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Motions Judge quashing CHRC's decision to appoint Tribunal to inquire into pay equity complaints against respondent — Commission not required to give reasons for decision — Acting as administrative, screening body, not deciding complaint on merits — Act granting Commission latitude when performing screening function on receipt of investigation report — Commission's finding complaints not out of time unassailable — Systemic discrimination extending over time — Commission considering Revised Report, respondent's submission on it, further submissions by respondent before reaching decision — Procedural fairness complied with.

BELL CANADA V. COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA, [1999] 1 F.C. 113 (C.A.)

T.C.C. reversing M.N.R.'s determination worker's employment not insurable under Unemployment Insurance Act, s. 3(1)(*a*) — Minister said to have improperly relied upon T.C.C.'s previous decision between same parties — Whether T.C.J. erred in interfering with discretionary determination by Minister under Act, s. 3(2)(*c*)(ii) — Minister granted discretionary power to determine whether employer, worker deemed to deal at arm's length — Tax Court's intervention justified only if Minister exercised discretion in manner contrary to law — Judicial deference not extending to Minister's findings of fact — T.C.J. failing to consider whole evidence — Judicial deference not accorded.

CANADA (ATTORNEY GENERAL) V. JENCAN LTD., [1998] 1 F.C. 187 (C.A.)

Standard of review — Appeal from Motions Judge's dismissal of application for judicial review of adjudicator's decision respondent employee, within adjudicator's jurisdiction to hear grievance — Motions Judge erred in using test of patent unreasonableness — Appropriate standard of review correctness — Determination of whether respondent "employee" within PSSRA, s. 92 (only employee having right to grieve), requiring examination of par. (*g*) exclusion of persons employed "on a casual basis" from s. 2(1) definition of "employee" — Question concerned legislative provision limiting tribunal's powers — In such case mere error causing tribunal to lose jurisdiction, subjecting tribunal to judicial review — PSSRA, s. 2(1)(*g*) making it clear

ADMINISTRATIVE LAW—Continued

Judicial Review—Continued

Certiorari—Continued

"on a casual basis" connoting application of legal standards impacting on adjudicator's jurisdiction — Adjudicator must refer to PSEA, governing employment contracts herein — Not having expertise in interpretation of PSEA, PSSRA, since PSSRA not giving adjudicator exclusive jurisdiction to determine who is employed "on a casual basis".

CANADA (ATTORNEY GENERAL) v. MARINOS, [2000] 4 F.C. 98 (C.A.)

Applications to set aside CHRT order requiring preparation of inventory of legislation etc. containing definition of common law spouse discriminating against same-sex couples, further order Treasury Board failed to comply with first order in granting employment benefits to employees with same-sex partners — Tribunal directing employer to grant benefits at issue by changing definition of "spouse" in relevant employment documents — TB creating separate class of persons, "same-sex partners" entitled to employment benefits — Order to prepare inventory not contrary to requirements of natural justice, procedural fairness — Tribunal not pre-judging discriminatory impact of material to be included in inventory, including provisions of Income Tax Act — Broad, liberal interpretation of Tribunal's remedial powers under CHRA allowing it to retain jurisdiction — Applicant given fair notice of case to be met.

CANADA (ATTORNEY GENERAL) v. MOORE, [1998] 4 F.C. 585 (T.D.)

Review Committee under Old Age Security Regulations defining words "subject to Canada Pension Plan" in Agreement between Canada and Germany, Art. 11(*a*) as extending to both contributors and those receiving benefits thereunder when unable to contribute — In view of full privative clause, applicable standard of review patent unreasonableness — Impugned decision not patently unreasonable — Whether Review Committee improperly rejected evidence of subsequent practice and of supplementary means of interpretation under Vienna Convention, Arts. 31(3)(*b*), 32 — Committee correctly rejecting evidence but for wrong reasons — Evidence not helping to establish agreement between parties as to interpretation of Art. 11(*a*) — Absence of complaint by Germany inconclusive — Evidence of Canada's unilateral intention not assisting Court in determining what interpretation parties agreed to — Internal memorandum not helpful in interpretation of Agreement, Art. 11(*a*).

CANADA (ATTORNEY GENERAL) v. SIMON, [1998] 4 F.C. 3 (T.D.)

Applicants challenging CITT's decisions on complaints made by unsuccessful bidder for government procurement contract — Tribunal deciding: (1) mandatory qualification requirements of request for proposals improperly applied, (2) "extended" procurement process not conducted in accordance with NAFTA as consultant not given entire text of Tribunal's findings with respect to original complaint — CITT having wide latitude when deciding on legal, factual matters within jurisdiction — Standard of review one of correctness — Tribunal not *functus officio* regarding second complaint — Decisions

ADMINISTRATIVE LAW—Continued

Judicial Review—Continued

Certiorari—Continued

made by CITT different determinations based on different legal considerations — Second decision not patently unreasonable on merits.

CANADA (ATTORNEY GENERAL) V. SYMTRON SYSTEMS INC., [1999] 2 F.C. 514 (C.A.)

Minister seeking to set aside decision by Pension Appeals Board allowing surviving spouse's benefit under Canada Pension Plan — Standard of review of Board decision correctness — Curial deference not appropriate for several reasons: no privative clause; Board having adjudicative function, no broad regulatory responsibilities; Board composed of judges; legal issues having application beyond facts of instant case; legal rights at issue — Only factor favouring curial deference that Parliament entrusted Board with appellate functions for benefits of economical, expeditious decision-making.

CANADA (MINISTER OF HUMAN RESOURCES DEVELOPMENT) V. SKORIC, [2000] 3 F.C. 265 (C.A.)

Judicial review of RCMP adjudication board's decision quashing summons to prosecuting officer to appear as witness — Board investigating allegations of breach of RCMP Code of Conduct — Application premature — Court will not intervene to set aside interlocutory decisions unless exceptional circumstances i.e. attack on very existence of tribunal — Decision not disposing of substantive question — Merely interlocutory decision, dealing with preliminary evidentiary issue — Error in procedural decision may be subject to appeal.

CANNON V. CANADA (ASSISTANT COMMISSIONER, RCMP), [1998] 2 F.C. 104 (T.D.)

Visa officer denying applicant, Hong Kong film, T.V. actor permanent resident status on ground inadmissible under Immigration Act, s. 19(1)(*c*.2) (reasonable grounds to believe member of organization reasonably believed to have engaged in criminal activity) — Prior to interview, visa officer informing applicant reasons to believe may be person described in s. 19(1)(*c*.2), explaining aim of interview to ascertain whether maintained links with triads or other organized criminal elements — Visa officer receiving confidential information from foreign governmental sources applicant closely linked to most powerful Chinese triad — Later subject of s. 82.1(10) order prohibiting disclosure to applicant — Requirements of procedural fairness met — Information provided before interview sufficient to enable applicant to know case to be met — Given full opportunity to respond to visa officer's concerns — Own triad membership, triad control over entertainment industry discussed — Visa officer entitled to assess credibility of applicant's answers, explanations — Not obliged to provide summary of confidential information relied upon — Procedural fairness viewed in context of immigration law principles, practices — Fundamental principle: aliens having no right to admission to Canada — During in camera examination of confidential information,

ADMINISTRATIVE LAW—Continued

Judicial Review—Continued

Certiorari—Continued

Court finding it persuasive, worthy of consideration, disclosure of source would cause it to disappear — National security superseding alien's right to become resident — Questions certified as to entitlement as matter of procedural fairness to summary of information protected under s. 82.1(10).

CHIAU V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1998] 2 F.C. 642 (T.D.)

