ***The Doctrine of Legitimate Expectations*** is based on whether there were any representations by word or conduct that led the parties to believe there was some type of procedural protection. Legitimate

expectations can arise in two circumstances: First, if there is a consistent pattern of the Administrative Decision Maker in similar cases; and, second, if there is an express representation.

19. The Board made express representations to the public, and indeed to Aviva, that a Presenter would not be subject to questioning from Intervenors AND the Board has not allowed questioning of other Presenters by the Intervenors during the Board Review hearings.

20. The test re: Legitimate Expectations has four parts: a public authority makes a promise; the promise is to follow a certain procedure; in respect to an interested person; and, they relied and acted upon that promise.

21. The test has clearly been met, such that Aviva relied on the express written representation of the Board and the Board has conducted the hearing such that no questioning, cross examination or otherwise, has been allowed of presenters by any Intervenors.

22. In *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, the Supreme Court of Canada articulated the following principles of legitimate expectation:

> *The legitimate expectation may arise from some conduct of the decision-maker or some other relevant actor. The practice or conduct said to give rise to the reasonable expectation must be clear, unambiguous and unqualified, meaning to the level that had they been made in the context of a private law contract, they would be sufficiently certain to be capable of enforcement.*

Tab #10

23. A legitimate expectation may arise where a public authority or agency:

    i. has made representations about the procedure it will follow in making a particular decision;

ii. has consistently adhered to certain procedural practices in the past in making such a decision;

iii. has made representations with respect to a substantive result to an individual; or

iv. has created administrative rules of procedure or a procedure on which the agency had voluntarily embarked in a particular instance.

24. If a party (in this case Aviva) has a legitimate expectation that a certain procedure will be followed then the duty of fairness requires that procedure be followed.

Procedural Fairness: The nature of the Statutory Scheme:

25. *Baker, supra*, requires that one factor in the review of procedural fairness owing to a claimant pursuant to an administrative decision is the examination of the nature of the statutory scheme:

As *Baker, supra*, states:

24 A second factor is the nature of the statutory scheme and the "terms of the statute pursuant to which the body operates": Old St. Boniface, supra, at p. 1191. The role of the particular decision within the statutory scheme and other surrounding indications in the statute help determine the content of the duty of fairness owed when a particular administrative decision is made. Greater procedural protections, for example, will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted: see D.J.M. Brown and J.M. Evans, Judicial Review of Administrative Action in Canada (loose-leaf), at pp. 7-66 to 7-67.

Further:

27 Fifth, the analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances: Brown and Evans, supra, at pp. 7-66 to 7-70. While this, of course, is not determinative, important weight must be given to the choice of procedures made by the agency itself and its institutional constraints: I.W.A. Local 2-69 v. Consolidated Bathurst Packaging Ltd., [1990] 1 S.C.R. 282 (S.C.C.), per Gonthier J.

26. The *Regulations* (discussed below), at section 3, clearly give the Board choice of procedure. This fact speaks to the need for a high degree of procedural fairness.

27. The Board Review was authorized pursuant to section 3.1(1) of the *Insurance Companies Act* ("ICA") and OC2017-195 when the NL Provincial Government directed the Board to conduct the Review and report on Automobile Insurance as stipulated in terms of reference. Section 3.1(1) of the ICA directs the Board to conduct the Board Review pursuant to the procedures available to the Board under the *Public Utilities Act.*

Board of Commissioners of Public Utilities Regulations, 1996 under the *Public Utilities Act* (OC 96-476) (the "Regulations")

28. Section 3 of the Regulations affords the Board with wide discretion regarding its procedures. It is apparent from the Board's representations to Aviva and to the Public that it has varied its procedural rules in regards to parties and participants in the Board Review of Automobile Insurance. It is these specific representations made by the Board to all Presenters (including Aviva) that Aviva has relied upon.

29. Under the Regulations, for the purpose of the Board Review, Aviva is not an "Intervenor", and the Board has varied the procedure set out in the Regulations for the purpose of the Board Review – and has distinguished Intervenors from Presenters and/or other interested participants.

30. Under the remaining factors in the Baker test (paragraph 13, *supra*) yet to be discussed, Aviva's position ought to be that they weigh in its favour of creating a high degree of Procedural Fairness owing by the Board to Aviva. Those remaining factors are:

(1) **the nature of the decision;**
(2) the nature of the statutory scheme;
(3) **the importance of the decision to the affected person;**
(4) the presence of any legitimate expectations; and
(5) **the choice of procedure made by the decision-maker.**

31. Under factor 1, "the nature of the decision", it is yet to be determined what the Board's decision will be in relation to the within Application. If the decision of the Board is that Aviva is required to be questioned or withdraw its presentation, then such a decision is prejudicial to Aviva with Aviva being treated differently than all other Presenters.

32. Under factor 3, any amendments to Aviva's participation, requiring it to be questioned and examined by a party was a process that all Presenters would avoid and to now change this would essentially force Aviva to withdraw its presentation from the Board Review and therefore, would disallow Aviva's contribution to this public discourse.

33. Finally, under factor 5, which is touched on above, the choice of procedure already made by the Board was that its quasi-judicial procedure would not apply to the Automobile Insurance Review. Therefore a high degree of procedural fairness is owing to Aviva based on the Board's written and verbal representations relating to the hearing procedures it adopted and have followed up to his point in the hearing.

34. At the time the hearing adjourned on June 13th, 2018 eight (8) Presenters had already filed their papers and made their presentations and only after each Presenter gave oral presentation were the Board's panel members given opportunity to ask questions of the public Presenters which is precisely the process all Presenters had agreed to be involved with.

35. Based on the foregoing Aviva requests the Application of the Applicant be dismissed.

DATED AT St. John's, Newfoundland and Labrador this 17th day of July, 2018.

GOODLAND BUCKINGHAM
David P. Goodland, Q.C.
16 Forest Road, Suite 200
St. John's, NL A1C 2B9

1

Newfoundland Labrador

Government of Newfoundland and Labrador
Service NL
Office of the Minister

AUG 0 9 2017

Darlene Whalen
Chair and CEO (Acting)
Board of Commissioners of Public Utilities
P.O. Box 21040
St. John's, NL A1A 5B2

Re: Terms of Reference -
Board of Commissioners of Public Utilities Review into Automobile Insurance

Dear Ms. Whalen:

As set out in Section 3.1 (1) of the *Insurance Companies Act* and OC2017-195, the Lieutenant-Governor in Council directs the Board of Commissioners of Public Utilities to conduct a review and provide a report of automobile insurance in the province as stipulated in the attached Terms of Reference.

Please provide me with a copy of your work plan and estimated time lines for the review when finalized.

Thank you for undertaking this important review.

Sincerely,

S Gambin-Walsh

SHERRY GAMBIN-WALSH, MHA
Placentia-St. Mary's
Minister

Enclosure

Terms of Reference
For The Board of Commissioners of Public Utilities
Review into Automobile Insurance

The Public Utilities Board shall undertake a review and report on the issues outlined below with respect to Automobile Insurance in the Province and in addition shall detail other issues or concerns raised by stakeholders participating in the review. Certain parts of the review are independent of each other and may be provided to the Department of Service NL upon completion separately.

Phase I
Phase I of the review will consist of a closed claim study into private passenger automobile insurance and a separate closed claim study into causes of high taxi claims costs.

- To conduct a closed claims study to determine the costs associated with Third Party Liability / Section A bodily injury claims arising from the use of private passenger vehicles, including the use (or no use) of interim payments and whether Accident Benefits were available.

- To review the impact on rates of a monetary cap on claims for non-economic loss for minor/mild injuries and the implications of such a cap for claimants.

- To review the impact on rates of continuing with the current deductible of $2,500 or increasing the deductible.

- To conduct an audit of taxi closed claims to determine the causes of poor claims experience, including details regarding the underlying causes of loss and high claim costs incurred, and provide any recommendations to reduce claim costs and reduce rates.

Phase II
Phase II will review the existing private passenger automobile insurance products and assess and recommend possible options to contain costs.

- To review the auto insurance product offered in Newfoundland and Labrador and conduct a jurisdictional scan of other provinces' auto insurance product offerings.

- To review the current mandatory Section A/Third Party Liability limit of $200,000 and the rate implications of increasing the limit.

- To review Section B/Accident Benefits coverage and impact on rates with respect to:
    - Coverage limits on medical and rehabilitation benefits and indemnity for loss of income;
    - Benefit payment practices (i.e. advance payments versus reimbursement);
    - Order of payment of benefits in relation to other insurance plans;
    - Timeliness and efficiency of the injury assessment process;
    - The relationship of Section B benefits to the settlement of Section A benefits; and
    - Whether the coverage should be mandatory.

- To review the impact of Newfoundland and Labrador adopting minor injury diagnostic and treatment protocols such as those provided in Alberta and Nova Scotia and how mandatory Section B coverage and the diagnostic protocols would impact Section A claim costs.

- To review the impact of offering direct compensation for physical damage to automobiles (Section C).

- To review Section D Uninsured Automobiles coverage in the Province.

- To report on measures to improve highway safety and automotive accident prevention in Newfoundland and Labrador.

- To review the financial profitability of the auto insurance industry in Newfoundland and Labrador.

- To review the current auto insurance market and provide comment of insurer exits and report on ways to encourage new entrants into the market.

- To report any other cost savings or other improvements on any aspect of automobile insurance offered in this Province.

2

PUBLIC UTILITIES BOARD

Automobile Insurance Review

Notice of Public Hearing - Invitation to Participate

The Public Utilities Board has been requested by the Government of Newfoundland and Labrador to review and report on a number of issues with respect to automobile insurance in the province, including the reasons behind increasing claims costs for private passenger vehicles and taxi operators, and options to reduce these costs. The Board has been specifically asked to examine the impact on rates and implications for claimants of introducing a monetary cap on claims for non-economic loss for minor/mild injuries or continuing with the current deductible of $2,500 or increasing the deductible.

The Board has scheduled a public hearing to start on Monday, June 4, 2018 at 9:30 a.m. at its offices in St. John's. At the hearing the Board's consultants will present their findings and interested persons will have the opportunity to present their views to the Board.

How to Participate

Information about the review, including the Terms of Reference, and all documents filed to date can be found on the Board's website www.pub.nl.ca.

You can participate in the public hearing by i) becoming an intervenor, which will give you the opportunity to present evidence and ask questions of witnesses, or ii) making a presentation to the Board during the hearing. Any person may attend and observe the hearing at any time.

To be an intervenor you must complete and file the Intervenor Submission Form on the Board's website by Wednesday, May 16, 2018. If you wish to make a presentation you should contact the Board Secretary, Cheryl Blundon, at (709)726-8600 or email cblundon@pub.nl.ca no later than Wednesday, May 23, 2018.

You may also provide your views as below:

Contact the Board

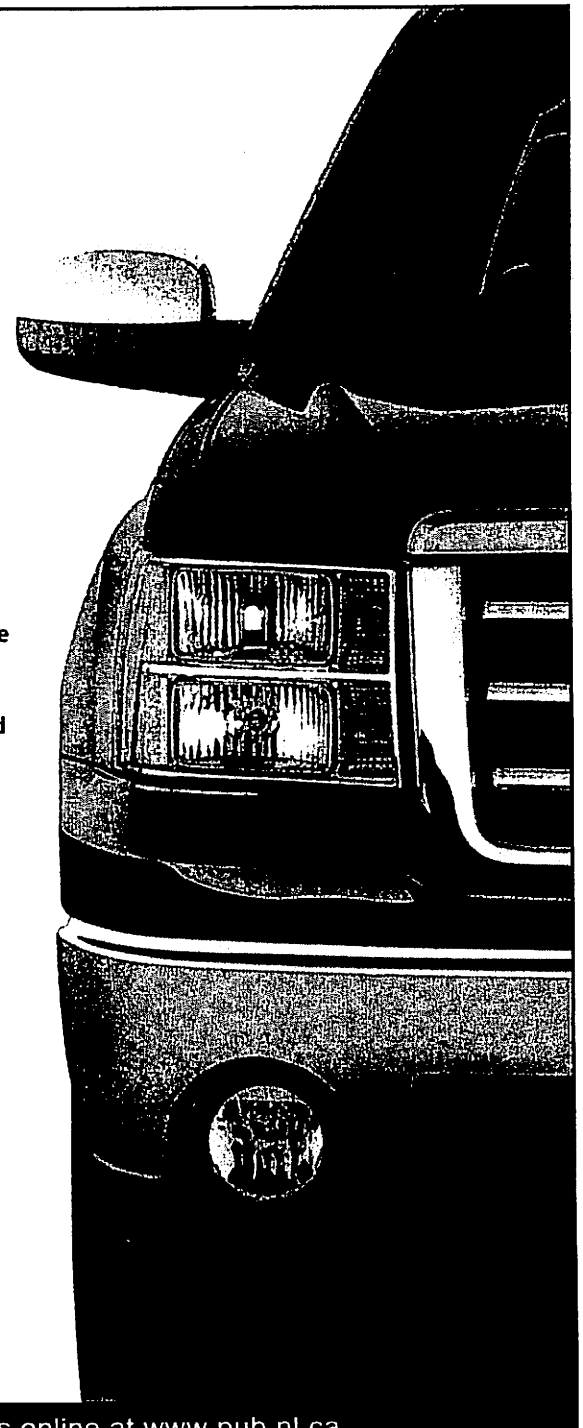
- Complete a feedback form on the Board's website
- Send your comments in writing:

Email: insurancereview@pub.nl.ca
Mail: Public Utilities Board
Automobile Insurance Review
P.O. Box 21040
St. John's, NL A1A 5B2
Fax: 709 726-9604

Consumer Advocate

Contact the Government appointed Consumer Advocate, Dennis Browne, Q.C. at:

Email: dbrowne@bfma-law.com
Mail: The Consumer Advocate
Automobile Insurance Review
Level 2, Terrace on the Square
St. John's, NL A1B 4S9
Tel: 709 724-3800
Fax: 709 754-3800



For more information contact the Public Utilities Board at (709) 726-8600 or visit us online at www.pub.nl.ca

3

NEWFOUNDLAND AND LABRADOR

BOARD OF COMMISSIONERS OF PUBLIC UTILITIES

120 Torbay Road, P.O. Box 21040, St. John's, Newfoundland and Labrador, Canada, A1A 5B2

HEARING GUIDELINES

These guidelines govern public hearings of the Board of Commissioners of Public Utilities (the "Board").

General Information

1. The Board is an independent, quasi-judicial regulatory body established in accordance with the provisions of the *Public Utilities Act, RSN 1990, c. P-47.*
2. The Board conducts hearings in accordance with the principles of natural justice and procedural fairness, as well as the provisions of the legislation of the province. Orders issued by the Board have the force of law and can be appealed to the Supreme Court of Newfoundland.

Hearings

1. Hearings of the Board are conducted in an open and transparent manner and members of the public and media may participate unless specifically prohibited by the provisions of provincial legislation or an Order of the Board.
2. All witnesses are required to take an oath or otherwise affirm that the evidence presented is truthful.
3. All hearings are recorded. Transcripts of hearings are made a part of the record of the proceeding.

Documents

1. Hearing documents including transcripts are a matter of public record unless sealed in accordance with the provisions of legislation or by Board Order.
2. All written communication to the Board in relation to a hearing must be provided to the Board Secretary and copied to all Registered Parties.
3. All original hearing documents are maintained by the Board Secretary. Hearing documents and transcripts are available electronically on the Board's website www.pub.nl.ca . Paper copies may also be obtained by request from the Board Secretary at a cost determined by the Board.

4

2017 Automobile Insurance Review

Hearing Information

The following provides general information with respect to the hearing in the 2017 Automobile Insurance Review scheduled to begin on Monday, June 4, 2018.

1. Hearing Schedule and Sitting Times

The hearing will proceed in accordance with the Hearing Schedule established by the Board. The regular sitting times are from 9:00 am to 1:30 pm daily with a half hour break scheduled for 11:00 am. Please note that the first day of the hearing starts at 9:30 a.m. Interested persons should check the Board's website for the up-to-date Hearing Schedule.

2. Presentations

Presenters will not be sworn or subject to cross-examination. The Board's consultants and the parties' presenters may be questioned by the Board and the other parties. The Board may ask questions of all presenters.

3. Information and Documents

Parties should file all information and documentation in adobe*pdf format.

Written questions should be individually numbered and should identify the requesting party (example, PUB 01, PUB 02). Responses should reference the identifying number and repeat the question with the answer directly below.

The parties must provide copies of questions, information and documents to the other parties, in accordance with the Distribution List established by the Board.

All information and documents filed in the review will be placed on the record and on the Board's website, which is updated regularly. Information and documentation that is referenced during the hearing may be displayed on the screens in the hearing room.

4. Transcripts

Transcripts of the hearing will be distributed electronically to the parties and will be posted on the Board's website. Transcripts are normally available by 7:00 p.m. daily.

5

2017 Automobile Insurance Review

Listing of Parties

Party	Representative
Consumer Advocate Dennis Browne, Q.C Browne Fitzgerald Morgan & Avis Terrace on the Square, Level 2 P.O. Box 23135 St. John's, NL A1B 4J9 Telephone: 709-724-3800 E-mail: dbrowne@bfma-law.com	**Legal Counsel:** Andrew Wadden E-mail: andrew@wphlaw.ca
Atlantic Provinces Trial Lawyers Association Libby Kinghorne P.O. Box 2618 Central RPO Halifax, NS B3J 3N5 E-mail: libbykinghorne@aptla.ca	**Legal Counsel:** Gittens & Associates Ernest Gittens, Solictor E-mail: egittens@gittenslaw.com
Campaign to Protect Accident Victims Colin Feltham P.O. Box 5236 St. John's, NL A1C 5W1 E-mail: cfeltham@wrmmlaw.com	**Legal Counsel:** Roebothan McKay Marshall Jerome Kennedy, Q.C. and Colin Feltham E-mail: cfeltham@wrmmlaw.com
Spinal Cord Injury NL Michael Burry, Executive Director P.O. Box 21284 St. John's, NL A1A 5G6 E-mail: mburry@sci-nl.ca	**Legal Counsel:** Fraize Law Offices Thomas W. Fraize, Q.C. E-mail: tfraize@fraizelawoffices.nf.net
Insurance Bureau of Canada Amanda Dean, Vice President, Atlantic 1969 Upper Water Street, Suite 1706 Purdy's Wharf, Tower II Halifax, NS B3J 3R7 E-mail: adean@ibc.ca	**Legal Counsel**: Martin, Whalen, Hennebury, Stamp Law Kevin Stamp, Q.C. E-mail: kstamp@mwhslaw.com Terry Rowe, Q.C. E-mail: TRowe@mwhslaw.com

Update June 6, 2018

6

2017 Automobile Insurance Review

Hearing Information

LIST OF PRESENTERS AND SCHEDULE OF DATES FOR PRESENTATIONS*

Presentation Date	Presenter
Tuesday, June 5, 2018	CUPE - Atlantic Regional Office
Monday, June 11, 2018	Aviva Canada
Tuesday, June 12, 2018	Insurance Bureau of Canada
Wednesday, June 13, 2018	Insurance Brokers Association of Newfoundland
	Ken Moyse, Rogers Moyse Personal Injury Law
	SmartDRIVER Training
	Robert Rogers, NL Federation of the 50+ Club
	Jeremiah Perry
	Doug McCarthy

* The schedule is subject to change.
All sessions start at 9:00am with presenters appearing in order shown.
Times of presentations have not been set as length of presentations vary.

7

1978 CarswellOnt 609
Supreme Court of Canada

Nicholson v. Haldimand-Norfolk (Regional Municipality) Commissioners of Police

1978 CarswellOnt 609F, 1978 CarswellOnt 609, [1978] 3 A.C.W.S. 185, [1979] 1 S.C.R. 311, 23 N.R. 410, 2 W.C.B. 615, 78 C.L.L.C. 14,181, 88 D.L.R. (3d) 671

Arthur Gwyn Nicholson, Appellant and Haldimand-Norfolk Regional Board of Commissioners of Police, Respondent and Attorney-General for the Province of Ontario, Intervenor

Laskin C.J. and Martland, Ritchie, Spence, Pigeon, Dickson, Beetz, Estey and Pratte JJ.

Judgment: February 22, 1978
Judgment: October 3, 1978

Proceedings: On appeal from the Court of Appeal for Ontario

Counsel: *Ian Scott, Q.C.*, for the appellant.
P.D. Amey, for the respondent.
Dennis Brown, for the intervenant the Attorney-General of Ontario.

Subject: Employment; Public

Headnote

Administrative Law --- Requirements of natural justice — Right to hearing — Duty of fairness

There is a duty of fairness in all administrative decisions, ev en if they are not classifiable as judicial or quasi-judicial which may import a requirement for a hearing even if a less elaborate hearing than would be required for a judicial or quasi-judicial decision.

Police --- Organization of police forces — Disciplinary proceedings — Probationary officers

Constable's contract stipulating probationary period of 12 months — Constable dismissed after such period and without opportunity to be heard — Whether dismissal proper — Police Act, R.S.O. 1970, c. 351, s. 72(1)(a).

A police constable who had been appointed for a probationary period of 12 months had his services "dispensed with" after 12 months but before 18 months after commencing duty and without notice of cause or an opportunity to be heard. The Divisional Court held that the discharge was ultra vires for breach of the audi alteram partem rule of natural justice. On appeal, it was held the appeal should be allowed. On further appeal to the Supreme Court of Canada by the constable, held, the appeal should be allowed. The constable should be given an opportunity to respond even though he had not completed the probationary period.

The judgment of Laskin C.J. and Ritchie, Spence, Dickson and Estey JJ. was delivered by *The Chief Justice*:

1 The issue in this appeal arises out of a letter of June 10, 1974 written to the appellant by the Deputy Chief of Police of the Regional Municipality of Haldimand-Norfolk advising him that "the Board of Commissioners of Police have approved the termination of your services effective June 4, 1974". The appellant, then a second class constable of the Regional Municipali ty, had been in its service since April 1, 1974 but he carried over his service as a police constable with

the Town of Caledonia, which had been amalgamated with the Town of Haldimand on that date as an area municipality within the Regional Municipality of Haldimand-Norfolk.

2 The appellant was engaged as a constable, third class, by the Town of Caledonia on March 1, 1973 under an oral hiring of which a term was that he would serve a probationary period of twelve months. On March 1, 1974, he was promoted to constable second class, and pursuant to *The Regional Municipality of Haldimand-Norfolk Amendment Act*, 1973 (Ont.), c. 155, s. 75, he became a member of the Regional Police Force, carrying over his previous service to the same extent as if appointed by the Haldimand-Norfolk Police Board.

3 Subject to some observations to be made later in these reasons on the question whether the appellant knew why his services had been terminated, the formal record indicates that he was not told why he was dismissed nor was he given any notice, prior to dismissal, of the likelihood thereof or of the reason therefor, nor any opportunity to make representations before his services were terminated. Counsel for the appellant does not assert any right on his behalf to an adjudication of the existence of proper cause but rests primarily on the contention that, however fragile was the appellant's security of position, he was in law entitled to be treated fairly and there was a corresponding duty on the respondent to act fairly toward the appellant. This, it is said, the respondent did not do.

4 The fragility of the appellant's tenure, the allegation that in law he had no security of position and was dismissable at pleasure, is at the foundation of the respondent's case; and from this base it was contended that there was no obligation to give any notice or to assign any reason or to hear any representations from the appellant before dispensing with his services.

5 It is common ground that the relevant legislation within which the respective contentions of the parties are to be assessed is *The Police Act*, R.S.O. 1970, c. 351 and, particularly, s. 27(*b*) of Regulation 680 made pursuant thereto. Section 27 of the Regulation is as follows:

> 27. No chief of police, constable or other police officer is subject to any penalty under this Part except after a hearing and final disposition of a charge on appeal as provided by this Part, or after the time for appeal has expired, but nothing herein affects the authority of a board or council,
>
> (a) subject to the consent of the Commission, to dispense with the services of any member of a police force for the purpose of reducing the size of or abolishing the police force, where the reduction or abolition is not in contravention of the Act;
>
> (b) to dispense with the services of any constable within eighteen months of his becoming a constable;
>
> (c) to make rules or regulations for the retirement of members of the police force who are entitled to a pension under a pension plan established for the members of the force, under which the municipality contributes an amount not less than 5 per cent of the amount of the salaries of the members participating in the plan, and to retire the members in accordance with those rules or regulations;
>
> (d) to act in accordance with a report or recommendation of the Commission made under section 28; or
>
> (e) to discharge or place on retirement, if he is entitled thereto, any member of the force who, on the evidence of two legally qualified medical practitioners is, due to mental or physical disability, incapable of performing his duties in a manner fitted to satisfy the requirements of his position but any decision of the board or council made pursuant to this clause may be appealed to the Commission.

6 Following his dismissal, the appellant instituted proceedings to quash the decision of June 4, 1974 made by Haldimand-Norfolk Board of Police Commissioners. They came before the Ontario Divisional Court under *The Judicial Review Procedure Act*, 1971 (Ont.), c. 48. In giving the appellant the relief that he sought, Hughes J., who spoke for the Court, took three points to which I wish to refer. He cleared out any issue arising from the transfer of service and status

from Caledonia to Haldimand-Norfolk by declaring that whatever benefits of employment may have been conferred upon the appellant by Caledonia, his status as a police officer was neither impaired nor enhanced thereby. I agree with this assessment. Second, he concluded that a collective agreement entered into between the Haldimand-Norfolk Board of Police Commissioners and the Regional Police had no bearing on the case before the Divisional Court. That was common ground at the hearing in this Court and nothing more need be said about it.

7 This left for consideration a third point, central there as here, namely, whether, in the case of a constable who has served less than the eighteen months specified in s. 27(*b*), the Board may dismiss peremptorily without obligation to give previous notice or assign a reason or give any opportunity to contest the proposed dismissal. Hughes J., in the course of his reasons, put the point in terms of whether a hearing was required as well as notice of the complaint against a constable. Arnup J.A., speaking for the Court of Appeal, which reversed the Divisional Court, took a like view of the issue, putting it as follows at the very front of his reasons:

> Can the services of a police constable be dispensed with within eighteen months of his becoming a constable, without observance by the authority discharging him of the requirements of natural justice, including a hearing?

Counsel for the appellant did not, in his main submission here, put his case that high, as I have already noted.

8 In his reasons for the Divisional Court, Hughes J. founded his conclusion in favour of the appellant on an application of the judgment of the Ontario Court of Appeal, delivered by Laidlaw J.A., in *Re a Reference under the Constitutional Questions Act* [1], and he drew support as well from the judgment of the Divisional Court in *Re Cardinal and the Board of Commissioners of Police of Cornwall* [2]. At bottom, however, Hughes J. was of the view that *Ridge v. Baldwin* [3], was in point in obliterating the distinction between those who perform ministerial acts and those who perform judicial acts, and in proclaiming a duty to act fairly applicable to the former as to the latter. He posed and answered the issue in the following passage of his reasons:

> ...Can it be that the disclaimer in s. 27(b) of Reg. 680, which otherwise enshrines the principles of natural justice as they affect the dismissal or suspension of a police officer, confers an immunity from the application of those principles on members of a board when dealing with a police officer, who has taken the oath of office and upon whom has been conferred the province-wide powers prescribed in the Police Act, but who has not yet completed eighteen months of service? I do not believe that it can. It may relieve them from complying with the regulations and preclude the officer's appeal to the Ontario Police Commission, but it cannot relieve them of the duty to act judicially with all which that implies.

He concluded his reasons by stating that a duty to act fairly rested squarely upon the Board of Police Commissioners of Haldimand-Norfolk, adding this:

> Their deliberations may be untrammelled by regulations made under the Police Act, but this Court should not allow them to proceed as if the principles of natural justice did not exist.

9 Hughes J. did not spell out the elements of the duty to act fairly but, in the course of his reasons, and adverting to s. 27(*b*), he stated that "what this Court has to decide is whether s. 27(*b*) by not specifically requiring a hearing confers upon the Haldimand-Norfolk Board power to dismiss a constable, not having served for eighteen months, without one". In a later part of his reasons, he said the crucial question was whether the dismissal could be made without any notice of the complaint against the appellant and without a hearing. It can be taken from his reasons that he was asserting a duty of compliance with the rules of natural justice in their traditional sense of notice and hearing, with an opportunity to make representations, and with reviewability of the decision as much as a less onerous duty of acting fairly.

10 The holding of the Divisional Court depended on regarding a police constable as holder of an office, and not as being in an ordinary master-serv ant relationship *qua* the Board and the Regional Municipality. A master-servant relationship would not, *per se*, give rise to any legal requirement of observance of any of the principles of natural justice.

The contention of the respondent Board was, however, that the historical position of a constable as holding office during pleasure and, consequently, as subject to dismissal without cause assigned, had not been altered by s. 27(*b*) in the case of a constable who had served less than eighteen months. (An earlier regulation had fixed the period at twelve months). Although Lord Reid in *Ridge v. Baldwin, supra*, had examined the position of one holding office at pleasure and had concluded that the power of dismissal was exercisable against such a person without obligation to assign a reason, Hughes J. was of the opinion that, having regard to the judgment in *Re a Reference under the Constitutional Questions Act, supra*, the position of a constable under s. 27(*b*) was no different from that of the constable in *Ridge v. Baldwin* under the relevant statutory provision in that case, which gave power to dismiss for negligence in the discharge of duty or for being otherwise unfit for duty. Discharge could not, therefore, be peremptory.

11 The Ontario Court of Appeal took a different view. Arnup J.A., speaking for that Court, considered that the eighteen month period fixed by s. 27(*b*) was a probationary period, a position reinforced by the use of the words "dispense with the services of any constable", and he contrasted the reference to "dismissal" in ss. 20(2) and 23(7) of Regulation 680 and the reference to "discharge" in s. 27(*e*), all pointing to disciplinary action. I take no issue with this appraisal, nor do I disagree with the the conclusion of Arnup J.A. that the terms of s. 27(*b*) admit of no contractual variation. Whatever might be said of a statutory provision which simply provided for engagements at pleasure, the express reference to an eighteen month period in a regulation prescribed by a statute such as *The Police Act* excludes any inconsistent contract.

12 For Arnup J.A., the consequence of the appellant being short of eighteen months' service when he was separated from his position was that (to use his words) "the board may act as it was entitled to act at common law, i.e. without the necessity of prior notice of allegations or of a hearing and, *a fortiori*, with no right of appeal by the constable". He also relied on the *expressio unius* rule of construction by noting that "the Legislature has expressly required notice and hearing for certain purposes and has by necessary implication excluded them for other purposes". There is no recognition in his reasons, as there was in those of Hughes J., that there may be a common law duty to act fairly falling short of a requirement of a hearing or, indeed, falling short of a duty to act judicially. Counsel for the appellant asserted that there is an emerging line of authority on this distinction which this Court should approve, and that although it may be regarded as an aspect of natural justice it has a procedural content of its own. It does not, however, rise to the level of what is required to satisfy natural justice where judicial or quasi-judicial powers are being exercised. I shall come to this line of authority later in these reasons.

13 Considerable emphasis was placed by Arnup J.A. on the position of a constable at common law as an office holder at pleasure who could claim no procedural protection against peremptory removal from office. We are not concerned in this case with any involvement of the Crown, with the holding of an office under the Crown, assuming that this would make any difference today. It was, however, contended in this Court, as in the Courts below, that the words in s. 27, "but nothing herein affects the authority of a board or council", point to a preservation of some pre-existing authority as contrasted with a grant of power; and hence, it was not only proper but necessary to examine the position of a constable at common law. I can see some value in this as background research, but the scheme of *The Police Act* and the involvement of statutory agencies, whether Boards of Commissioners of Police or Municipal Councils, has created an entirely different frame of reference, and what is preserved of the common law is merely the fact that a constable may still be considered as the holder of an office and not simply an employee of a Board or of a Municipality which, for many purposes, he certainly is.

