COMPETITION TRIBUNAL
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THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34;

AND IN THE MATTER OF certain conduct of Google Canada Corporation and Google LLC relating to the supply of online advertising technology services in Canada;

AND IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 79 of the *Competition Act*.

B E T W E E N:

COMMISSIONER OF COMPETITION

Applicant

and

GOOGLE CANADA CORPORATION AND GOOGLE LLC

Respondents

BOOK OF AUTHORITIES OF GOOGLE CANADA CORPORATION AND GOOGLE LLC
VOLUME 20 OF 20

August 22, 2025

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SINGH v. MINISTER OF EMPLOYMENT & IMMIGRATION

Dickson C.J.C., Ritchie, * Beetz, Estey, McIntyre, Lamer and Wilson JJ.

Heard: April 30, 1984; May 1, 1984
Judgment: April 4, 1985
Docket: Nos. 18209, 17997, 17952, 17898, 18207, 18235, 17904

Counsel: *Ian Scott, Q.C.*, for appellants.
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E.A. Bowie, Q.C., and *Roslyn Levine*, for respondent.
Mendel Green, Q.C., *Barbara Jackman*, and *Donald Chiasson*, for intervenants.

Subject: Public; Constitutional; Immigration; Human Rights
Headnote
Immigration and citizenship --- Constitutional issues — Charter of Rights and Freedoms — Visitors and immigrants — Convention refugees
Procedure under Act depriving aliens applying for Convention refugee status of right to life, liberty and security of person guaranteed by s. 7 of Charter — Failure of system of adjudication to accord with principles of fundamental justice not being demonstrably justified in free and democratic society — Administrative convenience not overriding need to adhere to principles of fundamental justice and procedural fairness — Cost of compliance not shown to be so prohibitive as to constitute justification within meaning of s. 1 of Charter Constitution Act, 1982, s 1; Constitution Act, 1982, s 7.
Immigration and citizenship --- Refugee protection — Appeal or redetermination of claim — Procedure
Right to oral hearing before Immigration Appeal Board for redetermination of claim to Convention refugee status — Charter protection extending to refugees and claimants to refugee status whether in Canada or merely seeking entry — Three Judges basing right on s. 2(e) of Bill of Rights, three Judges basing right on s. 7 of Charter — Canadian Charter of Rights and Freedoms, s. 7 Constitution Act, 1982, s 7.

Constitutional law --- Charter of Rights and Freedoms — Nature of rights and freedoms — Life, liberty and security — Miscellaneous

Procedure under Act depriving aliens applying for Convention refugee status of right to life, liberty and security of person guaranteed by s. 7 of Charter — Failure of system of adjudication to accord with principles of fundamental justice not being demonstrably justified in free and democratic society — Administrative convenience not overriding need to adhere to principles of fundamental justice and procedural fairness — Cost of compliance not shown to be so prohibitive as to constitute justification within meaning of s. 1 of Charter Constitution Act, 1982, s 1; Constitution Act, 1982, s 7.

S and a number of others applied under s. 28 of the Federal Court Act for a review and setting aside of decisions by the Immigration Appeal Board that their claims for Convention refugee status would not be allowed to proceed to a full hearing by the board. This decision was taken without an oral hearing.

Under the Immigration Act, a person subject to an Immigration Act inquiry and claiming to be a Convention refugee could apply to the Minister to be designated as such. If the Minister acting on the advice of the Refugee Status Advisory Committee rejected the application, the applicant could seek a redetermination by the Immigration Appeal Board under ss. 70 and 71 of the Act. The board was obliged to allow the matter to go to a hearing if satisfied on the basis of the materials submitted that there were "reasonable grounds to believe that a claim would, upon a hearing of the application be established".

The Act created certain rights in Convention refugees including, most importantly, the right (subject to limited exceptions) to remain in Canada if a Minister's permit was obtained.

S and all the other applicants were unsuccessful before the Federal Court of Appeal and leave was granted to appeal to the Supreme Court of Canada. Before the Supreme Court of Canada, the principal argument on behalf of S and the others was that the procedures for the denial of a redetermination hearing by Immigration Appeal Board were contrary to s. 7 of the Canadian Charter of Rights and Freedoms. However, on direction from the Court, the parties also made submissions on the applicability of s. 2(e) of the Canadian Bill of Rights.

Held:

Appeals allowed; application granted. Application for redetermination of refugee claims remitted to the Immigration Appeal Board for a hearing on the merits in accordance with the principles of fundamental justice. Declaration made that, in its present form, s. 71(1) of the Immigration Act had no application to S and the others.

Beetz J. (Estey and McIntyre JJ. concurring)

1. By virtue of s. 26 of the Canadian Charter of Rights and Freedoms, the provisions of the Canadian Bill of Rights remained applicable after the coming into force of the Charter.

2. Section 2(e) of the Canadian Bill of Rights established an independent right, not qualified by the list of rights and freedoms in s. 1 to a fair hearing in accordance with the principles of fundamental justice whenever a person's rights and obligations were being determined.

3. Given the rights conferred on Convention refugees by the Immigration Act, the adjudication of refugee claims involved the determination of a claimant's rights, not simply a claim to a privilege, and was, therefore subject to s. 2(e).

4. The denial of S's claim to refugee status without affording him an oral hearing was contrary to the principles of fundamental justice enshrined in s. 2(e). While oral hearings were not necessary in every situation covered by s. 2(e), the nature of the interest involved in a Convention refugee claim was such as to make an oral hearing necessary. By definition, a Convention refugee was someone whose life or liberty was being threatened by a foreign power. Such cases also potentially involved findings of fact and credibility.

5. In an attack on the Immigration Appeal Board's decision, the Court could have no concern with the earlier proceedings before the Minister or with the Refugee Status Advisory Committee nor could it rewrite the legislation by directing a full oral hearing before the Refugee Status Advisory Committee. In the circumstances, the appropriate step was to allow the appeals and quash the board's initial determinations and to declare inoperative as far as S and the others were concerned the provisions of s. 71(1) with respect to the board's preliminary determination of whether a claim should proceed to a hearing. (Quaere whether in other cases the provision of an oral hearing with the burden on the claimant to persuade the Immigration Appeal Board to proceed to a redetermination hearing would be a breach of the Canadian Bill of Rights.) An order was also made directing the board to restrict itself to the material listed in s. 70(2) of the Act and not to rely on information acquired through its experience with such cases.

6. Given the absence of a declaration in the Immigration Act, 1976 that it applied notwithstanding the Canadian Bill of Rights and s. 5(2) of S.C. 1960, c. 44, providing that the Bill of Rights applied to "laws of Canada" enacted both before and after the passage of the Bill of Rights, the Court had authority to declare s. 71(1) inoperative.

Wilson J. (Dickson C.J.C. and Lamer J. concurring)

1. The Convention refugee determination procedures laid down in the Immigration Act clearly excluded the possibility of a full oral or adversarial hearing before the Minister or the Refugee Status Advisory Committee or before the Immigration Appeal Board on an application for a redetermination hearing. Given the explicitness of the relevant provisions, there was, therefore, little or no room for the Court in the name of procedural fairness to supplement the procedures laid down in the legislation. Given that those procedures were followed, S and the others therefore had to rely upon the protections of either the Canadian Bill of Rights or the Canadian Charter of Rights and Freedoms if they were to be successful.

2. Both the Immigration Act and its administration were subject to the Charter given that, in terms of s. 32(1) of the Charter, immigration was a matter within the legislative competence of the Parliament of Canada.

3. Section 7's protections were not restricted to citizens of Canada but potentially applied to applicants for Convention refugee status.

4. At the very least, a decision to deprive an applicant for Convention refugee status of the substantive rights established by the Immigration Act impaired that person's right to "life, liberty

and security of the person". While a return to that person's country of origin might not necessarily result in a deprivation of life or liberty, such an action, having the potential threats that it did, involved a deprivation of "security of the person" in terms of s. 7. Categorizing Convention refugee status as a privilege and taking a narrow view of rights for the purposes of the application of the Charter was an unacceptable approach. Given the potential threats to those who were Convention refugees, it was unthinkable that the protections of s. 7 would not apply to the determination of whether such a person came within that category. Moreover, it was not necessary for these purposes to base the claim of the appellants in the fact that they were within the country as opposed to being persons who were applying for admission.

5. Fundamental justice in s. 7 of the Charter involved at a minimum the notion of procedural fairness and, measured against that standard, the Immigration Act did not provide an adequate opportunity for S to state his case or to know the case he had to meet. Indeed, if s. 7 interpreted properly related to questions of death, physical liberty and physical punishment, it was difficult to conceive of such a situation where an oral hearing was not necessary. However, even conceding that s. 7 did not always require an oral hearing, where a serious issue as to credibility was involved with respect to a matter within the coverage of s. 7, an oral hearing should always be offered. Moreover, in terms of ss. 70 and 71 of the Immigration Act the statutory provisions enabled an applicant for Convention refugee status to be denied a redetermination hearing without knowledge of the information placed before the board by the Minister both as to policy and facts and without the benefit of discovery and all this in adversarial context of having to persuade the board that the Minister's initial decision was wrong. (The possibility that the Minister might claim Crown privilege with respect to some did not negate this argument.)

6. The Act's denial of an oral hearing was not a "reasonable limit" that could be "demonstrably justified in a free and democratic society". The approbation of Canada's procedures by the United Nations High Commissioner for Refugees and the additional strain on the Immigration Appeal Board of providing an oral hearing in every case were not sufficient reasons in light of the necessity for a commitment to the rights which the Charter established. In particular, utilitarian considerations or administrative convenience arguments missed the point. Even in the Government's own terms, the arguments were not compelling in that both the chairman of the Immigration Appeal Board and a Ministry Task Force had criticized the present procedures and questioned their continuation simply on the justification of cost-benefit analysis. The Minister had failed to demonstrate that the cost of such procedures was so prohibitive as to constitute a justification in terms of s. 1.

7. As a result, S and the others were entitled to a declaration that s. 71(1) was inoperative to the extent that it conflicted with s. 7 of the Charter. Furthermore, given that the Federal Court of Appeal was a "court of competent jurisdiction" in terms of s. 24(1) of the Charter this being a quasi-judicial determination, the Court was entitled to review on the basis of the Charter the denial of a redetermination hearing as well as order an oral hearing on the merits. However, as the Minister's original denial of Convention refugee status under s. 45 was an administrative decision coming within the orginal review jurisdiction of the Federal Court, Trial Division under s. 18 of the Federal

Court Act, the Supreme Court on an appeal from the Federal Court of Appeal's disposition of a s. 28 application was not a "court of competent jurisdiction" with respect to this decision.

Annotation

In 1983, the Immigration Appeal Board summarily dismissed Mr. Singh's application for redetermination of his claim to refugee status. Mr. Singh applied under s. 28 of the Federal Court Act, R.S.C. 1970, c. 10 (2nd Supp.), for a review of the board's decision. Counsel's sole argument was that under s. 7 of the Canadian Charter of Rights and Freedoms, Mr. Singh was entitled to some sort of hearing before the board before being subject to deportation. The Federal Court of Appeal dismissed the application on the basis that s. 7 of the Charter applied only to rights granted by Canadian authorities when applying Canadian laws. On appeal to the Supreme Court of Canada, the case was consolidated with six other cases which raised basically the same issues.

The case was argued in May 1984. The main argument before the Court was whether the procedure set out in the Immigration Act for the adjudication of the claims of persons claiming refugee status in Canada denied those persons rights to which they are entitled under s. 7 of the Charter. In December 1984, the Court also requested written submissions on the applicability of the Canadian Bill of Rights to the issues before it.

Although unanimous in result, the six members who participated in the judgment of the Court split equally in their reasons for coming to the conclusion that they did. Three relied on the Charter of Rights and Freedoms and three relied on the Canadian Bill of Rights. The reasoning behind this split raises some interesting indications of future directions for administrative law.

The Court was unanimous in determining that the Canadian Bill of Rights is still in full force and effect; however, Wilson J. found that as s. 7 of the Canadian Charter of Rights and Freedoms applied, she preferred to base her decision on that document. By contrast, Beetz J. declined to comment on the applicability of the Charter to the facts and relied only on the Canadian Bill of Rights which specifically applies to the situation in the case, namely the determination of status. That the Canadian Bill of Rights would still be useful in this area of the law following the enactment of the Charter was predicted by Professor P.W. Hogg when he wrote:

An adjudication authorized by federal law of a person's rights and obligations will continue to be subject to the requirements of the Bill of Rights.

[1] Professor Hogg noted further that to the extent that the Charter does not contain a general right to a fair hearing for the determination of a person's rights and obligations, the Bill of Rights remains preeminent in this regard. Beetz J.'s use of the Bill rather than the Charter in a case "almost tailor-made" for its application provides judicial approval of the reasoning of Professor Hogg.

Applying the Drybones case, [2] Beetz J. declared inoperative that part of s. 71(1) of the Immigration Act, S.C. 1976-77, c. 52, which is inconsistent with s. 2(e) of the Canadian Bill of Rights. However, he took care to limit this declaration to the particular circumstances and plaintiffs in the case before him. The general effect of inconsistency with the Bill of Rights is a declaration that the provision is inoperative, not invalid. [3] The specific effect of declaring this subsection of the Immigration Act, 1976, inoperative is to leave open the possibility that the section would have been operative had an oral hearing been held either by the Refugee Status Advisory Committee (R.S.A.C.) initially or by the Immigration Appeal Board itself. Beetz J. noted that whether the section is inoperative or not may depend on the type of hearing given to an applicant at an earlier stage. The applicants in this case had received no hearing (oral or otherwise) at any stage of the proceedings.

By contrast, in her decision on the basis of s. 7 of the Charter of Rights and Freedoms, Wilson J. noted that s. 52(1) of the Charter requires a declaration that s. 71(1) of the Immigration Act is of no force and effect to the extent it is inconsistent with s. 7. From this judgment, it would appear that the Charter remedy is wider than that provided for by the Canadian Bill of Rights.

Another issue which this case raises with respect to remedies stemmed from the applicants' express preference for redetermination by the R.S.A.C. or the Minister, rather than a redetermination at the appellate level by the Immigration Appeal Board. Neither judgment ruled definitively on this request as the scope for intervention was limited to the decision of the board by reason of the fact that this was an appeal from the denial of a challenge to the board's decision brought under s. 28 of the Federal Court Act. Even Wilson J., relying on the Charter, did not take the view that s. 24 of the Charter of Rights and Freedoms gave any wider jurisdiction on remedy. She had no hesitation in deciding that the broad remedial power which the Court possesses under s. 24(1) of the Charter did not entitle it to here extend its review to possible violations of fundamental justice in determinations made pursuant to s. 45 of the Act (i.e., decisions of the Minister on refugee status made after advice from R.S.A.C.).

In directing the Immigration Appeal Board to redetermine the case on the merits and to restrict itself to the issues it is permitted to take into account under s. 70(2) of the Act, the Supreme Court of Canada reaffirmed that the Immigration Appeal Board, as a quasi-judicial body, cannot rely on outside knowledge or expertise in the same way that R.S.A.C. or the Minister may do. In all probability, applicants would prefer a redetermination at the earlier level where the determinative bodies are not restricted to a quasi-judicial hearing on the record but could take into account information obtained by reason of personal expertise or specialized knowledge. That this would be a more appropriate forum is also reinforced by the recently released report on refugees by Rabbi Plaut. [4]

Since its landmark decision in Nicholson [5] in 1978, the Supreme Court of Canada has had little opportunity to develop the procedural content of fairness. The Singh case on the claim to determination of status and the serious consequences to an individual of a failure to make that determination fairly gave the Court an ideal opportunity to make some interesting observations and expand on the content of procedural fairness in such circumstances.

First, both Beetz J. and Wilson J. held that in order to assess the adequacy of the procedure it was necessary to examine the whole scheme of the Act with respect to refugee determination. This involved the Court in examining the role of the R.S.A.C. and the Minister, even though, as seen already, the Court was limited in its remedies to dealing with the Immigration Appeal Board decision. Second, Wilson J. appeared to place the rights of the person claiming refugee status somewhat higher than Beetz J. in that in addition to noting the right to remain or not to be removed to a place where life and liberty are threatened, she added a third aspect, namely, a "right" to a determination by the Minister as to whether a permit should issue based on proper principles for exercising discretion.

Although placing the rights somewhat higher than her colleague, Wilson J. does not conclude, however, that an oral hearing is always essential when s. 7 applies. She makes it clear that procedural fairness may require different procedures in different contexts. She also accepts that written submissions may be an adequate substitute for an oral hearing in certain circumstances. However, she concludes that where a serious issue of credibility is involved, fundamental justice requires that credibility be determined on the basis of an oral hearing. Interestingly, she does not indicate that this is a case where there happens to be such serious issues of credibility. By contrast, Beetz J. found an oral hearing essential in these circumstances because life and liberty of the applicant may depend on findings of fact and credibility.

Wilson J.'s main concern is that in the entire procedural scheme of the Immigration Act there is inadequate opportunity for the refugee claimant to state his case and know the case he has to meet. She noted that although it may be acceptable for the R.S.A.C. and the Minister to take into account policy considerations and information about world affairs to which the refugee claimant would have no opportunity to respond, before the Immigration Appeal Board, which is not entitled to rely on material outside the record, such a procedure is unacceptable.

She rejects arguments that the procedure before the Immigration Appeal Board was non-adversarial, saying "it is in fact highly adversarial but the adversary, the Minister, is waiting in the wings". She notes that the task facing the refugee claimant to refute the Minister's position, "of which he knows not", is the aspect of the procedure which she believes runs counter to the concept of fundamental justice in s. 7 of the Charter.

Mr. Justice Beetz is also concerned that a quasi-judicial body such as the Immigration Appeal Board is required by the Act to give neither reasons (except when requested) nor a hearing. He suggests that at least one or the other must be required in order to demonstrate the basis of the decision and thus indicate its conformity with fundamental justice. He clearly suggests further that a lack of both is prima facie evidence of a failure to afford fundamental justice. These statements are further indications that the Court is unwilling to accept at face value a decision of an administrative agency without indications of the process by which the agency reached its conclusions.

In summary, the Singh decision demonstrates the Court's willingness not only to strike down a decision arrived at without fundamental justice, but also to articulate what fundamental justice requires in particular circumstances. The decision is an important step in establishing the parameters in which administrators must work to tailor procedures to meet the fairness standards required at common law, and under the Bill of Rights and the Charter of Rights and Freedoms.

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ss. 19(3)(k), 20, 40(1).

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Universal Declaration of Human Rights (1948), art. 25, para. 1.

United Nations Convention Relatin to the Status of Refugees HCR/INF/29Rev. 2, c. 1, Preamble, art. 1(A)(2).

Universal Declaration of Human Rights (1948), art. 25, para. 1.

Words and phrases considered:

COURT OF COMPETENT JURISDICTION

Section 24(1) of the Charter provides remedial powers to "a court of competent jurisdiction". As I understand this phrase, it premises the existence of jurisdiction from a source external to the Charter itself. This court certainly has jurisdiction to review the decisions of the Immigration Appeal Board in these cases pursuant to s. 28 of the Federal Court Act [R.S.C. 1970, c. 10 (2nd Supp.)].

EVERYONE

Section 7 of the *Charter* states that "Everyone has the right

to life, liberty and security of the person . . . " I am prepared to

accept that the term [everyone] includes every human being who is physically

present in Canada and by virtue of such presence amenable to Canadian law.

FAIR HEARING IN ACCORDANCE WITH THE PRINCIPLES OF FUNDAMENTAL JUSTICE

All counsel were agreed that at a minimum the concept of "fundamental justice" as it appears in s. 7 of the Charter includes the notion of procedural fairness articulated by Fauteux C.J. in Duke v. The Queen, [1972] S.C.R. 917 at 923 . . . He said:

Under s. 2(e) of the Bill of Rights no law of Canada shall be construed or applied so as to deprive him of "a fair hearing in accordance with the principles of fundamental justice". Without attempting to formulate any final definition of those words, I would take them to mean, generally, that the tribunal which adjudicates upon his rights must act fairly, in good faith, without bias and in a judicial temper, and must give to him the opportunity adequately to state his case.

SECURITY OF THE PERSON

It seems to me that . . . "security of the person" [in s. 7 of the *Charter*] must encompass freedom from the threat of physical punishment or suffering as well as freedom from such punishment itself.

SINGLE RIGHT THEORY

Even if we accept the "single right" theory advanced by counsel for the Minister in interpreting s. 7 [of the *Charter*], I think we must recognize that the "right" which is articulated in s. 7 has three elements: life, liberty and security of the person. As I understand the "single right" theory, it is not suggested that there must be a deprivation of all three of these elements before an individual is deprived of his "right" under s. 7. In other words, I believe that it is consistent with the "single right" theory advanced by counsel to suggest that a deprivation of the appellants' "security of the person", for example, would constitute a deprivation of their "right" under s. 7, whether or not it can also be said that they have been deprived of their lives or liberty. Rather, as I understand it, the "single right" theory is advanced in support of a narrow construction of the words "life", "liberty" and "security of the person" as different aspects of a single concept rather than as separate concepts each of which must be construed independently.

APPEALS from decisions for Federal Court of Appeal dismissing applications to review and set aside decisions of Immigration Appeal Board denying redetermination hearing under s. 71(1) of the Immigration Act (Canada).

***Beetz J.* (*Estey* and *McIntyre JJ.* concurring):**

1 The main issue which was argued when these appeals were heard on April 30 and May 1, 1984, was whether the procedures set out in the Immigration Act, S.C. 1976-77, c. 52 as amended, for the adjudication of the claims of persons claiming refugee status in Canada, deny such claimants rights they are entitled to assert under s. 7 of the Canadian Charter of Rights and Freedoms. No submissions were made at that time as to the possible application of the Canadian Bill of Rights to these appeals.

2 On December 7, 1984, the Deputy Registrar wrote to counsel to inform them that the members of the Court would like to have their submissions in writing on the application of the Canadian Bill of Rights, R.S.C. 1970, App. III. Counsel for all the parties and the intervenors complied and counsel for the appellants replied, also in writing.

3 Like my colleague, Madame Justice Wilson, whose reasons for judgment I have had the advantage of reading, I conclude that these appeals ought to be allowed. But I do so on the basis of the Canadian Bill of Rights. I refrain from expressing any views on the question whether the Canadian Charter of Rights and Freedoms is applicable at all to the circumstances of these cases and more particularly, on the important question whether the Charter affords any protection against a deprivation or the threat of a deprivation of the right to life, liberty or security of the person by foreign governments.

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

> 26. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

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

6 I refer to my colleague's account of the facts, the procedural history of the seven appeals and generally, to her quotation of the relevant provisions of the Immigration Act, 1976, and her description of the scheme of the Act.

7 The main issue, as I see it, is whether the procedures followed in these cases for the determination of Convention refugee status are in conflict with the Canadian Bill of Rights and more particularly with s. 2(e) thereof.

8 In order to understand the scheme of the Immigration Act, 1976 it is necessary to refer to all the procedures for determination of whether an individual is a Convention refugee, including initial determination under ss. 45 to 48 of the Act and redetermination by the Immigration Appeal Board, under ss. 70 and 71. It should be emphasized however that, in these appeals, we are directly concerned only with redetermination made by the Immigration Appeal Board pursuant to s. 71(1) of the Immigration Act, 1976, whereby the board ordered that the applications for redetermination of the claims be not allowed to proceed and determined that the applicants were not Convention refugees. The appellants have unsuccessfully applied to the Federal Court of Appeal pursuant to s. 28 of the Federal Court Act, R.S.C. 1970, c. 10 (2nd Supp.), to have these orders reviewed and set aside. But the advice given by the Refugee Status Advisory Committee and the initial determinations made by the Minister pursuant to s. 45 of the Act have not been attacked and are not subject to review in these appeals from the decisions of the Federal Court of Appeal. I stress this because several submissions were made to us relating to alleged procedural shortcomings at the initial determination stage and relating as well to various means to remedy those shortcomings. Such remedies, whatever their merit, would not help the present appellants who have passed the initial determination stage. And, in any event, in an appeal from a decision of the Federal Court of Appeal on a s. 28 application to review, our jurisdiction, if we allow the appeal, is limited to rendering the decision which the Federal Court of Appeal ought to have rendered.

9 As I said earlier, the relevant provision of the Canadian Bill of Rights is s. 2(e) but it will also be convenient to quote s. 1:

> 1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,
>
> (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;
>
> (b) the right of the individual to equality before the law and the protection of the law;
>
> (c) freedom of religion;
>
> (d) freedom of speech;
>
> (e) freedom of assembly and association, and
>
> (f) freedom of the press.

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

. . . . .

(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations.

10 The main submissions made by Mr. Scott, of counsel for the first six appellants, are to a substantial extent supported by Mr. Coveney, of counsel for the seventh appellant, who took a slightly different approach. They read as follows:

2. The Appellants submit that either section 45 or 71 of the Immigration Act abrogates the right guaranteed by section 2(e) of the Bill of Rights, unless one of those sections is construed as requiring a full hearing before the Refugee Status Advisory Committee (RSAC), the Minister, or the Immigration Appeal Board, which hearings have not been held in any of these 6 cases.

3. The Appellants submit that two points must be established in order to show that a breach of section 2(e) has occurred:

1. that the Appellants' 'rights and obligations' fall to be 'determined' by the RSAC, the Minister and the Immigration Appeal Board; and

2. that the Appellants were not afforded a 'fair hearing in accordance with the principles of fundamental justice' by any of these statutory authorities.

11 Mr. Scott then gives what seems to me an accurate summary of the legal rights given to Convention refugees in Canada by the Immigration Act, 1976 and Regulations:

1. the 'right to remain in Canada' if a Minister's Permit is obtained; or Immigration Act, s. 4(2).

2. if a Minister's Permit cannot be obtained, then: (a) the right not to be removed to a country where life or freedom is threatened; Immigration Act, s. 55.

(b) if removed from Canada, the right to re-enter if a safe country cannot be found; and Immigration Act, s. 14(1)(c).

(c) the right to be considered under the criteria provided in the Regulations, for 'employment authorization' while residing in Canada. Regulations, s. 19(3)(k), 20.

12 Mr. Scott then concludes on this first branch of his submission:

> 10. It is submitted that because Convention refugees enjoy these rights under Canadian law, a person who applies for refugee status under section 45 or 70 of the Act meets the first requirement for claiming the protection of 'fundamental justice' under section 2(e) of the Bill of Rights, namely, that a law of Canada provides a procedure 'for the determination of his rights'.

13 In his written submissions, Mr. Bowie, of counsel for the Attorney General of Canada, makes a concession in the following terms:

> 2. The Attorney General of Canada does not dispute that the process of determining and redetermining refugee claims involves the determination of rights and obligations of the refugee claimants. It is only in that respect that his submissions with respect to section 2(e) of the Bill of Rights differ from his submissions with respect to section 7 of the Canadian Charter of Rights and Freedoms. It was submitted upon the hearing of these appeals that a denial of a claim to refugee status by the operation of Canadian law does not deprive the claimant of 'the right to life, liberty and security of the person' guaranteed by section 7 of the Charter.

14 In his reply, Mr. Scott refers to the Attorney General's acknowledgment that the process of adjudicating refugee claims under the Immigration Act, 1976 involves the determination of "rights and obligations". Mr. Scott then concludes:

> The remaining issue, therefore, is whether the procedures provided by the Act conform to the dictates of 'fundamental justice'.

15 In view of the last sentence in the Attorney General's acknowledgment quoted above, I am not absolutely clear whether or not it was conceded by the Attorney General that the "rights" referred to in s. 2(e) of the Canadian Bill of Rights are not the same rights or rights of the same nature as those which are enumerated in s. 1, including "the right of the individual to life, liberty, security of the person ... and the right not to be deprived thereof except by due process of law".

16 Be that as it may, it seems clear to me that the ambit of s. 2(e) is broader than the list of rights enumerated in s. 1 which are designated as "human rights and fundamental freedoms" whereas in s. 2(e), what is protected by the right to a fair hearing is the determination of one's "rights and obligations", whatever they are and whenever the determination process is one which comes under the legislative authority of the Parliament of Canada. It is true that the first part of s. 2 refers to "the rights or freedoms herein recognized and declared", but s. 2(e) does protect a right which is fundamental, namely "the right to a fair hearing in accordance with the principles of fundamental justice" for the determination of one's rights and obligations, fundamental or not. It is my view that, as was submitted by Mr. Coveney, it is possible to apply s. 2(e) without making reference to s. 1 and that the right guaranteed by s. 2(e) is in no way qualified by the "due process" concept mentioned in s. 1(a).

17 Accordingly, the process of determining and redetermining appellants refugee claims involves the determination of rights and obligations for which the appellants have, under s. 2(e) of the Canadian Bill of Rights, the right to a fair hearing in accordance with the principles of fundamental justice. It follows also that this case is distinguishable from cases where a mere privilege was refused or revoked, such as *Prata v. Min. of Manpower & Immigration*, , [1976] 1 S.C.R. 376, 52 D.L.R. (3d) 383, 3 N.R. 484S.C.C., and *Mitchell v. R.*, [1976] 2 S.C.R. 570[1976] 1 W.W.R. 57724 C.C.C. (2d) 2416 D.L.R. (3d) 776, N.R. 389(S.C.C.).

18 I therefore agree with the first branch of Mr. Scott's submission.

19 What remains to be decided is whether in the cases at Bar, the appellants were afforded "a fair hearing in accordance with the principles of fundamental justice".

20 I have no doubt that they were not.

21 What the appellants are mainly justified in complaining about in my view is that their claims to refugee status have been finally denied without their having been afforded a full oral hearing at a single stage of the proceedings before any of the bodies or officials empowered to adjudicate upon their claim on the merits. They have actually been heard by the one official who has nothing to say in the matter, a senior immigration officer. But they have been heard neither by the Refugee Status Advisory Committee, who could advise the Minister, nor by the Minister, who had the power to decide and who dismissed their claim, nor by the Immigration Appeal Board which did not allow their application to proceed and which determined, finally, that they are not Convention refugees.

22 I do not wish to suggest that the principles of fundamental justice will impose an oral hearing in all cases. In A.G. Can. v. Inuit Tapirisat of Can., [1980] 2 S.C.R. 735 at 747, 115 D.L.R. (3d) 1, 33 N.R. 304 (S.C.C.), Estey J. speaking for the Court quoted Tucker L.J. in Russell v. Duke of Norfolk, [1949] 1 All E.R. 109 at 118 (C.A.):

> The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the Tribunal is acting, the subject-matter that is being dealt with, and so forth.

23 The most important factors in determining the procedural content of fundamental justice in a given case are the nature of the legal rights at issue and the severity of the consequences to the individuals concerned. In the same Inuit Tapirisat case, at the same page, Estey J. also quoted Lord Denning in Selvarajan v. Race Relations Bd., [1976] 1 All E.R. 12 at 19[1975] 1 W.L.R. 1686 (sub nom. R. v. Race Relations Bd.; Ex parte Selvarajan):

> ... 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.

24 In the cases at Bar, the seven appellants have stated under oath the reasons for which they claim to be Convention refugees. A "Convention refugee" is defined in s. 2(1) of the Immigration Act, 1976:

'Convention refugee' means any persons who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside the country of his nationality and is unable or, by reason of such fear, is unwilling to avail himself of the protection of that country, or

(b) not having a country of nationality, is outside the country of his former habitual residence and is unable or, by reason of such fear, is unwilling to return to that country

25 The Immigration Act, 1976 gives Convention refugees the right to "remain" in Canada, or, if a Minister's Permit cannot be obtained, at least the right not to be removed to a country where life and freedom is threatened, and to re-enter Canada if no safe country is willing to accept them. The rights at issue in these cases are accordingly of vital importance for those concerned.

26 The first six appellants make the following submissions:

18. In the Appellants submission the fact that the threat to life or freedom or physical security comes from a foreign state in refugee cases is irrelevant to the legal issue now before this Court under the Canadian Bill of Rights. In considering the application of section 7 of the Charter in these cases, it may be that the locus of the threat to life or liberty or security of the person is relevant, because in order to claim the protection of 'fundamental justice' under the Charter, the Appellants must establish an infringement of the right to life or liberty or security of the person as guaranteed by section 7. Presumably, only a Canadian government can breach the Charter of Rights and Freedoms, including section 7. For this reason, at the hearing before this Court, the Appellants put their Charter case on the basis that the government of Canada infringed their liberty by arresting them and detaining them until 'removal' from Canada could be effected.

19. Under section 2(e) of the Bill of Rights, however, the Appellants need not show that the Canadian government deprives them of their life, liberty or physical security. Rather, they need only show that their 'rights' fall to be 'determined' by federal law. In construing and applying the Immigration Act according to the terms of section 2(e) of the Bill of Rights therefore, threats to life or liberty by a foreign power are relevant ...

27 Again, I express no views as to the applicability of the Charter of Rights and Freedoms, but I otherwise agree with these submissions: threats to life or liberty by a foreign power are relevant, not with respect to the applicability of the Canadian Bill of Rights, but with respect to the type of hearing which is warranted in the circumstances. In my opinion, nothing will pass muster short of at least one full oral hearing before adjudication on the merits.

28 There are additional reasons why the appellants ought to have been given an oral hearing. They are mentioned in the following submission with which I agree:

> The Appellants submit that although 'fundamental justice' will not require an oral hearing in every case, where life or liberty may depend on findings of fact and credibility, and it may in these cases, the opportunity to make written submissions, even if coupled with an opportunity to reply in writing to allegations of fact and law against interest, would be insufficient.

29 Finally, I wish to quote part of the dissenting reasons written by Pigeon J. in Ernewein v. Min. of Employment & Immigration, [1980] 1 S.C.R. 639 at 657 and following 14 C.P.C. 264, 103 D.L.R. (3d) 1, 30 N.R. 316 (S.C.C.):

> It should at first be pointed out that the appellant's claim for refugee status was made under amendments to the Immigration Appeal Board Act (R.S.C. 1970, c. I-3, 'the Act') enacted by the statute of 1973, 21-22 Eliz. II, c. 27, ss. 1 and 5. (The Immigration Act, 1976 (25-26 Eliz. II, c. 52), although assented to August 5, 1977, was proclaimed in force on April 10, 1978).
>
> The first mentioned amendment added to s. 2 of the Act the following definition:
>
> 'Convention' means the United Nations Convention Relating to the Status of Refugees signed at Geneva on the twenty-eighth day of July, 1951 and includes any Protocol thereto ratified or acceded to by Canada;
>
> The other amendment replaced s. 11 by a new section, the relevant parts of which are as follows:
>
> 11. (1) Subject to subsections (2) and (3), a person against whom an order of deportation is made under the Immigration Act may appeal to the Board on any ground of appeal that involves a question of law or fact or mixed law and fact, if, at the time that the order of deportation is made against him, he is
>
> . . . . .
>
> (c) a person who claims he is a refugee protected by the Convention; or
>
> (2) Where an appeal is made to the Board pursuant to subsection (1) and the right of appeal is based on a claim described in paragraph (1)(c) or (d), the notice of appeal to the Board shall contain or be accompanied by a declaration under oath setting out

(a) the nature of the claim;

(b) a statement in reasonable detail of the facts on which the claim is based;

(c) a summary in reasonable detail of the information and evidence intended to be offered in support of the claim upon the hearing of the appeal; and

(d) such other representations as the appellant deems relevant to the claim.

(3) Notwithstanding any provision of this Act, where the Board receives a notice of appeal and the appeal is based on a claim described in paragraph (1)(c) or (d), a quorum of the Board shall forthwith consider the declaration referred to in subsection (2) and, if on the basis of such consideration the Board is of the opinion that there are reasonable grounds to believe that the claim could, upon the hearing of the appeal, be established, it shall allow the appeal to proceed, and in any other case it shall refuse to allow the appeal to proceed and shall thereupon direct that the order of deportation be executed as soon as practicable.

. . . . .

[p. 659]:

In the present case no indication was given to the appellant of the reasons for which her claim to refugee status was denied and, in my view, this raises a very serious question. The Immigration Appeal Board is not an administrative agency but a 'court of record' (s. 7, now s. 65). It must therefore be subject to the rule that it is not enough that justice be done, it must appear to be done. It is also a well established principle that audi alteram partem is a rule of natural justice so firmly adopted by the common law that it applies to all those who fulfil judicial functions and it is not excluded by inference. See: L'Alliance des Professeurs Catholiques de Montréal v. Labour Relations Board [[1953] 2 S.C.R. 140], per Rinfret C.J. at p. 154:

[Translation]

> The rule that no one should be convicted or deprived of his rights without a hearing, and especially without even being informed that his rights would be in question, is a universal rule of equity, and the silence of a statute should not be relied on as a basis for ignoring it. In my opinion, there would have to be nothing less than an express statement by the legislator for this rule to be superseded: it applies to all courts and to all bodies required to make a decision that might have the effect of destroying a right enjoyed by an individual.

In Komo Construction Inc. v. Labour Relations Board [[1968] S.C.R. 172] this Court upheld a decision rendered without a hearing when the parties had been given the opportunity of submitting argument in writing and the Board had issued reasons. This is a very different situation from that which is presented in this case where there was no hearing and no reasons

> were given. In MacDonald v. The Queen [[1977] 2 S.C.R. 665] this Court upheld a conviction by special Court Martial although no reasons had been given but there had been a hearing. I know of no case where a judicial decision was upheld, where there was neither a hearing nor reasons given, so that nothing shows on what basis the decision was reached. It may be different when the decision is on a purely discretionary matter such as the granting of leave to appeal, but here the decision of the Board is an adjudication on appellant's entitlement to refugee status, a matter of right under the statute and the Convention, not a matter of discretion. In Minister of Manpower and Immigration v. Hardayal [[1978] 1 S.C.R. 470] this Court accepted that where the statute provided for the issue of a special certificate by administrative decision this was to be taken as final and as excluding the audi alteram partem rule, but such is not the case with respect to the determination of refugee status. This was entrusted to a board which is a 'court' and must act judicially as appears from such cases as Leiba v. Minister of Manpower and Immigration [1972] S.C.R. 660].
>
> I do, of course, appreciate that the validity of the Immigration Appeal Board 'judgment' is not directly in question before this Court and that the decision challenged before us is the order of the Federal Court of Appeal denying leave to appeal. However, I feel it is essential for a proper appreciation of what is involved in the matter to consider fully the ultimate result, that Canada having entrusted to a special court the adjudication of claims to refugee status this was done in this case without any semblance of due process. The Court is faced with a decision without reasons, without a hearing, without any statement of the Minister's objections, if any, to appellant's claim for refugee status.

30 It should be pointed out that in the cases at Bar, all the appellants were provided with short reasons of the Minister and two of them were provided with more elaborate reasons of the Immigration Appeal Board. The remaining appellants did not exercise their rights to request and receive the reasons of the board pursuant to subs. 71(4) of the Immigration Act, 1976. But the opinion of Pigeon J. retains all its relevance with respect to the necessity of a hearing and it is reinforced by the Canadian Bill of Rights. As indicated earlier, this was a dissenting opinion, but it was not on this point that it differed from the reasons of the majority. It was also concurred in by two other members of the Court. Pigeon J. does not expressly mention the necessity of an oral hearing but this is what he must have meant given his distinguishing the Komo Const. case [Komo Const. Inc. v. Que. L.R.B., [1968] S.C.R. 17268 C.L.L.C. 14,1081 D.L.R. (3d) 125 (S.C.C.)] dealing with a situation in which there had been no oral hearing, and his reference to the MacDonald case [MacDonald v. R., [1977] 2 S.C.R. 665, 34 C.C.C. (2d) 1, 75 D.L.R. (3d) 107, 14 N.R. 421], a special Court Martial case where an oral hearing had been held.

31 Since the appellants have been denied their fundamental right to a hearing, the question arises as to what remedy they are entitled to in the circumstances of these cases.

32 It seems clear to me that the orders of the Immigration Appeal Board concerning them ought to be set aside and that their claims to Convention refugee status ought to be adjudicated upon on the merits after the holding of full oral hearings. The question is by whom should these claims so be adjudicated upon.

33 For various reasons, all the appellants have expressed a preference for an adjudication at the initial stage, that is at the level of the Refugee Status Advisory Committee which would then not only advise, but decide in a manner consistent with s. 2(e) of the Canadian Bill of Rights; or alternatively, at the level of the Minister who would decide the issue in a similar manner. In their written submissions, counsel argued that it was more proper as well as more convenient that the situation be remedied at the first instance level rather than at the appellate one. It was pointed out that in a press release dated May 2, 1983, the Minister of Employment and Immigration announced that oral hearings for refugee claimants would be held on an experimental basis in Montreal and Toronto by members of the Refugee Status Advisory Committee. It was observed that the text of s. 45 of the Immigration Act, 1976 in no way forbids or prevents the holding of oral hearings. Declarations that certain parts of subss. 45(4) and 45(5) of the Immigration Act, 1976 are inoperative were suggested to empower the Refugee Status Advisory Committee to adjudicate rather than to advise.

34 The points might be well taken if they were addressed to Parliament. There is probably more than one way to remedy the constitutional shortcomings of the Immigration Act, 1976. But it is not the function of this Court to re-write the Act. Nor is it within its power. If the Constitution requires it, this and other Courts can do some relatively crude surgery on deficient legislative provisions, but not plastic or re-constructive surgery. Furthermore, for the procedural and jurisdictional reasons mentioned earlier, all that is before us is a decision of the Federal Court of Appeal dismissing s. 28 applications aimed at the orders of the Immigration Appeal Board. To repeat, the advice given by the Refugee Status Advisory Committee and the initial determinations made by the Minister have not been attacked and are not subject to review in these appeals.

35 We are thus left with the Immigration Appeal Board and with ss. 70 and 71 of the Immigration Act, 1976:

> 70.(1) A person who claims to be a Convention refugee and has been informed in writing by the Minister pursuant to subsection 45(5) that he is not a Convention refugee may, within such period of time as is prescribed, make an application to the Board for a redetermination of his claim that he is a Convention refugee.
>
> (2) Where an application is made to the Board pursuant to subsection (1), the application shall be accompanied by a copy of the transcript of the examination under oath referred to in subsection 45(1) and shall contain or be accompanied by a declaration of the applicant under oath setting out

(a) the nature of the basis of the application;

(b) a statement in reasonable detail of the facts on which the application is based;

(c) a summary in reasonable detail of the information and evidence intended to be offered at the hearing; and

(d) such other representations as the applicant deems relevant to the application.

71.(1) Where the Board receives an application referred to in subsection 70(2), it shall forthwith consider the application and if, on the basis of such consideration, it is of the opinion that there are reasonable grounds to believe that a claim could, upon the hearing of the application, be established, it shall allow the application to proceed, and in any other case it shall refuse to allow the application to proceed and shall thereupon determine that the person is not a Convention refugee.

(2) Where pursuant to subsection (1) the Board allows an application to proceed, it shall notify the Minister of the time and place where the application is to be heard and afford the Minister a reasonable opportunity to be heard.

(3) Where the Board has made its determination as to whether or not a person is a Convention refugee, it shall, in writing, inform the Minister and the applicant of its decision.

(4) The Board may, and at the request of the applicant or the Minister shall, give reasons for its determination.

36 While subs. 71(1) may not expressly prohibit an oral hearing, as drafted, it does not make any sense if an oral hearing is held at this stage, and it is accordingly inconsistent with the holding of an oral hearing. Mr. Scott made the two following submissions:

31. In the further alternative, the Appellants submit that if section 45(4) is not construed as requiring a hearing before either the Minister or the RSCA, 'fundamental justice' would nevertheless be satisfied if section 71 were construed as requiring a hearing before the Immigration Appeal Board on an application for 'redetermination'.

32. It is submitted, however, that this would require a somewhat awkward construction of section 71(1) insofar as the section would then require a full oral hearing and consideration of the merits, in conformity with natural justice, in order that the Board might determine whether to grant leave to appeal, in which case a second hearing on the merits would occur. It is submitted, therefore, that the most straightforward and reasonable alternative is to declare 'inoperative' all the words of section 71(1) following the words 'Where the Board receives an application referred to in subsection 70(2), it shall forthwith consider the application ...'. If

the remainder of this subsection were 'inoperative' the result would be a hearing on the merits before the Appeal Board, which would decide the case.

37 I agree with the last submission and I would grant the declaration therein requested, such a declaration to be in force however only with respect to the seven cases at Bar where Convention refugee claims have been adjudicated upon on the merits without the holding of an oral hearing at any stage.

38 The reason of the last mentioned restriction in the declaration is that I wish to refrain from expressing any view and to reserve judgment on the question whether subs. 71(1) of the Immigration Act, 1976 is compatible with s. 2(e) of the Canadian Bill of Rights, in a case where a Convention refugee claim has been dismissed at the initial stage but after an oral hearing, and the claimant applied to the board for a redetermination of his claim. It seems to me that in such a case, an application in writing for what is analogous to a leave to appeal, would not necessarily deprive the claimant of the right to a fair hearing in accordance with the principles of fundamental justice. Much might depend on the type of oral hearing held at the earlier stage, as well as on the type of questions to be decided in the appeal.

39 In such a hypothetical case, the question would also arise as to whether the burden imposed upon the applicant by s. 71(1) to show a probability of success on a full hearing is compatible with the principles of natural justice. This test was adopted by this Court as a matter of statutory construction in Kwiatkowsky v. Min. of Employment & Immigration, [1982] 2 S.C.R. 856142 D.L.R. (3d) 38545 N.R. 116, but the Canadian Bill of Rights was not argued in that case. This question would not arise in the cases at Bar where the Immigration Appeal Board will have to adjudicate on merits for the appellants claims.

40 I realize that if the board does as I propose, the proceedings contemplated by s. 71(1) of the Immigration Act, 1976 will be short-circuited and, for all practical purposes, be replaced by what amounts to a full appeal. But I fail to see any other practical or reasonable alternative in the circumstances of these cases.

41 In the case of R. v. Drybones, [1970] S.C.R. 28271 W.W.R. 16110 C.R.N.S. 334[1970] 3 C.C.C. 3559 D.L.R. (3d) 473(S.C.C.), a provision of the Indian Act, R.S.C. 1952, c. 149, enacted prior to the adoption of the Canadian Bill of Rights was declared inoperative because it operated so as to abrogate, abridge or infringe one of the rights declared and recognized by the Canadian Bill of Rights. It has not been declared by any Act of the Parliament of Canada that the Immigration Act, 1976 shall operate notwithstanding the Canadian Bill of Rights. In view of s. 5(2) of An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms, S.C. 1960, c. 44, in Pt. II which follows the Canadian Bill of Rights, I do not see any reason not to apply the principle in the Drybones case to a provision enacted after the Canadian Bill of Rights. Section 5(2) provides:

(2) The expression 'law of Canada' in Part I means an Act of the Parliament of Canada enacted before or after the coming into force of this Act, any order, rule or regulation thereunder, and any law in force in Canada or in any part of Canada at the commencement of this Act that is subject to be repealed, abolished or altered by the Parliament of Canada.

42 One last point before I reach my conclusion.

43 All the parties agree that when the Immigration Appeal Board proceeds under s. 71(1) of the Immigration Act, it should not take into account any facts or materials other than those specified by s. 70(2) of the Act, notwithstanding some decisions of the Federal Court of Appeal which would appear to hold that the board may rely for instance on information acquired through its experience in refugee cases. I would so direct the board to restrict itself to the facts and material specified in s. 70(2) of the Act.

Conclusions

44 The appeals are allowed, the decisions of the Federal Court of Appeal and of the Immigration Appeal Board are set aside. The applications of the appellants for redetermination of their refugee claims are remanded to the Immigration Appeal Board which is directed to adjudicate upon them on the merits after a full oral hearing in each case, in accordance with the directions contained in these reasons.

45 For the purposes of these seven cases, I would declare inoperative all the words of s. 71(1) of the Immigration Act, 1976, following the words:

> Where the Board receives an application referred to in subsection 70(2), it shall forthwith consider the application.

46 I would award costs on the application for leave to appeal and costs of the appeal to this Court to Mr. Satnam Singh on a solicitor-client basis. Costs in respect of the other six appellants shall be as prescribed by the order of this Court dated February 16, 1984.

***Wilson J. (Dickson C.J.C.* and *LamerJ.* concurring):**

47 The issue raised by these appeals is whether the procedures set out in the Immigration Act, 1976, S.C. 1976-77, c. 52 as amended, for the adjudication of the claims of persons claiming refugee status in Canada deny such claimants rights they are entitled to assert under s. 7 of the Canadian Charter of Rights and Freedoms.

48 On February 16, 1984, the Court granted leave to appeal in these seven cases and they were consolidated for hearing on April 30, 1984. Six of the appellants were unrepresented by counsel when they made their applications for leave to appeal and counsel was appointed to represent

them at the hearing of the appeal. The seventh appellant, Mr. Satnam Singh, was represented by his own counsel both at the hearing of the leave application and at the hearing of the appeal. The Court also had the benefit of a joint submission by counsel for two intervenors, the Federation of Canadian Sikh Societies and the Canadian Council of Churches. During the hearing on April 30 and May 1, 1984, counsels submissions were confined to the application of the Charter of Rights and Freedoms. On December 7, 1984, counsel were invited to make written submissions to the Court on the application of the Canadian Bill of Rights.

49 At the hearing of the appeals in April and May 1984 counsel took somewhat different approaches to the presentation of the issues but I think it is fair to say that in substance the appeals were argued on the basis that the Court should approach the appeals in three stages. First, the Court should decide whether refugee claimants physically present in Canada are entitled to the protection of s. 7 of the Charter. If the answer to this question is yes, then the Court should consider whether the relevant provisions of the Immigration Act, in particular s. 71(1), deny the appellants' rights under s. 7 of the Charter. Finally, if the Court answers the second question in the affirmative, it should determine whether any limitation on the appellants' rights imposed by the Act is justified within the meaning of s. 1 of the Charter.

50 In the written submissions presented in December 1984 counsel considered whether the procedures for the adjudication of refugee status claims violated the Canadian Bill of Rights, in particular s. 2(e). There can be no doubt that this statute continues in full force and effect and that the rights conferred in it are expressly preserved by s. 26 of the Charter. However, since I believe that the present situation falls within the constitutional protection afforded by the Charter of Rights and Freedoms, I prefer to base my decision upon the Charter.

51 I think the suggestion of counsel that the appeals should be approached in three stages is a good one and I am adopting it in the analysis which follows. First, however, it is important to present the facts and the legislative context within which the appeals have arisen.

1. The Facts

52 The facts and procedural history of the seven appeals have a great deal in common and it was because of these similarities that the Court felt it appropriate to consolidate the hearing. Each appellant, in accordance with the procedures set out in the Immigration Act, asserted a claim to Convention refugee status as defined in s. 2(1) of the Act. The Minister of Employment and Immigration, acting on the advice of the Refugee Status Advisory Committee, made determinations pursuant to s. 45 of the Act that none of the appellants were Convention refugees. Each of the appellants then made an application for redetermination of his or her refugee claim by the Immigration Appeal Board pursuant to s. 70 of the Act. In accordance with s. 71(1) of the Act the Immigration Appeal Board in each case refused to allow the application to proceed on the basis that it did not believe that there were "reasonable grounds to believe that a claim could,

upon the hearing of the application, be established ...". Each applicant then sought judicial review of the board's decision pursuant to the provisions of s. 28 of the Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10. These applications were denied by the Federal Court of Appeal.

53 So much for the similarities. There are a number of distinctions, both substantive and procedural, which can be drawn among the cases of the seven appellants. Six of the appellants are citizens of India who claim Convention refugee status on the basis of their fear of persecution by Indian authorities as a result of their political activities and beliefs, in particular their association with the Akali Dal party in that country. The seventh appellant, Ms. Indrani, is a citizen of Guyana who is of Indian extraction. Her claim to Convention refugee status is based on her fear of persecution on racial, religious and political grounds. Each appellant, in the course of his or her examination under oath pursuant to s. 45 of the Act, set out different facts in support of their refugee status claims. It is common ground that the Court is not concerned on these appeals with the merits of the individual claims made by the appellants.

54 The procedure whereby each appellant came to assert his or her refugee status claim also varies from case to case. Four of the appellants (Mr. Harbhajan Singh, Mr. Sadhu Singh Thandi, Mr. Charanjit Singh Gill and Mr. Satnam Singh) were refused admission into Canada at a port of entry. Inquiries were held pursuant to s. 23 of the Act to determine whether removal orders should be made against them and it was in the course of these inquiries that the appellants raised their claim to refugee status. In accordance with the procedures under s. 45 the s. 23 inquiries were continued until it was determined that removal orders should be made against the appellants. At that point the inquiries under s. 23 were adjourned and each appellant was examined under oath respecting his claim by a senior immigration officer pursuant to s. 45(1).

55 The other three appellants asserted their refugee claims in the course of inquiries conducted pursuant to s. 27(4) of the Act to determine whether they should be removed after having been admitted to Canada. One of the appellants, Mr. Paramjit Singh Mann, succeeded in eluding inquiry within the meaning of s. 27(2)(f) when he first came to Canada in July 1977. This came to the attention of immigration officials when he surrendered himself in November 1980 with the result that a s. 27 inquiry was held. Ms. Indrani came to Canada in October 1979 using a false passport and was granted visitor status until November 30, 1979. It eventually came to the attention of immigration officials that she was working illegally and in March 1981 she was arrested. On the basis of ss. 27(2)(b) and 27(2)(g) an inquiry was held during the course of which she asserted her refugee status claim. Finally, Mr. Kewal Singh came to Canada in November 1980 and was granted temporary status as a visitor. When his visitor status expired he surrendered himself to immigration authorities and, because he had ceased to be a visitor, an inquiry was held on the basis of s. 27(2)(e).

56 Inquiries under s. 27 differ from those under s. 23 principally in their effect; in the former case the outcome is liable to be the issuance of a deportation order or a departure notice pursuant

to s. 32(6) whereas the latter is liable to lead to a removal order pursuant to s. 32(5), the nature of the order being of significance in its effect on the person's right to return to Canada at some point in the future. The procedures for the determination of refugee status found in ss. 45 to 48 of the Act and the procedures for redetermination by the Immigration Appeal Board found in ss. 70 and 71 do not draw a significant distinction between inquiries held pursuant to s. 23 and those held pursuant to s. 27.

57 Counsel have presented these appeals on the basis that in terms of the application of the Charter the factual and procedural differences just adverted to have no significance. While I believe this to be the case I am also of the view that it is useful to bear the existence of such differences in mind, particularly as the scheme of the Immigration Act itself is being explored.

2. The Scheme of the Immigration Act

58 The appellants allege that the procedural mechanisms set out in the Immigration Act, as opposed to the application of those procedures to their particular cases, have deprived them of their rights under the Charter. It is important, therefore, to understand these provisions in the context of the Act as a whole. If, as a matter of statutory interpretation, the procedural fairness sought by the appellants is not excluded by the scheme of the Act, there is, of course, no basis for resort to the Charter. The issue may be resolved on other grounds. In Toronto v. Outdoor Neon Displays Ltd., [1960] S.C.R. 307 at 314, 22 D.L.R. (2d) 241, this Court refused counsel's invitation to express an opinion as to the constitutional validity of a statute in a situation in which it was not necessary to the Court's decision to do so. I note as well that the United States Supreme Court has on many occasions articulated a policy of not deciding constitutional issues in a context where it was not strictly necessary to do so: see Rescue Army v. Municipal Court, Los Angeles, 331 U.S. 549 at 568-75 (1947), and cases cited therein. Accordingly, I believe that the Court should scrutinize closely:

(a) the rights which Convention refugees are accorded under the Act; and

(b) the procedures the Act sets out for adjudicating claims for refugee status

before turning to the application of the Charter in this context.