Judicial review of denial of applications for rehabilitation, landing — Applicant, Convention refugee, applied for landing in 1995 — In 1998 Minister requesting evidence of rehabilitation — Refusing to provide copy of affidavit from Philippines giving details of charges laid there against applicant, particulars of allegations — Court ordering Minister to decide landing application — Applicant informed by letter dated February 23, 1999 landing refused — Actual written decision dated February 24, 1999 — Rehabilitation decision set aside — Denial of natural justice, procedural fairness — Applicant denied opportunity to review, rebut allegations against him — Minister not having complete record before her as information referred to in Philippines affidavit not part of record — Manner of communicating decision raising question of whether made at all — Landing decision set aside as rehabilitation decision on which based erroneous, and as unexplained discrepancy between date of letter informing applicant of decision, actual decision raising serious question of fairness, whether decision properly made, communicated.

DEE V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 3 F.C. 345 (T.D.)

Application to set aside decision of Director, Bureau of Drug Surveillance to issue notices to Ontario College of Pharmacists, members prohibiting their dispensing narcotic drugs upon applicant's order — Serious shortages in employer's narcotic inventory for period when applicant pharmacist responsible — No reasonable apprehension of bias — Finding of breach of Narcotic Control Regulations, ss. 50(*d*), (*e*) necessary to determine whether Minister should exercise discretion to issue notice, not pre-judgment — Merely decision to proceed made within administrative framework — Director's decision relied upon documents not previously disclosed — Breach of procedural fairness — Matter should be returned to Director unless outcome inevitable — Question whether applicant could have made meaningful submissions had documents been disclosed — Given unaccountable losses for which applicant responsible, outcome inevitable, Director's decision justified.

ELGUINDI V. CANADA (MINISTER OF HEALTH), [1997] 2 F.C. 247 (T.D.)

Presumption against sub-delegation of exercise of statutory powers affecting rights of individuals — Application to reopen refugee hearing heard by one member only — Presumption excluded where nature of statutory scheme so indicating — Statutory

ADMINISTRATIVE LAW—Continued

Judicial Review—Continued

Certiorari—Continued

scheme revealing Parliament's intention to avoid protraction of refugee determination process — Refugee Division's discretion over own process not displaced by presumption — To require motions be heard by two members unjustifiably diverting resources from CRDD's job: determining refugee claims.

FAGHIHI V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 1 F.C. 249 (T.D.)

Decision to remove applicant, refugee in respect of whom danger opinion issued, to Iran where torture feared — Filing affidavit evidence, not before original decision makers, regarding torture risk — Risk assessed at neither danger opinion nor removal decision stages of process — Question certified as to whether, in such circumstances, Court, on judicial review, may have regard to evidence not before decision makers.

FARHADI V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1998] 3 F.C. 315 (T.D.)

Screening Environmental Assessment Reports, addenda, approvals issued under Navigable Waters Protection Act, s. 5(1) — Reports, addenda concluding two proposed bridges not likely to cause significant adverse environmental effects — Not separate reviewable decisions — Bridges designed to be integral elements of single roadway — Resulting in virtually identical recommendations — Judicial review process not impeded by seeking review of more than one decision — In interests of justice to treat matter as single application notwithstanding comprised multiple decisions integrally interrelated — Court ordering production of substantially more material than filed in tribunal record — All material provided pursuant to Court order relevant, properly before Court — Unlike human rights scenario where document relied upon by investigator, but not called for by Commission, not subject to production — No distinct investigation, decision-making stage herein because Canadian Environmental Assessment Act, s. 17(2) mandating Minister, other responsible authority to take supervisory role over investigation, not merely be passive recipient.

FRIENDS OF THE WEST COUNTRY ASSN. V. CANADA (MINISTER OF FISHERIES AND OCEANS), [1998] 4 F.C. 340 (T.D.)

Judicial review of Assistant Deputy Minister's (ADM) decision reversing Supervising Mining Recorder's decision upholding notice of protest against recording of mineral claims in name of Boyd Warner — Prior to rendering decision, letter from ADM stating documents enclosed comprised all of information "relied on" to make determination — Subsequent letter concluding, "I expect to be making a final decision in matter soon afterwards" — ADM refusing applicants' request to cross-examine Warner on statutory declaration recorded claims on behalf of Golden Rule, denying told SMR acted on behalf of Tyler — (1) ADM not disqualified by virtue of reasonable apprehension of bias — Whether reasonable apprehension of bias deter-

ADMINISTRATIVE LAW—Continued

Judicial Review—Continued

Certiorari—Continued

mined from perspective of reasonable observer reasonably informed about relevant facts who has thought them through — Question herein whether reasonable observer to be attributed with knowledge of events occurring after event giving rise to reasonable apprehension of bias, but before decision rendered — Wrong to exclude events occurring before decision maker made impugned decision since question whether decision maker satisfied legal standard of impartiality at time decision made — When ADM's letter read with subsequent letter, no disqualifying bias — Reference in s. 84 to "his final decision" suggesting decision maker may make non-final decision in course of reviewing matter — (2) Refusal to allow cross-examination breach of duty of fairness — Cross-examination within discretion of decision maker — Possibly anomalous to import even limited right of cross-examination into decision-making process entrusted by statute to minister — Should be exception in ministerial reviews — ADM indicating could never accede to request for cross-examination — Suggesting unlawful failure to consider exercise of discretion — Denied applicants fair opportunity to participate effectively in decision-making process, particularly given importance ADM attached to statutory declaration in reaching decision — (3) ADM erred in law by failing to give adequate reasons for decision — Statutory duty to give reasons including duty to make findings of fact on which decision based, to indicate why decision maker rejected most important items of evidence, including findings of credibility — Citizens not required to take on trust general statements ADM considered all submissions, documentary materials received, as substitute for demonstration decision maker considered principal items of evidence tendered — Quantity, cogency of applicants' evidence sufficiently compelling as to require more analysis than provided in ADM's reasons.

GERLE GOLD LTD. V. GOLDEN RULE RESOURCES LTD., [1999] 2 F.C. 630 (T.D.)

Content of duty of procedural fairness in disposition of applications to remain in Canada on humanitarian and compassionate grounds pursuant to Immigration Act, s. 114(2) no longer minimal in view of S.C.C. decision in *Baker*.

HAGHIGHI V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 4 F.C. 407 (C.A.)

Denial of applicant's grievances by Chief of Defence Staff (CDS) — Application not premature — Applicant using internal grievance procedure under National Defence Act, s. 29 — Queen's Regulations and Orders for the Canadian Forces (QR&O), art. 19.26 permitting complaint to Minister if not satisfied with redress — Although normally recourse to Minister adequate alternative remedy, applicant also filing complaint with Canadian Human Rights Commission — QR&O, art. 19.26(16), (17) providing as long as complaint under Canadian Human Rights Act outstanding Minister precluded from acting on complaint — Recourse to Minister not adequate alternative remedy since precluded from acting — Respondent's decision invalid — Explicitly

ADMINISTRATIVE LAW—Continued

Judicial Review—Continued

Certiorari—Continued

referring to second career medical review board (CRB(M)) decision — CRB(M) breaching natural justice principles as applicant given neither notice of hearing, nor opportunity to make submissions — Not rendering independent recommendation but device of officers opposed to applicant's retention to force CDS to conclude must be released — Respondent stating no impropriety — Clearly mistaken — Court unable to say respondent not relying on CRB(M) decision in making decision to release applicant — Decision to release, not promote applicant related.