14 In my opinion, nothing turns on pre-existing authority but the fact is, rather, that *The Police Act* and regulations thereunder form a code for police constables with an array of powers, some of which, as in the case of s. 27(*b*), are discretionary. There are two observations I would make in this connection. First, the respondent Board is not the Crown and, being simply a body created by statute, it has only such powers as are given by statute or regulations thereunder. I cannot, therefore, accept the proposition, referable to the words in the opening portion of s. 27(*b*) ("but nothing herein affects the authority of a board ..."), that they do not confer power but leave the respondent Board with such powers as it already had. I know not where they could come from, save from the statute or regulations governing the Board. It follows that any attempt to measure the issue in this case by resort to the common law position of a constable is inapt.

15 The second observation is a reinforcement of the first. The assimilation by the Ontario Court of Appeal of the position of a constable under s. 27(*b*) to that of a constable at common law holding office at pleasure involved importing the term "at pleasure", with its connotation of peremptory power of dismissal without need to give notice or reason before or after, into s. 27(*b*). The words "at pleasure" which at one time governed the appointment of all members of a police force in a municipality having a Board (see *The Police Act*, R.S.O. 1950, c. 279, s. 13) were removed by 1951 (Ont.), c. 66, s. 1 and, thereafter, regulations were promulgated along the lines of those still in force and applicable here. I wish to emphasize here that the frame of the Act and regulations thereunder has left the words "at pleasure" behind as relics of Crown law which no longer governs the relations of police and Boards or Municipal Councils.

16 I agree with Arnup J.A. that *Re a Reference under the Constitutional Questions Act, supra*, is of no assistance in the present case because the question under consideration ("Has a Municipal Council power to dismiss a chief constable or other police officer appointed by the Council without a hearing as provided by the Police Act and the regulations made thereunder?") was answered in terms of the position of a chief constable or other police officer who was outside of what is now s. 27(*b*), and the answer was in the negative. Again, the *Cardinal* case is, at best, of marginal relevance since it was concerned with s. 27(*e*), but one cannot discount completely the holding that a hearing was required prior to discharge on the grounds specified in s. 27(*e*), even though there was express provision for an appeal to the Ontario Police Commission.

17 The position at which I have arrived to this point is this: a constable is "the holder of a police office" (to use the description of the Privy Council in *Attorney-General for New South Wales v. Perpetual Trustee Co. (Ld.)*[4], at p. 489), exercising, so far as his police duties are concerned, an original authority confirmed by s. 55 of *The Police Act* and by the oath of office prescribed by s. 64 of the Act (wherein reference is made to "the duties of his office", among which are duties specified in the *Criminal Code*). He is a member of a civilian force, and I take his assimilation to a soldier, as stated by the Privy Council in the *Perpetual Trustee Co.* case, *supra*, to be an assimilation related only to whether an action *per quod* lies against a tortfeasor at common law for the loss of his services, and not to assimilation for other purposes, such as liability to peremptory discharge, if that be the case with a soldier.

18 The effect of the judgment below is that a constable who has served eighteen months or more is afforded protection against arbitrary discipline or discharge through the requirement of notice and hearing and appellate review, but there is no protection at all, no halfway house, between the observance of natural justice aforesaid and arbitrary removal in the case of a constable who has held office for less than eighteen months. In so far as the Ontario Court of Appeal based its conclusion on the *expressio unius* rule of construction, it has carried the maxim much too far. This Court examined its application in *L'Alliance des professeurs catholiques de Montréal v. Labour Relations Board of Quebec*[5], and rejected an argument for its application to deny notice and hearing in that case. Rinfret C.J.C. referred, *inter alia*, to the judgment of Farwell L.J. in *Re Lowe v. Darling & Son*[6], at p. 785 where mention is made of *Colquhoun v. Brooks*[7] and of the statement of Lopes L.J., at p. 65, that "the maxim ought not to be applied when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice". This statement commends itself to me and I think it relevant to the present case where we are dealing with the holder of a public office, engaged in duties connected with the maintenance of public order and preservation of the peace, important values in any society.

19 Again, in so far as the judgment of the Ontario Court of Appeal is based on reading the words "at pleasure" (as importing arbitrary power) into s. 27(*b*), or the term "probationary" (with similar import), it results in reducing the status of the office of police constable to that involved in a master-servant relationship merely because there has been less than eighteen months' service in the office, and I do not regard this as either an obvious or a necessary gloss on s. 27(*b*). The view so taken by the Ontario Court of Appeal, and supported strongly in this Court by counsel for the respondent, relied heavily on the three-fold classification of dismissal situations formulated by Lord Reid in *Ridge v. Baldwin, supra*, at p. 65. Since the present case is not one where the constable holds office at pleasure, he fits more closely into Lord Reid's third class of dismissal from an office where there must be cause for dismissing him, rather than into his second class of dismissal from an office held at pleasure.

20 I would observe here that the old common law rule, deriving much of its force from Crown law, that a person engaged as an office holder at pleas ure may be put out without reason or prior notice ought itself to be re-examined. It has an anachronistic flavour in the light of collective agreements, which are pervasive in both public and private employment, and which offer broad protection against arbitrary dismissal in the case of employees who cannot claim the status of office holders. As de Smith has pointed out in his book *Judicial Review of Administrative Action* (3rd ed. 1973), at p. 200, "public policy does not dictate that tenure of an office held at pleasure should be terminable without allowing its occupant any right to make prior representations on his own behalf; indeed, the unreviewability of the substantive grounds for removal indicates that procedural protection may be all the more necessary". The judgment of the House of Lords in *Malloch v. Aberdeen Corporation* [8], is a useful reference in this connection. In that case the statutory provision for appointment of teachers at pleasure was qualified by a restriction against dismissal without due notice and due deliberation by the School Board. Observations were there made about the holding of an office at pleasure, and I refer particularly to what Lord Wilberforce said, at p. 1295, where he commented as follows on Lord Reid's statement in *Ridge v. Baldwin, supra*, that an officer holding during pleasure has no right to be heard before being dismissed:

> ...As a general principle, I respectfully agree; and I think it important not to weaken a principle which, for reasons of public policy, applies, at least as a starting point, to so wide a range of the public service. The difficulty arises when, as here, there are other incidents of the employment laid down by statute, or regulations, or code of employment or agreement. The rigour of the principle is often, in modern practice, mitigated for it has come to be perceived that the very possibility of dismissal without reason being given — action which may vitally affect a man's career or his pension — makes it all the more important for him, in suitable circumstances, to be able to state his case and, if denied the right to do so, to be able to have his dismissal declared void. So, while the courts will necessarily respect the right, for good reasons of public policy, to dismiss without assigned reasons, this should not, in my opinion, prevent them from examining the framework and context of the employment to see whether elementary rights are conferred on him expressly or by necessary implication, and how far these extend. The present case is, in my opinion, just such a case where there are strong indications that a right to be heard, in appropriate circumstances, should not be denied.

21 This case does not, however, fall to be determined on the ground that the appellant was dismissable at pleasure. The dropping of the phrase "at pleasure" from the statutory provision for engagement of constables, and its replacement by a regime under which regulations fix the temporal point at which full procedural protection is given to a constable, indicates to me a turning away from the old common law rule even in cases where the full period of time has not fully run. The status enjoyed by the office holder must now be taken to have more substance than to be dependent upon the whim of the Board up to the point where it has been enjoyed for eighteen months. Moreover, I find it incongruous in the present case to insist on treating the appellant as engaged at pleasure when he was first taken on as a third class constable (and not, as was possible, as a fourth class one) and when he was promoted to second class constable after serving twelve months.

22 In short, I am of the opinion that although the appellant clearly cannot claim the procedural protections afforded to a constable with more than eighteen months' service, he cannot be denied any protection. He should be treated "fairly" not arbitrarily. I accept, therefore, for present purposes and as a common law principle what Megarry J. accepted in *Bates v. Lord Hailsham* [9], at p. 1378, "that in the sphere of the so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness".

23 The emergence of a notion of fairness involving something less than the procedural protection of traditional natural justice has been commented on in de Smith, *Judicial Review of Administrative Action, supra*, at p. 208, as follows:

> That the donee of a power must "act fairly" is a long-settled principle governing the exercise of discretion, though its meaning is inevitably imprecise. Since 1967 the concept of a duty to act fairly has often been used by judges to denote an implied procedural obligation. In general it means a duty to observe the rudiments of natural justice for a limited

> purpose in the exercise of functions that are not analytically judicial but administrative. Given the flexibility of natural justice, it is not strictly necessary to use the term "duty to act fairly" at all. But the term has a marginal value because of (i) the frequent re-emergence of the idea that a duty to observe natural justice is not to be imported into the discharge of "administrative" functions and (ii) a tendency to assume that a duty to "act judicially" in accordance with natural justice means a duty to act like a judge in a court of law. It may therefore be less confusing to say that an immigration officer or a company inspector or a magistrate condemning food as unfit for human consumption is obliged to act fairly rather than obliged to act judicially (or to observe natural justice, which means the same thing). However, close analysis of the relevant judgments is apt to generate its own confusion; for sometimes one judge will differentiate a duty to act fairly from a duty to act judicially and another will assimilate them, both judges being in full agreement as to the scope of the procedural duty cast on the competent authority. [Footnotes omitted]

What rightly lies behind this emergence is the realization that the classification of statutory functions as judicial, quasi-judicial or administrative is often very difficult, to say the least; and to endow some with procedural protection while denying others any at all would work injustice when the results of statutory decisions raise the same serious consequences for those adversely affected, regardless of the classification of the function in question: see, generally, Mullan, *Fairness: The New Natural Justice* (1975), 25 Univ. of Tor. L.J. 281.

24 The distinction was clearly made by Lord Pearson in *Pearlberg v. Varty* [10], at p. 547, and "fair ness" was also mentioned in the speeches of Viscount Dilhorne and Lord Salmon. Lord Pearson put the matter in the following terms:

> A tribunal to whom judicial or quasi-judicial functions are entrusted is held to be required to apply those principles in performing those functions unless there is a provision to the contrary. But where some person or body is entrusted by Parliament with administrative or executive functions there is no presumption that compliance with the principles of natural justice is required, although, as "Parliament is not to be presumed to act unfairly," the courts may be able in suitable cases (perhaps always) to imply an obligation to act with fairness. Fairness, however, does not necessarily require a plurality of hearings or representations and counter-representations. If there were too much elaboration of procedural safeguards, nothing could be done simply and quickly and cheaply. Administrative or executive efficiency and economy should not be too readily sacrificed....

Pearlberg v. Varty has no affinity with the present case, but rather was a case where, pursuant to certain taxing measures, the revenue proposed to reassess for a back period and sought leave from a commissioner, as required by statute, in order to do so. The taxpayer was informed of the application for leave, and although he had the right to appeal against the reassessments if made, he contended that he should be heard on the application for leave. He failed in all courts. Unlike the situation in the present case, the decision in issue would not be a final determination of his rights.

25 Not long after, the Privy Council also took up the notion of fairness in a New Zealand appeal, *Furnell v. Whangarei High Schools Board* [11]. Lord Morris of Borth-Y-Gest, speaking for the majority of three said, at p. 679 that "natural justice is but fairness writ large and juridically. It has been described as 'fair play in action'. Nor is it a leaven to be associated only with judicial or quasi-judicial occasions. But as was pointed out by Tucker L.J. in *Russell v. Duke of Norfolk* [12], at p. 118, the requirements of natural justice must depend on the circumstances of each particular case and the subject matter under consideration". The majority concluded in that case that "the scheme of the procedure gives no scope for action which can properly be described as unfair and there are no grounds for thinking that the sub-committee acted unfairly" (at p. 682). The two dissenting Judges were of a different view. The importance of the case lies in the respect paid by both the majority and the dissenting Judges to a duty to act fairly.

26 A more recent illustration of a court considering a duty to act fairly is *Selvarajan v. Race Relations Board* [13], where the Court of Appeal was satisfied that the Board, and administrative agency with no judicial functions, concerned primarily with conciliation in relation to its duty to envestigate complaints of unlawful discrimination and to form an opinion thereon, had acted fairly in concluding after a review of the evidence that there was no such discrimination. Lord Denning had this to say about the duty to act fairly (at p. 19):

> ...In recent years we have had to consider the procedure of many bodies who are required to make an investigation and form an opinion. Notably the Gaming Board, who have to enquire whether an applicant is fit to run a gaming club (see *R v Gaming Board for Great Britain, ex parte Benaim*, [1970] 2 All ER 528), and inspectors under the Companies Acts, who have to investigate the affairs of a company and make a report (see *Re Pergamon Press Ltd.*, [1970] 3 All ER 535), and the tribunal appointed under s. 463 of the Income and Corporation Taxes Act 1970, who have to determine whether there is a prima facie case (see *Wiseman v. Borneman*, [1971] A.C. 297). In all these cases it has been held that the investigating body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigation and the consequences which it may have on persons affected by it. The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some such way adversely affected by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it. The investigating body is, however, the master of its own procedure. It need not hold a hearing. It can do everything in writing. It need not allow lawyers. It need not put every detail of the case against a man. Suffice it if the broad grounds are given. It need not name its informants. It can give the substance only. Moreover it need not do everything itself. It can employ secretaries and assistants to do all the preliminary work and leave much to them. But, in the end, the investigating body itself must come to its own decision and make its own report.

The present case is one where the consequences to the appellant are serious indeed in respect of his wish to continue in a public office, and yet the respondent Board has thought it fit and has asserted a legal right to dispense with his services without any indication to him of why he was deemed unsuitable to continue to hold it.

27 In my opinion, the appellant should have been told why his services were no longer required and given an opportunity, whether orally or in writing as the Board might determine, to respond. The Board itself, I would think, would wish to be certain that it had not made a mistake in some fact or circumstance which it deemed relevant to its determination. Once it had the appellant's response, it would be for the Board to decide on what action to take, without its decision being reviewable elsewhere, always premising good faith. Such a course provides fairness to the appellant, and it is fair as well to the Board's right, as a public authority to decide, once it had the appellant's response, whether a person in his position should be allowed to continue in office to the point where his right to procedural protection was enlarged. Status in office deserves this minimal protection, however brief the period for which the office is held.

28 It remains to consider whether the appellant should not be heard to complain of want of fairness because he was aware of the reason for his dismissal. The only evidence in the record that goes to this point is his cross-examination on his affidavit in support of his application for judicial review. Questions were put to him respecting the performance of various of his duties, and among them was a reference to a telephone call made by Nicholson to police headquarters in Simcoe, asking for instructions for obtaining and completing an overtime slip. It apparently angered his superior, one Sergeant Burger, that the appellant "was going over his head" in making the call (which Nicholson charged to himself and not to the police department). He was told by Burger that this was disobedience to a direct order (Nicholson said he was unaware of any relevant order) and that he was being suspended indefinitely. The cross-examination shows that Nicholson asked if any charges would be laid and the answer he got was "there won't be any charges". All of this happened on May 29, 1974, some six days before the dismissal by the Board. An inspector, whom Nicholson went to see the same day, had been told by Burger of his suspension of Nicholson, and the inspector said he supported what Burger had done and that Nicholson had no future in the department.

29 The cross-examination also revealed that the inspector invited or offered to let Nicholson resign. Nicholson denied that he was told by the inspector that "subject to the confirmation of the Board, [he was] no longer a policeman", these words being put to him by counsel for the Board on his cross-examination. When asked what he thought his position was when he left the inspector's office, Nicholson said this:

> I thought that if they felt I was dispensed with, I thought it was illegal. There were no charges, there was no lawful suspension, there was no lawful firing and I was in a quandary. I knew that I was off probation, so I decided to go and see a lawyer, and retain a lawyer.

30 If the making of the telephone call of which Burger disapproved, (and which he said was in disobedience of a direct order, Nicholson saying he was unaware of any relevant order) was the basis of the proposed dismissal, it would have been simple enough to say so. I can hardly credit that in itself it could be a reason for dismissing a constable who had served for fifteen months. If it was an allegedly culminating event this too could be easily stated, or if there was another ground Nicholson could have been told of it prior to dismissal. I do not regard it as giving a reason for dismissal to tell Nicholson that he had no future in the department. Moreover, there is nothing in the record to show that an inspector, the particular inspector, had the power to dismiss a constable with less than eighteen months' service.

31 I would allow the appeal, set aside the judgment of the Ontario Court of Appeal and restore the order of the Divisional Court, with costs to the appellant throughout.

The judgment of Martland, Pigeon, Beetz and Pratte JJ. was delivered by *Martland J.* (*dissenting*):

32 The facts which give rise to this appeal and the course of the litigation up to this point are outlined in the reasons of the Chief Justice. The essential matter is that the respondent terminated the services of the appellant, as a police constable, within eighteen months of his becoming a constable without his having been told why his services were no longer required and without his having had an opportunity to respond.

33 Under the provisions of *The Police Act*, R.S.O. 1970, C. 351, the respondent Board had the responsibility for the appointment of the members of the Haldimand-Norfolk Regional Police Force. The members of that force were subject to the government of the Board.

34 Section 72(1)(*a*) of that Act empowered the Lieutenant-Governor in Council to make regulations:

> for the government of police forces and governing the conduct, duties, suspension and dismissal of members of police forces.

35 Pursuant to this power regulation 680 was enacted. The key section for the purposes of this appeal is s. 27 (as amended):

> 27. No chief of police, constable or other police officer is subject to any penalty under this Part except after a hearing and final disposition of a charge on appeal as provided by this Part, or after the time for appeal has expired, but nothing herein affects the authority of a board or council.
>
> (a) subject to the consent of the Commission, to dispense with the services of any member of a police force for the purpose of reducing the size of or abolishing the police force, where the reduction or abolition is not in contravention of the Act;
>
> (b) to dispense with the services of any constable within eighteen months of his becoming a constable;
>
> (c) to make rules or regulations for the retirement of members of the police force who are entitled to a pension plan established for the members of the force, under which the municipality contributes an amount not less than 5 per cent of the amount of the salaries of the members participating in the plan, and to retire the members in accordance with those rules or regulations;
>
> (d) to act in accordance with a report or recommendation of the Commission made under section 28; or

> (e) to discharge or place on retirement, if he is entitled thereto, any member of the force who, on the evidence of two legally qualified medical practitioners is, due to mental or physical disability, incapable of performing his duties in a manner fitted to satisfy the requirements of his position but any decision of the board or council made pursuant to this clause may be appealed to the Commission.

36 The relevant provision in this appeal is s. 27(*b*). Both the Divisional Court and the Court of Appeal have regarded the eighteen month period as a probationary one, and with this I agree. It is significant that whereas paras. (*a*), (*c*) and (*e*) refer to "member of the police force", para. (*b*) does not. During the eighteen month period after appointment a constable is on probation, and only becomes a full member of the force after the expiration of that period.

37 Commenting on s. 27(*b*), Arnup J.A. who delivered the reasons of the Court of Appeal, said:

> The words "to dispense with the services of" are to be contrasted with "dismissal", which is one of the penalties that may be imposed when a person, including a chief of police, has been found guilty of a major offence: see ss. 20(2) and 23(7). Clause (a) of s. 27 also uses the words "to dispense with the services of" any member of a police force for the purpose of reducing the size of the force. Such reduction is unrelated to matters of discipline. Finally, clause (e) uses the expression "to discharge or place on retirement". The words "to dispense with the services of" in clause (b) are consistent with the idea of a probationary period; during such a period the probationer in effect is liable to be let go without cause assigned. There need be no misconduct involved. The words are in contrast to "dismissal" or "discharge".

38 Section 27(*b*) clearly recognizes the existence of an authority in the Board to terminate the employment of a police constable at any time within a period of eighteen months commencing from the date of his appointment. During that period his employment is at the pleasure of the Board. This being so, the question is whether there is any legal obligation resting on the Board to give to a police constable on probation the opportunity to be heard before dispensing with his services.

39 The leading English authority on this issue is *Ridge v. Baldwin* [14], a judgment of the House of Lords. That case involved the dismissal of the chief constable of a borough police force. Under the relevant statute the watch committee was empowered to dismiss a borough constable "whom they think negligent in the discharge of his duty". The dismissal was made without informing the chief constable of the charges against him and without giving him an opportunity to be heard. It was held that the watch committee was bound to observe the principles of natural justice and that, in view of the failure to do so, the dismissal was a nullity.

40 It will be noted that this case involved a dismissal from office by the watch committee, whose power to dismiss was limited to dismissal for specified causes. The position of someone who holds an office at the pleasure of an authority, which may dispense with his services without cause, is different. This difference is recognized in the judgment of Lord Reid at p. 65:

> The law regarding master and servant is not in doubt. There cannot be specific performance of a contract of service, and the master can terminate the contract with his servant at any time and for any reason or for none. But if he does so in a manner not warranted by the contract he must pay damages for breach of contract. So the question in a pure case of master and servant does not at all depend on whether the master has heard the servant in his own defence: it depends on whether the facts emerging at the trial prove breach of contract. But this kind of case can resemble dismissal from an office where the body employing the man is under some statutory or other restriction as to the kind of contract which it can make with its servants, or the grounds on which it can dismiss them. The present case does not fall within this class because a chief constable is not the servant of the watch committee or indeed of anyone else.

> Then there are many cases where a man holds an office at pleasure. Apart from judges and others whose tenure of office is governed by statute, all servants and officers of the Crown hold office at pleasure, and this has been held even to apply to a colonial judge (*Terrell v. Secretary of State for the Colonies*, [1953] 2 Q.B. 482, [1953] 3 W.L.R. 331, [1953] 2 All E.R. 490). It has always been held, I think rightly, that such an officer has no right to be heard before he is dismissed, and the reason is clear. As the person having the power of dismissal need not have anything against the officer, he need not give any reason. That was stated as long ago as 1670 in *Rex v. Stratford-on-Avon Corporation* ((1809) 11 East 176), where the corporation dismissed a town clerk who held office durante bene placito. The leading case on this matter appears to be *Reg. v. Darlington School Governors* ((1844) 6 Q.B. 682) although that decision was doubted by Lord Hatherley L.C. in *Dean v. Bennett* ((1870) L.R. 6 Ch. 489), and distinguished on narrow grounds in *Willis v. Childe* ((1851) 13 Beav. 117). I fully accept that where an office is simply held at pleasure the person having power of dismissal cannot be bound to disclose his reasons. No doubt he would in many cases tell the officer and hear his explanation before deciding to dismiss him. But if he is not bound to disclose his reason and does not do so, then, if the court cannot require him to do so, it cannot determine whether it would be fair to hear the officer's case before taking action. But again that is not this case. In this case the Act of 1882 only permits the watch committee to take action on the grounds of negligence or unfitness. Let me illustrate the difference by supposing that a watch committee who had no complaint against their present chief constable heard of a man with quite outstanding qualifications who would like to be appointed. They might think it in the public interest to make the change, but they would have no right to do it. But there could be no legal objection to dismissal of an officer holding office at pleasure in order to put a better man in his place.

41 In *Malloch v. Aberdeen Corporation* [15], the House of Lords considered a case involving the dismissal of a school teacher by an education authority. He had not been given the opportunity to make written representations to the authority or to be heard by it before the resolution for his dismissal was passed. In that case the majority held that, although his appointment was during the pleasure of the authority, the statutory provisions which required that notice of the motion for dismissal be sent to the teacher not less than three weeks prior to the meeting which would consider his dismissal, and which required the agreement of a majority of the full members of the board coupled with an explanation of the purpose of those provisions in the Act of 1882 which first introduced them "to secure that no certificated teacher ... shall be dismissed from office without due notice to the teacher and due deliberation on the part of the School Board", by implication indicated that the teacher should have the right to be heard.

42 It should be noted that two of the five judges who heard the appeal dissented. Even accepting the majority view, there is no parallel with the present appeal. In the present case there is no requirement for a fixed notice and no other limitation on the authority to dispense with services. The majority in the *Malloch* case recognized that, in the absence of the special statutory provisions, at common law there would have been no right to a hearing prior to dismissal.

43 The case of *Furnell v. Whangarei High Schools Board* [16], is of no assistance to the appellant. In that case complaints had been made against a high school teacher. The complaints were investigated by a sub-committee appointed under the disciplinary regulations which was to report to the Board. He was suspended by the Board pending the subsequent investigation of the charges to be made by the Board. The teacher was not interviewed by the sub-committee nor did he have an opportunity to make representations to the sub-committee or to the Board prior to his suspension. He sought, *inter alia, certiorari* to quash the decision of the Board. He succeeded at trial but the Board's appeal to the Court of Appeal was allowed. His appeal to the Privy Council from his judgment was dismissed.

44 Lord Morris of Borth-Y-Gest, who wrote the majority reasons, said at p. 679:

> It has often been pointed out that the conceptions which are indicated when natural justice is invoked or referred to are not comprised within and are not to be confined within certain hard and fast and rigid rules: see the speeches in *Wiseman v. Borneman*, [1971] A.C. 297. Natural justice is but fairness writ large and juridically. It has been described as "fair play in action". Nor is it a leaven to be associated only with judicial or quasi-judicial occasions. But as was

pointed out by Tucker L.J. in *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109, 118, the requirements of natural justice must depend on the circumstances of each particular case and the subject matter under consideration.

45 In the present case the circumstances and the subject matter under consideration are as follows: The respondent was not called on to make an investigation of the appellant's conduct. Its right to dispense with his services was not limited to specific causes. Its function was not to condemn or criticize him. The decision which the respondent made was that it did not wish to continue the appellant's services as a constable. His status was that of a constable on probation. The very purpose of the probationary period was to enable the respondent to decide whether it wished to continue his services beyond the probationary period. The only interest involved was that of the Board itself. Its decision was purely administrative. This being so, it was under no duty to explain to the appellant why his services were no longer required, or to give him an opportunity to be heard. It could have taken that course as a matter of courtesy, but its failure to do so was not a breach of any legal duty to the appellant.

46 I would dismiss the appeal with costs.

Appeal allowed with costs, Martland, Pigeon, Beetz and Pratte JJ. dissenting.

Solicitors of record:
Solicitors for the appellant: *Cameron, Brewin & Scott*, Toronto.
Solicitors for the respondent: *Waterous, Holden, Kellock & Kent*, Brantford.
Solicitor for the Attorney General of Ontario: *D. W. Brown*, Toronto.

Footnotes

1 [1957] O.R. 28.

2 (1974), 2 O.R. (2d) 183.

3 [1964] A.C. 40.

4 [1955] A.C. 457.

5 [1953] 2 S.C.R. 140.

6 [1906] 2 K.B. 772.

7 (1888), 21 Q.B.D. 52.

8 [1971] 2 All E.R. 1278.

9 [1972] 1 W.L.R. 1373.

10 [1972] 1 W.L.R. 534.

11 [1973] A.C. 660.

12 [1949] 1 All E.R. 109.

13 [1976] 1 All E.R. 13.

14 [1964] A.C. 40 (H.L.).

15 [1971] 2 All E.R. 1278.

16 [1973] A.C. 660.

End of Document

8

1999 CarswellNat 1124
Supreme Court of Canada

Baker v. Canada (Minister of Citizenship & Immigration)

1999 CarswellNat 1124, 1999 CarswellNat 1125, [1999] 2 S.C.R. 817, [1999] F.C.J. No. 39, [1999] S.C.J. No. 39, 14 Admin. L.R. (3d) 173, 174 D.L.R. (4th) 193, 1 Imm. L.R. (3d) 1, 243 N.R. 22, 89 A.C.W.S. (3d) 777, J.E. 99-1412

Mavis Baker, Appellant v. Minister of Citizenship and Immigration, Respondent and The Canadian Council of Churches, the Canadian Foundation for Children, Youth and the Law, the Defence for Children International-Canada, the Canadian Council for Refugees and the Charter Committee on Poverty Issues, Interveners

L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Bastarache, Binnie, JJ.A.

Heard: November 4, 1998
Judgment: July 9, 1999
Docket: 25823

Proceedings: reversing *Baker v. Canada (Minister of Citizenship & Immigration)* (1996), [1996] F.C.J. No. 1726, [1996] F.C.J. No. 1570, 1996 CarswellNat 2693, 1996 CarswellNat 2052, [1997] 2 F.C. 127, 122 F.T.R. 320 (note), 207 N.R. 57, 142 D.L.R. (4th) 554 (Fed. C.A.); affirming *Baker v. Canada (Minister of Citizenship & Immigration)* (1995), [1995] F.C.J. No. 1441, 1995 CarswellNat 1244, 101 F.T.R. 110, 31 Imm. L.R. (2d) 150 (Fed. T.D.)

Counsel: *Roger Rowe* and *Rocco Galanti*, for Appellant.
Urszula Kaczmarczyk and *Cheryl D. Mitchell*, for Respondent.
Sheena Scott and *Sharryn Aiken*, for Interveners The Canadian Foundation for Children, Youth and the Law, the Defence for Children International-Canada, the Canadian Council for Refugees.
John Terry and *Craig Scott*, for Intervener the Charter Committee on Poverty Issues.
Barbara Jackman and *Marie Chen*, for Intervener the Canadian Council of Churches.

Subject: Immigration; Public; Human Rights

Headnote

Immigration and citizenship --- Admission — Application for temporary resident or immigrant visa — Inland applications — Application of humanitarian and compassionate considerations

Applicant entered Canada in 1981 and supported herself for 11 years before being diagnosed as paranoid schizophrenic and obtaining welfare — Following deportation order, immigration officer refused application under s. 114(2) of Immigration Act for exemption on humanitarian and compassionate grounds to requirement that application for permanent residence be made from outside Canada — Applicant unsuccessfully applied for judicial review — Question was certified regarding whether immigration authorities are required to treat best interests of child as one primary consideration in assessing applicant under s. 114(2) of Act — Question was answered in negative — Applicant appealed — Appeal allowed — Junior immigration officer's notes constituted decision and demonstrated reasonable apprehension of bias — Officer appeared to have drawn conclusions based not on evidence but on fact that applicant was single mother with several children and was diagnosed with mental illness — Failure to give serious consideration to interests of applicant's children was unreasonable exercise of discretion notwithstanding deference that should be given to officer's

decision — Reasons also failed to give sufficient weight or consideration to hardship that might be caused to applicant if returned to country of origin.

Immigration and citizenship --- Admission — Application for temporary resident or immigrant visa — Best interests of child

Applicant entered Canada in 1981 and supported herself for 11 years before being diagnosed as paranoid schizophrenic and obtaining welfare — Applicant had four Canadian-born children — Following deportation order, immigration officer refused application under s. 114(2) of Immigration Act for exemption on humanitarian and compassionate grounds to requirement that application for permanent residence be made from outside Canada — Applicant unsuccessfully applied for judicial review — Question was certified of whether federal immigration authorities are required to treat best interests of Canadian child as one primary consideration in assessing applicant under s. 114(2) of Act — Question was answered in negative — Applicant appealed — Appeal allowed — Reasonable exercise of power under s. 114(2) of Act requires close attention to interests and needs of children — Children's rights and attention to their interests are central humanitarian and compassionate values in Canadian society — Interests of children were minimized in manner inconsistent with Canadian humanitarian and compassionate tradition and Minister's guidelines — Reasons for decision did not indicate that decision was made in manner alive, attentive, or sensitive to interests of applicant's children — Failure to give serious consideration to interests of applicant's children was unreasonable exercise of discretion notwithstanding deference that should be given to officer's decision.

Immigration and citizenship --- Appeals to Federal Court of Appeal and Supreme Court of Canada — Certification of questions by Federal Court Trial Division

Section 83(1) of Immigration Act does not require Federal Court of Appeal to address only certified question — Once question has been certified, then Federal Court of Appeal may consider all aspects of appeal lying within its jurisdiction.