(a) The Rights of Convention Refugees Under the Immigration Act

59 The appellants make no attempt to assert a constitutional right to enter and remain in Canada analogous to the right accorded to Canadian citizens by s. 6(1) of the Charter. Equally, at common law an alien has no right to enter or remain in Canada except by leave of the Crown: Prata v. Min. of Manpower & Immigration, [1976] 1 S.C.R. 37652 D.L.R. (3d) 3833 N.R. 484(S.C.C.). As Martland J. expressed the law in Prata at p. 380 "The right of aliens to enter and remain in

Canada is governed by the Immigration Act" and s. 5(1) states that "No person, other than a person described in section 4, has a right to come into or remain in Canada."

60 However, the Immigration Act does provide Convention refugees with certain limited rights to enter and remain in Canada. The Act envisages the assertion of a refugee claim under s. 45 in the context of an inquiry, which presupposes that the refugee claimant is physically present in Canada and within the jurisdiction of the Canadian authorities. The Act and Regulations do envisage the resettlement in Canada of refugees who are outside the country but the following observations are not made with reference to these individuals. When a person who is in Canada has been determined to be a Convention refugee, s. 47(1) requires the adjudicator to reconvene the inquiry held pursuant to s. 23 or s. 27 in order to determine whether the individual is a person described in s. 4(2) of the Act. Section 4(2) provides that a Convention refugee "while lawfully in Canada [has] a right to remain in Canada ..." except where it is established that he or she falls into the category of criminal or subversive persons set out in s. 4(2)(b). If it is determined that the person is a Convention refugee described in s. 4(2), s. 47(3) requires the adjudicator to allow the person to remain in Canada notwithstanding any other provisions of the Act or Regulations.

61 The scope of the refugee's right to remain in Canada is made problematic by the existence in s. 4(2) of the phrase "while lawfully in Canada". Since it is a prerequisite to the holding of an examination under s. 45 that a refugee claimant be a person against whom a removal order or departure notice may be made (see Singh v. Min. of Employment & Immigration, [1982] 2 F.C. 689(Fed. T.D.)), it is apparent that nobody who is determined to be a Convention refugee will, in one sense, be lawfully in Canada. In practice this circularity is avoided by the issuance of a Minister's permit pursuant to s. 37 at the time a person is determined to be a Convention refugee, thus regularizing the individual's status for purposes of s. 4(2). The case of Boun-Leua v. Min. of Employment & Immigration, [1981] 1 F.C. 259113 D.L.R. (3d) 41436 N.R. 431(Fed. C.A.), is illustrative of the difficulties which can arise where a Minister's Permit is not issued.

62 In Boun-Leua the applicant was a stateless person who was born in Laos but had been granted refugee status in France and had taken up residence there. He came to Canada as a visitor in December 1978 and, when his visitor status expired in January 1979, he surrendered himself to immigration officials and made a refugee claim. In due course it was determined that he was a Convention refugee but he was not issued a Minister's permit. At the resumption of the inquiry held pursuant to s. 47(1) the adjudicator determined that he was not a Convention refugee "lawfully in Canada" and she issued him a departure notice. The applicant sought judicial review of this decision pursuant to s. 28 of the Federal Court Act. Urie J., writing for the Federal Court of Appeal, dismissed the application. At pp. 263-64 he made the following observations:

> A Convention refugee, on the other hand, is not given the right to reside permanently in Canada nor, by being designated such, is he given the right to remain in Canada for a specific period of time. Presumably his right to remain is dependent upon his continuing to be a refugee

> from the country of his nationality. If for any reason, he no longer can fulfil the requirements to be characterized as a Convention refugee, he is subject to a removal or deportation order. The duration of his stay, as a Convention refugee, can only be fixed by a Ministerial permit issued pursuant to section 37 of the Act. If no such permit issued then, if he is within an inadmissible class, he may be the subject of a removal or deportation order. The only rights accorded to a Convention refugee are first, not to be returned to a country where his life or freedom would be threatened, a right granted by virtue of section 55 of the Act, and, second, to be able to appeal a removal order or a deportation order made against him on a question of law or fact or of mixed law and fact and 'on the ground that, having regard to the existence of compassionate or humanitarian considerations' he should not be removed from Canada (sections 72(2)(a) and (b) and 72(3)).
>
> From all of the above, I can only conclude that the determination by the Minister that a person is a Convention refugee does not, as urged by applicant's counsel, confer on that person a status of some undefined nature. It gives him only the rights to which I have previously alluded. In this case the applicant as a refugee admitted to France can return to France so long as his travel permit, issued by that country to him, is valid. France having found him to be a refugee, then Canada as a signatory to the United Nations Convention Relating to the Status of Refugees would find it difficult to determine that he was not a refugee. Whether or not such is the case is immaterial in this case. Since he can return to France, which is not the country of his nationality, or where his life or freedom would be threatened, there is no obligation on the Minister to permit him to remain in Canada. The applicant has no legal right to do so. In my view, therefore, applicant counsel's submission that the determination by the Minister that his client was a Convention refugee gave him the right to remain in Canada must fail.

Although I agree with Urie J.'s decision on the facts before him, I believe that his reasons may have placed the position of the Convention refugee under the Act too low. In addition to the important rights set out in ss. 55 and 72, it seems to me that a Convention refugee is entitled to require the Minister to exercise his discretion to give a permit under s. 37 fairly and in accordance with proper principles and, if the Minister fails to do so, the Convention refugee may have a right to take proceedings under s. 18(a) of the Federal Court Act: see Min. of Manpower & Immigration v. Hardayal, [1978] 1 S.C.R. 470 at 479, 75 D.L.R. (3d) 465, 15 N.R. 396 (S.C.C.) (per Spence J.); Brempong v. Min. of Employment & Immigration, [1981] 1 F.C. 211113 D.L.R. (3d) 23636 N.R. 323 (Fed. C.A.).

63 In the Boun-Leua case, as Urie J. pointed out, the applicant was able to return to France where his life or liberty would not be threatened and it would not be inconsistent with Canada's obligations to refugees to require him to return there. On the other hand, s. 2(2) and s. 3(g) of the Immigration Act envisage that the Act will be administered in a way that fulfils Canada's international legal obligations. These provisions read as follows:

2.

. . . . .

(2) The term 'Convention' in the expression 'Convention refugee' refers to the United Nations Convention Relating to the Status of Refugees signed at Geneva on the 28th day of July, 1951 and includes the Protocol thereto signed at New York on the 31st day of January, 1967.

3. It is hereby declared that Canadian immigration policy and the rules and regulations made under this Act shall be designed and administered in such a manner as to promote the domestic and international interests of Canada recognizing the need

. . . . .

(g) to fulfil Canada's international legal obligations with respect to refugees and to uphold its humanitarian tradition with respect to the displaced and the persecuted;

64 The Preamble to the Convention and Protocol provides:

Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination.

Considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms, ...

The term "refugee" is defined in the Convention as follows:

A. For the purposes of the present Convention, the term 'refugee' shall apply to any person who:

... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it ....

65 (United Nations Convention relating to the Status of Refugees. HCR/INF/29/Rev. 2, c. 1, Art. 1, para. A(2)).

66 I believe therefore that a Convention refugee who does not have a safe haven elsewhere is entitled to rely on this country's willingness to live up to the obligations it has undertaken as a signatory to the United Nations Convention Relating to the Status of Refugees (see Ernewein v. Min. of Employment & Immigration, [1980] 1 S.C.R. 639 at 657-6214 C.P.C. 264, 103 D.L.R.

(3d) 1, 30 N.R. 316 (S.C.C.) (per Pigeon J. dissenting); Hurt v. Min. of Manpower & Immigration, [1978] 2 F.C. 34020 C.C.C. (2d) 12752 D.L.R. (3d) 6396 N.R. 343 (Fed. C.A.)).

(b) The Procedures for the Determination of Convention Refugee Status

67 The Term "Convention refugee" is defined in s. 2(1) of the Act as follows:

> 'Convention refugee' means any person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,
>
> > (a) is outside the country of his nationality and is unable or, by reason of such fear, is unwilling to avail himself of the protection of that country, or
> >
> > (b) not having a country of nationality, is outside the country of his former habitual residence and is unable or, by reason of such fear, is unwilling to return to that country;

68 As noted above, the procedures for determination of whether an individual is a Convention refugee and for redetermination of claims by the Immigration Appeal Board are set out in ss. 45 to 48 and 70 to 71 respectively. Focussing first on the initial determination, s. 45 provides as follows:

> 45. (1) Where, at any time during an inquiry, the person who is the subject of the inquiry claims that he is a Convention refugee, the inquiry shall be continued and, if it is determined that, but for the person's claim that he is a Convention refugee, a removal order or a departure notice would be made or issued with respect to that person, the inquiry shall be adjourned and that person shall be examined under oath by a senior immigration officer respecting his claim.
>
> (2) Where a person who claims that he is a Convention refugee is examined under oath pursuant to subsection (1), his claim, together with a transcript of the examination with respect thereto, shall be referred to the Minister for determination.
>
> (3) A copy of the transcript of an examination under oath referred to in subsection (1) shall be forwarded to the person who claims that he is a Convention refugee.
>
> (4) Where a person's claim is referred to the Minister pursuant to subsection (2), the Minister shall refer the claim and the transcript of the examination under oath with respect thereto to the Refugee Status Advisory Committee established pursuant to section 48 for consideration and, after having obtained the advice of that Committee, shall determine whether or not the person is a Convention refugee.
>
> (5) When the Minister makes a determination with respect to a person's claim that he is a Convention refugee, the Minister shall thereupon in writing inform the senior immigration officer who conducted the examination under oath respecting the claim and the person who claimed to be a Convention refugee of his determination.

> (6) Every person with respect to whom an examination under oath is to be held pursuant to subsection (1) shall be informed that he has the right to obtain the services of a barrister or solicitor or other counsel and to be represented by any such counsel at his examination and shall be given a reasonable opportunity, if he so desires and at his own expense, to obtain such counsel.

It is difficult to characterize this procedure as a "hearing" in the traditional sense: see Brempong supra at pp. 217-18. As Urie J. noted in Brempong at p. 217, n. 7, the procedure is technically "non-adversarial" since only the claimant is entitled to be represented by counsel. Urie J. described the procedure as "purely administrative in nature" and this characterization was adopted by counsel for the respondent Minister in the course of argument on these appeals.

69 In Mensah v. Min. of Employment & Immigration, [1982] 1 F.C. 7036, N.R. 332(Fed. C.A.), Pratte J. observed at p. 71 that by enacting s. 45 "Parliament did not intend to subject either the Minister or the Refugee Status Advisory Committee to the procedural duty of fairness invoked by the applicant." If Pratte J. intended by this statement to suggest that Parliament has excluded the duty of fairness articulated in this Court's decision in Nicholson v. Haldimand-Norfolk Reg. Bd. of Police Commrs., [1979] 1 S.C.R. 311, 78 C.L.L.C. 14,181, 88 D.L.R. (3d) 671, 23 N.R. 410, I believe that he must have been mistaken. In Nicholson at p. 324, Laskin C.J.C. expressly adopted the statement of Megarry J. in Bates v. Lord Hailsham, [1972] 3 All E.R. 1019[1972] 1 W.L.R. 1373 at 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". In other words, the mere classification of the Minister's duty under s. 45 as administrative does not eliminate the duty of fairness set out in Nicholson: see A.G. Can. v. Inuit Tapirisat of Can., [1980] 2 S.C.R. 735 at 750, 115 D.L.R. (3d) 1, 33 N.R. 304 (per Estey J.); Martineau v. Matsqui Inst. Disciplinary Bd. (No. 2), [1980] 1 S.C.R. 602 at 623-24, 628-31, 13 C.R. (3d) 1(Eng.), 15 C.R. (3d) 315(Fr.), 50 C.C.C. (2d) 353, 106 D.L.R. (3d) 385, 30 N.R. 119 (S.C.C.) (per Dickson J., as he then was).

70 The existence of a duty of fairness does not, however, define its content. I believe, therefore, that Pratte J.'s observation in Mensah was intended to make the point that the duty of fairness imposed on the Minister in the context of s. 45 did not require the Minister to allow a refugee claimant to respond to the Minister's objections to his claim as counsel in that case had submitted. In his concurring reasons in Martineau No. 2, supra, Dickson J. (as he then was) observed at p. 630 that "The content of the principles of natural justice and fairness in application to the individual cases will vary according to the circumstances of each case ...". As Estey J. pointed out in the Inuit Tapirisat case at p. 755: "It is always a question of construing the statutory scheme as a whole in order to see to what degree, if any, the legislator intended the principle [of procedural fairness] to apply."

71 Counsel for the respondent in this case submitted that the Act did not contemplate an oral hearing before the Minister or the Refugee Status Advisory Committee and that the Minister and

the committee were entitled to rely upon what he described as "the government's knowledge of world affairs" in rendering a decision. As I read s. 45, and in particular s. 45(4), these submissions appear to be correct. It is clear from s. 45(4) that the Act does not envisage an opportunity for the refugee claimant to be heard other than through his claim and the transcript of his examination under oath. Nor does the Act appear to envisage the refugee claimant's being given an opportunity to comment on the advice the Refugee Status Advisory Committee has given to the Minister. The insulation of the process is reinforced by the fact that the Minister is entitled under s. 123 of the Act to delegate his powers under s. 45 and in fact these powers are customarily delegated to the Registrar of the Refugee Status Advisory Committee: see Wieckowska v. Lanthier, [1980] 1 F.C. 655 at 656, 180 D.L.R. (3d) 492. In substance, therefore, it would appear that the Refugee Status Advisory Committee acts as a decision-making body isolated from the persons whose status it is adjudicating and that it applies policies and makes use of information to which the refugee claimants themselves have no access. The committee and the Minister have an obligation to act fairly in carrying out their duties in the sense that decisions cannot be made arbitrarily and they must make an effort to treat equivalent cases in equivalent fashion. I do not think, however, that the Courts can import into the duty of fairness procedural constraints on the committee's operation which are incompatible with the decision-making scheme set up by Parliament.

72 In any event, the Minister's exercise of his jurisdiction under s. 45 is not reviewable on these appeals. As Urie J. noted in the Brempong case judicial review under s. 28 of the Federal Court Act is unavailable with respect to "a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis ...". Thus, despite Nicholson's tendency to eliminate the significance of the distinction between administrative and judicial or quasi-judicial functions for purposes of determining whether procedural fairness in decision-making is required, the Federal Court Act preserves the significance of the distinction for purposes of determining whether judicial review is available by means of certiorari under s. 18(a) or by way of review under s. 28: see Martineau No. 2 at pp. 629, 637. Since the appellants did not challenge the procedural fairness of the Minister's decision under s. 45 of the Immigration Act by the proper procedures, I do not believe that the Court has any jurisdiction on these appeals to review those decisions or the mechanisms by which they were taken except for purposes of developing a greater understanding of the procedural scheme of the Act with respect to refugee claims.

73 The refugee claimant's status, however, need not be conclusively determined by the Minister's decision on the advice of the Refugee Status Advisory Committee made pursuant to s. 45. Under s. 70(1) of the Act a person whose refugee claim has been refused by the Minister may, within a period prescribed in Reg. 40(1) as 15 days from the time he is so informed, apply for a redetermination of his claim by the Immigration Appeal Board. Section 70(2) requires the refugee claimant to submit with such an application a copy of the transcript of the examination under oath which was conducted pursuant to s. 45(1) and a declaration under oath setting out the basis of the application, the facts upon which the appellant relies and the information and evidence the applicant intends

to offer at a redetermination hearing. The applicant is also permitted pursuant to s. 70(2)(d) to set out in his declaration such other representations as he deems relevant to his application.

74 The Immigration Appeal Board's duties in considering an application for redetermination of a refugee status claim are set out in s. 71 which reads as follows:

> 71. (1) Where the Board receives an application referred to in subsection 70(2), it shall forthwith consider the application and if, on the basis of such consideration, it is of the opinion that there are reasonable grounds to believe that a claim could, upon the hearing of the application, be established, it shall allow the application to proceed, and in any other case it shall refuse to allow the application to proceed and shall thereupon determine that the person is not a Convention refugee.
>
> (2) Where pursuant to subsection (1) the Board allows an application to proceed, it shall notify the Minister of the time and place where the application is to be heard and afford the Minister a reasonable opportunity to be heard.
>
> (3) Where the Board has made its determination as to whether or not a person is a Convention refugee, it shall, in writing, inform the Minister and the applicant of its decision.
>
> (4) The Board may, and at the request of the applicant or the Minister shall, give reasons for its determination.

75 If the board were to determine pursuant to s. 71(1) that the application should be allowed to proceed, the parties are all agreed that the hearing which would take place pursuant to s. 71(2) would be quasi-judicial one to which full natural justice would apply. The board is not, however, empowered by the terms of the statute to allow a redetermination hearing to proceed in every case. It may only do so if "it is of the opinion that there are reasonable grounds to believe that a claim could, upon the hearing of the application, be established ...". In Kwiatkowsky v. Min. of Employment & Immigration, [1982] 2 S.C.R. 856142 D.L.R. (3d) 38545 N.R. 116, this Court interpreted those words as requiring the board to allow the claim to proceed only if it is of the view that "it is more likely than not" that the applicant will be able to establish his claim at the hearing, following the test laid down by Urie J. in Lugano v. Min. of Manpower & Immigration, [1976] 2 F.C. 43813 N.R. 322(Fed. C.A.).

76 In his concurring reasons for the Federal Court of Appeal's decision in Kwiatkowski(y) (1980), 34 N.R. 237, Le Dain J. made the following observation about the Immigration Appeal Board's authority under s. 71(1) at p. 240:

> This is a somewhat unusual authority — to determine at a preliminary stage, not whether there is an arguable case, but whether there is a probability or likelihood of success, without knowing what a full hearing might add to the strength of the case. *It is an authority that gives rise to the understandable concern, but it is one that Parliament appears clearly to have*

> *conferred upon the Board for reasons which it has judged sound*. In effect, it is an authority to determine the issue of refugee status upon a consideration of the examination under oath and the declaration under oath.

(Emphasis added)

77 I agree with these remarks. The issue directly before this Court in Kwiatkowsky was not whether there had been a denial of natural justice but whether the Immigration Appeal Board had applied the wrong test in exercising its power under s. 71(1). It is implicit in the Court's decision, however, that the Act imposes limitations on the scope of the hearing afforded to refugee claimants which it is difficult to reconcile with the principles of natural justice: see Ernewein v. Min. of Employment & Immigration, supra, at 659-60 (per Pigeon J. dissenting).

78 In L'Alliance des Professeurs catholiques de Montréal v. Que. L.R. Bd., [1953] 2 S.C.R. 140, Rinfret C.J.C. expressed this Court's commitment to the interpretation of statutes in accordance with the principles of natural justice in the following terms at p. 154:

> Le principe que nul ne doit être condamné ou privé de ses droits sans être entendu, et surtout sans avoir même reçu avis que ses droits seraient mis en jeu est d'une équité universelle et ce n'est pas le silence de la loi qui devrait être invoqué pour en priver quelqu'un. *A mon avis, il ne faudrait rien moins qu'une déclaration expresse du législateur pour mettre de côté cette exigence qui s'applique à tous les tribunaux et à tous les corps appelés à rendre une décision qui aurait pour effet d'annuler un droit possédé par un individu*.

(Emphasis added) In the same case, at p. 166, Fauteux J. (as he then was) stated:

> Il est de règle que l'application du principe audi alteram partem est implicitement sous-entendue dans les lois attribuant aux corps administratifs des fonctions d'ordre judiciaire. Maxwell: On Interpretation of Statutes, 9th ed., 368. Le Législateur est présumé tenir compte de cette règle en édictant ces lois. *Pour en suspendre l'operation, il faut donc, dans la loi, un texte explicite à cet effet ou une inférence en ayant l'équivalence*.

(Emphasis added) In a number of subsequent cases including Nicholson, supra, this Court has come to the same conclusion: see Pue, Natural Justice in Canada (1981) at pp. 82-4. In the present instance, however, it seems to me that s. 71(1) is precisely the type of express provision which prevents the Courts from reading the principles of natural justice into a statutory scheme for the adjudication of the rights of individuals.

79 The substance of the appellants' case, as I understand it, is that they did not have a fair opportunity to present their refugee status claims or to know the case they had to meet. I do not think there is any basis for suggesting that the procedures set out in the Immigration Act were not followed correctly in the adjudication of these individuals claims. Nor do I believe that there is

any basis for interpreting the relevant provisions of the Immigration Act in a way that provides a significantly greater degree of procedural fairness or natural justice than I have set out in the preceding discussion. The Act by its terms seems to preclude this. Accordingly, if the appellants are to succeed, I believe that it must be on the basis that the Charter requires the Court to override Parliament's decision to exclude the kind of procedural fairness sought by the appellants.

3. The Application of the Charter

(1) Are the Appellants Entitled to the Protection of s. 7 of the Charter?

80 Section 32(1)(a) of the Charter provides:

32.(1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament ....

Since immigration is clearly a matter falling within the authority of Parliament under s. 91 ¶ 25 of the Constitution Act, 1867, the Immigration Act itself and the administration of it by the Canadian government are subject to the provisions of the Charter.

81 Section 7 of the Charter states that "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Counsel for the appellants contrasts the use of the word "Everyone" in s. 7 with language used in other sections, for example, "Every citizen of Canada" in s. 3, "Every citizen of Canada and every person who has the status of a permanent resident of Canada" in s. 6(2) and "Citizens of Canada" in s. 23. He concludes that "Everyone" in s. 7 is intended to encompass a broader class of persons than citizens and permanent residents. Counsel for the Minister concedes that "everyone" is sufficiently broad to include the appellants in its compass and I am prepared to accept that the term includes every human being who is physically present in Canada and by virtue of such presence amenable to Canadian law.

82 That premise being accepted, the question then becomes whether the rights the appellants seek to assert fall within the scope of s. 7. Counsel for the Minister does not concede this. He submits that the exclusion or removal of the appellants from Canada would not infringe "the right to life, liberty and security of the person". He advances three main lines of argument in support of this submission.

83 The first may be described as a reliance on the "single right" theory articulated by Marceau J. in R. v. Operation Dismantle Inc., [1983] 1 F.C. 745 at 773-7439 C.P.C. 1203 D.L.R. (4th) 19349 N.R. 363(Fed. C.A.). In counsel's submission, the words "the right to life, liberty and security of the person" form a single right with closely inter-related parts and this right relates to matters of death, arrest, detention, physical liberty and physical punishment of the person. Moreover, counsel

says, s. 7 only protects persons against the deprivation of that type of right if the deprivation results from a violation of the principles of fundamental justice. This argument by itself does not advance the Minister's case very far since the appellants submit that, even on this restrictive interpretation of s. 7, their rights in relation to matters of death, arrest, detention, physical liberty and physical punishment are indeed affected. Counsel for the appellants took two different approaches in their attempt to demonstrate this.

84 Mr. Coveney, for the appellant Satnam Singh, and Ms. Jackman for the intervenors who supported the position of the appellants, took the position that it was inherent in the definition of a Convention refugee that rejection of his right to stay in Canada would affect his right to life, liberty and security of the person in the sense articulated by counsel for the Minister. In other words, because a Convention refugee is, by definition, a person who has a "well-founded fear of persecution", the refusal to give him refuge exposes him to jeopardy of death, significant diminution of his physical liberty or physical punishment in his country of origin.

85 Mr. Scott, for the other six appellants, took a different approach. He noted that the Act empowers immigration officials physically to detain the appellants both for purposes of examination pursuant to s. 23 or s. 27 and for purposes of removal: see ss. 20(1); 23(3); 23(5); and 104 to 108. He argued that the detention of the appellants by Canadian immigration officials would itself deprive them of personal liberty in this country and it would be a violation of s. 7 to deprive them of this liberty except in accordance with the principles of fundamental justice.

86 Counsel for the Minister, Mr. Bowie, sought to counter both these arguments. With respect to the first argument, he took the position that s. 7 of the Charter affords individuals protection from the action of the Legislatures and governments in Canada and its provinces and territories but that it affords no protection against the acts of other persons or foreign governments. He relied on the decision of Pratte J. in Singh v. Min. of Employment & Immigration, [1983] 2 F.C. 347144 D.L.R. (3d) 76647 N.R. 189(Fed. C.A.) [Leave to appeal to the Supreme Court of Canada refused 144 D.L.R. (3d) 766n, 50 N.R. 320(S.C.C.)] who said at p. 349 (F.C.):

> The decision of the [Immigration Appeal] Board did not have the effect of depriving the applicant of his right to life, liberty and security of the person. If the applicant is deprived of any of those rights after his return to his own country, that will be as a result of the acts of the authorities or of other persons of that country, not as a direct result of the decision of the Board. In our view, the deprivation of rights referred to in section 7 refers to a deprivation of rights by Canadian authorities applying Canadian laws.

With respect to the second line of argument, Mr. Bowie noted that the procedures for detention and removal of individuals under the Act were no different for those claiming refugee status than they were for any other individuals and he argued that those provisions were consistent with the principles of fundamental justice.

87 It seems to me that in attempting to decide whether the appellants have been deprived of the right to life, liberty and security of the person within the meaning of s. 7 of the Charter, we must begin by determining what rights the appellants have under the Immigration Act. As noted earlier, s. 5(1) of the Act excludes from persons other than those described in s. 4 the right to come into or remain in Canada. The appellants therefore do not have such a right. However, the Act does accord a Convention refugee certain rights which it does not provide to others, namely the right to a determination from the Minister based on proper principles as to whether a permit should issue entitling him to enter and remain in Canada (ss. 4(2) and 37); the right not to be returned to a country where his life or freedom would be threatened (s. 55); and the right to appeal a removal order or a deportation order made against him (ss. 72(2)(a), 72(2)(b) and 72(3)).

88 We must therefore ask ourselves whether the deprivation of these rights constitutes a deprivation of the right to life, liberty and security of the person within the meaning of s. 7 of the Charter. Even if we accept the "single right" theory advanced by counsel for the Minister in interpreting s. 7, I think we must recognize that the "right" which is articulated in s. 7 has three elements: life, liberty and security of the person. As I understand the "single right" theory, it is not suggested that there must be a deprivation of all three of these elements before an individual is deprived of his "right" under s. 7. In other words, I believe that it is consistent with the "single right" theory advanced by counsel to suggest that a deprivation of the appellants "security of the person", for example, would constitute a deprivation of their "right" under s. 7, whether or not it can also be said that they have been deprived of their lives or liberty. Rather, as I understand it, the "single right" theory is advanced in support of a narrow construction of the words "life", "liberty" and "security of the person" as different aspects of a single concept rather than as separate concepts each of which must be construed independently.

89 Certainly, it is true that the concepts of the right to life, the right to liberty, and the right to security of the person are capable of a broad range of meaning. The Fourteenth Amendment to the United States Constitution provides in part " ... nor shall any State deprive any person of life, liberty, or property, without the due process of law ...". In Bd. of Regents of State Colleges v. Roth, 408 U.S. 564 at 572 (1972), Stewart J. articulated the notion of liberty as embodied in the Fourteenth Amendment in the following way:

> While this Court has not attempted to define with exactness the liberty ... guaranteed (by the Fourteenth Amendment), the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized ... as essential to the orderly pursuit of happiness by free men. Meyer v. Nebraska, 262 U.S. 390, 399. In a constitution for a free people, there can

> be no doubt that the meaning of 'liberty' must be broad indeed. See, e.g., Bolling v. Sharpe, 347 U.S. 497, 499-500; Stanley v. Illinois, 405 U.S. 645.

The "single right" theory advanced by counsel for the Minister would suggest that this conception of "liberty" is too broad to be employed in our interpretation of s. 7 of the Charter. Even if this submission is sound, however, it seems to me that it is incumbent upon the Court to give meaning to each of the elements, life, liberty and security of the person, which make up the "right" contained in s. 7.

90 To return to the facts before the Court, it will be recalled that a Convention refugee is by definition a person who has a well-founded fear of persecution in the country from which he is fleeing. In my view, to deprive him of the avenues open to him under the Act to escape from that fear of persecution must, at the least, *impair* his right to life, liberty and security of the person in the narrow sense advanced by counsel for the Minister. The question, however, is whether such an impairment constitutes a "deprivation" under s. 7.

91 It must be acknowledged, for example, that even if a Convention refugee's fear of persecution is a well-founded one, it does not automatically follow that he will be deprived of his life or his liberty if he is returned to his homeland. Can it be said that Canadian officials have deprived a Convention refugee of his right to life, liberty and security of the person if he is wrongfully returned to a country where death, imprisonment or another form of persecution *may* await him? There may be some merit in counsel's submission that closing off the avenues of escape provided by the Act does not *per se* deprive a Convention refugee of the right to life or to liberty. It may result in his being deprived of life or liberty by others, but it is not certain that this will happen.

92 I cannot, however, accept the submission of counsel for the Minister that the denial of the rights possessed by a Convention refugee under the Act does not constitute a deprivation of his security of the person. Like "liberty", the phrase "security of the person" is capable of a broad range of meaning. The phrase "security of the person" is found in s. 1(a) of the Canadian Bill of Rights and its interpretation in that context might have assisted us in its proper interpretation under the Charter. Unfortunately no clear meaning of the words emerges from the case law, although the phrase has received some mention in cases such as Morgentaler v. R., [1976] 1 S.C.R. 616 at 628-3430 C.R.N.S. 209, 20 C.C.C. (2d) 449, 53 D.L.R. (3d) 161, 4 N.R. 277 (per Laskin C.J.C. dissenting); Curr v. R., [1972] S.C.R. 88918 C.R.N.S. 2817 C.C.C. (2d) 18126 D.L.R. (3d) 603(S.C.C.); and R. v. Berrie 197524 C.C.C. (2d) 66 at 70, 30 C.R.N.S. 145(B.C.). The Law Reform Commission, in its Working Paper No. 26 "Medical Treatment and Criminal Law" (1980) suggested at p. 6 that:

> The right to security of the person means not only protection of one's physical integrity, but the provision of necessaries for its support.

The commission went on to describe the provision of necessaries in terms of art. 25, para. 1 of the Universal Declaration of Human Rights (1948) which reads:

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

Commentators have advocated the adoption of a similarly broad conception of "security of the person" in the interpretation of s. 7 of the Charter: see Garant "Fundamental Freedoms and Natural Justice" in Tarnopolsky and Beaudoin (eds.) The Canadian Charter of Rights and Freedoms (1982) at pp. 264-65, 271-74; Manning Rights, Freedoms and the Courts: A Practical Analysis of the Constitution Act, 1982 (1983) at pp. 249-54.

93 For purposes of the present appeal it is not necessary, in my opinion, to consider whether such an expansive approach to "security of the person" in s. 7 of the Charter should be taken. It seems to me that even if one adopts the narrow approach advocated by counsel for the Minister, "security of the person" must encompass freedom from the threat of physical punishment or suffering as well as freedom from such punishment itself. I note particularly that a Convention refugee has the right under s. 55 of the Act not to " ... be removed from Canada to a country where his life or freedom would be threatened ...". In my view, the denial of such a right must amount to a deprivation of security of the person within the meaning of s. 7.

94 This approach receives support from at least one lower Court decision applying s. 7 of the Charter. In Collin v. Lussier, [1983] 1 F.C. 2186, C.R.R. 89(Fed. T.D.), the applicant before the Trial Division of the Federal Court applied for certiorari to quash a decision made by the respondent to have him transferred from a medium security to a maximum security prison. He argued that the transfer endangered his "security of the person" and since it was not made in accordance with the principles of fundamental justice, his rights under s. 7 had been infringed. At p. 239, Décary J. stated:

> ... such detention, by increasing applicant's anxiety as to his state of health, is likely to make his illness worse and, by depriving him of access to adequate medical care, it is in fact an impairment of the security of his person.

It is noteworthy that the applicant had not demonstrated that his health had been impaired; he merely showed that it was likely that his health would be impaired. This was held to be sufficient to constitute a deprivation of the right to security of the person under the circumstances.

95 It must be recognized that the appellants are not at this stage entitled to assert rights as Convention refugees; their claim is that they are entitled to fundamental justice in the determination

of whether they are Convention refugees or not. From some of the cases dealing with the application of the Canadian Bill of Rights to the determination of the rights of individuals under immigration legislation it might be suggested that whatever procedures the legislation itself sets out for the determination of rights constitute "due process" for purposes of s. 1(a) and "fundamental justice" for purposes of s. 2(e) of the Canadian Bill of Rights: see Prata v. Min. of Manpower & Immigration, supra [1976] 1 S.C.R. 376 at 383; Rebrin v. Bird, [1961] S.C.R. 376 at 381-8335 C.R. 412130 C.C.C. 5527 D.L.R. (2d) 622(S.C.C.); Louie Yuet Sun v. R., [1961] S.C.R. 7026 D.L.R. (2d) 63(S.C.C.); Cf. United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 at 544 (1950). As Professor Tarnopolsky (as he then was) observed in his text The Canadian Bill of Rights (2nd ed., 1975), at p. 273:

> The courts have consistently held that immigration is a privilege, and not a right.

96 The creation of a dichotomy between privileges and rights played a significant role in narrowing the scope of the application of the Canadian Bill of Rights, as is apparent from the judgment of Martland J. in *Mitchell v. R.,* , [1976] 2 S.C.R. 570, [1976] 1 W.W.R. 57724 C.C.C. (2d) 2416 D.L.R. (3d) 776, N.R. 389 (S.C.C.). At p. 588 Martland J. said:

> The appellant also relies upon s. 2(e) of the Bill of Rights, which provides that no law of Canada shall be construed or applied so as to deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations. In the McCaud case [[1965] 1 C.C.C. 168] Spence J., whose view was adopted unanimously on appeal, held that the provisions of s. 2(e) do not apply to the question of the revocation of parole under the provisions of the Parole Act.
>
> The appellant had no right to parole. He was granted parole as a matter of discretion by the Parole Board. He had no right to remain on parole. His parole was subject to revocation at the absolute discretion of the Board.

I do not think this kind of analysis is acceptable in relation to the Charter. It seems to me rather that the recent adoption of the Charter by Parliament and nine of the ten provinces as part of the Canadian constitutional framework has sent a clear message to the Courts that the restrictive attitude which at times characterized their approach to the Canadian Bill of Rights ought to be re-examined. I am accordingly of the view that the approach taken by Laskin C.J.C. dissenting in Mitchell, supra, is to be preferred to that of the majority as we examine the question whether the Charter has any application to the adjudication of rights granted to an individual by statute.

97 In Mitchell the issue was whether the Canadian Bill of Rights required s. 16(1) of the Parole Act, R.S.C. 1970, c. P-2, to be interpreted so as to require the Parole Board to provide a parolee with a fair hearing before revoking his parole. Laskin C.J.C. focussed on the consequences of the revocation of parole for the individual and concluded that parole could not be characterized as a

"mere privilege" even although the parolee had no absolute right to be released from prison. He said at p. 585:

> Between them, s. 2(c)(i) and s. 2(e) [of the Canadian Bill of Rights] call for at least minimum procedural safeguards in parole administration where revocation is involved, despite what may be said about the confidentiality and sensitiveness of the parole system.

98 It seems to me that the appellants in this case have an even stronger argument to make than the appellant in Mitchell. At most Mr. Mitchell was entitled to a hearing from the Parole Board concerning the revocation of his parole and a decision from the board based on proper considerations as to whether to continue his parole or not. He had no statutory right to the parole itself; rather he had a right to proper consideration of whether he was entitled to remain on parole. By way of contrast, if the appellants had been found to be Convention refugees as defined in s. 2(1) of the Immigration Act they would have been entitled as a matter of law to the incidents of that status provided for in the Act. Given the potential consequences for the appellants of a denial of that status if they are in fact persons with a "well-founded fear of persecution", it seems to me unthinkable that the Charter would not apply to entitle them to fundamental justice in the adjudication of their status.

99 Given this conclusion, it is perhaps unnecessary to address Mr. Scott's line of argument in detail. I must, however, acknowledge some reluctance to adopt his analogy from American law that persons who are inside the country are entitled to the protection of the Charter while those who are merely seeking entry to the country are not. In the first place, it should be noted that the presence in this country of four of the appellants who were refused entry when they arrived in Canada is due only to the fact that the Act provides for a mechanism for their release from detention. As Ms. Jackman pointed out, a rule which provided Charter protection to refugees who succeeded in entering the country but not to those who were seeking admission at a port of entry would be to reward those who sought to evade the operation of our immigration laws over those who presented their cases openly at the first available opportunity.

100 An equally serious objection, it seems to me, is that the American rule does not differentiate between the special status statutorily accorded to Convention refugees who are present in this country and the status of other individuals who are seeking to enter or remain in Canada. As I understand the American law, the constitutional protection of the Fifth and Fourteenth Amendments has long been available to aliens whom the government is seeking to remove from the United States (Kuoru Yamataya v. Fisher (The Japanese Immigrant case), 189 U.S. 86 (1903)) but such protection is not available to those seeking entry which the government has decided to refuse (U.S. ex. rel. Knauff v. Shaughnessy supra). The rationale of this distinction as articulated in Knauff and more fully in Shaughnessy v. U.S. ex. rel. Mezei, 345 U.S. 206 at 210 (1953), is that "Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." Seen

in this sense, the deference which American Courts have shown to the political branches of government in the field of immigration has been described as one aspect of the political questions doctrine: see Scharpf "Judicial Review and the Political Question: A Functional Analysis" (1966), 75 Yale L.J. 517 at 578-83.

101 Two observations about this approach will suffice for present purposes. The first is that recently the United States Supreme Court has been more reluctant to employ the political questions doctrine to provide the executive and legislative branches of government with an unreviewable authority over the regulation of aliens: see Immigration & Naturalization Service (I.N.S.) v. Chadha, 77 L. Ed. 2d 317 at 338-40, 462 U.S. 919 (1983) (per Burger C.J.). Second, and more importantly, it seems to me that in the Canadian context Parliament has in the Immigration Act made many of the "political" determinations which American Courts have been justifiably reluctant to attempt to get involved in themselves. On these appeals this Court is being asked by the appellants to accept that the substantive rights of Convention refugees have been determined by the Immigration Act itself and the Court need concern itself only with the question whether the procedural scheme set up by the Act for the determination of that status is consistent with the requirements of fundamental justice articulated in s. 7 of the Charter. I see no reason why the Court should limit itself in this inquiry or establish distinctions between classes of refugee claimants which are not mandated by the Act itself. It is unnecessary for the Court to consider what it would do if it were asked to engage in a larger inquiry into the substantive rights conferred in the Act.

102 In summary, I am of the view that the rights which the appellants are seeking to assert are ones which entitle them to the protection of s. 7 of the Charter. It is necessary therefore to consider whether the procedures for the determination of refugee status as set out in the Act accord with fundamental justice.

(2) Is Fundamental Justice Denied by the Procedures for the Determination of Convention Refugee Status set out in the Act?

103 All counsel were agreed that at a minimum the concept of "fundamental justice" as it appears in s. 7 of the Charter includes the notion of procedural fairness articulated by Fauteux C.J.C. in Duke v. R., [1972] S.C.R. 91718 C.R.N.S. 3027 C.C.C. (2d) 47428 D.L.R. (3d) 129(S.C.C.). At p. 923 he said:

> Under s. 2(e) of the Bill of Rights no law of Canada shall be construed or applied so as to deprive him of 'a fair hearing in accordance with the principles of fundamental justice'. Without attempting to formulate any final definition of those words, I would take them to mean, generally, that the tribunal which adjudicates upon his rights must act fairly, in good faith, without bias and in a judicial temper, and must give to him the opportunity adequately to state his case.

104 Do the procedures set out in the Act for the adjudication of refugee status claims meet this test of procedural fairness? Do they provide an adequate opportunity for a refugee claimant to state his case and know the case he has to meet? This seems to be the question we have to answer and, in approaching it, I am prepared to accept Mr. Bowie's submission that procedural fairness may demand different things in different contexts: see Martineau No. 2, supra, at p. 630. Thus it is possible that an oral hearing before the decision-maker is not required in every case in which s. 7 of the Charter is called into play. However, I must confess to some difficulty in reconciling Mr. Bowie's argument that an oral hearing is not required in the context of this case with the interpretation he seeks to put on s. 7. If "the right to life, liberty and security of the person" is properly construed as relating only to matters such as death, physical liberty and physical punishment, it would seem on the surface at least that these are matters of such fundamental importance that procedural fairness would invariably require an oral hearing. I am prepared, nevertheless, to accept for present purposes that written submissions may be an adequate substitute for an oral hearing in appropriate circumstances.

105 I should note, however, that even if hearings based on written submissions are consistent with the principles of fundamental justice for some purposes, they will not be satisfactory for all purposes. In particular, I am of the view that where a serious issue of credibility is involved, fundamental justice requires that credibility be determined on the basis of an oral hearing. Appellate Courts are well aware of the inherent weakness of written transcripts where questions of credibility are at stake and thus are extremely loath to review the findings of tribunals which have had the benefit of hearing the testimony of witnesses in person: see Stein v. The "Kathy K", [1976] 2 S.C.R. 802 at 806-0862 D.L.R. (3d) 1, 6 N.R. 359 (per Ritchie J.). I find it difficult to conceive of a situation in which compliance with fundamental justice could be achieved by a tribunal making significant findings of credibility solely on the basis of written submissions.

106 As I have suggested, the absence of an oral hearing need not be inconsistent with fundamental justice in every case. My greatest concern about the procedural scheme envisaged by ss. 45 to 58 and 70 and 71 of the Immigration Act is not, therefore, with the absence of an oral hearing in and of itself, but with the inadequacy of the opportunity the scheme provides for a refugee claimant to state his case and know the case he has to meet. Mr. Bowie argued that since the procedure under s. 45 was an administrative one, it was quite proper for the Minister and the Refugee Status Advisory Committee to take into account policy considerations and information about world affairs to which the refugee claimant had no opportunity to respond. However, in my view the proceedings before the Immigration Appeal Board were quasi-judicial and the board was not entitled to rely on material outside the record which the refugee claimant himself submitted on his application for redetermination: see Permaul v. Min. of Employment & Immigration (unreported judgment of the Federal Court of Appeal, No. A-576-83, dated November 24, 1983 [now reported 53 N.R. 323]); Saraos v. Min. of Employment & Immigration, [1982] 1 F.C. 304 at 308-0938 N.R. 170(Fed. C.A.). Mr. Bowie submitted that there was no case against

the refugee claimant at that stage; it was merely his responsibility to make a written submission which demonstrated on the balance of probabilities that he would be able to establish his claim at a hearing. If the applicant failed to bring forward the requisite facts his claim would not be allowed to proceed, but there was nothing fundamentally unfair in this procedure.

107 It seems to me that the basic flaw in Mr. Bowie's characterization of the procedure under ss. 70 and 71 is his description of the procedure as non-adversarial. It is in fact highly adversarial but the adversary, the Minister, is waiting in the wings. What the board has before it is a determination by the Minister based in part on information and policies to which the applicant has no means of access that the applicant for redetermination is not a Convention refugee. The applicant is entitled to submit whatever relevant material he wishes to the board but he still faces the hurdle of having to establish to the board that on the balance of probabilities the Minister was wrong. Moreover, he must do this without any knowledge of the Minister's case beyond the rudimentary reasons which the Minister has decided to give him in rejecting his claim. It is this aspect of the procedures set out in the Act which I find impossible to reconcile with the requirements of "fundamental justice" as set out in s. 7 of the Charter.

108 It is perhaps worth noting that if the Immigration Appeal Board allows a redetermination hearing to proceed pursuant to s. 71(1), the Minister is entitled pursuant to s. 71(2) to notice of the time and place of the hearing and a reasonable opportunity to be heard. It seems to me that, as a matter of fundamental justice, a refugee claimant would be entitled to discovery of the Minister's case prior to such a hearing. It must be acknowledged, of course, that some of the information upon which the Minister's case would be based might be subject to Crown privilege. But the Courts are well able to give the applicant relief if the Minister attempts to make an overly broad assertion of privilege: see Canada Evidence Act, S.C. 1980-81-82-83, c. 111, Sched. III, s. 36.1.

109 Under the Act as it presently stands, however, a refugee claimant may never have the opportunity to make an effective challenge to the information or policies which underlie the Minister's decision to reject his claim. Because s. 71(1) requires the Immigration Appeal Board to reject an application for redetermination unless it is of the view that it is more likely than not that the applicant will be able to succeed, it is apparent that an application will usually be rejected before the refugee claimant has had an opportunity to discover the Minister's case against him in the context of a hearing. Indeed, given the fact that s. 71(1) resolves any doubt as to whether or not there should be a hearing against the refugee claimant, I find it difficult to see how a successful challenge to the accuracy of the undisclosed information upon which the Minister's decision is based could ever be launched.

110 I am accordingly of the view that the procedures for determination of refugee status claims as set out in the Immigration Act do not accord refugee claimants fundamental justice in the adjudication of those claims and are thus incompatible with s. 7 of the Charter. It is therefore necessary to go forward to the third stage of the inquiry and determine whether the shortcomings of

these procedures in relation to the standards set out by s. 7 constitute reasonable limits which can be demonstrably justified in a free and democratic society within the meaning of s. 1 of the Charter.

(3) Can the Procedures be Saved Under s. 1 of the Charter?

111 Section 1 of the Charter reads:

> 1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

It follows, accordingly, that if the limitations on the rights set out in the Charter meet the test articulated in s. 1, the Charter has not been violated and the Court's remedial powers thereunder are not called into play.

112 The question of the standards which the Court should use in applying s. 1 is, without a doubt, a question of enormous significance for the operation of the Charter. If too low a threshold is set, the Courts run the risk of emasculating the Charter. If too high a threshold is set, the Courts run the risk of unjustifiably restricting government action. It is not a task to be entered upon lightly.

113 Unfortunately, counsel devoted relatively little time in the course of argument to the principles the Court should espouse in applying s. 1. This is certainly understandable given the complexity of the other issues which are in one sense preliminary to the application of s. 1. It is nevertheless to be regretted. A particular disappointment is the limited scope of the factual material brought forward by the respondent in support of the proposition that the Immigration Act's provisions constitute a "reasonable limit" on the appellants rights. It must be acknowledged that counsel operated under considerable time pressure in the preparation of these appeals and I do not intend these remarks as a criticism of the presentation made to the Court by counsel which was, indeed, extremely valuable. On the other hand, I feel constrained to echo the observations made by Estey J. in L.S.U.C. v. Skapinker, [1984] 1 S.C.R. 357 at 384, 11 C.C.C. (3d) 4818 C.R.R. 1939 D.L.R. (4th) 1613 O.A.C. 32153 N.R. 169(S.C.C.), where he said:

> As experience accumulates, the law profession and the courts will develop standards and practices which will enable the parties to demonstrate their position under s. 1 and the courts to decide issues arising under that provision. May it only be said here, in the cause of being helpful to those who come forward in similar proceedings, that the record on the s. 1 issue was indeed minimal, and without more, would have made it difficult for a court to determine the issue as to whether a reasonable limit on a prescribed right had been demonstrably justified.

114 Mr. Bowie's submissions on behalf of the Minister with respect to s. 1 were that Canadian procedures with respect to the adjudication of refugee claims had received the approbation of the office of the United Nations High Commissioner for Refugees and that it

was not uncommon in Commonwealth and Western European countries for refugee claims to be adjudicated administratively without a right to appeal. He further argued that the Immigration Appeal Board was already subjected to a considerable strain in terms of the volume of cases which it was required to hear and that a requirement of an oral hearing in every case where an application for redetermination of a refugee claim has been made would constitute an unreasonable burden on the board's resources.

115 One or two comments are in order respecting this approach to s. 1. It seems to me that it is important to bear in mind that the rights and freedoms set out in the Charter are fundamental to the political structure of Canada and are guaranteed by the Charter as part of the supreme law of our nation. I think that in determining whether a particular limitation is a reasonable limit prescribed by law which can be "demonstrably justified in a free and democratic society" it is important to remember that the Courts are conducting this inquiry in light of a commitment to uphold the rights and freedoms set out in the other sections of the Charter. The issue in the present case is not simply whether the procedures set out in the Immigration Act for the adjudication of refugee claims are reasonable; it is whether it is reasonable to deprive the appellants of the right to life, liberty and security of the person by adopting a system for the adjudication of refugee status claims which does not accord with the principles of fundamental justice.

116 Seen in this light I have considerable doubt that the type of utilitarian consideration brought forward by Mr. Bowie can constitute a justification for a limitation on the rights set out in the Charter. Certainly the guarantees of the Charter would be illusory if they could be ignored because it was administratively convenient to do so. No doubt considerable time and money can be saved by adopting administrative procedures which ignore the principles of fundamental justice but such an argument, in my view, misses the point of the exercise under s. 1. The principles of natural justice and procedural fairness which have long been espoused by our Courts, and the constitutional entrenchment of the principles of fundamental justice in s. 7, implicitly recognize that a balance of administrative convenience does not override the need to adhere to these principles. Whatever standard of review eventually emerges under s. 1, it seems to me that the basis of the justification for the limitation of rights under s. 7 must be more compelling than any advanced in these appeals.

117 Moreover, I am not convinced in light of the submissions made by the appellants that the limitations on the rights of refugee claimants which are imposed by the adjudication procedures of the Immigration Act are reasonable even on the respondent's own terms. It is obvious that there is a considerable degree of dissatisfaction with the present system even on the part of those who administer it. In an address given in Toronto on October 25, 1980, Janet Scott, Q.C., the chairman of the Immigration Appeal Board made the following remarks:

> There is no blinking at the fact that the sections dealing with the Board's jurisdiction in refugee redetermination are highly unsatisfactory. Leaving aside any consideration of natural justice,

> the system is extremely cumbersome and when we enter into the sphere of natural justice, open to criticism as unjust.

118 In September 1980 the Minister of Employment and Immigration established a Task Force on Immigration Practices and Procedures and in November 1981 the Task Force issued a report entitled The Refugee Status Determination Process. The Task Force recommended wholesale changes in the procedures employed in the determination of refugee claims, including a recommendation that "A refugee claimant should be entitled to a hearing in every case where the [Refugee Status Advisory Committee] is not prepared to make a positive recommendation on the basis of the transcript." (Report p. xvi) In its conclusion, the Task Force discussed the impact of its recommendation that an oral hearing be given in each case. At p. 103 the Report states:

> In the end, then, the question is one of resources. Would the additional expenditures be warranted? How does one do a cost-benefit analysis where the 'benefit' is to be found in vague concepts, such as 'fairness' and 'justice'? One approach may be to canvass other forms of adjudication by federal tribunals and compare the significance of their decisions and the kinds of hearings which they offer with those of the refugee determination process. Without referring to specific bodies or in any way denigrating the importance of their work, the impact of their decisions often pales in comparison to refugee determination. Yet they generally offer far more in the way of procedural fairness.

119 Even if the cost of compliance with fundamental justice is a factor to which the Courts would give considerable weight, I am not satisfied that the Minister has demonstrated that this cost would be so prohibitive as to constitute a justification within the meaning of s. 1. Though it is tempting to make observations about what factors might give rise to justification under s. 1, and on the standards of review which should be applied with respect to s. 1, I think it would be unwise to do so. I therefore confine my observations on the application of section 1 to those necessary for the disposition of the appeals.

120 To recapitulate, I am persuaded that the appellants are entitled to assert the protection of s. 7 of the Charter in the determination of their claims to Convention refugee status under the Immigration Act. I am further persuaded that the procedures under the Act as they were applied in these cases do not meet the requirements of fundamental justice under s. 7 and that accordingly the appellants rights under s. 7 were violated. Finally, I believe that the respondent has failed to demonstrate that the procedures set out in the Act constitute a reasonable limit on the appellants rights within the meaning of s. 1 of the Charter. I would accordingly allow the appeals. In so doing I should, however, observe that the acceptance of certain submissions, particularly concerning the scope of s. 7 of the Charter in the context of these appeals, is not intended to be definitive of the scope of the section in other contexts. I do not by any means foreclose the possibility that s. 7 protects a wider range of interests than those involved in these appeals.

4. Remedies

121 I turn now to the issue of the remedy to which the appellants are entitled. Sections 24(1) and 52(1) of the Charter both apply. Section 52(1) requires a declaration that s. 71(1) of the Immigration Act is of no force and effect to the extent it is inconsistent with s. 7. The appellants who have suffered as a result of the application of an unconstitutional law to them are entitled under s. 24(1) to apply to a Court of competent jurisdiction for "such remedy as the court considers appropriate and just in the circumstances". What remedy is available in the context of this case?

122 The Court's jurisdiction is invoked in two contexts. In the first, these are appeals from dismissals by the Federal Court of Appeal of applications for judicial review under s. 28 of the Federal Court Act. In this context the Court is limited to the powers the Federal Court is entitled to exercise pursuant to s. 28. In the other context, however, the Court's broad remedial powers under s. 24 of the Charter are invoked.

123 The significance of the limitation of the Court's judicial review power under s. 28 of the Federal Court Act is apparent from the decision of Urie J. in Brempong v. Min. of Employment & Immigration, supra. In that case, Urie J. observed that s. 28 provided the Federal Court of Appeal with supervisory powers only over decisions made on a "judicial or quasi-judicial basis" and that accordingly the Court had no jurisdiction to review what he characterized as an "administrative" decision by the Minister under s. 45 of the Immigration Act. The board is a quasi-judicial body and without doubt its determinations are subject to review under s. 28. The question the Court faces, as I see it, is whether the broader remedial power which it possesses under s. 24(1) of the Charter entitles it to extend its review of possible violations of the Charter to the ministerial determinations made pursuant to s. 45 of the Immigration Act. In my view it does not.

124 Section 24(1) of the Charter provides remedial powers to "a court of competent jurisdiction". As I understand this phrase, it premises the existence of jurisdiction from a source external to the Charter itself. This Court certainly has jurisdiction to review the decisions of the Immigration Appeal Board in these cases pursuant to s. 28 of the Federal Court Act. If the appeals originated as petitions for certiorari brought in the Trial Division of the Federal Court pursuant to s. 18 of the Federal Court Act, the ministerial decisions made pursuant to s. 45 of the Immigration Act would be subject to review. In my view, however, any violations of the Charter which arose out of ministerial decisions under s. 45 are not subject to review on these appeals because of the judicial limitations on the Federal Court of Appeal under s. 28 of the Federal Court Act. I would accordingly make no observations with respect to them or with respect to the question of whether or to what extent s. 45 of the Immigration Act is of no force and effect as a result of any inconsistency with the Charter.

125 Confining myself to the decisions of the Immigration Appeal Board which are under review, I would allow the appeals, set aside the decisions of the Federal Court of Appeal and of

the Immigration Appeal Board and remand all seven cases for a hearing on the merits by the board in accordance with the principles of fundamental justice articulated above. Since s. 71(1) of the Immigration Act, which restricts the board's power to allow hearings to proceed to cases in which it is of the opinion that the applicant for redetermination is more likely than not to succeed upon a hearing of his claim, is inconsistent with the principles of fundamental justice set out in s. 7 of the Charter, the appellants are also entitled to a declaration that s. 71(1) is of no force and effect to the extent of the inconsistency.

126 I would award costs on the application for leave to appeal and costs of the appeal to this Court to Mr. Satnam Singh on a solicitor-client basis. Costs in respect of the other six appellants shall be as prescribed by the order of this Court dated February 16, 1984.