HUTTON V. CANADA (CHIEF OF DEFENCE STAFF), [1998] 1 F.C. 219 (T.D.)

Judicial review of Commissioner's dismissal of appeal from Adjudication Board's finding applicant should resign or be dismissed for disgraceful conduct bringing discredit to RCMP — Witness identifying applicant as man seen climbing backyard fence, masturbating in street, but not absolutely certain — No criminal charges laid, but internal investigation conducted — At applicant's request, Adjudication Board taking view of area in presence of applicant, counsel — Applicant given opportunity to add to record with respect to view — Board noting discrepancies between description of offender, applicant; frailty of identification evidence; other circumstantial evidence; applicant's demeanour at hearing — Concluding identification sufficiently clear, convincing to satisfy it on balance of probabilities applicant responsible for committing acts proven — External Review Committee (ERC) finding Board failed to adequately consider problems with identification evidence — Commissioner confirming Board's decision — Application dismissed — Board neither ignoring nor misunderstanding evidence, rule of law — Required to weigh evidence, make determination based on balance of probabilities, on basis of clear, cogent evidence — Final determination depending on subjective reaction of Board, ERC, Commissioner — Commissioner not erring in subjective appreciation of evidence — Board disbelieved applicant, causing it to put aside applicant's evidence — Board applying appropriate framework, analysis in arriving at conclusion witness's evidence sufficiently clear, convincing to prove identification — Procedural fairness not requiring tribunal to disclose ongoing observations with respect to evidence as tendered.

JAWORSKI V. CANADA (ATTORNEY GENERAL), [1998] 4 F.C. 154 (T.D.)

Application for federal export permits denied as applicant not having obtained approval of provincial export advisory committee — Discretionary powers — Adoption of general policies — Policy of using provincial committee's expertise — Neither Minister nor delegates making independent decision — Treating provincial committee's decision as determinative — Fettering discretion — Abdicating decision-making responsibility — Principles of fairness breached in reliance upon evidence prejudicial to applicant without notice given of existence.

K.F. EVANS LTD. V. CANADA (MINISTER OF FOREIGN AFFAIRS), [1997] 1 F.C. 405 (T.D.)

ADMINISTRATIVE LAW—Continued

Judicial Review—Continued

Certiorari—Continued

Appeal from dismissal of application for judicial review of denial of Convention refugee claims — Motions Judge certifying question of general importance as to whether opinion in context political — In view of importance of certified question, precedential value of Court's decision, standard of review correctness.

KLINKO V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 3 F.C. 327 (C.A.)

Standard of review — Judicial review of Veterans Review and Appeal Board's decision applicant not entitled to disability pension under Pension Act, s. 21(2)(*a*) — S. 21(2)(*a*) permitting award of pension where member suffering disability resulting from injury "arising out of or directly connected with" military service — Applicant injured by motor vehicle when crossing road to return to base where on duty after dining in restaurant as no mess at base — Pragmatic, functional analysis applied to determine appropriate standard of judicial review of specialist tribunal's interpretation, application of constitutive statute — (i) "Arose out of" or "directly connected with" not legal terms of art — Meaning must be determined in light of purposes of statutory scheme to enable claims to be decided with minimum of formality, costs, delay — Absence of right of appeal from Board, creation of series of administrative appeals, that appeal panels expressly empowered to reconsider own decisions, indicating Parliament not intending close judicial scrutiny of Board's decisions — (ii) Adjudicative nature of Board's responsibilities, composition of Board (including part-time members, neither qualifications nor representation of different interests prescribed) indicative of intent standard of review should be towards correctness — Nature of rights at stake (important to individuals, but not akin to rights protected by Charter), reasons for creation of Board (to ensure fair, accessible, inexpensive, expeditious determination of claims) consistent with deferential standard — (iii) Nature of issue (application of s. 21(2)(*a*) to facts) indicating judicial deference appropriate — Weight of factors indicating Parliament intended deferential standard of review, but not most deferential standard.

MCTAGUE V. CANADA (ATTORNEY GENERAL), [2000] 1 F.C. 647 (T.D.)

Applicant challenging Minister's decision to appoint adjudicator under Canada Labour Code — Whether Minister deprived of jurisdiction due to release signed by employee as part of termination agreement — Privative clauses not excluding judicial review of decision on jurisdictional issue where tribunal exceeded jurisdiction — Appropriate standard of review correctness — Power of Minister to appoint adjudicator discretionary — Minister bound by requirements of natural justice — Applicant given fair opportunity for commenting on, contradicting statements prejudicial to it — Requirements of natural justice met.

NATIONAL BANK OF CANADA V. CANADA (MINISTER OF LABOUR), [1997] 3 F.C. 727 (T.D.)

ADMINISTRATIVE LAW—Continued

Judicial Review—Continued

Certiorari—Continued

Duty of fairness — Convention refugee convicted, sentenced for criminal offences — Minister's delegate denying request for reconsideration of danger opinion — Three documents not in existence at time of initial opinion before Minister's delegate on reconsideration application indicating little or no risk of re-offending — Documents of extreme importance to applicant — Minister's delegate having duty to give them most careful attention, give reasons why not constituting sufficient grounds to justify re-opening decision.

NEMOUCHI V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 2 F.C. 529 (T.D.)

Decision of RCMP Commissioner denying admission to Witness Protection Program — Allegation of bias and that Commissioner more concerned with impact of decision on Ontario Court of Justice (General Division) action than on merits — Lawyer defending Ontario action also acting as counsel to Commissioner in making impugned decision — Allegation counsel wrote Commissioner's decision — Legal opinions provided to adjudicative tribunal not always privileged — Whether applicants thwarted by solicitor-client privilege rule from ascertaining counsel's role in Commissioner's decision — No longer unacceptable that reasons of quasi-judicial or administrative tribunal be written by other than decision maker — Commissioner's workload such that assistance required in writing reasons — Commissioner must retain control of decision-making process, avoid appearance of bias, lack of independence — Commissioner relying on case law working papers, staff opinions not relevant to impugned decision — Reliance of administrative tribunals on deliberative secrecy — Extent of counsel's involvement in writing of reasons, making recommendations, relevant to apprehension of bias allegation — Staff papers producible if relating to ground of claim — Applicants entitled to know extent of counsel's involvement — Applicants could have asked filing of documents "for Court's eyes only" — Commissioner ordered to review documents to ensure indeed privileged, produce any dealing with merits rather than being legal opinion.

PERSONS SEEKING TO USE THE PSEUDONYMS OF JOHN WITNESS AND JANE DEPENDANT V. CANADA (COMMISSIONER OF THE ROYAL CANADIAN MOUNTED POLICE), [1998] 2 F.C. 252 (T.D.)

Declarations — Applicants seeking *certiorari*, *mandamus* to obtain permanent resident status, immigrant visas, return of identification documents — MCI's course of conduct demonstrating cavalier attitude toward applicants — Court having jurisdiction to entertain application — Minister's official failing to give reason why identity documents considered inadequate — MCI erred in law in rejecting passport submitted by principal applicant — Immigration Act, s. 46.04(8) speaking only of "valid and subsisting" passport — No explanation, reasons given for rejection of other identity

ADMINISTRATIVE LAW—Continued

Judicial Review—Continued

Certiorari—Continued

documents — Court granting *certiorari*, declaratory relief, but *mandamus* found inappropriate — Question certified in respect of "course of conduct".

POPAL V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 3 F.C. 532 (T.D.)