Administrative law --- Requirements of natural justice — Right to hearing — Duty of fairness

Duty of fairness is flexible and variable and depends on context of particular statute and rights affected — Participatory rights within that duty ensure that administrative decisions are made using fair and open procedure appropriate to decision being made and its statutory, institutional, and social context with opportunity for those affected by decision to put forward their views and evidence fully and have them considered by decision-maker — Factors for determining requirements of duty include nature of decision being made and process followed in making it, nature of statutory scheme and terms of statute pursuant to which body operates, importance of decision to individuals affected, legitimate expectations of person challenging decision, and choices of procedure made by agency itself — Other factors may also be important when considering aspects of duty of fairness unrelated to participatory rights — Duty of fairness applies to humanitarian and compassionate applications under Immigration Act.

Administrative law --- Requirements of natural justice — Right to hearing — Procedural rights at hearing — Opportunity to respond and make submissions

Applicant entered Canada in 1981 and supported herself for 11 years before being diagnosed as paranoid schizophrenic and obtaining welfare — Applicant had four Canadian-born children — Following deportation order, immigration officer refused written application under s. 114(2) of Immigration Act for exemption on humanitarian and compassionate (H & C) grounds to requirement that application for permanent residence be made from outside Canada — Applicant unsuccessfully applied for judicial review — Applicant appealed — Appeal allowed on other grounds — Duty of procedural fairness applies to H & C decisions — There was no legitimate expectation that specific procedural rights would be accorded above those normally required by duty of fairness — H & C application is different from judicial decision because it involves exercise of considerable discretion, requires consideration of multiple factors, and is exception to general principles of of Canadian immigration law — Duty of fairness requires that applicant and those whose important interests are affected by decision in fundamental way have meaningful opportunity to present evidence relevant to their case and have it fully and fairly considered — Lack of oral hearing or notice of such hearing does not violate procedural fairness — Opportunity to produce full and complete written documentation was sufficient.

Administrative law --- Requirements of natural justice — Right to hearing — Procedural rights at hearing — Reasons for decision

Applicant entered Canada in 1981 and supported herself for 11 years before being diagnosed as paranoid schizophrenic and obtaining welfare — Applicant had four Canadian-born children — Following deportation order, immigration

officer refused written application under s. 114(2) of Immigration Act for exemption on humanitarian and compassionate (H & C) grounds to requirement that application for permanent residence be made from outside Canada — Applicant unsuccessfully applied for judicial review — Applicant appealed — Appeal allowed on other grounds — Duty of procedural fairness requires written explanation for decision where decision has important significance for individual or where there is statutory right of appeal — Profound importance of H & C decisions to those affected militates in favour of requiring reasons to be provided — Requirement was satisfied by provision of junior immigration officer's notes — Individuals are entitled to fair procedures and open decision-making but in administrative context, this transparency may occur in various ways.

Administrative law --- Requirements of natural justice — Bias — Personal bias — Apprehended

Applicant entered Canada in 1981 and supported herself for 11 years before being diagnosed as paranoid schizophrenic and obtaining welfare — Applicant had four Canadian-born children — Following deportation order, immigration officer refused application under s. 114(2) of Immigration Act for exemption on humanitarian and compassionate grounds to requirement that application for permanent residence be made from outside Canada — Applicant alleged that there was reasonable apprehension of bias — Applicant unsuccessfully applied for judicial review — Applicant appealed — Appeal allowed — Procedural fairness requires decision to be made free from reasonable apprehension of bias by impartial decision-maker — Duty applies to all immigration officers playing role in decision-making — Immigration decisions require sensitivity and understanding by decision-makers — There must be recognition of diversity, understanding of others and openness to difference — Immigration officer's notes gave impression that conclusion may have been based not on evidence but on fact that applicant was single mother with several children and had been diagnosed with psychiatric illness — Reasonable and well-informed members of community would conclude that reviewing officer did not approach case with impartiality appropriate to decision made by immigration officer.

Administrative law --- Standard of review — Reasonableness — Reasonableness simpliciter

Review of substantive aspects of discretionary decisions is to be approached within pragmatic and functional framework given difficulty in making rigid classifications between discretionary and non-discretionary decisions — Relevant factors include expertise of tribunal, nature of decision being made, language of provision and surrounding legislation, whether decision is polycentric, intention revealed by statutory language, and amount of choice left by Parliament to decision-maker — Discretion must be exercised in accordance with boundaries imposed in statute, principles of rule of law, principles of administrative law, fundamental values of Canadian society, and principles of Canadian Charter of Rights and Freedoms.

Administrative law --- Discretion of tribunal under review — General principles

Applicant entered Canada in 1981 and supported herself for 11 years before being diagnosed as paranoid schizophrenic and obtaining welfare — Applicant had four Canadian-born children — Following deportation order, immigration officer refused application under s. 114(2) of Immigration Act for exemption on humanitarian and compassionate grounds to requirement that application for permanent residence be made from outside Canada — Applicant unsuccessfully applied for judicial review — Question was certified of whether federal immigration authorities are required to treat best interests of Canadian child as one primary consideration in assessing applicant under s. 114(2) of Act — Question was answered in negative — Applicant appealed — Appeal allowed — Reasonable exercise of power conferred by section requires close attention to interests and needs of children — Children's rights and attention to their interests are central humanitarian and compassionate values in Canadian society — Reasons for decision did not indicate that decision was made in manner alive, attentive, or sensitive to interests of applicant's children — Failure to give serious consideration to interests of applicant's children was unreasonable exercise of discretion notwithstanding deference that should be given to officer's decision.

Immigration and citizenship --- Admission — Appeals and judicial review — Judicial review — Jurisdiction

"Reasonableness simpliciter » is standard of review of discretionary decision under s. 114(2) of Immigration Act and s. 2.1 of Immigration Regulations determining whether humanitarian and compassionate considerations warrant exemption from requirements of Act — Considerable deference should be given to immigration officers exercising powers conferred by Act, given fact-specific nature of inquiry, its role in statutory scheme as exception, fact that decision-maker is Minister of Citizenship and Immigration, and considerable discretion given by wording of statute — However, lack of privative

clause, existence of judicial review, and nature of decision as individual rather than polycentric suggest that standard is not as deferential as "patent unreasonableness".

Statutes --- Interpretation — Extrinsic aids — Statutes in pari materia

Applicant entered Canada in 1981 and supported herself for 11 years before being diagnosed as paranoid schizophrenic and obtaining welfare — Applicant had four Canadian-born children — Following deportation order, immigration officer refused application under s. 114(2) of Immigration Act for exemption on humanitarian and compassionate grounds to requirement that application for permanent residence be made from outside Canada — Applicant unsuccessfully applied for judicial review — Question was certified of whether, given that Immigration Act does not expressly incorporate language of Canada's international obligations under International Convention on the Rights of the Child, federal immigration authorities must treat best interests of Canadian child as one primary consideration in assessing applicant under s. 114(2) of Act — Question was answered in negative — Applicant appealed — Appeal allowed — Values in international human rights law assist in statutory interpretation and judicial review — Convention's values recognize importance of being attentive to children's rights and best interests when making decisions relating to and affecting their future — Convention's principles place special importance on protections for children and on consideration of their interests, needs, and rights — Reasons for decision did not indicate that decision was made in manner alive, attentive, or sensitive to interests of applicant's children and did not consider them important factor in decision — Failure to give serious consideration to interests of applicant's children was unreasonable exercise of discretion.

Étrangers, immigration et citoyenneté --- Admission — Demande de visa à titre de visiteur ou immigrant — Demande effectuée sur le territoire — Demande pour des motifs d'ordre humanitaire

Requérante est entrée au Canada en 1981 et a subvenu à ses besoins pendant 11 ans avant d'être diagnostiquée comme souffrant de schizophrénie avec paranoïa, et d'obtenir de l'assistance sociale — Après l'ordonnance de déportation, l'agent d'immigration a refusé d'exercer le pouvoir discrétionnaire prévu au par. 114(2) de la Loi sur l'immigration, fondé sur des motifs d'ordre humanitaire — Demande de contrôle judiciaire de la requérante a été rejetée — Requérante a formé un pourvoi — Question a été certifiée quant à savoir si les autorités de l'immigration devaient traiter le meilleur intérêt des enfants comme la principale considération au moment d'évaluer la demande de la requérante en vertu du par. 114(2) de la Loi — Pourvoi de la requérante à l'égard de la question certifiée a été rejeté — Requérante a formé un pourvoi — Pourvoi accueilli — Question a reçu une réponse affirmative — Notes de l'agent de l'immigration constituaient une décision et démontraient une crainte raisonnable de partialité — Agent semble avoir tiré des conclusions non fondées sur la preuve mais sur le fait que la requérante était monoparentale, qu'elle avait plusieurs enfants et qu'elle était atteinte d'une maladie mentale — Omission de considérer sérieusement le meilleur intérêt des enfants de la requérante constituait un exercice déraisonnable du pouvoir discrétionnaire, sans tenir compte de la déférence à laquelle la décision de l'agent devrait avoir droit — Loi sur l'immigration, L.R.C. 1985, c. I-2, par. 114(2).

The applicant entered Canada as a visitor in 1981 and continued to remain in the country. She had four Canadian-born children. She supported herself illegally for 11 years before being diagnosed as paranoid schizophrenic. She subsequently collected welfare and underwent treatment at a mental health centre. In 1992 she was ordered deported. An immigration officer refused discretionary action under s. 114(2) of the *Immigration Act* based on humanitarian and compassionate grounds.

In dismissing the applicant's application for judicial review, the motions judge found that the *Convention on the Rights of the Child* did not apply and was not part of domestic law. The motions judge also found that the evidence showed the children were a significant factor in the decision-making process. The motions judge certified a question as to whether the immigration authorities were required to treat the best interests of the child as a primary consideration in assessing an applicant under s. 114(2) of the Act, given that the Act did not expressly incorporate the language of Canada's international obligations with respect to the Convention.

On appeal of the certified question, the court held that the Convention could not have legal effect in Canada as it had not been implemented through domestic legislation. The Convention could not be interpreted to impose an obligation upon the government to give primacy to the interests of the children in deportation proceedings. Finally, because the doctrine of legitimate expectations does not create substantive rights, and because a requirement that the best interests

of the children be given primacy by a decision-maker under s. 114(2) of the Act would be to create a substantive right, the doctrine did not apply.

The applicant appealed.

Held: The appeal was allowed.

Per L'Heureux-Dubé J. (Gonthier, McLachlin, Bastarache and Binnie JJ. concurring): The Convention did not give rise to a legitimate expectation that when the decision on the applicant's humanitarian and compassionate grounds application was made, specific procedural rights above what would normally be required under the duty of fairness would be accorded, a positive finding would be made, or particular criteria would be applied. The Convention is not the equivalent to a government representation about how such applications will be decided.

The lack of an oral hearing did not constitute a violation of the requirements of procedural fairness. The opportunity, which was accorded for the applicant or her children to produce full and complete written documentation in relation to all aspects of her application, satisfied the requirements of the participatory rights required by the duty of fairness.

The duty of procedural fairness required a written explanation for the decision, which was done. The junior immigration officer's notes constituted the decision and were provided to the applicant. However, the notes demonstrated a reasonable apprehension of bias. The notes appeared to link the applicant's mental illness, her training as a domestic worker and the fact that she had eight children in total to the conclusion that she would, therefore, be a strain on the social welfare system for the rest of her life. The conclusion drawn was contrary to the psychiatrist's letter, which stated that with treatment she could remain well and return to being a productive member of society. The statements gave the impression that the junior officer may have been drawing conclusions based not on the evidence before him, but on the fact that she was a single mother with several children, and had been diagnosed with a psychiatric illness.

The failure to give serious consideration to the interests of the applicant's children constituted an unreasonable exercise of discretion, notwithstanding the important deference that should be given to the immigration officer's decision. The reasons failed to give sufficient weight or consideration to the hardship that a return to Jamaica might cause the applicant, given that she had been in Canada for 12 years, was ill and might not be able to obtain treatment in Jamaica, and would necessarily be separated from some of her children. Attentiveness and sensitivity to the importance of the rights of the children, to their best interests, and to the hardship that may be caused to them by a negative decision is essential for a humanitarian and compassionate decision to be made in a reasonable manner. While deference should be given to immigration officers on s. 114(2) judicial review applications, decisions cannot stand when the manner in which the decision was made and the approach taken are in conflict with humanitarian and compassionate values.

Per Iacobucci J. (Cory J. concurring): The certified question should be answered in the negative. An international convention ratified by the executive branch of government is of no force or effect within the Canadian legal system until it has been incorporated into domestic law by way of implementing legislation. The primacy accorded to the rights of children in the Convention is irrelevant unless and until such provisions are the subject of legislation enacted by Parliament.

La requérante est entrée au Canada en 1981 avec le statut de visiteur et y est restée par la suite. Elle a donné naissance à quatre enfants au Canada. Elle a illégalement subvenu à ses besoins pendant 11 ans, soit jusqu'au moment où l'on a diagnostiqué qu'elle souffrait de schizophrénie paranoïaque. Elle a par la suite touché de l'aide sociale et a suivi un traitement dans un établissement de santé. En 1992, une mesure d'expulsion a été prise contre elle. Un fonctionnaire de l'immigration a refusé d'exercer le pouvoir discrétionnaire qui lui était conféré par l'art 114(2) de la *Loi sur l'immigration* et qui était fondé sur des motifs d'ordre humanitaire.

En rejetant la requête en révision judiciaire de la requérante, la juge saisie de la requête a conclu que la *Convention relative aux droits de l'enfant* ne s'appliquait pas et que ses dispositions ne faisaient pas partie du droit interne canadien. Elle a également conclu qu'il ressortait de la preuve que les enfants avaient constitué un facteur important dans le cadre du processus décisionnel. La juge s'est également prononcée sur la question de savoir si, dans le cadre de l'examen d'une requête faite en vertu de l'art. 114(2) de la Loi, les autorités en matière d'immigration étaient tenues de considérer le meilleur intérêt des enfants comme constituant un élément primordial, même si la Loi n'incorporait pas expressément le langage des obligations internationales du Canada en ce qui concerne la Convention .

En se prononçant sur l'appel de la décision portant sur la question certifiée, la Cour d'appel a estimé que la Convention ne pouvait avoir d'effet juridique au Canada, puisqu'elle n'avait pas été intégrée dans la législation nationale. La Convention

ne pouvait être interprétée comme imposant au gouvernement l'obligation d'accorder priorité à l'intérêt des enfants dans le cadre des procédures d'expulsion. Enfin, compte tenu que la doctrine de l'attente légitime ne crée pas de droits matériels et qu'imposer à un décideur l'obligation d'accorder la primauté au meilleur intérêt des enfants en vertu de l'art. 114(2) de la Loi serait de nature à créer un droit matériel, la doctrine était inapplicable.

La requérante a formé un pourvoi à l'encontre de la décision.

Held: Le pourvoi a été accueilli.

Le juge L'Heureux-Dubé (les juges Gonthier, McLachlin, Bastarache et Binnie y souscrivant) : La Convention n'a pas créé chez la requérante l'attente légitime que sa demande fondée sur des motifs d'ordre humanitaire et de compassion donnerait lieu à des droits procéduraux particuliers plus étendus que ceux qui seraient normalement exigés en vertu de l'obligation d'équité, qu'une décision favorable serait rendue ou que des critères particuliers seraient appliqués. La Convention ne constituait pas l'équivalent d'une déclaration gouvernementale sur la façon dont les demandes doivent être tranchées.

L'absence d'audience ne contrevenait pas aux exigences imposées en vertu de l'équité procédurale. La possibilité qui avait été donnée à la requérante ou à ses enfants de produire toute la documentation écrite se rapportant à tous les aspects de sa requête satisfaisait aux exigences relatives aux droits de participation imposées en vertu de l'obligation d'agir équitablement.

L'obligation d'équité procédurale exigeait que les motifs écrits de la décision soient fournis, ce qui a été fait. Les notes de l'agent subalterne constituaient les motifs de la décision et elles ont été fournies à la requérante. Les notes donnaient toutefois lieu à une crainte raisonnable de partialité. Elles semblaient relier les troubles mentaux de la requérante, sa formation comme domestique et le fait qu'elle avait au total huit enfants à la conclusion qu'elle constituerait, par conséquent, un fardeau pour le système d'aide sociale jusqu'à la fin de ses jours. La conclusion tirée allait à l'encontre de la lettre du psychiatre qui indiquait qu'à l'aide d'un traitement, l'état de la requérante pouvait s'améliorer et qu'elle pourrait redevenir un membre productif de la société. Ces notes donnaient l'impression que l'agent subalterne avait tiré ses conclusions, non pas en se fondant sur la preuve qu'il avait devant lui, mais plutôt sur le fait que la requérante était une mère célibataire avec plusieurs enfants et sur le fait qu'elle était atteinte de troubles psychiatriques.

Le défaut de prendre sérieusement en compte l'intérêt des enfants de la requérante constituait un exercice déraisonnable du pouvoir discrétionnaire et ce, malgré le degré élevé de retenue qu'il convient d'observer à l'égard de la décision de l'agent d'immigration. Les motifs n'accordaient pas un poids et une considération suffisants au préjudice qu'un retour en Jamaïque pouvait causer à la requérante compte tenu qu'elle avait vécu pendant 12 ans au Canada, qu'elle était malade, qu'elle ne pourrait probablement pas recevoir des soins en Jamaïque et qu'elle serait inévitablement séparée de certains de ses enfants. L'attention et la sensibilité manifestées à l'égard de l'importance des droits des enfants, à leur meilleur intérêt et au préjudice qu'ils pourraient subir en raison d'une décision rejettant la requête sont les éléments essentiels d'une décision qui doit être prise de façon raisonnable. Même si, dans le cadre des demandes de contrôle judiciaire, il convient de faire preuve de retenue à l'égard des décisions des agents d'immigration rendues en vertu de l'art. 114(2), leurs décisions ne peuvent être maintenues lorsque la façon dont la décision a été rendue et l'approche adoptée sont contraires aux valeurs humanitaires.

Le juge Iacobucci (le juge Cory y souscrivant) : Une réponse négative devrait être donnée à la question certifiée. Une convention internationale ratifiée par le pouvoir exécutif du gouvernement n'a aucun effet en droit canadien tant que ses dispositions ne sont pas incorporées dans le droit interne par une loi les rendant applicables. La primauté accordée aux droits des enfants par la Convention n'est d'aucune pertinence tant et aussi longtemps que ses dispositions n'ont pas été intégrées dans une loi adoptée par le Parlement.

Annotation

There is a lot of clarification material resulting from this unusual decision. One article entitled the "Shame of Shah" is presently being engrossed by the editor. I say "shame" because of the extraordinary encroachment on the Canadian notion of fairness created by the Federal Court of Appeal in *Muliadi v. Canada (Minister of Employment & Immigration)*. 18 Admin. L.R. 243, 66 N.R. 8, [1986] 2 F.C. 205 (Fed. C.A.), and which was so casually proclaimed by the Court of Appeal in *Shah v. Canada (Minister of Employment & Immigration)* (1994), 29 Imm. L.R. (2d) 82, 170 N.R. 238, 81 F.T.R. 320 (note) (Fed. C.A.). It was for the Supreme Court of Canada in *Baker* to lead the way in disposing of this negative virus manifested in *Shah*. If we are going to have an *Immigration Act* inviting applications with signposts such as

"Humanitarian and Compassionate," it follows that there is not a limited duty of fairness. The *Shah* dictum of the three Court of Appeal judges was unceremoniously and quickly dumped by the Supreme Court of Canada, but not before this backward looking case was approved without hardly a murmur of dissent in more than a hundred cases that were to follow *Shah*. That is its shame. For if so noble a doctrine of fairness is said to exist by the Supreme Court, how is it that no one else could see it? What limitations were imposed on the juridical eyes and conscience of our jurists not to possess a similar vision that to the Supreme Court was so evident?

One of the corollary aspects of this case is that: where there is no fairness, it allows bias, prejudice and unfairness to creep in. Look at the findings of the Supreme Court of Canada in *Baker* at para. 48:

In my opinion, the well-informed member of the community would perceive bias when reading Officer Lorenz's comments. His notes, and the manner in which they are written, do not disclose the existence of an open mind or the weighing of the particular circumstance of the case *free from stereotypes* . . . His use of capitals to highlight the number of Ms. Baker's children may also suggest to a reader that this was a reason to deny her status.

[Emphasis mine]

The learned L'Heureux Dubé J. goes on to deal with the appropriate test of a choice of three when dealing with applications under s. 114(2) of the *Immigration Act*, and the test is reasonableness simpliciter.

She goes on to find that it must be reasonable to deal with the interests of the children of the applicant and that they are nowhere dealt with by the decision-makers. She states, at para. 65:

. . . I believe that the failure to give serious weight and consideration to the interests of the children constitutes an unreasonable exercise of the discretion conferred by the section, notwithstanding the important deference that should be given to the decision of the immigration officer . . .

and later, at para. 76:

Therefore, both because there was a violation of the principles of procedural fairness owing to a reasonable apprehension of bias, and because the exercise of the H & C discretion was unreasonable, I would allow the appeal.

Another matter arising out of *Baker* now being argued by justice lawyers is that the reasons and, indeed, the CAIPS notes can now be read in from the record as evidence. Justice lawyers are using any argument to avoid the making of an affidavit in judicial review applications and thus exposing immigration officers to cross-examination.

This matter was convincingly and clearly dealt with by the Court of Appeal in *Wang v. Canada (Minister of Employment & Immigration)*, 12 Imm. L.R. (2d) 178, 121 N.R. 243, [1991] 2 F.C. 165, 40 F.T.R. 239 (note) (Fed. C.A.).

However, since the notes of Lorenz and the CAIPS notes were read by the court in the *Baker* case, can it be said that the law in *Wang* is now being overruled? I would submit not.

In a judicial review application, under the rules, an applicant can call for the record, and indeed it is often so done. This is not unlike productions required by parties, which occur in a superior court of a province. In such cases, when called upon under the rules, a defendant, or indeed a plaintiff, must submit to production and make an affidavit that the documents produced are totally those that are within the possession and power of the litigant to produce.

However, the productions are not evidence for the party producing such documentation, as he must prove the documents that are produced by him and not otherwise admitted. But this does not prevent the other party from producing and putting such documents into evidence, as these productions from the opponents' point of view constitute an admission.

Therefore, an applicant can put in such record as he requires without proving anything, but this does not mean that the respondent can call up such record as he requires, as evidence of the contents therein. It must be provided by affidavit of one who has personal knowledge.

Moreover, if the document is one that is necessary for the respondent to call into evidence and he fails to do so, then there is an adverse inference to be taken that, had he called the evidence in the ordinary way, it would not have been in his favour.

Commentaire

Cette décision particulière clarifie plusieurs éléments. Un article intitulé « La honte de Shah » est en voie de rédaction par l'éditeur. Je dis « honte » à cause de l'empiètement extraordinaire sur la notion canadienne d'équité créée par la Cour fédérale d'appel dans la cause *Muliadi c. Canada (Ministre de l'Emploi & de l'Immigration)*, 18 Admin. L.R. 243, 66 N.R. 8, [1986] 2 C.F. 205 (C.A. féd.) et qui fut suivie sans retenue par la Cour d'appel dans *Shah c. Canada (Ministre de l'Emploi & de l'Immigration)*, [1994] 29 Imm. L.R. (2d) 82, 170 N.R. 238, 81 F.T.R. 320 (note) (C.A. féd.). Il revenait à la Cour suprême du Canada, dans *Baker*, de disposer de ce virus négatif établi dans l'affaire *Shah*. Si nous avons une *Loi sur l'immigration* invitant les demandes en affichant des motifs « humanitaires et de compassion », il s'ensuit qu'il n'existe pas de limite à l'équité. La maxime de *Shah* établie par trois juges de la Cour d'appel fut écartée rapidement et sans cérémonie par la Cour suprême du Canada, mais pas avant que ce jugement, qui représentait un pas en arrière, n'ait été appliqué dans une centaine de cas, sans même provoquer un murmure de dissidence. C'est là sa honte. Puisque cette noble doctrine de l'équité fut reconnue par la Cour suprême du Canada, comment se fait-il que personne d'autre ne l'ait reconnue? Quelle limite fut imposée sur la perception et la conscience juridique de nos juristes pour qu'ils ne possèdent pas une vision qui semble si évidente à la Cour suprême du Canada?

Un des aspects corollaires de cette cause est : lorsqu'il n'y a pas d'équité, cela fait place aux préjugés, à l'arbitraire et à l'injustice. Lisons cet énoncé du par. 48 de l'arrêt *Baker* de la Cour suprême du Canada :

Á mon avis, les membres bien informés de la communauté percevraient la partialité dans les commentaires de l'agent Lorenz. Ses notes, et la façon dont elles sont rédigées, ne témoignent ni d'un esprit ouvert ni d'une *absence de stéréotypes* dans l'évaluation des circonstances particulières de l'affaire. . . . L'utilisation de majuscules par l'agent pour souligner le nombre des enfants de Mme Baker peut également indiquer au lecteur que c'était là une raison de lui refuser sa demande.

[notre emphase]

La savante Juge L'Heureux-Dubé établit la règle de trois appropriée lorsque confrontée à l'application de l'art. 114(2) de la *Loi sur l'immigration* et cette règle est établie simplement sur l'aspect raisonnable de la décision.

Elle détermine qu'il est raisonnable de considérer l'intérêt des enfants de la requérante et que les décideurs ne traitaient pas de cet aspect. Elle énonce, au par. 65 :

. . . j'estime que le défaut d'accorder de l'importance et de la considération à l'intérêt des enfants constitue un exercice déraisonnable du pouvoir discrétionnaire conféré par l'article, même s'il faut exercer un degré élevé de retenue envers la décision de l'agent d'immigration. . . .

Plus loin, au para. 76 :

En conséquence, parce qu'il y a eu manquement aux principes d'quité procédurale en raison d'une crainte raisonnable de partialité, et parce que l'exercice du pouvoir en matière humanitaire était déraisonnable, je suis d'avis d'accueillir le présent pourvoi.

Un autre aspect émanant de l'affaire *Baker* est maintenant plaidé par les avocats du ministère de la justice est à l'effet que les motifs, et bien sûr les notes des CAIPS, peuvent être présentées à titre de preuve. Les avocats du ministère utilisent

tous les arguments pour éviter le dépôt d'affidavits lors des demandes de contrôle judiciaire pour ainsi éviter de soumettre les officiers à un contre-interrogatoire.

Cette question fut réglée de façon claire et convaincante par la Cour d'appel dans l'affaire *Wang c. Canada (Ministre de l'Emploi & de l'Immigration)*, 12 Imm. L.R. (2d) 178, 121 N.R. 243, [1991] 2 C.F. 165, 40 F.T.R. 239 (note) (C.A. féd.).

Par contre, pouvons-nous prétendre que la règle établie dans *Wang* est maintenant renversée puisque les notes de Lorenz et des CAIPS furent lues par la Cour dans l'affaire *Baker*? Je soumets que non.

Selon les règles, le requérant peut demander le dépôt du dossier lors d'une demande de contrôle judiciaire et ceci se fait fréquemment. Cet aspect est similaire à la production de documents par les parties lors de procédures devant la Cour supérieure d'une province. Dans ce cas, selon les règles, le défendeur ou le demandeur doit déposer un affidavit à l'effet que les documents produits représentent la totalité des pièces qu'il a en sa possession et qu'il peut produire.

Par ailleurs, le dépôt de documents ne constitue pas de la preuve pour la partie qui les produit puisqu'elle doit en établir la preuve s'ils ne sont pas autrement admis. Cela n'empêche pas l'autre partie au litige de produire ces documents en preuve puisque leur dépôt par l'adversaire constitue une admission.

En conséquence, un requérant peut déposer un tel dossier sans prouver quoi que ce soit. Mais cela ne veut pas dire que l'intimé peut invoquer ce dossier, s'il le désire, pour en établir le contenu. Ceci doit être fait par voie d'affidavit de la part de la personne qui a la connaissance personnelle des faits.

Cecil L. Rotenberg, Q.C.

APPEAL by applicant from judgment reported at *Baker v. Canada (Minister of Citizenship & Immigration)* (1996), [1996] F.C.J. No. 1726, [1996] F.C.J. No. 1570, 1996 CarswellNat 2693, 1996 CarswellNat 2052, [1997] 2 F.C. 127, 122 F.T.R. 320 (note), 207 N.R. 57, 142 D.L.R. (4th) 554 (Fed. C.A.), dismissing applicant's appeal from judgment dismissing application for judicial review of immigration officer's refusal of application under s. 114(2) of *Immigration Act* for exemption on humanitarian and compassionate grounds to requirement that application for permanent residence be made from outside Canada.

POURVOI de la requérante à l'encontre du jugement publié à (1996), 142 D.L.R. (4th) 554, 207 N.R. 57, 122 F.T.R. 320 (note), [1997] 2 F.C. 127 (C.A. Féd.), rejetant l'appel de la requérante du jugement publié à (1995), 31 Imm. L.R. (2d) 150, 101 F.T.R. 110 (C.Féd. (1re inst.)), rejetant sa demande de contrôle judiciaire du refus, par l'agent d'immigration, d'exercer son pouvoir discrétionnaire en vertu du par. 114(2) de la *Loi sur l'immigration* pour des motifs d'ordre humanitaire.

***L'Heureux-Dubé J.* (*Gonthier, McLachlin, Bastarache* and *Binnie JJ.* concurring):**

1 Regulations made pursuant to s. 114(2) of the *Immigration Act*, R.S.C., 1985, c. I-2, empower the respondent Minister to facilitate the admission to Canada of a person where the Minister is satisfied, owing to humanitarian and compassionate considerations, that admission should be facilitated or an exemption from the regulations made under the Act should be granted. At the centre of this appeal is the approach to be taken by a court to judicial review of such decisions, both on procedural and substantive grounds. It also raises issues of reasonable apprehension of bias, the provision of written reasons as part of the duty of fairness, and the role of children's interests in reviewing decisions made pursuant to s. 114(2).

I. Factual Background

2 Mavis Baker is a citizen of Jamaica who entered Canada as a visitor in August of 1981 and has remained in Canada since then. She never received permanent resident status, but supported herself illegally as a live-in domestic worker for 11 years. She has had four children (who are all Canadian citizens) while living in Canada: Paul Brown, born in 1985, twins Patricia and Peter Robinson, born in 1989, and Desmond Robinson, born in 1992. After Desmond was born, Ms.

Baker suffered from post-partum psychosis and was diagnosed with paranoid schizophrenia. She applied for welfare at that time. When she was first diagnosed with mental illness, two of her children were placed in the care of their natural father, and the other two were placed in foster care. The two who were in foster care are now again under her care, since her condition has improved.

3 The appellant was ordered deported in December 1992, after it was determined that she had worked illegally in Canada and had overstayed her visitor's visa. In 1993, Ms. Baker applied for an exemption from the requirement to apply for permanent residence outside Canada, based upon humanitarian and compassionate considerations, pursuant to s. 114(2) of the *Immigration Act*. She had the assistance of counsel in filing this application, and included, among other documentation, submissions from her lawyer, a letter from her doctor, and a letter from a social worker with the Children's Aid Society. The documentation provided indicated that although she was still experiencing psychiatric problems, she was making progress. It also stated that she might become ill again if she were forced to return to Jamaica, since treatment might not be available for her there. Ms. Baker's submissions also clearly indicated that she was the sole caregiver for two of her Canadian-born children, and that the other two depended on her for emotional support and were in regular contact with her. The documentation suggested that she too would suffer emotional hardship if she were separated from them.

4 The response to this request was contained in a letter, dated April 18, 1994, and signed by Immigration Officer M. Caden, stating that a decision had been made that there were insufficient humanitarian and compassionate grounds to warrant processing Ms. Baker's application for permanent residence within Canada. This letter contained no reasons for the decision.