***Le Juge Beetz (JJ. Estey* et *McIntyre* souscrivant):**

Version française des motifs

127 Le principal point litigieux débattu à l'audition de ces pourvois, les 30 avril et 1er mai 1984, était de savoir si la procédure prescrite par la Loi sur l'immigration, S.C. 1976-77, ch. 52 et ses modifications, pour statuer sur les revendications du statut de réfugié au Canada, empêche les personnes qui revendiquent ce statut de faire valoir les droits qui leur sont reconnus par l'art. 7 de la Charte canadienne des droits et libertés. A l'époque, aucun argument n'a porté sur l'application possible de la Déclaration canadienne des droits à ces pourvois.

128 Le 7 décembre 1984, le registraire adjoint a écrit aux avocats pour les informer que les membres de la Cour aimeraient recevoir par écrit leurs observations sur l'application de la Déclaration canadienne des droits. Les avocats de toutes les parties et des intervenants se sont rendus à cette demande et les avocats des appelants ont également présenté leur réponse par écrit.

129 A l'instar de ma collègue, Madame le juge Wilson, dont j'ai eu l'avantage de lire les motifs de jugement, je conclus que ces pourvois doivent être accueillis. Cependant, je le fais en fonction de la Déclaration canadienne des droits. Je m'abstiens d'exprimer une opinion sur la question de savoir si la Charte canadienne des droits et libertés s'applique d'aucune manière aux circonstances de ces affaires et, plus particulièrement, sur l'importante question de savoir si la Charte offre une protection quelconque contre les atteintes ou menaces d'atteintes au droit à la vie, à la liberté ou à la sécurité de la personne par des gouvernements étrangers.

130 L'article 26 de la Charte canadienne des droits et libertés doit être gardé à l'esprit. Il porte:

> 26. Le fait que la présente charte garantit certains droits et libertés ne constitue pas une négation des autres droits ou libertés qui existent au Canada.

131 Ainsi, la Déclaration canadienne des droits conserve toute sa force et son effet, de même que les diverses chartes des droits provinciales. Comme ces instruments constitutionnels ou quasi constitutionnels ont été rédigés de diverses façons, ils sont susceptibles de produire des effets cumulatifs assurant une meilleure protection des droits et des libertés. Ce résultat bénéfique sera perdu si ces instruments tombent en désuétude. Cela est particulièrement vrai dans le cas où ils contiennent des dispositions qu'on ne trouve pas dans la Charte canadienne des droits et libertés et qui paraissent avoir été spécialement conçues pour répondre à certaines situations de fait comme de celles en cause en l'espèce.

132 Je renvoie à l'exposé des faits de ma collègue, à l'historique des procédures relatives aux sept pourvois et, en général, à ses citations des dispositions pertinentes de la Loi sur l'immigration de 1976, ainsi qu'à sa description de l'économie de la Loi.

133 Le point principal, selon moi, est de savoir si la procédure de reconnaissance du statut de réfugié au sens de la Convention suivie dans ces affaires va à l'encontre de la Déclaration canadienne des droits et, plus particulièrement, de son al. 2e).

134 Pour comprendre l'économie de la Loi sur l'immigration de 1976, il est nécessaire de se reporter à l'ensemble de la procédure applicable pour reconnaître si une personne est un réfugié au sens de la Convention, y compris la procédure de reconnaissance initiale énoncée aux art. 45 à 48 de la Loi, et la procédure de réexamen par la Commission d'appel de l'immigration, énoncée aux art. 70 et 71. Il faut souligner cependant que, dans les présents pourvois, nous ne nous intéressons directement qu'au réexamen effectué par la Commission d'appel de l'immigration conformément au par. 71(1) de la Loi sur l'immigration de 1976, à la suite duquel la Commission a ordonné que les demandes de réexamen des revendications ne suivent pas leur cours et a décidé que les requérants n'étaient pas des réfugiés au sens de la Convention. Les appelants ont demandé sans succès à la Cour d'appel fédérale, conformément à l'art. 28 de la Loi sur la Cour fédérale, S.R.C. 1970, ch. 10 (2e Supp.), d'examiner et d'annuler ces décisions. Mais l'avis donné par le comité consultatif sur le statut de réfugié et les décisions initiales rendues par le Ministre conformément à l'art. 45 de la Loi n'ont pas été contestés et ne font pas l'objet d'un examen dans les présents pourvois formés contre les décisions de la Cour d'appel fédérale. J'insiste sur ce point car plusieurs observations nous ont été faites au sujet de prétendus vices de procédure au stade de la reconnaissance initiale, de même qu'au sujet de divers moyens de remédier à ces vices. Ces moyens, quel que soit leur bien-fondé, ne sont d'aucune aide aux présents appelants qui ont dépassé le stade de la procédure de la reconnaissance initiale. Et, en tout état de cause, dans un pourvoi contre une décision de la Cour d'appel fédérale suite à une demande d'examen en vertu de l'art. 28, notre compétence, au cas où nous ferions droit au pourvoi, se limite à rendre la décision que la Cour d'appel fédérale aurait dû rendre.

135 Comme je l'ai dit précédemment, l'al. 2e), de la Déclaration canadienne des droits est la disposition pertinente, mais il convient également de citer l'art. 1:

> 1. Il est par les présentes reconnu et déclaré que les droits de l'homme et les libertés fondamentales ci-après énoncés ont existé et continueront à exister pour tout individu au Canada quels que soient sa race, son origine nationale, sa couleur, sa religion ou son sexe:
>
> a) le droit de l'individu à la vie, à la liberté, à la sécurité de la personne ainsi qu'à la jouissance de ses biens, et le droit de ne s'en voir privé que par l'application régulière de la loi;
>
> b) le droit de l'individu à l'égalité devant la loi et à la protection de la loi;
>
> c) la liberté de religion;
>
> d) la liberté de parole;
>
> e) la liberté de réunion et d'association, et
>
> f) la liberté de la presse.
>
> 2. Toute loi du Canada, à moins qu'une loi du Parlement du Canada ne déclare expressément qu'elle s'appliquera nonobstant la Déclaration canadienne des droits, doit s'interpréter et s'appliquer de manière à ne pas supprimer, restreindre ou enfreindre l'un quelconque des droits ou des libertés reconnus et déclarés aux présentes, ni à en autoriser la suppression, la diminution ou la transgression, et en particulier, nulle loi du Canada ne doit s'interpréter ni s'appliquer comme
>
> . . . . .
>
> e) privant une personne du droit à une audition impartiale de sa cause, selon les principes de justice fondamentale, pour la définition de ses droits et obligations;

136 Les principaux arguments de Me Scott, l'avocat des six premiers appelants, reçoivent dans une large mesure l'appui de Me Coveney, l'avocat du septième appelant, qui a adopté un point de vue légèrement différent. Voici ces arguments:

> [TRADUCTION]
>
> 2. Les appelants font valoir que l'un ou l'autre des art. 45 et 71 de la Loi sur l'immigration supprime le droit que garantit l'al. 2e) de la Déclaration des droits, à moins que l'on interprète l'un de ces articles comme requérant la tenue d'une audition complète devant le comité consultatif sur le statut de réfugié (CCSR), le Ministre ou la Commission d'appel de l'immigration, auditions qui n'ont eu lieu dans aucun de ces six cas.
>
> 3. Les appelants soutiennent que deux éléments doivent être établis pour démontrer qu'il y a eu violation de l'al. 2e):

1. que les 'droits et obligations' des appelants doivent être 'définis' par le CCSR, le Ministre et la Commission d'appel de l'immigration; et

2. que les appelants n'ont eu droit à 'une audition impartiale de [leur] cause, selon les principes de justice fondamentale' devant aucune de ces autorités constituées par la loi.

137 Me Scott donne alors ce qui me paraît être un résumé exact des droits que confère la Loi sur l'immigration de 1976 et le Règlement à un réfugié au sens de la Convention qui se trouve au Canada:

[TRADUCTION]

1. le 'droit de demeurer au Canada' si un permis du Ministre est obtenu; ou (Loi sur l'immigration, par. 4(2))

2. si un permis du Ministre ne peut être obtenu, alors:

a) le droit de ne pas être renvoyé dans un pays où sa vie ou sa liberté seraient menacées; (Loi sur l'immigration, art. 55)

b) s'il a été renvoyé du Canada, le droit d'y revenir si un pays sûr ne peut être trouvé; et (Loi sur l'immigration, al. 14(1)c))

c) le droit à l'examen de son cas selon les critères prévus dans le Règlement, afin d'obtenir 'un permis de travail' pendant qu'il réside au Canada. (Règlement, al. 19(3)k) et art. 20)

138 Me Scott conclut alors le premier volet de son argumentation ainsi:

[TRADUCTION]

10. On fait valoir que puisque les réfugiés au sens de la Convention jouissent de ces droits en vertu da la loi en vigeur au Canada, la personne qui revendique le statut de réfugié aux termes des art. 45 ou 70 de la Loi remplit la première condition requise pour pouvoir réclamer la protection de la 'justice fondamentale' prévue à l'al. 2e) de la Déclaration des droits, savoir qu'une loi du Canada prescrit une procédure 'pour la définition de ses droits'.

139 Dans ses observations écrites, Me Bowie, le substitut du procureur général du Canada, concède ce qui suit:

[TRADUCTION]

2. Le procureur général du Canada ne conteste pas que le processus d'examen et de réexamen des revendications du statut de réfugié comporte la définition des droits et des obligations de ceux qui le revendiquent. Ce n'est que sur ce point que ses observations portant sur l'al.

> 2e) de la Déclaration des droits diffèrent de ses observations concernant l'art. 7 de la Charte canadienne des droits et libertés. On a soutenu à l'audition de ces pourvois que le rejet d'une revendication du statut de réfugié par application du droit canadien ne prive pas celui qui le revendique du 'droit à la vie, à la liberté et à la sécurité de sa personne' garanti par l'art. 7 de la Charte.

140 Dans sa réponse, Me Scott mentionne le fait que le procureur général a reconnu que la procédure prescrite par la Loi sur l'immigration pour statuer sur les revendications du statut de réfugié comporte la définition de "droits et obligations". Me Scott conclut ensuite:

> [TRADUCTION]
>
> Il reste donc à déterminer si la procédure prescrite par la Loi est conforme aux impératifs de la justice fondamentale.

141 Compte tenu de la dernière phrase de la reconnaissance du procureur général, je ne suis pas tout à fait convaincu qu'il ait reconnu que les "droits" mentionnés à l'al. 2e) de la Déclaration canadienne des droits ne sont pas les mêmes droits, ou des droits de même nature, que ceux énumérés à l'art. 1, dont "le droit de l'individu à la vie, à la liberté, à la sécurité de la personne ... et le droit de ne s'en voir privé que par l'application régulière de la loi".

142 Quoi qu'il en soit, il me semble évident que l'al. 2e) a une portée plus large que la liste des droits énumérés à l'art. 1 et désignés comme "droits de l'homme et libertés fondamentales", tandis qu'à l'al. 2e), ce que protège le droit à une audition impartiale, c'est la définition des "droits et obligations" d'une personne quels qu'ils soient et dans tous les cas où le processus de définition relève de l'autorité législative du Parlement du Canada. Il est vrai que la première partie de l'art. 2 parle "des droits ou des libertés reconnus et déclarés aux présentes", mais l'al. 2e) protège un droit fondamental, savoir le "droit à une audition impartiale de sa cause, selon les principes de justice fondamentale", pour la définition des droits et des obligations d'une personne, qu'ils soient fondamentaux ou non. Je suis d'avis que comme l'a fait valoir Me Coveney, il est possible d'appliquer l'al. 2e) sans se référer à l'art. 1 et que le droit garanti par l'al. 2e) n'est nullement limité par la notion "d'application régulière de la loi" mentionnée l'al. 1a).

143 En conséquence, la procédure d'examen et de réexamen des revendications du statut de réfugié par les appelants comporte la définition de droits et d'obligations à l'égard desquels les appelants ont droit, en vertu de l'al. 2e) de la Déclaration canadienne des droits, à une audition impartiale selon les principes de justice fondamentale. Il s'ensuit également que cette affaire peut être distinguée de celles où un simple privilège a été refusé ou révoqué comme, par exemple, dans les affaires Prata c. Ministre de la Main-d'oeuvre et de l'Immigration, [1976] 1 R.C.S. 37652 D.L.R. (3d) 3833 N.R. 484(C.S.C.), et Mitchell c. R., [1976] 2 R.C.S. 570[1976] 1 W.W.R. 57724 C.C.C. (2d) 2416 D.L.R. (3d) 776 N.R. 389(C.S.C.).

144 Je suis donc d'accord avec le premier volet de l'argumentation de Me Scott.

145 Il reste à décider si, dans les présentes espèces, les appelants ont eu droit "à une audition impartiale de [leur] cause, selon les principes de justice fondamentale".

146 Je suis convaincu que non.

147 Ce dont les appelants sont principalement justifiés de se plaindre, à mon avis, c'est que leur revendication du statut de réfugié ont été rejetées de manière définitive sans qu'ils aient pu bénéficier d'une audition complète à aucun moment au cours des procédures devant l'un ou l'autre des organismes ou fonctionnaires habilités à statuer sur le fond de leurs revendications. Ils ont en fait été entendus par un seul fonctionnaire qui n'a rien à dire dans cette affaire, savoir un agent d'immigration supérieur. Mais ils n'ont été entendus ni par le comité consultatif sur le statut de réfugié qui pouvait conseiller le Ministre, ni par le Ministre qui jouissait d'un pouvoir décisionnel et qui a rejeté leur revendication, ni par la Commission d'appel de l'immigration qui n'a pas laissé leur demande suivre son cours et qui a décidé, en dernière analyse, qu'ils n'étaient pas des réfugiés au sens de la Convention.

148 Je ne veux pas laisser entendre que les principes de justice fondamentale exigent la tenue d'audition dans tous les cas. Dans l'arrêt P.G. Can. c. Inuit Tapirisat du Can. [1980] 2 R.C.S. 735 à 747, 115 D.L.R. (3d) 133, N.R. 304(C.S.C.) le juge Estey, s'exprimant au nom de la Cour, cite l'opinion du lord juge Tucker dans l'arrêt Russell v. Duke of Norfolk, [1949] 1 All E.R. 109 à 118 (C.A.):

> [TRADUCTION]
>
> Les exigences de la justice naturelle doivent varier selon les circonstances de l'affaire, la nature de l'enquête, les règles qui régissent le tribunal, la question traitée, etc.

149 Les facteurs les plus importants lorsqu'il s'agit de déterminer le contenu de la justice fondamentale sur le plan de la procédure dans un cas donné sont la nature des droits en cause et la gravité des conséquences pour les personnes concernées. A la même page de l'arrêt Inuit Tapirisat, le juge Estey cite également lord Denning dans Selvarajan v. Race Relations Bd., [1976] 1 All E.R. 12 à 19, [1975] 1 W.L.R. 1686 (sub nom. R. v. Race Relations Bd.; Ex parte Selvarajan):

> [TRADUCTION]
>
> ... les exigences de l'équité dépendent de la nature de l'enquête et de ses conséquences pour les personnes en cause. La règle fondamentale est que dès qu'on peut infliger des peines ou sanctions à une personne ou qu'on peut la poursuivre ou la priver de recours, de redressment ou lui faire subir de toute autre manière un préjudice en raison de l'enquête et du rapport, il faut l'informer de la nature de la plainte et lui permettre d'y répondre.

150 Dans les présentes espèces, les sept appelants ont énoncé sous serment les motifs pour lesquels ils prétendent être des réfugiés au sens de la Convention. L'expression "réfugié au sens de la Convention" est définie au par. 2(1) de la Loi sur l'immigration de 1976:

> 'réfugié au sens de la Convention' désigne toute personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques.
>
> a) se trouve hors du pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de ce pays, ou
>
> b) qui, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ou, en raison de ladite crainte, ne veut y retourner;

151 Loi sur l'immigration de 1976 accorde aux réfugiés au sens de la Convention le droit de "demeurer" au Canada, ou s'il est impossible d'obtenir un permis du Ministre, au moins le droit de ne pas être renvoyé dans un pays où leur vie et leur liberté sont menacées et le droit de rentrer au Canada si aucun pays sûr n'est disposé à les accepter. Les droits en cause dans les présentes espèces sont donc d'une importance vitale pour les personnes concernées.

152 Les six premiers appelants invoquent les arguments suivants:

> [TRADUCTION]
>
> 18. Les appelants soutiennent que le fait que la menace à la vie, à la liberté ou à la sécurité physique provient d'un Etat étranger dans les affaires concernant des réfugiés est sans importance pour ce qui est de la question juridique dont est maintenant saisie la Cour en vertu de la Déclaration canadienne des droits. Dans l'analyse de l'application de l'art. 7 de la Charte dans les présents cas, il se peut que l'endroit d'où provient la menace à la vie, à la liberté ou à la sécurité de la personne soit pertinent, parce que pour se prévaloir de la protection de la 'justice fondamentale' en vertu de la Charte, les appelants doivent prouver une atteinte au droit à la vie, à la liberté ou à la sécuritié de la personne garanti par l'art. 7. Probablement, seul un gouvernement canadien peut violer la Charte des droits et liberté, notamment l'art. 7. Pour ce motif, lors de l'audition devant cette Cour, les appelants ont fondé leur recours à la Charte sur le fait que le gouvernement du Canada a violé leur liberté en les arrêtant et en les détenant jusqu'à ce que leur 'renvoi' du Canada puisse avoir lieu.
>
> 19. Toutefois, en vertu de l'al. 2e) de la Déclaration des droits, les appelants n'ont pas besoin de démontrer que le gouvernement canadien a porté atteinte à leur vie, à leur liberté ou à leur sécurité physique. Ils doivent plutôt démontrer que leurs 'droits' doivent être 'définis' par une loi fédérale. Lorsqu'il s'agit d'interpréter et d'appliquer la Loi sur l'immigration,

conformément aux termes de l'al. 2e) de la Déclaration des droits, les menaces à la vie ou à la liberté de la part d'une puissance étrangère sont donc pertinentes ...

153 Encore une fois, je ne me prononce pas sur l'applicabilité de la Charte des droits et libertés, mais par ailleurs, je suis d'accord avec ces moyens: les menaces à la vie ou à la liberté de la part d'une puissance étrangère sont pertinentes en ce qui concerne non pas l'applicabilité de la Déclaration canadienne des droits, mais le genre d'audition justifiée dans les circonstances. A mon sens, rien de moins n'est suffisant que la tenue d'une audition complète avant la décision sur le fond.

154 Il y a d'autres motifs pour lesquels les appelants auraient dû bénéficier d'une audition. Ils sont énoncés dans l'argument suivant que j'accepte:

[TRADUCTION]

Les appelants soutiennent que même si la 'justice fondamentale' n'exige pas la tenue d'une audition dans chaque cas, lorsque la vie ou la liberté peut dépendre de conclusions de fait et de la crédibilité, ce qui peut être le cas dans les présentes espèces, la possibilité de soumettre des observations écrites, même assortie de la possibilité de répondre par écrit aux allégations de fait et de droit défavorables, est insuffisante.

155 Enfin, je tiens à citer un extrait des motifs rédigés par le juge Pigeon dissident, dans Ernewein c. Ministre de l'Emploi et de l'Immigration, [1980] 1 R.C.S. 639, aux pp. 657 et suivantes, 14 C.P.C. 264103 D.L.R. (3d) 130 N.R. 316(C.S.C.):

Il faut d'abord faire remarquer que l'appelante a revendiqué le statut de réfugiée conformément à des modifications à la Loi sur la Commission d'appel de l'immigration (S.R.C. 1970, chap. I-3, 'la Loi') apportées par la Loi de 1973, 21-22 Eliz. II, chap. 17, art. 1 et 5. (La Loi sur l'immigration de 1976 (25-26 Eliz. II, chap. 52), quoique sanctionnée le 5 août 1977, n'a été proclamée en vigueur que le 10 avril 1978.)

La première modification mentionnée a ajouté à l'art. 2 de la Loi la définition suivante:

'Convention' désigne la Convention des Nations Unies relative au statut des réfugiés, signée à Genève le 28 juillet 1951, et comprend tout protocole à cette Convention que le Canada a ratifié ou auquel il a adhéré;

L'autre modification a remplacé l'art. 11 par un nouvel article dont voici les parties pertinentes:

11. (1) Sous réserve des paragraphes (2) et (3), une personne frappée d'une ordonnance d'expulsion, en vertu de la Loi sur l'immigration, peut, en se fondant sur un motif d'appel qui implique une question de droit, une question de fait ou une question mixte de droit et de fait, interjeter appel devant la Commission, si au moment où l'ordonnance d'expulsion est prononcée contre elle, elle est

. . . . .

c) une personne qui prétend être un réfugié que protège la Convention; ou

(2) Lorsqu'un appel est interjeté devant la Commission conformément au paragraphe (1) et que le droit d'appel se fonde sur l'une des prétentions visées par les alinéas (1)c) ou d), l'avis d'appel présenté à la Commission doit contenir une déclaration sous serment énonçant

a) la nature de la prétention;

b) un éconcé suffisamment détaillé des faits sur lesquels se fonde la prétention;

c) un résumé suffisamment détaillé des renseignments et de la prevue que l'appelant entend présenter à l'appui de la prétention lors de l'audience de l'appel; et

d) tout autre exposé que l'appelant estime pertinent en ce qui concerne la prétention.

(3) Nonobstant toute autre disposition de la présente loi, lorsque la Commission reçoit un avis d'appel et que l'appel se fonde sur une prétention visée par les alinéas (1)c) ou d), un groupe de membres de la Commission formant quorum doit immédiatement examiner la déclaration mentionnée au paragraphe (2). Si, se fondant sur cet examen, la Commission estime qu'il existe des motifs raisonnables de croire que le bien-fondé de la prétention pourrait être établi si'il y avait audition de l'appel suive son cours; sinon, elle doit refuser cette autorisation et ordonner immédiatement, l'exécution aussi prompte que possible de l'ordonnance d'expulsion.

[p. 659]:

En l'espèce, l'appelante n'a reçu aucune indication des motifs pour lesquels sa revendication du statut de réfugiée a été rejetée et, à mon avis, cela soulève une très grave question. La Commission d'appel de l'immigration n'est pas un organisme administratif, mais une 'cour d'archives' (art. 7, maintenant art. 65). Elle doit donc être soumise à la règle qu'il ne suffit pas que justice soit rendue, *il doit être manifeste qu'elle est rendue*. C'est aussi un principe bien établi que la règle audi alteram partem est une règle de justice naturelle que la common law a adoptée si fermement qu'elle s'applique à tous ceux qui remplissent des fonctions de nature judiciaire et ne peut être exclue que de façon expresse. Voir: L'Alliance des Professeurs Catholiques de Montréal c. La Commission des relations de travail [[1953] 2 R.C.S. 140] où le juge en chef Rinfret a dit à la p. 154:

> Le principe que nul ne doit être condamné ou privé de ses droits sans être entendu, et surtout sans avoir même reçu avis que ses droits seraient mis en jeu est d'une équité universelle et ce n'est pas le silence de la loi qui devrait être invoqué pour en priver quelqu'un. A mon avis, il ne faudrait rien moins qu'une déclaration expresse du législateur pour mettre de côté cette exigence qui s'applique à tous les tribunaux et à tous

> les corps appelés à rendre une décision qui aurait pour effet d'annuler un droit possédé par un individu.

> Dans Komo Construction Inc. c. La Commission des relations de travail [[1968] R.C.S. 172] cette Cour a confirmé une décision rendue sans qu'il y ait en d'audition lorsque les parties avaient eu l'occasion de présenter une plaidoirie écrite et la Commission avait rendu des motifs. C'est là une situation fort différente de celle soumise en l'espèce où il n'y a pas eu d'audition et où aucun motif n'a été rendu. Dans MacDonald, c. La Reine, [[1977] 2 R.C.S. 665] cette Cour a confirmé une déclaration de culpabilité prononcée par une Cour martiale spéciale bien qu'aucun motif n'ait été donné, mais une audition avait eu lieu. Je ne connais aucun cas où une décision judiciaire a été confirmée lorsqu'il n'y avait pas eu d'audition ni aucun motif donné, de sorte que rien n'indique sur quoi elle se fonde. Il peut en être autrement lorsque la décision est purement discrétionnaire comme l'autorisation d'appel, mais la décision de la Commission en l'espèce statue sur le droit de l'appelante au statut de réfugiée, une question de droit en vertu de la loi et de la Convention, non une question discrétionnaire. Dans Le ministre de la Main-d'oeuvre et de l'Immigration c. Hardayal [[1978] 1 R.C.S. 470] cette Cour a admis que lorsque la loi prévoit la délivrance d'un certificat spécial par décision administrative, celle-ci est définitive et exclut la règle audi alteram partem, mais ce n'est pas le cas à l'égard d'une décision portant sur le statut de réfugié. Celle-ci a été confiée à une commission qui est une 'cour' et doit agir de façon judiciaire comme il ressort de l'arrêt Leiba c. Le ministre de la Main-d'oeuvre et de l'Immigration [[1972] R.C.S. 660].

> Je suis, bien sûr, conscient que la validité du 'jugement' de la Commission d'appel de l'immigration n'est pas directement en cause devant cette Cour et que la décision contestée devant nous est l'ordre de la Cour d'appel fédérale qui refuse l'autorisation d'interjeter appel. Je suis cependant d'avis que pour bien saisir ce qui est en jeu en l'espèce, il est nécessaire de tenir pleinement compte du résultat ultime, que le Canada ayant confié à une cour spéciale la décision sur toute réclamation du statut de réfugié, la décision a été rendue en l'espèce sans la moindre apparence d'application régulière de la loi. Elle ne comporte aucun motif, il n'y a pas eu d'audition, ni d'énoncé des objections du ministre, s'il en est, à la revendication par l'appelante du statut de réfugiée.

156 Il y a lieu de souligner que dans les présentes espèces, tous les appelants ont reçu du Ministre de courts motifs et que deux d'entre eux ont reçu des motifs plus détaillés de la Commission d'appel de l'immigration. Les autres appelants n'ont pas exercé leur droit de demander et de recevoir les motifs de la commission conformément au par. 71(4) de la Loi sur l'immigration de 1976. Mais l'avis du juge Pigeon garde toute sa pertinence quant à la nécessité d'une audition et il est renforcé par la Déclaration canadienne des droits. Comme je l'ai déjà indiqué, il s'agit d'une dissidence, mais ce n'est pas sur ce point qu'elle diffère des motifs de la majorité. Deux autres juges de la cour y ont souscrit. Le juge Pigeon ne mentionne pas expressément la nécessité d'entendre les arguments, ou les dépositions orales des parties, mais c'est ce qu'il doit avoir voulu dire étant donné

la distinction qu'il établit avec l'arrêt Komo Construction [Komo Const. Inc. c. Que. L.R.B., [1968] R.C.S. 17268 C.L.L.C. 14,1081 D.L.R. (3d) 125(C.S.C.)] qui porte sur une situation où il n'y avait pas eu d'audition, et sa mention de l'arrêt MacDonald [MacDonald c. R., [1977] 2 S.C.R. 665, 34 C.C.C. (2d) 175 D.L.R. (3d) 10714 N.R. 421(C.S.C.)], une affaire de Cour martiale spéciale, où il y avait eu une audition.

157 Puisque les appelants ont été privés de leur droit fondamental à une audition, la question se pose de savoir à quel redressement ils ont droit dans les circonstances de l'espèce.

158 Il me semble clair que les ordonnances de la Commission d'appel de l'immigration qui les visent doivent être annulées et que leurs revendicaitons du statut de réfugié au sens de la Convention devraient être jugées au fond aprés la tenue d'auditions complètes. Il s'agit maintenant de savoir qui doit ainsi trancher ces revendications.

159 Pour divers motifs, tous les appelants ont exprimé leur préférence pour une décision à l'étape initiale, c.-à-d. au niveau du Comité consultatif sur le statut de réfugié qui alors non seulement donnerait un avis, mais déciderait conformément à l'al. 2e) de la Déclaration canadienne des droits ou, subsidiairement, au niveau du Ministre qui déciderait d'une façon semblable. Dans leurs plaidoiries écrites, les avocats ont soutenu qu'il était préférable et plus pratique que la situation soit réglée au niveau de première instance plutôt qu'à celui d'appel. On a souligné que dans un communiqué de presse du 2 mai 1983, le ministre de l'Emploi et de l'Immigration a annoncé que pour ceux qui revendiquent le statut de réfugié, des membres du comité consultatif sur le statut de réfugié tiendraient des auditions sur une base expérimentale à Montréal et à Toronto. On a fait remarquer que le texte de l'art. 45 de la Loi sur l'immigration de 1976 n'empêche ni ne défend nullement la tenue d'auditions. On a suggéré de déclarer certaines dispositions des par. 45(4) et 45(5) de la Loi sur l'immigration de 1976 inopérantes pour accorder au comité consultatif sur le statut de réfugié le pouvoir de rendre jugement plutôt que de donner des avis.

160 Ces points pourraient être à-propos s'ils s'adressaient au législateur. Il y a probablement plus d'un moyen de corriger les lacunes constitutionnelles de la Loi sur l'immigration de 1976. Il n'entre pas dans les attributions de cette Cour de rédiger la Loi. Ce n'est pas non plus de son pouvoir. Si la Constitution l'exige, cette Cour et d'autres cours peuvent procéder à des opérations drastiques sur les dispositions législatives défectueuses, mais non à des opérations d'embellissement ou de reconstruction. De plus, pour les motifs de procédure et de compétence mentionnés précédemment, tout ce qui nous est soumis c'est une décision de la Cour d'appel fédérale rejetant des demandes fondées sur l'art. 28 et visant les ordonnances de la Commission d'appel de l'immigration. Je le répète, l'avis donné par le Comité consultatif sur le statut de réfugié et la première décision rendue par le Ministre n'ont pas été contestés et ne sont pas susceptibles d'examen dans les présents pourvois.

161 Il reste donc la Commission d'appel de l'immigration et les art. 70 et 71 de la Loi sur l'immigration de 1976.

70. (1) La personne qui a revendiqué le statut de réfugié au sens de la Convention et à qui le Ministre a fait savoir par écrit, conformément au paragraphe 45(5), qu'elle n'avait pas ce statut, peut, dans le délai prescrit, présenter à la Commission une demande de réexamen de sa revendication.

(2) Toute demande présentée à la Commission en vertu du paragraphe (1) doit être accompagnée d'une copie de l'interrogatoire sous serment visé au paragraphe 45(1) et contenir ou être acompagnée d'une déclaration sous serment du demandeur contenant

a) le fondement de la demande;

b) un exposé suffisamment détaillé des faits sur lesquels repose la demande;

c) un résumé suffisamment détaillé des renseignements et des preuves que le demandeur se propose de fournir à l'audition; et

d) toutes observations que le demandeur estime pertinentes.

71. (1) La Commission, saisie d'une demande visée au paragraphe 70(2), doit l'examiner sans délai. A la suite de cet examen, la demande suivra son cours au cas où la Commission estime que le demandeur pourra vraisemblablement en établir le bien-fondé à l'audition; dans le cas contraire, aucune suite n'y est donnée et la Commission doit décider que le demandeur n'est pas un réfugié au sens de la Convention.

(2) Au cas où, conformément au paragraphe (1), la Commission permet à la demande de suivre son cours, elle avise le Ministre des date et lieu de l'audition et lui donne l'occasion de se faire entendre.

(3) La Commission, après s'être prononcée sur le statut du demandeur, en informe par écrit le Ministre et le demandeur.

(4) La Commission peut et, à la requête du demandeur ou du Ministre, doit motiver sa décision.

162 Bien que le texte même du par. 71(1) n'interdise pas expressément la tenue d'une audition, il n'a pas de sens si l'on doit tenir une audition à cette étape de la procédure, et en conséquence il est incompatible avec la tenue d'une audition. Me Scott propose les deux moyens suivants:

[TRADUCTION]

> 31. Subsidiairement, les appelants soutiennent que si on ne peut donner au par. 45(4) une interprétation qui exige une audition devant le Ministre ou le CCSR, les principes de 'justice fondamentale' seraient quand même respectés si on pouvait donner à l'art. 71 une interprétation qui exige la tenue d'une audition devant la Commission d'appel de l'immigration sur une demande de 'réexamen'."
>
> 32. On soutient toutefois que cela imposerait une interprétation assez bizarre du paragraphe 71(1) car l'article exigerait alors une audition complète et un examen au fond, conformément aux principes de justice naturelle, pour que la Commission puisse décider s'il y a lieu d'accorder l'autorisation d'appel, ce qui occasionnerait une seconde audition au fond. On soutient donc que la solution de rechange la plus simple est de déclarer 'inopérants' tous les mots du paragraphe 71(1) qui suivent les mots 'La Commission, saisie d'une demande visée au paragraphe 70(2), doit l'examiner sans délai .... Si le reste de ce paragraphe était 'inopérant', il en résulterait une audition au fond devant la Commission d'appel, qui statuerait sur la cause.

163 Je suis d'accord avec ce dernier argument et d'avis d'accorder le jugement déclaratoire qui est demandé, lequel ne s'appliquerait cependant qu'à l'égard des sept causes en l'espèce où la demande de statut de réfugié au sens de la Convention a été décidée au fond sans audition quelle qu'elle soit.

164 Le motif de la restriction mentionnée en dernier lieu dans le jugement déclaratoire tient à ce que je ne veux pas exprimer d'avis, mais réserver mon jugement sur la question de savoir si le par. 1(1) de la Loi sur l'immigration de 1976 est compatible avec l'al. 2e) de la Déclaration canadienne des droits, dans le cas où la demande de statut de réfugié au sens de la Convention a été rejetée au stade initial, mais après une audition et où le demandeur a demandé à la commission de réexaminer sa demande. Il me semble que, dans ce cas, une demande écrite pour ce qui est analogue à une autorisation d'appel ne priverait pas nécessairement le demandeur du droit à une audition impartiale de sa cause selon les principes de justice fondamentale. Cela dépendrait beaucoup du genre d'audition tenue à l'étape antérieure de même qu'au genre de question tranchée en appel.

165 Dans ce cas hypothétique, il faudrait également savoir si le fardeau que le par. 71(1) impose au requérant de prouver qu'il pourra vraisemblablement en établir le bien-fondé à l'audition est conforme aux principes de la justice naturelle. Cette Cour a adopté ce critère à titre d'interprétation législative dans l'arrêt Kwiatkowsky c. ministre de l'emploi et de l'Immigration, [1982] 2 R.C.S. 856, 142 D.L.R. (3d) 385, 45 N.R. 116, mais la Déclaration canadienne des droits n'avait pas été invoquée dans cette affaire-là. Cette question ne se poserait pas dans les présentes affaires où la Commission d'appel de l'immigration devra trancher au fond les demandes des appelants.

166 Je me rends compte que si la commission fait ce que je propose, la procédure prévue au par. 71(1) de la Loi sur l'immigration de 1976 sera court-circuitée et, à toutes fins pratiques, remplacée par un appel véritable. Je ne puis cependant voir d'autre solution pratique ou raisonnable dans les circonstances.

167 L'arrêt R. c. Drybones, [1970] R.C.S. 28271 W.W.R. 16110 C.R.N.S. 334[1970] 3 C.C.C. 3559 D.L.R. (3d) 473(C.S.C.), déclare inopérante une disposition de la Loi sur les Indiens, S.R.C. 1952, ch. 149, adoptée avant la Déclaration canadienne des droits, parce qu'elle supprimait, restreignait ou enfreignait l'un des droits reconnus et proclamés dans la Déclaration canadienne des droits. Aucune loi du Parlement du Canada ne déclare que la Loi sur l'immigration de 1976 doit s'appliquer nonobstant la Déclaration canadienne des droits. Vu le par. 5(2) de la Loi ayant pour objets la reconnaissance et la protection des droits de l'homme et des libertés fondamentales, S.C. 1960, ch. 44, dans la Partie II qui suit la Déclaration canadienne des droits, je ne vois pas de motif de ne pas appliquer le principe énoncé dans l'arrêt Drybones à une disposition adoptée après la Déclaration canadienne des droits. Voici le par. 5(2):

> (2) L'expression 'loi du Canada' à la Partie I, désigne une loi du Parlement du Canada, édictée avant ou après la mise en vigueur de la présente loi, ou toute ordonnance, règle ou règlement établi sous son régime, et toute loi exécutoire au Canada ou dans une partie du Canada lors de l'entrée en application de la présente loi, qui est susceptible d'abogation, d'abolition ou de modification par le Parlement du Canada.

168 Enfin voici un dernier point avant de conclure.

169 Toutes les parties sont d'accord pour dire que lorsque la Commission d'appel de l'immigration agit en vertu du par. 71(1) de la Loi sur l'immigration, elle ne doit pas tenir compte d'autres faits ou documents que ceux qui sont mentionnés au par. 72(2) de la Loi, malgré certaines décisions de la Cour d'appel fédérale qui semblent énoncer que la commission peut, par exemple, se fonder sur des renseignements acquis par son expérience dans des affaires de réfugiés. Je donnerais donc à la commission la directive de s'en tenir aux faits et aux documents mentionnés au par. 70(2) de la Loi.

Conclusions

170 Les pourvois sont accueillis, les décisions de la Cour d'appel fédérale et de la Commission d'appel de l'immigration sont infirmées. Les demandes des appelants visant le réexamen de leurs revendications du statut de réfugié sont renvoyées à la Commission d'appel de l'immigration afin qu'elle se prononce sur ces demandes au fond après avoir tenu une audition complète dans chaque cas, conformément aux directives contenues dans les présents motifs.

171 Pour les sept causes en l'espèce, je suis d'avis de déclarer inopérants tous les mots du par. 71(1) de la Loi sur l'immigration de 1976, qui suivent les mots:

> La Commission, saisie d'une demande visée au paragraphe 70(2), doit l'examiner sans délai.

172 Je suis d'avis d'accorder à M. Satnam Singh des dépens sur la base procureur-client relativement à la demande d'autorisation de pourvoi et au pourvoi lui-même devant cette Cour. Quant aux six autres appelants, des dépens leur seront accordés tel que prescrit par l'ordonnance de cette Cour en date du 16 février 1984.

***Le Juge Wilson (J.C.C. Dickson* et *J. Lamer* souscrivant):**

173 La question soulevée dans ces pourvois est de savoir si la procédure énoncée dans la Loi sur l'immigration, S.C. 1976-77, ch. 52 et ses modifications, concernant l'arbitrage des revendications du statut de réfugié au Canada empêche les personnes qui revendiquent ce statut de faire valoir les droits qui leur sont reconnus par l'art. 7 de la Charte canadienne des droits et libertés.

174 Le 16 février 1984, la Cour a accordé l'autorisation de pourvoi dans ces sept affaires qui ont été jointes en vue de leur audition prévue pour le 30 avril 1984. Six des appelants n'étaient pas représentés par un avocat lorsqu'ils ont présenté leur demande d'autorisation de pourvoi et on leur a nommé un avocat pour qu'ils soient représentés à l'audition du pourvoi proprement dit. Le septième appelant, M. Satnam Singh, était représenté par son propre avocat, tant à l'audition de sa demande d'autorisation qu'à l'audition du pourvoi. La Cour a également entendu la plaidoirie conjointe des avocats de deux intervenants, la Fédération des sociétés Sikh du Canada et le Conseil canadien des Eglises. Au cours de l'audition du 30 avril et du ler mai 1984, l'argumentation des avocats n'a porté que sur l'application de la Charte des droits et libertés. Le 7 décembre 1984, les avocats ont été invités à soumettre à la Cour des observations écrites sur l'application de la Déclaration canadienne des droits.

175 Au cours de l'audition des pourvois en avril et en mai 1984, les avocats ont présenté les questions en litige de façon quelque peu différente, mais on peut dire, à mon avis, qu'ils ont fait valoir essentiellement que la Cour devrait procéder en trois étapes. Celle-ci devrait d'abord décider si les personnes qui revendiquent le statut de réfugié et se trouvent au Canada ont droit à la protection de l'art. 7 de la Charte. A supposer que cette question reçoive une réponse affirmative, la Cour devrait ensuite se demander si les dispositions pertinentes de la Loi sur l'immigration de 1976, en particulier le par. 71(1), nient les droits conférés aux appelants par l'art. 7 de la Charte. Enfin, à supposer que la Cour réponde à la deuxiéme question par l'affirmative, elle devrait déterminer si les limites imposées par la Loi aux droits des appelants sont justifiées au sens de l'art. 1 de la Charte.

176 Dans les observations écrites soumises en décembre 1984, les avocats ont examiné la question de savoir si la procédure relative à l'arbitrage des revendications du statut de réfugié violait le Déclaration canadienne des droits et, en particulier, son al. 2e). Il ne peut y avoir de doute que cette loi continue de s'appliquer pleinement et que les droits qu'elle confère sont expressément préservés par l'art. 26 de la Charte. Cependant, étant donné que j'estime que la présente situation relève de la protection constitutionnelle que fournit la Charte des droits et libertés, je préfère fonder ma décision sur la Charte.

177 J'estime que la suggestion des avocats de procéder en trois étapes est bonne et je l'adopterai dans l'analyse qui suit. Cependant, il importe en premier lieu de présenter les faits et le contexte législatif dans lequel les pourvois ont pris naissance.

1. Les faits

178 Les faits et l'historique des procédures des sept pourvois ont plusieurs points en commun et c'est en raison de ces similitudes que la Cour a jugé bon de les entendre ensemble. Conformément à la procédure énoncée dans la Loi sur l'immigration de 1976, chacun des appelants a revendiqué le statut de réfugié au sens de la Convention, défini au par. 2(1) de la Loi. Après avoir reçu l'avis du comité consultatif sur le statut de réfugié, le ministre de l'Emploi et de l'Immigration a décidé, en application de l'art. 45 de la Loi, qu'aucun des appelants n'était un réfugié au sens de la Convention. Chacun d'eux a alors demandé à la Commission d'appel de l'immigration de réexaminer sa revendication du statut de réfugié conformément à l'art. 70 de la Loi. Conformément au par. 71(1) de la Loi, la Commission d'appel de l'immigration a refusé de donner suite à chacune des demandes parce qu'elle n'a pas estimé "que le demandeur pourra vraisemblablement en établir le bien-fondé à l'audition ...". Chaque requérant a alors demandé l'examen judiciaire de la décision de la commission conformément à l'art. 28 de la Loi sur la Cour fédérale, S.R.C. 1970, ch. 10 (2e Supp.). La Cour d'appel fédérale a rejeté ces demandes.

179 Voilà pour ce qui est des similitudes. On peut établir un certain nombre de distinctions, tant sur le plan du fond que sur celui de la procédure, entre les causes des sept appelants. Six sont des citoyens de l'Inde qui revendiquent le statut de réfugié au sens de la Convention parce qu'ils craignent d'être persécutés par les autorités indiennes en raison de leurs activités et de leurs opinions politiques, et en particulier à cause de leur association avec le parti Akali Dal de ce pays. La septième appelante, Mme Indrani, qui est d'origine indienne, est une citoyenne de la Guyanne. Elle revendique le statut de réfugié au sens de la Convention parce qu'elle craint d'être persécutée du fait de sa race, de sa religion et de ses opinions politiques. Au cours de leur interrogatoire sous serment prévu à l'art. 45 de la Loi, les appelants ont présenté des faits différents à l'appui de leurs revendications respectives du statut de réfugié. Les parties reconnaissent qu'en l'espèce la Cour n'a pas à examiner le bien-fondé de chacune des revendications des appelants.

180 Les circonstances dans lesquelles chaque appelant en est venu à revendiquer le statut de réfugié varient également d'un cas à l'autre. L'admission au Canada de quatre des appelants (MM. Harbhajan Singh, Sadhu Singh Thandi, Charanjit Singh Gill et Satnam Singh) leur a été refusée à un point d'entrée. Des enquêtes ont été tenues en vertu de l'art. 23 de la Loi afin de déterminer s'il y avait lieu de rendre des ordonnances de renvoi contre eux et c'est au cours de ces enquêtes que ceux-ci ont revendiqué le statut de réfugié. Conformément à la procédure énoncée à l'art. 45, les enquêtes prévues à l'art. 23 se sont poursuivies jusqu'à ce que l'on décide de rendre des ordonnances de renvoi contre les appelants. Les enquêtes tenues en vertu de l'art. 23 ont alors été ajournées et,

conformément au par. 45(1), un agent d'immigration supérieur a interrogé sous serment chaque appelant au sujet de sa revendication.

181 Les trois autres appelants ont revendiqué le statut de réfugié au cours des enquêtes tenues, en vertu du par. 27(4) de la Loi, afin de déterminer s'ils devaient être renvoyés après avoir été admis au Canada. L'un des appelants, M. Paramjit Singh Mann, a réussi à se dérober à l'enquête mentionnée à l'al. 27(2)f) lorsqu'il est venu pour la première fois au Canada en juillet 1977. Les agents d'immigration l'ont appris lorsque l'appelant en question s'est rendu aux autorités au mois de novembre 1980, ce qui a donné lieu à la tenue d'une enquête en vertu de l'art. 27. Mme Indrani est arrivée au Canada en octobre 1979 en utilisant un faux passeport et elle s'est vu accorder le statut de visiteur jusqu'au 30 novembre 1979. Les agents d'immigration se sont finalement rendus compte qu'elle travaillait illégalement et elle a été arrêtée au mois de mars 1981. On a tenu une enquête en application des al. 27(2)b) et 27(2)g) et, au cours de cette enquête, elle a revendiqué le statut de réfugié. Enfin, M. Kewal Singh est arrivé au Canada au mois de novembre 1980 et il a obtenu temporairement le statut de visiteur. A l'expiration de son statut de visiteur, il s'est rendue aux autorités de l'immigration et, parce qu'il avait perdu la qualité de visiteur, on a tenue une enquête en application de l'al. 27(2)e).

182 Les enquêtes tenues en vertu de l'art. 27 diffèrent de celles qui sont prévues à l'art. 23 surtout en ce qui concerne leur effet; dans le premier cas, il peut en résulter une ordonnance d'expulsion ou un avis d'interdiction de séjour en vertu du par. 32(6), tandis que dans le second cas il peut en résulter une ordonnance de renvoi prévue au par. 32(5), la nature de l'ordonnance ayant des conséquences importantes sur le droit de la personne de revenir plus tard au Canada. La procédure de reconnaissance du statut de réfugié énoncée aux art. 45 à 48 de la Loi et la procédure de réexamen par la Commission d'appel de l'immigration énoncée aux art. 70 et 71 n'établissent pas de distinction importante entre les enquêtes tenues en vertu de l'art. 23 et celles tenues en vertu de l'art. 27.

183 Les avocats ont formé ces pourvois en faisant valoir que, pour les fins de l'application de la Charte, les différences sur le plan des faits et de la procédure ne revêtent tout simplement aucune importance. Même si j'accepte cette prétention, j'estime également qu'il faut garder ces différences à l'esprit, surtout lorsqu'on examine l'économie de la Loi sur l'immigration de 1976 elle-même.

2. L'économie de la Loi sur l'immigration de 1976

184 Les appelants allèguent que les mécanismes de procédure énoncés dans la Loi sur l'immigration de 1976, indépendamment de l'application de cette procédure à leurs cas particuliers, ont porté atteinte aux droits qui leur sont reconnus par la Charte. Il est donc important de situer ces dispositions dans le contexte de l'ensemble de la Loi. Si, sur le plan de l'interprétation législative, l'équité en matière de procédure demandée par les appelants n'est pas exclue par l'économie de la Loi, il va sans dire qu'il n'y a aucune raison de recourir à la Charte. Le litige peut être tranché par

d'autres moyens. Dans l'arrêt Toronto v. Outdoor Neon Displays Ltd., [1960] R.C.S. 307 à 314, 22 D.L.R. (2d) 241, cette Cour a refusé de donner satisfaction aux avocats qui l'invitaient à se prononcer sur la constitutionnalité d'une loi dans des circonstances où il ne lui était pas nécessaire de le faire pour rendre une décision. Je remarque également qu'à maintes reprises la Cour suprême des Etats-Unis a adopté la politique de ne pas trancher des questions constitutionnelles lorsqu'elle n'est pas strictement tenue de le faire: voir Rescue Army v. Municipal Court, Los Angeles, 331 U.S. 549 (1947), aux pp. 568 à 575 et les décisions qui y sont citées. J'estime par conséquent que la Cour doit examiner attentivement

a) les droits que la Loi confère aux réfugiés au sens de la Convention; et

b) la procédure que la Loi énonce relativement à l'arbitrage des revendications du statut de réfugié

avant de se pencher sur l'application de la Charte dans ce contexte.

a) Les droits que la Loi sur l'immigration de 1976 confère aux réfugiés au sens de la Convention

185 Les appelants ne tentent pas de revendiquer un droit d'entrer et de demeurer au Canada, qui soit semblable au droit reconnu aux citoyens canadiens par le par. 6(1) de la Charte. De même, sous le régime de la common law, un étranger n'a pas le droit d'entrer au Canada ou d'y demeurer sauf avec l'autorisation de Sa Majesté: Prata c. Ministre de la Main-d'oeuvre et de l'Immigration, [1976] 1 R.C.S. 376, 52 D.L.R. (3d) 3833 N.R. 384(C.S.C.). Dans l'arrêt Prata, le juge Martland a énoncé, à la p. 380, la règle selon laquelle "Le droit des étrangers d'entrer et de demeurer au Canada, est régi par la Loi sur l'immigration" et le par. 5(1) prévoit que "Seules les personnes visées à l'article 4 ont le droit d'entrer au Canada et d'y demeurer".

186 Cependant, la Loi sur l'immigration de 1976 confère aux réfugiés au sens de la Convention certains droits limités d'entrer au Canada et d'y demeurer. La Loi prévoit la présentation d'une revendication du statut de réfugié visée par l'art. 45 dans le cadre d'une enquête, ce qui présuppose que la personne qui revendique le statut de réfugié se trouve au Canada et relève des autorités canadiennes. La Loi et le Règlement envisagent l'établissement au Canada des réfugiés qui sont à l'étranger mais les observations qui suivent ne concernent pas ces personnes. Lorsqu'il a été reconu qu'une personne qui se trouve au Canada est un réfugié au sens de la Convention, le par. 47(1) exige que l'arbitre reprenne l'enquête tenue en vertu de l'art. 23 ou de l'art. 27 afin de déterminer si la personne en cause remplit les conditions prévues au par. 4(2) de la Loi. Le paragraphe 4(2) prévoit qu'un réfugié au sens de la Convention "qui se trouve légalement au Canada [a] le droit d'y demeurer ..." à moins qu'il ne soit établi qu'il fait partie de la catégorie des criminels ou des personnes qui se livrent à des actes de subversion, dont il est question à l'al. 4(2)b). S'il est établi que la personne est un réfugié au sens de la Convention qui remplit les conditions prévues au par. 4(2), le par. 47(3) exige que l'arbitre l'autorise à demeurer au Canada nonobstant toute autre disposition de la Loi ou du Règlement.

187 L'étendue du droit d'un réfugié de demeurer au Canada est difficile à déterminer en raison de la présence au par. 4(2) de l'expression "qui se trouve légalement au Canada". Puisqu'il faut, comme condition préalable à la tenue d'un interrogatoire en vertu de l'art. 45, que la personne qui revendique le statut de réfugié puisse faire l'objet d'une ordonnance de renvoi ou d'un avis d'interdiction de séjour (voir l'arrêt Singh c. Ministre de l'Emploi et de l'Immigration, [1982] 2 C.F. 689), il est manifeste que nulle personne reconnue comme un réfugié au sens de la Convention ne peut, en un sens, se trouver légalement au Canada. En pratique, ce cercle vicieux est évité par la délivrance d'un permis du Ministre conformément à l'art. 37, au moment où une personne est reconnue comme un réfugié au sens de la Convention, ce qui régularise le statut de la personne pour les fins du par. 4(2). L'affaire Boun-Leua c. Ministre de l'Emploi et de l'Immigration, [1981] 1 C.F. 259113 D.L.R. (3d) 41436 N.R. 431, illustre les difficultés qui peuvent surgir lorsqu'un permis du Ministre n'est pas délivré.

188 Dans l'affaire Boun-Leua, le requérant était un apatride né au Laos qui avait obtenu le statut de réfugié en France et s'y était établi. Il est arrivé au Canada en décembre 1978 en qualité de visiteur et, une fois son statut de visiteur expiré en janvier 1979, il s'est rendu aux agents d'immigration et a revendiqué le statut de réfugié. En définitive, il a été reconnu comme un réfugié au sens de la Convention mais il n'a pas obtenu de permis du Ministre. A la reprise de l'enquête tenue en vertu du par. 47(1), l'arbitre a décidé qu'il n'était pas un réfugié au sens de la Convention "qui se trouve légalement au Canada" et lui a émis un avis d'interdiction de séjour. Le requérant a fait une demande d'examen judiciaire de cette décision conformément à l'art. 28 de la Loi sur la Cour fédérale. Le juge Urie, s'exprimant au nom de la Cour d'appel fédérale, a rejeté cette demande. Il formule les observations suivantes, aux pp. 263 et 264:

> D'autre part, ni le droit de résider en permanence au Canada ni celui d'y demeurer pour une durée déterminée ne sont accordés à un réfugié au sens de la Convention. Son droit de séjour dépend du fait qu'il est un réfugié qui a dû fuir son pays d'origine. Si, pour quelque raison que ce soit, il ne remplit plus les conditions d'un réfugié au sens de la Convention, il s'expose à une ordonnance de renvoi ou d'expulsion. La durée de son séjour, en tant que réfugié au sens de la Convention, ne peut être fixée que par un permis délivré par le Ministre conformément à l'article 37 de la Loi. Si aucun permis n'est délivré et qu'il appartient à une catégorie inadmissible, il peut faire l'objet d'une ordonnance de renvoi ou d'expulsion. Un réfugié au sens de la Convention se voit accorder les seuls droits suivants, à savoir, en premier lieu, de ne pas être renvoyé dans un pays où sa vie et sa liberté seraient menacées (article 55 de la Loi) et, en second lieu, d'interjeter appel d'une ordonnance de renvoi ou d'une ordonnance d'expulsion rendue contre lui en invoquant un moyen d'appel comportant une question de droit ou de fait ou une question mixte de droit et de fait et en faisant valoir que 'compte tenu de considérations humanitaires ou de compassion', il ne devrait pas être renvoyé du Canada (articles 72(2)a) et b) et 72(3)).

Ce qui précède me force à conclure que le fait que le Ministre décide qu'une personne est un réfugié au sens de la Convention ne confère pas à cette personne, contrairement à ce qu'a prétendu l'avocat du requérant, un statut quelconque. La décision du Ministre ne lui accorde que les droits que j'ai mentionnés. En l'espèce, le requérant étant un réfugié en France, il peut retourner en ce pays dans la mesure où le visa que lui a délivré ce pays est toujours valide. Puisque la France l'a considéré comme un réfugié, le Canada, en tant que signataire de la Convention des Nations-Unies relative au statut des réfugiés, pourrait difficilement lui refuser cette qualité. Mais là n'est pas la question. Puisque l'intéressé peut retourner en France, qui n'est pas son pays d'origine ou un pays où sa vie et sa liberté seraient menacées, le Ministre n'est nullement obligé de l'autoriser à demeurer au Canada. Le séjour au Canada du requérant n'est fondé sur aucun droit. Par conséquent, à mon avis, l'avocat du requérant échoue dans sa prétention selon laquelle le fait que le Ministre ait décidé que son client était un réfugié au sens de la Convention lui donne le droit de demeurer au Canada.