Commissioner of Patents denying patent with respect to claims 1 to 12 in patent application covering forms of transgenic non-human mammals — Refusal upheld by F.C.T.D. — F.C.A. holding decisions of Patent Commissioner warranting more deferential approach by reviewing courts when made within area of expertise — Even when reviewed on more deferential reasonableness *simpliciter* standard, Commissioner's decision could not stand — Patent Commissioner, F.C.T.D. Judge committed numerous errors in reasoning, conclusions — Commissioner applied overly broad control test, not implied by usefulness requirement — Erred in splitting invention into phases, relying upon F.C.A. decision in *Pioneer Hi-Bred Ltd.* which was distinguishable.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE V. CANADA (COMMISSIONER OF PATENTS), [2000] 4 F.C. 528 (C.A.)

Judicial review of PSSRB Chairperson's refusal to refer certain proposals to arbitration board — Standard of review that of reasonableness — In determining what matters properly included in arbitral award, Chairperson acting within confines of jurisdiction conferred by Parliament — While no privative clause, also no statutory right of appeal — Chairperson specialized decision maker with considerable expertise — Standard of correctness applied to ruling Public Sector Compensation Act freezing terms, conditions of employment of NCC employees — Not established Chairperson frequently encountering that Act.

PUBLIC SERVICE ALLIANCE OF CANADA V. NATIONAL CAPITAL COMMISSION, [1998] 2 F.C. 128 (T.D.)

Appeal from dismissal of application for judicial review of visa officer's second refusal of application for permanent residence — Subsequent to refusal of application on ground insufficient units of assessment, visa officer acknowledging error and that appellant having more points than normally required — Exercising discretion under Immigration Regulations, 1978, s. 11(3)(*b*) to refuse application — In so doing when appellant satisfying selection criteria, visa officer depriving appellant of legitimate expectation would be issued visa — Decisions removing legitimate expectation of receiving benefit typically attracting greater procedural protection than those where discretion is at large — Visa officer breaching duty of fairness.

SADEGHI V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 4 F.C. 337 (C.A.)

ADMINISTRATIVE LAW—Continued

Judicial Review—Continued

Certiorari—Continued

Reasonable apprehension of bias — Standard of review — Procedural fairness — Judicial review of P.S.S.R.B. Adjudicator's denial of applicant's grievance of termination — After Minister's arguments, applicant presenting 349-page submission including amendments claiming additional relief — Adjudicator accepting all exhibits adduced by Minister, including letter written by applicant, CHRC complaint form — Attempting to continue hearings after noon until advised hearings scheduled to last only mornings because of applicant's disability (chronic fatigue syndrome) — Reasons addressing some, but not all of issues raised by applicant during hearing — Describing $10 million damages claim as "contradiction", "ridiculous abuse of grievance process" — Rejected applicant's proposed amendments — (1) Viewed realistically, practically, informed person would not conclude reasonable apprehension Adjudicator biased based on deference to Minister's counsel, comments concerning applicant's efforts to increase relief sought — As master of own procedure, within Adjudicator's discretion to admit CHRC form, weigh relevancy — Admission *per se* not establishing bias — No additional cogent evidence inferring bias — (2)(a) Balancing factors set out in *Baker v. Canada (Minister of Citizenship and Immigration)* for determining appropriate standard of review, duty of fairness not requiring every argument, issue raised during PSSRA hearing be acknowledged in written reasons — (i) Rights-oriented nature of adjudicator's decision, powers granted by PSSRA favouring greater procedural safeguards — (ii) Adjudicator's decision final under statutory scheme — (iii) That importance of decision for applicant primarily financial militating only moderately in favour of strong procedural safeguards — (iv) P.S.S.R.B. Rules of procedure requiring decision to contain "summary" of evidence, suggesting fewer procedural safeguards called for — (b) PSSRA, s. 25 giving Board power to accept evidence as in its discretion sees fit, whether or not admissible in Court — Suggesting minimum of procedural safeguards vis-à-vis admission of evidence — Balanced with other Baker factors, Adjudicator not required by rules of procedural fairness to refuse to admit document given to applicant just prior to hearing — (c) Absence of record of proceedings breaching rules of natural justice only if frustrating Court's hearing of appeal or review — As Court able to decide all matters on material before it, lack of transcripts not resulting in breach of natural justice.

SCHEUNEMAN V. CANADA (ATTORNEY GENERAL), [2000] 2 F.C. 365 (T.D.)

Calculation, pursuant to Indian Oil and Gas Act, of royalty on production of natural gas under leases located on reserve land — Minister's decision set aside as applicant not given opportunity to respond and as decision given retroactive or retrospective operation.

SHELL CANADA LTD. V. CANADA (ATTORNEY GENERAL), [1998] 3 F.C. 223 (T.D.)

Judicial review of 1998 CITT decision rescinding 1993 decision dumping in Canada of steel plates from eight named countries causing, likely to cause material injury to production of like goods in Canada — Where federal administrative tribunal's decision

ADMINISTRATIVE LAW—Continued

Judicial Review—Continued

Certiorari—Continued

impugned on ground findings of fact not supported by evidence, question whether finding made in perverse, capricious manner or without regard for material before it under Federal Court Act, s. 18.1(4)(*d*) — Unimportant whether "patently unreasonable" or "unreasonable *simpliciter*" — To establish reviewable error, must be shown, on balance of probabilities, CITT's decision not supported by any material before it.

STELCO INC. V. BRITISH STEEL CANADA INC., [2000] 3 F.C. 282 (C.A.)

Appellant seeking to set aside Minister's decision to issue danger opinion letter under Immigration Act, s. 53(1)(*b*) — Constitutional standard of review whether deportation to face torture sufficiently shocks national conscience — No breach of implied limitations governing exercise of discretionary decision-making power — Minister not acting in bad faith, in "capricious" or "vexatious manner" — State's interests outweighing those of appellant — Canadian conscience not shocked by Minister's decision.

SURESH V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 2 F.C. 592 (C.A.)

Appellants seeking to set aside Minister's decision to lease land on Indian reserve under Indian Act, s. 58(3) — Crown under no fiduciary obligation to Indian band when acting under s. 58(3) — Purpose of Act band-oriented when use of reserve land at issue — Factors determining standard of review of Minister's decision those outlined by S.C.C. in *Pushpanathan* — Reasonableness appropriate standard herein — Minister bound to give weight to band's concerns where lease detrimental to band — Minister granting lease to substantial detriment of Band without proper consideration of major concerns — Decision unreasonable.

TSARTLIP INDIAN BAND V. CANADA (MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT), [2000] 2 F.C. 314 (C.A.)

Pension Appeals Board allowing appeal but referring matter back to Minister for consideration — Minister's delegate making decision going against what Board decided — Board having statutory authority to take any action Minister could have — Board's decision "final and binding for all purposes of this Act" — Board lacking power to refer back — Minister, delegate *functus officio* — Delegate's decision quashed as: no lawful basis for intervention, principle of natural justice breached, made without regard to material before him.

WIEMER V. GANIM, [1997] 1 F.C. 759 (T.D.)

Application to quash Immigration Act, s. 70(5) decision applicant danger to public — S. 70(5) removing statutory right to appeal from deportation order where Minister of opinion person danger to public and person convicted of serious offence — No

ADMINISTRATIVE LAW—Continued

Judicial Review—Continued

Certiorari—Continued

legislatively required decision-making process for s. 70(5) decisions — Departmental official making recommendation, concurred with or rejected by manager, Minister's delegate making final decision — No reasons given — Natural justice, fairness requiring reasons — As several decision makers, difficult to assume consistency in decision making — Decision makers required to apply legal standard to form opinion affecting liberty, but no legal training required — Decision-making process giving no assurance final decision maker considering applicant's submissions — No way of knowing whether appropriate test for deciding whether danger to public applied — Uprooting applicant from family, removing him to country applicant left as child substantial consequences.