5 Upon request of the appellant's counsel, she was provided with the notes made by Immigration Officer G. Lorenz, which were used by Officer Caden when making his decision. After a summary of the history of the case, Lorenz's notes read as follows:

> PC is unemployed - on Welfare. No income shown - no assets. Has four Cdn.-born children- four other children in Jamaica- HAS A TOTAL OF EIGHT CHILDREN
>
> Says only two children are in her "direct custody". (No info on who has ghe [*sic*] other two).
>
> There is nothing for her in Jamaica - hasn't been there in a long time - no longer close to her children there - no jobs there - she has no skills other than as a domestic - children would suffer - can't take them with her and can't leave them with anyone here. Says has suffered from a mental disorder since '81 - is now an outpatient and is improving. If sent back will have a relapse.
>
> Letter from Children's Aid - they say PC has been diagnosed as a paranoid schizophrenic. - children would suffer if returned -
>
> Letter of Aug. '93 from psychiatrist from Ont. Govm't. Says PC had post-partum psychosis and had a brief episode of psychosis in Jam. when was 25 yrs. old. Is now an out-patient and is doing relatively well - deportation would be an extremely stressful experience.
>
> Lawyer says PS [*sic*] is sole caregiver and single parent of two Cdn born children. Pc's mental condition would suffer a setback if she is deported etc.
>
> This case is a catastrophy [*sic*]. It is also an indictment of our "system" that the client came as a visitor in Aug. '81, was not ordered deported until Dec. '92 and in APRIL '94 IS STILL HERE!
>
> The PC is a paranoid schizophrenic and on welfare. She has no qualifications other than as a domestic. She has FOUR CHILDREN IN JAMAICA AND ANOTHER FOUR BORN HERE. She will, of course, be a tremendous strain on our social welfare systems for (probably) the rest of her life. There are no H&C factors other than her

FOUR CANADIAN-BORN CHILDREN. Do we let her stay because of that? I am of the opinion that Canada can no longer afford this kind of generosity. However, because of the circumstances involved, there is a potential for adverse publicity. I recommend refusal but you may wish to clear this with someone at Region.

There is also a potential for violence - see charge of" assault with a weapon" [Capitalization in original.]

6 Following the refusal of her application, Ms. Baker was served, on May 27, 1994, with a direction to report to Pearson Airport on June 17 for removal from Canada. Her deportation has been stayed pending the result of this appeal.

II. Relevant Statutory Provisions and Provisions of International Treaties

7 *Immigration Act*, R.S.C., 1985, c. I-2

82.1 (1) An application for judicial review under the *Federal Court Act* with respect to any decision or order made, or any matter arising, under this Act or the rules or regulations thereunder may be commenced only with leave of a judge of the Federal Court — Trial Division.

83. (1) A judgment of the Federal Court — Trial Division on an application for judicial review with respect to any decision or order made, or any matter arising, under this Act or the rules or regulations thereunder may be appealed to the Federal Court of Appeal only if the Federal Court — Trial Division has at the time of rendering judgment certified that a serious question of general importance is involved and has stated that question.

114. ...

(2) The Governor in Council may, by regulation, authorize the Minister to exempt any person from any regulation made under subsection (1) or otherwise facilitate the admission of any person where the Minister is satisfied that the person should be exempted from that regulation or that the person's admission should be facilitated owing to the existence of compassionate or humanitarian considerations.

Immigration Regulations, 1978, SOR/78-172, as amemded by SOR/93-44

2.1 The Minister is hereby authorized to exempt any person from any regulation made under subsection 114(1) of the Act or otherwise facilitate the admission to Canada of any person where the Minister is satisfied that the person should be exempted from that regulation or that the person's admission should be facilitated owing to the existence of compassionate or humanitarian considerations.

Convention on the Rights of the Child, Can. T.S. 1992 No. 3

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

. . . . .

Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular

case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

III. Judgments

A. Federal Court -- Trial Division (1995), 101 F.T.R. 110 (Fed. T.D.)

8 Simpson J. delivered oral reasons dismissing the appellant's judicial review application. She held that since there were no reasons given by Officer Caden for his decision, no affidavit was provided, and no reasons were required, she would assume, in the absence of evidence to the contrary, that he acted in good faith and made a decision based on correct principles. She rejected the appellant's argument that the statement in Officer Lorenz's notes that Ms. Baker would be a strain on the welfare system was not supported by the evidence, holding that it was reasonable to conclude from the reports provided that Ms. Baker would not be able to return to work. She held that the language of Officer Lorenz did not raise a reasonable apprehension of bias, and also found that the views expressed in his notes were unimportant, because they were not those of the decision-maker, Officer Caden. She rejected the appellant's argument that the *Convention on the Rights of the Child* mandated that the appellant's interests be given priority in s. 114(2) decisions, holding that the Convention did not apply to this situation, and was not part of domestic law. She also held that the evidence showed the children were a significant factor in the decision-making process. She rejected the appellant's submission that the Convention gave rise to a legitimate expectation that the children's interests would be a primary consideration in the decision.

9 Simpson J. certified the following as a serious question of general importance under s. 83(1) of the *Immigration Act*: "Given that the Immigration Act does not expressly incorporate the language of Canada's international obligations with respect to the International Convention on the Rights of the Child, must federal immigration authorities treat the best interests of the Canadian child as a primary consideration in assessing an applicant under s. 114(2) of the Immigration Act?"

B. Federal Court of Appeal (1996), [1997] 2 F.C. 127 (Fed. C.A.)

10 The reasons of the Court of Appeal were delivered by Strayer J.A. He held that pursuant to s. 83(1) of the *Immigration Act*, the appeal was limited to the question certified by Simpson J. He also rejected the appellant's request to challenge the constitutional validity of s. 83(1). Strayer J.A. noted that a treaty cannot have legal effect in Canada unless implemented through domestic legislation, and that the Convention had not been adopted in either federal or provincial legislation. He held that although legislation should be interpreted, where possible, to avoid conflicts with Canada's international obligations, interpreting s. 114(2) to require that the discretion it provides for must be exercised in accordance with the Convention would interfere with the separation of powers between the executive and legislature. He held that such a principle could also alter rights and obligations within the jurisdiction of provincial legislatures. Strayer J.A. also rejected the argument that any articles of the Convention could be interpreted to impose an obligation upon the government to give primacy to the interests of the children in a proceeding such as deportation. He held that the deportation of a parent was not a decision" concerning" children within the meaning of article 3. Finally, Strayer J.A. considered the appellant's argument based on the doctrine of legitimate expectations. He noted that because the doctrine does not create substantive rights, and because a requirement that the best interests of the children be given primacy by a decision-maker under s. 114(2) would be to create a substantive right, the doctrine did not apply.

III. Issues

11 Because, in my view, the issues raised can be resolved under the principles of administrative law and statutory interpretation, I find it unnecessary to consider the various *Charter* issues raised by the appellant and the interveners who supported her position. The issues raised by this appeal are therefore as follows:

> (1) What is the legal effect of a stated question under s. 83(1) of the *Immigration Act* on the scope of appellate review?
>
> (2) Were the principles of procedural fairness violated in this case?
>
> (i) Were the participatory rights accorded consistent with the duty of procedural fairness?
>
> (ii) Did the failure of Officer Caden to provide his own reasons violate the principles of procedural fairness?
>
> (iii) Was there a reasonable apprehension of bias in the making of this decision?
>
> (3) Was this discretion improperly exercised because of the approach taken to the interests of Ms. Baker's children?

I note that it is the third issue that raises directly the issues contained in the certified question of general importance stated by Simpson J.

IV. Analysis

A. Stated Questions Under s. 83(1) of the Immigration Act

12 The Court of Appeal held, in accordance with its decision in *Liyanagamage v. Canada (Secretary of State)* (1994), 176 N.R. 4 (Fed. C.A.), that the requirement, in s. 83(1), that a serious question of general importance be certified for an appeal to be permitted restricts an appeal court to addressing the issues raised by the certified question. However, in *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982 (S.C.C.) at para. 25, this Court held that s. 83(1) does not require that the Court of Appeal address only the stated question and issues related to it:

> The certification of a "question of general importance" is the trigger by which an appeal is justified. The object of the appeal is still the judgment itself, not the certified question.

Rothstein J. noted in *Ramoutar v. Canada (Minister of Employment & Immigration)*, [1993] 3 F.C. 370 (Fed. T.D.), that once a question has been certified, all aspects of the appeal may be considered by the Court of Appeal, within its jurisdiction. I agree. The wording of s. 83(1) suggests, and *Pushpanathan* confirms, that if a question of general importance has been certified, this allows for an appeal from the judgment of the Trial Division which would otherwise not be permitted, but does not confine the Court of Appeal or this Court to answering the stated question or issues directly related to it. All issues raised by the appeal may therefore be considered here.

B. The Statutory Scheme and the Nature of the Decision

13 Before examining the various grounds for judicial review, it is appropriate to discuss briefly the nature of the decision made under s. 114(2) of the *Immigration Act*, the role of this decision in the statutory scheme, and the guidelines given by the Minister to immigration officers in relation to it.

14 Section 114(2) itself authorizes the Governor in Council to authorize the Minister to exempt a person from a regulation made under the *Act*, or to facilitate the admission to Canada of any person. The Minister's power to grant an exemption based on humanitarian and compassionate (H & C) considerations arises from s. 2.1 of the *Immigration Regulations*, which I reproduce for convenience:

> The Minister is hereby authorized to exempt any person from any regulation made under subsection 114(1) of the Act or otherwise facilitate the admission to Canada of any person where the minister is satisfied that the person should be exempted from that regulation or that the person's admission should be facilitated owing to the existence of compassionate or humanitarian considerations.

For the purpose of clarity, I will refer throughout these reasons to decisions made pursuant to the combination of s. 114(2) of the Act and s. 2.1 of the Regulations as "H & C decisions".

15 Applications for permanent residence must, as a general rule, be made from outside Canada, pursuant to s. 9(1) of the Act. One of the exceptions to this is when admission is facilitated owing to the existence of compassionate or humanitarian considerations. In law, pursuant to the *Act* and the regulations, an H & C decision is made by the Minister, though in practice, this decision is dealt with in the name of the Minister by immigration officers: see, for example, *Jiminez-Perez v. Canada (Minister of Employment& Immigration)*, [1984] 2 S.C.R. 565 (S.C.C.), at p. 569. In addition, while in law, the H & C decision is one that provides for an *exemption* from regulations or from the *Act*, in practice, it is one that, in cases like this one, determines whether a person who has been in Canada but does not have status can stay in the country or will be required to leave a place where he or she has become established. It is an important decision that affects in a fundamental manner the future of individuals' lives. In addition, it may also have an important impact on the lives of any Canadian children of the person whose humanitarian and compassionate application is being considered, since they may be separated from one of their parents and/or uprooted from their country of citizenship, where they have settled and have connections.

16 Immigration officers who make H & C decisions are provided with a set of guidelines, contained in chapter 9 of the *Immigration Manual: Examination and Enforcement*. The guidelines constitute instructions to immigration officers about how to exercise the discretion delegated to them. These guidelines are also available to the public. A number of statements in the guidelines are relevant to Ms. Baker's application. Guideline 9.05 emphasizes that officers have a duty to decide which cases should be given a favourable recommendation, by carefully considering all aspects of the case, using their best judgment and asking themselves what a reasonable person would do in such a situation. It also states that although officers are not expected to "delve into areas which are not presented during examination or interviews, they should attempt to clarify possible humanitarian grounds and public policy considerations even if these are not well articulated".

17 The guidelines also set out the bases upon which the discretion conferred by s. 114(2) and the regulations should be exercised. Two different types of criteria that may lead to a positive s. 114(2) decision are outlined -- public policy

considerations and humanitarian and compassionate grounds. Immigration officers are instructed, under guideline 9.07, to assure themselves, first, whether a public policy consideration is present, and if there is none, whether humanitarian and compassionate circumstances exist. Public policy reasons include marriage to a Canadian resident, the fact that the person has lived in Canada, become established, and has become an "illegal de facto resident", and the fact that the person may be a long-term holder of employment authorization or has worked as a foreign domestic. Guideline 9.07 states that humanitarian and compassionate grounds will exist if "unusual, undeserved or disproportionate hardship would be caused to the person seeking consideration if he or she had to leave Canada". The guidelines also directly address situations involving family dependency, and emphasize that the requirement that a person leave Canada to apply from abroad may result in hardship for close family members of a Canadian resident, whether parents, children, or others who are close to the claimant, but not related by blood. They note that in such cases, the reasons why the person did not apply from abroad and the existence of family or other support in the person's home country should also be considered.

C. Procedural Fairness

18 The first ground upon which the appellant challenges the decision made by Officer Caden is the allegation that she was not accorded procedural fairness. She suggests that the following procedures are required by the duty of fairness when parents have Canadian children and they make an H & C application: an oral interview before the decision-maker, notice to her children and the other parent of that interview, a right for the children and the other parent to make submissions at that interview, and notice to the other parent of the interview and of that person's right to have counsel present. She also alleges that procedural fairness requires the provision of reasons by the decision-maker, Officer Caden, and that the notes of Officer Lorenz give rise to a reasonable apprehension of bias.

19 In addressing the fairness issues, I will consider first the principles relevant to the determination of the content of the duty of procedural fairness, and then address Ms. Baker's arguments that she was accorded insufficient participatory rights, that a duty to give reasons existed, and that there was a reasonable apprehension of bias.

20 Both parties agree that a duty of procedural fairness applies to H & C decisions. The fact that a decision is administrative and affects "the rights, privileges or interests of an individual" is sufficient to trigger the application of the duty of fairness: *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643 (S.C.C.) at p. 653. Clearly, the determination of whether an applicant will be exempted from the requirements of the Act falls within this category, and it has been long recognized that the duty of fairness applies to H& C decisions: *Sobrie v. Canada (Minister of Employment & Immigration)* (1987), 3 Imm. L.R. (2d) 81 (Fed. T.D.) at p. 88; *Said v. Canada (Minister of Employment & Immigration)* (1992), 6 Admin. L.R. (2d) 23 (Fed. T.D.); *Shah v. Canada (Minister of Employment & Immigration)* (1994), 170 N.R. 238 (Fed. C.A.).

(1) Factors Affecting the Content of the Duty of Fairness

21 The existence of a duty of fairness, however, does not determine what requirements will be applicable in a given set of circumstances. As I wrote in *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 (S.C.C.) at p. 682, "the concept of procedural fairness is eminently variable, and its content is to be decided in the specific context of each case". All of the circumstances must be considered in order to determine the content of the duty of procedural fairness: *Knight* at pp. 682-83; *Cardinal, supra*, at p. 654; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170 (S.C.C.), *per* Sopinka J.

22 Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances. I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

23 Several factors have been recognized in the jurisprudence as relevant to determining what is required by the common law duty of procedural fairness in a given set of circumstances. One important consideration is the nature of the decision being made and the process followed in making it. In *Knight, supra*, at p. 683, it was held that "the closeness of the administrative process to the judicial process should indicate how much of those governing principles should be imported into the realm of administrative decision making". The more the process provided for, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness. See also *Old St. Boniface, supra*, at p. 1191; *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109 (Eng. C.A.) at p. 118; *Syndicat des employés de production du Québec & de l'Acadie v. Canada (Human Rights Commission)*, [1989] 2 S.C.R. 879 (S.C.C.) at p. 896, *per* Sopinka J.

24 A second factor is the nature of the statutory scheme and the "terms of the statute pursuant to which the body operates": *Old St. Boniface, supra*, at p. 1191. The role of the particular decision within the statutory scheme and other surrounding indications in the statute help determine the content of the duty of fairness owed when a particular administrative decision is made. Greater procedural protections, for example, will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted: see D.J.M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 7-66 to 7-67.

25 A third factor in determining the nature and extent of the duty of fairness owed is the importance of the decision to the individual or individuals affected. The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated. This was expressed, for example, by Dickson J. (as he then was) in *Kane v. University of British Columbia*, [1980] 1 S.C.R. 1105 (S.C.C.) at p. 1113:

> A high standard of justice is required when the right to continue in one's profession or employment is at stake.... A disciplinary suspension can have grave and permanent consequences upon a professional career.

As Sedley J. (now Sedley L.J.) stated in *R. v. Higher Education Funding Council* (1993), [1994] 1 All E.R. 651 (Eng. Q.B.), at p. 667:

> In the modern state the decisions of administrative bodies can have a more immediate and profound impact on people's lives than the decisions of courts, and public law has since *Ridge v. Baldwin*, [1963] 2 All E.R. 66, [1964] A.C. 40 been alive to that fact. While the judicial character of a function may elevate the practical requirements of fairness above what they would otherwise be, for example by requiring contentious evidence to be given and tested orally, what makes it "judicial" in this sense is principally the nature of the issue it has to determine, not the formal status of the deciding body.

The importance of a decision to the individuals affected, therefore, constitutes a significant factor affecting the content of the duty of procedural fairness.

26 Fourth, the legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances. Our Court has held that, in Canada, this doctrine is part of the doctrine of fairness or natural justice, and that it does not create substantive rights: *Old St. Boniface, supra*, at p. 1204; *Reference re Canada Assistance Plan (Canada)*, [1991] 2 S.C.R. 525 (S.C.C.) at p. 557. As applied in Canada, if a legitimate expectation is found to exist, this will affect the content of the duty of fairness owed to the individual or individuals affected by the decision. If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness: *Qi v. Canada (Minister of Citizenship & Immigration)* (1995), 33 Imm. L.R. (2d) 57 (Fed. T.D.); *Mercier-Néron v. Canada (Minister of National Health & Welfare)* (1995), 98 F.T.R. 36 (Fed. T.D.); *Bendahmane v. Canada (Minister of Employment & Immigration)*, [1989] 3 F.C. 16 (Fed. C.A.). Similarly, if a claimant has a legitimate expectation that a certain result will be reached in his or her case, fairness may require more extensive

procedural rights than would otherwise be accorded: D.J. Mullan, *Administrative Law* (3rd ed. 1996), at pp. 214-15; D. Shapiro, "Legitimate Expectation and its Application to Canadian Immigration Law" (1992), 8 *J.L. & Soc. Pol'y* 282, at p. 297; *Canada (Attorney General) v. Canada (Human Rights Tribunal)* (1994), 76 F.T.R. 1 (Fed. T.D.). Nevertheless, the doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain. This doctrine, as applied in Canada, is based on the principle that the "circumstances" affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights.

27 Fifth, the analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances: Brown and Evans, *supra*, at pp. 7-66 to 7-70. While this, of course, is not determinative, important weight must be given to the choice of procedures made by the agency itself and its institutional constraints: *I.W.A. Local 2-69 v. Consolidated Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282 (S.C.C.), *per* Gonthier J.

28 I should note that this list of factors is not exhaustive. These principles all help a court determine whether the procedures that were followed respected the duty of fairness. Other factors may also be important, particularly when considering aspects of the duty of fairness unrelated to participatory rights. The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.

(2) Legitimate Expectations

29 I turn now to an application of these principles to the circumstances of this case, to determine whether the procedures followed respected the duty of procedural fairness. I will first determine whether the duty of procedural fairness that would otherwise be applicable is affected, as the appellant argues, by the existence of a legitimate expectation based upon the text of the articles of the Convention and the fact that Canada has ratified it. In my view, however, the articles of the Convention and their wording did not give rise to a legitimate expectation on the part of Ms. Baker that when the decision on her H& C application was made, specific procedural rights above what would normally be required under the duty of fairness would be accorded, a positive finding would be made, or particular criteria would be applied. This Convention is not, in my view, the equivalent of a government representation about how H& C applications will be decided, nor does it suggest that any rights beyond the participatory rights discussed below will be accorded. Therefore, in this case there is no legitimate expectation affecting the content of the duty of fairness, and the fourth factor outlined above therefore does not affect the analysis. It is unnecessary to decide whether an international instrument ratified by Canada could, in other circumstances, give rise to a legitimate expectation.

(3) Participatory Rights

30 The next issue is whether, taking into account the other factors related to the determination of the content of the duty of fairness, the failure to accord an oral hearing and give notice to Ms. Baker or her children was inconsistent with the participatory rights required by the duty of fairness in these circumstances. At the heart of this analysis is whether, considering all the circumstances, those whose interests were affected had a meaningful opportunity to present their case fully and fairly. The procedure in this case consisted of a written application with supporting documentation, which was summarized by the junior officer (Lorenz), with a recommendation being made by that officer. The summary, recommendation, and material was then considered by the senior officer (Caden), who made the decision.

31 Several of the factors described above enter into the determination of the type of participatory rights the duty of procedural fairness requires in the circumstances. First, an H & C decision is very different from a judicial decision, since it involves the exercise of considerable discretion and requires the consideration of multiple factors. Second, its

role is also, within the statutory scheme, as an exception to the general principles of Canadian immigration law. These factors militate in favour of more relaxed requirements under the duty of fairness. On the other hand, there is no appeal procedure, although judicial review may be applied for with leave of the Federal Court — Trial Division. In addition, considering the third factor, this is a decision that in practice has exceptional importance to the lives of those with an interest in its result — the claimant and his or her close family members — and this leads to the content of the duty of fairness being more extensive. Finally, applying the fifth factor described above, the statute accords considerable flexibility to the Minister to decide on the proper procedure, and immigration officers, as a matter of practice, do not conduct interviews in all cases. The institutional practices and choices made by the Minister are significant, though of course not determinative factors to be considered in the analysis. Thus, it can be seen that although some of the factors suggest stricter requirements under the duty of fairness, others suggest more relaxed requirements further from the judicial model.

32 Balancing these factors, I disagree with the holding of the Federal Court of Appeal in *Shah, supra*, at p. 239, that the duty of fairness owed in these circumstances is simply "minimal". Rather, the circumstances require a full and fair consideration of the issues, and the claimant and others whose important interests are affected by the decision in a fundamental way must have a meaningful opportunity to present the various types of evidence relevant to their case and have it fully and fairly considered.

33 However, it also cannot be said that an oral hearing is always necessary to ensure a fair hearing and consideration of the issues involved. The flexible nature of the duty of fairness recognizes that meaningful participation can occur in different ways in different situations. The Federal Court has held that procedural fairness does not require an oral hearing in these circumstances: see, for example, *Said, supra*, at p. 30.

34 I agree that an oral hearing is not a general requirement for H & C decisions. An interview is not essential for the information relevant to an H& C application to be put before an immigration officer, so that the humanitarian and compassionate considerations presented may be considered in their entirety and in a fair manner. In this case, the appellant had the opportunity to put forward, in written form through her lawyer, information about her situation, her children and their emotional dependence on her, and documentation in support of her application from a social worker at the Children's Aid Society and from her psychiatrist. These documents were before the decision-makers, and they contained the information relevant to making this decision. Taking all the factors relevant to determining the content of the duty of fairness into account, the lack of an oral hearing or notice of such a hearing did not, in my opinion, constitute a violation of the requirements of procedural fairness to which Ms. Baker was entitled in the circumstances, particularly given the fact that several of the factors point toward a more relaxed standard. The opportunity, which was accorded, for the appellant or her children to produce full and complete written documentation in relation to all aspects of her application satisfied the requirements of the participatory rights required by the duty of fairness in this case.

(4) The Provision of Reasons

35 The appellant also submits that the duty of fairness, in these circumstances, requires that reasons be given by the decision-maker. She argues either that the notes of Officer Lorenz should be considered the reasons for the decision, or that it should be held that the failure of Officer Caden to give written reasons for his decision or a subsequent affidavit explaining them should be taken to be a breach of the principles of fairness.

36 This issue has been addressed in several cases of judicial review of humanitarian and compassionate applications. The Federal Court of Appeal has held that reasons are unnecessary: *Shah, supra*, at pp. 239-40. It has also been held that the case history notes prepared by a subordinate officer are not to be considered the decision-maker's reasons: see *Tylo v. Canada (Minister of Employment & Immigration)* (1995), 90 F.T.R. 157 (Fed. T.D.) at pp. 159-60. In *Gheorlan v. Canada (Secretary of State)* (1995), 26 Imm. L.R. (2d) 170 (Fed. T.D.), and *Chan v. Canada (Minister of Citizenship & Immigration)* (1994), 87 F.T.R. 62 (Fed. T.D.), it was held that the notes of the reviewing officer should not be taken to be the reasons for decision, but may help in determining whether a reviewable error exists. In *Marques v. Canada*

(Minister of Citizenship & Immigration) (1995), 116 F.T.R. 241 (Fed. T.D.), an H & C decision was set aside because the decision making officer failed to provide reasons or an affidavit explaining the reasons for his decision.

37 More generally, the traditional position at common law has been that the duty of fairness does not require, as a general rule, that reasons be provided for administrative decisions: *Northwestern Utilities Ltd. v. Edmonton (City)* (1978), [1979] 1 S.C.R. 684 (S.C.C.); *Supermarchés Jean Labrecque Inc. v. Québec (Tribunal du travail)*, [1987] 2 S.C.R. 219 (S.C.C.) at p. 233; *Public Service Board of New South Wales v. Osmond* (1986), 159 C.L.R. 656 (Australia H.C.) at pp. 665-66.

38 Courts and commentators have, however, often emphasized the usefulness of reasons in ensuring fair and transparent decision-making. Though *Northwestern Utilities* dealt with a statutory obligation to give reasons, Estey J. held as follows, at p. 706, referring to the desirability of a common law reasons requirement:

> This obligation is a salutary one. It reduces to a considerable degree the chances of arbitrary or capricious decisions, reinforces public confidence in the judgment and fairness of administrative tribunals, and affords parties to administrative proceedings an opportunity to assess the question of appeal....

The importance of reasons was recently reemphasized by this Court in *R. v. Campbell*, [1997] 3 S.C.R. 3 (S.C.C.) at pp. 109-10.

39 Reasons, it has been argued, foster better decision making by ensuring that issues and reasoning are well articulated and, therefore, more carefully thought out. The process of writing reasons for decision by itself may be a guarantee of a better decision. Reasons also allow parties to see that the applicable issues have been carefully considered, and are invaluable if a decision is to be appealed, questioned, or considered on judicial review: R.A. Macdonald and D. Lametti, "Reasons for Decision in Administrative Law" (1990), 3 *C.J.A.L.P.* 123, at p. 146; *Williams v. Canada (Minister of Citizenship & Immigration)*, [1997] 2 F.C. 646 (Fed. C.A.) at para. 38 Those affected may be more likely to feel they were treated fairly and appropriately if reasons are given: de Smith, Woolf, & Jowell, *Judicial Review of Administrative Action* (5th ed. 1995), at pp. 459-60. I agree that these are significant benefits of written reasons.

40 Others have expressed concerns about the desirability of a written reasons requirement at common law. In *Osmond, supra*, Gibbs C.J. articulated, at p. 668, the concern that a reasons requirement may lead to an inappropriate burden being imposed on administrative decision-makers, that it may lead to increased cost and delay, and that it" might in some cases induce a lack of candour on the part of the administrative officers concerned". Macdonald and Lametti, *supra*, though they agree that fairness should require the provision of reasons in certain circumstances, caution against a requirement of "archival" reasons associated with court judgments, and note that the special nature of agency decision-making in different contexts should be considered in evaluating reasons requirements. In my view, however, these concerns can be accommodated by ensuring that any reasons requirement under the duty of fairness leaves sufficient flexibility to decision-makers by accepting various types of written explanations for the decision as sufficient.

41 In England, a common law right to reasons in certain circumstances has developed in the case law: see M.H. Morris, "Administrative Decision-makers and the Duty to Give Reasons: An Emerging Debate" (1997), 11 *C.J.A.L.P.* 155, at pp. 164-168; de Smith, Woolf & Jowell, *supra*, at pp. 462-65. In *R. v. Civil Service Appeal Board*, [1991] 4 All E.R. 310 (Eng. C.A.), reasons were required of a board deciding the appeal of the dismissal of a prison official. The House of Lords, in *R. v. Secretary of State for the Home Department* (1993), [1994] 1 A.C. 531 (U.K. H.L.), imposed a reasons requirement on the Home Secretary when exercising the statutory discretion to decide on the period of imprisonment that a prisoner who had been imposed a life sentence should serve before being entitled to a review. Lord Mustill, speaking for all the law lords on the case, held that although there was no general duty to give reasons at common law, in those circumstances a failure to give reasons was unfair. Other English cases have held that reasons are required at common law when there is a statutory right of appeal: see *Norton Tool Co. v. Tewson*, [1973] 1 W.L.R. 45 (N.I.R.C.) at p. 49; *Alexander Machinery (Dudley) Ltd. v. Crabtree*, [1974] I.C.R. 120 (N.I.R.C.).

42 Some Canadian courts have imposed, in certain circumstances, a common law obligation on administrative decision-makers to provide reasons, while others have been more reluctant. In *Orlowski v. British Columbia (Attorney General)* (1992), 94 D.L.R. (4th) 541 (B.C. C.A.) at pp. 551-52, it was held that reasons would generally be required for decisions of a review board under Part XX.1 of the *Criminal Code*, based in part on the existence of a statutory right of appeal from that decision, and also on the importance of the interests affected by the decision. In *R.D.R. Construction Ltd. v. Nova Scotia (Rent Review Commission)* (1982), 55 N.S.R. (2d) 71 (N.S. T.D.), the court also held that because of the existence of a statutory right of appeal, there was an implied duty to give reasons. Smith D.J., in *Taabea v. Canada (Refugee Status Advisory Committee)* (1979), [1980] 2 F.C. 316 (Fed. T.D.), imposed a reasons requirement on a Ministerial decision relating to refugee status, based upon the right to apply to the Immigration Appeal Board for redetermination. Similarly, in the context of evaluating whether a statutory reasons requirement had been adequately fulfilled in *Boyle v. New Brunswick (Workplace Health, Safety & Compensation Commission)* (1996), 179 N.B.R. (2d) 43 (N.B. C.A.), Bastarache J.A. (as he then was) emphasized, at p. 55, the importance of adequate reasons when appealing a decision. However, the Federal Court of Appeal recently rejected the submission that reasons were required in relation to a decision to declare a permanent resident a danger to the public under s. 70(5) of the *Immigration Act*: *Williams*, *supra*.

43 In my opinion, it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required. This requirement has been developing in the common law elsewhere. The circumstances of the case at bar, in my opinion, constitute one of the situations where reasons are necessary. The profound importance of an H& C decision to those affected, as with those at issue in *Orlowski*, *R. v. Civil Service Appeal Board*, and *R. v. Secretary of State for the Home Department*, militates in favour of a requirement that reasons be provided. It would be unfair for a person subject to a decision such as this one which is so critical to their future not to be told why the result was reached.

44 In my view, however, the reasons requirement was fulfilled in this case, since the appellant was provided with the notes of Officer Lorenz. The notes were given to Ms. Baker when her counsel asked for reasons. Because of this, and because there is no other record of the reasons for making the decision, the notes of the subordinate reviewing officer should be taken, by inference, to be the reasons for decision. Accepting documents such as these notes as sufficient reasons is part of the flexibility that is necessary, as emphasized by Macdonald and Lametti, *supra*, when courts evaluate the requirements of the duty of fairness with recognition of the day-to-day realities of administrative agencies and the many ways in which the values underlying the principles of procedural fairness can be assured. It upholds the principle that individuals are entitled to fair procedures and open decision-making, but recognizes that in the administrative context, this transparency may take place in various ways. I conclude that the notes of Officer Lorenz satisfy the requirement for reasons under the duty of procedural fairness in this case, and they will be taken to be the reasons for decision.

(5) Reasonable Apprehension of Bias

45 Procedural fairness also requires that decisions be made free from a reasonable apprehension of bias, by an impartial decision-maker. The respondent argues that Simpson J. was correct to find that the notes of Officer Lorenz cannot be considered to give rise to a reasonable apprehension of bias because it was Officer Caden who was the actual decision-maker, who was simply reviewing the recommendation prepared by his subordinate. In my opinion, the duty to act fairly and therefore in a manner that does not give rise to a reasonable apprehension of bias applies to all immigration officers who play a significant role in the making of decisions, whether they are subordinate reviewing officers, or those who make the final decision. The subordinate officer plays an important part in the process, and if a person with such a central role does not act impartially, the decision itself cannot be said to have been made in an impartial manner. In addition, as discussed in the previous section, the notes of Officer Lorenz constitute the reasons for the decision, and if they give rise to a reasonable apprehension of bias, this taints the decision itself.