189 Bien que je sois d'accord avec la décision prise par le juge Urie concernant les faits qui lui ont été soumis, je crois que ses motifs peuvent avoir trop affaibli la situation du réfugié au sens de la Convention en vertu de la Loi. Outre les droits importants énoncés aux art. 55 et 72, il me semble qu'un réfugié au sens de la Convention a le droit d'exiger du Ministre qu'il exerce d'une façon équitable et conforme à des principes appropriés son pouvoir discrétionnaire de délivrer un permis en vertu de l'art. 37 et que, si le Ministre omet de le faire, le réfugié peut avoir le droit d'engager des procédures en vertu de l'al. 18a) de la Loi sur la Cour fédérale: voir les arrêts Ministre de la Main-d'oeuvre et de l'Immigration c. Hardayal, [1978] 1 R.C.S. 470 à 479, 75 D.L.R. (3d) 465, 15 N.R. 396 (le juge Spence); Brempong c. Ministre de l'Emploi et de l'Immigration, [1981] 1 C.F. 211113 D.L.R. (3d) 23636 N.R. 323.

190 Dans l'affaire Boun-Leua, comme l'a fait remarquer le juge Urie, le requérant était en mesure de retourner en France où sa vie et sa liberté n'étaient pas menacées et obliger celui-ci à retourner en France n'était pas contraire aux obligations du Canada envers les réfugiés. D'autre part, le par. 2(2) et l'al. 3g) de la Loi sur l'immigration prévoient que la Loi doit être mise en oeuvre de manière à remplir, envers les réfugiés, les obligations légales du Canada sur le plan international. Ces dispositions se lisent ainsi:

2. ...

(2) Dans l'expression 'réfugié au sens de la Convention' le terme 'Convention' désigne la Convention des Nations-Unies relative au statut des réfugiés, signée à Genève le 28 juillet 1951 et le protocole signé à New York le 31 janvier 1967.

3. Il est, par les présentes, déclaré que la politique d'immigration du Canada, ainsi que les règles et règlements établis en vertu de la présente loi, sont conçus et mis en oeuvre en vue de promouvoir ses intérêts sur le plan interne et international, en reconnaissant la nécessité

. . . . .

g) de remplir, envers les réfugiés, les obligations légales du Canada sur le plan international et de maintenir sa traditionnelle attitude humanitaire à l'égard des personnes déplacées ou persécutées;

191 Le préambule de la Convention et du Protocole prévoit ce qui suit:

Les Hautes parties contractantes,

Considérant que le Charte des Nations Unies et la Déclaration universelle des droits de l'homme approuvée le 10 décembre 1948 par l'Assemblée générale ont affirmé ce principe que les êtres humains, sans distinction, doivent jouir des droits de l'homme et des libertés fondamentales,

Considérant que l'Organisation des Nations Unies a, à plusieurs reprises, manifesté la profonde sollicitude qu'elle éprouve pour les réfugiés et qu'elle s'est préoccupée d'assurer à ceux-ci l'exercice le plus large possible des droits de l'homme et des libertés fondamentales, ...

La Convention définit ainsi le terme "réfugié":

A. Aux fins de la présente convention, le terme 'réfugié' s'appliquera à toute personne:

... craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un certain groupe social ou de ses opinions politiques, se trouve hors du pays dont elle a la nationalité et qui ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de ce pays; ou qui, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle à la suite de tels événements, ne peut ou, en raison de ladite crainte, ne veut y retourner. ...

192 (Convention des Nations Unies relative au statut des réfugiés. HCR/INF/29/Rev. 2, chap. 1, article 1, paragraphe A2).)

193 J'estime donc qu'un réfugié au sens de la Convention dont la sécurité est menacée dans un autre pays a le droit de compter sur la volonté de ce pays de faire honneur aux obligations qu'il a contractées en qualité de signataire de la Convention des Nations unies relative au statut des réfugiés: (voir les arrêts Ernewein c. Ministre de l'Emploi et de l'Immigration, [1980] 1 R.C.S. 639, aux pp. 657 à 662, 14 C.P.C. 264103 D.L.R. (3d) 130 N.R. 316 (le juge Pigeon, dissident); Hurt c. Ministre de la Main-d'oeuvre et de l'Immigration, [1978] 2 C.F. 34020 C.C.C. (2d) 12752 D.L.R. (3d) 6396 N.R. 343).

b) La procédure de reconnaissance du statut de réfugié au sens de la Convention

194 L'expression "réfugié au sens de la Convention" est définie de la façon suivante au par. 2(1) de la Loi:

> 'réfugié au sens de la Convention' désigne toute personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques
>
> a) se trouve hors du pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de ce pays, ou
>
> b) qui, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ou, en raison de ladite crainte, ne veut y retourner;

Comme je l'ai fait remarquer, la procédure à suivre pour reconnaître si une personne est un réfugié au sens de la Convention et celle applicable au réexamen des revendications de ce statut par la Commission d'appel de l'immigration sont énoncées aux art. 45 à 48 et 70 à 71 respectivement. En ce qui concerne tout d'abord la reconnaissance, l'art. 45 prévoit:

> 45. (1) Une enquête, au cours de laquelle la personne en cause revendique le statut de réfugié au sens de la Convention, doit être poursuivie. S'il est établi qu'à défaut de cette revendication, l'enquête aurait abouti à une ordonnance de renvoi ou à un avis d'interdiction de séjour, elle doit être ajournée et un agent d'immigration supérieur doit procéder à l'interrogatoire sous serment de la personne au sujet de sa revendication.
>
> (2) Après l'interrogatoire visé au paragraphe (1), la revendication, accompagnée d'une copie de l'interrogatoire, est transmise au Ministre pour décision.
>
> (3) Une copie de l'interrogatoire visé au paragraphe (1) est remise à la personne qui revendique le statut de réfugié.
>
> (4) Le Ministre, saisi d'une revendication conformément au paragraphe (2), doit la soumettre, accompagnée d'une copie de l'interrogatoire, à l'examen du comité consultatif sur le statut de réfugié institué par l'article 48. Après réception de l'avis du comité, le Ministre décide si la personne est un réfugié au sens de la Convention.
>
> (5) Le Ministre doit notifier sa décision par écrit, à l'agent d'immigration supérieur qui a procédé à l'interrogatoire sous serment et à la personne qui a revendiqué le statut de réfugié.
>
> (6) Toute personne faisant l'objet de l'interrogatoire visé au paragraphe (1) doit être informée qu'elle a droit aux services d'un avocat, d'un procureur ou de tout autre conseil pour la représenter et il doit lui être donné la possibilité de choisir un conseil, à ses frais.

Il est difficile de qualifier cette procédure d' "audition" au sens traditionnel: voir l'arrêt Brempong, précité, aux pp. 217 et 218. Comme l'a fait remarquer le juge Urie dans cet arrêt à la p. 217, renvoi 7, la procédure "n'est pas contradictoire" en principe puisque seul le requérant a le droit d'être représenté par un avocat. Le juge Urie a décrit la procédure comme étant "de nature purement administrative" et l'avocat du Ministre intimé a adopté ce qualificatif au cours des plaidoiries en l'espèce.

195 Dans l'arrêt Mensah c. Ministre de l'Emploi et de l'Immigration, [1982] 1 C.F. 7036 N.R. 332, le juge Pratte a fait remarquer, à la p. 71 qu'en adoptant l'art. 45 "le législateur n'entendait pas soumettre le Ministre ou le comité consultatif sur le statut de réfugié à l'obligation procédurale d'équité qu'invoque le requérant". Si, en faisant cette affirmation, le juge Pratte a voulu laisser entendre que le législateur a exclu l'obligation d'équité énoncée dans l'arrêt de cette Cour Nicholson c. Haldimand-Norfolk Reg. Bd. of Police Commrs., [1979] 1 R.C.S. 311, 78 C.L.L.C. 14,181, 88 D.L.R. (3d) 671, 23 N.R. 410, j'estime qu'il a dû faire erreur. Dans cet arrêt, le juge en chef Laskin a expressément adopté, à la p. 324, ce que le juge Megarry a déclaré dans la décision Bates v. Lord Hailsham, [1972] 3 All E.R. 1019[1972] 1 W.L.R. 1373 à 1378: [TRADUCTION] "dans le domaine de ce qu'on appelle le quasi-judiciaire, on applique les règles de justice naturelle et, dans le domaine administratif ou exécutif, l'obligation générale d'agir équitablement". En d'autres termes, le simple fait de considérer l'obligation du Ministre prévue à l'art. 45 comme étant de nature administrative n'exclut pas l'obligation d'agir équitablement énoncée dans l'arrêt Nicholson: voir P. G. Can. c. Inuit Tapirisat du Can., [1980] 2 R.C.S. 735 à 750, 115 D.L.R. (3d) 133, N.R. 304 (le juge Estey); Martineau c. Comité de discipline de l'Institution de Matsqui, [1980] 1 R.C.S. 602 aux pp. 623 et 624, 628 à 631, 13 C.R. (3d) 1(Eng.), 15 C.R. (3d) 315(Fr.), 50 C.C.C. (2d) 353106 D.L.R. (3d) 38530 N.R. 119 (le juge Dickson, alors juge puîné).

196 Cependant, l'existence de l'obligation d'agir équitablement ne définit pas son contenu. J'estime, par conséquent, que l'observation du juge Pratte dans l'arrêt Mensah, précité, visait à préciser que l'obligation d'agir équitablement imposée au Ministre dans le contexte de l'art. 45 ne l'oblige pas à permettre à la personne qui revendique le statut de réfugié de répondre aux objections qu'il oppose à sa revendication, comme l'a prétendu l'avocat en l'espèce. Dans l'arrêt Martineau, précité, le juge Dickson (alors juge puîné) fait remarquer, à la p. 630 de ses motifs concourants, que "Le contenu des principes de justice naturelle et d'équité applicables aux cas individuels variera selon les circonstances de chaque cas ..." Comme l'a souligné le juge Estey dans l'affaire Inuit Tapirisat, à la p. 755: "Il faut toujours considérer l'économie globale de la loi pour voir dans quelle mesure, le cas échéant, le législateur a voulu que ce principe [de l'équité en matière de procédure] s'applique."

197 L'avocat de l'intimé en l'espèce a fait valoir que la Loi ne prévoit pas d'audition devant le Ministre ou le comité consultatif sur le statut de réfugié et qu'en rendant une décision ceux-ci ont le droit de se fonder sur ce qu'il a décrit comme [TRADUCTION] "la connaissance qu'a le

gouvernement des affaires internationales". Suivant mon interprétation de l'art. 45 et en particulier du par. 45(4), ces arguments semblent justes. Il ressort clairement du par. 45(4) que la Loi n'offre à la personne qui revendique le statut de réfugié aucune possibilité de se faire entendre si ce n'est au moyen de sa revendication et de la transcription de son interrogatoire sous serment. La Loi ne semble pas non plus offrir à la personne qui revendique le statut de réfugié la possibilité de commenter l'avis donné au Ministre par le comité consultatif sur le statut de réfugié. Le fonctionnement en vase clos du processus est renforcé par le fait que l'art. 123 de la Loi autorise le Ministre à déléguer les pouvoirs que lui confère l'art. 45 et. en fait, ces pouvoirs sont habituellement délégués au greffier du comité consultatif sur le statut de réfugié: voir Wieckowska c. Lanthier, [1980] 1 C.F. 655 à 656, 180 D.L.R. (3d) 492. Par conséquent, il semblerait essentiellement que le comité consultatif sur le statut de réfugié est un organisme doté d'un pouvoir décisionnel qui agit sans la participation des personnes dont il détermine le statut et qu'il applique des politiques et utilise des renseignements auxquels n'ont pas accès les personnes qui revendiquent le statut de réfugié. Le comité et le Ministre sont tenus d'agir équitablement dans l'exercice de leurs fonctions en ce sens qu'ils ne peuvent pas rendre des décisions arbitraires et qu'ils doivent s'efforcer de traiter de la même façon les cas analogues. Je ne crois pas cependant que les tribunaux puissent interpréter l'obligation d'agir équitablement de manière à soumettre le comité à des contraintes en matière de procédure qui sont incompatibles avec le processus décisionnel établi par le législateur.

198 Quoi qu'il en soit, l'exercice par le Ministre de la compétence que lui confère l'art. 45 ne peut faire l'objet d'un examen judiciaire en l'espèce. Comme l'a fait remarquer le juge Urie dans l'arrêt Brempong, précité, il ne peut y avoir d'examen judiciaire en vertu de l'art. 28 de la Loi sur la cour fédérale dans le cas d'une "décision ou ordonnance de nature administrative qui n'est pas légalement soumise à un processus judiciaire ou quasi judiciaire ..." Ainsi, malgré la tendance de l'arrêt Nicholson à supprimer l'importance de la distinction entre les fonctions administratives et judiciaires ou quasi judiciaires aux fins de déterminer si l'équité en matière de procédure est requise dans le processus décisionnel, la Loi sur la Cour fédérale maintient l'importance de cette distinction aux fins de déterminer si le contrôle judiciaire peut être exercé par voie de certiorari en vertu de l'al. 18a) ou par voie d'examen en vertu de l'art. 28: voir l'arrêt Martineau, précité, aux pp. 629 et 637. Etant donné que les appelants n'ont pas contesté de la manière appropriée l'équité, sur le plan de la procédure, de la décision du Ministre rendue en vertu de l'art. 45 de la Loi sur l'immigration de 1976, je ne crois pas que la Cour ait compétence en l'espèce pour examiner ces décisions ou les mécanismes par lesquels celles-ci ont été rendues, si ce n'est pour mieux faire comprendre le système de procédure établi par la Loi relativement aux revendications du statut de réfugié.

199 Il n'est pas nécessaire cependant que le statut du requérant soit réglé de façon définitive par la décision que rend le Ministre, conformément à l'art. 45, après avoir reçu l'avis du comité consultatif sur le statut de réfugié. Aux termes du par. 70(1) de la Loi, la personne dont la revendication du statut de réfugié a été refusée par le Ministre peut, dans le délai prescrit par le par. 40(1) du Règlement, c'est-à-dire dans les quinze jours à compter du moment où il est informé de ce refus, présenter à la Commission d'appel de l'immigration une demande de réexamen de sa revendication.

Le paragraphe 70(2) exige de la personne qui revendique le statut de réfugié qu'elle joigne à sa demande une copie de la transcription de l'interrogatoire sous serment visé au par. 45(1) ainsi qu'une déclaration sous serment énonçant le fondement de la demande, les faits invoqués par l'appelant ainsi que les renseignements et les éléments de preuve que le requérant se propose de fournir au cours de l'audition de la demande de réexamen. L'alinéa 70(2)d) permet également au requérant d'énoncer dans sa déclaration toutes autres observations qu'il estime pertinentes.

200 Les fonctions que doit remplir la commission d'appel de l'immigration lorsqu'elle est saisie d'une demande de réexamen d'une revendication du statut de réfugié sont énoncées à l'art. 71 que voici:

> 71. (1) La Commission, saisie d'une demande visée au paragraphe 70(2), doit l'examiner sans délai. A la suite de cet examen, la demande suivra son cours au cas où la Commission estime que le demandeur pourra vraisemblablement en établir le bien-fondé à l'audition; dans le cas contraire, aucune suite n'y est donnée et la Commission doit décider que le demandeur n'est pas un réfugié au sens de la Convention.
>
> (2) Au cas où, conformément au paragraphe (1), la Commission permet à la demande de suivre son cours, elle avise le Ministre des date et lieu de l'audition et lui donne l'occasion de se faire entendre.
>
> (3) La Commission, après s'être prononcée sur le statut du demandeur, en informe par écrit le Ministre et le demandeur.
>
> (4) La Commission peut et, à la requête du demandeur ou du Ministre, doit motiver sa décision.

201 Si la commission décidait, en application du par. 71(1), que la demande doit suivre son cours, les parties sont toutes d'accord pour dire que l'audition qui serait tenue conformément au par. 71(2) serait de nature quasi judiciaire et assujettie à toutes les règles de justice naturelle. Cependant, les dispositions de la Loi n'habilitent pas la commission à autoriser l'audition d'une demande de réexamen dans tous les cas. Elle ne peut le faire que si "la Commission estime que le demandeur pourra vraisemblablement en établir le bien-fondé à l'audition ..." Dans l'arrêt Kwiatkowsky c. Ministre de l'Emploi et de l'Immigration, [1982] 2 R.C.S. 856142 D.L.R. (3d) 38545 N.R. 116, cette Cour a interprété ces mots comme exigeant que la commission ne laisse la demande suivre son cours que si elle estime que le requérant sera "probablement" en mesure d'établir le bien-fondé de sa demande à l'audition, suivant ainsi le critère énoncé par le juge Urie dans l'arrêt Lugano c. Ministre de la Main-d'oeuvre et de l'Immigration, [1976] 2 C.F. 438, 13 N.R. 322(C.A.). Dans les motifs concourants qu'il a rédigés dans l'arrêt de la Cour d'appel fédérale Kwiatkowski(y) (1980), 34 N.R. 237, le juge Le Dain formule l'observation suivante, à la p. 240, au sujet du pouvoir conféré à la Commission d'appel de l'immigration par le par. 71(1):

> Il s'agit d'un pouvoir assez exceptionnel, celui de déterminer à un stade préliminaire, non pas s'il existe un moyen de défense valable, mais s'il y a une chance de succès, quand bien même une audition pourrait servir à renforcer la cause. *Bien que l'exercice de ce pouvoir ne manque pas de nous préoccuper, il s'agit toutefois d'un pouvoir que le Parlement a expressément conféré à la Commission pour des raisons qu'il a jugées bonnes.* En fait, c'est le pouvoir de décider de la question du statut de réfugié après l'examen de l'interrogatoire et de la déclaration sous serment.

(C'est moi qui souligne.)

202 Je suis d'accord avec ces observations. La question soumise à cette Cour dans l'affaire Kwiatkowsky était de savoir non pas s'il y a eu un déni de justice naturelle mais si la Commission d'appel de l'immigration a appliqué un critère erroné dans l'exercice du pouvoir que lui confère le par. 71(1). Toutefois, il ressort implicitement de l'arrêt de la Cour que la Loi limite la portée de l'audition dont bénéficient les personnes qui revendiquent le statut de réfugié, ce qui est difficilement conciliable avec les principes de justice naturelle: voir l'arrêt Ernewein c. Ministre de l'Emploi et de l'Immigration, précité, aux pp. 659 et 660 (le juge Pigeon, dissident).

203 Dans l'arrêt Alliance des Professeurs catholiques de Montréal v. Que. L.R.B., [1953] 2 R.C.S. 140, le juge en chef Rinfret décrit ainsi, à la p. 154, l'obligation qui incombe à cette Cour d'interpréter les lois en conformité avec les principes de justice naturelle:

> Le principe que nul ne doit être condamné ou privé de ses droits sans être entendu, et surtout sans avoir même reçu avis que ses droits seraient mis en jeu est d'une équité universelle et ce n'est pas le silence de la loi qui devrait être invoqué pour en priver quelqu'un. *A mon avis, il ne faudrait rien moins qu'une déclaration expresse du législateur pour mettre de côté cette exigence qui s'applique à tous les tribunaux et à tous les corps appelés à rendre une décision qui aurait pour effet d'annuler un droit possédé par un individu.*

(C'est moi qui souligne.) Le juge Fauteux (alors juge puîné) affirme dans le même arrêt, à la p. 166:

> Il est de règle que l'application du principe *audi alteram partem* est implicitement sous-entendue dans les lois attribuant aux corps administratifs des fonctions d'ordre judiciaire. Maxwell: On Interpretation of Statutes, 9th ed., 368. Le Législateur est présumé tenir compte de cette règle en édictant ces lois. *Pour en suspendre l'opération, il faut donc, dans la loi, un texte explicite à cet effet ou une inférence en ayant l'équivalence.*

(C'est moi qui souligne.) Dans un bon nombre d'arrêts subséquents, dont l'arrêt Nicholson, précité, cette Cour est arrivée à la même conclusion: voir l'ouvrage de Pue, Natural Justice in Canada (1981), aux pp. 82 à 84. Cependant, il me semble que, dans le présent cas, le par. 71(1) est précisément le genre de disposition expresse qui empêche les tribunaux de considérer que les principes de justice naturelle s'appliquent à un système d'arbitrage des droits des particuliers établi par la loi.

204 Si je comprends bien, les appelants prétendent essentiellement qu'ils n'ont pas eu vraiment la possibilité de présenter leurs revendications de statut de réfugié ni de savoir ce qu'ils devaient établir. Je ne crois pas qu'on puisse laisser entendre que la procédure énoncée dans la Loi sur l'immigration de 1976 n'a pas été suivie correctement au cours de l'arbitrage de leurs revendications. Je ne pense pas non plus qu'on puisse interpréter les dispositions pertinentes de la Loi sur l'immigration de 1976 de manière à exiger un degré de justice naturelle ou d'équité en matière de procédure qui soit beaucoup plus élevé que celui mentionné dans l'analyse qui précède. Les termes mêmes de la Loi semblent s'y opposer. Donc, pour avoir gain de cause, les appelants doivent, à mon avis, démontrer que la Charte exige que la Cour passe outre à la décision du législateur d'exclure le genre d'équité en matière de procédure que demandent les appelants.

3. L'application de la Charte

1) Les appelants ont-ils droit à la protection de l'art. 7 de la Charte?

205 L'alinéa 32(1)a) de la Charte prévoit ce qui suit:

> 32. (1) La présente charte s'applique:
>
> a) au Parlement et au gouvernement du Canada, pour tous les domaines relevant du Parlement ...

Etant donné que l'immigration est manifestement un domaine qui relève du Parlement en vertu du par. 91 ¶ 25 de la Loi constitutionnelle de 1867, la Loi sur l'immigration elle-même et son administration par le gouvernement du Canada sont assujetties aux dispositions de la Charte.

206 L'article 7 de la Charte prévoit que "Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale." L'avocat des appelants compare l'emploi du mot "Chacun" à l'art. 7 avec les mots utilisés dans d'autres articles, comme par exemple, "Tout citoyen canadien" à l'art. 3, "Tout citoyen canadien et toute personne ayant le statut de résident permanent au Canada" au par. 6(2) et "Les citoyens canadiens" à l'art. 23. Il conclut que le mot "Chacun" employé à l'art. 7 vise à englober une catégorie de personnes plus large que les citoyens et les résidents permanents. L'avocat du Ministre admet que "Chacun" est suffisamment général pour inclure les appelants et je suis disposée à accepter que ce mot englobe tout être humain qui se trouve au Canada et qui, de ce fait, est assujetti à la loi canadienne.

207 Cette prémisse étant acceptée, il s'agit alors de savoir si les droits que les appelants tentent de faire valoir sont visés par l'art. 7. L'avocat du Ministre prétend que non. Il soutient que l'exclusion

ou le renvoi des appelants du Canada ne porterait pas atteinte au "droit à la vie, à la liberté et à la sécurité de [leur] personne". Il avance trois arguments principaux à l'appui de cette prétention.

208 Le premier argument peut être décrit comme fondé sur la théorie d'un "seul droit" formulée par le juge Marceau dans l'arrêt R. c. Operation Dismantle Inc., [1983] 1 C.F. 745 aux pp. 773 et 774, 39 C.P.C. 1203 D.L.R. (4th) 19349 N.R. 363(C.A.). Selon l'avocat, les termes "droit à la vie, à la liberté et à la sécurité de sa personne" forment un seul droit constitué de parties intimement reliées et ce droit se rapporte aux questions de mort, d'arrestation, de détention, de liberté physique et de châtiment corporel de la personne. L'avocat soutient en outre que l'art. 7 ne protège les personnes contre les atteintes à ce genre de droit que si ces atteintes résultent d'une violation des principes de justice fondamentale. Cet argument en soi n'aide pas beaucoup la cause du Ministre puisque les appelants soutiennent qu'en dépit de cette interprétation restrictive de l'art. 7 leurs droits relatifs aux questions de mort, d'arrestation, de détention, de liberté physique et de châtiment corporel sont effectivement touchés. Les avocats des appelants ont adopté deux méthodes différentes pour tenter de démontrer cela.

209 Me Coveney, au nom de l'appelant Satnam Singh, et Me Jackman, au nom des intervenants qui ont appuyé la position des appelants, ont prétendu que, de par la définition même d'un réfugié au sens de la Convention, le rejet du droit d'un tel réfugié de demeurer au Canada porte atteinte à son droit à la vie, à la liberté et à la sécurité de sa personne, au sens que lui donne l'avocat du Ministre. En d'autres termes, étant donné qu'un réfugié au sens de la Convention est, par définition, une personne qui "craint avec raison d'être persécutée", le refus de lui accorder refuge a pour effet de l'exposer à un danger de mort, à une diminution importante de sa liberté physique ou à un châtiment corporel dans son pays d'origine.

210 Me Scott qui représente les six autres appelants a adopté un point de vue différent. Il a souligné que la Loi habilite les agents d'immigration à détenir les appelants pour fins d'interrogatoire en vertu de l'art. 23 ou 27 et pour fins de renvoi: voir les par. 20(1), 23(3), 23(5) et les art. 104 à 108. Il a prétendu qu'en soi la détention des appelants par les agents d'immigration canadiens priverait les appelants de leur liberté dans ce pays et qu'il serait contraire à l'art. 7 de les priver de cette liberté à moins que ce ne soit en conformité avec les principes de justice fondamentale.

211 L'avocat du Ministre, Me Bowie, a tenté de réfuter ces deux arguments. En ce qui concerne le premier argument, il a soutenu que l'art. 7 de la Charte protège les particuliers contre les actes des législatures et des gouvernements du Canada, de ses provinces et de ses territoires, mais non contre les actes d'autres personnes ou de gouvernements étrangers. Il s'est fondé sur l'arrêt Singh c. Ministre de l'Emploi et de l'Immigration, [1983] 2 C.F. 347144 D.L.R. (3d) 76647 N.R. 189 où le juge Pratte affirme, à la p. 349:

> La décision de la Commission [d'appel de l'immigration] n'a pas eu pour effet de porter atteinte au droit du requérant à la vie, à la liberté et à la sécurité de sa personne. Si, après avoir regagné son propre pays, le requérant devient victime d'une atteinte à l'un quelconque de ces droits, ce sera par suite d'actes accomplis par les autorités ou par d'autres gens de ce pays; ce ne sera pas une conséquence directe de la décision de la Commission. Selon nous, l'article 7 vise le cas où des autorités canadiennes, dans l'application de lois canadiennes, portent atteinte à ces droits.

Quant au second argument, Me Bowie a fait remarquer que les procédures de détention et de renvoi prévues par la Loi sont les mêmes, qu'il s'agisse de personnes qui revendiquent le statut de réfugié ou de toute autre personne et il a prétendu que ces dispositions sont compatibles avec les principes de justice fondamentale.

212 Il me semble que, aux fins de décider si on a porté atteinte au droit des appelants à la vie, à la liberté et à la sécurité de leur personne au sens de l'art. 7 de la Charte, nous devons d'abord déterminer quels droits leur sont conférés par la Loi sur l'immigration de 1976. Comme nous l'avons déjà fait remarquer, le par. 5(1) de la Loi ne reconnaît qu'aux personnes visées à l'art. 4 le droit d'entrer au Canada et d'y demeurer. Les appelants ne bénéficient donc pas de ce droit. La Loi accorde cependant à un réfugié au sens de la Convention certains droits qu'elle ne confère pas à d'autres, notamment le droit de demander au Ministre de décider, en vertu de principes appropriés, s'il y a lieu de délivrer un permis l'autorisant à entrer au Canada et à y demeurer (par. 4(2) et art. 37), le droit de ne pas être renvoyé dans un pays où sa vie ou sa liberté seraient menacées (art. 55) et le droit d'interjeter appel d'une ordonnance de renvoi ou d'une ordonnance d'explusion rendue contre lui (al. 72(2)a), al. 72(2)b) et par. 72(3)).

213 Nous devons par conséquent nous demander si l'atteinte à ces droits constitue une atteinte au droit à la vie, à la liberté et à la sécurité de la personne au sens de l'art. 7 de la Charte. Même si nous acceptons la théorie d'un "seul droit" avancée par l'avocat du Ministre dans son interprétation de l'art. 7, nous devons reconnaître, à mon avis, que le "droit" qui est énoncé à l'art. 7 comporte trois éléments: la vie, la liberté et la sécurité de la personne. Si je comprends bien la théorie d'un "seul droit", on ne laisse pas entendre qu'il doit y avoir atteinte à ces trois éléments pour qu'il y ait atteinte au "droit" que confère à une personne l'art. 7. En d'autres termes, je crois que la théorie d'un "seul droit" avancée par l'avocat permet de dire que l'atteinte à la "sécurité de la personne" des appelants, par exemple, constitue une atteinte au "droit" que leur confère l'art. 7, qu'il soit également possible ou non d'affirmer qu'il y a eu atteinte à leur vie ou à leur liberté. Si je comprends bien, la théorie d'un "seul droit" est soumise à l'appui d'une interprétation stricte des mots "vie", "liberté" et "sécurité de sa personne" comme constituant différents aspects d'un seul concept plutôt que comme constituant des concepts distincts dont chacun doit être interprété séparément.

214 Il est certain que les concepts du droit à la vie, du droit à la liberté et du droit à la sécurité de sa personne peuvent avoir plusieurs acceptions. Le Quatorzième amendement de la Constitution des

Etats-Unis prévoit notamment: [TRADUCTION] " ... et aucun Etat n'a le droit de porter atteinte à la vie, à la liberté ou aux biens d'une personne sans l'application régulière de la loi ...". Dans l'arrêt Bd. of Regents of State Colleges v. Roth, 408 U.S. 564 (1972), à la p. 572, le juge Stewart a expliqué ainsi la notion de liberté incorporée dans le Quatorzième amendement:

> [TRADUCTION]
>
> Même si cette Cour n'a pas tenté de définir avec exactitude la liberté ... garantie [par le Quatorzième amendement], ce terme a souvent été examiné et certains des éléments qui y sont compris ont été précisés de façon définitive. Ce terme s'entend sans aucun doute non seulement de l'absence de contrainte physique mais également du droit des particuliers de contracter, de vaquer aux occupations ordinaires de la vie, d'acquérir des connaissances utiles, de se marier, de fonder un foyer et d'élever des enfants, d'adorer Dieu selon sa conscience et, en général, de jouir des privilèges reconnus depuis longtemps ... comme étant essentiels à la poursuite du bonheur par les hommes libres. Meyer v. Nebraska, 262 U.S. 390, 399. Dans la constitution d'un peuple libre, il ne fait aucun doute que le terme 'liberté' doit avoir un sens large. Voir, par exemple, Bolling v. Sharpe, 347 U.S. 497, 499 et 500; Stanley v. Illinois, 405 U.S. 645.

La théorie d'un "seul droit" avancée par l'avocat du Ministre laisse entendre que cette conception de la "liberté" est trop large pour être utilisée dans notre interprétation de l'art. 7 de la Charte. Même si cet argument est valable, il me semble cependant qu'il incombe à la Cour de préciser le sens de chacun des éléments, savoir la vie, la liberté et la sécurité de la personne, qui constituent le "droit" mentionné à l'art. 7.

215 Pour revenir aux faits soumis à la Cour, on se rappellera qu'un réfugié au sens de la Convention est par définition une personne qui craint avec raison d'être persécutée dans le pays qu'elle fuit. A mon avis, si on la prive des moyens que lui offre la Loi d'échapper à cette crainte d'être persécutée, cela a pour effet tout au moins de *porter atteinte* à son droit à la vie, à la liberté et à la sécurité de sa personne suivant le sens strict proposé par l'avocat du Ministre. Il s'agit cependant de savoir si une telle atteinte constitue une "atteinte" au sens de l'art. 7.

216 On doit reconnaître, par exemple, que même si un réfugié au sens de la Convention craint avec raison d'être persécuté, il ne s'ensuit pas automatiquement que l'on portera atteinte à sa vie ou à sa liberté s'il est renvoyé dans son pays. Peut-on dire que les fonctionnaires canadiens portent atteinte au droit d'un réfugié au sens de la Convention à la vie, à la liberté et à la sécurité de sa personne s'il est renvoyé à tort dans un pays où il *peut* être menacé de mort, d'emprisonnement ou d'une autre forme de persécution? L'argument de l'avocat, selon lequel le refus d'accorder les recours prévus par la Loi ne porte pas atteinte en soi au droit à la vie ou à la liberté que possède un réfugié au sens de la Convention, peut être valable dans une certaine mesure. Il peut en résulter que quelqu'un d'autre porte atteinte à sa vie ou à sa liberté, mais il n'est pas certain que cela se produira.

217 Toutefois, je ne puis accepter la prétention de l'avocat du Ministre selon laquelle la négation des droits que la Loi confère à un réfugié au sens de la Convention ne constitue pas une atteinte à la sécurité de sa personne. Comme le mot "liberté", l'expression "sécurité de sa personne" peut avoir plusieurs sens. L'expression "sécurité de la personne" figure à l'al. la) de la Déclaration canadienne des droits et son interprétation dans ce contexte aurait peut-être pu nous aider à l'interpréter correctement dans le contexte de la Charte. Malheureusement, la jurisprudence ne précise pas le sens de ces termes, même si l'expression a été mentionnée jusqu'à un certain point dans des arrêts comme Morgentaler c. R., [1976] 1 R.C.S. 616, aux pp. 628 à 634, 30 C.R.N.S. 209, 20 C.C.C. (2d) 449, 53 D.L.R. (3d) 161, 4 N.R. 277 (le juge en chef Laskin, dissident), Curr c. R., [1972] R.C.S. 889, 18 C.R.N.S. 2817 C.C.C. (2d) 18126 D.L.R. (3d) 603(C.S.C.), et R. v. Berrie 197524 C.C.C. (2d) 66 à 1a p. 70, 30 C.R.N.S. 145 (C.-B.). Dans son document de travail no 26 intitulé Le traintement médical et le droit criminel (1980), la Commission de réforme du droit précise, aux pp. 6 et 7:

> Le droit à la sécurité de la personne signifie non seulement la protection de l'intégrité physique, mais encore le droit aux choses nécessaires à la vie ...

La commission définit ensuite le droit aux choses nécessaires à la vie en fonction du par. 1 de l'art. 25 de la Déclaration universelle des droits de l'homme (1948) qui prévoit:

> Toute personne a droit à un niveau de vie suffisant pour assurer sa santé, son bien-être et ceux de sa famille, notamment pour l'alimentation, l'habillement, le logement, les soins médicaux ainsi que pour les services sociaux nécessaires; elle a droit à la sécurité en cas de chômage, de maladie, d'invalidité, de veuvage, de vieillesse ou dans les autres cas de perte de ses moyens de subsistance par suite de circonstances indépendantes de sa volonté.

Des glossateurs ont également préconisé l'adoption d'une conception large semblable de la "sécurité de sa personne" pour les fins de l'interprétation de l'art. 7 de la Charte. Voir Garant, "Libertés fondamentales et justice naturelle", Tarnopolsky et Beaudoin (éditeurs), dans Charte canadienne des droits et libertés (1982), aux pp. 336, 337 et 345 à 349; Manning, Rights, Freedoms and the Courts: A Practical Analysis of the Constitution Act, 1982 (1983), aux pp. 249 à 254.

218 Pour les fins de l'espèce, il n'est pas nécessaire, à mon avis, de se demander si on doit adopter une interprétation aussi large de l'expression "sécurité de sa personne" employée à l'art. 7 de la Charte. Il me semble que même si on adopte l'interprétation stricte préconisée par l'avocat du Ministre, l'expression "sécurité de sa personne" doit englober tout autant la protection contre la menace d'un châtiment corporel ou de souffrances physiques, que la protection contre le châtiment lui-même. Je constate, en particulier, qu'un réfugié au sens de la Convention a le droit, en vertu de l'art. 55 de la Loi, de ne pas " ... être renvoyé dans un pays où sa vie ou sa liberté seraient menacées ..." A mon avis, la négation d'un tel droit ne peut que correspondre à une atteinte à la sécurité de sa personne au sens de l'art. 7.

219 Ce point de vue est appuyé par au moins une décision d'une cour d'instance inférieure concernant l'application de l'art. 7 de la Charte. Dans l'affaire Collin c. Lussier, [1983] 1 C.F. 2186 C.R.R. 89, le requérant a demandé un bref de certiorari à la Division de première instance de la Cour fédérale en vue d'obtenir l'annulation de la décision de l'intimé de le faire transférer d'un pénitencier à sécurité moyenne à un pénitencier à sécurité maximale. Il a prétendu que le transfèrement mettait en danger la "sécurité de sa personne" et qu'il portait atteinte aux droits que lui confère l'art. 7 parce qu'il n'était pas fait en conformité avec les principes de justice fondamentale. Le juge Décary affirme, à la p. 239:

> ... cette détention, en augmentant l'anxiété du requérant due à son état de santé, risque d'aggraver sa maladie et en le privant d'accès à des soins médicaux adéquats, elle porte atteinte effectivement à la sécurité de sa personne.

Il convient de souligner que le requérant n'a pas établi qu'il y avait eu détérioration de sa santé; il a simplement démontré qu'il y aurait probablement détérioration de sa santé. On a jugé que, dans les circonstances, cela était suffisant pour constituer une atteinte au droit à la sécurité de sa personne.

220 On doit reconnaître qu'à ce stade les appelants ne peuventpas invoquer des droits de réfugié au sens de la Convention; ils prétendent avoir droit à l'application des principes de justice fondamentale lorsqu'il s'agit de reconnaître s'ils sont des réfugiés au sens de la Convention. Certains arrêts portant sur l'application de la Déclaration canadienne des droits à la détermination des droits conférés aux particuliers par la législation en matière d'immigration pourraient laisser entendre que, quelle que soit la procédure que la loi elle-même prescrit au sujet de la détermination des droits, cette procédure constitue une "application régulière de la loi" au sens de l'al. 1a) et est conforme à la "justice fondamentale" dont il est question à l'al. 2e) de la Déclaration canadienne des droits: voir Prata c. Ministre de la Main-d'oeuvre et de l'Immigration, précité, à la p. 383; Rebrin v. Bird, [1961] R.C.S. 376, aux pp. 381 à 383, 35 C.R. 412130 C.C.C. 5527 D.L.R. (2d) 622(C.S.C.),; Louie Yuet Sun v. R., [1961] R.C.S. 7026 D.L.R. (2d) 63; Cf. United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950), à la p. 544. Comme l'a fait remarquer le professeur Tarnopolsky (tel était alors son titre) dans son texte intitulé The Canadian Bill of Rights (2e éd., 1975), à la p. 273:

> [TRADUCTION]
>
> Les tribunaux ont constamment décidé que l'immigration est un privilége et non un droit.

221 La dichotomie entre privilèges et droits a contribué de façon importante à restreindre l'application de la Déclaration canadienne des droits, comme il ressort des motifs du juge Martland dans l'arrêt Mitchell c. R., [1976] 2 R.C.S. 570[1976] 1 W.W.R. 57724 C.C.C. (2d) 2416 D.L.R. (3d) 776 N.R. 389(C.S.C.), lequel affirme, à la p. 588:

> L'appelant s'appuie aussi sur l'al. e) de l'art. 2 de la Déclaration canadienne des droits qui prévoit que nulle loi du Canada ne doit s'interpréter ni s'appliquer comme privant une personne du droit à une audition impartiale de sa cause, selon les principes de justice fondamentale, pour la définition de ses droits et obligations. Dans l'arrêt McCaud [[1965] 1 C.C.C. 168], le juge Spence à l'opinion duquel la Cour a unanimement souscrit en appel, a décidé que les dispositions de l'al. e) de l'art. 2 ne s'appliquent pas à la révocation des libérations conditionnelles en vertu des dispositions de la Loi sur la libération conditionnelle de détenus.
>
> L'appelant n'avait aucun droit à une libération conditionnelle. Elle lui a été octroyée à la discrétion de la Commission des libérations conditionnelles. Il n'avait aucun droit de demeurer en liberté à ce titre. Sa libération conditionnelle était susceptible de révocation à la discrétion absolue de la Commission.

Je ne crois pas que ce genre d'analyse soit acceptable en ce qui concerne la Charte. Il me semble plutôt que l'adoption récente de la Charte par le Parlement et neuf des dix provinces, comme partie de la Constitution canadienne, a clairement indiqué aux tribunaux qu'ils devraient réexaminer l'attitude restrictive qu'ils ont parfois adoptée en abordant la Déclaration canadienne des droits. Je suis par conséquent d'avis qu'il faut préférer le point de vue adopté, en dissidence, par le juge en chef Laskin dans l'arrêt Mitchell à celui de la majorité lorsqu'il s'agit de savoir si la Charte s'applique à la détermination des droits conférés par la loi à un particulier.

222 Dans l'affaire Mitchell, il s'agissait de savoir si, en vertu de la Déclaration canadienne des droits, le par. 16(1) de la Loi sur la libération conditionnelle de détenus devait être interprété de manière à exiger de la Commission des libérations conditionnelles qu'elle accorde une audition impartiale à la personne en liberté conditionnelle avant de révoquer sa libération conditionnelle. Le juge en chef Laskin a mis l'accent sur les conséquences, pour l'intéressé, de la révocation de sa libération conditionnelle et il a conclu qu'on ne pouvait pas qualifier cette libération de "simple privilège", même si la personne en liberté conditionnelle n'avait aucun droit absolu d'être mise en liberté. Voici ce qu'il affirme, à la p. 585:

> Mis ensemble, les al. c)(i) et e) de l'art. 2 [de la Déclaration canadienne des droits] exigent que, pour la révocation de la libération conditionnelle, la procédure offre un minimum de garanties, quoi que l'on puisse dire du caractère confidentiel et délicat du régime de libération conditionnelle.

223 Il me semble que les appelants en l'espèce disposent d'un argument encore plus solide que celui de l'appelant dans l'affaire Mitchell. M. Mitchell avait droit tout au plus à ce que la Commission des libérations conditionnelles tienne une audition concernant la révocation de sa libération conditionnelle et à ce qu'elle décide, à partir de considérations pertinentes, si elle devait maintenir sa libération conditionnelle. La Loi ne lui accordait aucun droit à la libération

conditionnelle elle-même; il avait plutôt droit à un examen approprié de la question de savoir s'il pouvait demeurer en liberté conditionnelle. Par contre, si les appelants avaient été déclarés réfugiés au sens de la Convention suivant la définition du par. 2(1) de la Loi sur l'immigration de 1976, ils auraient eu droit aux privilèges de ce statut prévus dans la Loi. Etant donné les conséquences que la négation de ce statut peut avoir pour les appelants si ce sont effectivement des personnes "craignant avec raison d'être persécutée[s]", il me semble inconcevable que la Charte ne s'applique pas de manière à leur donner le droit de bénéficier des principes de justice fondamentale dans la détermination de leur statut.

224 Vu cette conclusion, il est peut-être inutile d'examiner en détail les arguments de Me Scott. Je dois cependant admettre que j'hésite quelque peu à adopter son analogie avec le droit américan selon laquelle les personnes qui se trouvent à l'intérieur du pays ont droit à la protection de la Charte tandis que celles qui demandent simplement l'autorisation d'entrer n'y ont pas droit. En premier lieu, on doit souligner que la présence dans ce pays de quatre des appelants qui se sont vu refuser l'entrée au Canada est uniquement due au fait que la Loi prévoit un mécanisme permettant leur mise en liberté. Comme l'a fait remarquer Me Jackman, une règle accordant la protection de la Charte aux réfugiés qui réussissent à entrer au pays et non à ceux qui demandent leur admission à un point d'entrée équivaudrait à récompenser ceux qui ont cherché à se soustraire à l'application de nos lois sur l'immigration au détriment de ceux qui ont soumis leur cas ouvertement à la première occasion.

225 On peut également objecter, me semble-t-il, que la règle américaine ne fait pas la différence entre le statut spécial que la Loi accorde aux réfugiés au sens de la Convention qui se trouvent dans ce pays et le statut des autres personnes qui cherchent à entrer au Canada ou à y demeurer. Si je comprends bien le droit américain, les étrangers que le gouvernement cherche à renvoyer des Etats-Unis bénéficient dequis longtemps de la protection constitutionnelle des Cinquième et Quatorzième amendements (Kuoru Yamataya v. Fisher (The Japanese Immigrant Case), 189 U.S. 86 (1903)), mais les personnes qui demandent l'autorisation d'entrer et que le gouvernement refuse de laisser entrer ne jouissent pas de cette protection (United States ex. rel. Knauff v. Shaughnessy, précité).

226 Cette distinction faite dans l'arrêt Knauff et précisée dans l'arrêt Shaughnessy v. United States ex. rel. Mezei, 345 U.S. 206 (1953), à la p. 210, s'explique par le fait que [TRADUCTION] "les tribunaux reconnaissent depuis longtemps le pouvoir d'expulser les étrangers comme un attribut fondamental de la souveraineté exercée par les ministères politiques gouvernementaux qui échappent en grande partie au contrôle judiciaire". En ce sens, le respect que les tribunaux américains manifestent envers les organes politiques gouvernementaux dans le domaine de l'immigration a été décrit comme un aspect de la doctrine des questions politiques: voir l'ouvrage de Scharpf, "Judicial Review and the Political Question: A Functional Analysis" (1966), 75 Yale L.J. 517, aux pp. 578 à 583.

227 Pour les fins du présent litige, il suffit de faire deux observations à ce sujet. En premier lieu, la Cour suprême des Etats-Unis a hésité davantage, au cours des dernières années, à invoquer la doctrine des questions politiques pour conférer aux pouvoirs exécutif et législatif du gouvernement un pouvoir de réglementation sur les étrangers qui ne soit pas susceptible d'examen: voir l'arrêt Immigration & Naturalization Service (I.N.S.) v. Chadha, 77 L. Ed. 2d 317, 46 U.S. 919 (1983), aux pp. 338 à 340 (le juge en chef Burger). Quant à ma seconde observation qui est plus importante, il me semble que dans le contexte canadien le législateur a, dans la Loi sur l'immigration de 1976, pris un grand nombre de décisions "politiques" dans lesquelles les tribunaux américains ont hésité, à juste titre, à s'engager. En l'espèce, les appelants demandent à cette Cour de reconnaître que les droits fondamentaux des réfugiés au sens de la Convention sont déterminés par la Loi sur l'immigration de 1976 elle-même et, selon eux, la Cour doit se contenter d'examiner la question de savoir si le système de procédure de reconnaissance de ce statut établi par la Loi est compatible avec les exigences de justice fondamentale énoncées à l'art. 7 de la Charte. Je ne vois pas pourquoi la Cour devrait s'imposer des limites dans cet examen ou établir des distinctions non prescrites par la Loi elle-même entre les catégories de personnes qui revendiquent le statut de réfugié. La Cour n'a pas à se demander ce qu'elle ferait si on lui demandait d'examiner de façon plus approfondie les droits fondamentaux conférés par la Loi.

228 En résumé, je suis d'avis que les droits que cherchent à faire valoir les appelants leur permettent de bénéficier de la protection de l'art. 7 de la Charte. Il est donc nécessaire de se demander si la procédure de reconnaissance du statut de réfugié énoncée dans la Loi est conforme à la justice fondamentale.

2) La procédure énoncée dans la Loi concernant la reconnaissance du statut de réfugié au sens de la Convention constitue-t-elle un déni de justice fondamentale?

229 Tous les avocats s'entendent pour dire que la notion de "justice fondamentale" qui figure à l'art. 7 de la Charte englobe au moins la notion d'équité en matière de procédure énoncée par le juge en chef Fauteux dans l'arrêt Duke c. R., [1972] R.C.S. 917, 18 C.R.N.S. 3027 C.C.C. (2d) 47428 D.L.R. (3d) 129(C.S.C.). Celui-ci affirme, à la p. 923:

> En vertu de l'art. 2e) de la Déclaration canadienne des droits, aucune loi du Canada ne doit s'interpréter ni s'appliquer de manière à le priver d'une 'audition impartiale de sa cause selon les principes de justice fondamentale'. Sans entreprendre de formuler une définition finale de ces mots, je les interprète comme signifiant, dans l'ensemble, que le tribunal appelé à se prononcer sur ses droits doit agir équitablement, de bonne foi, sans préjugé et avec sérénité, et qu'il doit donner à l'acusé l'occasion d'exposer adéquatement sa cause.

230 La procédure d'arbitrage des revendications du statut de réfugié énoncée dans la Loi satisfait-elle à ce critère d'équité en matière de procédure? Offre-t-elle à la personne qui revendique le statut de réfugié une possibilité suffisante d'exposer sa cause et de savoir ce qu'elle doit prouver?

Il semble que ce soit là la question à laquelle nous devons répondre et, en l'abordant, je suis disposée à accepter la prétention de Me Bowie selon laquelle les exigences de l'équité en matière de procédure peuvent varier selon les circonstances: voir l'arrêt Martineau, précité, à la p. 630. Il est donc possible qu'une audition devant l'instance décisionnelle ne soit pas requise dans tous les cas où l'on invoque l'art. 7 de la Charte. Je dois cependant reconnaître qu'il m'est difficile de concilier l'argument de Me Bowie, selon lequel une audition n'est pas requise dans les circonstances de la présente affaire, avec l'interprétation qu'il cherche à donner à l'art. 7. Si on considère à juste titre que "le droit à la vie, à la liberté et à la sécurité de sa personne" porte uniquement sur des questions comme la mort, la liberté physique et le châtiment corporel, il semblerait, du moins à première vue, qu'il s'agisse là de questions d'une importance si fondamentale que l'équité en matière de procédure exigerait immanquablement la tenue d'une audition. Je suis néanmoins disposée à accepter, pour les fins de l'espèce, que des observations écrites peuvent être un substitut adéquat à une audition dans des circonstances appropriées.

231 Je ferai cependant remarquer que, même si les auditions fondées sur des observations écrites sont compatibles avec les principes de justice fondamentale pour certaines fins, elles ne donnent pas satisfaction dans tous les cas. Je pense en particulier que, lorsqu'une question importante de crédibilité est en cause, la justice fondamentale exige que cette question soit tranchée par voie d'audition. Les cours d'appel sont bien conscientes de la faiblesse inhérente des transcriptions lorsque des questions de crédibilité sont en jeu et elles sont donc très peu disposées à réviser les conclusions des tribunaux qui ont eu l'avantage d'entendre les témoins en personne: voir l'arrêt Stein c. Le navire "Kathy K", [1976] 2 R.C.S. 802, aux pp. 806 à 808, 62 D.L.R. (3d) 16, N.R. 359 (le juge Ritchie). Je puis difficilement concevoir une situation où un tribunal peut se conformer à la justice fondamentale en tirant, uniquement à partir d'observations écrites, des conclusions importantes en matière de crédibilité.

232 Comme je l'ai indiqué, il n'est pas nécessaire que l'absence d'audition soit, dans tous les cas, incompatible avec la justice fondamentale. Ma plus grande préoccupation au sujet du système de procédure envisagé par les art. 45 à 48 et 70 et 71 de la Loi sur l'immigration de 1976 n'est donc pas l'absence d'audition en soi, mais plutôt l'insuffisance de la possibilité qu'il offre à la personne qui revendique le statut de réfugié d'exposer sa cause et de savoir ce qu'elle doit prouver. Me Bowie a prétendu que, puisque la procédure prévue à l'art. 45 est de nature administrative, il était tout à fait approprié que le Ministre et le comité consultatif sur le statut de réfugié prennent en considération des questions de politique et des renseignements sur les affaires internationales, auxquels la personne qui revendique le statut de réfugié n'a pas eu la possibilité de répondre. Cependant, j'estime que les procédures devant la Commission d'appel de l'immigration étaient de nature quasi judiciaire et que la commission n'avait pas le droit de se fonder sur des documents qui ne faisaient pas partie du dossier que la personne qui revendique le statut de réfugié a soumis elle-même lorsqu'elle a demandé un réexamen: voir Permaul c. Ministre de l'Emploi et de l'Immigration (arrêt inédit de la Cour d'appel fédérale, no A-576-83, en date du 24 novembre 1983 [maintenant rapporté à 53 N.R. 323]); Saraos c. Ministre de l'Emploi et de l'Immigration, [1982] 1 C.F. 304,

aux pp. 308 et 309, 38 N.R. 170(C). Me Bowie a fait valoir qu'à ce stade il n'y avait aucune preuve contre la personne qui revendique le statut de réfugié; celle-ci était simplement tenue de présenter des observations écrites qui, suivant la prépondérance des probabilités, démontraient qu'elle serait en mesure d'établir le bien-fondé de sa revendication au cours d'une audition. Si le requérant ne soumet pas les faits requis, sa demande ne peut suivre son cours, mais cette procédure ne comporte rien de fondamentalement injuste.

233 Il me semble que Me Bowie commet une erreur fondamentale lorsqu'il décrit la procédure prévue aux art. 70 et 71 comme étant non contradictoire. En fait, il s'agit d'une procédure hautement contradictoire mais la partie adverse, c'est-à-dire le Ministre, attend dans la coulisse. Ce dont la commission est saisie est une décision du Ministre, fondée en partie sur des renseignements et des politiques auxquels le requérant n'a aucun moyen d'accès, portant que la personne qui demande un réexamen n'est pas un réfugié au sens de la Convention. Le requérant a le droit de soumettre à la commission tous les documents pertinents qu'il souhaite mais il est quand même tenu de prouver à la commission que, suivant la prépondérance des probabilités, le Ministre a commis une erreur. Qui plus est, il doit le faire sans connaître le contenu du dossier dont dispose le Ministre, mis à part les raisons sommaires que celui-ci a décidé de lui communiquer en rejetant sa revendication. C'est cet aspect de la procédure prévue dans la Loi que je trouve impossible à concilier avec les exigences de "justice fondamentale" énoncées à l'art. 7 de la Charte.

234 Il convient peut-être de souligner que, si la Commission d'appel de l'immigration autorise l'audition d'une demande de réexamen en vertu du par. 71(1), le Ministre a le droit, en vertu du par. 71(2), d'être avisé des date et lieu de l'audition et d'avoir l'occasion de se faire entendre. Il me semble que, du point de vue de la justice fondamentale, la personne qui revendique le statut de réfugié a le droit d'être informée du contenu du dossier dont dispose le Ministre avant la tenue de cette audition. Il faut bien sûr reconnaître que certains renseignements sur lesquels le Ministre fonde sa preuve peuvent être assujettis au privilège de Sa Majesté. Toutefois, les tribunaux sont bien en mesure d'accorder un redressement au requérant si le Ministre tente d'abuser de ce privilège: voir la Loi sur la preuve au Canada, S.C. 1980-81-82-111, annexe III, art. 36.1.

235 Cependant, vu les dispositions actuelles de la Loi, il se peut que la personne qui revendique le statut de réfugié n'ait jamais l'occasion de contester réellement les renseignements ou politiques sous-jacents à la décision du Ministre de rejeter sa revendication. Etant donné que le par. 71(1) oblige la Commission d'appel de l'immigration à rejeter une demande de réexamen, à moins qu'elle n'estime que le requérant pourra probablement obtenir gain de cause, il est manifeste qu'une demande sera habituellement rejetée avant que la personne qui revendique le statut de réfugié n'ait eu l'occasion de connaître le contenu du dossier dont dispose le Ministre dans le contexte d'une audition. En fait, étant donné que le par. 71(1) dissipe tout doute quant à savoir si la personne qui revendique le statut de réfugié devrait faire l'objet d'une audition, je vois difficilement comment on pourrait contester avec succès l'exactitude des renseignements non divulgués sur lesquels se fonde la décision du Ministre.