WILLIAMS V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1997] 1 F.C. 431 (T.D.)

Question certified: whether failure to provide reasons for determination under Immigration Act, s. 70(5) person constituting danger to public in context of procedure used breach natural justice, procedural fairness.

WILLIAMS V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1997] 1 F.C. 457 (T.D.)

Appeal from order setting aside Minister's opinion issued under Immigration Act, s. 70(5) respondent danger to Canadian public — Motions Judge holding denial of natural justice, fairness as Minister not providing reasons for decision — Appeal allowed — Test under s. 70(5) whether Minister of opinion constituting such danger — Unless scheme of Act indicating otherwise, subjective decisions judicially reviewable only if decision maker acting in bad faith, erring in law or acting on basis of irrelevant considerations — Based on record, no evidence to contrary, assumption decision maker acting in good faith — None of material considered irrelevant, nor other irrelevant considerations considered — Requirements of natural justice subsumed under general category of "fairness" — Requirements of fairness depending on seriousness of decision — Consequences of decision not deportation order, but withdrawal of discretionary power to exempt respondent from lawful deportation — Also substituting possibility of discretionary stay for automatic statutory stay — Decision-making authorized by s. 70(5) not judicial, quasi-judicial, involving application of legal principles to facts — Minimal requirement of fairness met.

WILLIAMS V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1997] 2 F.C. 646 (C.A.)

CHRC decision to request appointment of Tribunal to inquire into complaints applicant causing hate messages to be communicated through computer Web site — Allegation of bias against Deputy Chief Commissioner — Legal test of bias — Interpretation of enabling statute by Commission not automatically justifying judicial

ADMINISTRATIVE LAW—Continued

Judicial Review—Continued

Certiorari—Concluded

review — Not appropriate at this stage to determine issue of whether provision in violation of Charter, s. 2(*b*) as, in any event, recent amendment to CHRA, s. 50(2) giving Tribunal jurisdiction to determine constitutional issue.

ZÜNDEL V. CANADA (ATTORNEY GENERAL), [1999] 4 F.C. 289 (T.D.)

Declarations

Application for declaration Patented Medicines (Notice of Compliance) Regulations invalid — Patent Act, s. 55.2(4) permitting Governor in Council to make regulations as it considers necessary for preventing patent infringement — No onus on Governor in Council to demonstrate necessity or necessity considered — Adopting Regulations establishing considered necessary — That Regulations applied to particular producers (generic) in particular industry (pharmaceutical) even though Patent Act concerning patents generally, not discriminatory — Discrimination herein not relevant to human rights, Charter concerns, but relating to legitimate choices as Governor in Council deeming necessary — No basis for inference purpose of Regulations to preclude granting NOC to applicant — Doctrine of legitimate expectations not applicable to legislative functions — Governor in Council's function under s. 55.2(4) legislative — Not subject to duty of fairness — Minister's express undertaking to consult manufacturers association before regulations drafted not given on behalf of Governor in Council.

APOTEX INC. V. CANADA (ATTORNEY GENERAL), [1997] 1 F.C. 518 (T.D.)

Action for declarations Framework Agreement on First Nations Land Management breaches Crown's fiduciary duty, plaintiff's Charter rights — Crown contending action premature until land codes contemplated by Agreement coming into effect, seeking to strike references to Agreement in statement of claim — Declaratory relief having preventive role; neither injury nor wrong need to have actually been committed, threatened; plaintiffs need only show some legal right, interest in jeopardy or placed in grave uncertainty — Requirement for causal link between action, harm flowing therefrom in future — Must show recognizable, as opposed to hypothetical, speculative threat before declaratory relief will issue — Declaratory relief not precluded merely because future right placed at risk — If waiting until land codes contemplated by Agreement in effect, declaratory judgment as preventive measure becoming lesser tool.

B.C. NATIVE WOMEN'S SOCIETY V. CANADA, [2000] 1 F.C. 304 (T.D.)

Application for declaration sections of federal-provincial Accord, sub-agreements relating to environmental harmonization invalid — Argument Accord, sub-agreements fettering discretion of other ministers under Canadian Environmental Assessment Act premature — Whether such fettering will occur depending on content of future

ADMINISTRATIVE LAW—Continued

Judicial Review—Continued

Declaration—Continued

agreements — As no specific factual situation to which provisions apply advanced, insufficient factual basis for determination Minister fettered decision-making discretion by signing agreements in which Minister agreed not to act.

CANADIAN ENVIRONMENTAL LAW ASSN. V. CANADA (MINISTER OF THE ENVIRONMENT), [1999] 3 F.C. 564 (T.D.)

Application for declaration current owner restriction (COR), part of formula to determine halibut quota, unlawful — Halibut Advisory Committee (HAC) proposing implementation of COR without advance notice to anyone outside HAC — Opinions of HAC result of highly managed support building process for outcome DFO wanted i.e. quota system — Failure to give those adversely affected by COR opportunity to be heard before COR implemented breach of natural justice — Tests to determine whether motive improper — Minister acting for improper motive, exceeding jurisdiction — Decision to implement COR nullity.

CARPENTER FISHING CORP. V. CANADA, [1997] 1 F.C. 874 (T.D.)

Trial Judge declaring current owner restriction, part of formula to determine halibut fishing quota, unlawful — Imposition of quota policy discretionary decision, legislative action — Policy guidelines not subject to judicial review unless tainted by bad faith, non-conformity with natural justice, irrelevant purpose — Standard of review of administrative functions inapplicable to legislative action — Legislative, policy decisions not subject to principles of natural justice — Not for Court to question wisdom of Minister's policy decision — Trial Judge became Minister for day in substituting respondents' formula for Minister's.

CARPENTER FISHING CORP. V. CANADA, [1998] 2 F.C. 548 (C.A.)

Jurisdiction in Federal Court to grant declaratory relief in judicial review proceedings brought pursuant to Federal Court Act, s. 18 — Where action seeking declaration parallelling judicial review application seeking same relief, statement of claim should be struck as disclosing no reasonable cause of action.

MOKTARI V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 2 F.C. 341 (C.A.)

Application for declaration coercive search and seizure of documents in Canada requiring prior judicial authorization by grant of search warrant — Attorney General not disputing legal proposition — No justiciable issue between parties — No legal issue to be resolved by declaration — Not Court's practice to issue declaration about state of law for use in another forum i.e. Swiss courts.

SCHREIBER V. CANADA (ATTORNEY GENERAL), [2000] 1 F.C. 427 (T.D.)

ADMINISTRATIVE LAW—Continued

Judicial Review—Continued

Declaration—Concluded

Canada Evidence Act, s. 39 providing where Clerk of Privy Council certifying in writing document confidence of Queen's Privy Council, disclosure shall be refused without examination, hearing of information by court — Appellants arguing s. 39 should not apply because Parliament cannot authorize Executive to shield own conduct from constitutional scrutiny — Action for declaration as to constitutional invalidity of s. 39, not attack on Clerk's decision — Latter should be raised by way of judicial review.

SINGH V. CANADA (ATTORNEY GENERAL), [2000] 3 F.C. 185 (C.A.)

Deportation order against applicant, valid when issued, should not be quashed by *certiorari* — Exclusion order issued after granting of pardon which removed basis for enforcement of deportation order — Should be set aside by *certiorari* — Declaration most appropriate remedy in respect of deportation order — Requirements for declaration met — Declaration issued enforcement of deportation, exclusion order would constitute enforcement of disqualification contrary to Criminal Records Act, s. 5(b) — No basis for order of prohibition under Federal Court Act, s. 18.1(4).