46 The test for reasonable apprehension of bias was set out by de Grandpré J., writing in dissent, in *Committee for Justice & Liberty v. Canada (National Energy Board)* (1976), [1978] 1 S.C.R. 369 (S.C.C.) at p. 394:

> ...the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information... [T]hat test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

This expression of the test has often been endorsed by this Court, most recently in *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 (S.C.C.) at para. 11, *per* Major J.; at para. 31, *per* L'Heureux-Dubé and McLachlin JJ.; and at para. 111, *per* Cory J.

47 It has been held that the standards for reasonable apprehension of bias may vary, like other aspects of procedural fairness, depending on the context and the type of function performed by the administrative decision-maker involved: *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 (S.C.C.); *Old St. Boniface*, *supra*, at p. 1192. The context here is one where immigration officers must regularly make decisions that have great importance to the individuals affected by them, but are also often critical to the interests of Canada as a country. They are individualized, rather than decisions of a general nature. They also require special sensitivity. Canada is a nation made up largely of people whose families migrated here in recent centuries. Our history is one that shows the importance of immigration, and our society shows the benefits of having a diversity of people whose origins are in a multitude of places around the world. Because they necessarily relate to people of diverse backgrounds, from different cultures, races, and continents, immigration decisions demand sensitivity and understanding by those making them. They require a recognition of diversity, an understanding of others, and an openness to difference.

48 In my opinion, the well-informed member of the community would perceive bias when reading Officer Lorenz's comments. His notes, and the manner in which they are written, do not disclose the existence of an open mind or a weighing of the particular circumstances of the case free from stereotypes. Most unfortunate is the fact that they seem to make a link between Ms. Baker's mental illness, her training as a domestic worker, the fact that she has several children, and the conclusion that she would therefore be a strain on our social welfare system for the rest of her life. In addition, the conclusion drawn was contrary to the psychiatrist's letter, which stated that, with treatment, Ms. Baker could remain well and return to being a productive member of society. Whether they were intended in this manner or not, these statements give the impression that Officer Lorenz may have been drawing conclusions based not on the evidence before him, but on the fact that Ms. Baker was a single mother with several children, and had been diagnosed with a psychiatric illness. His use of capitals to highlight the number of Ms. Baker's children may also suggest to a reader that this was a reason to deny her status. Reading his comments, I do not believe that a reasonable and well-informed member of the community would conclude that he had approached this case with the impartiality appropriate to a decision made by an immigration officer. It would appear to a reasonable observer that his own frustration with the "system" interfered with his duty to consider impartially whether the appellant's admission should be facilitated owing to humanitarian or compassionate considerations. I conclude that the notes of Officer Lorenz demonstrate a reasonable apprehension of bias.

D. Review of the Exercise of the Minister's Discretion

49 Although the finding of reasonable apprehension of bias is sufficient to dispose of this appeal, it does not address the issues contained in the "serious question of general importance" which was certified by Simpson J. relating to the approach to be taken to children's interests when reviewing the exercise of the discretion conferred by the Act and the regulations. Since it is important to address the central questions which led to this appeal, I will also consider whether, as a substantive matter, the H & C decision was improperly made in this case.

50 The appellant argues that the notes provided to Ms. Baker show that, as a matter of law, the decision should be overturned on judicial review. She submits that the decision should be held to a standard of review of correctness,

that principles of administrative law require this discretion to be exercised in accordance with the Convention, and that the Minister should apply the best interests of the child as a primary consideration in H & C decisions. The respondent submits that the Convention has not been implemented in Canadian law, and that to require that s. 114(2) and the regulations made under it be interpreted in accordance with the Convention would be improper, since it would interfere with the broad discretion granted by Parliament, and with the division of powers between the federal and provincial governments.

(1) The Approach to Review of Discretionary Decision-Making

51 As stated earlier, the legislation and regulations delegate considerable discretion to the Minister in deciding whether an exemption should be granted based upon humanitarian and compassionate considerations. The regulations state that "[t]he Minister *is ... authorized to*" grant an exemption or otherwise facilitate the admission to Canada of any person "*where the Minister is satisfied* that" this should be done "owing to the existence of compassionate or humanitarian considerations". This language signals an intention to leave considerable choice to the Minister on the question of whether to grant an H & C application.

52 The concept of discretion refers to decisions where the law does not dictate a specific outcome, or where the decision-maker is given a choice of options within a statutorily imposed set of boundaries. As K.C. Davis wrote in *Discretionary Justice* (1969), at p. 4:

> A public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction.

It is necessary in this case to consider the approach to judicial review of administrative discretion, taking into account the "pragmatic and functional" approach to judicial review that was first articulated in *Syndicat national des employés de la commission scolaire régionale de l'Outaouais v. Union des employés de service, local 298*, [1988] 2 S.C.R. 1048 (S.C.C.) and has been applied in subsequent cases including *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 (S.C.C.) at pp. 601-7, *per* L'Heureux-Dubé J., dissenting, but not on this issue; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 (S.C.C.); *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.); and *Pushpanathan, supra.*

53 Administrative law has traditionally approached the review of decisions classified as discretionary separately from those seen as involving the interpretation of rules of law. The rule has been that decisions classified as discretionary may only be reviewed on limited grounds such as the bad faith of decision-makers, the exercise of discretion for an improper purpose, and the use of irrelevant considerations: see, for example, *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2 (S.C.C.) at pp. 7-8; *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231 (S.C.C.). A general doctrine of "unreasonableness" has also sometimes been applied to discretionary decisions: *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.* (1947), [1948] 1 K.B. 223 (Eng. C.A.). In my opinion, these doctrines incorporate two central ideas — that discretionary decisions, like all other administrative decisions, must be made within the bounds of the jurisdiction conferred by the statute, but that considerable deference will be given to decision-makers by courts in reviewing the exercise of that discretion and determining the scope of the decision-maker's jurisdiction. These doctrines recognize that it is the intention of a legislature, when using statutory language that confers broad choices on administrative agencies, that courts should not lightly interfere with such decisions, and should give considerable respect to decision-makers when reviewing the manner in which discretion was exercised. However, discretion must still be exercised in a manner that is within a reasonable interpretation of the margin of manouevre contemplated by the legislature, in accordance with the principles of the rule of law (*Roncarelli v. Duplessis*, [1959] S.C.R. 121 (S.C.C.)), in line with general principles of administrative law governing the exercise of discretion, and consistent with the *Canadian Charter of Rights and Freedoms* (*Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 (S.C.C.)).

54 It is, however, inaccurate to speak of a rigid dichotomy of "discretionary" or "non-discretionary" decisions. Most administrative decisions involve the exercise of implicit discretion in relation to many aspects of decision making. To

give just one example, decision-makers may have considerable discretion as to the remedies they order. In addition, there is no easy distinction to be made between interpretation and the exercise of discretion; interpreting legal rules involves considerable discretion to clarify, fill in legislative gaps, and make choices among various options. As stated by Brown and Evans, *supra*, at p. 14-47:

> The degree of discretion in a grant of power can range from one where the decision-maker is constrained only by the purposes and objects of the legislation, to one where it is so specific that there is almost no discretion involved. In between, of course, there may be any number of limitations placed on the decision-maker's freedom of choice, sometimes referred to as" structured" discretion.

55 The "pragmatic and functional" approach recognizes that standards of review for errors of law are appropriately seen as a spectrum, with certain decisions being entitled to more deference, and others entitled to less: *Pezim*, *supra*, at pp. 589-90; *Southam*, *supra*, at para. 30; *Pushpanathan*, *supra*, at para. 27. Three standards of review have been defined: patent unreasonableness, reasonableness *simpliciter*, and correctness: *Southam*, at paras. 54-56. In my opinion the standard of review of the substantive aspects of discretionary decisions is best approached within this framework, especially given the difficulty in making rigid classifications between discretionary and non-discretionary decisions. The pragmatic and functional approach takes into account considerations such as the expertise of the tribunal, the nature of the decision being made, and the language of the provision and the surrounding legislation. It includes factors such as whether a decision is "polycentric" and the intention revealed by the statutory language. The amount of choice left by Parliament to the administrative decision-maker and the nature of the decision being made are also important considerations in the analysis. The spectrum of standards of review can incorporate the principle that in certain cases, the legislature has demonstrated its intention to leave greater choices to decision-makers than in others, but that a court must intervene where such a decision is outside the scope of the power accorded by Parliament. Finally, I would note that this Court has already applied this framework to statutory provisions that confer significant choices on administrative bodies, for example, in reviewing the exercise of the remedial powers conferred by the statute at issue in *Southam*, *supra*.

56 Incorporating judicial review of decisions that involve considerable discretion into the pragmatic and functional analysis for errors of law should not be seen as reducing the level of deference given to decisions of a highly discretionary nature. In fact, deferential standards of review may give substantial leeway to the discretionary decision-maker in determining the" proper purposes" or "relevant considerations" involved in making a given determination. The pragmatic and functional approach can take into account the fact that the more discretion that is left to a decision-maker, the more reluctant courts should be to interfere with the manner in which decision-makers have made choices among various options. However, though discretionary decisions will generally be given considerable respect, that discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*.

(2) The Standard of Review in This Case

57 I turn now to an application of the pragmatic and functional approach to determine the appropriate standard of review for decisions made under s. 114(2) and Regulation 2.1, and the factors affecting the determination of that standard outlined in *Pushpanathan*, *supra*. It was held in that case that the decision, which related to the determination of a question of law by the Immigration and Refugee Board, was subject to a standard of review of correctness. Although that decision was also one made under the *Immigration Act*, the type of decision at issue was very different, as was the decision-maker. The appropriate standard of review must, therefore, be considered separately in the present case.

58 The first factor to be examined is the presence or absence of a privative clause, and, in appropriate cases, the wording of that clause: *Pushpanathan*, at para. 30. There is no privative clause contained in the *Immigration Act*, although judicial review cannot be commenced without leave of the Federal Court — Trial Division under s. 82.1. As mentioned above, s. 83(1) requires the certification of a serious question of general importance by the Federal Court — Trial Division before that decision may be appealed to the Court of Appeal. *Pushpanathan* shows that the existence of this provision means

there should be a lower level of deference on issues related to the certified question itself. However, this is only one of the factors involved in determining the standard of review, and the others must also be considered.

59 The second factor is the expertise of the decision-maker. The decision-maker here is the Minister of Citizenship and Immigration or his or her delegate. The fact that the formal decision-maker is the Minister is a factor militating in favour of deference. The Minister has some expertise relative to courts in immigration matters, particularly with respect to when exemptions should be given from the requirements that normally apply.

60 The third factor is the purpose of the provision in particular, and of the Act as a whole. This decision involves considerable choice on the part of the Minister in determining when humanitarian and compassionate considerations warrant an exemption from the requirements of the Act. The decision also involves applying relatively "open-textured" legal principles, a factor militating in favour of greater deference: *Pushpanathan*, *supra*, at para. 36. The purpose of the provision in question is also to *exempt* applicants, in certain circumstances, from the requirements of the Act or its regulations. This factor, too, is a signal that greater deference should be given to the Minister. However, it should also be noted, in favour of a stricter standard, that this decision relates directly to the rights and interests of an individual in relation to the government, rather than balancing the interests of various constituencies or mediating between them. Its purpose is to decide whether the admission to Canada of a particular individual, in a given set of circumstances, should be facilitated.

61 The fourth factor outlined in *Pushpanathan* considers the nature of the problem in question, especially whether it relates to determination of law or facts. The decision about whether to grant an H & C exemption involves a considerable appreciation of the facts of that person's case, and is not one which involves the application or interpretation of definitive legal rules. Given the highly discretionary and fact-based nature of this decision, this is a factor militating in favour of deference.

62 These factors must be balanced to arrive at the appropriate standard of review. I conclude that considerable deference should be accorded to immigration officers exercising the powers conferred by the legislation, given the fact-specific nature of the inquiry, its role within the statutory scheme as an exception, the fact that the decision-maker is the Minister, and the considerable discretion evidenced by the statutory language. Yet the absence of a privative clause, the explicit contemplation of judicial review by the Federal Court — Trial Division and the Federal Court of Appeal in certain circumstances, and the individual rather than polycentric nature of the decision, also suggest that the standard should not be as deferential as "patent unreasonableness". I conclude, weighing all these factors, that the appropriate standard of review is reasonableness *simpliciter*.

(3) Was this Decision Unreasonable?

63 I will next examine whether the decision in this case, and the immigration officer's interpretation of the scope of the discretion conferred upon him, was unreasonable in the sense contemplated in the judgment of Iacobucci J. in *Southam*, *supra*, at para. 56:

> An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. The defect, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it.

In particular, the examination of this question should focus on the issues arising from the serious question of general importance stated by Simpson J.: the question of the approach to be taken to the interests of children when reviewing an H & C decision.

64 The notes of Officer Lorenz, in relation to the consideration of "H&C factors", read as follows:

> The PC is a paranoid schizophrenic and on welfare. She has no qualifications other than as a domestic. She has FOUR CHILDREN IN JAMAICA AND ANOTHER FOUR BORN HERE. She will, of course, be a tremendous strain on our social welfare systems for (probably) the rest of her life. There are no H&C factors other than her FOUR CANADIAN-BORN CHILDREN. So we let her stay because of that? I am of the opinion that Canada can no longer afford this kind of generosity.

65 In my opinion, the approach taken to the children's interests shows that this decision was unreasonable in the sense contemplated in *Southam, supra*. The officer was completely dismissive of the interests of Ms. Baker's children. As I will outline in detail in the paragraphs that follow, I believe that the failure to give serious weight and consideration to the interests of the children constitutes an unreasonable exercise of the discretion conferred by the section, notwithstanding the important deference that should be given to the decision of the immigration officer. Professor Dyzenhaus has articulated the concept of "deference as respect" as follows:

> Deference as respect requires not submission but a respectful attention to the reasons offered or which could be offered in support of a decision...
>
> (D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286.)

The reasons of the immigration officer show that his decision was inconsistent with the values underlying the grant of discretion. They therefore cannot stand up to the somewhat probing examination required by the standard of reasonableness.

66 The wording of s. 114(2) and of regulation 2.1 requires that a decision-maker exercise the power based upon "*compassionate* or *humanitarian* considerations" (emphasis added). These words and their meaning must be central in determining whether an individual H & C decision was a reasonable exercise of the power conferred by Parliament. The legislation and regulations direct the Minister to determine whether the person's admission should be facilitated owing to the existence of such considerations. They show Parliament's intention that those exercising the discretion conferred by the statute act in a humanitarian and compassionate manner. This Court has found that it is necessary for the Minister to *consider* an H & C request when an application is made: *Jiminez-Perez, supra*. Similarly, when considering it, the request must be evaluated in a manner that is respectful of humanitarian and compassionate considerations.

67 Determining whether the approach taken by the immigration officer was within the boundaries set out by the words of the statute and the values of administrative law requires a contextual approach, as is taken to statutory interpretation generally: see *R. v. Gladue*, [1999] 1 S.C.R. 688 (S.C.C.); *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.) at paras. 20-23. In my opinion, a reasonable exercise of the power conferred by the section requires close attention to the interests and needs of children. Children's rights, and attention to their interests, are central humanitarian and compassionate values in Canadian society. Indications of children's interests as important considerations governing the manner in which H& C powers should be exercised may be found, for example, in the purposes of the Act, in international instruments, and in the guidelines for making H & C decisions published by the Minister herself.

(a) The Objectives of the Act

68 The objectives of the Act include, in s. 3(*c*):

> to facilitate the reunion in Canada of Canadian citizens and permanent residents with their close relatives from abroad;

Although this provision speaks of Parliament's objective of *reuniting* citizens and permanent residents with their close relatives from abroad, it is consistent, in my opinion, with a large and liberal interpretation of the values underlying this legislation and its purposes to presume that Parliament also placed a high value on keeping citizens and permanent

residents together with their close relatives who are already in Canada. The obligation to take seriously and place important weight on keeping children in contact with both parents, if possible, and maintaining connections between close family members is suggested by the objective articulated in s. 3(*c*).

(b) International Law

69 Another indicator of the importance of considering the interests of children when making a compassionate and humanitarian decision is the ratification by Canada of the *Convention on the Rights of the Child*, and the recognition of the importance of children's rights and the best interests of children in other international instruments ratified by Canada. International treaties and conventions are not part of Canadian law unless they have been implemented by statute: *Francis v. R.*, [1956] S.C.R. 618 (S.C.C.) at p. 621; *Capital Cities Communications Inc. v. Canada (Radio-Television & Telecommunications Commission)* (1977), [1978] 2 S.C.R. 141 (S.C.C.) at pp. 172-73. I agree with the respondent and the Court of Appeal that the Convention has not been implemented by Parliament. Its provisions therefore have no direct application within Canadian law.

70 Nevertheless, the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review. As stated in R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 330:

> [T]he legislature is presumed to respect the values and principles contained in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred. [Emphasis added.]

The important role of international human rights law as an aid in interpreting domestic law has also been emphasized in other common law countries: see, for example, *Tavita v. Minister of Immigration*, [1994] 2 N.Z.L.R. 257 (New Zealand C.A.) at p. 266; *Vishaka v. Rajasthan*, [1997] 3 L.R.C. 361 (S.C. India) at p. 367. It is also a critical influence on the interpretation of the scope of the rights included in the *Charter*: *Slaight Communications*, *supra*; *R. v. Keegstra*, [1990] 3 S.C.R. 697 (S.C.C.).

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

(c) The Ministerial Guidelines

72 Third, the guidelines issued by the Minister to immigration officers recognize and reflect the values and approach discussed above and articulated in the Convention. As described above, immigration officers are expected to make the decision that a reasonable person would make, with special consideration of humanitarian values such as keeping connections between family members and avoiding hardship by sending people to places where they no longer have connections. The guidelines show what the Minister considers a humanitarian and compassionate decision, and they are of great assistance to the Court in determining whether the reasons of Officer Lorenz are supportable. They emphasize that the decision-maker should be alert to possible humanitarian grounds, should consider the hardship that a negative decision would impose upon the claimant or close family members, and should consider as an important factor the connections between family members. The guidelines are a useful indicator of what constitutes a reasonable

interpretation of the power conferred by the section, and the fact that this decision was contrary to their directives is of great help in assessing whether the decision was an unreasonable exercise of the H & C power.

73 The above factors indicate that emphasis on the rights, interests, and needs of children and special attention to childhood are important values that should be considered in reasonably interpreting the "humanitarian" and" compassionate" considerations that guide the exercise of the discretion. I conclude that because the reasons for this decision do not indicate that it was made in a manner which was alive, attentive, or sensitive to the interests of Ms. Baker's children, and did not consider them as an important factor in making the decision, it was an unreasonable exercise of the power conferred by the legislation, and must, therefore, be overturned. In addition, the reasons for decision failed to give sufficient weight or consideration to the hardship that a return to Jamaica might cause Ms. Baker, given the fact that she had been in Canada for 12 years, was ill and might not be able to obtain treatment in Jamaica, and would necessarily be separated from at least some of her children.

74 It follows that I disagree with the Federal Court of Appeal's holding in *Shah, supra*, at p. 239, that a s. 114(2) decision is "*wholly* a matter of judgment and discretion" (emphasis added). The wording of s. 114(2) and of the regulations shows that the discretion granted is confined within certain boundaries. While I agree with the Court of Appeal that the Act gives the applicant no right to a particular outcome or to the application of a particular legal test, and that the doctrine of legitimate expectations does not mandate a result consistent with the wording of any international instruments, the decision must be made following an approach that respects humanitarian and compassionate values. Therefore, attentiveness and sensitivity to the importance of the rights of children, to their best interests, and to the hardship that may be caused to them by a negative decision is essential for an H & C decision to be made in a reasonable manner. While deference should be given to immigration officers on s. 114(2) judicial review applications, decisions cannot stand when the manner in which the decision was made and the approach taken are in conflict with humanitarian and compassionate values. The Minister's guidelines themselves reflect this approach. However, the decision here was inconsistent with it.

75 The certified question asks whether the best interests of children must be a primary consideration when assessing an applicant under s. 114(2) and the regulations. The principles discussed above indicate that, for the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. That is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying an H & C claim even when children's interests are given this consideration. However, where the interests of children are minimized, in a manner inconsistent with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable.

E. Conclusions and Disposition

76 Therefore, both because there was a violation of the principles of procedural fairness owing to a reasonable apprehension of bias, and because the exercise of the H & C discretion was unreasonable, I would allow this appeal.

77 The appellant requested that solicitor-client costs be awarded to her if she were successful in her appeal. The majority of this Court held as follows in *Young v. Young*, [1993] 4 S.C.R. 3 (S.C.C.) at p. 134:

> Solicitor-client costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties.

There has been no such conduct on the part of the Minister shown during this litigation, and I do not believe that this is one of the exceptional cases where solicitor-client costs should be awarded. I would allow the appeal, and set aside the decision of Officer Caden of April 18, 1994, with party-and-party costs throughout. The matter will be returned to the Minister for redetermination by a different immigration officer.

***Iacobucci J.* (*Cory J.* concurring):**

78 I agree with L'Heureux-Dubé J.'s reasons and disposition of this appeal, except to the extent that my colleague addresses the effect of international law on the exercise of Ministerial discretion pursuant to s. 114(2) of the *Immigration Act*, R.S.C., 1985, c. I-2. The certified question at issue in this appeal concerns whether federal immigration authorities must treat the best interests of the child as a primary consideration in assessing an application for humanitarian and compassionate consideration under s. 114(2) of the Act, given that the legislation does not implement the provisions contained in the *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, a multilateral convention to which Canada is party. In my opinion, the certified question should be answered in the negative.

79 It is a matter of well-settled law that an international convention ratified by the executive branch of government is of no force or effect within the Canadian legal system until such time as its provisions have been incorporated into domestic law by way of implementing legislation: *Capital Cities Communications Inc. v. Canada (Radio-Television & Telecommunications Commission)* (1977), [1978] 2 S.C.R. 141 (S.C.C.). I do not agree with the approach adopted by my colleague, wherein reference is made to the underlying values of an unimplemented international treaty in the course of the contextual approach to statutory interpretation and administrative law, because such an approach is not in accordance with the Court's jurisprudence concerning the status of international law within the domestic legal system

80 In my view, one should proceed with caution in deciding matters of this nature, lest we adversely affect the balance maintained by our Parliamentary tradition, or inadvertently grant the executive the power to bind citizens without the necessity of involving the legislative branch. I do not share my colleague's confidence that the Court's precedent in *Capital Cities*, *supra*, survives intact following the adoption of a principle of law which permits reference to an unincorporated convention during the process of statutory interpretation. Instead, the result will be that the appellant is able to achieve indirectly what cannot be achieved directly, namely, to give force and effect within the domestic legal system to international obligations undertaken by the executive alone that have yet to be subject to the democratic will of Parliament

81 The primacy accorded to the rights of children in the Convention, assuming for the sake of argument that the factual circumstances of this appeal are included within the scope of the relevant provisions, is irrelevant unless and until such provisions are the subject of legislation enacted by Parliament. In answering the certified question in the negative, I am mindful that the result may well have been different had my collegue concluded that the appellant's claim fell within the ambit of rights protected by the *Canadian Charter of Rights and Freedoms*. Had this been the case, the Court would have had an opportunity to consider the application of the interpretive presumption, established by the Court's decision in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 (S.C.C.), and confirmed in subsequent jurisprudence, that administrative discretion involving *Charter* rights be exercised in accordance with similar international human rights norms.

Appeal allowed.

Pourvoi accueilli.

End of Document

9

2006 CarswellOnt 54
Ontario Superior Court of Justice (Divisional Court)

L.I.U.N.A., Local 183 v. Ontario (Human Rights Commission)

2006 CarswellOnt 54, [2006] O.J. No. 50, 144 A.C.W.S. (3d) 1068, 206 O.A.C. 199, 39 Admin. L.R. (4th) 285

Universal Workers Union, LIUNA Local 183, Daniel Avero, Roger Quinn and Tony Dionisio (Applicants) and Ontario Human Rights Commission, Human Rights Tribunal of Ontario and Anthony Tubbs (Respondents)

Lane J.

Heard: November 15, 2005
Judgment: January 9, 2006
Docket: 387/05

Counsel: Ronald Lebi for Applicants
Anthony Griffin for Respondent, O.H.R.C.
James C. Morton, Jim Schneider for Respondent, Tribunal
Winston Mattis for Respondent, Anthony Tubbs

Subject: Constitutional; Civil Practice and Procedure; Public

Headnote

Human rights --- Practice and procedure — Commissions and boards of inquiry — Evidence — Witnesses

At hearing of shop steward's human rights complaint, whereby union had discriminated against him by reason of colour and race, tribunal permitted complaint to be amended to plead additional grounds for complaint and ordered commission to summon certain additional witnesses — At commission's request, tribunal ordered union to present evidence, and prepare will-say statements for ten of new witnesses — Union brought application for urgent judicial review — Application granted — Order that union call certain witnesses and prepare their will-say statements was clear breach of natural justice and procedural fairness to applicants and potentially to witnesses — It was for commission to call witnesses, which it believed would establish facts on which tribunal could find for complainant — Order that union call certain witnesses was in breach of their right to determine for themselves who will be called in their defence and was inherently inappropriate in adversarial setting — Preparation of will-say statements would involve close communication with witnesses and selection of what evidence was relevant — Witnesses might include persons whom union wanted to cross-examine to discredit evidence set out in will-say statement — Tribunal's orders that union call and examine and prepare will-say statements for certain witnesses and that commission call and examine certain witnesses were struck and substituted with order that parties be free to conduct own cases as they saw fit.

Human rights --- Practice and procedure — Judicial review — Availability — General principles

At hearing of shop steward's human rights complaint, whereby union had discriminated against him by reason of colour and race, tribunal permitted complaint to be amended to plead additional grounds for complaint and ordered commission to summon certain additional witnesses — At commission's request, tribunal ordered union to present evidence, and prepare will-say statements for ten of new witnesses — Union brought application for urgent judicial review — Application granted — Order that union call certain witnesses and prepare their will-say statements was clear breach of natural justice and procedural fairness to applicants and potentially to witnesses — Hearings before tribunal were adversarial not inquisitorial — Adversarial system assumes parties will bring evidence and tribunal will reach decision based on evidence — By requiring certain witnesses to be called, tribunal turned proceeding into inquisitorial one and abandoned role of adjudicator for investigator — Courts will intervene in proceedings of tribunals prior to their completion in order to avoid wasting time or money, or if there is prospect of real unfairness through denial of natural justice or otherwise — Tribunal's orders that union call and examine and prepare will-say statements for certain

witnesses and that commission call and examine certain witnesses were struck and substituted with order that parties be free to conduct own cases as they saw fit.

APPLICATION by union for urgent judicial review application to quash interim order of Human Rights Tribunal requiring union to call certain persons as witnesses.

Lane J.:

1 This is an application under section 6(2) of the *Judicial Review Procedure Act* [1] seeking leave to bring an urgent judicial review before a single judge of the Superior Court on the ground that the delay in arranging for a full three-judge panel to hear it is likely to involve a failure of justice. The applicants seek to quash an interim order made by the respondent Tribunal requiring the present applicants, who are respondents before the Tribunal, to call as witnesses some ten persons whom the present applicants do not wish to call, and to produce "will-say" statements from these ten persons.

2 The hearing before the Tribunal arises from a complaint made to the Commission by Mr. Tubbs in June 1999, that he had been discriminated against by Local 183, and certain officers thereof, at a Union meeting on December 20, 1998. Mr. Tubbs, a black man, a member of the Union and a shop steward, made certain comments to the meeting about issues affecting minority Union members, such as himself, at various job sites and as to how minority members were treated by the Union leadership. During the meeting, Mr. Tubbs' views were challenged by the respondent Dionisio, and later, at a personal level, by the respondents Avero and Quinn and it is said that there was an altercation between Mr. Tubbs and Mr. Avero. The Commission investigated and took the view that there was a case to be met that Mr. Tubbs' rights under the *Human Rights Code* had been violated, as he had been treated unequally by reason of his colour and race. The Commission referred the complaint to the Tribunal to hold a hearing, which has commenced and is in recess pending the outcome of this application.

3 It is important to note that the scheme of the *Human Rights Code* is that the Commission, having received the complaint, inquires into it and endeavours to effect a settlement (section 33(1)). In aid of the inquiry, the Commission possesses extensive powers of entry into places, other than dwellings, (section 33(3)(a)); to request and remove for copying any document or thing that may be relevant (section 33(3)(b)(c)); and to question any person on matters that are, or may be relevant (section 33(3)(d)). It has the power to seek a search warrant when it meets with a lack of co-operation in its inquiry. The Commission decides whether to pursue the complaint based on whether the evidence warrants a referral to the Tribunal. The duty of the Tribunal under section 39 of the Code is to hold a hearing to determine whether a right of the complainant has been breached, if so by whom and to determine a remedy. The parties to the hearing are the Commission, which has carriage, the complainant, the person alleged to have infringed the right and other persons who may appear to the Tribunal to have infringed the right.

4 This scheme separates the inquisitorial from the adjudicative function. The Commission has the former, the Tribunal the latter.

5 Part way into the hearing, after Mr. Tubbs' evidence, and over the objections of the Union, the Tribunal permitted the complaint to be amended to plead seven occasions of reprisal in addition to the original grounds. As a condition of granting the amendments, the Tribunal directed that the Commission summon certain witnesses, mentioned by Mr. Tubbs in his evidence. This order was made on August 16, 2005.

6 The Tribunal resumed hearings on September 28, 2005 at which time the Commission asked for a ruling that the Union must call certain of the witnesses. Over the objections of the Union, the Tribunal required the Union to present the evidence, including advance will-say statements, for ten witnesses, some of whom the Union would not choose to present as its witnesses. The Tribunal attempted to soften the blow by statements that all counsel would have great leeway in examining these witnesses, recognizing that the order it was making was "for convenience" and not because these persons were the witnesses of the party calling them "in the ordinary sense".

7 The Tribunal went on to explain that it had considered the submissions of the respondents that, as the Tribunal was requiring these witnesses to appear, it should question them, but it had rejected that approach for reasons it would set out. It recognized that the order was an "extraordinary step" and quoted a passage from *Sopinka, Lederman and Bryant* [2]:

> In general terms it is the role of the parties, not the court, to call and examine witnesses. At common law, counsel have wide latitude to determine what witnesses to call, in what order, and what evidence to adduce from them. There are no witnesses which a party must call.

8 The Tribunal continued its reasons as follows:

> [21] The Tribunal took this unusual approach in order to bridge the gap between the original Complaint and the Amended Complaint. If these new allegations had been made earlier, the Commission would have had the investigative power under subsection 33(3)(d) of the Code to "question a person on matters that are or may be relevant . . . ".