236 J'estime par conséquent que la procédure d'examen des revendications du statut de réfugié énoncée dans la Loi sur l'immigration de 1976 constitue, pour les personnes qui revendiquent le statut de réfugié, un déni de justice fondamentale en ce qui concerne l'arbitrage de ces revendications et qu'elle est de ce fait incompatible avec l'art. 7 de la Charte. Il est donc nécessaire de passer à la troisième étape de l'enquête et de déterminer si les lacunes de cette procédure en ce qui concerne les normes énoncées à l'art. 7 constituent des limites raisonnables dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique au sens de l'art. 1 de la Charte.

3) La procédure peut-elle être sauvée par l'art. 1 de la Charte?

237 L'article 1 de la Charte prévoit:

> 1. La Charte canadienne des droits et libertés garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

Il s'ensuit donc que, si la limitation des droits énoncée dans la Charte satisfait au critère de l'art. 1, la Charte n'est pas violée et la Cour n'a pas à intervenir.

238 La question des normes que doit utiliser la Cour lorsqu'elle applique l'art. 1 revêt, sans aucun doute, une très grande importance pour les fins de l'application de la Charte. Si une norme trop faible est établie, les tribunaux risquent d'affaiblir la Charte. Si cette norme est trop rigoureuse, ils risquent d'entraver indûment l'action gouvernementale. Ce n'est pas une tâche qu'il faut prendre à la légère.

239 Malheureusement, au cours de leur argumentation, les avocats ont consacré relativement peu de temps aux principes que la Cour devrait adopter lorsqu'elle applique l'art. 1. Cela se comprend certainement, vu la complexité des autres questions qui, en un sens, doivent être examinées avant d'appliquer l'art. 1. Il faut néanmoins déplorer cette situation et en particulier la portée restreinte des documents factuels présentés par l'intimé à l'appui de la proposition que les dispositions de la Loi sur l'immigration de 1976 constituent une "limite raisonnable" aux droits des appelants. Il faut reconnaître que les avocats ont disposé de très peu de temps pour préparer ces pourvois et je n'entends pas, par ces remarques, critiquer l'exposé des avocats à la Cour qui, en fait, s'est révélé extrêmement utile. D'autre part, je me sens obligée de reprendre les observations formulées par le juge Estey à la p. 384 de l'arrêt L.S.U.C. c. Skapinker, [1984] 1 R.C.S. 357, 11 C.C.C. (3d) 481, 8 C.R.R. 193, 9 D.L.R. (4th) 161, 3 O.A.C. 321, 53 N.R. 169, où il affirme [p. 384]:

> Avec l'expérience, les avocats et les tribunaux établiront des critères et des pratiques qui permettront aux parties de faire la preuve de leurs prétentions relativement à l'art. 1, et aux tribunaux de trancher les questions que cette disposition pourra soulever. Qu'il soit simplement dit ici, dans le but d'aider ceux qui se présenteront dans des procédures analogues,

que le dossier portant sur l'art. 1 était effectivement réduit à sa plus simple expression et, à défaut d'autres choses, il aurait difficilement permis à une cour de trancher la question de savoir si on avait démontré que la limite imposée à un droit garanti était raisonnable et justifiée.

240 En ce qui concerne l'art. 1, Me Bowie a fait valoir au nom du Ministre que la procédure suivie au Canada relativement à l'arbitrage des revendications du statut de réfugié a reçu l'approbation du bureau du Haut-commissaire des Nations unies pour les réfugiés et qu'il n'est pas rare dans les pays du Commonwealth et de l'Europe de l'Ouest que ces revendications soient tranchées par voie administrative sans droit d'appel. Il a ajouté que la Commission d'appel de l'immigration faisait déjà face à un volume considérable d'affaires qu'elle devait entendre et que ce serait taxer ses ressources de façon déraisonnable que d'exiger la tenue d'une audition dans tous les cas où une demande de réexamen d'une revendication du statut de réfugié est présentée.

241 Une ou deux observations s'imposent au sujet de l'art. 1. Il est important, me semble-t-il, de garder à l'esprit que les droits et libertés énoncés dans la Charte sont des éléments essentiels de la structure politique du Canada et qu'ils sont garantis par la Charte en tant que partie de la loi suprême de notre pays. Je pense qu'en déterminant si une limite donnée constitue une limite raisonnable prescrite par la loi et "dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique", il est important de se rappeler que les tribunaux effectuent cette enquête tout en veillant au respect des droits et libertés énoncés dans les autres articles de la Charte. La question en l'espèce n'est pas simplement de savoir si la procédure énoncée dans la Loi sur l'immigration de 1976 relativement à l'arbitrage des revendications du statut de réfugié est raisonnable; il s'agit de savoir s'il est raisonnable de porter atteinte au droit des appelants à la vie, à la liberté et à la sécurité de leur personne en adoptant un système d'arbitrage des revendications du statut de réfugié qui n'est pas conforme aux principes de justice fondamentale.

242 A cet égard, je doute énormément que ce genre de considération utilitaire soumise par Me Bowie puisse justifier la limitation des droits énoncés dans la Charte. Les garanties de la Charte seraient certainement illusoires s'il était possible de les ignorer pour des motifs de commodité administrative. Il est sans doute possible d'épargner beaucoup de temps et d'argent en adoptant une procédure administrative qui ne tient pas compte des principes de justice fondamentale, mais un tel argument, à mon avis, passe à côté de l'objet de l'art. 1. Les principes de justice naturelle et d'équité en matière de procédure que nos tribunaux ont adoptés depuis longtemps et l'enchâssement constitutionnel des principes de justice fondamentale à l'art. 7 comportent la reconnaissance implicite que la prépondérance des motifs de commodité administrative ne l'emporte pas sur la nécessité d'adhérer à ces principes. Quelle que soit la norme d'examen qui se dégage finalement de l'art. 1, il me semble que le fondement de la limitation des droits sous le régime de l'art. 7 doit être plus convaincant que ceux qui ont été avancés en l'espèce.

243 En outre, les arguments présentés par les appelants ne me convainquent pas que les limites imposées aux droits des personnes qui revendiquent le statut de réfugié par la procédure d'arbitrage de la Loi sur l'immigration de 1976 sont raisonnables même au sens où l'entend l'intimé. Il est évident que le système actuel suscite beaucoup de mécontentement même parmi les personnes qui l'administrent. Dans une allocution prononcée à Toronto le 25 octobre 1980, Janet Scott, c.r., présidente de la Commission d'appel de l'immigration, a fait les remarques suivantes:

> [TRADUCTION]
>
> C'est un fait que les articles relatifs à la compétence de la Commission en matière de réexamen du statut de réfugié laissent énormément à désirer. Mis à part toute considération de justice naturelle, le système est extrêmement lourd et, lorsque nous abordons le domaine de la justice naturelle, il peut être taxé d'injuste.

244 Au mois de septembre 1980, le ministre de l'Emploi et de l'Immigration a constitué un groupe d'étude sur les règles et formalités en matière d'immigration et, en novembre 1981, ce groupe d'étude a publié un rapport intitulé Reconnaissance du statut de réfugié, dans lequel il recommande une modification systématique de la procédure d'arbitrage des revendications du statut de réfugié, en proposant notamment ce qui suit: "La personne qui revendique le statut de réfugié devrait avoir droit à une audition dans tous les cas où le [comité consultatif sur le statut de réfugié] n'est pas disposé à faire une recommandation positive se fondant sur la copie de l'interrogatoire" (page xviii du rapport). Dans sa conclusion, le groupe d'étude a examiné l'effet de sa recommendation qu'une audition soit accordée dans tous les cas. Voici ce que l'on dit à la p. 121 du rapport:

> La question qu'il faut finalement se poser à trait aux ressources. Serait-il justifié d'augmenter les dépenses? Comment peut-on faire une analyse de rentabilité lorsque les 'advantages' du processus se trouvent dans des notions abstraites comme la 'justice' et l' 'impartialité'? On pourrait analyser d'autres formes d'arbitrage adoptées par les tribunaux fédéraux et comparer l'importance de leurs décisions et le genre d'audition accordé avec le processus de reconnaissance du statut de réfugié. Sans donner le nom d'aucun organisme, ni dénigrer en aucune façon l'importance de leurs travaux, les répercussions de leurs décisions sont souvent bien loin de celles qu'impliquent les décisions concernant les réfugiés. Pourtant, ils offrent souvent beaucoup plus d'équité au niveau de la procédure.

245 Même si le coût qu'entraîne l'observation de la justice fondamentale est un facteur auquel les tribunaux attachent une grande importance, le Ministre ne m'a pas convaincue que ce coût serait prohibitif au point de constituer une justification au sens de l'art. 1. Bien qu'il soit tentant de faire des observations au sujet des facteurs qui pourraient donner lieu à une justification au sens de l'art. 1, et sur les normes d'examen qui doivent être appliquées relativement à cet article, je pense qu'il ne serait pas sage de le faire. Je limiterai par conséquent mes observations concernant l'application de l'art. 1 à celles qui sont nécessaires pour statuer sur les pourvois.

246 Pour récapituler, je suis convaincue que les appelants ont le droit d'invoquer la protection de l'art. 7 de la Charte en ce qui concerne l'arbitrage, sous le régime de la Loi sur l'immigration de 1976, de leurs revendications du statut de réfugié au sens de la Convention. Je suis également convaincue que la procédure prévue par la Loi, appliquée en l'espèce, ne satisfait pas aux exigences de justice fondamentale énoncées à l'art. 7 et que, par conséquent, il y a eu violation des droits que cet article confère aux appelants. J'estime enfin que l'intimé n'a pas démontré que la procédure énoncée dans la Loi constitue une limite raisonnable aux droits des appelants, au sens de l'art. 1 de la Charte. Je suis par conséquent d'avis d'accueillir les pourvois. Ce faisant, je ferai cependant remarquer que l'acceptation de certains arguments, particulièrement en ce qui concerne la portée de l'art. 7 de la Charte dans le contexte des présents pourvois, ne vise pas à établir de façon définitive la portée de cet article dans d'autres contextes. Je n'exclus en aucune façon la possibilité que l'art. 7 protège un éventail de droits plus large que ceux dont il est question en l'espèce.

4. Mesures de redressement

247 J'examinerai maintenant la question du redressement auquel ont droit les appelants. Les paragraphes 24(1) de la Charte et 52(1) de la Loi Constitutionnelle de 1982 s'appliquent tous les deux. Le paragraphe 52(1) requiert une déclaration que le par. 71(1) de la Loi sur l'immigration est inopérant dans la mesure où il est incompatible avec l'art. 7. Les appellants qui ont subi un préjudice par suite de l'application à leur cas d'une loi inconstitutionnelle ont le droit, en vertu du par. 24(1), de s'adresser à un tribunal compétent en vue d'obtenir "la réparation que le tribunal estime convenable et juste eu égard aux circonstances." Quelle réparation peut-on accorder en l'espèce?

248 La compétence de la Cour est invoquée de deux façons. En premier lieu, les présents pourvois découlent du rejet par la Cour d'appel fédérale de demandes d'examen judiciaire fondées sur l'art. 28 de la Loi sur la Cour fédérale. Dans ce cas, la Cour est limitée aux pouvoirs que la Cour fédérale a le droit d'exercer en vertu de l'art. 28. En second lieu, cependant, on invoque le pouvoir général de redressement que possède la Cour en vertu l'art. 24 de la Charte.

249 L'arrêt Brempong c. Ministre de l'Emploi et de l'Immigration, précité, rédigé par le juge Urie, fait ressortir l'importance de la limitation du pouvoir d'examen judiciaire que possède par la cour en vertu de l'art. 28 de la Loi sur la Cour fédérale. Dans cet arrêt, le juge Urie fait remarquer que l'art. 28 confère à la Cour d'appel fédérale des pouvoirs de surveillance uniquement sur les décisions soumises à un "processus judiciaire ou quasi judiciaire" et que, par conséquent, cette cour n'a pas compétence pour examiner ce qu'il a qualifié de décision "administrative" rendue par le Ministre sous le régime de l'art. 45 de la Loi sur l'immigration de 1976. La commission est un organisme quasi judiciaire et ses décisions peuvent sans aucun doute être soumises à l'examen prévu à l'art. 28. Selon moi, la question soumise à la Cour est de savoir si le pouvoir de redressement plus étendu que lui confère le par. 24(1) de la Charte lui permet d'étendre son examen des violations

possibles de la Charte aux décisions ministérielles rendues conformément à l'art. 45 de la Loi sur l'immigration de 1976. J'estime que non.

250 Le paragraphe 24(1) de la Charte confère des pouvoirs de redressement à "un tribunal compétent". Cette expression présuppose, si je comprends bien, l'existence d'une compétence indépendante de la Charte elle-même. Cette Cour a certainement compétence, en vertu de l'art. 28 de la Loi sur la Cour fédérale, pour examiner les décisions de la Commission d'appel de l'immigration dans les cas qui nous intéressent. Si tout avait commencé en l'espèce par des requêtes en certiorari devant la Division de première instance de la Cour fédérale conformément à l'art. 18 de la Loi sur la Cour fédérale, les décisions ministérielles rendues en vertu de l'art. 45 de la Loi sur l'immigration de 1976 pourraient faire l'objet d'un examen. Mais, à mon avis, les violations de la Charte découlant des décisions ministérielles rendues en vertu de l'art. 45 ne peuvent faire l'objet d'un examen en l'espèce en raison des limites qu'impose à la Cour d'appel fédérale l'art. 28 de la Loi sur la Cour fédérale. Je ne ferai par conséquent aucune observation quant à ces violations ni en ce qui concerne la question de savoir si ou dans quelle mesure l'art. 45 de la Loi sur l'immigration de 1976 est inopérant pour cause d'incompatibilité avec la Charte.

251 Me limitant aux décisions de la Commission d'appel de l'immigration qui font l'objet de l'examen, je suis d'avis d'accueillir les pourvois, d'infirmer les décisions de la Cour d'appel fédérale et de la Commission d'appel de l'immigration et de renvoyer les sept affaires à la commission pour qu'elle procède à une audition sur le fond conformément aux principes de justice fondamentale énoncés précédemment. Etant donné que le par. 71(1) de la Loi sur l'immigration de 1976, qui limite le pourvoir de la commission d'autoriser la tenue d'une audition aux cas où elle estime que la personne qui demande le réexamen pourra probablement obtenir gain de cause à la suite de l'audition de sa revendication, est incompatible avec les principes de justice fondamentale énoncés à l'art. 7 de la Charte, les appelants ont également droit à un jugement déclaratoire portant que le par. 71(1) est inopérant dans la mesure de son incompatibilité.

252 Je suis d'avis d'accorder à M. Satnam Singh des dépens sur la base procureur-client relativement à la demande d'autorisation de pourvoi et au pourvoi lui-même devant cette Cour. Quant aux six autres appellants, des dépens leur seront accordés tel que prescrit par l'ordonnance de cette Cour en date du 16 février 1984.

Appeal allowed; decisions quashed. Parts of s. 71(1) declared inoperative in relation to appellants. Immigration Appeal Board directed to consider applications on the merits in accordance with the principles of fundamental justice.

Footnotes

* Mr Justice Ritchie did not participate in the judgment.

1 P.W. Hogg, "A Comparison of the Canadian Charter of Rights and Freedoms with the Canadian Bill of Rights" in Canadian Charter of Rights and Freedoms (Tarnopolsky and Beaudoin eds.) (1982), c. 1, p. 17.

2 [1970] S.C.R. 282, 71 W.W.R. 161, 10 C.R.N.S. 334, [1970] 3 C.C.C. 355, 9 D.L.R. (3d) 473.

3 Driedger, The Construction of Statutes in Canada (1984).

4 Refugee Determination in Canada, April 17, 1985 (Ottawa).

5 Nicholson v. Haldimand-Norfolk Reg. Bd. of Police Commrs., [1979] 1 S.C.R. 311, 78 C.L.L.C. 14,181, 88 D.L.R. (3d) 671, 23 N.R. 410 (S.C.C.).

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1989 CarswellNat 193
Supreme Court of Canada

Please see in particular para. 90 (*per* Lamer J. in partial dissent)

Slaight Communications Inc. v. Davidson

1989 CarswellNat 695, 1989 CarswellNat 193, [1989] 1 S.C.R. 1038, [1989] S.C.J. No. 45, 15 A.C.W.S. (3d) 132, 26 C.C.E.L. 85, 40 C.R.R. 100, 59 D.L.R. (4th) 416, 89 C.L.L.C. 14,031, 93 N.R. 183, J.E. 89-775, EYB 1989-67228

SLAIGHT COMMUNICATIONS INC. v. DAVIDSON

Dickson C.J.C., Beetz, Lamer, Wilson, Le Dain, * La Forest and L'Heureux-Dubé JJ.

As he then was

Heard: October 8, 1987
Judgment: May 4, 1989
Docket: No. 19412

Counsel: *Brian A. Grosman, Q.C.* and *John Martin*, for appellant.
Morris Cooper and *Fern Weinper*, for respondent.

Subject: Constitutional; Public; Employment; Human Rights

Headnote

Labour and employment law --- Employment law — Termination and dismissal — Termination of employment by employer — Procedure on dismissal — Miscellaneous

Employee wrongfully dismissed — Employer ordered to only send letter in response to any requests for references about employee — Limitation on freedom of expression justifiable — Canadian Charter of Rights and Freedoms, ss. 1, 2(b) — Canada Labour Code, R.S.C. 1970, c. L-1, s. 61.5(9)(c).

Constitutional law --- Charter of Rights and Freedoms — Nature of rights and freedoms — Freedom of expression — Provisions requiring disclosure of information

Employer terminated employee salesman's employment without cause — Employer made unfounded allegations of unsatisfactory performance by employee — An adjudicator awarded employee compensation and ordered employer to provide a letter of recommendation certifying details of the wrongful dismissal and to answer all inquiries concerning employee with that letter exclusively — Employer's appeal was dismissed — Employer appealed further to determine whether s. 61.5(9)(c) of the Code authorized an adjudicator to make such orders — The appeal should be dismissed — The positive order to draw up and to give employee a specified letter of reference infringed s. 2(b) of the Charter but was saved by s. 1 — The negative order that any inquiry about employee's employment be answered exclusively by the letter of reference was an infringement of s. 2(b) — The objective of both orders was to counteract the effects of the unjust dismissal by enhancing employee's ability to seek new employment without being lied about by employer — Constitutionally protecting the freedom of expression on the facts of the case would be tantamount to condoning the continuation of an abuse of an unequal relationship — There was no less intrusive measure that the adjudicator could have taken and have achieved the objective with any likelihood — The effects of the measures were not so deleterious as to outweigh the objective of the measures — The positive and negative orders were saved by s. 1 Constitution Act, 1982, R.S.C. 1985, App. II, No. 44, s 1; Constitution Act, 1982, R.S.C. 1985, App. II, No. 44, s 2(b).

The respondent radio time salesman was found under s. 61.5(6) of the *Canada Labour Code*, by an adjudicator appointed by the Minister of Labour, to have been unjustly dismissed. Pursuant to s. 61.5(9) of the *Labour Code*, the adjudicator ordered that the appellant employer give the respondent a letter of recommendation setting out the length of his employment, the sales quotas set for him and the extent to which he met those quotas, and the fact that he had been unjustly dismissed (the first order). The adjudicator further ordered that queries about the respondent were to be answered only with this letter (the second order). The appellant applied for judicial review of the adjudicator's decision. The Federal Court of Appeal dismissed the application. The appellant appealed. The issues on the appeal were: (1) does s. 6.5(9)(c) of the *Labour Code* authorize an adjudicator to make such an order, and (2) did the order infringe the appellant's freedom of expression guaranteed by s. 2(b) of the *Canadian Charter of Rights and Freedoms*?

Held:

The appeal was dismissed.

Per Dickson C.J.C. (Wilson, La Forest and L'Heureux-Dubé JJ. concurring)

Lamer J.'s discussion of the applicability of the *Charter* to administrative decision making was agreed with. Lamer J.'s conclusion that the second order was patently unreasonable, thereby obviating the need for *Charter* review, was not. Administrative law unreasonableness, as a preliminary standard of review, should not impose a more onerous standard upon government than would *Charter* review. While patent unreasonableness is important to maintain for questions untouched by the *Charter*, in the realm of value inquiry Courts should have recourse to this standard only in the clearest of cases in which a decision could not be justified under s. 1 of the *Charter*.

The first order infringed the appellant's freedom of expression under s. 2(b) of the *Charter* but was saved under s. 1.

The second order, that the appellant answer any reference inquiry exclusively by sending the specified letter, also infringed s. 2(b); it, too, was justified under s. 1. The objective sought to be achieved by both orders, i.e. to counteract the effects of the unjust dismissal by enhancing the ability of the respondent to seek new employment without the appellant lying about him, was of sufficient importance to warrant overriding the appellant's freedom of expression. The adjudicator's remedy was a legislatively sanctioned attempt to remedy the unequal balance of power that normally exists between an employer and an employee. Thus, this case falls within a class of cases in which the governing objective is that of protection of a particularly vulnerable group or members thereof. The Courts must be concerned to avoid constitutionalizing inequalities of power in the workplace. As long as the proportionality test is met, it would not, on the facts of this case, be in accordance with the underlying principles and values of a democratic society for the *Charter* to be successfully invoked by an employer. On the facts of this case, constitutionally protecting freedom of expression would be tantamount to condoning the continuation of an abuse of an already unequal relationship.

Both orders were rationally limited to the objective. Since there was a proven history of attempts by the appellant to promote a fabricated version of the quality of the respondent's services, it was rational for the adjudicator to attach a rider to the order for a reference letter so as to ensure that representatives of the employer did not subvert the effect of the letter by unjustifiably maligning the respondent in the guise of giving a reference.

The adjudicator could not have taken a less intrusive measure and still achieved the objective, with any likelihood. The letter was tightly and carefully designed to reflect only a very narrow range of facts which were not actually contested. The appellant was not forced to state opinions which were not its own. The second order sought to prevent the appellant from passing on an opinion, such prohibition being closely tied to the abuse of power which had been found to exist. That prohibition was very circumscribed in that it was triggered only when the appellant was contacted for a reference and there was no requirement to send the letter to anyone other than prospective employers.

The effects of the measures were not so deleterious as to outweigh the objectives. Among the underlying values essential to a free and democratic society are the inherent dignity of the human person and commitment to social justice and equality. Canada has ratified the *International Covenant on Economic, Social and Cultural Rights*, and committed itself thereby to protecting the right to work found in art. 6 of that treaty. The fact that a value has the status of an international human right, either in customary international law or under a treaty to which Canada is a state party, should generally be indicative of a high degree of importance attached to that objective.

Per Lamer J. (dissenting in part)

The word "like" in the English version of s. 61.5(9)(c) of the *Labour Code* does not have the effect of limiting the powers conferred on the adjudicator by allowing him to make orders similar to the orders expressly mentioned in paras. (a) and (b) of that subsection. The interpretation according to which the word "like" in the English version of para. (c) does not have the effect of limiting the general power conferred on the adjudicator is more consistent with the general scheme of the *Labour Code*, and in particular with the purpose of Division V.7, which is to give non-unionized employees a means of challenging a dismissal they feel to be unjust, and at the same time to equip the adjudicator with the powers necessary to remedy the consequences of such a dismissal.

The adjudicator had the jurisdiction, quite apart from any constitutional argument, to make the first order. However, the adjudicator was not authorized by s. 61.5(9)(c) to make the second order compelling the appellant to respond to reference requests only by sending the letter of recommendation, since such an order was patently unreasonable. Requiring someone to write a letter is not unreasonable as such, but the requirement becomes wholly unreasonable when the circumstances are such that the letter may be seen as reflecting that person's opinions when that is not necessarily the case. The second order prohibited the appellant from making comments of any kind. The effect of that part of the order was to create circumstances in which the letter of recommendation could be seen as the expression of the appellant's opinion.

The *Charter* applies to the order made by the adjudicator. The adjudicator is a statutory creature, appointed pursuant to a legislative provision and deriving all his powers from the statute. As the Constitution is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect, it is impossible to interpret legislation conferring discretion as conferring a power to infringe the *Charter*, unless that power is expressly conferred or necessarily implied. Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the *Charter* rights to be infringed. Accordingly, an adjudicator exercising delegated powers does not have the power to make an order that would result in an infringement of the *Charter*, and exceeds his jurisdiction if he does so.

The first order limited the appellant's freedom of expression. However, that limitation was justified under s. 1 of the *Charter*. The purpose of the order, i.e. to counteract the consequences of the unjust dismissal, was sufficiently important to warrant a limitation on freedom of expression. The means chosen to attain the objective were reasonable in the circumstances. The letter was rationally connected to the dismissal since it was the only way of effectively remedying the consequences of the dismissal. The consequences of the order were proportional to the objective sought. The limitation on freedom of expression in this case was not very serious.

Per Beetz J. (dissenting)

Both orders violated the appellant's freedom of expression and were not justified under s. 1 of the *Charter*. The first order forced the appellant to write, as if they were his own, statements of fact in which the appellant might not believe. The first order, then, could have the effect of forcing the appellant to lie. Such an effect is totalitarian in nature and can never be justified under s. 1. The second order could lead to the implication that the appellant had no further comment to make about the respondent's performance and that the letter, therefore, reflected the appellant's opinion. In any event, the second order was disproportionate and unreasonable.

Table of Authorities

Cases considered by the majority:

Blanchard v. Control Data Can. Ltd., [1984] 2 S.C.R. 476, 14 Admin. L.R. 133, 84 C.L.L.C. 14,070, 55 N.R. 194, 14 D.L.R. (4th) 289 — *referred to*

Edwards Books & Art Ltd. v. R., [1986] 2 S.C.R. 713, 87 C.L.L.C. 14,001, 28 C.R.R. 1, (sub nom. *Edwards Books & Art Ltd. v. R.; R. v. Nortown Foods Ltd.)* 58 O.R. (2d) 442 (note), 30 C.C.C. (3d) 385, 35 D.L.R. (4th) 1, (sub nom. *R. v. Videoflicks Ltd.)* 55 C.R. (3d) 193, 19 O.A.C. 239, 71 N.R. 161 — *referred to*

National Bank of Can. v. Retail Clerks' International Union, [1984] 1 S.C.R. 269, 84 C.L.L.C. 14,037, 53 N.R. 203, 9 D.L.R. (4th) 10 — *distinguished*

R. v. Oakes, [1986] 1 S.C.R. 103, 53 O.R. (2d) 719 (headnote only), 50 C.R. (3d) 1, 65 N.R. 87, 24 C.C.C. (3d) 321, 14 O.A.C. 335, 26 D.L.R. (4th) 200, 19 C.R.R. 308 — *referred to*

Reference re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313, 51 Alta. L.R. (2d) 97, [1987] 3 W.W.R. 577, 28 C.R.R. 305, 38 D.L.R. (4th) 161, 74 N.R. 99, 78 A.R. 1, [1987] D.L.Q. 225, 87 C.L.L.C. 14,021 — *referred to*

Cases considered by the dissent:

Blanchard v. Control Data Can. Ltd., [1984] 2 S.C.R. 476, 14 Admin. L.R. 133, 84 C.L.L.C. 14,070, 55 N.R. 194, 14 D.L.R. (4th) 289 — *referred to*

C.U.P.E., Local 963 v. N.B. Liquor Corp., [1979] 2 S.C.R. 227, 25 N.B.R. (2d) 237, 51 A.P.R. 237, 79 C.L.L.C. 14,209, 26 N.R. 341, 97 D.L.R. (3d) 417, N.B.L.L.C. 24259 — *referred to*

National Bank of Can. v. Retail Clerks' International Union, [1984] 1 S.C.R. 269, 84 C.L.L.C. 14,037, 53 N.R. 203, 9 D.L.R. (4th) 10 — *applied, considered*

Que. Assn. of Protestant School Bds. v. A.G. Que.; Wong-Woo v. A.G. Que.; Orman v. A.G. Que.; Mak v. A.G. Que.; Toma v. A.G. Que., [1984] 2 S.C.R. 66, 54 N.R. 196, 10 D.L.R. (4th) 321, 9 C.R.R. 133 — *referred to*

R. v. Oakes, [1986] 1 S.C.R. 103, 53 O.R. (2d) 719 (headnote only), 50 C.R. (3d) 1, 65 N.R. 87, 24 C.C.C. (3d) 321, 14 O.A.C. 335, 26 D.L.R. (4th) 200, 19 C.R.R. 308 — *referred to*

Reference re Alta. Legislation, [1938] S.C.R. 100, [1938] 2 D.L.R. 81, appeal dismissed [1938] 3 W.W.R. 337, [1939] A.C. 117, (sub nom. *A.G. Alta. v. A.G. Can.*), [1938] 4 D.L.R. 433 — *referred to*

Statutes considered/Lois citées:

Accurate News and Information Act (Alta.)

Canada Labour Code, R.S.C. 1970, c. L-1 [now R.S.C. 1985, c. L-2] —

Div. V.7

s. 3(a), as am. S.C. 1970-71-72, c. 50, s. 2

s. 61.5(6), as en. S.C. 1977-78, c. 27, s. 21 [now R.S.C. 1985, c. L-2, s. 242(1)]

s. 61.5(7), as en. S.C. 1977-78, c. 27, s. 21 [now R.S.C. 1985, c. L-2, s. 242(2)]

s. 61.5(8), as en. S.C. 1977-78, c. 27, s. 21 [now R.S.C. 1985, c. L-2, s. 242(3)]

s. 61.5(9), as en. S.C. 1977-78, c. 27, s. 21 [now R.S.C. 1985, c. L-2, s. 242(4)]

s. 184(1)(a), as en. S.C. 1972, c. 18, s. 1 [now R.S.C. 1985, c. L-2, s. 94(1)(a)]

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11 —

s. 1

s. 2

s. 32(1)

Federal Court Act, R.S.C. 1970, 2d Supp., c. 10 [now R.S.C. 1985, c. F-7] —

s. 52(d)

Treaties considered:

International Covenant on Economic, Social and Cultural Rights, Res. 2200 A (XXI), 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1966) —

art. 6

Words and phrases considered:

LIKE

In the case at bar I consider . . . that the presence of the word "like" in para. (c) of the English version [of s. 61.5(9) of the Canada Labour Code, R.S.C. 1970, c. L-1] was not intended to limit the powers conferred on the adjudicator by allowing him to make only orders similar to the orders expressly mentioned in paras. (a) and (b) of that subsection, and does not have that effect.

APPEAL from a judgment of the Federal Court of Appeal [reported at [1985] 1 F.C. 253, 12 C.C.E.L. 251, 58 N.R. 150, 85 C.L.L.C. 14,053, 16 C.R.R. 45] dismissing appellant's application pursuant to s. 28 of the Federal Court Act to set aside an order made by an adjudicator under s. 61.5(9)(c) of the Canada Labour Code. Appeal dismissed, Beetz J. dissenting and Lamer J. dissenting in part.

***Dickson C.J.C.* (*Wilson, La Forest and L'Heureux-Dubé* concurring):**

I

1 The respondent, Mr. Ron Davidson, a radio time salesman, was dismissed by his employer, the appellant Slaight Communications Inc., operating as Q107 FM Radio. A complaint was filed by Mr. Davidson under the *Canada Labour Code*, R.S.C. 1970, c. L-1, and an inquiry undertaken. As the matter could not be resolved or settled, Mr. Edward B. Joliffe, Q.C., was appointed by the Minister of Labour to act as adjudicator and to render a decision in accordance with the provisions of subss. (6) to (9) of s. 61.5, as en. S.C. 1977-78, c. 27, s. 21, Division V.7, Part III of the *Canada Labour Code*. Two days of hearings were held in Toronto. Twelve days later, Mr. Joliffe received a letter, written on behalf of the employer, requesting Mr. Joliffe to consider reopening the adjudication because, the letter read in part, "our client has advised us that it is in possession of certain material which may indicate that Mr. Davidson perjured his testimony before you in one or more respects." Mr. Joliffe demanded particulars of this very serious allegation. The company's counsel failed to comply. The application for another hearing was dismissed.

2 Adjudicator Joliffe reviewed at length the evidence of Ms. Stitt. Ms. Stitt was the sole witness on behalf of the employer and at the relevant time she was general sales manager of the company, though later dismissed. The adjudicator noted:

> In Ms. Stitt's letter to Labour Canada of February 27, 1984 ... she specified that the 'major complaint' was Mr. Davidson's failure to achieve 'monthly sales budgets since October of 1983.' To select four months (or less) from a total of 43 months of service as evidence of unsatisfactory service is obviously specious.

Later in his ruling the adjudicator stated:

> From first to last Ms. Stitt's attitude faithfully reflected the advice she attributes to Mr. Gary Slaight: 'If he failed to make budget, I'd hear about it. If he made it, the complaint would be that he could do more.' By this perverse logic it appears that the more Mr. Davidson sold, the more unacceptable his performance. Such absurd statements led this adjudicator to suggest disclosure of 'the real reason for dismissal,' but there was no response.

He concluded:

> An attempt has been made in this case to prove unsatisfactory performance as just cause for dismissal. The attempt has failed. I find that Mr. Davidson was dismissed without just cause.

3 Mr. Joliffe then turned his attention to the question of an appropriate remedy, quoting subs. (9) of s. 61.5 as follows:

> (9) Where an adjudicator decides pursuant to subsection (8) that a person has been unjustly dismissed, he may, by order, require the employer who dismissed him to
>
> (a) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;
>
> (b) reinstate the person in his employ; and
>
> (c) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

4 He ordered payment of $46,628.96 plus interest and legal costs of $2,500. He made a further order, which is central to this appeal, reading:

> Under the power given me by paragraph (c) in subsection (9) of Section 61.5, I further order:
>
> That the employer give the complainant a letter of recommendation, with a copy to this adjudicator, certifying that:

(1) Mr. Ron Davidson was employed by Station Q107 from June, 1980, to January 20, 1984, as a radio time salesman;

(2) That his sales 'budget' or quota for 1981 was $248,000, of which he achieved 97.3 per cent;

(3) That his sales 'budget' or quota for 1982 was $343,500, of which he achieved 100.3 per cent;

(4) That his sales 'budget' or quota for 1983 was $402,200, of which he achieved 114.2 per cent;

(5) That following termination in January, 1984, an adjudicator (appointed by the Minister of Labour) after hearing the evidence and representations of both parties, held that the termination had been an unjust dismissal.

I further order that any communication to Q107, its management or staff, whether received by letter, telephone or otherwise, from any person or company inquiring about Mr. Ron Davidson's employment at Q107, shall be answered exclusively by sending or delivering a copy of the said letter of recommendation.

5 An appeal by the employer to the Federal Court of Appeal was dismissed [reported at [1985] 1 F.C. 253, 12 C.C.E.L. 251, 58 N.R. 150, 85 C.L.L.C. 14,053, 16 C.R.R. 45 , Urie and Mahoney JJ., Marceau J. dissenting].

6 The question to be decided by this Court is whether para. (c) of s. 61.5(9) of the *Canada Labour Code* authorizes the adjudicator to order the employer to give the employee a letter of reference of specified content and to order the employer to say nothing further about the employee. Paragraph (c), it will be recalled, reads:

(c) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

7 Resolution of the problem involves (1) the construction and the true meaning and effect of para. (c), (2) whether the adjudicator's order in this case infringed freedom of expression under s. 2(b) of the *Canadian Charter of Rights and Freedoms*, and (3) if so, whether the infringement is justified under s. 1 of the *Charter*.

8 Two constitutional questions were stated in this appeal as follows:

1. Do the provisions of the adjudicator's order, pursuant to s. 61.5(9) of the *Canada Labour Code*, R.S.C. 1970, c. L-1, as amended, whereby the appellant was ordered to provide the respondent with a letter of recommendation of specified content combined with the further stipulation that any communication to the appellant relating to the respondent's employment

with the appellant be answered exclusively by sending or delivering a copy of the letter of recommendation, infringe or deny the rights and freedoms guaranteed by s. 2(b) of the *Canadian Charter of Rights and Freedoms*?

2. If the provisions of the adjudicator's order infringe or deny the rights and freedoms guaranteed by s. 2(b) of the *Canadian Charter of Rights and Freedoms*, are they justified by s. 1 of the *Charter* and therefore not inconsistent with the *Constitution Act, 1982*?

II — The Relationship Between Administrative Law Review And Review Under The Charter

9 I have had the benefit of reading the opinion of Justice Lamer and I am in complete agreement with his discussion of the applicability of the *Charter* to administrative decision making. I also agree with his conclusion that the positive order made by adjudicator Joliffe (to draw up and to give the respondent a specified letter of reference) infringes s. 2(b) of the *Charter* but is saved by s. 1. However, with regard to the negative order (that any inquiry about the respondent's employment at Q107 be answered exclusively by the letter of reference which is the subject of the positive order) I must respectfully disagree with the conclusion of Lamer J. that it is patently unreasonable, thereby obviating the need to consider the *Charter*. Furthermore, not only am I of the view that the negative order is reasonable in the administrative law sense, but I also believe that it is reasonable and demonstrably justified in the sense of s. 1 of the *Charter*.

10 I agree with Mahoney J. of the Federal Court of Appeal [[1985] 1 F.C., at 260-261] that:

> The ordering of provision of a totally factual letter of recommendation and foreclosing the undermining of its effect which, in the circumstances disclosed by the evidence, was patently foreseeable, seems to me to be an equitable remedial requirement. It is not punitive. It is appropriate redress to the wronged employee without, in any way, injuring the employer. In my view, the order was authorized by paragraph 61.5(9)(c).

11 The precise relationship between the traditional standard of administrative law review of patent unreasonableness and the new constitutional standard of review will be worked out in future cases. A few comments nonetheless may be in order. A minimal proposition would seem to be that administrative law unreasonableness, as a preliminary standard of review, should not impose a more onerous standard upon government than would *Charter* review. While patent unreasonableness is important to maintain for questions untouched by the *Charter*, such as review of determinations of fact (see *Blanchard v. Control Data Can. Ltd.*[1984] 2 S.C.R. 476 at 494-495, 14 Admin. L.R. 13384 C.L.L.C. 14,07055 N.R. 19414 D.L.R. (4th) 289) in the realm of value inquiry the Courts should have recourse to this standard only in the clearest of cases in which a decision could not be justified under s. 1 of the *Charter*. In contrast to s. 1, patent unreasonableness rests to a large extent on unarticulated and undeveloped values and lacks the same degree of structure and sophistication of analysis. It seems to me that had Lamer J. gone on to conduct a s. 1 inquiry, his excellent analysis of the contending values in the context of the positive order

would have been equally applicable to the negative order which he has instead found to be patently unreasonable.

12 I agree with Lamer J. that the order in this case is considerably different from that at issue in *National Bank of Can. v. Retail Clerks' International Union*, [1984] 1 S.C.R. 269, 84 C.L.L.C. 14,037, 53 N.R. 203, 9 D.L.R. (4th) 10, and therefore, the determination by Beetz J. that the letter in question in *National Bank* was patently unreasonable is not applicable to the facts of this case. The focus of condemnation in *National Bank* was on the "compelling [of] anyone to utter opinions that [were] not his own" (per Beetz J., at p. 296, S.C.R.) which was exacerbated by the wide publication of the letter to all employees and management staff of the bank. That is not this case. As the adjudicator noted here, there was no real conflict of evidence about the accounts and reports.

III — The Negative Order and Section 2(b) of the Charter

13 Adjudicator Joliffe's order that Slaight Communications Inc. answer any reference inquiry exclusively by sending the specified letter is an infringement of s. 2(b) freedom of expression. The government is attempting to prevent Q107 from expressing its opinion as to the qualifications of Mr. Davidson beyond the facts set out in the letter. The harm that it was aiming to prevent (decreased job prospects for Mr. Davidson) is only relevant to s. 1 analysis and not to s. 2(b) analysis.

IV — Section 1 of the Charter

14 The basic test for s. 1 analysis formulated in *R. v. Oakes*[1986] 1 S.C.R. 103 at 138-139, 53 O.R. (2d) 719 (headnote only), 50 C.R. (3d) 1 65 N.R. 87 24 C.C.C. (3d) 321 14 O.A.C. 335 26 D.L.R. (4th) 200 19 C.R.R. 308, has been reviewed in the reasons of Lamer J. and need not be reproduced here.

1. Importance of the Objective

15 I am in firm agreement with the conclusions of Lamer J. about the importance of the objective sought to be achieved by the positive order, namely, counteracting the effects of the unjust dismissal by enhancing the ability of the employee to seek new employment without being lied about by the previous employer. This is also the objective of the negative order which, in the words of Mahoney J. in the Federal Court of Appeal [[1985] 1 F.C., at 260] was designed to "foreclos[e] the undermining of [the] effect" of the positive order. Both orders seek to achieve the same goal, the negative order complementing and reinforcing the positive order.

16 It cannot be overemphasized that the adjudicator's remedy in this case was a legislatively-sanctioned attempt to remedy the unequal balance of power that normally exists between an employer and employee. Thus, in a general sense, this case falls within a class of cases in which the governmental objective is that of protection of a particularly vulnerable group, or members thereof.

In *Edwards Books & Art. Ltd. v. R.*[1986] 2 S.C.R. 71387 C.L.L.C. 14,00128 C.R.R. 1*Edwards Books & Art Ltd. v. R.; R. v. Nortown Foods Ltd.*58 O.R. (2d) 442 (note)30 C.C.C. (3d) 38535 D.L.R. (4th) 1*R. v. Videoflicks Ltd.*55 C.R. (3d) 19319 O.A.C. 23971 N.R. 161, I stated for the majority [S.C.R., at 779]:

> In interpreting and applying the *Charter* I believe that the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons. When the interests of more than seven vulnerable employees in securing a Sunday holiday are weighed against the interests of their employer in transacting business on a Sunday, I cannot fault the Legislature for determining that the protection of the employees ought to prevail.

Consistent with the above view of the place of the *Charter*, I can think of no better way to describe the employment relationship than as expressed in P. Davies and M. Freeland, *Kahn-Freund: Labour and the Law*, 3d ed. (London: Sweet & Maxwell, 1983) at 18:

> [T]he relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination. ... The main object of labour law has always been, and we venture to say will always be, a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship. Most of what we call protective legislation — legislation on the employment of women, children and young persons, on safety in mines, factories, and offices, on payment of wages in cash, on guarantee payments, on race or sex discrimination, on unfair dismissal, and indeed most labour legislation altogether — must be seen in this context. It is an attempt to infuse law into a relation of command and subordination.

The objective of both the positive and negative orders made by adjudicator Joliffe is sensitive to the reality identified by Kahn-Freund, Davies and Freeland. The Courts must be just as concerned to avoid constitutionalizing inequalities of power in the workplace and between societal actors in general. It must be recalled that *Oakes* supra, at p. 136 [[1986] 1 S.C.R.] stated that "[t]he underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified." As long as the proportionality test is met, it would not, on the facts of this case, be in accordance with those underlying principles and values for the *Charter* to be successfully invoked by an employer. The inequality in one employment relationship would be continued even after its termination, with the result that the worker looking for a new job would be placed in an even more unequal bargaining position vis-à-vis prospective employers than is normally the case. On the facts of this case, constitutionally protecting freedom of expression would be tantamount to condoning the continuation of an abuse of an already unequal relationship.

2. Proportionality

(a) Rational Connection

17 The negative order is very much rationally linked to the objective, no less than the positive order. The adjudicator was plainly of the view that the respondent had been the subject of some kind of personal vendetta or "set-up", as Mahoney J. termed it [[1985] 1 F.C., at 258] which had been initiated by the employer's general manager and executed by its sales manager, the latter of whom was Mr. Davidson's immediate superior.

18 As I have indicated, the representative of the employer was found to have engaged in bad faith and duplicitous conduct, giving misleading evidence about Mr. Davidson's work performance both at the time of his dismissal and during the unjust dismissal hearing. Further, in deciding that reinstatement was not a viable remedy, the adjudicator gave as his reason that "[t]here is no sign that he would receive fair treatment by an employer which has made such vigorous efforts to justify the indefensible." With this proven history of promoting a fabricated version of the quality of Mr. Davidson's service and the concern that the employer would continue to treat him unfairly if he went back to work for the employer, it was rational for the adjudicator to attach a rider to the order for a reference letter so as to ensure that representatives of the employer did not subvert the effect of the letter by unjustifiably maligning its previous employee in the guise of giving a reference.

(b) Minimal Impairment

19 In my view, there was no less intrusive measure that the adjudicator could have taken and still have achieved the objective with any likelihood. To the extent there was a likelihood that representatives of Q107 would not be content to pass on the letter of reference absent the kind of untrue comments that had resulted in the finding of unjust dismissal, the letter of reference would have been rendered illusory to the same degree of likelihood.

20 While an order of additional monetary compensation would clearly be less intrusive upon the appellant's freedom of expression, it would not be an acceptable substitute. Even if the adjudicator had ordered that Mr. Davidson could come back once he had secured a job and be granted compensation, above and beyond unemployment insurance for the actual period out of work, this would only be compensation for the *economic* effects of lack of employment, not the *personal* effects. This is directly contrary to the objective sought to be achieved by the order, which is securing new employment in the shortest order possible; the corollary of this objective is, of course, a concern to alleviate the personal problems associated with being out of work. As Professor David M. Beatty puts it in "Labour Is Not a Commodity" in B.J. Reiter and J. Swan, eds, *Studies in Contract Law* (London: Butterworths, 1980) at 323-324:

> The personal meaning of work is seen to go beyond rather than to be completely dependent upon the purposes of production. ... [R]eflecting the characterization of humans as, for the most part, doers and makers, the identity aspect of employment is increasingly seen to serve deep psychological needs. ... It recognizes the importance of providing the members of society with an opportunity to realize some sense of identity and meaning, some sense of worth in the community beyond that which can be taken from the material product of the institution. ... [E]mployment is seen as providing recognition of the individual's being engaged in something worthwhile. ... [E]mployment comes to represent the means by which most members of our community can lay claim to an equal right of respect and of concern from others. It is this institution through which most of us secure much of our self-respect and self-esteem. With such an emphasis on contributing to society one avoids the demoralization that inevitably attends idleness and exile, even when it is assuaged by social assistance.

Monetary compensation can only be an alternative measure if labour is treated as a commodity and every day without work seen as being exhaustively reducible to some pecuniary value. As I had occasion to say in *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at 368, 51 Alta. L.R. (2d) 97, [1987] 3 W.W.R. 577, 28 C.R.R. 305, 38 D.L.R. (4th) 161, 74 N.R. 99, 78 A.R. 1, [1987] D.L.Q. 225, 87 C.L.L.C. 14,021: "A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being." Viewing labour as a commodity is incompatible with such a perspective, which is reflected in the remedial objective chosen by the adjudicator. To posit monetary compensation as a less intrusive measure is, in effect, to challenge the legitimacy of the objective.

21 Consider the facts of this particular case. The letter was tightly and carefully designed to reflect only a very narrow range of *facts* which, we saw, were not really contested. As already discussed, unlike in *National Bank*, supra, the employer has not been forced to state *opinions* ("views and sentiments", per Beetz J., [1984] 1 S.C.R., at 295) which are not its own. Rather, the negative order seeks to prevent the employer from passing on an opinion, such prohibition being closely tied to the history of abuse of power which had been found to exist. Furthermore, that prohibition is very circumscribed. Firstly, it is triggered only in cases when the appellant is contacted for a reference and, secondly, there is no requirement to send the letter to anyone other than prospective employers. In sum, this is a much less intrusive and carefully designed order than that in *National Bank* in which the bank was required to send to a very large audience (all the employees and management staff of the bank) what amounted to a letter of contrition which conveyed the impression that certain opinions expressed therein were those of the employer.

22 Finally, it cannot be ignored that a letter such as this may not have a great beneficial impact on an employee's job hunt. The letter is very neutral in tone, totally unembellished as it is by any opinion customary in letters of reference, and it refers to the fact of the finding of unjust dismissal. It seems to me that the adjudicator went no further than was necessary to achieve the objective

and, even then, the measures adopted by the adjudicator cannot be said to have done more than to have enhanced, as opposed to having ensured, the chances of the respondent finding a job. The adjudicator did not in any sense pursue the objective without regard to the appellant's right to free expression.

(c) Deleterious Effects

23 It is clear to me that the effects of the measures are not so deleterious as to outweigh the objective of the measures. The importance of the above-discussed objective cannot be overemphasized. There are many diverse values that deserve protection in a free and democratic society such as that of Canada, only some of which are expressly provided for in the *Charter*. The underlying values of a free and democratic society both guarantee the rights in the *Charter* and, in appropriate circumstances, justify limitations upon those rights. As was said in *Oakes* at p. 136 [[1986] 1 S.C.R.] among the underlying values essential to our free and democratic society are "the inherent dignity of the human person" and "commitment to social justice and equality". Especially in light of Canada's ratification of the *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200 A (XXI), 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1966) and commitment therein to protect, inter alia, the right to work in its various dimensions found in art. 6 of that treaty, it cannot be doubted that the objective in this case is a very important one. In *Reference re Public Service Employee Relations Act (Alta.)*, supra, I had occasion to say at p. 349 [[1987] 1 S.C.R.]:

> The content of Canada's international human rights obligations is, in my view, an important indicia of the meaning of 'the full benefit of the *Charter*'s protection'. I believe that the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.

Given the dual function of s. 1 identified in *Oakes*, Canada's international human rights obligations should inform not only the interpretation of the content of the rights guaranteed by the *Charter* but also the interpretation of what can constitute pressing and substantial s. 1 objectives which may justify restrictions upon those rights. Furthermore, for purposes of this stage of the proportionality inquiry, the fact that a value has the status of an international human right, either in customary international law or under a treaty to which Canada is a state party, should generally be indicative of a high degree of importance attached to that objective. This is consistent with the importance that this Court has placed on the protection of employees as a vulnerable group in society.

24 In normal course, the suppression of one's right to express an opinion about a subject or person will be a serious infringement of s. 2(b) and only outweighed by very important objectives. In the foregoing analysis, I have sought to show that the negative order was minimally intrusive in a relative sense and also that the careful tailoring of both parts of the order has made this a much less serious infringement of s. 2(b) than, for instance, occurred in the *National Bank* case.

V — Conclusion

25 In conclusion, I am of the opinion that both of the adjudicator's orders at issue (the positive order and the negative order) infringe s. 2(b) but are saved by s. 1. I would answer both constitutional questions in the affirmative and dismiss the appeal with costs.

***Beetz J.*:**

I — Introduction

26 I have had the advantage of reading the reasons for judgment written by Mr. Justice Lamer and then the reasons for judgment written by the Chief Justice. I refer to their statements of the facts, proceedings and constitutional questions as well as to their summary of the decisions rendered by the adjudicator and the Federal Court of Appeal.

27 Like the Chief Justice, I am in agreement with Mr. Justice Lamer's discussion of the applicability of the *Charter* to administrative decision making. I also agree with Mr. Justice Lamer's construction of s. 61.5(9)(c) of the *Canada Labour Code*.

28 However, I have the misfortune of not being able to concur with one of the two main conclusions reached by both my colleagues, and while I agree with the other main conclusion reached by Mr. Justice Lamer, I do so for reasons which differ in part from his own reasons.

29 The two impugned orders issued by the adjudicator in the case at Bar read as follows:

> Under the power given me by paragraph (c) in subsection (9) of Section 61.5, I further order:
>
> That the employer give the complainant a letter of recommendation, with a copy to this adjudicator, certifying that:
>
> (1) Mr. Ron Davidson was employed by Station Q107 from June, 1980, to January 20, 1984, as a radio time salesman;
>
> (2) That his sales 'budget' or quota for 1981 was $248,000, of which he achieved 97.3 per cent;
>
> (3) That his sales 'budget' or quota for 1982 was $343,500, of which he achieved 100.3 per cent;
>
> (4) That his sales 'budget' or quota for 1983 was $402,200, of which he achieved 114.2 per cent;
>
> (5) That following termination in January, 1984, an adjudicator (appointed by the Minister of Labour) after hearing the evidence and representations of both parties, held that the termination had been an unjust dismissal.

> I further order that any communication to Q107, its management or staff, whether received by letter, telephone or otherwise, from any person or company inquiring about Mr. Ron Davidson's employment at Q107, shall be answered exclusively by sending or delivering a copy of the said letter of recommendation.

30 The first order, which has been labelled the positive order, relates to a letter of recommendation comprising five attestations numbered (1) to (5).

31 The second order, which has been labelled the negative order, forbids the appellant to answer any inquiry about the respondent's employment at Q107 otherwise than by the letter of recommendation dictated by the adjudicator in the first order.

32 The main issues are whether these two orders infringe or deny the freedoms guaranteed to the appellant by s. 2(b) of the *Canadian Charter of Rights and Freedoms* and, if so, whether they are justified by s. 1 of the *Charter*.

33 Section 1 and 2(b) of the *Charter* provide:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> . . . . .
>
> 2. Everyone has the following fundamental freedoms:
>
> . . . . .
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

34 I state my conclusions at the outset. In my view, the first order, that is the positive one, except attestation number (5) thereof, as well as the second order, that is the negative one in its entirety, violate the appellant's freedom of opinion and expression and cannot be justified under s. 1 of the *Charter*.

35 I hasten to add that the flaw which I find in the first order can easily be corrected. As for the second order, it can be replaced by another order which tends toward the same end without violating the *Charter*.

II — The First Order

36 The flaw which I find in the first order, with particular reference to its attestations numbered (1) to (4), is that this order forces the employer to write, as if they were his own, statements of facts in which, rightly or wrongly, he may not believe, or which he may ultimately find or think to be inaccurate, misleading or false. In other words, the first order may force the former employer to

tell a lie. In this particular respect, this case cannot in my opinion be distinguished from the case of *National Bank of Can. v. Retail Clerks' International Union*, where a majority of this Court held as follows at p. 296 [[1984] 1 S.C.R.]:

> Remedies Nos. 5 and 6 thus force the Bank and its president to do something, and to write a letter, which may be misleading or untrue.
>
> This type of penalty is totalitarian and as such alien to the tradition of free nations like Canada, even for the repression of the most serious crimes. I cannot be persuaded that the Parliament of Canada intended to confer on the Canada Labour Relations Board the power to impose such extreme measures, even assuming that it could confer such a power bearing in mind the *Canadian Charter of Rights and Freedoms*, which guarantees freedom of thought, belief, opinion and expression. These freedoms guarantee to every person the right to express the opinions he may have: *a fortiori* they must prohibit compelling anyone to utter opinions that are not his own.

37 It was argued that the case at Bar is different in that the letter of recommendation in question is totally factual and that the facts stated therein and found by the adjudicator were undisputed. In the Federal Court of Appeal, Mahoney J. accepted this argument. He wrote at p. 260 [[1985] 1 F.C.]:

> I am, of course, aware of the decision in *National Bank of Canada v. Retail Clerks' International Union et al.*, [1984] 1 S.C.R. 269. The letter ordered in that case required the employer to express, or at least imply, opinions which it did not necessarily hold. Here, the applicant has simply been *ordered to tell the truth*. The letter sets out bald facts that are neither misleading nor disputed.

(Emphasis added.)