SMITH V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1998] 3 F.C. 144 (T.D.)

Plaintiff guilty of manslaughter in husband's death — Seeking declaratory judgment Treasury Board not entitled to withhold payment of pension benefits under Public Service Superannuation Act on basis rule of public order person cannot profit from crime — Such rule not expressly incorporated in Act, contrary to ordinary law of Quebec person convicted of manslaughter may inherit from deceased — Declaration granted, order to go as asked.

ST-HILAIRE V. CANADA (ATTORNEY GENERAL), [1999] 4 F.C. 23 (T.D.)

Injunctions

Motion for interim injunctions to prevent expropriation by federal government of provincial Crown lands until challenge to validity of expropriation determined — Related to application to set aside Minister's decision to issue notice of intention to expropriate — Whether Expropriation Act providing for expropriation of provincial Crown lands as opposed to merely giving notice to provincial Attorney General, and whether provincial Crown lands under expropriation provisions dealing with lands owned by "persons" serious questions to be tried — Applicants not establishing irreparable harm, balance of convenience favouring granting injunction — Asserting breach of constitutional imperative always causing irreparable harm, but such breach not yet proven, nor do all breaches of constitutional rules result in irreparable harm — In Charter cases, issue whether refusal to grant relief could so adversely affect applicants' own interests that harm could not be remedied if eventual decision on

ADMINISTRATIVE LAW—Continued

Judicial Review—Continued

Injunctions—Concluded

merits not according with result of interlocutory application — Applicants not proving any adverse effect to own interests if injunction not granted — If expropriation unconstitutional, will be set aside — Property in question belonging to province, not applicant — Balance of convenience close to neutral, given province's undertaking not to interfere with continued operation of torpedo testing range on disputed lands pending Court resolution of applicants' claim — Weighed slightly in respondents' favour given potential for thrown away costs of deemed abandoned public hearings, report — No harm to either applicants, public interest if expropriation proceeding — If applicants ultimately successful, expropriation will be annulled.

HUMAN RIGHTS INSTITUTE OF CANADA V. CANADA (MINISTER OF PUBLIC WORKS AND GOVERNMENT SERVICES), [2000] 1 F.C. 475 (T.D.)

Motion for order staying removal of Convention refugee from Canada pending disposition of appeal from dismissal of application for judicial review of Minister's danger opinion — Application of tripartite test for granting stay formulated by H.L. in *American Cyanamid Co. v. Ethicon Ltd.* — (1) Certified questions raising serious issues; (2) irreparable harm, as raising serious Charter issues relating to complex scheme for removing persons from Canada, and possibility appellant would be exposed to inhumane treatment on arrival in former homeland; (3) appellant's private interest outweighing public interest as unclear appellant personally involved in acts of terrorism, no evidence appellant's presence in Canada representing threat to personal safety of Canadians, near certainty appellant will be subjected to inhumane treatment if returned to Sri Lanka — Allowing appellant to remain in Canada until appeal heard will not adversely affect Canada's reputation in international community with respect to fighting terrorism.

SURESH V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1999] 4 F.C. 206 (C.A.)

Mandamus

Unreasonable delay — CSIS investigation following application for citizenship — After three years, investigation still not complete — To allow CSIS to indefinitely delay conclusion of investigation and thereby prevent Registrar from submitting application to citizenship judge amounting to usurping powers conferred on Registrar, citizenship judge by Act — Where applicant *prima facie* meets requirements listed in Act, s. 5(1) and demand for performance made, authorities having duty to act and requirements for writ of *mandamus* met.

CONILLE V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1999] 2 F.C. 33 (T.D.)

Immigration and Refugee Board's (IRB) policy of not translating most decisions into other official language but providing translation if requested not "decision" within

ADMINISTRATIVE LAW—Continued

Judicial Review—Continued

Mandamus—Continued

meaning of Federal Court Act, s. 2 — Furthermore, in context of Official Languages Act, "federal board, commission or other tribunal" Commissioner of Official Languages, not IRB — Therefore, F.C.T.D. without jurisdiction to hear Federal Court Act, s. 18.1 application for judicial review challenging IRB's "official languages" policy.

DEVINAT V. CANADA (IMMIGRATION AND REFUGEE BOARD), [1998] 3 F.C. 590 (T.D.)

Immigration and Refugee Board's on-request translation policy in violation of Official Languages Act, s. 20 — Appellant, lawyer, translator requiring quick access to translations, had standing to seek judicial review of policy — In view of practical effect of requiring translation of thousands of decisions of little or no interest, and bearing in mind balance of convenience, not advisable to grant *mandamus* order regarding past decisions.

DEVINAT V. CANADA (IMMIGRATION AND REFUGEE BOARD), [2000] 2 F.C. 212 (C.A.)

Criteria — Whether tripartite test for granting injunctions and stays applicable to *mandamus* proceedings — *Mandamus* to compel administration of citizenship oath denied where Minister considering proceedings based on criminal conviction, misrepresentation of material facts.

KHALIL V. CANADA (SECRETARY OF STATE), [1999] 4 F.C. 661 (C.A.)

Appeal from order striking out originating notice of motion as filed beyond time limit prescribed in Federal Court Act, s. 18.1(2) — Appellants seeking *mandamus*, prohibition, declaration concerning allegation ongoing improper amortization of portions of surpluses in Public Service, Canadian Forces pension accounts since 1993-1994 fiscal year — Initial "decision" to adopt accounting procedure taken in 1989-1990 — Time limit imposed by s. 18.1(2) not barring appellants from seeking *mandamus*, prohibition, declaration — S. 18.1(1) permitting anyone directly affected by matter in respect of which relief sought to bring application for judicial review of federal tribunal's decision, order — "Matter" including any matter in respect of which remedy available under s. 18 — S. 18.1(3)(*a*), (*b*) contemplating *mandamus*, declaratory relief, prohibition — Exercise of s. 18 jurisdiction not depending on existence of "decision or order" — Acts of responsible Ministers in implementing decision attacked — Statutory duty arising in each fiscal year.

KRAUSE V. CANADA, [1999] 2 F.C. 476 (C.A.)

Application for *mandamus* ordering withdrawal of letter of request from Minister of Justice to Swiss authorities seeking assistance with RCMP investigation into fraud on

ADMINISTRATIVE LAW—Continued

Judicial Review—Continued

Mandamus—Concluded

government — Application not out of time as proceedings could not be commenced until refusal to withdraw — *Mandamus* not granted unless public legal duty owed to applicant — Applicant argued Attorney General having duty to withdraw request when facts alleged in request without foundation — Relying on apology for language in request wrongly indicating RCMP concluding criminal activities had occurred — Basis for duty to withdraw request not established — Not acknowledged allegations of fact in letter of request without foundation — Criminal investigation ongoing — To extent duty on respondent arising by implication from Swiss law, duty owed to Swiss authorities, not to applicant — Court not convinced, absent evidence of abuse by Attorney General, duty to applicant outweighed duty to public re: administration of justice.

SCHREIBER V. CANADA (ATTORNEY GENERAL), [2000] 1 F.C. 427 (T.D.)