9 In substance, the Tribunal admits that, so far as these new allegations are concerned, it has abandoned the role of adjudicator for that of investigator, a role which belongs to the Commission, not to the Tribunal. In so doing, it has turned the proceeding into an inquisitorial one, in which it, and not the parties will determine who is to be called and what evidence it will hear. Having opened up the hearing by adding the additional, and uninvestigated, complaints, the Tribunal will just go ahead and investigate them itself. It does not appear to have occurred to the Tribunal that the proper course is to require those who want to put forward these additional complaints to adduce the evidence in support of them. That would be Mr. Tubbs and the Commission. At paragraph 22 of the reasons, the Tribunal quotes, but does not follow, the passage from *Sopinka, et al* on the limits to a trial judge's involvement:

> Further, subject to the power to recall a witness, the trial judge should leave the leading of evidence to the parties. A new trial may also be ordered if the trial judge conducts an inquisitorial type of proceeding. [3]

10 The Code provides for an appeal of the ultimate decision, but there is no provision for an appeal of an interlocutory order. However, the possibility of a judicial review is not foreclosed by the absence of a right of appeal. In *Roosma v. Ford Motor Co. of Canada* [4] Reid J. of this court said:

> Notwithstanding their reluctance to intervene in the proceedings of tribunals prior to their completion courts will do so in order to avoid wasting time and money. Thus, if it appears at the outset that a proceeding in a tribunal will be fatally flawed, a means exists by way of judicial review to challenge it. That is so even where an appeal is provided.

11 In *Gage v. Ontario (Attorney General)* [5] this court said:

> If there is a prospect of real unfairness through denial of natural justice or otherwise, a superior court may always exercise its inherent supervisory jurisdiction to put an end to the injustice before all the alternative remedies are exhausted.

12 The present applicants submit that these authorities exactly state the problem before me. They have been ordered to call certain witnesses as their witnesses in breach of their right to determine for themselves who will be called in their defence. This hearing is an inherently adversarial proceeding in which important rights are at stake for the Union as well as for Mr. Tubbs. The Tribunal has failed to recognize that its order is inherently inappropriate in such an adversarial setting. Further, the present applicants have been directed to prepare will-say statements for these persons, a process which inherently involves close communication with these persons and a selection, from all the things they might say, of those that are relevant. This is not a fair demand for the Tribunal to make, particularly where the persons, or some of them, are not persons the party wishes to call. Indeed, they may include persons whom the Union will wish to cross-

examine in order to discredit the very evidence upon which it has worked to produce the will-say. Such a situation is the opposite of fairness, to witness and party alike.

13 The respondents argue that the application is premature, but in my view, if the consequences are as the applicants submit, that is no barrier to intervention. As to the unfairness, the Commission relies on the general rule that the Tribunal is master of its own procedure and this application is a mere procedural skirmish and not an exception to the general rule. The Commission contrasts this case with cases where the denial of natural justice had occurred and was manifest. I note, however, that in its factum, the Commission skates carefully around the facts of this case, maintaining that there is no breach because "the union and other respondents [have not] been prevented from leading whatever evidence they wish in support of their case". This is sheer sophistry: the right to call your witnesses includes the right not to call those you do not want to call. As pointed out in a passage cited by the Tribunal itself from *Sopinka et al*: "There are no witnesses which a party must call".

14 The Code allocates the carriage of the proceedings before the Tribunal to the Commission as a party. It is thus for the Commission to call the witnesses which it believes will establish the facts on which the Tribunal can find for the complainant. It will then be for the respondents to call the witnesses to establish their case. This process is one of the fundamental parts of our justice system. The parties diligently present all the material facts which will support their respective positions and will receive a dispassionate and impartial consideration from the trial judge. A trial is not a scientific inquiry conducted by the trial judge as research director: it is a forum for providing justice to the litigants. [6] The centrality of the adversary system is not confined to trials, but is inherently part of administrative hearings as well: *Hurd v. Hewitt* [7]. That was a case of a judicial review of the decision of a university grievance committee in which the Court of Appeal stressed that such hearings invariably are disputes between parties: there is a lis to be decided. Under our system, the driving force in the hearing is the adversary system which assumes the parties will bring the evidence and the tribunal will reach a decision based on that evidence. It is not the normal function of the tribunal to search out evidence and judges are criticized if they interfere so as to become advocates. The Court of Appeal stated that the duty of a tribunal is to decide on the evidence before it, to draw appropriate inferences from the failure of a party to call available evidence, but not to insist that evidence be called, and concluded:

> It would be a distortion of our system to have the tribunal determining what evidence is to be called and what persons are to be invited to intervene, notwithstanding the desires of the parties . . .

15 The Supreme Court of Canada has also spoken on the centrality of the adversary system:

> Given that the principles of fundamental justice contemplate an accusatorial and adversarial system of criminal justice . . . it seems clear to me that the principles of fundamental justice must also require that an accused person have the right to control his or her own defence. [8]

16 In my view, the authorities demonstrate that the order made by the Tribunal requiring the present applicants to call certain witnesses and to prepare will-says of their evidence is a clear breach of natural justice and procedural fairness to the applicants and potentially to the witnesses and must be set aside. The applicants ask that the whole of paragraph 1 of the Tribunal's order should be set aside. This would include the orders made that the Commission call and examine certain witnesses, which orders were not objected to by the Commission, but in my view that is no reason not to set them aside as the applicants ask, for they also taint these proceedings with injustice and so put the utility of the entire hearing at risk. I have also considered whether I should not only quash the order, but also make the order that the Tribunal ought to have made. It is the master of its own process, but only to the limits of natural justice and procedural fairness. Since these principles require that the parties be free to conduct their own cases, I have decided that I do not trench upon the Tribunal's authority by declaring what is the only order possible in the circumstances: that the parties be free to conduct their own cases as they see fit.

17 I am well aware of the rarity of successful applications for judicial review of interim orders made in hearings which are on-going. However, this hearing has already taken 13 days and is about to go entirely off the rails. The result of my not intervening will be a wasted 13 days and a further waste of the remainder of what will become a hearing hopelessly tainted with injustice to the present applicants. I am satisfied that the criteria for such an intervention, urgency and a failure of justice, are met.

18 For these reasons an order will go setting aside the directions contained in paragraph 39(1) of the Interim Decision dated October 6, 2005 and substituting an order that the parties shall be at liberty to call only such witnesses as they choose to call in support of their respective cases.

19 If the parties are unable to agree on costs, counsel may make brief written submissions within 30 days of the release of this decision.

Application granted.

Footnotes

1 R.S.O. 1990 c.L.1.

2 The Law of Evidence; 2nd ed. 1999, page 897, paragraph 16.2

3 Page 900, paragraph 16.11

4 (1988), 66 O.R. (2d) 18 (Ont. Div. Ct.)

5 (1992), 90 D.L.R. (4th) 537 (Ont. Div. Ct.), 14.

6 See *Phillips v. Ford Motor Co. of Canada* (1971), 18 D.L.R. (3d) 641 (Ont. C.A.) from which this passage is paraphrased.

7 [1994] O.J. No. 2552, 20 O.R. (3d) 639 (Ont. C.A.)

8 *R. v. Swain*, [1991] S.C.J. No. 32, [1991] 1 S.C.R. 933 (S.C.C.), para. 35.

10

Most Negative Treatment: Distinguished
Most Recent Distinguished: Bellechasse (Municipalité régionale de comté) c. Station touristique Massif du Sud (1993) inc. | 2016 QCCS 6206, 2016 CarswellQue 11956, EYB 2016-274089, 276 A.C.W.S. (3d) 459 | (C.S. Qué., Dec 14, 2016)

2013 SCC 36
Supreme Court of Canada

Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)

2013 CarswellNat 1983, 2013 CarswellNat 1984, 2013 SCC 36, [2013] 2 S.C.R. 559, [2013] S.C.J. No. 36, 16 Imm. L.R. (4th) 173, 228 A.C.W.S. (3d) 1098, 360 D.L.R. (4th) 411, 446 N.R. 65, 52 Admin. L.R. (5th) 183, J.E. 2013-1121

Muhsen Ahmed Ramadan Agraira, Appellant and Minister of Public Safety and Emergency Preparedness, Respondent and British Columbia Civil Liberties Association, Ahmad Daud Maqsudi, Canadian Council for Refugees, Canadian Association of Refugee Lawyers, Canadian Arab Federation and Canadian Tamil Congress, Interveners

McLachlin C.J.C., LeBel, Fish, Abella, Rothstein, Moldaver, Karakatsanis JJ.

Heard: October 18, 2012
Judgment: June 20, 2013
Docket: 34258

Proceedings: affirming *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)* (2011), 2011 CarswellNat 639, 2011 FCA 103, [2012] 4 F.C.R. 538, [2011] A.C.F. No. 407, [2011] F.C.J. No. 407, 2011 CarswellNat 2494, 96 Imm. L.R. (3d) 20, 2011 CAF 103, 415 N.R. 121 (F.C.A.); reversing *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)* (2009), 87 Imm. L.R. (3d) 135, 2009 CarswellNat 4438, 2009 FC 1302, 357 F.T.R. 246 (Eng.), [2009] F.C.J. No. 1664, 2009 CF 1302, 2009 CarswellNat 5509 (F.C.)

Counsel: Lorne Waldman, Jacqueline Swaisland, Clare Crummey, for Appellant
Urszula Kaczmarczyk, Marianne Zoric, for Respondent
Jill Copeland (written), Colleen Bauman (written), for Intervener, British Columbia Civil Liberties Association
Leigh Salsberg, for Intervener, Ahmad Daud Maqsudi
John Norris, Andrew Brouwer, for Interveners, Canadian Council for Refugees and Canadian Association of Refugee Lawyers
Barbara Jackman, Hadayt Nazami, for Interveners, Canadian Arab Federation and Canadian Tamil Congress

Subject: Immigration; Civil Practice and Procedure

Headnote

Immigration and citizenship --- Exclusion and removal — Inadmissible classes — Security — Terrorists

Applicant non-resident, citizen of Libya, arrived in Canada and made Convention refugee claim — Claim was dismissed on finding that non-resident was member of terrorist group — Some years later, after non-resident had married Canadian citizen, non-resident brought application for permanent residence in Canada, which required inter alia respondent Minister of Public Safety and Emergency Preparedness to grant relief from inadmissibility finding — Minister found that, inter alia as non-resident had changed details of association with terrorist group, admitting non-resident would not be in "national interest" — Relief was accordingly refused and application for permanent residence dismissed — Non-resident brought application for judicial review — Application was granted, Minister's appeal was allowed and dismissal of permanent residence application was reinstated, and non-resident appealed to Supreme Court of Canada —

Appeal dismissed — Court of Appeal properly held that standard of review was reasonableness, and accordingly Minister was entitled to high degree of deference on review — Reasons for Minister's decision were transparent, and Minister's "implied" definition of "national interest" was reasonable — Minister's reliance on non-resident's shifting accounts of non-resident's scope of participation in terrorist group was within reasonable range of possible outcomes — Content of duty of procedural fairness was low in present case, and assuming that duty required consideration of humanitarian and compassionate considerations record disclosed that they were considered — Accordingly impugned decision was reasonable and appeal was properly dismissed.

Immigration and citizenship --- Appeals to Federal Court of Appeal and Supreme Court of Canada — Miscellaneous

Applicant non-resident, citizen of Libya, arrived in Canada and made Convention refugee claim — Claim was dismissed on finding that non-resident was member of terrorist group — Some years later, after non-resident had married Canadian citizen, non-resident brought application for permanent residence in Canada, which required inter alia respondent Minister of Public Safety and Emergency Preparedness to grant relief from inadmissibility finding — Minister found that, inter alia as non-resident had changed details of association with terrorist group, admitting non-resident would not be in "national interest" — Relief was accordingly refused and application for permanent residence dismissed — Non-resident brought application for judicial review — Application was granted, Minister's appeal was allowed and dismissal of permanent residence application was reinstated, and non-resident appealed to Supreme Court of Canada — Appeal dismissed — Court of Appeal properly held that standard of review was reasonableness, and accordingly Minister was entitled to high degree of deference on review — Reasons for Minister's decision were transparent, and Minister's "implied" definition of "national interest" was reasonable — Minister's reliance on non-resident's shifting accounts of non-resident's scope of participation in terrorist group was within reasonable range of possible outcomes — Content of duty of procedural fairness was low in present case, and assuming that duty required consideration of humanitarian and compassionate considerations record disclosed that they were considered — Accordingly impugned decision was reasonable and appeal was properly dismissed.

Immigration et citoyenneté --- Exclusion et renvoi — Catégories non admissibles — Sécurité — Terroristes

Demandeur étranger, un citoyen libyen, est arrivé au Canada et a demandé le statut de réfugié au sens de la Convention — Demande a été rejetée au motif que l'étranger faisait partie d'un groupe terroriste — Quelques années plus tard, après avoir marié une citoyenne canadienne, l'étranger a déposé une demande de résidence permanente au Canada pour laquelle l'étranger, entre autres choses, devait obtenir de la part de l'intimé, le ministre de la Sécurité publique et de la Protection civile, une dispense quant au constat d'interdiction de territoire — Considérant, notamment, que l'étranger avait modifié certains renseignements concernant son association au groupe terroriste, le ministre a conclu qu'il ne serait pas dans l'« intérêt national » d'admettre l'étranger — Conséquemment, la dispense n'a pas été accordée et la demande de résidence permanente a été rejetée — Étranger a entamé des procédures en contrôle judiciaire — Requête a été accordée, l'appel interjeté par le ministre a été accueilli et le rejet de la demande de résidence permanente a été rétabli, et l'étranger a formé un pourvoi auprès de la Cour suprême du Canada — Pourvoi rejeté — Cour d'appel a eu raison de conclure que la norme de contrôle applicable était celle de la décision raisonnable et, ainsi, le ministre avait droit à un haut niveau de déférence en révision — Motifs du ministre étaient transparents, et la définition « implicite » de ce que constituait l'« intérêt national » était raisonnable — Fait que le ministre s'est fondé sur les explications fluctuantes de l'étranger concernant l'importance de sa participation au sein du groupe terroriste faisait partie des issues raisonnables et possibles — Contenu que l'obligation d'équité procédurale était faible en l'espèce, et en prenant pour acquis qu'il fallait, en vertu de cette obligation, tenir compte de facteurs d'ordre humanitaire, le dossier révélait qu'ils avaient été pris en considération — Par conséquent, la décision contestée était raisonnable et le pourvoi a été rejeté.

Immigration et citoyenneté --- Pourvois à la Cour d'appel fédérale et à la Cour suprême du Canada — Divers

Demandeur étranger, un citoyen libyen, est arrivé au Canada et a demandé le statut de réfugié au sens de la Convention — Demande a été rejetée au motif que l'étranger faisait partie d'un groupe terroriste — Quelques années plus tard, après avoir marié une citoyenne canadienne, l'étranger a déposé une demande de résidence permanente au Canada pour laquelle l'étranger, entre autres choses, devait obtenir de la part de l'intimé, le ministre de la Sécurité publique et de la Protection civile, une dispense quant au constat d'interdiction de territoire — Considérant, notamment, que l'étranger avait modifié certains renseignements concernant son association au groupe terroriste, le ministre a conclu qu'il ne serait pas dans l'« intérêt national » d'admettre l'étranger — Conséquemment, la dispense n'a pas été accordée et la demande de

résidence permanente a été rejetée — Étranger a entamé des procédures en contrôle judiciaire — Requête a été accordée, l'appel interjeté par le ministre a été accueilli et le rejet de la demande de résidence permanente a été rétabli, et l'étranger a formé un pourvoi auprès de la Cour suprême du Canada — Pourvoi rejeté — Cour d'appel a eu raison de conclure que la norme de contrôle applicable était celle de la décision raisonnable et, ainsi, le ministre avait droit à un haut niveau de déférence en révision — Motifs du ministre étaient transparents, et la définition « implicite » de ce que constituait l'« intérêt national » était raisonnable — Fait que le ministre s'est fondé sur les explications fluctuantes de l'étranger concernant l'importance de sa participation au sein du groupe terroriste faisait partie des issues raisonnables et possibles — Contenu que l'obligation d'équité procédurale était faible en l'espèce, et en prenant pour acquis qu'il fallait, en vertu de cette obligation, tenir compte de facteurs d'ordre humanitaire, le dossier révélait qu'ils avaient été pris en considération — Par conséquent, la décision contestée était raisonnable et le pourvoi a été rejeté.

The applicant non-resident, a citizen of Libya, arrived in Canada in 1997 and made a claim to Convention refugee status. That application was dismissed and the applicant was found to be a member of an inadmissible class due to the applicant's admitted membership in the Libyan National Salvation Front, a listed terrorist organization which the applicant claimed was in fact a bona fide political organization opposed to the oppressive regime in power in Libya when the applicant resided there. The applicant then married a Canadian citizen and in 2002, in furtherance of an application for permanent residence in Canada in the sponsored family class, the applicant sought relief from his inadmissible person status from the respondent Minister of Public Safety and Emergency Preparedness. After a lengthy delay, in 2009 the Minister held that admitting the applicant would not be in the "national interest", and refused relief. The permanent residence application was accordingly dismissed, and the applicant commenced judicial review proceedings.

The application for judicial review was granted and the decision of the Minister quashed, inter alia on a finding that the record did not disclose sufficient grounds to continue to hold that the Libyan National Salvation Front was actually a terrorist organization. The Minister's appeal to the Court of Appeal was allowed and the decision of the Minister's delegate dismissing the permanent residence application was restored. The applicant appealed, with leave, to the Supreme Court of Canada.

Held: The appeal was dismissed.

Per LeBel J. (McLachlin C.J.C., Fish, Abella, Rothstein, Moldaver, Karakatsanis JJ. concurring): The jurisprudence concerning exercises of Ministerial discretion in immigration matters was sufficiently well-established and consistent to determine that the appropriate standard of review in the present case was reasonableness. Accordingly the decision of the Minister underlying the dismissal of the permanent residence application was entitled to a high degree of deference on review.

While the Minister did not define "national interest" in the reasons given for the impugned decision, the implication from the reasons was that it was not restricted to public safety or national security, which tended to accord with the governmental guidelines for consideration of applications like the present one. Given the standard of review, the Minister's decision was entitled to deference, and while the Minister was not required to use an expansive definition, that was well within a reasonable range of expected outcomes and was not properly interfered with on review. Indeed that decision was likely correct, given ordinary rules of statutory interpretation.

The reasons, though brief, disclosed that the Minister put some considerable emphasis on an evaluation of the applicant's credibility in terms of the applicant's shifting accounts of the type, duration and degree of participation in the Libyan National Salvation Front. The reasons were transparent and intelligible, and the Minister's reliance on the applicant's own accounts were a reasonably foreseeable result in the present case.

In respect of procedural fairness, the Minister did not have an unduly high threshold to meet. The applicant bore the burden of demonstrating that his reasonable and legitimate expectations were not met. In the present case the record showed that, assuming without deciding that the Minister had an affirmative obligation to consider humanitarian and compassionate factors in arriving at the decision declining relief from, the applicant's inadmissible person status, the Minister did in fact consider them. The impugned decision was reasonable, and the appeal was accordingly properly dismissed. Given the Minister's very significant delay in making a decision of great importance to the applicant, this was not a proper case for costs.

Le demandeur étranger, un citoyen libyen, est arrivé au Canada en 1997 et a demandé le statut de réfugié au sens de la Convention. Cette demande a été rejetée et le demandeur a été identifié comme faisant partie d'une catégorie

non admissible en raison de son appartenance confessée au Front de salut national libyen, une organisation terroriste reconnue que le demandeur a présentée comme étant une organisation politique légitime s'opposant au régime oppressif en place en Libye au moment où il y résidait. Le demandeur a ensuite marié une citoyenne canadienne et, en 2002, pour mener à bien sa demande de résidence permanente au Canada comme membre parrainé au titre de la catégorie du regroupement familial, le demandeur a déposé une requête visant à obtenir de la part de l'intimé, le ministre de la Sécurité publique et de la Protection civile, une dispense quant au constat d'interdiction de territoire. En 2009, au terme d'un long délai, le ministre a estimé qu'il ne serait pas dans l'« intérêt national » d'admettre le demandeur et a refusé d'accorder la dispense. Conséquemment, la demande de résidence permanente a été rejetée et le demandeur a entamé des procédures en contrôle judiciaire.

La demande en contrôle judiciaire a été accueillie et la décision du ministre a été annulée, notamment, parce que le dossier ne révélait pas de motifs suffisants permettant de maintenir la position selon laquelle le Front de salut national libyen était réellement une organisation terroriste. L'appel du ministre interjeté devant la Cour d'appel a été accueilli et la décision du délégué du ministre ayant rejeté la demande de résidence permanente a été rétablie. Le demandeur a formé un pourvoi, de plein droit, à la Cour suprême du Canada.

Arrêt: Le pourvoi a été rejeté.

LeBel, J. (McLachlin, J.C.C., Fish, Abella, Rothstein, Moldaver, Karakatsanis, JJ. souscrivant à son opinion) : La jurisprudence concernant l'exercice de la discrétion ministérielle en matière d'immigration était suffisamment bien établie et constante pour conclure que la norme de contrôle applicable en l'espèce était celle de la décision raisonnable. Conséquemment, la décision du ministre sous-jacente au rejet de la demande de résidence permanente commandait un haut niveau de retenue en révision.

Bien que le ministre ne définissait pas l'expression « intérêt national » dans les motifs de la décision contestée, il ressortait de ses motifs que cette expression n'était pas limitée à la sécurité publique ou la sécurité nationale, ce qui semblait conforme aux directives gouvernementales applicables dans le cadre de demandes telles que celle qui faisait l'objet du présent litige. Étant donné la norme de contrôle, la décision du ministre commandait la déférence et, bien que le ministre n'était pas tenu d'utiliser une définition large, cette décision faisait bien partie des issues acceptables auxquelles on pouvait s'attendre et n'a pas fait l'objet d'une intervention inappropriée en révision. En fait, cette décision était probablement correcte, selon les règles ordinaires d'interprétation des lois.

Les motifs, bien que brefs, révélaient que le ministre a accordé une grande importance à la crédibilité du demandeur, étant donné les différentes explications offertes par le demandeur concernant le type et la durée d'implication ainsi que le niveau de participation au sein du Front de salut national libyen. Les motifs étaient transparents et intelligibles, et il était raisonnablement prévisible en l'espèce que le ministre se fonde sur les explications du demandeur.

Concernant la question de l'équité procédurale, le ministre n'était pas tenu de répondre à un critère injustement exigeant. Le demandeur avait le fardeau de démontrer que ses attentes raisonnables et légitimes n'avaient pas été satisfaites. En l'espèce, le dossier révélait que, si l'on tenait pour acquis sans pour cela prendre position sur la question que le ministre avait l'obligation de tenir compte de facteurs d'ordre humanitaire avant de parvenir à la conclusion qu'il fallait refuser la dispense souhaitée quant au constat d'interdiction de territoire, dans les faits, le ministre en a tenu compte. La décision contestée était raisonnable et le pourvoi a été rejeté. Considérant le long délai qui s'est écoulé avant que le ministre ne rende sa décision, laquelle revêtait une grande importance aux yeux du demandeur, il ne s'agissait pas de circonstances donnant lieu à des frais.

APPEAL by non-resident from judgment reported at *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)* (2011), 2011 CarswellNat 639, 2011 FCA 103, [2012] 4 F.C.R. 538, [2011] A.C.F. No. 407, [2011] F.C.J. No. 407, 2011 CarswellNat 2494, 96 Imm. L.R. (3d) 20, 2011 CAF 103, 415 N.R. 121 (F.C.A.), allowing Minister's appeal from judgment granting non-residents's application for judicial review of decision of Minister's delegate finding that non-resident was member of inadmissible class and dismissing non-resident's application for permanent residence in Canada.

POURVOI formé par un étranger à l'encontre d'une décision publiée à *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)* (2011), 2011 CarswellNat 639, 2011 FCA 103, [2012] 4 F.C.R. 538, [2011] A.C.F. No. 407, [2011] F.C.J. No. 407, 2011 CarswellNat 2494, 96 Imm. L.R. (3d) 20, 2011 CAF 103, 415 N.R. 121 (F.C.A.), ayant accueilli l'appel interjeté par le ministre à l'encontre d'un jugement ayant accordé la requête de l'étranger visant à obtenir

le contrôle judiciaire de la décision du délégué du ministre ayant conclu que l'étranger appartenait à une catégorie non admissible et ayant rejeté la demande de résidence permanente au Canada de ce dernier.

***LeBel J.* (McLachlin C.J.C. and Fish, Abella, Rothstein, Moldaver and Karakatsanis JJ. concurring):**

I. Introduction

1 The appellant, Muhsen Ahmed Ramadan Agraira, a citizen of Libya, has been residing in Canada continuously since 1997, despite having been found to be inadmissible on security grounds in 2002. The finding of inadmissibility was based on the appellant's membership in the Libyan National Salvation Front ("LNSF") — a terrorist organization according to Citizenship and Immigration Canada ("CIC"). The appellant applied in 2002 under s. 34(2) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("*IRPA*"), for ministerial relief from the determination of inadmissibility, but his application was denied in 2009. The Minister of Public Safety and Emergency Preparedness ("Minister") concluded that it was not in the national interest to admit individuals who have had sustained contact with known terrorist and/or terrorist-connected organizations. The appellant's application for permanent residence was accordingly denied, and he is now at risk of deportation.

2 Mr. Agraira appeals to this Court from a decision in which the Federal Court of Appeal dismissed an application for judicial review of the Minister's decision denying relief from the determination of inadmissibility. He contends that the Minister took an overly narrow view of the term "national interest" in s. 34(2) of the *IRPA* by equating it with national security and public safety. He adds that the Minister's decision failed to meet his legitimate expectations that certain procedures would be followed and certain factors would be taken into account in determining his application for relief.

3 The question raised by this appeal is whether the Minister's decision to deny relief can be successfully challenged. Two central issues are raised. First, what is the appropriate standard of review to apply to the Minister's decision? Second, in light of this standard, should the Minister's decision be set aside? This appeal also raises two other issues incidental to these central issues, namely the interpretation of the term "national interest" in s. 34(2) of the *IRPA* and the impact of any legitimate expectations created by Chapter 10 of the CIC's *Inland Processing Manual*: "Refusal of National Security Cases/Processing of National Interest Requests" (the "Guidelines").

4 I agree with the Federal Court of Appeal, but for reasons differing in part, that the Minister's decision was reasonable and that the application for judicial review should be dismissed.

II. Background

5 The appellant left Libya in 1996. He first sought refugee status in Germany on the basis of his connection with the LNSF, but his application was denied. He entered Canada in 1997, at Toronto, using a fake Italian passport. He applied for Convention Refugee status in this country on the basis of his affiliation with the LNSF. On his personal information form, he described his activities with that organization as follows: as a member of an 11-person cell, he had delivered envelopes to members of other cells, raised funds, and watched the movements of supporters of the regime then in power. As part of his training, he was taught how to engage people in political discourse and how to raise funds.

6 The appellant was heard by the Convention Refugee Determination Division of the Immigration and Refugee Board. At the hearing, he provided a letter from the LNSF confirming his membership in that organization. On October 24, 1998, he was denied Convention Refugee status on the basis that he lacked credibility.

7 While his application for refugee status was pending, the appellant married a Canadian woman in a religious ceremony in December 1997. He later married her in a civil ceremony in March 1999. His wife sponsored his application for permanent residence in August 1999.

8 In May 2002, the appellant was advised by CIC that his application for permanent residence might be refused, because there were grounds to believe that he was or had been a member of an organization that was or had been engaged in terrorism, contrary to s. 19(1)(*f*)(iii)(B) of the *Immigration Act*, R.S.C. 1985, c. I-2 ("*IA*"), which was then in force.

9 Later in May 2002, the appellant was interviewed by an immigration officer. In the course of that interview, he confirmed that he had been a member of the LNSF, but claimed that he had previously exaggerated the extent of his involvement in order to bolster his refugee claim. Although he now claimed that he did not know very much about the LNSF, he was able to name its founder and its current leader. Also, after stating that he had attended LNSF meetings in Libya, he said that he had only discussed the group with friends. Finally, he stated that he had had no contact with the LNSF after leaving Libya, but then acknowledged having received newsletters from chapters in the United States since that time. These contradictions led the immigration officer to conclude that the appellant was or had been a member of an organization that engaged in terrorism. He was found to be inadmissible on that basis.

10 On May 22, 2002, CIC sent the appellant a letter advising him of the possibility of requesting ministerial relief. In July of that year, the appellant applied for that relief. The immigration officer noted, while preparing her report on the interview, that, once again, there were statements in the appellant's application for relief that contradicted earlier statements he had made. For example, the appellant indicated in this application that he had attended meetings of the LNSF at which he had been trained to approach potential members and raise funds. However, in his interview with the immigration officer, the appellant said that he was unaware how the LNSF funded itself or how it recruited members. The officer concluded that the appellant had been and continued to be a member of the LNSF, but that his involvement had been limited to distributing leaflets and enlisting support for the organization. She therefore recommended that he be granted relief.

11 At the same time (July 2002), the officer prepared a Report on Inadmissibility regarding the appellant under s. 44(1) of the *IRPA*. Her report indicated that he was inadmissible to Canada pursuant to s. 34(1)(*f*) of the *IRPA* because he was a member of a terrorist organization.

12 Next, in August 2005, a briefing note for the Minister was prepared by the Canada Border Services Agency ("CBSA"). After having been reviewed by counsel for the appellant, who made no further comment, the note was submitted to the Minister on March 9, 2006. It contained a recommendation that the appellant be granted relief, as there was "not enough evidence to conclude that Mr. Ramadan Agraira's continued presence in Canada would be detrimental to the national interest" (A.R., vol. I, at p. 9). This recommendation was based on the following considerations:

> Mr. Ramadan Agraira admitted to joining the LNSF but was only a member for approximately two years. There is some information to suggest that he became a member at a time when the organization was not in its most active phase and well after it was involved in an operation to overthrow the Libyan regime. He initially stated that he had participated in a number of activities on behalf of the organization but later indicated that he had exaggerated the extent of his involvement so that he could make a stronger claim to refugee status in Canada. This is supported to some extent by the fact that his attempts to obtain refugee status in Germany and Canada were rejected on the basis of credibility. Mr. Ramadan Agraira denied having been involved in any acts of violence or terrorism and there is no evidence to the contrary. He appears to have been a regular member who did not occupy a position of trust or authority within the LNSF. He does not appear to have been totally committed to the LNSF specifically as he indicated to the immigration officer at CIC Oshawa that he would support anyone who tried to remove the current regime in Libya through non-violent means. [A.R., vol. I, at p. 9]

13 On January 27, 2009, the Minister rejected the recommendation in the briefing note. The response he gave was as follows:

> After having reviewed and considered the material and evidence submitted in its entirety as well as specifically considering these issues:

> • The applicant offered contradictory and inconsistent accounts of his involvement with the Libyan National Salvation Front (LNSF).
>
> • There is clear evidence that the LNSF is a group that has engaged in terrorism and has used terrorist violence in attempts to overthrow a government.
>
> • There is evidence that LNSF has been aligned at various times with Libyan Islamic opposition groups that have links to Al-Qaeda.
>
> • It is difficult to believe that the applicant, who in interviews with officials indicated at one point that he belonged to a "cell" of the LNSF which operated to recruit and raise funds for LNSF, was unaware of the LNSF's previous activity.
>
> It is not in the national interest to admit individuals who have had sustained contact with known terrorist and/or terrorist-connected organizations. Ministerial relief is denied. [A.R., vol. I, at p. 11]

14 On March 24, 2009, the appellant received notice that his application for permanent residence was denied. He then applied to the Federal Court for judicial review of the Minister's decision regarding relief.

III. Judicial History

A. Federal Court, 2009 FC 1302, 357 F.T.R. 246 (Eng.) (F.C.)

15 Mosley J. began his analysis by ruling on the standard of review. He held that the appropriate standard was reasonableness, citing the discretionary nature of the decision, the fact that it was not delegable, and the Minister's expertise in matters of national security and the national interest. He added that the political nature of the decision and the Minister's special knowledge involving sensitivity to the imperatives of public policy and the nuances of the legislative scheme also weighed in favour of deference.