38 With the greatest of respect, in so accepting the argument, Mahoney J. missed the point altogether and begged the essential question: what is the truth? The facts found to be true by the adjudicator are binding for the purpose of establishing whether or not there had been an unjust dismissal. But the former employer cannot be forced to acknowledge and state them as the truth apart from his belief in their veracity. If he states these facts in the letter, as ordered, but does not believe them to be true, he does not tell the truth; he tells a lie. He may not have disputed these facts at the time of the hearing but he could change his mind later, for instance on the basis of evidence discovered after the adjudicator's decision was rendered.

39 There may be a distinction, somewhat difficult to apply, between being forced to express opinions or views which one does not necessarily entertain, and being compelled to state facts, the veracity of which one does not necessarily believe; but, in my opinion, both types of coercion constitute gross violations of the freedoms of opinion and expression or, at the very least, of the freedom of expression. That is why, with respect, I cannot possibly agree with the suggestion that

the restriction to freedom of expression which results from the first order is not very serious or very grave. The superficial innocuousness of the first order should not blind us to the nature of this order and to the positive manner in which it violates the freedom of expression. It is one thing to prohibit the disclosure of certain facts. It is quite another to order the affirmation of facts, apart from belief in their veracity by the person who is ordered to affirm them. The prohibition constitutes a prima facie violation of the freedoms of opinion and expression but such a prohibition may, in some circumstances, be justified under s. 1 of the *Charter*. On the other hand, to order the affirmation of facts, apart from belief in their veracity by the person who is ordered to affirm them, constitutes a much more serious violation of the freedoms of opinion and expression, as was held in the case of the *National Bank of Can.* In my view, such a violation is totalitarian in nature and can never be justified under s. 1 of the *Charter*. It does not differ, essentially, from the command given to Galileo by the Inquisition to abjure the cosmology of Copernicus. As was stated in the unanimous reasons of this Court in *Que. Assn. of Protestant School Bds. v. A.G. Que.; Wong-Woo v. A.G. Que.; Orman v. A.G. Que.; Mak v. A.G. Que.; Toma v. A.G. Que.*[1984] 2 S.C.R. 6654 N.R. 19610 D.L.R. (4th) 3219 C.R.R. 133, s. 1 of the *Charter* cannot be used to justify a complete negation of a constitutionally protected right or freedom [S.C.R., at 88]:

> The provisions of s. 73 of *Bill 101* collide directly with those of s. 23 of the *Charter*, and are not limits which can be legitimized by s. 1 of the *Charter*. Such limits cannot be exceptions to the rights and freedoms guaranteed by the *Charter* nor amount to amendments of the *Charter*. *An Act of Parliament or of a legislature which, for example, purported to impose the beliefs of a State religion would be in direct conflict with s. 2(a) of the Charter, which guarantees freedom of conscience and religion, and would have to be ruled of no force of effect without the necessity of even considering whether such legislation could be legitimized by s. 1*.

(Emphasis added.) (See also *Reference re Alta. Legislation*, [1938] S.C.R. 100, [1938] 2 D.L.R. 81, appeal dismissed [1938] 3 W.W.R. 337[1939] A.C. 117, (sub nom. *A.G. Alta. v. A.G. Can.*), [1938] 4 D.L.R. 433, with respect to the *Accurate News and Information Act* of Alberta.)

40 In spite of its gravity however, and as indicated earlier, the flaw which I find in the first order can easily be corrected. It would suffice to add to the letter a sentence or sentences indicating that the attestations numbered (1) to (4) refer to facts as found by the adjudicator.

41 As for attestation number (5), it does not give rise to any difficulty in my view since it refers to a matter of record.

III — The Second Order

42 The second order is in the form of a prohibition to answer enquiries relating to the respondent's employment at Q107 otherwise than be the letter of recommendation described in the first order.

43 I agree with Mr. Justice Lamer that the sending of the letter as drafted by the adjudicator, coupled with the prohibition to say or write anything else, could lead to the implication that the former employer has no further comment to make upon the performance of the respondent and that, accordingly, the letter reflects the opinion of the former employer. This being the case, the second order, coupled with the first, also violates the former employer's freedoms of opinion and expression in a manner which, for the reasons given above, cannot be justified under s. 1 of the *Charter*.

44 The risks of such an implication might be reduced and perhaps eliminated should the first order be corrected as I suggested earlier. But I believe that we must decide the case on the basis of the orders as they now stand, and not as we would if they were corrected.

45 In any event, I find the second order disproportionate and unreasonable. I believe one should view with extreme suspicion an administrative order or even a judicial order which has the effect of preventing the litigants from commenting upon and even criticizing the rulings of the deciding board or Court.

46 Adjudicators and boards who, in cases of unjust dismissal, order the sending of letters of recommendation by former employers face a dilemma. They cannot foresee all the possible types of exchanges which are susceptible to occur between former and prospective employers. They accordingly issue a blanket and perpetual prohibition to write or say anything but what they have dictated in the letter of recommendation. This can lead to absurd and even counter-productive results.

47 Thus, in the case at Bar, if after having received the letter dictated by the adjudicator, a prospective employer were to address specific questions to the former employer, relating for instance to the respondent's health or drinking habits, the appellant would have to go on answering with sales statistics. This could not but compromise the respondent's chances for employment. Or if the former employer finally saw the light and, out of remorse, became inclined to write a letter considerably more complimentary and flattering than the one dictated by the adjudicator, he could not do so.

48 The absurdity which results from the adjudicator's second order is sufficient to warrant its reversal, in my view. It is disproportionate and unreasonable from a practical point of view. Then it has to be unreasonable from an administrative law point of view and I have difficulty in conceiving how it could be reasonable within the meaning of s. 1 of the *Charter*.

49 This being said, I agree that the adjudicator was legitimately concerned by the risk that the former employer undermine the effect of the letter of recommendation. While I believe that the prohibition he issued to foreclose that possibility is disproportionate and unreasonable, I think that other legitimate means might have been devised towards the same end. The adjudicator could, for

instance, have ordered the former employer to write in the letter that he had been instructed by the adjudicator to tell prospective employers that they would be well advised to read the adjudicator's decision. I do not believe that such a neutral order would be punitive, but it might alert prospective employers to the animosity displayed by the former employer towards the respondent.

IV — Conclusions

50 One last point before I reach my conclusions properly so called.

51 I would not like it to be thought that I condone the highly reprehensible conduct of the appellant. But under the *Charter*, freedom of opinion and freedom of expression are guaranteed to "everyone", employers and employees alike, irrespective of their labour practices and of their bargaining power.

52 I would allow the appeal, set aside the judgment of the Federal Court of Appeal as well as the first and second order of the adjudicator quoted in these reasons for judgment, and refer the matter back to the adjudicator so that these orders be replaced by an order or orders compatible with these reasons.

53 I would give an affirmative answer to the first constitutional question and a negative answer to the second constitutional question.

54 I would not make any order as to costs.

***Lamer J.*:**

55 An adjudicator appointed by the Minister of Labour pursuant to s. 61.5(6) of the *Canada Labour Code* made an order in favour of an employee based on s. 61.5(9) of the Code. The employer challenged the said order but its appeal was dismissed by the Federal Court of Appeal. With leave of this Court, the employer is now appealing here from this judgment of the Federal Court of Appeal. The outcome of this appeal involves determining whether, under s. 61.5(9) of the *Canada Labour Code*, as it read at the time of his decision, the adjudicator had the power to make the order at issue.

I — Facts

56 Respondent had been employed by appellant as a "radio time salesman" for 3 1/2 years when he was dismissed on the ground that his performance was inadequate. It is not in dispute that when he was dismissed respondent received all monies to which he was entitled under his employment contract.

57 However, respondent filed a complaint with an inspector alleging that he had been unjustly dismissed. As the parties were unable to settle this complaint and respondent asked that it be

referred to an adjudicator, the Minister of Labour appointed an adjudicator to hear and decide the matter in accordance with the Code.

58 After hearing the evidence and the submissions of the parties, the adjudicator made an order directing the employer to pay respondent as compensation the sum of $46,628.96 with interest at the rate of 12 per cent and to pay his counsel the sum of $2,500 to reimburse him for the legal costs incurred. The said order further imposed on the employer an obligation to give respondent a letter of recommendation certifying that he had been employed by station Q107 from June 1980 to January 20, 1984, and that an adjudicator had found he was unjustly dismissed and indicating the sales quotas he had been set and the amount of sales he actually made during this period. It should be noted that the order made specifically indicates the amounts to be shown as sales quotas and as sales actually made. Finally, the order directed appellant to answer requests for information about respondent only by sending this letter of recommendation.

59 This order reads as follows:

> In the matter of compensation, I am satisfied that had he not been dismissed, the sales and commissions of the complainant would have at least equalled those of 1983. After taking into consideration the fact that he worked until January 20, 1984, and received certain commissions (at reduced levels) thereafter, my order is that he be paid forthwith the equivalent of 75 per cent of his 1983 earnings of $62,171.95, being the sum of $46,628.96.
>
> I further order that interest be paid at the rate of 12 per cent per annum, divided by two, on the said amount from January 20 to November 20, 1984. Thereafter interest will be payable on any unpaid balance at the rate of 12 per cent per annum, which is not to be divided by two.
>
> I say nothing of the U.I.C. payments received by the complainant, which is a matter to be resolved between the complainant and the Commission.
>
> I further order payment of legal costs in the amount of $2,500.00 to the complainant's solicitor and counsel, Mr. Morris Cooper.
>
> Further orders are necessary, resembling the order made by Adjudicator Adams in the *Roberts* case, but in greater detail.
>
> Under the power given me by paragraph (c) in subsection (9) of Section 61.5, I further order:
>
> That the employer give the complainant a letter of recommendation, with a copy to this adjudicator, certifying that:
>
> (1) Mr. Ron Davidson was employed by Station Q107 from June, 1980 to January 20, 1984, as a radio time salesman;
>
> (2) That his sales 'budget' or quota for 1981 was $248,000, of which he achieved 97.3 per cent;

(3) That his sales 'budget' or quota for 1982 was $343,500, of which he achieved 100.3 per cent;

(4) That his sales 'budget' or quota for 1983 was $402,200, of which he achieved 114.2 per cent;

(5) That following termination in January, 1984, an adjudicator (appointed by the Minister of Labour) after hearing the evidence and representations of both parties, held that the termination had been an unjust dismissal.

I further order that any communication to Q107, its management or staff, whether received by letter, telephone or otherwise, from any person or company inquiring about Mr. Ron Davidson's employment at Q107, shall be answered exclusively by sending or delivering a copy of the said letter of recommendation.

60 Appellant is challenging in this Court only the parts of the order relating to (1) the sending of a letter of recommendation and (2) the prohibition on answering a request for information in any other way than by sending this letter.

II — Judgments of Lower Courts

61 Appellant challenged this order by filing an application with the Federal Court of Appeal to set it aside. However, the Federal Court of Appeal, made up of Urie and Mahoney JJ. with Marceau J. dissenting, dismissed this application to set aside.

62 In his reasons, Mahoney J. first said that the purpose of s. 61.5(9)(c) and the fact that it would be difficult or even impossible to find remedies similar to the remedies expressly authorized in paras. (a) and (b) meant that the presence of the word "like" in the English version of s. 61.5(9)(c) was not intended to restrict the powers conferred on the adjudicator. In his opinion, this paragraph simply expressed a kind of ejusdem generis rule which did not have the effect of limiting the scope of the powers conferred.

63 Ordering the employer to give respondent a letter of recommendation was in his opinion an equitable remedy designed to remedy the consequences of the dismissal, not to punish the employer. This letter, he thought, only stated objective facts that were not in dispute and so simply required the employer to tell the truth.

64 However, he agreed with appellant's argument that the part of the decision ordering the employer to issue a letter of recommendation imposed limitations on its freedom of expression guaranteed by the *Canadian Charter of Rights and Freedoms*. In his view, however, such a limitation was justified under s. 1 of that *Charter*. He stressed that the limitation on freedom of

expression was prescribed by law, since it was the Act which authorized the adjudicator to make such an order.

65 Urie J., for his part, agreed with the reasons stated by his brother Judge Mahoney. However, he indicated that he was not sure that the ejusdem generis rule applied in any way to the interpretation of s. 61.5(9)(c).

66 Finally, Marceau J. wrote his own reasons, which differ from the majority reasons in certain respects. First, he expressed agreement with Mahoney J. as to the way in which s. 61.5(9)(c) should be construed, but expressed some reservations regarding application of the ejusdem generis rule. He noted that the powers conferred on the adjudicator were already clearly limited by the fact that the orders he was empowered to make under para. (c) must be aimed at remedying or counteracting the consequences of the dismissal.

67 In his view, the remedies ordered in the case at Bar were of two types, positive and negative. The part of the order directing the employer to furnish respondent and any person seeking information about him with a letter of recommendation having a specified content was, in his opinion, an order that could be characterized as positive. It directed the employer to do something and sought to remedy the consequences of the dismissal found to be unjust: accordingly, it was authorized by s. 61.5(9)(c). The part of the order which also prohibited the employer from answering any request for information about respondent other than by issuing this letter might for its part be characterized as negative, since it prohibited the employer from doing something. Such an order, in his view, was not aimed at remedying the consequences of the dismissal and so was not authorized by the said paragraph.

68 He also considered that this part of the order infringed the freedom of thought, belief, opinion and expression guaranteed appellant by s. 2(b) of the *Canadian Charter of Rights and Freedoms*. He said he did not think it possible to say that the limitation was prescribed by law, since the extent of the limitation was not indicated by the legislation in question. He added, however, that in any case in his opinion these freedoms were not subject to reasonable limits that could be demonstrably justified in a free and democratic society. He therefore concluded that the application to set aside should be allowed and the matter referred back to the adjudicator concerned for him to determine what remedies it would be appropriate to impose in order to counteract the effects of the dismissal.

III — Legislation

69 The following legislation is relevant to this appeal:

Canada Labour Code

70

61.5. ...

(9) Where an adjudicator decides pursuant to subsection (8) that a person has been unjustly dismissed, he may, by order, require the employer who dismissed him to

(a) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;

(b) reinstate the person in his employ; and

(c) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

Canadian Charter of Rights and Freedoms

71

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

. . . . .

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(c) freedom of peaceful assembly; and

(d) freedom of association

. . . . .

32. (1) This *Charter* applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

IV — Analysis

72 To begin with, appellant argued that the adjudicator had no power to make these parts of the order since the orders he is authorized to make under s. 61.5(9)(c) must be of the same kind

as the orders expressly mentioned in s. 61.5(9)(a) and (b), in view of the word "like" that appears in the English version.

73 As can readily be seen, the English and French versions of s. 61.5(9)(c) are different. Section 61.5(9)(c) of the English version confers a general power on the adjudicator as follows:

> 61.5. ...
>
> (9) Where an adjudicator decides pursuant to subsection (8) that a person has been unjustly dismissed, he may, by order, require the employer who dismissed him to
>
> . . . . .
>
> (c) do any other *like* thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

(My emphasis.)

74 The French version, for its part, does not contain any word or expression equivalent to the word "like" used in the English version. The general power conferred on the adjudicator is conferred in the following language:

> 61.5.
>
> (9) Lorsque l'arbitre décide conformément au paragraphe (8) que le congédiement d'une personne a été injuste, il peut, par ordonnance, requérir l'employeur
>
> . . . . .
>
> (c) de faire toute autre chose qu'il juge équitable d'ordonner afin de contrebalancer les effets du congédiement ou d'y remédier.

75 First of all, therefore, these two versions have to be reconciled if possible. To do this, an attempt must be made to get from the two versions of the provision the meaning common to them both and ascertain whether this appears to be consistent with the purpose and general scheme of the Code.

76 In the case at Bar, I consider, like the Federal Court of Appeal Judges, that the presence of the word "like" in para. (c) of the English version was not intended to limit the powers conferred on the adjudicator by allowing him to make only orders similar to the orders expressly mentioned in paras. (a) and (b) of that subsection, and does not have that effect. Interpreting this provision in this way would mean applying the ejusdem generis rule. I think it is impossible to apply this rule in the case at Bar since one of the conditions essential for its application has not been met. The specific terms (here the orders referred to in paras. (a) and (b)) which precede the general term (the power conferred on the adjudicator in para. (c) to make any order that is equitable) must have a common characteristic, a common genus. As Maxwell writes in P. St. J. Langan, ed. *Maxwell on the Interpretation of Statutes*, 12th ed. (London: Sweet & Maxwell, 1969) at 299:

> Unless there is a genus or class or category, there is no room for any application of the *ejusdem generis* doctrine.

77 Professor P.-A. Côté also notes this requirement when he writes in his work titled *The Interpretation of Legislation in Canada*, trans. K. Lippel (Cowansville, Qué.: Éditions Yvon Blais, 1984) at 245:

> As a third condition, the specific terms must have a significant common denominator to be considered within one given category. If this is lacking, *ejusdem generis* does not apply.

78 In the case at Bar, I do not see what characteristic could be described as common to a compensation order and a reinstatement order.

79 The only "denominator" which seems to me common to these two orders in the context of s. 61.5(9) is the fact that these orders are both intended to remedy or counteract the consequences of the dismissal found by the adjudicator to be unjust. However, para. (c) expressly provides that an order made under that paragraph must be designed to remedy or counteract any consequence of the dismissal. This "common denominator" cannot therefore assist in the application of the ejusdem generis rule, since the legislator has already expressly provided that the orders the adjudicator is empowered to make must have this characteristic. Even if I were to admit that the English version should prevail over the French version, which I do not admit, I would still consider that this provision is ambiguous and that the most rational way of interpreting it is to say that the presence of the word "like" in this version does not have the effect of limiting the general power conferred on the adjudicator. This interpretation is in any case much more consistent with the general scheme of the Code, and in particular with the purpose of Division V.7, which is to give non-unionized employees a means of challenging a dismissal they feel to be unjust and at the same time to equip the adjudicator with the powers necessary to remedy the consequences of such a dismissal. Section 61.5 is clearly a remedial provision and must accordingly be given a broad interpretation. The consequence of interpreting para. (c) in the manner suggested by appellant would be to limit considerably the type of order the adjudicator could make. It would in fact be very difficult to find remedies *like* the remedies mentioned in paras. (a) and (b). The extent of the compensation that can be ordered has been carefully limited by the legislator and there is not really any similarity between reinstatement and any other measure. I believe that, on the contrary, by enacting s. 61.5(9)(c), the legislator intended to vest in the adjudicator powers that would be sufficiently wide and flexible for him to adequately perform the duties entrusted to him, in each of the cases that come before him. I therefore consider that the meaning to be given to both versions is what clearly appears on the face of the French version and that accordingly the type of order the adjudicator can make should not be limited to orders like those expressly authorized in paras. (a) and (b).

80 Appellant further argued that the adjudicator exceeded his jurisdiction since there is no connection between the order made in the case at Bar, the dismissal and the consequences of that dismissal. I cannot entirely agree with him in this regard. The part of the order dealing with the sending of a letter of recommendation is, in my view, clearly meant to counteract the consequences of the dismissal found to be unjust by the adjudicator. This part of the order is designed to prevent the employer's decision to dismiss respondent from having negative consequences for the latter's chances of finding new employment. The letter of recommendation is intended to correct the impression given by the fact of the dismissal, by clearly indicating that the dismissal was found by an adjudicator to be unjust and by clearly setting out certain "objective" facts relating to respondent's performance. The situation is therefore very different from that which existed in *National Bank of Can. v. Retail Clerks' International Union*.

81 In that case, the Canada Labour Relations Board had found that the National Bank of Canada, which had closed a unionized branch and incorporated it in a non-unionized branch, had taken its decision for anti-union reasons and had therefore infringed s. 184(1)(a) and (3)(a) of the *Canada Labour Code*. These provisions prohibit an employer, inter alia, from interfering with the formation or administration of a trade union and from suspending, transferring or laying off an employee on the ground that he is a member of a trade union. The Canada Labour Relations Board had therefore ordered the Bank to do a number of things. Among these were that it create a trust fund to further the objectives of the Code among all its employees and send the employees a letter telling them this fund had been created. The order specifically indicated what the wording of this letter should be and prohibited the employer from adding or deleting anything in its wording. Chouinard J., with whose reasons the other members of this Court concurred, said that in his opinion the part of the order prescribing the creation of a trust fund should be set aside since there was no relationship between this remedy and the alleged act and its consequences. He thought that the announcement of the creation of the fund was the key feature of the letter the employer was required to send, and concluded that this part of the order should suffer the same fate as that reserved for the part of the order dealing with the creation of the fund. Beetz J., for his part, added that in his opinion both the creation of the fund and the letter were open to the interpretation that they resulted from an initiative taken by the National Bank of Canada, reflecting the views of the Bank and in particular its approval of the *Canada Labour Code* and its objectives. He stated that in his opinion this part of the order was contrary to the democratic traditions of this country and so could not have been authorized by the Parliament of Canada.

82 In the case at Bar, the letter the employer is required to give respondent is of a different nature from the letter the National Bank of Canada was required to send in that case. It expresses no opinions and simply sets out facts which, as counsel for the appellant admitted at the hearing, and it is important to note this, are not in dispute. Ordering an employer to give a former employee a letter of recommendation containing only objective facts that are not in dispute does not seem to me to be as such unreasonable. Such an order may be completely justified in certain circumstances,

and in the case at Bar there is nothing to indicate that the adjudicator was pursuing an improper objective or acting in bad faith or in a discriminatory manner. As this order was not unreasonable, it is not the function of this Court to examine its appropriateness or to substitute its own opinion for that of the person making the order, unless of course the decision impinges on a right protected by the *Canadian Charter of Rights and Freedoms*.

83 Accordingly, I am not prepared to say at this stage that the nature of this part of the order is such that the adjudicator necessarily exceeded his jurisdiction in making it. Quite apart from the constitutional argument that this order infringes the freedom of expression guaranteed by the *Canadian Charter of Rights and Freedoms*, therefore, I consider that the adjudicator had the power to make this part of the order at issue here. The only limitation placed by s. 61.5(9) on the type of order the adjudicator can make is that any order must be designed to "remedy or counteract any consequence of the dismissal." In my view, this part of the order is clearly intended for that purpose.

84 However, I take a different view of the part of the order that prohibits the employer from answering a request for information about respondent other than by sending this letter of recommendation. Although this part of the order is probably meant to remedy or counteract the consequences of the dismissal, I believe that the issuing of this letter in such a context could be interpreted as meaning that appellant has no comments to make regarding the work done by respondent other than those mentioned in the letter. In such circumstances, it could thus be construed as expressing, at least by implication, appellant's opinion in this regard. Although requiring someone to write a letter is not unreasonable as such, the requirement becomes wholly unreasonable when the circumstances are such that the letter may be seen as reflecting their opinions when that is not necessarily the case. This part of the order does not prohibit the employer from stating facts found to be incorrect at the hearing, which might have been reasonable and justified: it prohibits the employer from making comments of any kind. In my view the effect of this part of the order, by thus prohibiting the employer from adding any comments whatever, is to create circumstances in which the letter of recommendation could be seen as the expression of appellant's opinions. As my brother Beetz J. so admirably phrased it in *National Bank of Canada* at p. 296 [[1984] 1 S.C.R.]:

> This type of penalty is totalitarian and as such alien to the tradition of free nations like Canada, even for the repression of the most serious crimes.

85 Parliament cannot have intended to authorize such an unreasonable use of the discretion conferred by it. A discretion is never absolute, regardless of the terms in which it is conferred. This is a long-established principle. H.W.R. Wade, in his text titled *Administrative Law*, 4th ed. (Oxford: Clarendon Press, 1977) says the following at p. 336:

> For more than three centuries it has been accepted that discretionary power conferred upon public authorities is not absolute, even within its apparent boundaries, but is subject to general

> legal limitations. These limitations are expressed in a variety of different ways, as by saying that discretion must be exercised *reasonably* and in good faith, that relevant considerations only must be taken into account, that there must be no malversation of any kind, or that the decision must not be arbitrary or capricious.

(My emphasis.)

86 This limitation on the exercise of administrative discretion has been clearly recognized in our law, by *C.U.P.E., Local 963 v. N.B. Liquor Corp.*[1979] 2 S.C.R. 22725 N.B.R. (2d) 23751 A.P.R. 23779 C.L.L.C. 14,20926 N.R. 34197 D.L.R. (3d) 417, N.B.L.L.C. 24259, and *Blanchard v. Control Data Can. Ltd.*, [1984] 2 S.C.R. 476, 14 Admin. L.R. 133, 84 C.L.L.C. 14,070, 55 N.R. 194, 14 D.L.R. (4th) 289 inter alia. Whether it is the interpretation of legislation that is unreasonable or the order made in my view matters no more than the question of whether the error is one of law or of fact. An administrative tribunal exercising discretion can never do so unreasonably. To reiterate what I said earlier in *Blanchard* [[1984] 2 S.C.R., at 494-495]:

> An administrative tribunal has the necessary jurisdiction to make a mistake, and even a serious one, but not to be unreasonable. The unreasonable finding is no less fatal to jurisdiction because the finding is one of fact rather than law. An unreasonable finding is what justifies intervention by the courts.
>
> Not only is the distinction between error of law and of fact superfluous in light of an unreasonable finding or conclusion, but the reference to error itself is as well. Indeed, though all errors do not lead to unreasonable findings, every unreasonable finding results from an error (whether of law, fact, or a combination of the two), which is unreasonable.
>
> In conclusion, an unreasonable finding, whatever its origin, affects the jurisdiction of the tribunal.

87 In the case at Bar, I consider that the adjudicator was not authorized by s. 61.5(9)(c) to order the employer not to answer a request for information about respondent, except by sending the letter of recommendation containing the aforementioned wording, since such an order is patently unreasonable. Though the adjudicator clearly had jurisdiction to make an order he felt to be equitable and proper, he lost this jurisdiction when he made a patently unreasonable decision.

88 Appellant further argued that s. 61.5(9)(c) did not empower the adjudicator to make such an order, since that paragraph does not clearly state that the adjudicator can use a remedy that differs from the remedies usually available under the ordinary rules of common law in such circumstances. The principle underlying this argument is that, in the absence of a clear provision to the contrary, the legislator should not be assumed to have intended to alter the pre-existing ordinary rules of common law. There is no need for me to rule on the merits of this principle, since I consider that in the case at Bar, by enacting para. (c), the legislator clearly indicated his intent to confer wider

powers on the adjudicator than those he usually has under the ordinary rules of common law in such circumstances.

89 It now remains to assess in light of the *Canadian Charter of Rights and Freedoms* the part of the order we have found to be not unreasonable in terms of the rules of administrative law. The fact that the part of the order relating to sending the letter of recommendation is not unreasonable from an administrative law standpoint does not mean that it is necessarily consistent with the *Charter*.

90 The fact that the *Charter* applies to the order made by the adjudicator in the case at Bar is not, in my opinion, open to question. The adjudicator is a statutory creature: he is appointed pursuant to a legislative provision and derives *all* his powers from the statute. As the Constitution is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect, it is impossible to interpret legislation conferring discretion as conferring a power to infringe the *Charter*, unless, of course, that power is expressly conferred or necessarily implied. Such an interpretation would require us to declare the legislation to be of no force or effect, unless it could be justified under s. 1. Although this Court must not add anything to legislation or delete anything from it in order to make it consistent with the *Charter*, there is no doubt in my mind that it should also not interpret legislation that is open to more than one interpretation so as to make it inconsistent with the *Charter* and hence of no force or effect. Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the *Charter* rights to be infringed. Accordingly, an adjudicator exercising delegated powers does not have the power to make an order that would result in an infringement of the *Charter*, and he exceeds his jurisdiction if he does so. This idea was very well expressed by Prof. Peter Hogg when he wrote in his text titled *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985) at 671:

> The references in s. 32 to the 'Parliament' and a 'legislature' make clear that the Charter operates as a limitation on the powers of those legislative bodies. Any statute enacted by either Parliament or a Legislature which is inconsistent with the Charter will be outside the power of (ultra vires) the enacting body and will be invalid. It follows that any body exercising statutory authority, for example, the Governor in Council or Lieutenant Governor in Council, ministers, officials, municipalities, school boards, universities, administrative tribunals and police officers, is also bound by the Charter. Action taken under statutory authority is valid only if it is within the scope of that authority. Since neither Parliament nor a Legislature can itself pass a law in breach of the Charter, neither body can authorize action which would be in breach of the Charter. Thus, the limitations on statutory authority which are imposed by the Charter will flow down the chain of statutory authority and apply to regulations, by-laws, orders, decisions and all other action (whether legislative, administrative or judicial) which depends for its validity on statutory authority.

91 Section 61.5(9)(c) must therefore be interpreted as conferring on the adjudicator a power to require the employer to do any other thing that it is equitable to require the employer to do in

order to remedy or counteract any consequence of the dismissal, provided however that such an order, if it limits a protected right or freedom, only does so within reasonable limits that can be demonstrably justified in a free and democratic society. It is only if the limitation on a right or freedom is not kept within reasonable and justifiable limits that one can speak of an infringement of the *Charter*. The *Charter* does not provide an absolute guarantee of the rights and freedoms mentioned in it. What it guarantees is the right to have such rights and freedoms subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. There is thus no reason not to ascribe to Parliament an intent to limit a right or freedom mentioned in the *Charter* or to allow a protected right or freedom to be limited when the language used by Parliament suggests this.

92 It would be useful, in my view, to describe the steps that must be taken to determine the validity of an order made by an administrative tribunal, which are as follows.

93 First, there are two important principles that must be borne in mind:

1. An administrative tribunal may not exceed the jurisdiction it has by statute; and

2. It must be presumed that legislation conferring an imprecise discretion does not confer the power to infringe the *Charter* unless that power is conferred expressly or by necessary implication.

94 The application of these two principles to the exercise of a discretion leads to one of the following two situations:

1. The disputed order was made pursuant to legislation which confers, either expressly or by necessary implication, the power to infringe a protected right.

(a) It is then necessary to subject the *legislation* to the test set out in s. 1 by ascertaining whether it constitutes a reasonable limit that can be demonstrably justified in a free and democratic society.

2. The legislation pursuant to which the administrative tribunal made the disputed order confers an imprecise discretion and does not confer, either expressly or by necessary implication, the power to limit the rights guaranteed by the *Charter*.

(a) It is then necessary to subject the *order* made to the test set out in s. 1 by ascertaining whether it constitutes a reasonable limit that can be demonstrably justified in a free and democratic society.

(b) If it is not thus justified, the administrative tribunal has necessarily exceeded its jurisdiction.

(c) If it is thus justified, on the other hand, then the administrative tribunal has acted within its jurisdiction.

95 There is no doubt in the case at Bar that the part of the order dealing with the issuing of a letter of recommendation places, in my opinion, a limitation on freedom of expression. There is no denying that freedom of expression necessarily entails the right to say nothing or the right not to say certain things. Silence is in itself a form of expression which in some circumstances can express something more clearly than words could do. The order directing appellant to give respondent a letter containing certain objective facts in my opinion unquestionably limits appellant's freedom of expression.

96 However, this limitation is prescribed by law and can therefore be justified under s. 1. The adjudicator derives all his powers from statute and can only do what he is allowed by statute to do. It is the legislative provision conferring discretion which limits the right or freedom, since it is what authorizes the holder of such discretion to make an order the effect of which is to place limits on the rights and freedoms mentioned in the *Charter*. The order made by the adjudicator is only an exercise of the discretion conferred on him by statute.

97 To determine whether this limitation is reasonable and can be demonstrably justified in a free and democratic society, therefore, one must examine whether the use made of the discretion has the effect of keeping the limitation within reasonable limits that can be demonstrably justified in a free and democratic society. If the answer is yes, we must conclude that the adjudicator had the power to make such an order since he was authorized to make an order reasonably and justifiably limiting a right or freedom mentioned in the *Charter*. If on the contrary the answer is no, then one has to conclude that the adjudicator exceeded his jurisdiction since Parliament has not delegated to him a power to infringe the *Charter*. If he has exceeded his jurisdiction, his decision is of no force or effect.

98 The test that must be applied in such an assessment has been largely defined by my brother Dickson C.J. in *R. v. Oakes*. According to that test, the objective to be served by the disputed measures must first be sufficiently important to warrant limiting a right or freedom protected by the *Charter*. Second, the party seeking to maintain the limitation must show that the means selected to attain this objective are reasonable and justifiable. To do this, it will be necessary to apply a form of proportionality test involving three separate components: the disputed measures must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective. The means chosen must also be such as to impair the right or freedom as little as possible, and finally, its effects must be proportional to the objective sought.

99 I consider that the objective sought by the order made in the case at Bar is sufficiently important to justify some limitation on freedom of expression. The purpose of the order is clearly, as required by the Code and as I indicated above, to counteract, or at least to remedy,

the consequences of the dismissal found by the adjudicator to be unjust. In my opinion, such an objective is sufficiently important to warrant a limitation on a right or freedom mentioned in the *Charter*. I think it is important for the legislator to provide certain mechanisms to restore equilibrium in the relations between an employer and his employee, so that the latter will not be subject to arbitrary action by the former. These observations should not be taken as meaning that in my view all employers necessarily try to abuse their position. However, it cannot be denied that some employees are in an especially vulnerable position in relation to their employers and that the forces involved are usually not equal. Accordingly, I think that mechanisms designed to remedy or counteract the consequences of an unlawful action taken by an employer are justified in such a context. It should also be noted that in these circumstances the limitation on rights or freedoms is not in fact made until after the act committed by the employer has been found by an adjudicator to be unlawful, and only in order to remedy the consequences of that act found to be unlawful.

100 An order directing the employer to give respondent a letter of recommendation containing objective facts also seems to me to be reasonable and justifiable in these circumstances. It has the three characteristics necessary to meet the proportionality test. As I mentioned earlier, the purpose of the letter of recommendation is to correct the impression given by the fact of the dismissal, by clearly indicating that the dismissal was found by an adjudicator to be unjust, and by clearly indicating certain "objective" facts that are not in dispute regarding the respondent's performance. A reinstatement order is not always desirable and a compensation order is not always adequate to remedy the consequences of an unjust dismissal. It is possible in some cases for a dismissal to have very negative consequences on the former employee's chances of finding new employment. It seems to me, therefore, that there will be times when such an order is the only means of attaining the objective sought, that of counteracting or remedying the consequences of the dismissal. It is certainly very rationally connected to the latter, since in certain cases it is the only way of effectively remedying the consequences of the dismissal. It is also limited to requiring that the employer state "objective" facts which, in the case at Bar, are not in dispute and do not require the employer to express any opinion, since the part of the order regarding the prohibition on answering a request for information about respondent other than by issuing this letter has been found to be unreasonable, and accordingly outside the jurisdiction conferred on the adjudicator. The employer may thus, if this part found to be unreasonable is removed, indicate for example that he was directed to write the letter and that it therefore does not necessarily contain all his views about the work done by respondent. Taking these circumstances into account, I do not see any way of attaining this objective in the case at Bar without impairing the employer's freedom of expression. Finally, I consider that the consequences of the order are proportional to the objective sought. As I have already said, the latter is important in our society. The limitation on freedom of expression is not what could be described as very serious. It does not abolish that freedom, but simply limits its exercise by requiring the employer to write something determined in advance. This limitation on freedom of expression mentioned in the *Charter* is thus in my opinion kept within reasonable limits that can be demonstrably justified in a free and democratic society. In making this part of the order, therefore, the adjudicator did not infringe the *Charter* and acted within his jurisdiction.

101 As this appeal is covered by s. 52(d) of the *Federal Court Act*, R.S.C. 1970, 2d Supp., c. 10, I would refer the matter back to the adjudicator in question for him to make an order consistent with this judgment.

102 Accordingly, I would allow the appeal at Bar, reverse the judgment of the Federal Court of Appeal, invalidate the order made by the adjudicator and refer the matter back to him so he may make a new order consistent with the instant judgment, the whole with costs.

Appeal dismissed

Footnotes

* Le Dain J. took no part in the judgment.

In the Court of Appeal of Alberta

Please see in particular para. 63

Citation: **Southam Inc. v. Canada (Combines Investigation, Director), 1983 ABCA 32**

Affirmed: **1984 CarswellAlta 121 (SCC)**

Date: 19830131
Docket: 15502, 15529
Registry: Edmonton

Between:

Southam Inc.

Appellant
(Plaintiff)

- and -

Lawson A. W. Hunter, Director of Investigation and Research of the Combines Investigation Branch; Michael J. Milton; Michael L. Murphy; J. Andrew McAlpine; and Antonio P. Marrocco, also known as Anthony P. Marrocco

Respondents
(Defendants)

The Court:

The Honourable Chief Justice McGillivray
The Honourable Mr. Justice Prowse
The Honourable Mr. Justice Laycraft
The Honourable Mr. Justice McClung
The Honourable Mr. Justice Kerans

Reasons for Judgment of The Honourable Mr. Justice Prowse
Concurred in by The Honourable Chief Justice McGillivray
Concurred in by The Honourable Mr. Justice Laycraft
Concurred in by The Honourable Mr. Justice McClung
And Concurred in by The Honourable Mr. Justice Kerans

COUNSEL:

A. H. Lefever, Esq., Q. C.

F. Kozak, Esq. for the Appellant

Mrs. I. C. Hutton, for the Attorney General of Canada

T. Lind, Esq., for the Respondent,

N. D. Steed, Esq. for the Attorney General of Alberta, intervenent

REASONS FOR JUDGMENT
OF THE HONOURABLE MR. JUSTICE PROWSE

[1] The issue on this appeal is whether subsections (1) & (3) of s.10 of The Combines Investigation Act R.S.C. 1970 Chap.23 ("The Combines Act") are, in whole or in part, inconsistent with the right to be secure against unreasonable search and seizure set out in s. 8 of The Constitution Act, 1982 ("The Charter") and consequently, to the extent of any such inconsistency, of no force or effect by virtue of s.52 (1) of the latter Act.

[2] In this case four individuals were named as representatives of the Director of Investigation and Research of the Combines Investigation Branch pursuant to s.10(1) of The Combines Act to enter the premises of the appellant and to examine, copy, and take away any book, paper, record or other document that might afford evidence in connection with an inquiry as to whether there was a breach of ss. 33 or 34(1)(c) of the Act.

[3] The appellant promptly issued a statement of claim in which the relief sought included an order restraining the four individuals and the Director from continuing the search and seizure. On an application for an interim injunction the appellant contended, among other things, that the search was in violation of section 8 of the Charter. The trial judge dismissed the application on grounds not argued before this Court. On an interim application this Court allowed the search to continue but ordered that any documents taken would be sealed and left with the Clerk of the Court pending our determination of the issues. At a further hearing this Court continued that order and stated:

> "It further seems to us that this was a proper case for the learned trial judge to treat the application as one for summary judgment on two issues:
>
> > (a) Do the Courts of Alberta have jurisdiction at all?
> >
> > (b) Is Section 10 of the Combines Investigation Act in whole or in part inconsistent with the provisions of the Constitution to the extent that they are of no force or effect?
>
> We are of the opinion that the appeal, which we direct be heard in September, 1982 should be heard on this basis."

[4] The first issue was abandoned by the Respondent and the appeal proceeded on the second issue.

[5] Section 10(1) & (3) of The Combines Act reads as follows:

> "10.(1) Subject to subsection (3), in any inquiry under this Act the Director or any representative authorized by him may enter any premises on which the Director believes there may be evidence relevant to the matters being inquired into and may examine any thing on the premises and may copy or take away for further examination or copying any book, paper, record or other document that in the opinion of the Director or his authorized representative, as the case may be, may afford such evidence."
>
> 10.(3) "Before exercising the power conferred by subsection (1), the Director or his representative shall produce a certificate from a member of the Commission, which may be granted on the ex parte application of the Director, authorizing the exercise of such power."

[6] The commission referred to in s.10(3) "means the Restrictive Trade Practises Commission appointed under the Act" (s.2)

[7] Section 8 of the Charter, reads as follows:

> "Everyone has the right to be secure against unreasonable search and seizure."

[8] The Respondents do not seek to support s.10 of The Combines Act on the basis of s.1 of The Charter and for that reason there is no need to comment on the effect of that section.

[9] Reproduced below is the certificate referred to in s.10(3) of the Combines Act in which a member of the Commission authorized the Director to exercise the power set out in s.10(1). This document was a printed form in English and French and was produced by the respondents named therein when they arrived at Southams' premises in Edmonton.

[illegible]

In the matter of the Combines Investigation Act and section 33 and section 34(1)(c) thereof

and

in the matter of an Inquiry Relating to the Production, Distribution and Supply of Newspapers and Related Products in Edmonton

TO: M.J. Milton
M.L. Murphy
J.A. McAlpine
A.P. Marrocco
being my representatives under section 10 of the Combines Investigation Act

You are hereby authorized to enter upon the premises hereinafter mentioned, on which I believe there may be evidence relevant to this inquiry, and examine anything therein and copy or take away for copying any book, paper, record or other document that in your opinion may afford such evidence.

The premises referred to herein are those occupied by or on behalf of

Southam Inc.
10006-101 Street
Edmonton, Alberta
and elsewhere in Canada

This authorization is not valid after May 31, 1982

Dated in Hull, in the Province of Quebec
this 13th day of April 1982

[illegible]

[illegible]

I certify that the above [illegible] of powers is authorized pursuant to Section 10 of the Combines Investigation Act.

Dated in Ottawa, in the Province of Ontario
this 16th day of April, 1982

Member

[illegible]

[10] The provisions of the Combines Act must be considered in the light of s.8 of The Charter.

[11] I construe s.8 bearing in mind that it is set out in a constitutional document which enshrines some of the principles which are basic in a free and democratic society. In construing the B.N.A. Act, Lord Sankey in Edwards & others v. A.G. of Canada & others [1930] A.C. 124 said at p.136:

> "The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a constitution to Canada. "Like all written constitutions it has been subject to developments through usage and convention". Canadian Constitutional Studies, Sir Robert Borden (1922), p.55. "
>
> Their Lordships do not conceive it to be the duty of this Board--it is certainly not their desire--to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation"

[12] In interpreting the Bermuda Constitution, in Minister of Home Affairs v. Fisher [1980] A.C. 319, Lord Wilberforce, in considering whether the "provisions are to be construed in a manner and according to rules which apply to Acts of Parliament" said at page 329:

> "In their Lordships' view there are two possible answers to this. The first would be to say that, recognising the status of the Constitution as, in effect, an Act of Parliament, there is room for interpreting it with less rigidity, and greater generosity, than other Acts, such as those which are concerned with property, or succession, or citizenship…… The second would be more radical: it would be to treat a constitutional instrument such as this as sui generis, calling for principles of interpretation of its own, suitable to its character as already described, without necessary acceptance of all the presumptions that are relevant to legislation of private law.
>
> …Their Lordships prefer the second. This is in no way to say that there are no rules of law which should apply to the interpretation of a Constitution. A Constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences."

[13] With those principles in mind I turn to consider Sec. 8 of The Charter. This section does not confer powers of search and seizure on the Government of Canada or the Provinces but rather it is a limitation upon the powers they derive from other sources. It secures the public against the abuse of such powers. It deals with one apsect of what has been referred to as a right of privacy which is the right to be secure against encroachment

upon the citizens' reasonable expectation of privacy in a free and democratic society. However, in determining the rights given under s.8 of the Charter the public's need for effective law enforcement must be balanced against the individual's right to be secure against unreasonable search and seizure.

[14] The roots of the right to be so secure are embedded in the common law and the safeguards according that right are found in common law, in statutes subsequently enacted, and in decisions of the courts made as the society in which we live has evolved. The expression of the right in a constitutional document reminds us of those roots and the tradition associated with the right. One would be presumptuous to assume that we have attained the zenith of our development as a civilization and that the right accorded an individual is frozen for eternity. Section 8, however, requires us to be ever mindful of some of the criteria that have been applied in the past in securing the right. Such criteria must be considered in determining whether a particular enactment meets our reasonable expectation of privacy in the light of the stage of development of our society at the time the right is being considered.

[15] The only search warrant recognized at common law was one authorizing an entry and search for stolen goods.

> "A Justice of the Peace has at common law the power on an information being sworn before him alleging a suspicion that a larceny has been committed, to issue a search warrant authorizing a search in any house etc. in the day time for stolen goods and the arrest of any person found in possession of such goods.
>
> "Except in the case of stolen goods, there is no power at common law to issue a warrant authorizing a search of a house" (9 Hals. 1st Ed p. 310)

[16] The authority for that statement is found in Entick v. Carrington (1765), 19 State 2 1030, 1067, 2 Wels K.B. 275 at 291-292. There the Secretary of State purported to issue a warrant authorizing a search and seizure of papers in the plaintiff's home in the expectation that papers and documents would be found which linked the plaintiff with seditious papers then being circulated in England. There the judgment of the Court reads in part as follows:

> "The warrant in our case was an execution in the first instance, without any previous summons, examination, hearing the plaintiff, or proof that he ws the author of the supposed libels; a power claimed by no other magistrate whatever…..it was left to the discretion of these defendants to execute the warrant in the absence of presence of the plaintiff, when he might have no witness present to see what they did; for they were to seize all papers, bank bills, or any other valuable papers they might take

away if they were so disposed; there might be nobody to detect them. If this be lawful, both Houses of Parliament are involved in it, for they have both ruled, that privilege doth not extend to this case. In the case of Wilkes, a member of the Commons House, all his books and papers were seized and taken away; we were told by one of those messengers that he was obliged by his oath to sweep away all papers whatsoever; if this is law it would be found in our books but no such law ever existed in this country; our law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law. The defendants have no right to avail themselves of the usage of these warrants since the Revolution, and if that would have justified them they have not averred it in their plea, so it could not be put, nor was in issue at the trial; we can safely say there is no law in this country to justify the defendants in what they have done; if there was, it would destroy all the comforts of society; for papers are often the dearest property a man can have. This case was compared to that of stolen goods, 4 Inst. 176, 177, though now it prevails to be law; but in that case the justice and the informer must proceed with great caution; there must be an oath that the [292] party has had his goods stolen, and his strong reason to believe they are concealed in such a place;"

[17] In I.R.C. v. Rossminster Ltd. [1980] 1 All ER 80, in considering search and seizure powers set out in the Taxes Management Act 1970, Lord Salmon stated at page 96:

"My Lords, it is very much in the public interest that anyone who commits an offence involving any form of fraud in relation to tax - a very grave offence - should be brought to justice. It is at least equally in the public interest that individual liberty should be protected by the judges who have the traditional right and duty to protect individuals from an abuse of power by the executive. Accordingly, at common law, it would be unlawful for any officer of the Inland Revenue or any member of the police to force his way into the home or business premises of any person and search for and seize any documents he might find there, even if he believed that there was reasonable ground for suspecting that an offence involving any form of fraud in relation to tax had been committed and that the documents seized might be required as evidence for the purpose of proceedings in respect of the offence which he suspected."

[18] During the 19th century the powers of search and seizure were extended by a number of statutes. Section 443(1) of The Criminal Code represents a codification of these developments. It provides the following powers and conditions of their exercise.

"443.(1) A justice who is satisfied by information upon oath in Form 1, that there is reasonable ground to believe that there is in a building, receptacle or place

(a) anything upon or in respect of which any offence against this Act has been or is suspected to have been committed,

(b) anything that there is reasonable ground to believe will afford evidence with respect to the commission of an offence against this Act, or

(c) anything that there is reasonable ground to believe is intended to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant,

may at any time issue a warrant under his hand authorizing a person named therein or a peace officer to search the building, receptacle or place for any such thing, and to seize and carry it before the justice who issued the warrant or some other justice for the same territorial division to be dealt with by him according to law.

(2) Where the building, receptacle, or place in which anything mentioned in subsection (1) is believed to be is in some other territorial division, the justice may issue his warrant in like form modified according to the circumstances, and the warrant may be executed in the other territorial division after it has been endorsed, in Form 25, by a justice having jurisdiction in that territorial division.

(3) A search warrant issued under this section may be in Form 5.

(4) An endorsement that is made upon a warrant pursuant to subsection (2) is sufficient authority to the peace officers to whom it was originally directed and to all peace officers within the jurisdiction of the justice by whom it is endorsed to execute the warrant and to take the things to which it relates before the justice who issued the warrant or some other justice for the same territorial division. 1953-54, c. 51, s.429."

[19] Section 443(1)(a) encompasses the power at common law to issue warrants for stolen property and extends that power to "anything upon or in respect of which any offence against the Act has been or is suspected to have been committed"

[20] Section 443(1)(b) encompasses search and seizure for anything that may constitute relevant evidence.

[21] The basic requirements of a lawful search and seizure under the common law and under s. 443(1) of the Code may be summarized in the following propositions:

(a) the power to authorize a search and seizure is given to an impartial and independent person (at common law a justice) who is bound to act judicially in discharging that function,

(b) that evidence must satisfy the justice that the person seeking the authority has reasonable ground to suspect that an offence had been committed,

(c) that evidence must satisfy the justice that the person seeking the authority has reasonable grounds to believe, at common law, that stolen property may be on the premises or, under s.443(1)(b), that something that will afford evidence of an offence may be recovered, and

(d) there must be evidence on oath before him.

Elsee v. Smith (1822) 24 Rev. Rep. 639, 1 DW and Ry KB 97, Jones v. German 1897 1 QB 347; Rex v. Solloway, Mills & Co., (1930) 53CCC261; R. v. Kehr 11 O.L.R. 571;

[22] Unless there are exceptional circumstances I am of the view that for the public to be reasonably secure in the right enshrined in s. 8 of the Charter, the requirements under the Code and at common law should be treated as minimal standards that must be met before a search warrant is issued in connection with the investigation of an indictable offence. As is noted below, the Respondents concede that the attempted search and seizure was for that purpose and no other.

[23] With the above general principles in mind I turn to consider the provisions of the Combines Act.

[24] An analysis of the powers granted to the Director and to a commission member under s. 10 of the Combines Act must be made in the context of the Act as a whole. The background to the present Act is summarized in the report of The Committee To Study The Combines Legislation announced by the Minister of Justice on January 27th, 1950. The report by that Committee, known as the MacQuarrie Report, was made in March of 1952. The recommendations it made were followed in drafting the present Act. This being a constitutional case, the Respondents quite rightly put this report before us to assist us to discover the true legislative purpose.

[25] The object of the Act is to assess the existence of conditions or practices that lead to monopolistic situations or restraint of trade, and, to provide checks and restraints in such of those conditions or practices that would otherwise lead to harmful consequences. The committee that prepared the MacQuarrie Report was required to consider "what amendments, if any, should be made to our Canadian legislation to make it a more effective instrument for encouraging and safeguarding of our free economy". The practices referred to have generally being recognized as posing a threat to a free economy.

[26] The Act provides the administrative means required to carry out the objects of the Act and to make the policy decisions required in doing so. We are concerned primarily with the powers granted to the Director under s.10(1) and to a Commissioner under s. 10(3).

[27] One recommendation of the MacQuarrie Report reads as follows:

> "It would seem advisable to make a clean organizational break between the functions of investigation and research and of appraisal and report, and to make it manifest that confusion of the two functions cannot occur"

[28] The above recommendation was followed generally by providing that inquiries and research would be carried out by the Director and that the results of such work would be transmitted to the Commission for appraisal and the preparation of a report. The Act purported to separate the functions of inquiry and research from the functions of appraisal and reporting. However, a review of the Act as a whole discloses that the separation sought was not attained in all circumstances.

[29] The Act provides that an inquiry by the Director:

(a) shall be commenced following an application by residents of Canada that complies with the requirements of s. 7 and s.8(a)

(b) shall be commenced whenever he has reason to believe that the circumstance set out in s. 8(b) exist

(c) <u>shall be continued or initiated when, following filing an interim report, he is required by the Commission under s. 22(b) to make further inquiry</u>

(d) shall be commenced when "directed by the Minister to inquire whether any of the circumstances described in subparagraphs 8(b)(i) to (iii) exist"s.8(c)

(e) <u>shall be commenced "upon direction by the Minister or at the instance of the Commission under s.47(1</u>)

(f) may be commenced on his own initiative under s.47(1)

(Underlining for emphasis)

[30] The Director may discontinue an inquiry, (s.14(1)) and then, or at any time, may refer the matter to the Attorney General of Canada for such action as he may be pleased to take (s. 15(1)).

[31] Section 18(1) provides:

"18. (1) At any stage of an inquiry,

(a) the Director may, if he is of the opinion that the evidence obtained discloses a situation contrary to any provision in Part V, and

(b) the Director shall, if the inquiry relates to an alleged or suspected offence under any provision of Part V and he is so required by the Minister,

prepare a statement of the evidence obtained in the inquiry which shall be submitted to the Commission and to each person against whom an allegation is made therein."

[32] Thereafter the Commission is required to hear argument by the Director and persons "against whom an allegation has been made in such statement" and then submit a report to the Minister. The report may be published by the Minister or a prosecution may follow.

[33] If the inquiry relates to matters falling under Part IV.1 of the Act (s.8(b)(ii)) dealing with certain restrictive trade practices such as tied selling, consignment sales, exclusive dealing, etc. the Commission may make orders affecting persons carrying on such practices.

[34] Under s. 13 the Commission may in any inquiry apply to the Attorney General of Canada "to appoint and instruct counsel to assist in an inquiry". The Commission is also given powers to supervise the Director in the exercise of his functions, for instance under s.17(1) when the Director wishes to examine someone on oath.

[35] The Commission may instigate inquiries or research carried on by the Director, request the appointment of counsel to assist in any inquiries carried on by the Director and dispose of applications by the Director under ss. 10(3), 17(1) and Part IV.1 of the Act. The result is that circumstances may arise where the Director is acting as investigator and prosecutor and the Commission is acting as investigator and judge with respect to breaches of the Act. Even though neither the Director nor the Commission can launch proceedings by way of indictment for offences under the Act such proceedings may follow the cumulative results of the discharge by each of them of their assigned functions.

[36] It follows that, even though the Act generally separates the functions of the Director from the functions of the 'Commission, there still remains an overlap between the two functions.

[37] The issue on the appeal was confined to the application of s. 10 to an inquiry "Relating to the Production, Distribution and Supply of Newspapers and Related Products in Edmonton" for the purpose of determining whether an offence has been or is about to be committed under sections 33 or 34 (1)(c) of The Combines Act. Those sections read as follows:

"33. Every person who is a party or privy to or knowingly assists in, or in the formation of, a merger or monopoly is guilty of an indictable offence and is liable to imprisonment for two years. 1960, c.45, s.13.

34.(1) Every one engaged in a business who

(c) engages in a policy of selling products at prices unreasonably low, having the effect or tendency of substantially lessening competition or eliminating a competitor, or designed to have such effect,

is guilty of an indictable offence and is liable to imprisonment for two years."

[38] The submissions made in the appeal did not' relate to the purpose of the inquiry but rather to the search and seizure powers granted to the Director in s.10(1) and the power of a member of the commission under s. 10(3) to grant a certificate authorizing the exercise of such power.

[39] The Director's decision to apply to exercise the powers set out in s. 10(1) is an administrative function involving policy matters. (Coopers & Lybrand, infra) It follows that in the absence of a provision in the Act such as s. 10(3) the Respondents' position would be untenable as there would be restraint upon the power granted the Director.

[40] The essential question is the effect of the power granted a Commissioner under s. 10(3); that is, whether the restraint provided in that subsection makes reasonable that which would otherwise be an unreasonable search and seizure within the meaning of s.8 of the Charter.