Prohibition

Procedural fairness — Doctrine of legitimate expectations — Somalia Inquiry investigating how Canada's military acting before, during, after deployment — In dismissing motion for disqualification of Commission Chairman on ground of bias, Commissioners stating findings concerning BGen Beno's credibility deferred until all evidence called over entire range of events under investigation heard — Whether legitimate expectation adverse findings not made until after all evidence in all phases heard — Doctrine of legitimate expectations applies if (1) undertaking to follow set procedure; (2) undertaking not in conflict with statutory duty — Commission's comments not binding undertaking — Unnecessary to invoke doctrine because s. 13 affording BGen Beno right to make representations — Doctrine not applicable to assurance would have opportunity to cross-examine certain witnesses as only affording protection to those with no right to make representations — Doctrine cannot set out scope, content of right to make representations — Express assurance cited not clear, concrete.

ADDY V. CANADA (COMMISSIONER AND CHAIRPERSON, COMMISSION OF INQUIRY INTO THE DEPLOYMENT OF CANADIAN FORCES IN SOMALIA), [1997] 3 F.C. 784 (T.D.)

Bias — Somalia Inquiry — Commissioners' duty to act fairly towards applicant — Chairperson's negative remarks, at and outside hearings, on applicant's credibility indication of bias.

BENO V. CANADA (COMMISSIONER AND CHAIRPERSON, COMMISSION OF INQUIRY INTO THE DEPLOYMENT OF CANADIAN FORCES TO SOMALIA), [1997] 1 F.C. 911 (T.D.)

Somalia Commission Chairman prohibited from making finding adverse to Armed Forces officer based on reasonable apprehension of bias — Role of commissioners,

ADMINISTRATIVE LAW—Continued

Judicial Review—Continued

Prohibition—Continued

judges distinguished — Commissioners having broad investigative powers, judges determine rights as between parties — Rules of evidence, procedure less strict at inquiry than in court — Reasonable apprehension of bias, not "closed mind" test, standard applicable herein — Chairman not deciding on basis other than evidence — That Judge disagreed with Chairman's assessment of officer's credibility not basis for bias finding.

BENO V. CANADA (COMMISSIONER AND CHAIRPERSON, COMMISSION OF INQUIRY INTO THE DEPLOYMENT OF CANADIAN FORCES TO SOMALIA), [1997] 2 F.C. 527 (C.A.)

Application to prohibit Registrar from proceeding with application for registration of trade-marks — Prohibition available where jurisdictional error, violation of natural justice or procedural fairness — Issue of distinctiveness, relied upon herein, will be raised in opposition proceedings — Distinctiveness within Registrar's jurisdiction to consider — Court lacking authority to prohibit Registrar from performing statutory duties where no evidence acting outside jurisdiction.

NOVOPHARM LTD. V. ELI LILLY AND CO., [1999] 1 F.C. 515 (T.D.)

Application for order prohibiting Minister from taking steps to issue "danger opinion" pursuant to Immigration Act, s. 46.01(1)(*e*) — Applicant's Convention refugee claim not yet dealt with — Acquired permanent resident status under "backlog" — Convicted of drug trafficking offence — Upon release from prison, conditional deportation order issued — Could not be executed until determined not Convention refugee — Minister questioned in House of Commons about applicant's case — Applicant alleging Minister's replies raising reasonable apprehension of bias, breach of principles of fundamental justice — Application dismissed — (1) No reason in principle to refuse to issue order of prohibition merely because decision within Minister's discretion — But order prohibiting Minister, delegate from issuing danger opinion may not be appropriate relief as not ensuring no one could exercise power — Decision could be made by someone specially appointed for this purpose — (2) Court having discretion to issue prohibition order even before commencement of proceedings — As no legal principle necessarily precluding in all cases possibility danger opinion could be issued without applicant being aware process started, appropriate case to consider prohibiting Minister, delegates from acting — (3) But no reasonable apprehension of bias reading Minister's comments in context — Minister maintained awareness of legal obligation to deal fairly with applicant in any consideration of danger opinion.

PUSHPANATHAN V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1999] 4 F.C. 465 (T.D.)

Appeal from order prohibiting SIRC from conducting proceedings under Citizenship Act, s. 19 — When respondent applying for citizenship, Minister reporting to SIRC

ADMINISTRATIVE LAW—Continued

Judicial Review—Concluded

Prohibition—Concluded

pursuant to Citizenship Act, s. 19(2) outlining reasonable grounds to believe respondent would engage in activity threatening security of Canada, based on information, advice provided by CSIS — SIRC involved in report on which Minister relying — Standard of impartiality required varying with nature of board's functions — SIRC, dealing with Citizenship Act, s. 19 report primarily investigative — Not functioning as court of law — Must balance applicant's interest with that of security of Canada, possibly entailing policy considerations — As merely reporting to Governor in Council, SIRC not decision-maker — Standard allowing agency to perform role conferred by Parliament closer to "open mind" than "informed bystander".

ZÜNDEL V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1998] 2 F.C. 233 (C.A.)

Reference

Minister seeking directions setting down procedure to be followed in reference under Citizenship Act, s. 18 — Party targeted by administrative proceeding not shielded from pre-trial compulsion — No void in rules prescribed for hearing of s. 18 reference — Application of relevant rules of practice not diminishing respondent's right to be treated fairly in compliance with principles of natural justice — Procedure to be followed by reference to rules of practice governing actions.

CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) V. DUECK, [1998] 2 F.C. 614 (T.D.)

Statutory Appeals

Pursuant to Federal Court Act, s. 18.5, plaintiffs' right of appeal to T.C.C. barring Court from adjudicating claims of plaintiffs — Act, s. 18.5 applying to actions as well as judicial review — Act, s. 18.5 barring Court from adjudicating claim entailing challenge to validity of tax assessment or of collection proceedings taken in respect thereof as alternative right of appeal to T.C.C. — Not precluding Court from adjudicating merits of claim for wrongful filing of writ of *fieri facias* as original amount subsequently varied and assessment not challenged.

ALBION TRANSPORTATION RESEARCH CORP. V. CANADA, [1998] 1 F.C. 78 (T.D.)

Certiorari — Standard of review — Appeal from Canadian Transportation Agency's order requiring removal of restrictions with respect to applicability of rates to Canadian points specified in Tariff — Specialized nature of tribunal, particular expertise in understanding, administering complex regulatory scheme most important factor in determining appropriate standard of review — Agency specialized tribunal possessing particular expertise in deciding matter such as that at issue herein, under somewhat complex regulatory scheme — Had to determine whether respondent's routing instructions contrary to arbitrator's decision, in breach of Canada Transportation Act,

ADMINISTRATIVE LAW—Continued

Statutory Appeals—Continued

s. 161(2)(*c*) undertaking — Interpretation of final offer, undertaking required to decide whether respondent entitled to invoke AAR Accounting Rule 11 in routing instructions or foreclosed by terms of final offer, statutory undertaking from doing so — Question of mixed fact, law whether facts satisfied legal tests — Standard of review reasonableness.

CANADIAN NATIONAL RAILWAY CO. V. EAGLE FOREST PRODUCTS LTD. PARTNERSHIP, [2000] 3 F.C. 46 (C.A.)