16 In applying the reasonableness standard, Mosley J. considered the fact that the Minister had focused on evidence that the LNSF had engaged in terrorism and been aligned with Libyan Islamic groups that had links to Al-Qaeda. He found, on the contrary, that the evidence of the LNSF's engagement in terrorism was minimal at best. In particular, the LNSF did not appear on the lists of terrorist organizations of the United Nations, Canada and the United States. Although several Libyan opposition groups had direct links with Al-Qaeda, there was no evidence in the record that LNSF was one of them. Because it had been previously determined that the LNSF was a terrorist group for the purposes of s. 34(1)*(f)* of the *IRPA*, the court could not review that finding. However, Mosley J. found it difficult to understand why the Minister had given so much weight to the LNSF's engagement in terrorism and its alignment with Libyan Islamic groups that had links to Al-Qaeda.

17 Mosley J. then referred to the Federal Court's decision in *Abdella v. Canada (Minister of Public Safety & Emergency Preparedness)*, 2009 FC 1199, 355 F.T.R. 86 (Eng.) (F.C.), in which Gibson J. had relied on the Guidelines to set aside the Minister's decision to deny relief under s. 34(2). Appendix D to the Guidelines contains five questions to be addressed in the context of an application for such relief:

> 1. Will the applicant's presence in Canada be offensive to the Canadian public?
>
> 2. Have all ties with the regime/organization been completely severed?
>
> 3. Is there any indication that the applicant might be benefiting from assets obtained while a member of the organization?

4. Is there any indication that the applicant might be benefiting from previous membership in the regime/ organization?

5. Has the person adopted the democratic values of Canadian society?

[A.R., vol. III, at pp. 437-39]

18 Mosley J. noted that in the instant case, the Minister had not addressed these questions in the reasons he gave for his decision, nor had he balanced the factors the Federal Court had in past cases identified as being relevant to the determination of what is in the national interest, namely: whether the appellant posed a threat to Canada's security; whether the appellant posed a danger to the public; the period of time the appellant had been in Canada; whether the determination is consistent with Canada's humanitarian reputation of allowing permanent residents to settle in Canada; the impact on both the appellant and all other members of society of the denial of permanent residence; and adherence to all Canada's international obligations. He criticized the Minister for not considering in his decision the facts that the appellant had been residing in Canada since 1997 and had been a productive member of society, that he had no criminal record, and that he owned a business earning over $100,000 a year. In Mosley J.'s view, the exercise of the Minister's discretion seemed to have been rendered meaningless by the Minister's "simplistic view that the presence in Canada of someone who at some time in the past may have belonged to a terrorist organization abroad can never be in the national interest" (para. 27).

19 Mosley J. granted the application for judicial review and certified the following questions for consideration by the Federal Court of Appeal:

> When determining a ss. 34(2) application, must the Minister of Public Safety consider any specific factors in assessing whether a foreign national's presence in Canada would be contrary to the national interest? Specifically, must the Minister consider the five factors listed in the Appendix D of IP10? [para. 32]

B. Federal Court of Appeal, 2011 FCA 103, 415 N.R. 121 (F.C.A.)

20 In the Federal Court of Appeal, Pelletier J.A. (Blais C.J. and Noël J.A. concurring) considered the issues separately in ruling on the standard of review. He held that establishing the meaning of the term "national interest" for the purposes of s. 34(2) is a question of law in respect of which the Minister has no particular expertise and for which the appropriate standard is therefore correctness. The appropriate standard for reviewing the exercise of the Minister's discretion, on the other hand, is reasonableness.

21 Pelletier J.A. confirmed that, in an application for ministerial relief, the onus is on the applicant to satisfy the Minister that his or her presence in Canada would not be detrimental to the national interest. Because this onus was reversed in the briefing note, he held that it was open to the Minister to disregard the recommendation made in the note.

22 Pelletier J.A. next turned to the interpretation of s. 34(2) of the *IRPA*. He tracked the legislative evolution of s. 34(2) to find what, in his view, was the correct interpretation of this subsection. He noted that Parliament had transferred the responsibility for exercising the discretion from the Minister of Citizenship and Immigration ("MCI") to the Minister. As a result of this change, s. 34(2) has to be read in light of the objects of the *Department of Public Safety and Emergency Preparedness Act*, S.C. 2005, c. 10 ("*DPSEPA*") (the Minister's enabling statute), the *Canada Border Services Agency Act*, S.C. 2005, c. 38 ("*CBSAA*") (the statute governing the CBSA, the organization that assists the Minister in his or her duties), and the *IRPA*. These statutes work together as part of a statutory scheme to which the presumption of coherence must be applied.

23 In May 2002, when the appellant's admissibility interview took place, the *IA* was in force. Under the *IA*, the MCI was responsible both for the determination of inadmissibility and for the decision on granting relief. He or she was

also responsible for deciding whether to grant exemptions from the *IA* on humanitarian and compassionate ("H&C") grounds.

24 On June 28, 2002, the *IRPA* replaced the *IA*. Under the transitional provisions of the *IRPA*, the appellant's application for relief would now be governed by the *IRPA*, and more specifically by s. 34 of that Act. At that time, the MCI was still responsible for deciding whether to grant relief under s. 34(2). After the *CBSAA* was passed in 2005, the responsible minister became "[t]he Minister as defined in section 2" of the *CBSAA* (s. 118). In 2008, the Minister was specifically identified as the responsible minister. The MCI retained the ability to grant exemptions from the *IRPA* on H&C grounds.

25 This review led Pelletier J.A. to conclude that under the statutory scheme, the Minister was responsible for deciding whether to grant relief, whereas the MCI continued to be responsible for deciding whether to grant exemptions on the basis of H&C considerations. Hence, Parliament intended that ministerial relief would be granted or denied on the basis of considerations other than those that could support an application for H&C relief. The proper procedure for making an application based on H&C considerations is that under s. 25 of the *IRPA*, not that of an application for ministerial relief under s. 34(2).

26 Pelletier J.A. then equated the "national interest", for the purposes of s. 34(2), with national security and public safety. He found support for this proposition in the *DPSEPA* and the *CBSAA*. The *DPSEPA* emphasizes the Minister's responsibility for public safety and emergency preparedness. Under the *CBSAA*, the Minister is also responsible for the CBSA, whose purpose is, *inter alia*, to provide "integrated border services that support national security and public safety priorities" (*CBSAA*, s. 5). Pelletier J.A. found that this statutory scheme supports the view that the exercise of the Minister's discretion under s. 34(2) must be primarily, if not exclusively, guided by his or her national security and public safety role.

27 Pelletier J.A. next considered the effect of the Guidelines, in which the following definition of the term "national interest" appears: "The consideration of national interest involves the assessment and balancing of all factors pertaining to the applicant's admission against the stated objectives of the Act as well as Canada's domestic and international interests and obligations" (s. 6).

28 Pelletier J.A. noted that the Guidelines cannot alter the law as enacted by Parliament and found that they are of limited application now that the Minister, as opposed to the MCI, has become responsible for decisions on granting ministerial relief under s. 34(2). This conclusion was based on s. 4(2)(*c*) of the *IRPA*, which provides that the Minister is responsible for the establishment of policies regarding "inadmissibility on grounds of security". As a consequence, the five factors set out in the Guidelines need not be considered in disposing of relief applications. For Pelletier J.A., this Court's dictum in *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.), at para. 72, to the effect that guidelines are "a useful indicator of what constitutes a reasonable interpretation of the power conferred by the section" does not apply in the case of the Guidelines. This is because the Guidelines serve to identify foreign nationals whose presence in Canada would be detrimental to the national interest, and thus to eliminate unsuitable candidates for relief. They do not serve, as was the case in *Baker*, to identify suitable candidates for relief.

29 Pelletier J.A. then went on to hold that the fact that a finding of inadmissibility under s. 34(1) might negate the possibility of relief under s. 34(2) does not render that relief illusory. Rather, on the basis of *Suresh v. Canada (Minister of Citizenship & Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3 (S.C.C.), the relief under s. 34(2) was meant to apply only in exceptional cases in which the applicant's association with a terrorist group was innocent or coerced.

30 Finally, Pelletier J.A. concluded that the Minister's decision was reasonable. The Minister had addressed the appellant's submission that his involvement with the LNSF was either non-existent, innocent or trivial and had found the appellant's account of his involvement to be "contradictory and inconsistent" (para. 69). Ultimately, because the appellant lacked credibility as a result of these contradictions and inconsistencies, the Minister had had no faith in any

of his representations. Accordingly, the Minister had not acted unreasonably in reaching the conclusion he had. The application for judicial review was dismissed, and the certified questions were answered as follows:

> 1- When determining a subsection 34(2) application, must the Minister of Public Safety consider any specific factors in assessing whether a foreign national's presence in Canada would be contrary to the national interest?
>
> Answer: National security and public safety, as set out in para. 50 of these reasons.
>
> 2- Specifically, must the Minister consider the five factors listed in the Appendix D of IP-10?
>
> Answer: No. [para. 74]

IV. Analysis

A. Issues

31 The issues to be resolved in this appeal are as follows:

> (1) Is the standard of review for the Minister's decision reasonableness or correctness?
>
> (2) Is the Minister's decision valid?
>
> (3) Was the decision unfair, and did it fail to meet the appellant's legitimate expectations?

32 As I mentioned above, a corollary issue related to the first and second issues is the meaning of the term "national interest" in s. 34(2) of the *IRPA*.

B. Positions of the Parties

(1) Position of the Appellant

33 The appellant submits that the standard of review applicable to all the issues before this Court is correctness, because they all constitute questions of pure law and natural justice. The Minister's decision was incorrect in that it was based on an erroneous view of the meaning of the term "national interest" in s. 34(2) of the *IRPA* and it failed to meet the appellant's legitimate expectations as to what factors would be considered in assessing his application for relief.

34 The appellant contends that the Federal Court of Appeal relied too heavily on the legislative transfer of ministerial responsibility in interpreting the term "national interest" for the purposes of s. 34(2). This shift in responsibility between governmental departments does not indicate a concomitant legislative intent to change the interpretation of the *IRPA*. He also argues that the term "national interest" should be given a broader meaning than the one ascribed to it by the Federal Court of Appeal. Although public security and national defence should both be taken into account as relevant factors in the Minister's exercise of discretion, they should not be the only factors considered in applying the "national interest" test. In taking an unduly narrow view of the term "national interest" by equating it with one aspect of that interest (national security and public safety), the Federal Court of Appeal set a precedent which unlawfully fetters the Minister's discretion by requiring that he or she consider only that one aspect when dealing with future applications for relief.

35 Finally, the appellant submits that the Minister's decision was unfair in that it failed to meet legitimate expectations created by the Guidelines. The Guidelines were clear and unambiguous representations made by the government to the public inasmuch as they were publicly available, had been routinely used by the Minister, and had been issued to ensure consistency. They created an expectation that certain factors extrinsic to national security would be considered in assessing s. 34(2) applications by instructing applicants to address, *inter alia*, the following factors in their submissions: the reason why the applicant is seeking admission to Canada, any special circumstances related to the application, and any current activities in which the applicant is involved. The appellant further contends that a letter he received from CIC in May 2002 created a legitimate expectation that H&C factors would be considered in assessing his application for

relief. It stated that a decision under s. 34(2) would require the Minister to assess both the detriment the appellant posed to the national interest of Canada and any H&C circumstances pertinent to his situation. According to the appellant, this legitimate expectation was not met, because the Minister did not, in assessing his application, consider the factors he had been told were relevant.

(2) Position of the Respondent

36 The respondent submits that the standard of review is reasonableness and that the Minister's decision was reasonable. The Minister's interpretation of the term "national interest" is entitled to deference, as the *IRPA* does not specify any factors that must be considered in this regard, and the term is found in the Minister's enabling statute, with which the Minister has particular familiarity. A decision on an application for relief under s. 34(2) falls at the political end of the spectrum, is discretionary, and concerns matters in which the Minister has expertise.

37 According to the respondent, the legislative history of the *IRPA* and the related legislation supports the view that the national security and public safety aspects of the national interest are to be the predominant considerations in determining whether to grant s. 34(2) relief, but these remain subject to any other considerations the Minister deems appropriate, except for H&C factors. The purpose of s. 34 is to ensure the safety and security of Canadians, while s. 34(2) provides for relief for innocent or coerced members of terrorist organizations who would otherwise be inadmissible. Section 34(2) must be seen as complementary to s. 34(1). Since s. 34(1) deals with inadmissibility on security grounds, the dominant considerations under s. 34(2) must be national security and public safety. H&C factors are not relevant to a determination of the "national interest" under s. 34(2), as they are properly dealt with in H&C applications under s. 25 of the *IRPA*. This interpretation of s. 34(2) is bolstered by the legislative transfer of responsibility for decisions on applications for relief to the Minister, whose mandate is the protection of public safety.

38 Ultimately, the respondent argues, the Minister's decision in this case was reasonable. It was transparent, intelligible and justifiable. It also fell within the range of possible acceptable outcomes that meet the standard of reasonableness in accordance with *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.). The appellant had offered self-serving and contradictory explanations of his role in, and activities for, the LNSF, and therefore lacked credibility. It was also clear that he had had sustained contact with a group that had committed terrorist acts.

39 The respondent also contends that there was no failure to meet legitimate expectations in this case. The Guidelines emphasize the exceptional and discretionary nature of ministerial relief, and their stated objectives emphasize national security and public safety. They created expectations with respect to procedures, but not to substantive rights. They could not alter the law as laid down by Parliament and so could not mandate the consideration of factors not relevant to the national interest analysis. In any event, immigration officials did follow the procedures they were expected to follow in this case. A letter sent from CIC to the appellant in May 2002 stated that the ministerial relief process would require an assessment of the detriment he posed to the national interest, and of any relevant H&C circumstances. The appellant had a sufficient opportunity to present evidence and submissions in support of his case. He was then provided with a further opportunity to respond to information officials had obtained and provided to the Minister. The Minister reviewed the application and the briefing note, and exercised his statutory discretion as he saw fit. He provided sufficient reasons for his decision, in which he indicated that he had "reviewed and considered the material and evidence submitted in its entirety".

C. Forms of Ministerial Relief

(1) Sections 25 and 25.1 of the IRPA

40 Before I turn to the Minister's decision, it will be helpful to explain the two forms of ministerial relief currently available to foreign nationals in Canada who are deemed to be inadmissible. The first form, H&C relief, is provided for in ss. 25 and 25.1 of the *IRPA*:

> **25.** (1) Subject to subsection (1.2), the [MCI] must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible or does not meet the requirements of this Act, and may, on request of a foreign national outside Canada who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the [MCI] is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.
>
> . . . . .
>
> **25.1** (1) The [MCI] may, on the [MCI's] own initiative, examine the circumstances concerning a foreign national who is inadmissible or who does not meet the requirements of this Act and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the [MCI] is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.

41 These provisions contemplate the granting of ministerial relief to foreign nationals seeking permanent resident status who are inadmissible or otherwise do not meet the requirements of the *IRPA*. Under them, the MCI may, either upon request or of his own accord, "grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of" the *IRPA*. However, relief of this nature will only be granted if the MCI "is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national". H&C considerations include such matters as children's rights, needs, and best interests; maintaining connections between family members; and averting the hardship a person would suffer on being sent to a place where he or she has no connections (see *Baker*, at paras. 67 and 72).

(2) Section 34(2) of the IRPA

42 Section 34(2) of the *IRPA* contemplates a different form of ministerial relief based upon the "national interest". Section 34 reads as follows:

> **34. (1)** [Security] A permanent resident or a foreign national is inadmissible on security grounds for
>
> (a) engaging in an act of espionage or an act of subversion against a democratic government, institution or process as they are understood in Canada;
>
> (b) engaging in or instigating the subversion by force of any government;
>
> (c) engaging in terrorism;
>
> (d) being a danger to the security of Canada;
>
> (e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or
>
> (f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (*a*), (*b*) or (*c*).
>
> (2) [Exception] The matters referred to in subsection (1) do not constitute inadmissibility in respect of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest.

43 As I mentioned above, the appellant was found to be inadmissible on security grounds for having been, in the words of s. 34(1)(*f*), "a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph ... (*c*)", namely acts of terrorism. He sought relief under s. 34(2), which provides that the Minister may make an exception where a person has been found to be inadmissible, on being satisfied

that the person's continued "presence in Canada would not be detrimental to the national interest". As the wording of the section ("who satisfies the Minister") implies, the onus is on the person who applies for relief to prove that his or her continued presence in Canada would not be detrimental to the national interest.

44 In short, s. 34(2) of the *IRPA* establishes a pathway for relief which is conceptually and procedurally distinct from the relief available under s. 25 or s. 25.1. It should be borne in mind that an applicant who fails to satisfy the Minister that his or her continued presence in Canada would not be detrimental to the national interest under s. 34(2) may still bring an application for H&C relief. Whether such an application would be successful is another matter.

D. Standard of Review

(1) Relationship Between the Administrative Law Standards of Review and the Appellate Standards of Review

45 The first issue in this appeal concerns the standard of review applicable to the Minister's decision. But, before I discuss the appropriate standard of review, it will be helpful to consider once more the interplay between (1) the appellate standards of correctness and palpable and overriding error and (2) the administrative law standards of correctness and reasonableness. These standards should not be confused with one another in an appeal to a court of appeal from a judgment of a superior court on an application for judicial review of an administrative decision. The proper approach to this issue was set out by the Federal Court of Appeal in *Telfer v. Canada (Revenue Agency)*, 2009 FCA 23, 386 N.R. 212 (F.C.A.), at para. 18:

> Despite some earlier confusion, there is now ample authority for the proposition that, on an appeal from a decision disposing of an application for judicial review, the question for the appellate court to decide is simply whether the court below identified the appropriate standard of review and applied it correctly. The appellate court is not restricted to asking whether the first-level court committed palpable and overriding error in its application of the appropriate standard.

46 In *Merck Frosst Canada Ltée c. Canada (Ministre de la Santé)*, 2012 SCC 3, [2012] 1 S.C.R. 23 (S.C.C.), at para. 247, Deschamps J. aptly described this process as "'step[ping] into the shoes' of the lower court" such that the "appellate court's focus is, in effect, on the administrative decision" (emphasis deleted).

47 The issue for our consideration can thus be summarized as follows: Did the application judge choose the correct standard of review and apply it properly?

(2) What Is the Standard of Review?

48 As this Court held in *Dunsmuir*, a court deciding an application for judicial review must engage in a two-step process to identify the proper standard of review. First, it must consider whether the level of deference to be accorded with regard to the type of question raised on the application has been established satisfactorily in the jurisprudence. The second inquiry becomes relevant if the first is unfruitful or if the relevant precedents appear to be inconsistent with recent developments in the common law principles of judicial review. At this second stage, the court performs a full analysis in order to determine what the applicable standard is.

Determination of the Standard in Light of the Jurisprudence

49 In my view, the standard of review applicable in the case at bar has been satisfactorily determined in past decisions to be reasonableness. A host of cases from the Federal Court indicate that reasonableness is the standard for reviewing decisions on applications for ministerial relief under s. 34(2) of the *IRPA*: *Esmaeili-Tarki v. Canada (Minister of Citizenship & Immigration)*, 2005 FC 509 (F.C.); *Miller v. Canada (Solicitor General)*, 2006 FC 912, [2007] 3 F.C.R. 438 (F.C.); *Naeem v. Canada (Minister of Citizenship & Immigration)*, 2007 FC 123, [2007] 4 F.C.R. 658 (F.C.); *Al Yamani v. Canada (Minister of Public Safety & Emergency Preparedness)*, 2007 FC 381, 311 F.T.R. 193 (Eng.) (F.C.); *Soe v. Canada (Minister of Public Safety & Emergency Preparedness)*, 2007 FC 461 (F.C.); *Kanaan v. Canada (Minister of*

Public Safety & Emergency Preparedness), 2008 FC 241, 71 Imm. L.R. (3d) 63 (F.C.); *Chogolzadeh v. Canada (Minister of Public Safety & Emergency Preparedness)*, 2008 FC 405, 327 F.T.R. 39 (Eng.) (F.C.); *Tameh v. Canada (Minister of Public Safety & Emergency Preparedness)*, 2008 FC 884, 332 F.T.R. 158 (Eng.) (F.C.); *Kablawi v. Canada (Minister of Public Safety & Emergency Preparedness)*, 2008 FC 1011, 333 F.T.R. 300 (Eng.) (F.C.); *Ramadan v. Canada (Minister of Citizenship & Immigration)*, 2008 FC 1155, 335 F.T.R. 227 (Eng.) (F.C.); *Afridi v. Canada (Minister of Public Safety & Emergency Preparedness)*, 2008 FC 1192, 75 Imm. L.R. (3d) 291 (F.C.); *Ismeal v. Canada (Minister of Public Safety & Emergency Preparedness)*, 2008 FC 1366, 77 Imm. L.R. (3d) 310 (F.C.); *Abdella*. This jurisprudence is well established, and the appellant has not shown why it should not be relied on in this appeal.

50 The applicability of the reasonableness standard can be confirmed by following the approach discussed in *Dunsmuir*. As this Court noted in that case, at para. 53, "[w]here the question is one of fact, discretion or policy, deference will usually apply automatically". Since a decision by the Minister under s. 34(2) is discretionary, the deferential standard of reasonableness applies. Also, because such a decision involves the interpretation of the term "national interest" in s. 34(2), it may be said that it involves a decision maker "interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity" (*Dunsmuir*, at para. 54). This factor, too, confirms that the applicable standard is reasonableness.

(3) Meaning of Reasonableness

51 In *Dunsmuir*, the Court defined reasonableness as follows:

> ... a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. [para. 47]

52 In *N.L.N.U. v. Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 (S.C.C.), Abella J., for a unanimous Court, returned to the meaning of reasonableness and deference. She stated:

> This, I think, is the context for understanding what the Court meant in *Dunsmuir* when it called for "justification, transparency and intelligibility". To me, it represents a respectful appreciation that a wide range of specialized decision-makers routinely render decisions in their respective spheres of expertise, using concepts and language often unique to their areas and rendering decisions that are often counter-intuitive to a generalist....
>
> Read as a whole, I do not see *Dunsmuir* as standing for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses — one for the reasons and a separate one for the result (Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at §§12:5330 and 12:5510). It is a more organic exercise — the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes" (para. 47).
>
> In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para.

> 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.
>
> ... if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met. [paras. 13-16]

53 In one of its most recent comments on this point, in *Construction Labour Relations Assn. (Alberta) v. Driver Iron Inc.*, 2012 SCC 65, [2012] 3 S.C.R. 440 (S.C.C.), the Court emphasized that the reviewing court must consider the tribunal's decision as a whole, in the context of the underlying record, to determine whether it was reasonable:

> ... administrative tribunals do not have to consider and comment upon every issue raised by the parties in their reasons. For reviewing courts, the issue remains whether the decision, viewed as a whole in the context of the record, is reasonable (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 [para. 3]).

54 I will now consider whether the Minister's decision was reasonable. The remainder of my reasons will focus on this issue.

E. Meaning of "National Interest" Under Section 34(2) of the IRPA

55 The meaning of the term "national interest" in s. 34(2) of the *IRPA* was central to the Minister's exercise of discretion in this case. As is plain from the statute, the Minister exercises this discretion by determining whether he or she is satisfied by the applicant that the applicant's presence in Canada would not be detrimental to the national interest. The meaning of "national interest" in the context of this section is accordingly key, as it defines the standard the Minister must apply to assess the effect of the applicant's presence in Canada in order to exercise his or her discretion.

56 The Minister, in making his decision with respect to the appellant, did not expressly define the term "national interest". The first attempt at expressly defining it was by Mosley J. in the Federal Court, and he also certified a question concerning this definition for the Federal Court of Appeal's consideration. We are therefore left in the position, on this issue, of having no *express* decision of an administrative decision maker to review.

57 This Court has already encountered and addressed this situation, albeit in a different context, in *A.T.A. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61, [2011] 3 S.C.R. 654 (S.C.C.). In that case, Rothstein J. held that a decision maker's decision on the merits may imply a particular interpretation of the statutory provision at issue even if the decision maker has not expressed an opinion on that provision's meaning.

58 The reasoning from *A.T.A.* can be applied to the case at bar. It is evident from the Minister's holding that "[i]t is not in the national interest to admit individuals who have had sustained contact with known terrorist and/or terrorist-connected organizations" that the Minister made a determination of the meaning of "national interest". An interpretative decision as to that term is necessarily implied within his ultimate decision on ministerial relief, although this Court is not in a position to determine with finality the actual reasoning of the Minister. In these circumstances, we may "consider the reasons that could be offered for the [Minister's] decision when conducting a reasonableness review" of that decision (*A.T.A.*, at para. 54). Accordingly, I now turn to consider, what appears to have been the ministerial interpretation of "national interest", based on the Minister's "express reasons" and the Guidelines, which inform the scope and context of those reasons. I will then assess whether this implied interpretation, and the Minister's decision as a whole, were reasonable.

59 The Minister stated in his reasons that he had "reviewed and considered the material and evidence submitted in its entirety". This material included the following information set out in the CBSA's briefing note, which addressed many of the questions presented in the Guidelines:

> 1. The extent of the appellant's membership in, and activities on behalf of, the LNSF are in question.

2. At most, the appellant was a "passive member" of the LNSF who carried out "basic functions". He was never involved in violent acts.

3. The appellant joined the LNSF in 1994 to support democracy, freedom of speech, and human rights in Libya. At that time, the organization was, by and large, no longer engaged in violence. In any event, the appellant claimed to have no knowledge of the LNSF's involvement in violence and would not have supported the LNSF had it espoused the use of violence to achieve political change.

4. There is evidence to suggest that the appellant severed all ties with the LNSF when he came to Canada in 1997.

5. Throughout, the appellant's goal has been to support the establishment of a democratic system of government in Libya.

6. The appellant has two children, attended English as a second language classes, and owns his own transport business.

(A.R., vol. I, pp. 5-9)

60 The Guidelines did not constitute a fixed and rigid code. Rather, they contained a set of factors, which appeared to be relevant and reasonable, for the evaluation of applications for ministerial relief. The Minister did not have to apply them formulaically, but they guided the exercise of his discretion and assisted in framing a fair administrative process for such applications. As a result, the Guidelines can be of assistance to the Court in understanding the Minister's implied interpretation of the "national interest".

61 Moreover, the Minister placed particular emphasis on matters related to national security and public safety in the reasons he gave for his decision. These included: the appellant's contradictory and inconsistent accounts of his involvement with the LNSF, a group that has engaged in terrorism; the fact that the appellant was most likely aware of the LNSF's previous activity; and the fact that the appellant had had sustained contact with the LNSF.

62 Taking all the above into account, had the Minister expressly provided a definition of the term "national interest" in support of his decision on the merits, it would have been one which related predominantly to national security and public safety, but did not exclude the other important considerations outlined in the Guidelines or any analogous considerations (see Appendix 1 (the relevant portions of the Guidelines)).

63 As a result of my comments above on the standard of review, I am of the view that the Minister is entitled to deference as regards this implied interpretation of the term "national interest". As Rothstein J. stated, "[w]here the reviewing court finds that the tribunal has made an implicit decision on a critical issue, the deference due to the tribunal does not disappear" (*A.T.A.*, at para. 50).

64 In my view, the Minister's interpretation of the term "national interest", namely that it is focused on matters related to national security and public safety, but also encompasses the other important considerations outlined in the Guidelines and any analogous considerations, is reasonable. It is reasonable because, to quote the words of Fish J. from *Alliance Pipeline Ltd. v. Smith*, 2011 SCC 7, [2011] 1 S.C.R. 160 (S.C.C.), it "accords ... with the plain words of the provision, its legislative history, its evident purpose, and its statutory context" (para. 46). That is to say, the interpretation is consistent with Driedger's modern approach to statutory interpretation:

Today there is only one principle or approach, namely, the words of an Act are to 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.

(*Construction of Statutes* (2nd ed. 1983), at p. 87)

(1) Plain Words of the Provision

65 There is no dispute between the parties that the term "national interest" refers to matters which are of concern to Canada and to Canadians. There is no doubt that public safety and national security are matters which are of concern to Canada and to Canadians. It is equally clear, however, that more than just public safety and national security are of concern to Canada and to Canadians. For example, the plain meaning of the term "national interest" would also include the preservation of the values that underlie the *Canadian Charter of Rights and Freedoms* and the democratic character of the Canadian federation, and in particular the protection of the equal rights of every person to whom its laws and its Constitution apply. The plain words of the provision therefore favour a broader reading of the term "national interest" than the one suggested by the respondent and by the Federal Court of Appeal, which would limit its meaning to the protection of public safety and national security. The words of the statute are consistent with the Minister's implied interpretation of this term, which relates predominantly to national security and public safety, but does not exclude the other important considerations outlined in the Guidelines or any analogous considerations. The legislative history of the provision is also relevant to an understanding of the range of values and interests underlying the concept of the national interest.

(2) Legislative History of the Provision

66 The legislative history of s. 34(2) is a long one. In these reasons, I will only discuss the salient points of this history, those which serve to demonstrate that the Minister's implied interpretation of the term "national interest" is consistent with it.

67 Ministerial relief from a finding of inadmissibility first became available in 1952. Relief was available to persons who were members of or associated with any organization, group or body that was or had been involved in the subversion by force or other means of democratic government, institutions or processes. Those who sought such relief had to satisfy the minister that they had ceased to be members of or associated with the organization, group or body in question *and that their admission "would not be detrimental to the security of Canada"* (*Immigration Act*, R.S.C. 1952, c. 325, s. 5(*l*)). Parliament made it clear at the time that it intended the focus of an application for ministerial relief to be national security.

68 In 1977, the provisions of the *Immigration Act* on inadmissibility were revised to read, in part, as follows:

> **19.** (1) No person shall be granted admission if he is a member of any of the following classes:
>
> . . . . .
>
> (*e*) persons who have engaged in or who there are reasonable grounds to believe will engage in acts of espionage or subversion against democratic government, institutions or processes, as they are understood in Canada, except persons who, having engaged in such acts, have satisfied the Minister that their admission would not be detrimental to the national interest;
>
> (*Immigration Act, 1976*, S.C. 1976-77, c. 52, s. 19(1)(*e*))

69 Thus, in 1977, Parliament made a clear decision to change the approach to ministerial relief. The test would no longer focus solely on national security, as access to relief would instead be premised on a broader array of domestic and international considerations constituting the "national interest". Since then, the provisions on ministerial relief in both the *IA* and the *IRPA* have at all times referred to the "national interest".

70 Parliament was (or at least must be taken to have been) aware of the previous "detrimental to the security of Canada" test when it decided to enact, and later to keep, the "national interest" test for ministerial relief. The fact that, at all material times, the wording of s. 34(2) referred to the applicant's not being detrimental to the "national interest", as opposed to not being detrimental to the "security of Canada", strongly suggests that Parliament did not intend the

term "national interest" to relate exclusively to national security and public safety. Had that been the case, Parliament could have returned to the expression "security of Canada" in enacting s. 34(2).

71 The *IRPA* replaced the *IA* in 2002. As it was enacted in a post-9/11 world, the *IRPA* was clearly in part a response to the threats of the complex and dangerous environment which had been developing internationally. In support of his contention that the interpretation of the term "national interest" should focus on national security and public safety, the respondent quotes the following passage from a Senate Committee report in his factum:

> The Committee recognizes that Bill C-11 represents a major overhaul of Canada's immigration and refugee protection legislation, and it will thus likely set the standard for many years to come. The Committee also fully appreciates that the current context in which the Bill is being considered is one of heightened security concerns following the profoundly tragic events of 11 September 2001 in the United States. In this context the Committee realizes that the Bill must embody a balance that will respect the needs and rights of individuals while simultaneously serving the public interest particularly with respect to security concerns and meeting Canada's international obligations.
>
> [Emphasis added.]
>
> (Standing Committee on Social Affairs, Science and Technology, "Ninth Report", 1st Sess., 37th Parl., October 23, 2001 (online))

72 This passage certainly highlights the *IRPA*'s role in "serving the public interest ... with respect to security concerns". However, it does not limit the national interest to security concerns. It also highlights the fact that meeting Canada's international obligations (including, presumably, obligations stemming from rules of customary and conventional international human rights law) is an important part of the national interest.