[41] Returning to the minimal safeguards required at common law and under s.443 of the Code where a search warrant is issued the first question that arises is whether the commissioner in exercising a judicial or quasi judicial function is an independent and impartial arbiter. It must first be observed that the MacQuarrie report acknowledged that the Commission proposed by it was not going to be a judicial tribunal. It said, at p.35:

"Unlike a Court, it [the proposed Commission] is not a judicial body determining the rights of individuals but an administrative agency which is a part of the legislative and executive structure of government."

[42] In M.N.R. V. Coopers & Lybrand [1978] 1 SCR 495, Mr. Justice Dickson, held that "in giving an authorization under s. 231(4) of the Income Tax Act, the Minister's actions are of an administrative nature, and that no obligation rests at law upon the Minister to act on a judicial or quasi judicial basis". He went on to deal with the function of a judge acting under s.231(4) and stated at page 174;

"Recognizing that a right of search is in derogation of the principles of the common law, and open to abuse, Parliament also built into the legislation an immediate review of the ministerial decision by interposing a judge between the revenue and the tax payer."

[43] Subsections 23(4) & (5) of the Act read as follows:

"23(4) Where the Minister has reasonable and probable grounds to believe that a violation of this Act or a regulation has been committed or is likely to be committed, he may, with the approval of a judge of a superior or county court, which approval the judge is hereby empowered to give on ex parte application, authorize in writing any officer of the Department of National Revenue, together with such members of the Royal Canadian Mounted Police or other peace officers as he calls on to assist him and such other persons as may be named therein, to enter and search, if necessary by force, any building, receptacle or place for documents, books, records, papers or things that may afford evidence as to the violation of any provision of this Act or a regulation and to seize and take away any such documents, books, records, papers or things and retain them until they are produced in any court proceedings.

(5) An application to a judge under subsection (4) shall be supported by evidence on oath establishing the facts upon which the application is based.

[44] With respect to the respective functions of the Minister and a judge, acting under these provisions, he went on to say on pages 174-5:

The functions and power of the Minister, and those of the judge, are entirely different. In carrying out the responsibilities with which he is entrusted under the Income Tax Act, the Minister discharges duties which are fundamentally administrative. He is invested with investigatory powers, including the right to audit, to request information and production of documents, and the right to authorize the conduct of an inquiry. Additional to these rights is the right conferred by s.231(4) to authorize the entry and search of buildings. The power he exercises under s. 231(4) is properly characterized as investigatory, rather than adjudicatory. He will collect material and advice from many sources. In deciding whether to exercise the right last mentioned, he will be governed by many considerations, dominant among which is the public interest and his duty as an executive officer of the government to administer the Act to the best of his ability. The decision to seek authority to enter and search will be guided by public policy and expediency, having regard to all the circumstances. The powers which the judge exercises are judicial when in review of ministerial administrative discretion."

[45] In I.R.C. and another v. Rossminster Ltd., supra, the House of Lords considered the grant of a similar power to an officer of the Board of Inland Revenue. The exercise of the power was authorized by a judge. In discussing this function of the courts Lord Wilberforce stated at page 82:

"The Courts have a duty to supervise, I would say critically even jealously, the legality of any purported exercise of these powers. They are the guardians of the citizens right to privacy.

[46] Viscount Dilhorne, in reference to the same power, stated at p. 87:

> "as the requirement that a judge be so satisfied in the final safeguard against abuse of the powers given by the section, it might be preferable to place the responsibility for their exercise on a more senior judge."

[47] The principle that a person exercising a judicial or quasi-judicial function must be free of bias was expressed by Viscount Cave in Frome United Breweries Co. v. Bath Justices, [1926] AC 586 as follows at page 589:

> "My Lords, if there is one principle which forms an integral part of the English law, it is that every member of a body engaged in a judicial proceeding must be able to act judicially; and it has been held over and over again that, if a member of such a body is subject to a bias (whether financial or other) in favour of or against either party to the dispute or is in such a position that a bias must be assumed, he ought not to take part in the decision or even sit upon the tribunal. This rule has been asserted, not only in the case of Courts of justice and other judicial tribunals, but in the case of authorities which, though in no sense to be called Courts, have to act as judges of the rights of others."

[48] I must not be taken to say that such a judicial or quasi-judicial function need of necessity be carried out by a judge. I am merely saying that the legislation must recognize the potential for abuse in granting such broad powers to any person and to safeguard the right enshrined in s.8 of the Charter, by making provision for a review of the exercise of that power by an impartial arbiter, acting judicially, who has the qualifications required to appreciate the sensitivity called for in the exercise of such power.

[49] The American authorities define these characteristics as "neutrality and detachment". (Shadwick v. City of Tampa (1972) 407 U.S. 345, 92 S.Ct. 2119, 32 L.Ed.(2d) 783; Katz v. U.S. (1967) 389 U.S. 347, 88 S.Ct. 507 19 L.Ed. (2d) 576 and Johnson v. U.S.A. (1948) 333 U.S.10, 68 S.Ct. 367, 92 L.Ed.436).

[50] If the person appointed to exercise the function does not have those qualifications the first required safeguard is lost. If that person has those qualifications and is tainted by circumstances that give rise to a reasonable apprehension of bias the safeguard will apparently be lost. The Respondents argue that loss of real partiality here is a far-fetched notion. That may or may not be so, but concern about appearances remains. That appearance becomes reality in the eyes of the public and the apprehension of bias alone is sufficient to strike down an otherwise valid exercise of that power. We are here faced with a failure on both grounds.

[51] Here we have a review under s.10(3) carried out by a person who plays a part in the overall investigative procedures leading up to a decision to prosecute, to not prosecute, or to take some administrative action. The purported separation of these powers into categories of research and investigation on the one hand and appraisal on the other does not in fact result in the separation of the function to the extent required to support the conclusion that the commissioner is an independent arbiter or a neutral and impartial person.

[52] The second question that arises is whether the review carried out by a member of the commission under s.10(3) meets the requirement that a person seeking to exercise the power had reasonable grounds to suspect that an offence had been committed. The nature of the power conferred upon a Commissioner under s.10(3) was considered by the Federal Court of Appeal in Petrofina Canada Ltd. v. Chairman, R.T.C.P. et al [1980] F.C. 381 The applicant alleged, inter alia, 1) that the Commission members lacked jurisdiction because the inquiry was not legally commenced; and 2) that the Commission members who gave their authorization under s.9(2) and s.10(3) failed to act judicially in that they exercised their discretion under these sections without showing that they had considered sufficient information to enable them to determine the reasonableness of the Director's belief that the circumstances warranted the exercise of his powers under ss.9 and 10. In discussing the powers conferred by 10(3) the Court stated at p.391:

> "Under those provisions, the Members are neither required nor authorized to determine the legality of the Director's decision to hold an inquiry; they are merely required to ascertain that there is, de facto, an inquiry in progress under the Act. The Members are not required or authorized, either, to pass judgment on the reasonableness of the motives prompting the Director to exercise his powers under sections 9 and 10. As the Members did not have to make decisions on those two points, they cannot, in my opinion, be blamed for not having required information on those points."

[53] The Petrofina case provides some assistance in determining the nature of the power conferred by s.10(3). Section 10(3) does not expressly set out the specific matters in respect of which a member of the commission must be satisfied before authorizing the Director's exercise of the search and seizure power contained in s.10(1). Moreover, s.10(3) draws no distinction between the manner in which inquiries are initiated or the object of such inquiries. For example, in addition to s.8 inquiries that are initiated by the Director to investigate the commission of an offence under the Act, the Minister, under s.47, can order the Director to commence an inquiry for purposes other than determining whether an offence has been committed.

[54] Section 10(1) expressly sets out only two conditions for the exercise of the power by the Director. These conditions are that there be "an inquiry" and that the Director believe that "there may be evidence relevant to the matters being inquired into" (emphasis mine). It is a reasonable implication of reading s.10(1) and s.10(3) together that the Commission, before authorizing a warrant, must be satisfied that the conditions in s.10(1) exist.

[55] If the powers accorded a member of the commission under s.10(3) are as found by the Federal Court of Appeal in the Petrofina case it follows that there is no review of the right to exercise the powers accorded persons under s.10(1) in the course of an inquiry. Even if the two conditions referred to in the last paragraph are implied the section would not meet the minimal standards referred to above.

[56] The Respondents submitted that the safeguards at common law could be implied into the section or alternatively that the power granted could be read down by the application of the principle enunciated in MacKay v. The Queen [1965] SCR 798. There the Supreme Court of Canada read down the scope of a municipal by-law forbidding the erection of signs in a certain residential area. The Court reasoned that the by-law could not have been intended to apply to the erection of campaign signs in a Federal election, a matter beyond the legislative competence of the municipal council. This does not help the Court in this case as MacKay involved limiting the scope of a legislative provision to prevent it from encroaching upon the jurisdiction of another legislative body. No such problem exists in this case.

[57] In my view it would not be appropriate in this case for the Court to imply the necessary safeguards into s.10(3) as it is presently worded.

[58] In interpreting statutes the courts are often required to make implications where the statute is silent. It must be kept in mind when doing this that the function of the court is to interpret legislation, not to create it. An interpretation is not "implied unless it necessarily follows, can be reasonably inferred, or is suggested by the expressed wording of the statute.

[59] Under the Act as it is presently worded the Director may seek authorization to exercise his power to search in any type of inquiry. Different safeguards may be reasonably required in order to effect compliance with the Charter depending upon the nature and object of the inquiry. Thus, in order to render the unreasonable provisions of

the Combines Act reasonable the Court would have to imply into s.10 a number of different sets of safeguards whose application would depend upon the type of inquiry being conducted. Clearly this would involve the court in legislating and not adjudicating. It is Parliament which has traditionally expressed the guidelines for authorization of search and seizure, as, for instance, in the Income Tax Act and the Criminal Code.

[60] In my view it would be a departure from the established tradition of separation of functions for the Court to promulgate a set of rules to effect a purpose not expressed or clearly implied in the Act. If the Charter is to have its intended effect then legislation touching upon the rights set out therein must be expressed clearly and unambiguously. Furthermore, it must be formulated in a public forum subject to public debate and public control. This leaves the court to carry out its judicial function and does not involve it in a legislative capacity.

[61] Finally, I wish to refer to the security afforded by the requirement that an application under s.10(3) be supported by evidence on oath. The hearing of evidence on oath is not a mere formality. The place of evidence on oath is self evident. It is a obvious omission in the Act not to require evidence on oath when the power sought to be exercised is, in the words of Lord Scarman, "a breath taking inroad on the individual's right of privacy and right of property".

(Rossminster, supra, p.101)

[62] I should add that I have not attempted to set out an inclusive list of safeguards which if applied will result in a search and seizure that satisfies s.8 of the Charter. 'I have merely dealt with some obvious omissions in the present Act.

[63] In the result, I would allow the appeal and declare that s.10(3) and, by implication, s.10(1) of the Combines Act are inconsistent with the provisions of s.8 of the Charter and are therefore of no force or effect. I would therefore direct the Clerk of the Court to return the documents in his possession to the appellant in ten (10) days in the event a stay is not sought and granted.

DATED at EDMONTON, Alberta,
this 31 day of January,
A.D. 1983.

1984 CarswellAlta 121
Supreme Court of Canada

Please see in particular paras. 22 and 43

Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.

Affirming: 1983 ABCA 32

1984 CarswellAlta 121, 1984 CarswellAlta 415, [1984] 2 S.C.R. 145, [1984] 6 W.W.R. 577, [1984] A.W.L.D. 968, [1984] A.W.L.D. 969, [1984] A.W.L.D. 983, [1984] S.C.J. No. 36, 11 D.L.R. (4th) 641, 12 W.C.B. 437, 14 C.C.C. (3d) 97, 27 B.L.R. 297, 2 C.P.R. (3d) 1, 33 Alta. L.R. (2d) 193, 41 C.R. (3d) 97, 55 A.R. 291, 55 N.R. 241, 84 D.T.C. 6467, 9 C.R.R. 355, J.E. 84-770

Lawson A.W. Hunter, Director of Investigation and Research of the Combines Investigation Branch, Michael J. Milton, Michael L. Murphy, J. Andrew McAlpine and Antonio P. Marrocco, also known as Anthony P. Marrocco and Southam Inc.

HUNTER, DIRECTOR OF INVESTIGATION AND RESEARCH OF THE COMBINES INVESTIGATION BRANCH et al. v. SOUTHAM INC.

Laskin C.J.C. [*], Ritchie, Dickson, Beetz, McIntyre, Lamer, Estey,Chouinard, and Wilson JJ.

As he then was

Heard: November 22-23, 1983
Judgment: September 17, 1984
Docket: No. 17569

Counsel: *E. A. Bowie, Q.C.*, and *I. C. Hutton, Q.C.*, for appellants
A. H. Lefever and *F. S. Kozak*, for respondent

Subject: Corporate and Commercial

Headnote

Trade and commerce --- Combines and competition legislation — Constitutional issues — Charter of Rights and Freedoms

Trade and commerce — Combines legislation — Constitutionality — Combines Investigation Act — Search provisions in ss. 10(1) and 10(3) inconsistent with guarantee against unreasonable search and seizure provided in s. 8 of Charter of Rights and Freedoms — Provisions of no force or effect.

Constitutional law --- Charter of Rights and Freedoms — Unreasonable search and seizure: Combines Investigation Act

Commercial law --- Trade and commerce — Competition and combines legislation — Constitutional issues — Charter of Rights and Freedoms

Search and seizure provisions under Act not requiring prior authorization of judge or other person capable of acting judicially — Such provisions also failing to set "reasonable and probable grounds" criteria for authorizing search — Provisions merely requiring Director of Investigation and Research to possess "belief" that evidence "may" exist of possible offences under Act — Such provisions therefore void as violating respondent's Charter right to freedom from unreasonable search or seizure Constitution Act, 1982, R.S.C. 1985, App. II, No. 44, s 8.

Pursuant to s. 10(1) of the Combines Investigation Act, the defendant director authorized the defendant officers to enter and examine documents at the plaintiff's business premises. The authorization was certified by a member of the Restrictive Trade Practices Commission pursuant to s. 10(3) of the Act. The Canadian Charter of Rights and Freedoms was proclaimed after the authorization was made but before the actual search had begun. The plaintiff unsuccessfully sought an interim injunction pending determination as to whether the search was in violation of s. 8 of the Charter. When the plaintiff appealed, the Court of Appeal sealed the documents pending resolution of the appeal. The court subsequently ruled that s. 10(1) and 10(3) of the Combines Investigation Act were inconsistent with s. 8 of the Charter. The defendants appealed.

Held: Appeal dismissed.

The Charter must be subject to a broad purposive analysis and its specific provisions must be interpreted in the light of its larger objects. Section 8 of the Charter guarantees a broad and general right to be secured from unreasonable searches and seizures; this right extends at least so far as to protect the right of privacy from unjustified state intrusion. Its purpose requires that unjustified searches be prevented. The purpose demands a means of preventing unjustified searches before they happen, not simply of determining after the fact, whether they ought to have occurred in the first place. Where it is feasible to obtain prior authorization, such authorization is a precondition for a valid search and seizure. In this case, it was feasible to obtain prior authorization for the searches contemplated by the Combines Investigation Act and therefore, in the absence of a valid procedure for prior authorization, the searches would be unreasonable.

For the authorization procedure to be meaningful, it is necessary for the person authorizing the search to be able to assess the conflicting interests of the state and the individual in an entirely neutral and impartial manner. This means that, while the person considering the prior authorization need not be a judge, he must nevertheless be capable of acting judicially. By investing the Restrictive Trade Practices Commission and its members with significant investigatory functions, the Combines Investigation Act vitiates the ability of a member of the commission to act in a judicial capacity. On that basis alone, the prior authorization mandated by s. 10(3) is inadequate to satisfy the requirements of s. 8 of the Charter.

In addition, there must be an objective standard to apply in determining whether or not to grant an authorization. In cases like this one, the minimum standard for authorizing search and seizure consists of reasonable and probable grounds, established upon oath, to believe than an offence has been committed and that there is evidence to be found at the place of the search. The Combines Investigation Act does not provide such minimum standards since it leaves the decision to search to the director, who must only believe that the premises may contain relevant evidence.

Insofar as the Combines Investigation Act does not specify minimum standards consistent with s. 8 of the Charter, the court will not read the appropriate standard into the provisions. It is the legislature's responsibility to enact legislation which complies with the Charter requirements.

The respondent's business premises were searched and documents seized pursuant to authorization given by the director of investigation and research of the Combines Investigation Branch under s. 10(1) of the Combines Investigation Act. As required by s. 10(3) of the Act this authorization was certified by a member of the Restricted Trade Practices Commission. The respondent appealed from an unsuccessful application for an interim injunction pending trial of the issue whether the search violated the right against unreasonable search and seizure guaranteed by s. 8 of the Charter of Rights and Freedoms. The Alberta Court of Appeal held that s. 10(3) and, by implication, s. 10(1) of the Act were inconsistent with s. 8 of the Charter and were therefore of no force or effect. The appellant appealed. Held, appeal dismissed. The purpose of s. 8 of the Charter was to protect individuals from unjustified state intrusions upon their privacy and only a system of prior authorization of searches would be consistent with that purpose. While s. 10(3) purported to require prior authorization, it did not provide an acceptable prior authorization procedure. Firstly, the fact that the commission was invested with significant investigatory functions vitiated the ability of a member of the commission to act in a judicial capacity when authorizing a search. Members were caught by the maxim "nemo judex in sua causa" and could not be impartial arbitrators. Secondly, the procedure was inadequate in so far as it did not require reasonable and probable grounds established on oath to believe that an offence had been committed and that there was evidence to be found at the place of the search. The court would not read the necessary procedural safeguards into the Act. It was the legislature's responsibility to enact legislation which complied with the constitution's requirements.

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Held:

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For the authorization procedure to be meaningful, it is necessary for the person authorizing the search to be able to assess the conflicting interests of the state and the individual in an entirely neutral and impartial manner. This means that, while the person considering the prior authorization need not be a judge, he must nevertheless be capable of acting judicially. By investing the Restrictive Trade Practices Commission and its members with significant investigatory functions, the Combines Investigation Act vitiates the ability of a member of the commission to act in a judicial capacity. On that basis alone, the prior authorization mandated by s. 10(3) is inadequate to satisfy the requirements of s. 8 of the Charter.

In addition, there must be an objective standard to apply in determining whether or not to grant an authorization. In cases like this one, the minimum standard for authorizing search and seizure consists of reasonable and probable grounds, established upon oath, to believe than an offence has been committed and that there is evidence to be found at the place of the search. The Combines Investigation Act does not provide such minimum standards since it leaves the decision to search to the director, who must only believe that the premises may contain relevant evidence.

Insofar as the Combines Investigation Act does not specify minimum standards consistent with s. 8 of the Charter, the court will not read the appropriate standard into the provisions. It is the legislature's responsibility to enact legislation which complies with the Charter requirements.

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Annotation

The case reported here has obvious and very significant consequences for the search or seizure provisions in many Canadian statutes. For a good discussion of the implications of this case see the forthcoming article by Neil Finkelstein entitled, *Constitutional Guaranty Against Unreasonable Search or Seizure After Southam* in the Canadian Bar Review.

One point to note in reading the case is that Chief Justice Dickson writes repeatedly of "search and seizure" while the Charter in s. 8 speaks of "search or seizure". The use of the word "or" in the Charter may ultimately be found to be of significance and ought not to go unnoticed.

Table of Authorities

Cases considered:

A.G. Can. v. Law Soc. of B.C.; Jabour v. Law Soc. of B.C., [1982] 2 S.C.R. 307, [1982] 5 W.W.R. 289, 37 B.C.L.R. 145, 19 B.L.R. 234, 137 D.L.R. (3d) 1, 66 C.P.R. (2d) 1, 43 N.R. 451 — *referred to*

Edwards v. A.G. Can., [1930] A.C. 124, [1929] 3 W.W.R. 479, [1930] 1 D.L.R. 98 — *considered*

Entick v. Carrington (1765), 2 Wils. K.B. 275, 19 State Tr. 1029, 95 E.R. 807 — *considered*

Katz v. U.S., 389 U.S. 347, 19 L.Ed. 2d 576 (1967) — *applied*

McKay v. R., [1965] S.C.R. 798, 53 D.L.R. (2d) 532 — *considered*

M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 314 (1819) — *referred to*

Min. of Home Affairs v. Fisher, [1980] A.C. 319, [1979] 2 W.L.R. 889, [1979] 3 All. E.R. 21 (P.C.) — *applied*

M.N.R. v. Coopers & Lybrand, [1979] 1 S.C.R. 495, [1978] C.T.C. 829, 78 D.T.C. 6258, 92 D.L.R. (3d) 1 — *considered*

Petrofina Can. Ltd. v. Chairman, Restrictive Trade Practices Comm., [1980] 2 F.C. 386, 46 C.P.R. (2d) 1, 107 D.L.R. (3d) 319 — *considered*

R. v. I.R.C.; Ex parte Rossminster, [1980] 2 W.L.R. 1, 70 Cr. App. R. 157, [1980] 1 All E.R. 80 (H.L.) — *considered*

R. v. Metro. Toronto Pharmacists' Assn., Ont. H.C., 4th May 1983 (not yet reported) — *referred to*

U.S. v. Rabinowitz, 339 U.S. 56, 94 L.Ed. 653 (1950) — *considered*

Statutes considered:

Charter of Rights and Freedoms, Constitution Act, 1982, Pt. I, ss. 1, 8.

Combines Investigation Act, R.S.C. 1970, c. C-23, ss. 9, 10, 12 [am. 1976-77, c. 28, s. 9], 13, 17, 19(3) [re-en. 1974-75-76, c. 76, s. 7], 22(2)(*b*), (*c*), 27.1 [en. 1974-75-76, c. 76. s. 9], 33, 34(1)(*c*) [re-en. 1974-75-76, c. 76, s. 16], 45.1 [en. 1974-75-76, c. 76, s. 22], 47 [am. 1974-75-76, c. 76, s. 25].

Constitution Act, 1982, s. 52(1).

Criminal Code, R.S.C. 1970, c. C-34, s. 443.

Federal Court Act, R.S.C. 1970, c. 10 (2nd Supp.), s. 2(*g*).

Income Tax Act, 1970-71-72 (Can.), c. 63, s. 231(4).

United States Constitution, Bill of Rights, Fourth Amendment.

Words and phrases considered:

CONSTITUTION

A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of Rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers.

DEMONSTRABLY JUSTIFIED

The phrase "demonstrably justified" [in s. 1 of the *Charter*] puts the onus of justifying a limitation on a right or freedom set out in the *Charter* on the party seeking to limit.

PRIVACY

In [*Katz v. U.S.*, 389 U.S. 347] Stewart J. discussed the notion of a right to privacy, which he described at pp. 350-51 as "the right to be left alone by other people" . . . this notion played a prominent role in his construction of the nature and the lmits of the American constitutional protection against unreasonable search and seizure.

UNREASONABLE

As is clear from the arguments of the parties as well as from the judgment of Prowse J.A., the crux of this case is the meaning to be given to the term "unreasonable" in the s. 8 [in the *Charter*] guarantee of freedom from unreasonable search or seizure. The guarantee is vague and open . . . There is no specificity in the section beyond the bare guarantee of freedom from "unreasonable" search and seizure; nor is there any particular historical, political or philosophic context capable of providing an obvious gloss on the meaning of the guarantee.It is clear that the meaning of "unreasonable" cannot be determined by recourse to a dictionary, nor, for that matter, by reference to the rules of statutory construction. The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a bill or a charter of rights, for the unremitting protection of individual rights and liberties. Once enacted, its provision cannot easily be repealed or amended. It must . . . be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind. Professor Paul Freund expressed this idea aptly when he admonished the

American courts, "not to read the provisions of the *Constitution* like a last will and testament lest it become one".

. . . . .

I begin with the obvious. The *Canadian Charter of Rights and Freedoms* is a purposive document. Its purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines. It is intended to constrain governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for governmental action. In the present case this means, as Prose J.A. pointed out, that in guaranteeing the right to be secure from unreasonable searches and seizures s. 8 acts as limitation on whatever powers of search and seizure the federal or provincial governments already and otherwise possess. It does not in itself confer any powers, even of "reasonable" search and seizure, on these governments. This leads . . . to the further conclusion that an assessment of the constitutionality of a search and seizure, or of a statute authorizing a search or seizure, must focus on its "reasonable" or "unreasonable" impact on the subject of the search or the seizure, and not simply on its rationality in furthering some valid government objective.

. . . . .

. . . the interests protected by s. 8 are of a wider ambit than those enunciated in *Entick v. Carrington* [(1765), 19 State Tr. 1029]. Section 8 is an entrenched constitutional provision. It is not . . . vulnerable to encroachment by legislative enactments in the same way as common law protections. There is, further, nothing in the language of the section to restrict it to the protection of property or to associate it with the law of trespass. It guarantees a broad and general right to be secure from unreasonable search and seizure.

. . . . .

Like the Supreme Court of the United States, I would be wary of foreclosing the possibility that the right to be secure against unreasonable search and seizure might protect interests beyond the right of privacy, but for purposes of the present appeal I am satisfied that its protections go at least that far. The guarantee of security from unreasonable search and seizure protects only a reasonable expectation. This limitation on the right guaranteed by s. 8, whether it is expressed negatively, as freedom from "unreasonable" search and seizure, or positively, as an entitlement to a "reasonable" expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement.

. . . . .

. . . in [*Katz v. U.S.*, 389 U.S. 347] Stewart J. concluded that a warrantless search was prima facie "unreasonable" under the *Fourth Amendment*. The terms of the *Fourth* Amendment are not identical to those of s. 8 [of the *Charter*] and American decisions can be transplanted to the Canadian context only with the greatest caution. Nevertheless, I would in the present instance respectfully adopt Stewart J.'s formulations as equally applicable to the concept of "reasonableness" under s. 8, and would require the party seeking to justify a warrantless search to rebut this presumption of unreasonableness.

UNREASONABLE SEARCH OR SEIZURE

. . . in guaranteeing the right to be secure from unreasonable searches and seizures, s. 8 [of the *Charter*] acts as a limitation on whatever powers of search and seizure the federal or provincial governments already and otherwise possess. It does not in itself confer any powers even of "reasonable" search and seizure, on these governments . . . an assessment of the constitutionality of a search and seizure, or of a statute authorizing a search or seizure, must focus on its "reasonable" or "unreasonable" impact on the subject of the search or the seizure, and not simply on its rationality in furthering some valid government objective.

. . . . .

This limitation on the right guaranteed by s. 8, whether it is expressed negatively a freedom from "unreasonable" search and seizure, or positively as an entitlement to a "reasonable" expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement.

Appeal from judgment of Alberta Court of Appeal, *Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.* (1983), 147 D.L.R. (3d) 420, [1983] 3 W.W.R. 385, 42 A.R. 93, 3 C.C.C. (3d) 497, 32 C.R. (3d) 141, 4 C.R.R. 368, 24 Alta. L.R. (2d) 307, 1983 CarswellAlta 27, 72 C.P.R. (2d) 145 (Alta. C.A.), allowing appeal from judgment of Cavanagh J., *Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.* (1982), 20 Alta. L.R. (2d) 144, 42 A.R. 109, 68 C.C.C. (2d) 356, 65 C.P.R. (2d) 80, 2 C.R.R. 264, 136 D.L.R. (3d) 133, [1982] 4 W.W.R. 673, 1982 CarswellAlta 94 (Alta. Q.B.), dismissing application for interim injunction pending trial.

***Dickson J.*:**

1 The Constitution of Canada, which includes the *Canadian Charter of Rights and Freedoms*, is the supreme law of Canada. Any law inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. Section 52(1) of the *Constitution Act, 1982* so mandates. The constitutional question posed in this appeal is whether s. 10 (3), and by implication s. 10 (1), of the *Combines Investigation Act*, R.S.C. 1970, c.C-23 (the "Act") are inconsistent with s. 8 of the *Charter* by reason of authorizing unreasonable searches and seizures and are therefore of no force and effect.

I Background

2 Subsections 10(1) and 10(3) of the *Combines Investigation Act* provide:

> 10(1) Subject to subsection (3) in any inquiry under this Act the Director [of Investigation and Research of the Combines Investigation Branch] or any representative authorized by him may enter any premises on which the Director believes there may be evidence relevant to the matters being inquired into and may examine any thing on the premises and may copy or take away for further examination or copying any book, paper, record or other document that in the opinion of the Director or his authorized representative, as the case may be, may afford such evidence.
>
> 10.(3) Before exercising the power conferred by subsection (1), the Director or his representative shall produce a certificate from a member of the [Restrictive Trade Practices] Commission, which may be granted on the *ex parte* application of the Director, authorizing the exercise of such power.

3 On April 13, 1982, in the course of an inquiry under the *Act*, the appellant Lawson A.W. Hunter, Director of Investigation and Research of the Combines Investigation Branch, authorized the other appellants, Messrs. Milton, Murphy, McAlpine and Marroco, all Combines Investigation officers, to exercise his authority under s. 10 of the *Act* to enter and examine documents and other

things at the business premises of the Edmonton Journal, a division of the respondent corporation, Southam Inc.

4 On April 16, 1982, in fulfilment of the requirement in s. 10(3) of the *Act*, Dr. Frank Roseman, a member of the Restrictive Trade Practices Commission, (the "R.T.P.C.") certified his authorization of this exercise of the Director's powers.

5 On April 17, 1982, the *Constitution Act, 1982*, incorporating the *Canadian Charter of Rights and Freedoms* was proclaimed. Section 8 of the *Charter* provides:

> Everyone has the right to be secure against unreasonable search and seizure.

6 On April 19, 1982 the officers presented their certified authorization at the premises of the Edmonton Journal. The English version of this certificate reads as follows:

> In the matter of the Combines Investigation Act and section 33 and section 34(1)(c) thereof and in the matter of an Inquiry relating to the Production, Distribution and Supply of Newspapers and Related Products in Edmonton
>
> TO:
>
> M.J. Milton
>
> M.L. Murphy
>
> J.A. McAlpine
>
> A.P. Marrocco
>
> being my representatives under section 10 of the Combines Investigation Act
>
> You are hereby authorized to enter upon the premises hereinafter mentioned, on which I believe there may be evidence relevant to this inquiry, and examine anything thereon and copy or take away for copying any book, paper, record or other document that in your opinion may afford such evidence.
>
> The premises referred to herein are those occupied by or on behalf of
>
> Southam Inc,
>
> 10006-101 Street
>
> Edmonton, Alberta
>
> and elsewhere in Canada
>
> This authorization is not valid after May 31, 1982.

Dated in Hull, in the Province of Quebec this 13th day of April 1982.

Lawson A.W. Hunter

Director D1 Investigation and Research

Combines Investigation Act

I hereby certify that the above exercise of powers is authorized pursuant to Section 10 of the Combines Investigation Act.

Dated in Ottawa, in the Province of Ontario, this 16th day of April, 1982.

Frank Roseman, Member,

Restrictive Trade Practices Commission

The authorization has a breathtaking sweep; it is tantamount to a license to roam at large on the premises of Southam Inc. at the stated address "and elsewhere in Canada".

7 On April 20 the officers commenced the search. They said they wished to search every file of Southam Inc. at 10006 - 101 Street, Edmonton, except files in the news room but including all files of J. Patrick O'Callaghan, publisher of the Edmonton Journal. They declined to give the name of any person whose complaint had initiated the inquiry, or to say under which section of the *Act* the inquiry had been begun. They also declined to give more specific information as to the subject matter of the inquiry than that contained in the authorization to search.

8 At noon of the 20th Southam Inc. served upon the officers of the Combines Investigation Branch a notice of motion for an interim injunction. The application was heard by Cavanagh J. who held that although Southam had raised a serious question as to whether the search was in violation of s.8 of the *Charter*, the balance of convenience militated in favour of denying the interlocutory injunction pending trial of the matter. At the hearing, the appellants maintained, unsuccessfully, that the Director of Investigation and Research, and his authorized representatives, acting pursuant to s. 10 of the *Act* were a "federal board, commission or other tribunal" within s.2(g) of the *Federal Court Act* and that the Federal Court, not the provincial courts of Alberta, had jurisdiction.

9 Southam appealed to the Alberta Court of Appeal. The appellants also appealed, from that part of the judgment which held that the Alberta Court of Queen's Bench had jurisdiction. As an interim provision the Court of Appeal ordered that the documents taken from the premises of the Edmonton Journal be sealed pending resolution of the appeal. After hearing the parties, the Court held that the case was a proper one to have been treated at first instance as an application for summary judgment on the issues of (1) whether the Alberta courts or the Federal Court had jurisdiction to make the orders requested and (2) whether s. 10 of the *Act* was in whole or in part

inconsistent with the provisions of the *Constitution*. The Court therefore directed that the appeal itself be heard on this basis. At the subsequent hearing, the judgment of this Court in *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307 having by then been delivered, the present appellants abandoned their challenge to the jurisdiction of the Alberta courts and addressed their arguments solely to the substantive issue of the constitutionality of s. 10 of the *Act*. A unanimous five-judge panel of the Alberta Court of Appeal, speaking through Prowse J.A., held that s. 10(3), and, by implication s. 10(1), of the *Act*, were inconsistent with the provisions of s.8 of the *Charter* and therefore of no force or effect. It is from this ruling that the present appellants bring their appeal before this Court.

II The Positions of the Parties

A) The Respondent, Southam Inc.

10 In alleging that subsections 10(1) and 10(3) of the *Combines Investigation Act* are inconsistent with the right to be secure against unreasonable search and seizure, Southam Inc. relies heavily on the historic protections afforded by common law and by statute as defining the correct standard of reasonableness for purposes of s. 8 of the *Charter*. This was essentially the approach taken by Prowse J.A. when he said:

> The roots of the right to be so secure are embedded in the common law and the safeguards according that right are found in common law, in statutes subsequently enacted, and in decisions of the courts made as the society in which we live has evolved. The expression of the right in a constitutional document reminds us of those roots and the tradition associated with the right. One would be presumptuous to assume that we have attained the zenith of our development as a civilization and that the right accorded an individual is frozen for eternity. Section 8, however, requires us to be ever mindful of some of the criteria that have been applied in the past in securing the right.

11 Applying this approach, Prowse J.A. concluded - correctly in Southam Inc.'s submission - that, absent exceptional circumstances, the provisions of s. 443 of the *Criminal Code*, which extends to investigations of *Criminal Code* offences the procedural safeguards the common law required for entries and searches for stolen goods, constitute the minimal prerequisites for reasonable searches and seizures in connection with the investigation of any criminal offence, including possible violations of the *Combines Investigation Act*. Prowse J.A. summarized these procedural safeguards in the following propositions:

> (a) the power to authorize a search and seizure is given to an impartial and independent person (at common law a justice) who is bound to act judicially in discharging that function,

(b) that evidence must satisfy the justice that the person seeking the authority has reasonable ground to suspect that an offence had been committed,

(c) that evidence must satisfy the justice that the person seeking the authority has reasonable grounds to believe, at common law, that stolen property may be on the premises or, under s.443(1)(b), that something will afford evidence of an offence may be recovered, and

(d) there must be evidence on oath before him.

12 Southam Inc. contends that subsections 10(1) and 10(3) fail to provide any of these safeguards. In its submission, the approval by a member of the R.T.P.C. of the Director's decision to authorize search and seizure is not approval by an independent arbiter or neutral and impartial person. It argues further that subsections 10(1) and 10(3) do not require that the R.T.P.C. member be satisfied that the Director has reasonable grounds to suspect an offence has been committed or to believe there may be evidence at the place at which the Director wishes to search, nor does it require evidence under oath about these matters. In fact, Southam Inc. contends, as these subsections have been judicially interpreted in cases such as *Petrofina Canada Ltd. v. Chairman, Restrictive Trade Practices Commission No. 2*, [1980] 2 F.C. 386, they *prevent* the R.T.P.C. member from ascertaining or passing judgment on anything except that there is, *de facto*, an inquiry in progress under the *Act*, an interpretation which, in Southam's submission, constitutes the R.T.P.C. member as merely a "rubber stamp" for the Director's decision to authorize a search. For all these reasons, Southam submits, giving effect to subsections 10(1) and 10(3) could yield no other result than an unreasonable search and seizure.

B) The Appellants

13 The appellants take a different view. In their submission the constitutionality of s. 10 ought to be considered on the basis of whether its provisions *could be* applied consistently with the *Charter*. It is their contention that they can. In their view, approval by the R.T.P.C. member *does* constitute authorization by a neutral and impartial arbiter. They deny there is any reasonable apprehension of bias attaching to him or to his function in approving the Director's authorizations to enter and search premises. As to the further requirements cited by Prowse J.A. and amplified on by Southam Inc., the appellants implicitly deny that an easy parallel can be drawn between the offences set out in the *Criminal Code* and those created by the *Combines Investigation Act* so as to justify invoking the procedural safeguards in s.443 as the proper standard of reasonableness for searches and seizures by the authorities in connection with these latter offences. In their submission combines offences require specialized techniques for their detection and suppression. They say that for such offences, as compared to most other criminal offences, there is inherently less basis for certainty and specificity, both as to the commission of an offence and as to the existence of specific physical evidence in relation to such offence. In this context, they contend, s. 10 does not

authorize "unreasonable" search or seizure. Further, the appellants argue, the wording of s. 10 does not prevent the R.T.P.C. member in appropriate cases from requiring, for instance, evidence under oath before he approves the Director's authorization. In any event, they maintain, it cannot be said that s. 10 is incapable of being applied in a manner which does not offend the Constitution, and it ought not, therefore, to be struck down. At most it ought to be read down so as to include any necessary procedural safeguards. In support, they cite the decision of Van Camp J. in *The Queen v. Metropolitan Toronto Pharmacists' Association* (unreported, Ont. H.C., May 4, 1983).

III "Unreasonable" Search or Seizure

14 At the outset it is important to note that the issue in this appeal concerns the constitutional validity of a statute authorizing a search and seizure. It does not concern the reasonableness or otherwise of the manner in which the appellants carried out their statutory authority. It is not the conduct of the appellants, but rather the legislation under which they acted, to which attention must be directed.

15 As is clear from the arguments of the parties as well as from the judgment of Prowse J.A., the crux of this case is the meaning to be given to the term "unreasonable" in the s.8 guarantee of freedom from unreasonable search or seizure. The guarantee is vague and open. The American courts have had the advantage of a number of specific prerequisites articulated in the Fourth Amendment to the United States Constitution, as well as a history of colonial opposition to certain Crown investigatory practices from which to draw out the nature of the interests protected by that Amendment and the kinds of conduct it proscribes. There is none of this in s. 8. There is no specificity in the section beyond the bare guarantee of freedom from "unreasonable" search and seizure; nor is there any particular historical, political or philosophic context capable of providing an obvious gloss on the meaning of the guarantee.

16 It is clear that the the meaning of "unreasonable" cannot be determined by recourse to a dictionary, nor for that matter, by reference to the rules of statutory construction. The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a *Bill* or a *Charter of Rights*, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind. Professor Paul Freund expressed this idea aptly when he admonished the American courts "not to read the provisions of the Constitution like a last will and testament lest it become one".

17 The need for a broad perspective in approaching constitutional documents is a familiar theme in Canadian constitutional jurisprudence. It is contained in Viscount Sankey's classic formulation in *Edwards v. Attorney General for Canada*, [1930] A.C. 124 at 136-37, cited and applied in countless Canadian cases:

> The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada... Their Lordships do not conceive it to be the duty of this Board -- it is certainly not their desire -- to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation.

18 More recently, in *Minister of Home Affairs v. Fisher*, [1980] A.C. 319, dealing with the Bermudian Constitution, Lord Wilberforce reiterated at p. 321 that a constitution is a document "*sui generis* calling for principles of interpretation of its own, suitable to its character", and that as such, a constitution incorporating a *Bill of Rights* calls for:

> a generous interpretation avoiding what has been called "the austerity of tabulated legalism" suitable to give individuals the full measure of the fundamental rights and freedoms referred to.

Such a broad, purposive analysis, which interprets specific provisions of a constitutional document in the light of its larger objects is also consonant with the classical principles of American constitutional construction enunciated by Chief Justice Marshall in *M'Culloch v. Maryland* (1819), 17 U.S. (4 Wheat.) 316. It is, as well, the approach I intend to take in the present case.

19 I begin with the obvious. The *Canadian Charter of Rights and Freedoms* is a purposive document. Its purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines. It is intended to constrain governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for governmental action. In the present case this means, as Prowse J.A. pointed out, that in guaranteeing the right to be secure from unreasonable searches and seizures, s. 8 acts as a limitation on whatever powers of search and seizure the federal or provincial governments already and otherwise possess. It does not in itself confer any powers, even of "reasonable" search and seizure, on these governments. This leads, in my view, to the further conclusion that an assessment of the constitutionality of a search and seizure, or of a statute authorizing a search or seizure, must focus on its "reasonable" or "unreasonable" impact on the subject of the search or the seizure, and not simply on its rationality in furthering some valid government objective.

20 Since the proper approach to the interpretation of the *Charter of Rights and Freedoms* is a purposive one, before it is possible to assess the reasonableness or unreasonablness of the impact

of a search or of a statute authorizing a search, it is first necessary to specify the purpose underlying s. 8: in other words, to delineate the nature of the interests it is meant to protect.

21 Historically, the common law protections with regard to governmental searches and seizures were based on the right to enjoy property and were linked to the law of trespass. It was on this basis that in the great case of *Entick v. Carrington* (1765), 19 State Tr. 1029the Court refused to countenance a search purportedly authorized by the executive, to discover evidence that might link the plaintiff to certain seditious libels. Lord Camden prefaced his discussion of the rights in question by saying, at p. 1066:

> The great end, for which men entered into society, was to preserve their property. That right is preserved sacred and incommunicable all instances where it has not been taken away or abridged by some public law for the good of the whole.

The defendants argued that their oaths as Kings' messengers required them to conduct the search in question and ought to prevail over the plaintiff's property rights. Lord Camden rejected this contention, at p. 1067:

> Our law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave: if he does he is a trespasser though he does no damage at all; if he will tread upon his neighbour's ground he must justify it by law.

Lord Camden could find no exception from this principle for the benefit of Kings' messengers. He held that neither the intrusions nor the purported authorizations were supportable on the basis of the existing law. That law would only have countenanced such an entry if the search were for stolen goods and if authorized by a justice on the basis of evidence upon oath that there was "strong cause" to believe the goods were concealed in the place sought to be searched. In view of the lack of proper legal authorization for the governmental intrusion, the plaintiff was protected from the intended search and seizure by the ordinary law of trespass.

22 In my view the interests protected by s. 8 are of a wider ambit than those enunciated in *Entick v. Carrington*. Section 8 is an entrenched constitutional provision. It is not therefore vulnerable to encroachment by legislative enactments in the same way as common law protections. There is, further, nothing in the language of the section to restrict it to the protection of property or to associate it with the law of trespass. It guarantees a broad and general right to be secure from unreasonable search and seizure.

23 The Fourth Amendment of the United States Constitution, also guarantees a broad right. It provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon

probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Construing this provision in *Katz v. United States* (1967), 389, U.S. 347, Stewart J. delivering the majority opinion of the United States Supreme Court declared at p. 351 that "the Fourth Amendment protects people, not places". Justice Stewart rejected any necessary connection between that Amendment and the notion of trespass. With respect, I believe this approach is equally appropriate in construing the protections in s. 8 of the *Charter of Rights and Freedoms*.

24 In *Katz*, Stewart J. discussed the notion of a right to privacy, which he described at pp. 350-51 as "the right to be let alone by other people". Although Stewart J. was careful not to identify the Fourth Amendment exclusively with the protection of this right, nor to see the Amendment as the only provision in the Bill of Rights relevant to its interpretation, it is clear that this notion played a prominent role in his construction of the nature and the limits of the American constitutional protection against unreasonable search and seizure. In the Alberta Court of Appeal, Prowse J.A. took a similar approach to s. 8, which he described as dealing "with one aspect of what has been referred to as the right of privacy, which is the right to be secure against encroachment upon the citizens' reasonable expectation of privacy in a free and democratic society".

25 Like the Supreme Court of the United States, I would be wary of foreclosing the possibility that the right to be secure against unreasonable search and seizure might protect interests beyond the right of privacy, but for purposes of the present appeal I am satisfied that its protections go at least that far. The guarantee of security from *unreasonable* search and seizure only protects a *reasonable* expectation. This limitation on the right guaranteed by s. 8, whether it is expressed negatively as freedom from "unreasonable" search and seizure, or positively as an entitlement to a "reasonable" expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement.

26 The question that remains, and the one upon which the present appeal hinges, is how this assessment is to be made. When is it to be made, by whom and on what basis? Here again, I think the proper approach is a purposive one.

A) When is the balance of interests to be assessed?

27 If the issue to be resolved in assessing the constitutionality of searches under s. 10 were whether *in fact* the governmental interest in carrying out a given search outweighed that of the individual in resisting the governmental intrusion upon his privacy, then it would be appropriate to determine the balance of the competing interests *after* the search had been conducted. Such a *post facto* analysis would, however, be seriously at adds with the purpose of s. 8. That purpose is, as I have said, to protect individuals from unjustified state intrusions upon their privacy. That purpose

requires a means of *preventing* unjustified searches before they happen, not simply of determining, after the fact, whether they ought to have occurred in the first place. This, in my view, can only be accomplished by a system of *prior authorization*, not one of subsequent validation.

28 A requirement of prior authorization, usually in the form of a valid warrant, has been a consistent pre-requisite for a valid search and seizure both at common law and under most statutes. Such a requirement puts the onus on the state to demonstrate the superiority of its interest to that of the individual. As such it accords with the apparent intention of the *Charter* to prefer, where feasible, the right of the individual to be free from state interference to the interests of the state in advancing its purposes through such interference.

29 I recognize that it may not be reasonable in every instance to insist on prior authorization in order to validate governmental intrusions upon individuals' expectations of privacy. Nevertheless, where it is feasible to obtain prior authorization, I would hold that such authorization is a precondition for a valid search and seizure.

30 Here also, the decision in *Katz*, *supra*, is relevant. In *U.S. v. Rabinowitz* 1950 339 U.S. 56, the Supreme Court of the United States had held that a search without warrant was not *ipso facto* unreasonable. Seventeen years later, however, in *Katz*, Stewart J. concluded that a warrantless search was *prima facie* "unreasonable" under the Fourth Amendment. The terms of the Fourth Amendment are not identical to those of s. 8 and American decisions can be transplanted to the Canadian context only with the greatest caution. Nevertheless, I would in the present instance respectfully adopt Stewart J.'s formulation as equally applicable to the concept of "unreasonableness" under s. 8, and would require the party seeking to justify a warrantless search to rebut this presumption of unreasonableness.

31 In the present case the appellants make no argument that it is infeasible or unnecessary to obtain prior authorization for the searches contemplated by the *Combines Investigation Act* and, in my view, no such argument could be made. I would therefore conclude that in the absence of a valid procedure for prior authorization searches conducted under the *Act* would be unreasonable. In the event, s. 10(3) *does* purport to establish a requirement for prior authorization, specifying, as it does, that searches and seizures conducted under s. 10(1) must be authorized by a member of the R.T.P.C. The question then becomes whether s. 10(3) provides for an acceptable prior authorization procedure.

B) Who must grant the authorization?

32 The purpose of a requirement of prior authorization is to provide an opportunity, before the event, for the conflicting interests of the state and the individual to be assessed, so that the individual's right to privacy will be breached only where the appropriate standard has been met, and the interests of the state are thus demonstrably superior. For such an authorization procedure to be meaningful it is necessary for the person authorizing the search to be able to assess the evidence

as to whether that standard has been met, in an entirely neutral and impartial manner. At common law the power to issue a search warrant was reserved for a justice. In the recent English case of *I.R.C. v. Rossminster*, [1980] 1 All E.R. 80 Viscount Dilhorne suggested at p. 87 that the power to authorize administrative searches and seizures be given to "a more senior judge". While it may be wise, in view of the sensitivity of the task, to assign the decision whether an authorization should be issued to a judicial officer, I agree with Prowse J.A. that this is not a necessary precondition for safeguarding the right enshrined in s. 8. The person performing this function need not be a judge, but he must at a minimum be capable of acting judicially.

33 In *M.N.R. v. Coopers and Lybrand*, [1979] 1 S.C.R. 495 this Court had occasion to discuss the difference between an administrative and a judicial function in the authorization of a search and seizure. The *Income Tax Act*, S.C. 1970-71-72 (Can.), c. 63, as amended, confers upon the Minister a number of powers including, in s. 231(4), the power under certain conditions to authorize the entry and search of buildings. At p. 507 the Court described the Minister's powers as "fundamentally administrative", going on to explain:

> The power he exercises under s. 231(4) is properly characterized as investigatory rather than adjudicatory. He will collect material and advice from many sources. In deciding whether to exercise the right [to authorize entry and search] he will be governed by many considerations, dominant among which is the public interest and his duty as an executive officer of the government to administer the Act to the best of his ability. The decision to seek authority to enter and search will be guided by public policy and expediency, having regard to all the circumstances.

The Court contrasted these powers with the judicial powers which s. 231(4) conferred on a judge of the superior or county court to approve the Minister's authorization.

34 Under the scheme envisaged by s. 10 of the *Combines Investigation Act* it is clear that the Director exercises administrative powers analogous to those of the Minister under s. 231(4) of the *Income Tax Act*. They too are investigatory rather than adjudicatory, with his decision to seek approval for an authorization to enter and search premises equally guided by considerations of expediency and public policy. But what of the member of the R.T.P.C. whom s. 10(3) empowers to approve the Director's authorization? Is his function investigatory or adjudicatory? In the Alberta Court of Appeal Prowse J.A. carefully reviewed the respective powers of the Director and the Commission and concluded that the *Act* was not entirely successful in separating the role of the Director as investigator and prosecutor from that of the Commission as adjudicator. In his view circumstances may arise under the *Act* where "the Director is acting as investigator and prosecutor and the Commission is acting as investigator and judge with respect to breaches of the *Act*". Southam Inc. summarizes and enlarges upon Prowse J.A.'s analysis, producing the following list of investigatory functions bestowed upon the Commission or one of its members by the *Act*:

i) The power in s. 47 to instruct the Director to commence a s. 8 inquiry.

ii) The power to cause evidence to be gathered pursuant to ss. 9, 10, 12 and 17.

iii) The power to issue a s. 17 order.

iv) The power under ss. 17, 22(2)(b) to seek further or better evidence after the Commission has commenced a hearing.

v) the power under s. 22(2)(b) after commencing a hearing and receiving evidence to direct the Director to make further inquiry and, in effect, to go back to the investigatory stage;

vi) the power under s. 22(2)(c) to compel the Director to turn over to the R.T.P.C. copies of all books, papers, records or other documents obtained by the Director in such further inquiry;

vii) the power under s. 27.1 to order the Director to give evidence before any other federal board, commission or other tribunal;

viii) the power under s. 45.1 to seek production of statistics for evidence in an inquiry;

ix) the power to deliver to the Director all books, papers, records of other documents produced on a s. 17 hearing;

x) the power under s. 13 to request the appointment and instruction of counsel to assist in the inquiry.

35 In my view, investing the Commission or its members wit significant investigatory functions has the result of vitiating the ability of a member of the Commission to act in a judicial capacity when authorizing a search or seizure under s.10(3). This is not, of course, a matter of impugning the honesty or good faith of the Commission or its members. It is rather a conclusion that the administrative nature of the Commission's investigatory duties (with its quite proper reference points in considerations of public policy and effective enforcement of the *Act*) ill accords with the neutrality and detachment necessary to assess whether the evidence reveals that the point has been reached where the interests of the individual must constitutionally give way to those of the state. A member of the R.T.P.C. passing on the appropriateness of a proposed search under the *Combines Investigation Act* is caught by the maxim *nemo judex in sua causa*. He simply cannot be the impartial arbiter necessary to grant an effective authorization.

36 On this basis alone I would conclude that the prior authorization mandated by s. 10(3) of the *Combines Investigation Act* is inadequate to satisfy the requirements of s. 6 of the *Charter* and consequently a search carried out under the authority of ss.10(1) and 10(3) is an unreasonable one. Since, however, the Alberta Court of Appeal found other, perhaps even more serious defects

in these provisions I pass on to consider whether even if s.10(3) did specify a truly neutral and detached arbiter to authorize searches it would nevertheless remain inconsistent with s.8 of the *Charter*.

C) On what basis must the balance of interests be assessed?

37 Section 10 is terse in the extreme on the subject of criteria for issuing an authorization for entry, search and seizure. Section 10(3) merely states that an R.T.P.C. member may grant an authorization *ex parte*. The only explicit criteria for granting such an authorization are those mentioned in s.10(1), namely: (1) that an inquiry under the *Act* must be in progress, and (2) that the Director must believe that the premises may contain relevant evidence.

38 In cases argued before passage of the *Charter of Rights and Freedoms* the courts took a narrow view of what s.10 required or permitted the R.T.P.C. member to consider when asked to authorize search and seizure. In *Petrofina Canada Ltd. v. Chairman, Restrictive Trade Practices Commission No. 2, supra*, the applicant challenged authorizations under ss.9(2) and 10(3) of the *Act* on the grounds, *inter alia*, that the members who gave their authorizations did not show that they had before them sufficient information to enable them to determine the legality of the inquiry then in progress or the reasonableness of the Director's belief that circumstances warranted the exercise of his powers. The Federal Court of Appeal rejected the relevance of such considerations to the members' decisions, at p.391:

> In making the decisions that sections 9 and 10 require them to make, the Members must act judicially ... However that duty to act judicially applies only to the decisions that the Members are required to make under sections 9(2) and 10(3). Under those provisions, the Members are neither required nor authorized to determine the legality of the Director's decision to hold an inquiry: they are merely required to ascertain that there is, de facto, an inquiry in progress under the Act. The Members are not required or authorized, either to pass judgment on the reasonableness of the motives prompting the Director to exercise his powers under section 9 and 10. As the Members did not have to make decisions on those two points, they cannot, in my opinion, be blamed for not having required information on those points.

39 As Prowse J.A. pointed out, if the powers of a Commission member are as the Federal Court of Appeal found them to be, then it follows that the decision of the Director in the course of an inquiry to exercise his powers of entry, search and seizure is effectively unreviewable. The extent of the privacy of the individual would be left to the discretion of the Director. A provision authorizing such an unreviewable power would clearly be inconsistent with s.8 of the *Charter*.

40 Assuming, *arguendo*, that the Federal Court of Appeal was wrong, and the member *is* authorized, or even required, to satisfy himself as to (1) the legality of the enquiry and (2) the reasonableness of the Director's belief that there may be evidence relevant to the matters being inquired into, would that remove the inconsistency with s.8?

41 To read ss.10(1) and 10(3) as simply *allowing* the authorizing party to satisfy himself on these questions, without requiring him to do so, would in my view be clearly inadequate. Such an amorphous standard cannot provide a meaningful criterion for securing the right guaranteed by s.8. The location of the constitutional balance between a justifiable expectation of privacy and the legitimate needs of the state cannot depend on the subjective appreciation of individual adjudicators. Some objective standard must be established.