73 In 2005, the *DPSEPA* formally established both the Department of Public Safety and Emergency Preparedness and the Minister's post. The respondent submits that the creation of this new department and of the CBSA, as well as the transfer of ministerial responsibility for decisions under s. 34(2), formed part of a new national security policy instituted by Parliament in response to the events of September 11, 2001. In particular, he argues that the legislative transfer of the responsibility for making such decisions from the MCI to the Minister, occurring as it did in the broader context of national security and public safety, supports the Federal Court of Appeal's interpretation of the term "national interest".

74 I am not persuaded that the transfer of ministerial responsibility for s. 34(2) applications serves as a sufficient basis for upholding the Federal Court of Appeal's interpretation of the term "national interest". On its own, this transfer should not be read as changing, nor does it change, the substantive law governing relief applications under s. 34(2). Ministerial responsibilities may be reassigned for a wide variety of reasons. If this argument was valid, it would imply that the meaning of a law might change whenever ministerial responsibilities are reassigned. This would be a new and perplexing principle of interpretation. There is a presumption against the implicit alteration of the law according to which, absent an explicit change in the wording of a provision, it is presumed that Parliament did not intend to amend its meaning. Although the ministerial responsibility for deciding relief applications under s. 34(2) was transferred in 2005, Parliament did not amend the wording of this provision. Therefore, the presumption against implicit alteration applies, and there was no intent to amend the meaning of the term "national interest". As the appellant points out in his factum, this presumption is not rebutted by a mere transfer of ministerial responsibility:

> It does not make sense that every time Parliament decides to change the responsibilities of particular Ministers for administrative purposes, or without indicating that there is a substantive reason for a change, the words of a statute should be given different meanings. A mere transfer in Ministerial responsibility is not sufficient to establish that the change is meant to have a substantive effect on the rights of persons who are affected by legislation administered by the various ministers. The Court of Appeal's interpretation of national interest effectively amends section 34(2). Amending legislation is a legislative function, and falls outside of the judicial function. [para. 76]

75 In summary, this review demonstrates that the Minister's implied interpretation of the term "national interest" — that it relates predominantly to national security and public safety, but does not exclude the other important considerations outlined in the Guidelines or any analogous considerations — is consistent with the legislative history of the provision.

(3) Purpose of the Provision

76 The respondent argues that the *IRPA* is concerned with public safety and national security. More specifically, he argues that the purpose of s. 34(1)(*c*) and (*f*) is to ensure the safety and security of Canadians, while s. 34(2) provides for relief only for innocent or coerced members of terrorist organizations who would otherwise be inadmissible.

77 The respondent is correct in saying that the *IRPA* is concerned with national security and public safety. In fact, the Court recognized this in *Medovarski v. Canada (Minister of Citizenship & Immigration)*, 2005 SCC 51, [2005] 2 S.C.R. 539 (S.C.C.):

> The objectives as expressed in the *IRPA* indicate an intent to prioritize security.... Viewed collectively, the objectives of the *IRPA* and its provisions concerning permanent residents, communicate a strong desire to treat criminals and security threats less leniently than under the former Act. [para. 10]

78 That said, the respondent's argument that s. 34(2) is focused exclusively on national security and public safety, and that it provides for relief only for innocent or coerced members of terrorist organizations, fails to give adequate consideration to the other objectives of the *IRPA*. Section 3(1) of the *IRPA* sets out 11 objectives of the Act with respect to immigration. Only two of these are related to public safety and national security: to protect public health and safety and to maintain the security of Canadian society (s. 3(1)(*h*)), and to promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks (s. 3(1)(*i*)). The other nine objectives relate to other factors that properly inform the interpretation of the term "national interest" (e.g. "to permit Canada to pursue the maximum social, cultural and economic benefits of immigration" (s. 3(1)(*a*))). The explicit presence of these other objectives in the *IRPA* strongly suggests that this term is not limited to public safety and national security, but that the Parliament of Canada also intended that it be interpreted in the context of the values of a democratic state. Section 34 is intended to protect Canada, but from the perspective that Canada is a democratic nation committed to protecting the fundamental values of its *Charter* and of its history as a parliamentary democracy.

79 Accordingly, the Minister's broad implied interpretation of the term "national interest" is also consistent with the purpose of the provision.

(4) Context of the Provision

80 As the Court noted in *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 (S.C.C.), "[t]he preferred approach [to statutory interpretation] recognizes the important role that context must inevitably play when a court construes the written words of a statute" (para. 27). The context of s. 34(2) provides much guidance for the interpretation of the term "national interest".

81 First, according to the presumption of consistent expression, when different terms are used in a single piece of legislation, they must be understood to have different meanings. If Parliament has chosen to use different terms, it must have done so intentionally in order to indicate different meanings. The term "national interest" is used in s. 34(2), which suggests that what is to be considered by the Minister under that provision is broader than the considerations of whether the individual is "a danger to the security of Canada" (s. 34(1)(*d*)) or whether he or she "might endanger the lives or safety of persons in Canada" (s. 34(1)(*e*)), both of which appear in s. 34(1). If Parliament had intended national security and public safety to be the only considerations under s. 34(2), it could have said so using the type of language found in s. 34(1). It did not do so, however.

82 In a similar vein, the terms "national security", "danger to the public" and "endanger the safety of any person" each appear several times elsewhere in the *IRPA*. In light of the presumption of consistent expression, "national interest" cannot be synonymous with any of these terms. Rather, the use of the term "national interest" implies that the Minister is to carry out a broader analysis under s. 34(2). Contrary to what the Federal Court of Appeal held in the case at bar, in determining whether a person's continued presence in Canada would not be detrimental to the national interest, the Minister must consider more than just national security and whether the applicant is a danger to the public or to the safety of any person.

83 Second, if s. 34(2) were concerned solely with the danger an applicant poses to the security of Canada, it would be impossible for a person found to be inadmissible under s. 34(1)(*d*) ("being a danger to the security of Canada") to obtain relief under s. 34(2). This is an absurd interpretation which must be avoided.

84 Third, the respondent argues that, because of the possibility of H&C relief under s. 25 of the *IRPA*, the principle of consistent expression dictates that H&C factors should not be relevant to a determination of what is in the national interest under s. 34(2). I agree, but with some qualifications. H&C considerations are more properly considered in the context of a s. 25 application, and s. 34 should not be transformed into an alternative form of humanitarian review. But s. 34 does not necessarily exclude the consideration of personal factors that might be relevant to this particular form of review. For example, such considerations may have an impact on the assessment of the applicant's personal characteristics for the purpose of determining whether he or she can be viewed as a threat to the security of Canada. Of the considerations in the Guidelines unrelated to national security and public safety which formed part of the Minister's implied interpretation, only very few are H&C factors. The fact that the Minister considered such factors did not render his interpretation of the term "national interest" unreasonable.

85 Finally, the broader context of s. 34(2) of the *IRPA* also includes the Guidelines. Although not law in the strict sense, and although they are liable to evolve over time as the context changes, thus giving rise to new requirements adapted to different contexts, guidelines are "a useful indicator of what constitutes a reasonable interpretation of the ... section" (*Baker*, at para. 72). The Guidelines were published in 2005, and they applied to applications for ministerial relief under s. 34(2) at the time the Minister reached his decision on the appellant's application. As is evident from the numerous considerations contained in Appendix 1, the Guidelines represent a broad approach to the concept of the "national interest". They do not simply equate the "national interest" with national security and public safety, as the Federal Court of Appeal did. Rather, they suggest that the national interest analysis is broader than that, although its focus may properly be on national security and public safety.

86 Thus, the Minister's implied interpretation of the term "national interest" — that it relates predominantly to national security and public safety, but does not exclude the other important considerations outlined in the Guidelines or any analogous considerations — is consistent with all these contextual indications of the meaning of this term.

87 In summary, an analysis based on the principles of statutory interpretation reveals that a broad range of factors may be relevant to the determination of what is in the "national interest", for the purposes of s. 34(2). Even excluding H&C considerations, which are more appropriately considered in the context of a s. 25 application, although the factors the Minister may validly consider are certainly not limitless, there are many of them. Perhaps the best illustration of the wide variety of factors which may validly be considered under s. 34(2) can be seen in the ones set out in the Guidelines (with the exception of the H&C considerations included in the Guidelines). Ultimately, which factors are relevant to the analysis in any given case will depend on the particulars of the application before the Minister (*Soe*, at para. 27; *Tameh*, at para. 43).

88 This interpretation is compatible with the interpretation of the term "national interest" the Minister might have given in support of his decision on the appellant's application for relief. It is consistent with that decision. The Minister's implied interpretation of the term related predominantly to national security and public safety, but did not exclude the

other important considerations outlined in the Guidelines or any analogous considerations. In light of my discussion of the principles of statutory interpretation, this interpretation was eminently reasonable.

F. Is the Minister's Decision Valid?

89 Having concluded that the Minister's implied interpretation of the term "national interest" is reasonable, I should also confirm that the decision as a whole is valid. The Minister's reasons were justifiable, transparent and intelligible. Although brief, they made clear the process he had followed in ruling on the appellant's application. He reviewed and considered all the material and evidence before him. Having done so, he placed particular emphasis on: the appellant's contradictory and inconsistent accounts of his involvement with the LNSF, a group that has engaged in terrorism; the fact that the appellant was most likely aware of the LNSF's previous activity; and the fact that the appellant had had sustained contact with the LNSF. The Minister's reasons revealed that, on the basis of his review of the evidence and other submissions as a whole, and of these factors in particular, he was not satisfied that the appellant's continued presence in Canada would not be detrimental to the national interest. In short, his reasons allow this Court to clearly understand why he made the decision he did.

90 Furthermore, the Minister's decision falls within a range of possible acceptable outcomes which are defensible in light of the facts and the law. The burden was on the appellant to show that his continued presence in Canada would not be detrimental to the national interest. The Minister declined to provide discretionary relief to the appellant, as he was not satisfied that this burden had been discharged. His conclusion was acceptable in light of the facts which had been submitted to him.

91 As this Court held in *Suresh*, a court reviewing the reasonableness of a minister's exercise of discretion is not entitled to engage in a new weighing process (para. 37; see also *United States v. Lake*, 2008 SCC 23, [2008] 1 S.C.R. 761 (S.C.C.), at para. 39). As the Minister stated in his reasons, he had "reviewed and considered" (i.e. weighed) all the factors set out in the appellant's application which were relevant to determining what was in the "national interest" in light of his reasonable interpretation of that term. He gave particular weight to certain factors pertaining to national security and public safety and emphasized them in his reasons, namely: the appellant's contradictory and inconsistent accounts of his involvement with the LNSF; the fact that the appellant was most likely aware of the LNSF's previous activity; and the fact that the appellant had had sustained contact with the LNSF. Given that the Minister considered and weighed all the relevant factors as he saw fit, it is not open to the Court to set the decision aside on the basis that it is unreasonable.

92 In all the circumstances, it cannot be said that either the result or the Minister's decision as a whole was unreasonable. But a final issue remains: it relates to an allegation of a failure to meet the requirements of procedural fairness.

G. Was the Decision Unfair, and Did it Fail to Meet the Appellant's Legitimate Expectations?

93 As this Court noted in *Dunsmuir*, at para. 79, "[p]rocedural fairness is a cornerstone of modern Canadian administrative law. Public decision makers are required to act fairly in coming to decisions that affect the rights, privileges or interests of an individual." The Court's comment that "[p]rocedural fairness has many faces" (*Dunsmuir*, at para. 77) is also relevant to this case.

94 The particular face of procedural fairness at issue in this appeal is the doctrine of legitimate expectations. This doctrine was given a strong foundation in Canadian administrative law in *Baker*, in which it was held to be a factor to be applied in determining what is required by the common law duty of fairness. If a public authority has made representations about the procedure it will follow in making a particular decision, or if it has consistently adhered to certain procedural practices in the past in making such a decision, the scope of the duty of procedural fairness owed to the affected person will be broader than it otherwise would have been. Likewise, if representations with respect to a substantive result have been made to an individual, the duty owed to him by the public authority in terms of the procedures it must follow before making a contrary decision will be more onerous.

95 The specific conditions which must be satisfied in order for the doctrine of legitimate expectations to apply are summarized succinctly in a leading authority entitled *Judicial Review of Administrative Action in Canada*:

> The distinguishing characteristic of a legitimate expectation is that it arises from some conduct of the decision-maker, or some other relevant actor. Thus, a legitimate expectation may result from an official practice or assurance that certain procedures will be followed as part of the decision-making process, or that a positive decision can be anticipated. As well, the existence of administrative rules of procedure, or a procedure on which the agency had voluntarily embarked in a particular instance, may give rise to a legitimate expectation that such procedures will be followed. Of course, the practice or conduct said to give rise to the reasonable expectation must be clear, unambiguous and unqualified.
>
> [Emphasis added.]
>
> (D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at §7:1710; see also *Centre hospitalier Mont-Sinaï c. Québec (Ministre de la Santé & des Services sociaux)*, 2001 SCC 41, [2001] 2 S.C.R. 281 (S.C.C.), at para. 29; *Mavi v. Canada (Attorney General)*, 2011 SCC 30, [2011] 2 S.C.R. 504 (S.C.C.), at para. 68.)

96 In *Mavi*, Binnie J. recently explained what is meant by "clear, unambiguous and unqualified" representations by drawing an analogy with the law of contract (at para. 69):

> Generally speaking, government representations will be considered sufficiently precise for purposes of the doctrine of legitimate expectations if, had they been made in the context of a private law contract, they would be sufficiently certain to be capable of enforcement.

97 An important limit on the doctrine of legitimate expectations is that it cannot give rise to substantive rights (*Baker*, at para. 26; *Reference re Canada Assistance Plan (Canada)*, [1991] 2 S.C.R. 525 (S.C.C.), at p. 557). In other words, "[w]here the conditions for its application are satisfied, the Court may [only] grant appropriate *procedural* remedies to respond to the 'legitimate' expectation" (*C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539 (S.C.C.), at para. 131 (emphasis added)).

98 In the case at bar, the Guidelines created a clear, unambiguous and unqualified procedural framework for the handling of relief applications, and thus a legitimate expectation that that framework would be followed. The Guidelines were published by CIC, and, although CIC is not the Minister's department, it is clear that they are "used by employees of [both] CIC and the CBSA for guidance in the exercise of their functions and in applying the legislation" (R.F., at para. 108). The Guidelines are and were publicly available, and, as Appendix 2 to these reasons illustrates, they constitute a relatively comprehensive procedural code for dealing with applications for ministerial relief. Thus, the appellant could reasonably expect that his application would be dealt with in accordance with the process set out in them. In brief, this process is as follows:

> 1. Following the receipt of an application for relief, the CIC officer provides the applicant with a copy of the "National Interest Information Sheet". The applicant is given 15 days to send his or her submission to the local CIC office.
>
> 2. Upon receipt of the applicant's submission, the CIC officer prepares a report which discusses the current situation regarding the applicant's ground for inadmissibility, the details of the applicant's application for relief, and any personal or exceptional circumstances of the applicant that should be considered.
>
> 3. The CIC report is forwarded to the National Security Division, Intelligence Directorate, CBSA, along with the applicant's submission and all supporting documents. The CBSA may conduct further investigations at this stage.
>
> 4. The CBSA analyst prepares a recommendation to the Minister, which includes all supporting documentation.

5. A copy of the recommendation to the Minister is disclosed to the applicant, who may then make additional submissions or provide additional documents in response.

6. The applicant's original submission and its supporting documentation, the CIC officer's report, the CBSA's recommendation, and any additional submissions or documents received from the applicant in response to that recommendation are all forwarded to the Minister.

7. The Minister renders a decision on the application. The decision is entirely within the Minister's discretion.

8. If the decision is negative, CIC issues a refusal letter to the applicant.

99 The appellant has not shown that his application was not dealt with in accordance with this process outlined in the Guidelines. In May 2002, he was advised of the ministerial relief process by way of a letter akin to the National Interest Information Sheet. He responded to this letter by making submissions through his counsel, and CIC then prepared its report. The CBSA prepared a briefing note for the Minister, which contained its recommendation, and this note was disclosed to the appellant. The appellant declined to make additional submissions or provide additional documents in response to the recommendation. The appellant's submission and its supporting documentation, the CIC officer's report, and the CBSA's recommendation were all forwarded to the Minister, and the Minister rendered a decision on the application. As counsel for the appellant rightly acknowledges, "[i]n the Appellant's case, the Ministerial relief process followed the process set out in the IP 10 guidelines" (A.F., at para. 53). His legitimate expectation in this regard was therefore fulfilled.

100 The appellant raises a further argument to the effect that he had a legitimate expectation that the Minister would consider certain factors in determining his relief application. The source of this alleged expectation is twofold. First, the appellant argues that the Guidelines created an expectation that the pertinent factors set out in Appendix 1 to these reasons would be considered. Second, he alleges that he had a legitimate expectation that H&C factors would be considered in determining his application as a result of a letter CIC had sent him on May 22, 2002. That letter read, in part, as follows:

The Minister will consider whether granting you permanent residence to Canada would be contrary to the National Interest to Canada. This will require an assessment of the detriment that you pose to the National Interest of Canada, as well as any humanitarian and compassionate circumstances pertinent to your situation.

[Emphasis added.]

(A.R., vol. III, at p. 287)

101 Even were I to assume that the Guidelines and the letter unambiguously promised the appellant that certain factors would be considered in assessing his application for relief and that, at law, someone in his position might in fact have a legitimate expectation that certain factors would be considered in making a discretionary decision, his argument would nevertheless fail. As I mentioned above, the Minister's implied interpretation of the term "national interest" encompasses all the factors referred to in the Guidelines. Also as I mentioned above, and as the appellant acknowledges, these factors include H&C factors (A.F., at para. 122). In a manner consistent with this interpretation of the term "national interest", the Minister "reviewed and considered the material and evidence submitted in its entirety". Therefore, if the appellant had a legitimate expectation that the Minister would consider certain factors, including H&C factors, in determining his application for relief, this expectation was fulfilled.

102 In my opinion, there was no failure to meet the appellant's legitimate expectations or to discharge the duty of procedural fairness owed to him. The Minister's decision cannot therefore be set aside on this basis.

V. Conclusion

103 As a result, I would dismiss the appeal and allow the Minister's decision under s. 34(2) of the *IRPA* to stand. In the circumstances, and taking particular account of the Minister's inordinate delay in rendering a decision that was of the utmost importance to Mr. Agraira, I would make no order as to costs.

Appeal dismissed.

Pourvoi rejeté.

Appendix 1

Relevant Portions of the Guidelines re: "National Interest"

9.2. Processing the request

. . . . .

Upon receipt of the applicant's submission, the officer should prepare a report, which consists of the following:

- the applicant's current situation regarding the ground of inadmissibility (refer to Appendix D for an outline of the questions and considerations that must be addressed in preparing this information);
- the details of the application and any personal or exceptional circumstances to be taken into consideration; this would include:
  - details of immigration application;
  - basis for refugee protection, if applicable;
  - other grounds of inadmissibility, if applicable;
  - activities while in Canada;
  - details of family in Canada or abroad;
  - any Canadian interest.

. . . . .

Appendix B National interest information sheet

. . . . .

You may be exempted from this ground of inadmissibility if the Minister decides that your presence in Canada would not be detrimental to Canada's national interest. The consideration of national interest involves the assessment and balancing of all factors pertaining to your admission to Canada against the stated objectives in Canada's *Immigration and Refugee Protection Act*, as well as Canada's domestic and international interests and obligations.

If you wish to be considered for this exemption, you must prepare a submission along with any supporting documentation that you deem relevant. To assist you in preparing your submission, it is suggested that you address the following:

- Why are you seeking admission to Canada?
- Are there any special circumstances surrounding your application?
- Provide evidence that you do not constitute a danger to the public.

• Explain current activities you are involved in (employment, education, family situation, involvement in the community, etc.).

If the ground of inadmissibility involves membership in a regime or organization, explain the purpose of the organization, your role in the organization and activities in which you were involved. You must provide extensive detail and be very thorough in explaining this, including dates, locations and impact of these activities. When and for how long were you a member? Did these activities involve violence? If you are claiming to no longer be a member of this regime or organization, you must provide evidence. Explain when and why you disassociated yourself from the regime/organization and whether you are still involved with persons who are members of the regime/organization.

Lastly, explain your current attitude towards this regime/organization, its goals and objectives and how you feel about the means it has chosen to achieve its objectives.

Your submission need not be restricted to the above. You may provide any information and documents that you think may strengthen your request for an exemption....

Appendix D Preparing the request for relief report

A request to the Minister should consist of three parts:

1. The client's submission and all supporting documentation;

2. A report prepared by the officer addressing the applicant's current situation with respect to the ground of inadmissibility and any exceptional circumstances to be taken into account. This includes:

• details of the immigration application;

• basis for refugee protection, if applicable;

• other grounds of inadmissibility, if applicable;

• activities while in Canada;

• details of family in Canada or abroad;

• any Canadian interest;

• any personal or exceptional circumstances to be considered.

3. A recommendation to the Minister prepared by the CBSA, NHQ. In order to assess the current situation regarding the ground of inadmissibility, evidence must be produced to address the questions stated in the following table:

Question	**Details**
Will the applicant's presence in Canada be offensive to the Canadian public?	• Is there satisfactory evidence that the person does not represent a danger to the public? • Was the activity an isolated event? If not, over what period of time did it occur? • When did the activity occur? • Was violence involved? • Was the person personally involved or complicit in the activities of the regime/organization?

	• Is the regime/organization internationally recognized as one that uses violence to achieve its goals? If so, what is the degree of violence shown by the organization? • What was the length of time that the applicant was a member of the regime/organization? • Is the organization still involved in criminal or violent activities? • What was the role or position of the person within the regime/ organization? • Did the person benefit from their membership or from the activities of the organization? • Is there evidence to indicate that the person was not aware of the atrocities/criminal/terrorist activities committed by the regime/ organization?
Have all ties with the regime/organization been completely severed?	• Has the applicant been credible, forthright, and candid concerning the activities/membership that have barred admission or has the applicant tried to minimize their role? • What evidence exists to demonstrate that ties have been severed? • What are the details concerning disassociation from the regime/ organization? Did the applicant disassociate from the regime/ organization at the first opportunity? Why? • Is the applicant currently associated with any individuals still involved in the regime/organization? • Does the applicant's lifestyle demonstrate stability or is there a pattern of activity likely associated with a criminal lifestyle?
Is there any indication that the applicant might be benefiting from assets obtained while a member of the organization?	• Is the applicant's lifestyle consistent with Personal Net Worth (PNW) and current employment? • If not, provide evidence to establish that the applicant's PNW did not come from criminal activities.
Is there any indication that the applicant may be benefiting from previous membership in the regime/ organization?	• Does the applicant's lifestyle demonstrate any possible benefits from former membership in the regime/organization? • Does the applicant's status in the community demonstrate any special treatment due to former membership in the regime/ organization?
Has the person adopted the democratic values of Canadian society?	• What is the applicant's current attitude towards the regime/ organization, their membership, and their activities on behalf of the regime/organization? • Does the applicant show any remorse for their membership or activities? • Does the applicant still share the values and lifestyle known to be associated with the organization? • What is the applicant's current attitude towards violence to achieve political change? • What is the applicant's attitude towards the rule of law and democratic institutions, as they are understood in Canada?

Appendix 2

Relevant Portions of the Guidelines re: Legitimate Expectations

1. What this chapter is about

In addition to the general procedures for processing applications for permanent residence in Canada this chapter outlines procedures to be applied in cases involving possible inadmissibility on grounds of national security. It describes the process to be followed when an applicant requests relief under the national interest provisions. These guidelines are issued to ensure consistency in the application of procedural fairness requirements.

7.2. Specific requirements

The procedural fairness requirements when assessing inadmissibility and processing requests for ministerial relief are as follows:

- The decision-maker must make the decision on complete information. All documents provided by the applicant must be considered by the decision-maker. It is not acceptable that the contents of such documentation be summarized for the decision-maker without attaching the primary documentation.

- The applicant is entitled to be provided with all the relevant information that will be considered by the decision-maker to challenge the information and to present evidence and submissions. This entitlement is limited where disclosure of the information would be injurious to national security or to the safety of any person.

- The applicant is entitled to be made aware of concerns raised by the officer and to respond to those concerns.

9. Procedure - Requests for relief

At the interview with CIC, the applicant may request information about the national interest provision or apply for ministerial relief. The officer should be guided by the following principles and guidelines.

9.1. Principles

The national interest provisions are intended to be exceptional. A6(3) precludes any delegation from the Minister. The following principles apply:

- The decision to grant relief is entirely within the discretion of the Minister. The role of the officer is primarily to ensure that accurate and complete information is placed before the Minister so that the Minister can make an informed decision.

- The officer should not encourage or discourage the applicant from applying for relief, nor should the officer provide an opinion regarding the merits of the application.

The request for relief under the national interest provisions must be initiated by the applicant. The request for relief is usually made after the applicant has been informed that they may be inadmissible to Canada on grounds of national security. Officers are not required to notify or advise the applicant of the possibility of requesting ministerial relief....

9.2. Processing the request

. . . . .

Following the receipt of an application for relief, the officer should provide the applicant with a copy of the *National Interest Information Sheet* (Appendix B). The applicant should normally be given 15 days (excluding mailing time) to send their submission to the local CIC office.

Upon receipt of the applicant's submission, the officer should prepare a report, which consists of the following:

- the applicant's current situation regarding the ground of inadmissibility (refer to Appendix D for an outline of the questions and considerations that must be addressed in preparing this information);

- the details of the application and any personal or exceptional circumstances to be taken into consideration; this would include:

    - details of immigration application;

- basis for refugee protection, if applicable;
- other grounds of inadmissibility, if applicable;
- activities while in Canada;
- details of family in Canada or abroad;
- any Canadian interest.

This report should be signed by the officer and forwarded to the National Security Division, Intelligence Directorate, CBSA, with the applicant's submission and all supporting documents. A recommendation should not be provided at this stage as the CBSA NHQ may conduct further investigations and acquire additional information before the matter is put before the Minister. For this reason, the recommendation to the Minister will be made by the National Security Division, Intelligence Directorate, CBSA at that time.

9.3. Disclosure to client

The CBSA NHQ analyst will conduct any further inquiries that may be necessary and then prepare a recommendation to the Minister. The recommendation will include all supporting documentation. At this juncture, a copy of the recommendation to the Minister and all the supporting documentation (except classified information) will be returned to the CIC for disclosure to the client.

The CIC will deliver these documents by courier with a covering letter as provided in Appendix E. The person must sign the acknowledgment of receipt.

9.4. After disclosure

The CIC should return the following documents to the National Security Division, Intelligence Directorate, CBSA:

- a copy of the letter sent to the client;
- any additional submissions or documents received from the client.

9.5. After issuance of Minister's decision

A faxed copy of the Minister's decision will be forwarded to the CIC. Where the decision is positive, the client should be informed that they are not inadmissible on grounds of national security and processing of the application for permanent residence should continue.

Where the decision is negative, the client should be issued a refusal letter and action taken pursuant to section 8.8 above. The refusal letter (see Appendix F) should indicate that the application for permanent residence is refused as the applicant was determined to be inadmissible and the Minister did not grant relief.

Appendix B National interest information sheet

You have asked to be considered by the Minister of Public Safety and Emergency Preparedness for relief under paragraph _____ of Canada's *Immigration and Refugee Protection Act* which reads as follows: *(Insert appropriate paragraph)*

You may be exempted from this ground of inadmissibility if the Minister decides that your presence in Canada would not be detrimental to Canada's national interest. The consideration of national interest involves the assessment and

balancing of all factors pertaining to your admission to Canada against the stated objectives in Canada's *Immigration and Refugee Protection Act*, as well as Canada's domestic and international interests and obligations.

If you wish to be considered for this exemption, you must prepare a submission along with any supporting documentation that you deem relevant. To assist you in preparing your submission, it is suggested that you address the following:

- Why are you seeking admission to Canada?
- Are there any special circumstances surrounding your application?
- Provide evidence that you do not constitute a danger to the public.
- Explain current activities you are involved in (employment, education, family situation, involvement in the community, etc.).

If the ground of inadmissibility involves membership in a regime or organization, explain the purpose of the organization, your role in the organization and activities in which you were involved. You must provide extensive detail and be very thorough in explaining this, including dates, locations and impact of these activities. When and for how long were you a member? Did these activities involve violence? If you are claiming to no longer be a member of this regime or organization, you must provide evidence. Explain when and why you disassociated yourself from the regime/organization and whether you are still involved with persons who are members of the regime/organization.

Lastly, explain your current attitude towards this regime/organization, its goals and objectives and how you feel about the means it has chosen to achieve its objectives.

Your submission need not be restricted to the above. You may provide any information and documents that you think may strengthen your request for an exemption. Your submission, in English or French, should be provided to the local immigration office within 15 days. If we do not receive your submissions, your request for relief may be considered abandoned.

An officer will review your request, seek any required clarification and forward it to our National Headquarters with a report. National Headquarters will review the matter and make a recommendation to the Minister. You will be provided an opportunity to review the recommendation for any errors or omissions prior to it being referred to the Minister.

Appendix D Preparing the request for relief report

A request to the Minister should consist of three parts:

1. The client's submission and all supporting documentation;

2. A report prepared by the officer addressing the applicant's current situation with respect to the ground of inadmissibility and any exceptional circumstances to be taken into account. This includes:

- details of the immigration application;
- basis for refugee protection, if applicable;
- other grounds of inadmissibility, if applicable;
- activities while in Canada;
- details of family in Canada or abroad;

- any Canadian interest;
- any personal or exceptional circumstances to be considered.

3. A recommendation to the Minister prepared by the CBSA, NHQ....

Appendix E Final disclosure letter

(Insert letterhead)

Our ref:

(Insert address)

Dear:

This is further your request to seek relief under the national interest provisions of Canada's immigration legislation.

You will find attached a copy of releasable information* on this matter that will be presented to the Minister. This consists of:

- a report with relevant documents from the immigration office handling your file;
- a recommendation from the President, Canada Border Services Agency, to the Minister of Public Safety and Emergency Preparedness;
- *(other documents as applicable)*.

Your original submission and supporting documentation, which are not attached to this letter, will also be presented to the Minister. The Canada Border Services Agency is prepared to present this matter to the Minister for a decision. However, before doing so, we invite you to review these documents and provide us with any further comments you deem necessary. These comments will be included for consideration by the Minister.

We would request that your comments be provided to this office within 15 days. Should we not receive any comments from you by that time, we will proceed to put the matter before the Minister.

Sincerely,

- Confidential information cannot be disclosed if the disclosure would be injurious to national security or to the safety of any person.

Appendix F Refusal letter (Application for permanent residence refused based on A34, A35 or A37; request for ministerial relief denied)

(Insert letterhead)

Our ref:

(Insert address)

Dear:

This refers to your application for permanent residence. A letter dated (*insert date*) was sent to you inviting you to respond to concerns about your admissibility. The information you provided (*in your letter of* _____ *or at the interview on* _____) has been carefully reviewed together with all other information in your application.

It appears that you are a person described in section (*34, 35 or 37*) of the *Immigration and Refugee Protection Act*. I have come to the conclusion that you are inadmissible to Canada based on (*provide details concerning individual circumstances as they relate to the finding of inadmissibility. Exact content may be developed in consultation with NHQ*).

When client has requested ministerial relief and the Minister has not granted relief, officers should insert the following paragraph:

Furthermore, you have not satisfied the Minister of Public Safety and Emergency Preparedness that your presence in Canada would not be detrimental to the national interest. As a result, your application for permanent residence is refused.

Sincerely,