42 Requiring the authorizing party to satisfy himself as to the legality of the inquiry and the reasonableness of the Director's belief in the possible existence of relevant evidence, would have the advantage of substituting an objective standard for an amorphous one, but would, in my view, still be inadequate. The problem is with the stipulation of a reasonable belief that evidence *may* be uncovered in the search. Here again it is useful, in my view, to adopt a purposive approach. The purpose of an objective criterion for granting prior authorization to conduct a search or seizure is to provide a consistent standard for identifying the point at which the interests of the state in such intrusions come to prevail over the interests of the individual in resisting them. To associate it with an applicant's reasonable belief that relevant evidence *may* be uncovered by the search, would be to define the proper standard as the *possibility* of finding evidence. This is a very low standard which would validate intrusion on the basis of suspicion, and authorize fishing expeditions of considerable latitude. It would tip the balance strongly in favour of the state and limit the right of the individual to resist, to only the most egregious intrusions. I do not believe that this is a proper standard for securing the right to be free from unreasonable search and seizure.

43 Anglo-Canadian legal and political traditions point to a higher standard. The common law required evidence on oath which gave "strong reason to believe" that stolen goods were concealed in the place to be searched before a warrant would issue. Section 443 of the *Criminal Code* authorizes a warrant only where there has been information upon oath that there is "reasonable ground to believe" that there is evidence of an offence in the place to be searched. The American *Bill of Rights* provides that "no warrants shall issue, but upon probable cause, supported by oath or affirmation..." The phrasing is slightly different but the standard in each of these formulations is identical. The state's interest in detecting and preventing crime begins to prevail over the individual's interest in being left alone at the point where credibly-based probability replaces suspicion. History has confirmed the appropriateness of this requirement as the threshhold for subordinating the expectation of privacy to the needs of law enforcement. Where the state's interest is not simply law enforcement as, for instance, where state security is involved, or where the individual's interest is not simply his expectation of privacy as, for instance, when the search threatens his bodily integrity, the relevant standard might well be a different one. That is not the situation in the present case. In cases like the present, reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search, constitutes the minimum standard, consistent with s.8 of the *Charter*, for

authorizing search and seizure. Insofar as ss. 10(1) and 10(3) of the *Combines Investigation Act* do not embody such a requirement, I would hold them to be further inconsistent with s.8.

Reading In and Reading Down

44 The appellants submit that even if ss.10(1) and 10(3) do not specify a standard consistent with s.8 for authorizing entry, search and seizure, they should not be struck down as inconsistent with the *Charter*, but rather that the appropriate standard should be read into these provisions. An analogy is drawn to the case of *MacKay v. The Queen*, [1965] S.C.R. 798 in which this Court held that a local ordinance regulating the use of property by prohibiting the erection of unauthorized signs, though apparently without limits, could not have been intended unconstitutionally to encroach on federal competence over elections, and should therefore be "read down" so as not to apply to election signs. In the present case, the overt inconsistency with s.8 manifested by the lack of a neutral and detached arbiter renders the appellants' submissions on reading in appropriate standards for issuing a warrant purely academic. Even if this were not the case, however, I would be disinclined to give effect to these submissions. While the courts are guardians of the Constitution and of individuals' rights under it, it is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements. It should not fall to the courts to fill in the details that will render legislative lacunae constitutional. Without appropriate safeguards legislation authorizing search and seizure is inconsistent with s.8 of the *Charter*. As I have said, any law inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. I would hold ss.10(1) and 10(3) of the *Combines Investigation Act* to be inconsistent with the *Charter* and of no force and effect, as much for their failure to specify an appropriate standard for the issuance of warrants as for their designation of an improper arbiter to issue them.

Section 1

45 Section 1 of the *Charter* provides:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

46 The phrase "demonstrably justified" puts the onus of justifying a limitation on a right or freedom set out in the *Charter* on the party seeking to limit. In the present case the appellants have made no submissions capable of supporting a claim that even if searches under ss.10(1) and 10(3) are "unreasonable" within the meaning of s.8, they are nevertheless a reasonable limit, demonstrably justified in a free and democratic society, on the right set out in s.8. It is, therefore, not necessary in this case to consider the relationship between s. 8 and s. 1. I leave to another day the difficult question of the relationship between those two sections and, more particularly, what further balancing of interests, if any, may be contemplated by s.1, beyond that envisaged by s.8.

Conclusion

47 By order of Chief Justice Laskin the constitutional question was stated as follows:

> Did the Alberta Court err in holding that subsection 10(3), and by implication subsection 10(1), of the Combines Investigation Act, R.S.C. 1970, c.C-23 are inconsistent with the provisions of Section 8 of the Canadian Charter of Rights and Freedoms and that they are therefore of no force or effect?

48 I would answer that question in the negative. I would dismiss the appeal with costs to the respondent.

Appeal dismissed.

Footnotes

* The Chief Justice did not take part in the judgment.

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Federal Court of Appeal

Cour d'appel fédérale

Please see in particular paras. 8-9, 41, 74 and 76

Date: 20110525

Docket: A-242-10

Citation: 2011 FCA 176

CORAM: **NADON J.A.**
DAWSON J.A.
TRUDEL J.A.

BETWEEN:

UNITED STATES STEEL CORPORATION
and U.S. STEEL CANADA INC.

Appellants

and

THE ATTORNEY GENERAL OF CANADA

Respondents

Heard at Ottawa, Ontario, on December 7, 2010.

Judgment delivered at Ottawa, Ontario, on May 25, 2011.

REASONS FOR JUDGMENT BY: NADON J.A.

CONCURRED IN BY: DAWSON J.A.
TRUDEL J.A.

Federal Court of Appeal | Cour d'appel fédérale

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REASONS FOR JUDGMENT

NADON J.A.

[1] The *Investment Canada Act*, R.S. 1985, c. 28 (1st Suppl.) (the "*Act*") allows the Minister of Industry (the "Minister") to review and approve applications from foreign investors who wish to obtain control of major Canadian corporations. Section 39 of the Act allows the Minister to demand that a foreign investor in control of a Canadian corporation comply with the *Act* and with any undertaking made during the application stage. If the Minister is not satisfied with the investor's actions or response, he can apply under section 40 to a superior court which can grant several forms of relief.

[2] On July 17, 2009, the Minister commenced an application in the Federal Court pursuant to section 40 of the *Act* with respect to two written undertakings, namely, the production and employment undertakings given by the respondents United States Steel Corporation and U.S. Steel Canada Inc. (collectively "U.S. Steel") in connection with the acquisition of Stelco Inc. ("Stelco").

[3] On October 8, 2009, U.S. Steel filed a Notice of Motion challenging the constitutional validity of sections 39 and 40 of the *Act*. More particularly, U.S. Steel says that the impugned provisions violate their right to a fair hearing in accordance with principles of fundamental justice, contrary to subsection 2*(e)* of the *Canadian Bill of Rights*, S.C. 1960, c.44 (the "*Bill of Rights*") and that they violate the principle of presumption of innocence and the right to a fair hearing, contrary to subsection 11*(d)* of the *Canadian Charter of Rights and Freedoms*, the *Constitution Act* being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c.11 (the "*Charter*").

[4] In a judgment dated June 14, 2010, 2010 FC 642, Hansen J. (the "Judge") of the Federal Court dismissed U.S. Steel's challenge in its entirety. This is an appeal from that decision.

Facts and Procedural History

[5] In September 2007, U.S. Steel intended to invest in and acquire control of Stelco's Hamilton-based business. To this end, it submitted an application for ministerial approval and provided 31 undertakings to the Minister, two of which related to employment and production levels. On October 29, 2007, the Minister approved the acquisition.

[6] On May 5, 2009, the Minister advised U.S. Steel that it was in contravention of the employment and production undertakings. As a result, the Minister demanded, under section 39 of the Act, that U.S. Steel cease the contraventions, remedy the default and either demonstrate there were no contraventions or justify the contraventions.

[7] U.S. Steel responded by sending a lengthy letter to the Minister which explained the difficulties it was facing due to the unexpected economic downturn.

[8] The Minister, being dissatisfied with U.S. Steel's response, informed it on July 15, 2009, that he would be bringing proceedings under section 40 of the *Act*, seeking an order directing compliance with the undertakings and imposing a penalty of $10,000 per day per breach, running from November 1, 2008, until such time as U.S. Steel had complied with the undertakings.

[9] As I indicated earlier, the Minister filed his Notice of Application on July 17, 2009. Paragraphs 3 and 4 of the application read as follows:

> 3. Directing the Respondents to forthwith comply with the relevant undertakings:
> a. by increasing steel production at the Canadian Business, as defined in this Application, such that:
> i. in the period from November 1, 2007 to October 31, 2009, steel production at the Canadian Business is greater than or equal to a total of 8,690,000 tons (2 x 4,345,000); and
> ii. in the period from November 1, 2009 to October 31, 2010, steel production at the Canadian Business is greater than or equal to 4,345,000 net tons; and
> b. by taking all such steps as are necessary to ensure that over the Term of the undertakings, as defined in this Application, the Respondents

maintain an average level of employment at the Canadian Business of 3,105 employees on a full time equivalent.

4. Imposing on US Steel and US Steel Canada, jointly and severally, a penalty of $10,000 per day, per breach of the relevant undertakings, calculated from November 1, 2008 or from such other dates as this Court may determine, until the Respondents have complied with the relevant undertakings and such order as this Court may issue;

[10] In response to the Minister's Notice of Application, U.S. Steel filed an application with the Federal Court seeking to have sections 39 and 40 of the *Act* declared of no force or effect.

Legislation

[11] Before turning to the Judge's decision, I will set out the relevant legislation. Section 39 of the *Act* allows the Minister to send a demand to a non-Canadian investor requiring compliance with the *Act* or the investor's undertakings, or else a justification for non-compliance:

39. (1) Where the Minister believes that a non-Canadian, contrary to this Act,	**39.** (1) Le ministre peut faire émettre une mise en demeure à l'intention d'un non Canadien qui, selon lui, a, contrairement à la présente loi, selon le cas :
(*a*) has failed to give a notice under section 12 or file an application under section 17,	*a*) fait défaut de déposer l'avis mentionné à l'article 12 ou la demande d'examen mentionnée à l'article 17;
(*a.1*) has failed to provide any prescribed information or any information that has been requested by the Minister or Director,	*a.1*) omis de fournir les renseignements prévus par règlement ou ceux exigés par le ministre ou le directeur;
(*b*) has implemented an investment the implementation of which is prohibited by section 16, 24, 25.2 or 25.3,	*b*) effectué un investissement en contravention avec les articles 16, 24, 25.2 ou 25.3;
(*c*) has implemented an investment on terms and conditions that vary materially from those contained in an application filed under section 17 or	*c*) effectué un investissement selon des modalités qui sont substantiellement différentes de celles que contenait la demande d'examen déposée en

from any information or evidence provided under this Act in relation to the investment,

conformité avec l'article 17 ou des autres renseignements ou éléments de preuve fournis en conformité avec la présente loi à l'égard de l'investissement;

(*d*) has failed to divest himself of control of a Canadian business as required by section 24,

d) fait défaut de se départir du contrôle d'une entreprise canadienne comme l'exige l'article 24;

(*d.1*) has failed to comply with an undertaking given to Her Majesty in right of Canada in accordance with an order made under section 25.4,

d.1) omis de se conformer à tout engagement pris envers Sa Majesté du chef du Canada conformément au décret pris en vertu de l'article 25.4;

(*d.2*) has failed to comply with an order made under section 25.4,

d.2) omis de se conformer au décret pris en vertu de l'article 25.4;

(*e*) <u>has failed to comply with a written undertaking given to Her Majesty in right of Canada relating to an investment that the Minister is satisfied or is deemed to be satisfied is likely to be of net benefit to Canada,</u>

e) fait défaut de se conformer à l'engagement écrit envers Sa Majesté du chef du Canada qu'il a pris à l'égard de l'investissement au sujet duquel le ministre est d'avis ou est réputé être d'avis qu'il sera vraisemblablement à l'avantage net du Canada;

(*f*) has failed to comply with any other provision of this Act or with the regulations, or

f) fait défaut de se conformer à une autre disposition de la présente loi ou des règlements;

(*g*) has entered into any transaction or arrangement primarily for a purpose related to this Act, <u>the Minister may send a demand to the non- Canadian, requiring the non-Canadian, forthwith or within such period as is specified in the demand, to cease the contravention, to remedy the default, to show cause why there is no contravention of the Act or regulations or, in the case of undertakings, to justify any non-compliance therewith</u>.

g) procédé à une opération ou à un arrangement dans un but lié à la présente loi. <u>La mise en demeure exige du non-Canadien, de mettre fin, immédiatement ou à l'intérieur du délai qu'elle précise, à la contravention, de se conformer à la loi ou aux règlements, ou de démontrer qu'ils n'ont pas été violés ou, dans le cas d'un engagement, de justifier le défaut.</u>

(2) If the Minister believes that a person or an entity has, contrary to this Act, failed to comply with a requirement to provide information

(2) S'il estime qu'une personne ou une unité a, contrairement à la présente loi, omis de se conformer soit à une demande de renseignements faite en

under subsection 25.2(3) or 25.3(5) or failed to comply with subsection 25.4(3), the Minister may send a demand to the person or entity requiring that they immediately, or within any period that may be specified in the demand, cease the contravention, remedy the default or show cause why there is no contravention of the Act.	vertu des paragraphes 25.2(3) ou 25.3(5), soit au paragraphe 25.4(3), le ministre peut envoyer une mise en demeure exigeant de la personne ou de l'unité que, sans délai ou dans le délai imparti, elle mette fin à la contravention, elle se conforme à la présente loi ou elle démontre que celle-ci n'a pas été violée.
(3) A demand under subsection (1) or (2) shall indicate the nature of the proceedings that may be taken under this Act against the non-Canadian or other person or entity to which it is sent in the event that the non-Canadian, person or entity fails to comply with the demand.	(3) La mise en demeure fait état de la nature des poursuites judiciaires qui peuvent être instituées en vertu de la présente loi contre le non-Canadien, la personne ou l'unité à qui elle est adressée s'il omet de s'y conformer.
[Emphasis added]	[Non souligné dans l'original]

[12] Section 40 of the Act allows the Minister to bring an application to a superior court if a section 39 demand is not complied with:

40. (1) <u>If a non-Canadian or any other person or entity fails to comply with a demand under section 39, an application on behalf of the Minister may be made to a superior court for an order under subsection (2) or (2.1).</u>	**40.** <u>(1) Une demande d'ordonnance judiciaire peut être présentée au nom du ministre à une cour supérieure si le non-Canadien, la personne ou l'unité ne se conforme pas à la mise en demeure reçue en application de l'article 39.</u>
(2) If, at the conclusion of the hearing on an application referred to in subsection (1), the superior court decides that the Minister was justified in sending a demand to the non-Canadian or other person or entity under section 39 and that the non-Canadian or other person or entity has failed to comply with the demand, the court may make any order or orders as, in its opinion, the circumstances	(2) Après audition de la demande visée au paragraphe (1), la cour supérieure qui décide que le ministre a agi à bon droit et constate le défaut du non-Canadien, de la personne ou de l'unité peut rendre l'ordonnance que justifient les circonstances; elle peut notamment rendre une ou plusieurs des ordonnances suivantes :

require, including, without limiting the generality of the foregoing, an order

(*a*) directing the non-Canadian to divest themselves of control of the Canadian business, or to divest themselves of their investment in the entity, on any terms and conditions that the court considers just and reasonable;

(*b*) enjoining the non-Canadian from taking any action specified in the order in relation to the investment that might prejudice the ability of a superior court, on a subsequent application for an order under paragraph (*a*), to effectively accomplish the end of such an order;

(*c*) directing the non-Canadian to comply with a written undertaking given to Her Majesty in right of Canada in relation to an investment that the Minister is satisfied or is deemed to be satisfied is likely to be of net benefit to Canada;

(*c.1*) directing the non-Canadian to comply with a written undertaking given to Her Majesty in right of Canada in accordance with an order made under section 25.4;

(*d*) against the non-Canadian imposing a penalty not exceeding ten thousand dollars for each day the non-Canadian is in contravention of this Act or any provision thereof;

(*e*) directing the revocation, or suspension for any period specified in the order, of any rights attached to any voting interests acquired by the non-Canadian or of any right to control any such rights;

a) ordonnance enjoignant au non-Canadien de se départir soit du contrôle de l'entreprise canadienne, soit de son investissement dans l'unité, selon les modalités que la cour estime justes et raisonnables;

b) ordonnance enjoignant au non-Canadien de ne pas prendre les mesures mentionnées dans l'ordonnance à l'égard de l'investissement qui pourraient empêcher une cour supérieure, dans le cadre d'une autre demande pour une ordonnance visée à l'alinéa *a*), de rendre une ordonnance efficace;

c) ordonnance enjoignant au non-Canadien de se conformer à l'engagement écrit envers Sa Majesté du chef du Canada pris à l'égard d'un investissement au sujet duquel le ministre est d'avis ou est réputé être d'avis qu'il sera vraisemblablement à l'avantage net du Canada;

c.1) ordonnance enjoignant au non-Canadien de se conformer à l'engagement écrit pris envers Sa Majesté du chef du Canada conformément au décret pris en vertu de l'article 25.4;

d) ordonnance infligeant au non-Canadien une pénalité maximale de dix mille dollars pour chacun des jours au cours desquels se commet ou se continue la contravention;

e) ordonnance de révocation ou de suspension, pour une période qu'elle précise, des droits afférents aux intérêts avec droit de vote qu'a acquis le non-Canadien ou du droit de contrôle de ces droits;

(*f*) directing the disposition by any non-Canadian of any voting interests acquired by the non-Canadian or of any assets acquired by the non-Canadian that are or were used in carrying on a Canadian business; or (*g*) directing the non-Canadian or other person or entity to provide information requested by the Minister or Director.	*f*) ordonnance enjoignant au non-Canadien de se départir des intérêts avec droit de vote qu'il a acquis ou des actifs qu'il a acquis et qui sont ou ont été utilisés dans l'exploitation de l'entreprise canadienne; *g*) ordonnance enjoignant au non-Canadien, à la personne ou à l'unité de fournir les renseignements exigés par le ministre ou le directeur.
(2.1) If, at the conclusion of the hearing on an application referred to in subsection (1), the superior court decides that the Minister was justified in sending a demand to a person or an entity under section 39 and that the person or entity has failed to comply with it, the court may make any order or orders that, in its opinion, the circumstances require, including, without limiting the generality of the foregoing, an order against the person or entity imposing a penalty not exceeding $10,000 for each day on which the person or entity is in contravention of this Act or any of its provisions.	(2.1) Après audition de la demande visée au paragraphe (1), la cour supérieure qui décide que le ministre a agi à bon droit et constate le défaut de conformité peut rendre l'ordonnance que justifient, à son avis, les circonstances, et notamment infliger à la personne ou à l'unité en défaut une pénalité maximale de 10 000 $ pour chacun des jours au cours desquels se commet ou se continue la contravention.
(3) <u>A penalty imposed by an order made under paragraph (2)(*d*) or subsection (2.1) is a debt due to Her Majesty in right of Canada and is recoverable as such in a superior court.</u>	(3) <u>Les pénalités infligées en vertu de l'alinéa (2)*d*) ou du paragraphe (2.1) sont des créances de Sa Majesté du chef du Canada dont le recouvrement peut être poursuivi à ce titre devant une cour supérieure.</u>
(4) <u>Everyone who fails or refuses to comply with an order made by a superior court under subsection (2) or (2.1) that is directed to them may be cited and punished by the court that made the order, as for other contempts of that court.</u>	(4) <u>Quiconque refuse ou omet de se conformer aux ordonnances visées aux paragraphes (2) ou (2.1) peut être puni pour outrage au tribunal par la cour qui a rendu l'ordonnance.</u>

(5) For greater certainty, all rights of appeal provided by law apply in the case of any decision or order made by a superior court under this section, as in the case of other decisions or orders made by that court.

(6) In this section, “superior court” has the same meaning as in subsection 35(1) of the *Interpretation Act* but does not include the Supreme Court of Canada, the Federal Court of Appeal or the Tax Court of Canada.

[Emphasis added]

(5) Il demeure entendu que tous les droits d’appel que prévoit la loi s’appliquent aux ordonnances visées au présent article comme s’il s’agissait d’une ordonnance ordinaire rendue par la cour.

(6) Au présent article, « cour supérieure » a le sens que lui donne le paragraphe 35(1) de la *Loi d’interprétation* mais ne vise pas la Cour suprême du Canada, la Cour d’appel fédérale et la Cour canadienne de l’impôt.

[Non souligné dans l’original]

[13] Subsection 11*(d)* of the Charter reads as follows:

11. Any person charged with an offence has the right:

…

(e) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

11. Tout inculpé a le droit:

…

e) d’être présumé innocent tant qu’il n’est pas déclaré coupable, conformément à la loi, par un tribunal indépendant et impartial à l’issue d’un

[14] Subsection 2*(e)* of the Bill of Rights reads as follows:

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

…

2. Toute loi du Canada, à moins qu’une loi du Parlement du Canada ne déclare expressément qu’elle s’appliquera nonobstant la *Déclaration canadienne des droits*, doit s’interpréter et s’appliquer de manière à ne pas supprimer, restreindre ou enfreindre l’un quelconque des droits ou des libertés reconnus et déclarés aux présentes, ni à en autoriser la suppression, la diminution ou la transgression, et en particulier, nulle loi du Canada ne doit s’interpréter ni s’appliquer comme (*e*) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;

…
e) privant une personne du droit à une audition impartiale de sa cause, selon les principes de justice fondamentale, pour la définition de ses droits et obligations;

Decision of the Federal Court

[15] After an overview of the facts, the relevant statutory provisions and the appellants' submissions, the Judge turned to the question of whether subsection 11*(d)* of the *Charter* applied to section 40 of the *Act*.

[16] The Judge proceeded to apply the two-category test set out by the Supreme Court of Canada in *R. v. Wigglesworth*, [1987] 2 S.C.R. 541 [*Wigglesworth*], to the effect that if a matter falls within one of two categories, subsection 11*(d)* applies. The first category asks whether a matter is by its very nature a criminal proceeding, whereas the second asks whether the provision in question allows the imposition of true penal consequences.

[17] Turning to the first category, the Judge looked at the purpose of section 40, the purpose of the sanction and the process leading to the sanction, which led her to write at paragraph 40 of her Reasons:

> [40] The central feature of the legislation is the determination that the proposed investment "is likely to be of net benefit to Canada". This determination is based on the strength of the investor's information, representations and undertakings in relation to the broad economic factors found in section 20. If the investment is not carried out in accordance with the basis upon which it was approved, in particular, if the undertakings are not honoured, there is a risk that the ultimate objective of the legislation will be undermined… ,

adding at paragraph 41:

> [41] Read in the context of sections 39 and 39.1 and having regard to the legislative objectives and the types of orders available under section 40, the objective of a section 40 proceeding is to enforce compliance with the provisions of the *Act* and any undertakings that may have been given in support of the application for approval.

[18] With regard to the purpose of the sanction found in section 40, the Judge was of the view that its purpose was "… to encourage and promote timely compliance and to enforce compliance with any undertakings and provisions of the legislation" (Judge's Reasons, para. 42).

[19] The Judge went on to say that despite the public aspect of section 40, its subject matter was largely private since it related to private business transactions in that the provision allowed the government to call to account private entities that had breached their commitments. In her view, legislative history reinforced the idea that section 40 was not criminal in nature.

[20] Consequently, on the first *Wigglesworth* category, the Judge concluded that a section 40 proceeding was not a criminal proceeding.

[21] The Judge then turned to the question of whether section 40 could be fitted into the second *Wigglesworth* category, that is, whether it imposed true penal consequences.

[22] In the Judge's view, that enquiry had "…to proceed beyond the magnitude of the fine to determine whether it is being imposed for the purpose of redressing the harm done to society or for a particular private purpose" (Judge's Reasons, para. 54). For this view, the Judge relied on the

Supreme Court's decision in *Martineau v. M.N.R.*, [2004] 3 S.C.R. 737, 192 C.C.C. (3d) 129 [*Martineau*] and that of the Queen's Bench of Alberta in *Lavallee v. Alberta (Securities Commission)*, 2009 ABQB 17, affirmed 2010 ABCA 48 [*Lavallée*].

[23] The Judge found no merit in U.S. Steel's argument that magnitude of the fine alone could indicate true penal consequences. In her view, magnitude of the fine could not be assessed in isolation. At paragraph 58 of her Reasons, she stated that "[w]ithout context, it cannot be said that a dollar value alone, can lead to no other inference but that the penalty is being imposed to punish", adding that it was important to bear in mind that the provision gave the court discretion to determine the magnitude of the penalty (Judge's Reasons, para. 59).

[24] In the Judge's view, it was crucial that a legislated monetary penalty be of sufficient scope and magnitude so as to address the full range of reviewable instruments and to deter non-compliance, adding that the penalty should not simply constitute a cost of doing business (Judge's Reasons, para. 58).

[25] The Judge then indicated that she was satisfied that the purpose of the fine imposed by section 40 was not to redress harm caused to society. The mere fact that the fine was payable to Her Majesty in Right of Canada did not point to a public purpose, nor did the fact that the penalty did not aim to compensate for any particular harm. On the second *Wigglesworth* category, the Judge concluded as follows at paragraph 67:

> [67] In the absence of any of the usual indicia, on what basis can it be determined whether the monetary penalty by its magnitude is being imposed for the purpose of redressing the

> harm done to society. In the context of ICA, the court should have regard to the objectives of the legislation, the legislative scheme including the nature of the monitoring process and the availability of the opportunity to voluntary comply or remedy a default, the critical role the investor's undertakings play in the attainment of the legislative objectives, the nature of the transaction subject to review, the relationship between the investor and the government, the conduct being sanctioned is not morally blameworthy conduct and the structuring of the monetary penalty. Having regard to these factors, I conclude that the monetary penalty is not a true penal consequence. Instead, the purpose of the monetary penalty is to promote and ensure the attainment of the legislative objectives.

[26] The Judge then turned to U.S. Steel's arguments directed at subsection 2*(e)* of the *Bill of Rights*. In her view, the key question was "… whether section 40 violates the right to a fair hearing in accordance with the principles of fundamental justice" (Judge's Reasons, para. 69).

[27] U.S. Steel's argument was that the *Act* improperly allowed for the divesture of property without affording the right to know the case one had to meet and that it did not properly set out either the requested elements of a failure to comply or the available defences. In making this argument, U.S. Steel relied on its submission that the words "principles of fundamental justice" found in subsection 2*(e)* of the *Bill of Rights* covered more than the common law principles of natural justice.

[28] After a careful review of the relevant case law, the Judge rejected U.S. Steel's argument. At paragraph 79, she wrote as follows:

> [79] Accordingly, it can be seen that a fair hearing in accordance with the principles of fundamental justice in the context of subsection 2*(e)* of the Bill of Rights is synonymous with the concept of natural justice and procedural fairness. It remains to be determined what the requirements of natural justice are in these circumstances.

[29] The Judge then turned to the identification of the relevant principles of natural justice. She was of the opinion that U.S. Steel's expansive view of subsection 2*(e)* rights focused unduly on the magnitude of the financial penalty, adding that the requirements of natural justice were not as stringent as argued by U.S. Steel. At paragraph 84 of her Reasons, she wrote as follows:

> [84] There is no doubt that the importance of the decision to the affected party is a significant factor. However, a distinction must be drawn between those decisions that implicate the life, liberty, and security of the person involved and those, as in the present case, having only an economic impact. As well, the magnitude of the penalty and the forced divestiture have to be viewed in the context of the legislative scheme. Although when viewed in isolation the monetary penalty may appear to be very large, as stated earlier, having regard to the financial thresholds that trigger ministerial review and approval, the penalties under the ICA have to be sufficiently significant to be effective given the size of the investments under the Act. Further, although the possibility of forced divestiture appears to be ominous and a serious intrusion on the right to the enjoyment of property, having regard to the objectives of the legislation and the broad discretion a court has in structuring a divestiture, it does not rise to the level of those decisions in which the life, liberty and security of the person are at stake. It is purely an economic outcome. It is also important to note that a section 40 proceeding arises in a regulatory context. As well, the parties seeking ministerial approval are sophisticated, well represented, economic actors who are given an opportunity of voluntary compliance before the application at issue is undertaken.

[30] With regard to U.S. Steel's main argument that it did not and could not adequately determine the case that it had to meet, the Judge was of the view that that concern was not justified in that the *Federal Court Rules*, SOR/98-106, which dealt with the conduct of applications, clearly allowed U.S. Steel to know the case it had to meet. At paragraphs 87 to 90 of her Reasons, she explained in clear terms why she was of that view.

[31] Finally, the Judge declined to deal with U.S. Steel's argument that section 40 was void for vagueness because of her view that that concept did not apply where only procedural rights were at

issue, adding that U.S. Steel had abandoned its argument that subsection 2*(e)* provided protection of substantive rights.

[32] For those reasons, the Judge concluded that section 40 of the *Act* did not infringe subsection 11*(d)* of the *Charter* or subsection 2*(e)* of the *Bill of Rights* and, as a result, she dismissed U.S. Steel's motion.

U.S. Steel's Position

[33] U.S. Steel submits that the Minister has not given it any explanation for the rejection of its May 20, 2009 response in which it sought to justify its failure to fulfill the two undertakings at issue on the grounds of the prevailing severe economic situation. U.S. Steel argues that sections 39 and 40 of the *Act* create a punitive regime to which subsection 11*(d)* of the *Charter* applies because the statutory regime "fails to accord an Investor disclosure of the case to meet, fails to provide fair notice of the prescribed conduct and allows guilt to be found on a mere balance of probability" (U.S. Steel Memorandum of Fact and Law, para. 19).

[34] U.S. Steel further argues that the availability of contempt proceedings to enforce section 40 sanctions demonstrates that those sanctions have a penal character: the monetary penalty is a fine. The fact that a contempt power is rarely included in other administrative regimes indicates that the statutory regime is of a different character. Moreover, the regime is directed to public ends and is enforced in superior courts which can impose retributive penalties, rather than in regulatory tribunals which can only impose penalties aimed at inducing compliance. Furthermore, U.S. Steel

argues that the fines imposed under section 40 do not relate to any loss or extent of the breach involved. Thus, the fines do not aim to promote compliance, but rather to punish. Consequently, in U.S. Steel's submission, subsection 11*(d)* of the *Charter* is engaged.

[35] Moreover, U.S. Steel submits that, in the circumstances of this case, subsection 11*(d)* is infringed. The *Act* imposes no duty on the Minister to disclose relevant information and is also impermissibly vague on what can constitute a "justification" for violations. Furthermore, proceedings that can impose punitive fines of the size provided for in the *Act* should be subject to proof beyond a reasonable doubt, but they are not.

[36] U.S. Steel further argues that these subsection 11*(d)* violations fail the test enunciated by the Supreme Court of Canada in *R. v. Oakes*, [1986] 1 S.C.R. 103, because the removal of procedural rights is not rationally connected to the objectives of the *Act* and does not minimally impair the infringements of the subsection 11*(d)* interests at issue.

[37] U.S. Steel also submits that sections 39 and 40 of the *Act* violate subsection 2*(e)* of the *Bill of Rights*. It argues that the principles of fundamental justice under subsection 2*(e)* are not coterminous with the rules of natural justice and procedural fairness because these rules are not freestanding. Their aim is to reflect legislative intent and they can be circumscribed by statute, whereas the *Bill of Rights* principles of fundamental justice are not subject to Parliamentary will and so they should be interpreted more expansively than the rules of natural justice and procedural fairness. Moreover, they should apply robustly to property rights.

[38] U.S. Steel further argues that in the present matter, the principles of fundamental justice are infringed because section 40 does not adequately afford an investor a right to disclosure. Moreover, "the legislature's failure to clearly delineate the boundaries of the offence, or of any offence that an Investor may have, result in a provision that is so vague as to effectively deprive an Investor of the right to fair notice of the case it has to meet" (U.S. Steel's Memorandum of Fact and Law, para. 97).

Issues

[39] The issues for determination in this appeal are the following:

1. What is the applicable standard of review?

2. Do sections 39 and 40 of the *Act* violate subsection 11*(d)* of the *Charter*?

3. Do sections 39 and 40 of the *Act* violate subsection 2*(e)* of the *Bill of Rights*?

Analysis

1. Standard of review:

[40] In my view, there can be no doubt that the standard of review applicable to the issues raised by the appeal is that of correctness (see: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, para. 8).

2. Are sections 39 and 40 of the Act in violation of subsection 11(d) of the Charter?

[41] Section 11*(d)* of the *Charter* guarantees that an accused natural or legal person will benefit from a panoply of protections. However, for an accused natural or legal person to enjoy these protections, that person must be "charged with an offence". In *Wigglesworth*, Wilson J. explained

the meaning of that expression, stating that a matter might fall within section 11 in two ways. At page 559 of her Reasons, she wrote:

> … a matter could fall within s. 11 either because by its very nature it is a criminal proceeding or because a conviction in respect of the offence may lead to a true penal consequence. I believe that a matter could fall within s. 11 under either branch.

[42] Thus, proceedings that can result in imprisonment can fall within section 11, as can proceedings that lead to lesser penalties such as monetary penalties (*Wigglesworth*, page 559).

[43] As I have already indicated, the Judge found that sections 39 and 40 of the *Act* did not fit within either of the two categories. In my view, the Judge made no error in concluding as she did. My reasons for this view are as follows.

a. Are proceedings under sections 39 and 40 by their very nature criminal?

[44] In *Wigglesworth*, Wilson J. explained at page 560 what she meant by the words "by its very nature a criminal proceeding":

> In my view, if a particular matter is of a public nature, intended to promote public order and welfare within a public sphere of activity, then that matter is the kind of matter which falls within s. 11. It falls within the section because of the kind of matter it is. This is to be distinguished from private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity:…

[45] Pursuing her explanation, Wilson J. added at page 560 that "[p]roceedings of an administrative nature instituted for the protection of the public in accordance with the policy of a

statute are also not the sort of 'offence' proceedings to which s. 11 is applicable" (see also *Lavallée* at para. 21 for a recent expression of the same idea).

[46] In writing for the Supreme Court in *Martineau*, Fish J. enunciated at paragraph 24 of his Reasons three factors which ought to be considered when determining whether a proceeding is criminal by its very nature:

> [24] To determine the nature of the proceeding, the case law must be reviewed in light of the following criteria: (1) the objectives of the [statute and relevant provisions]… thereof; (2) the purpose of the sanction; and (3) the process leading to imposition of the sanction.

[47] With respect to the first *Martineau* factor, U.S. Steel argues that the *Act* "… is manifestly concerned with promoting the public good in the realm of foreign investment and punishing contraventions accordingly" (U.S. Steel Memorandum of Fact and Law, para. 40). While it is true that both Wilson J. in *Wigglesworth* (page 560) and Fish J. in *Martineau* (para. 21) made the point that proceedings which are criminal by their very nature will have public purposes, it cannot be automatically concluded that a public purpose necessarily leads to a criminal proceeding. This is made clear by Fish J., at paragraph 22 of his Reasons in *Martineau*, where he states that administrative proceedings "… instituted for the protection of the public in accordance with the policy of a statute are not penal in nature".

[48] Consequently, proceedings having a public purpose can be penal or not. Hence, certain proceedings with publicly beneficial purposes will automatically fall within section 11, such as proceedings brought under the *Criminal Code* (*Wigglesworth*, page 560) Other proceedings,

however, with publicly beneficial purposes will almost always fall outside the realm of section 11, such as proceedings brought under provincial securities acts (*Lavallée*, para.21).

[49] Thus, it seems clear that the mere existence of a public purpose cannot *per se* be determinant. Courts must go further and ask what sort of public purpose is the legislation addressing? There will not be much doubt that a public purpose pertaining to dishonesty, fraud or immorality will usually lead to a penal characterization by the court. However, a public purpose that pertains to financial regulations will generally fall on the administrative/non-penal side of the spectrum.

[50] The purpose of the *Act* at issue in this appeal is found at section 2 thereof which reads:

> **2.** Recognizing that increased capital and technology benefits Canada, and recognizing the importance of protecting national security, the purposes of this Act are to provide for the review of significant investments in Canada by non-Canadians in a manner that encourages investment, economic growth and employment opportunities in Canada and to provide for the review of investments in Canada by non-Canadians that could be injurious to national security.

> **2.** Étant donné les avantages que retire le Canada d'une augmentation du capital et de l'essor de la technologie et compte tenu de l'importance de préserver la sécurité nationale, la présente loi vise à instituer un mécanisme d'examen des investissements importants effectués au Canada par des non-Canadiens de manière à encourager les investissements au Canada et à contribuer à la croissance de l'économie et à la création d'emplois, de même qu'un mécanisme d'examen des investissements effectués au Canada par des non-Canadiens et susceptibles de porter atteinte à la sécurité nationale.

[51] There is no suggestion that national security is an issue in this case, thus leaving as the relevant purpose that of encouraging economic growth and employment opportunities in Canada.

This purpose drives the *Act*'s application process for foreign investors, and informs the factors which the Minister must consider when approving or rejecting an application (the *Act*, s. 20).

[52] As the Judge correctly points out at paragraph 41 of her Reasons, sections 39 and 40 aim to maintain compliance with the *Act* and with undertakings made under it. It therefore follows that the proceedings by the Minister under the provisions at issue have the ultimate aim of stimulating economic development and employment opportunities, much like the *Act* as a whole. Thus, in my view, the first *Martineau* factor points away from the proceedings being of a penal nature.

[53] Moreover, as the respondent points out, section 40 proceedings are never entirely public in their aim or purpose. When they relate to undertakings that a foreign investor has made to the Minister, they take on, at least in part, the character of enforcement of a private agreement. Of course, the underlying undertakings are themselves related to public economic purposes, but this partially private nature of section 40 proceedings further suggests against section 11 applicability.

[54] The second *Martineau* factor looks at the purpose of the sanction. Subsection 40(2) of the *Act* gives various powers to a court hearing a section 40 application. One of them – the one mostly at issue in this appeal – is found in paragraph 40(2)*(d)* which imposes a penalty not exceeding $10,000 against a non-Canadian for each day that the non-Canadian's actions or omissions contravene the *Act* or any provision thereof. In the Judge's view, the purpose of this sanction was "to encourage and promote timely compliance with any undertakings and provisions of the legislation" (Judge's Reasons, para. 42).

[55] I can find no fault with the Judge's view. The fact that the penalty is imposed for each day of non-compliance suggests that the goal of the penalty is to enforce compliance. A foreign investor knows that it will continue to incur penalties unless it complies with the Minister's demands.

[56] The monetary penalty's context also suggests that it is aimed at a public purpose. It is embedded among other powers that a court has after having heard a section 40 application. These powers include ordering a foreign investor to divest itself of the enterprise (para. 40(2)*(a)* of the *Act*); ordering the compliance with an undertaking "in relation to an investment that the Minister is satisfied or is deemed to be satisfied is likely to be of net benefit to Canada" (para. 40(2)*(c)*); and revoking voting rights in the corporation (para. 40(2)*(f)*. These powers are not directed to retributive aims. Rather, they are directed at preventing harm to Canadian economic interests by forcing compliance or taking away the power of a foreign investor whose actions or omissions jeopardize the goals of the *Act*.

[57] In my view, the determination of the purpose of the paragraph 40(2)*(d)* sanction should be ascertained by situating the sanction in the wider remedial scheme of which it forms a part. The purpose of the sanction is, as the Judge found, "…to encourage and promote timely compliance and to enforce compliance with any undertakings and provisions of the legislation" (Judge's Reasons, para. 42). In *Martineau*, Fish J. dealt with a sanction that did not aim to "redress a wrong done to society", but rather to "produce a deterrent effect" in order to preserve the viability of an administrative scheme (*Martineau*, paras. 33 to 39). In Fish J.'s view, this suggested against section

11 applicability and, in my respectful view, this same view should apply to the sanction at issue in this appeal.

[58] The third *Martineau* factor looks at the "process leading to imposition of the sanction". U.S. Steel argues that the fact that a section 40 application is brought before a court rather than before a tribunal gives the application a penal character. While it is true that courts have the power to impose penal sanctions, I see no basis to conclude that courts cannot impose sanctions of an administrative nature. Consequently, this factor should not weigh much in the balance.

[59] Of greater significance, however, is the fact that section 40 sanctions lack the indicia of penal proceedings. In this, they resemble more the sanction that Fish J. dealt with in *Martineau* and which he described as follows at paragraph 45:

> [45] This process thus has little in common with penal proceedings. No one is charged in the context of an ascertained forfeiture. No information is laid against anyone. No one is arrested. No one is summoned to appear before a court of criminal jurisdiction. No criminal record will result from the proceedings. At worst, once the administrative proceeding is complete and all appeals are exhausted, if the notice of ascertained forfeiture is upheld and the person liable to pay still refuses to do so, he or she risks being forced to pay by way of a civil action.

[60] Like the sanction in *Martineau*, the section 40 sanction herein does not involve the laying of charges, arrest powers, courts of criminal jurisdiction or a criminal record. Consequently, this suggests against the applicability of subsection 11*(d)*.

[61] The principal difference between the sanction in *Martineau* and the sanction herein is the one that goes to the heart of U.S. Steel's submissions, i.e. the availability of contempt proceedings

under subsection 40(4). U.S. Steel points to the general unavailability of contempt orders to enforce civil judgments, which can be enforced only under rule 425 of the *Federal Courts Rules*. In its view, the availability of contempt orders shows that section 40 monetary penalties are penal fines.

[62] U.S. Steel commences its argument by noting that paragraph 40(2)*(d)* of the *Act* allows the court deciding a section 40 proceeding to impose a monetary penalty and that subsection 40(4) allows the court to punish non-compliance of its orders through contempt of court proceedings. Contempt of court proceedings, of course, can result in imprisonment. Together these provisions suggest, in U.S. Steel's view, that the *Act* allows a court to punish non-payment of a fine with imprisonment. Thus, the use of contempt proceedings suggests that the penalties imposed under the *Act* are criminal rather than civil in nature.

[63] I cannot subscribe to this argument. While U.S. Steel is correct to say that a person cannot be imprisoned for a civil debt for, as Justice Binnie held in *R. v. Wu*, [2003] 3 S.C.R. 530 at paragraph 2, "[d]ebtors' prison for impoverished people is a Dickensian concept that in civilized countries has largely been abolished", the *Act* does not provide for the possibility of U.S. Steel or any of its executives being sent to debtors' prison for the failure to pay a penalty imposed upon it. A person who is ordered by a court to pay money to another cannot be imprisoned for contempt if he or she is unable to pay the debt because imprisonment for debt has been abolished: *Vidéotron Ltée v. Industries Microlec Produits Électroniques*, [1992] 2 S.C.R. 1065 at 1078. However, a person who is ordered by a court to pay money can be imprisoned for contempt if he or she shows "a

certain degree of intention to evade his or her obligations": *Ibid*. That is, if he or she is unwilling to pay the debt despite having the ability to pay.

[64] Thus, U.S. Steel would only face the possibility of contempt proceedings if it is able but unwilling to pay the penalty imposed upon it under the *Act*. Such a proceeding does not undermine the abolishment of debtors' prison because in that case, U.S. Steel would not be subject to imprisonment for its debt *per se*, but rather for refusing to pay the debt in spite of its ability to pay it.

[65] Moreover, as the Judge says at paragraph 66 of her Reasons, any contempt proceedings brought against U.S. Steel would be separate proceedings subject to the *Federal Court Rules* and, in those circumstances, U.S. Steel would benefit from full *Charter* protection.

[66] In response to this point of view, U.S. Steel argues that the mere availability of punishment by contempt for an unpaid penalty gives the section 40 proceedings a criminal nature. I cannot agree. As the Judge found at paragraph 66 of her Reasons, contempt proceedings are separate from section 40 proceedings. Thus, while contempt proceedings may have a criminal nature, section 40 proceedings remain civil in nature.

[67] Accepting U.S. Steel's argument would lead to a perverse result. Any civil trial can produce a monetary judgment which may be enforceable by way of court order to pay. Any court order which is not complied with may result in contempt proceedings. Any contempt proceedings can result in imprisonment. Thus, in U.S. Steel's logic, the availability of contempt would make of

every civil trial a proceeding which is criminal in nature *per Wigglesworth* and thus entitle every civil defendant to full *Charter* protection. Such a conclusion is, in my respectful opinion, entirely contrary to the wording of subsection 11*(d)* of the *Charter* which gives its protection only to those "charged with an offence".

[68] Furthermore, all contempt proceedings attract *Charter* protection: *Pro Swing Inc. v. Elta Golf Inc.* [2006] 2 S.C.R. 612 at paragraphs 34 and 35. As a result, there is no possibility of U.S. Steel being cited for contempt without it being afforded *Charter* protection.

[69] U.S. Steel's argument is also inconsistent with the text of the *Act*. Subsection 40(4) reads: "[e]veryone <u>who fails or refuses to comply</u> with an order made by a superior court under subsection (2) or (2.1) that is directed to them may be cited and punished by the court that made the order, <u>as for other contempts of that court</u>" [emphasis added]. Subsection 40(3) reads: "[a] penalty imposed by an order made under paragraph (2)*(d)* or subsection (2.1) <u>is a debt</u> due to Her Majesty in right of Canada and is recoverable as such in a superior court" [emphasis added].

[70] The *Act*'s language is notable for three reasons. First, section 40(4) refers to both subsection 40(2) and subsection 40(2.1), so that it covers a broad variety of orders. Second, as a result of this broadness, the language of the *Act* is more general than it might otherwise be. Subsection 40(4) suggests that a person can breach a court order in two different ways: "failing" and "refusing". The language of "refusing" includes an element of intention, while the language of "failing" does not require proof of intention to disobey, merely the act of disobeying. Third, the language of the *Act*

does not suggest that each and every order listed in subsections 40(2) and 40(2.1) must be punishable both for intentional and unintentional non-compliance. Subsection 40(3) suggests that any money resulting from a penalty imposed under paragraph 40(2)*(d)* or subsection 40(2.1) is a debt recoverable as such in a superior court. The language of "debt" suggests the penalty has a civil as opposed to a criminal nature.

[71] Similarly, subsection 40(4) says a court may punish a person "as for other contempts of that court". I read this phrase to mean that contempts found under subsection 40(4) may be punished in the same way as other contempts are punished in the court hearing the proceedings. What is the way in which a person may be punished for contempt in Federal Court? The aforementioned jurisprudence shows that the non-payment of a civil debt cannot be punished by imprisonment, unless it is shown that the debtor had the means of paying the debt and intentionally refused to do so.

[72] Thus, a monetary penalty imposed under either paragraph 40(2)*(d)* or subsection 40(2.1) may be punished through contempt of court, but only if the penalized person "refuses" to pay the penalty – that is, if the person is able to pay, but intentionally decides not to. A monetary penalty under those sections cannot be punished through contempt if the penalized person "fails" to pay the penalty – that is, the person is simply unable to pay. Thus, the language of the *Act* supports the conclusion that section 40 proceedings are not criminal.

[73] I must therefore conclude that the third *Martineau* factor also points away from section 40 proceedings being penal and away from subsection 11*(d)* applicability. Consequently, section 40 proceedings are not criminal by their very nature and as a result, do not fit within the first *Wigglesworth* category.

b. *Do proceedings brought under section 40 lead to true penal consequences?*

[74] As I have already made clear, even if section 40 proceedings are not criminal by their very nature, section 11 of the *Charter* will still apply to them if they lead to "true penal consequences" (*Wigglesworth* at p. 559). With respect to monetary penalties, sheer magnitude is not determinative. The case law has consistently drawn a distinction between penalties that aim to punish or denounce (penal) and penalties that aim to deter (non-penal). *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132 [*Asbestos Minority Shareholders*] and *Cartaway Resources Corp. (Re)*, [2004] 1 S.C.R. 672 [*Cartaway*], establish that, in general, administrative penalties do not aim to punish. Rather, they aim to deter. Summarizing these authorities, Groberman J.A. of the British Columbia Court of Appeal wrote in *Thow v. B.C. (Securities Commission)*, [2009] B.C.J. No. 211 (Q.L.) at paragraph 30, that these cases establish that "[a]dministrative sanctions and penalties, in contradiction to criminal ones, are, as Iacobucci J. went on to observe at paragraph 45 of [*Asbestos Minority Shareholders*], 'preventive in nature and prospective in orientation'".

[75] On the relationship between magnitude and purpose, Fish J. wrote in *Martineau* at paragraph 60:

> 60. It remains to be determined whether the payment of $315,458 demanded pursuant to s. 124 of the *CA* [*Customs Act*] constitutes a fine that, by its magnitude, is imposed for the purpose of redressing a wrong done to society at large, as opposed to the purpose of maintaining the effectiveness of customs requirements.
>
> [Emphasis in original]

[76] The important thing is purpose. Magnitude might be an indicator of purpose, but there are other indicators as well. One of these is the final destination of the fine. The fact that a fine is being paid into the Consolidated Revenue Fund points towards a penal sanction (*Wigglesworth*, p. 561). This is the case with a paragraph 42(2)*(d)* fine.

[77] However, other indicators point in the opposite direction. First, no stigma attaches to a regulatory penalty such as is provided for in the *Act* (*Martineau*, para. 64). Second, the large potential size of the fine does not necessarily point to a punitive character. As the Judge pointed out in her Reasons at paragraph 58, large penalties are required to deter major corporations. Recently, in *Lavallée*, the Alberta Court of Appeal remarked at paragraph 23 that a large pecuniary penalty "reflects a legislative intent to ensure that the penalties are not simply considered another cost of doing business". That the financial penalty is intended to deter is demonstrated by the fact that it rises with each passing day of non-compliance. When the contravention stops, the fine stops accumulating, so foreign investors have every incentive to comply with the Act and their undertakings.

[78] Moreover, that the fine can be imposed retrospectively to account for past contraventions is not necessarily an indicator of penal purpose (*Lavallée*, para. 25). *Cartaway* was not a case about section 11, but it did clarify that "it is reasonable to view general deterrence as an appropriate, and perhaps necessary, consideration in making orders on a both protective and preventative basis (para. 61). Imposing fines retrospectively is an attempt to meet the goal of general deterrence. If foreign investors know that they will face penalties for contraventions after those contraventions have taken place, they will think twice about not complying. If retrospective fines were not available, investors could act however they pleased until faced with a court-ordered prospective penalty. The *Act* would have no "teeth" and the administrative scheme would be weak. The penalty's potential size is therefore not indicative of penal purpose.

[79] U.S. Steel's principal submission with regard to the second *Wigglesworth* category is that the *Act* provides no criteria by which to assess monetary penalties. These penalties will not be directly related to the consequences of breach, unlike the penalties discussed for example in *Martineau*. Essentially, U.S. Steel assumes that the lack of criteria for setting fines means that "a monetary penalty assessed under the *Act* will <u>inevitably</u> be punitive" (U.S. Steel Memorandum of Fact and Law, paras. 55-60 / Emphasis added). With respect, I fail to see why this should be the case. Indeed, *Wigglesworth* implies that it should be the opposite. At page 561 of her Reasons in *Wigglesworth*, Wilson wrote as follows:

> It is my view that if a body or an official has an unlimited power to fine, and if it does not afford the rights enumerated under s. 11, it cannot impose fines designed to redress the harm done to society at large. Instead, it is restricted to the power to impose fines in order to achieve the particular private purpose…

[80] A statutory power to impose fines that comes along with little statutory guidance will not be subject to section 11 as long as it is exercised in a way so as to achieve proper administrative aims. If, as U.S. Steel contends, the procedure provided for in section 40 does not meet the standard of subsection 11*(d)* of the *Charter*, this simply means that the Court is limited in the goals it can consider in imposing monetary fines. It can only consider goals that are constitutionally appropriate for the sanctioning regime. This, in my view, accords with the principle that we should not assume before the fact that judges will exercise their discretion in an unconstitutional way (see: *R. v. Shoker*, [2006] 3 S.C.R. 399, para. 39). The deterrence goals of the *Act* will necessarily be front and centre. The fact that such an approach to setting penalties accords well with the goals of the *Act* and of the sanction further suggests that an approach to setting penalties that is focused on deterrence is appropriate.

[81] I therefore conclude that the penalties provided for under paragraph 20(2)*(d)* of the *Act* are best understood, and will necessarily be exercised, as being part of "… proceedings of an administrative – private, internal or disciplinary – nature instituted for the protection of the public in accordance with the policy of a statute…" (*Martineau*, para. 22). These penalties do not lead to true penal consequences and, thus, subsection 11*(d)* of the *Charter* is not engaged.

3. Do sections 39 and 40 violate subsection 2(e) of the Bill of Rights?

[82] The subject of the subsection 2*(e)* analysis is the hearing under section 40 and not the Minister's actions under section 39. The latter do not constitute a hearing under subsection 2*(e)* and

they do not make any determination of rights or obligations as that section requires. The parties are agreed on that, but there the agreement ends.

[83] U.S. Steel submits that the principles of fundamental justice differ from the rules of natural justice or procedural fairness, pointing out that unlike the rules of natural justice, subsection 2*(e)* works *ex ante* to determine whether federal laws set out adequate procedures. Moreover, subsection 2*(e)* allows a court to override or not apply such laws. This assertion is, of course, correct, but the argument says nothing about content. U.S. Steel is vague about what subsection 2*(e)* adds to the general common law principle that a party should know the case he or she has to meet. I have considered *R. v. Duke*, [1972] S.C.R. 917 [*Duke*], and *Bell Canada v. Canadian Telephone Employees Association*, [2003] 1 S.C.R. 884, and agree entirely with the Judge's view that these cases suggest "or at least assume without deciding" that subsection 2*(e)*'s principles of fundamental justice do not go any further than demanding that "the tribunal which adjudicates upon a party's rights just act fairly, in good faith, without bias and in a judicial temper, and must give to him the opportunity adequately to state his case" (*Duke*, p. 923).

[84] Nor does U.S. Steel present any argument that would suggest that the *Federal Court Rules*, which deal with the conduct of applications, would be inadequate to satisfy the requirements of subsection 2*(e)*. In its arguments on right to disclosure, U.S. Steel focuses on the fact that section 40 does not provide for any – or for any procedural protections for that matter. But this ignores the fact that providing procedural protections is not the purpose of the *Act*. It is, instead, the purpose of the *Federal Courts Rules* which the Judge correctly points out provide for a notice of application, list of

documentary evidence to be used at a hearing, the filing of affidavits and documentary exhibits, pre-hearing cross-examinations and the disclosure of evidence (Judge's Reasons, paras. 87 to 89).

[85] With respect for the contrary view, I cannot see how these *Rules* can be found to be inadequate to satisfy an investor's right to understand the Minister's case. I would add that, in any event, the record provides little assistance to U.S. Steel's argument that it will be unable to understand the Minister's case.

[86] U.S. Steel also asserts that sections 39 and 40 are so vague that they do not allow an investor to know what constitutes complying with any demands or justifying non-compliance. The Judge dismissed this "void for vagueness" argument as going not to procedural due process, but to substantive due process. The argument, therefore, fell outside the ambit of subsection 2*(e)*.

[87] It seems to me that the notion of vagueness cannot be totally dissociated from procedural rights, since knowing the case one has to meet must entail understanding what one has to prove to win. However, the Judge was correct to cite in support of her view *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, as considering vagueness to be a substantive doctrine. In that case, Gonthier J. called the right to know the scope of the law "a substantive aspect to fair notice" (para. 46). In my view, this is sufficient to dispose of this aspect of U.S. Steel's subsection 2*(e)* arguments.

Disposition

[88] I therefore conclude that the Judge made no reviewable error which would allow us to intervene. For these reasons, I would dismiss the appeal with costs.

"M. Nadon"
J.A.

"I agree.
Eleanor R. Dawson J.A."

"I agree.
Johanne Trudel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CONCURRED IN BY:	DAWSON J.A. TRUDEL J.A.
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