Standard of review — Appeal pursuant to Canada Transportation Act, s. 41(1) of Canadian Transportation Agency's decision to apportion equally between appellant, respondent capital, maintenance costs of fence along railway right of way — Railway Act, s. 16 permitting reference to Agency where proposing party, any other person standing to benefit from completion of work, cannot agree on apportionment of costs between them — On questions of law, jurisdiction standard of review correctness with some deference owed to expert tribunal on questions other than those of jurisdictional nature — On questions of mixed law, fact proper test reasonableness — But those decisions having potential to apply widely to many cases more likely to be treated as involving questions of law in contrast to those dealing with particular set of circumstances appropriately treated as involving mixed questions of law, fact — (i) Whether fence "railway work" mixed question of law, fact, subject to standard of reasonableness i.e. whether facts satisfy legal tests — Decision on particular set of circumstances, not likely to be of much general interest in future — Although decision as to jurisdiction, difficult to apply test of minimum deference (correctness) as within CTA's expertise — (ii) Interpretation of "stands to benefit" jurisdictional question subject to standard of correctness as involving question of law with potentially broad impact — (iii) Application of concept "stands to benefit" to facts, involving mixed question of fact, law — Such finding having no precedential significance — Standard of review reasonableness.

METROPOLITAN TORONTO (MUNICIPALITY) V. CANADIAN NATIONAL RAILWAY CO., [1998] 4 F.C. 506 (C.A.)

Appeal from F.C.T.D. judgment allowing appeal from Registrar's refusal to register trade-mark "Export" in association with brewed alcoholic beverages based largely on additional evidence filed (sales, advertising figures, application by Labatt's subsidiary to register "Export" as trade-mark) on appeal — Trade-marks Act, s. 56 providing for appeal to Federal Court from any decision of Registrar — S. 56(5) permitting evidence in addition to that adduced before Registrar to be adduced on such appeal, permitting Federal Court to exercise any discretion vested in Minister — S. 56 appeal partly involves review of Registrar's findings — In absence of additional evidence before F.C.T.D., Registrar's decisions, whether of fact, law or discretion, within area of expertise, to be reviewed on standard of reasonableness simpliciter — When additional evidence adduced in F.C.T.D. that would materially affect findings of fact or exercise of discretion, Judge must come to own conclusion as to correctness of Registrar's decision — Applying reasonableness simpliciter standard of review to

ADMINISTRATIVE LAW—Concluded

Statutory Appeals—Concluded

Registrar's decision, and having regard to fact additional evidence adduced in F.C.T.D. not materially affecting findings of fact, exercise of discretion, Registrar's decision should stand.

MOLSON BREWERIES V. JOHN LABATT LTD., [2000] 3 F.C. 145 (C.A.)

Appeal from Minister of Finance's direction to Superintendent of Financial Institutions to take control of appellant — Insurance Companies Act, s. 680(2) permitting Minister to make such direction where believing circumstances in s. 680(1)(*b*) existing — Superintendent making three recommendations, including direction herein — At Minister of Finance's request, Minister of State (Finance and Privatization) hearing appellant's representations — Appellant also making written submissions — Appellant not given opportunity to respond to either letter from private company expressing support for Superintendent's recommendations or Minister of State's report analyzing positions, drawing conclusions, making recommendations — Appeal dismissed — (1) Minister forming belief necessary as condition precedent to exercise of s. 680(2) authority — Not simply acting on Superintendent's recommendation — Adopting only two of three recommendations — (2) Minister not improperly delegating decision-making authority to Minister of State — "Reasonable opportunity to make representations" met by providing opportunity to make written representations — Provision of opportunity to make oral representations, designating Minister of State to preside at meeting, not delegation of authority since no obligation to provide oral hearing — Minister making decision of such wide, significant import entitled to seek advice — As not acting under delegation of authority, Minister of State not exceeding jurisdiction by making recommendations — (3) Ministerial decision based on public policy grounds affording little procedural protection, except as required on face of statute — Neither Minister of State's report nor private company's letter containing new facts — Failure to share either not grounds for appeal.

SOVEREIGN LIFE INSURANCE CO. V. CANADA (MINISTER OF FINANCE), [1998] 1 F.C. 299 (T.D.)

AGRICULTURE

Judicial review of Canadian Wheat Board's grain delivery program — Program directed at implementation of public policy not amenable to judicial review — Crown in right of province lacking standing to bring application — Application dismissed on merits — That program neither relieving producers from all uncertainty nor resulting in Board taking all risks of downward turns in markets neither refusal to exercise jurisdiction nor other error in respect of which judicial review may be sought.

ALBERTA V. CANADA (WHEAT BOARD), [1998] 2 F.C. 156 (T.D.)

Action for declaratory relief Canadian Wheat Board Act breaching plaintiffs' Charter rights, freedoms — Individual plaintiffs grain farmers residing in "designated area" in Western provinces — Challenging Board's monopoly as single-desk marketing agency

AGRICULTURE—Concluded

in designated area — Rationale for monopoly under Act, s. 5 to secure orderly marketing, in interprovincial and export trade, of grain grown in Canada — Act not infringing plaintiffs' rights.

ARCHIBALD V. CANADA, [1997] 3 F.C. 335 (T.D.)

Canadian Wheat Board Act — Compulsory pooling under Wheat Board monopoly in designated area in Western provinces for stated purpose of securing orderly marketing, in interprovincial and export trade, of grain grown in Canada — Act not infringing appellants' Charter rights, freedoms — In any event, demonstrably justified in free and democratic society.

ARCHIBALD V. CANADA, [2000] 4 F.C. 479 (C.A.)

AIR LAW

Transport Canada's Personnel Licensing Handbook, s. 3.18 providing persons having diabetes mellitus controllable without drugs assessed as fit — Respondent, insulin-dependent diabetic, denied medical certificate for private pilots' licence — S. 3.18 contrary to Charter, s. 15(1) equality rights, but justified under Charter, s. 1 — Context of impugned provision: as signatory to International Convention on Air Safety, Canada undertaking to adopt rules re: licensing diabetics similar to those of I.C.A.O. — No other state licensing IDDM diabetics for solo flight — No consensus of medical opinion on safety of solo flight by insulin-dependent pilots — Flight safety pressing and substantial objective — S. 3.18 respecting Charter rights as much as possible.

BAHLSEN V. CANADA (MINISTER OF TRANSPORT), [1997] 1 F.C. 800 (C.A.)

Closure of airstrips at Banff, Jasper National Parks — Flying club members argue for retention for emergency landings — Parks Canada argues modern advances in aviation rendered emergency landing strips obsolete — Decommissioning prohibited pending completion of comprehensive environmental studies.

BOWEN V. CANADA (ATTORNEY GENERAL), [1998] 2 F.C. 395 (T.D.)

Nationair DC-8 crash in Saudi Arabia kills 263 — Post-Accident Safety Review undertaken under Aeronautics Act, s. 4.2 into carrier's organization, operations, maintenance, management — Access to Information Act requester denied Safety Review Report as exempted under s. 20(1)(*b*) — F.C.T.D. Judge held reasonable expectation of harm to future Reviews if report disclosed — F.C.A. holds that, on proper interpretation of legislation, disclosure cannot be denied on ground would have chilling effect on future investigations — Should Court's decision negatively impact upon willingness of individuals to participate in Reviews, Parliament could amend Aeronautics Act to provide broader confidentiality protection.

RUBIN V. CANADA (MINISTER OF TRANSPORT), [1998] 2 F.C. 430 (C.A.)

ANIMALS

Commissioner of Patents denying patent for transgenic mice containing gene introduced into chromosomes of mammal at single cell stage — Fertilized eggs transferred to female mouse, allowed to gestate naturally — Oncomouse used to test for carcinogens, cancer-treating products — Whether oncomouse "invention" under Patent Act, s. 2 — Mouse complex life form — Not "raw material" given new qualities by inventor — Essential feature of mouse presence of transgene — Not present without human intervention — Result of gestation process variable, unknown — Mouse not reproducible as term understood in Patent Act — Location, presence, quality of gene uncontrollable — Complex life form not within current parameters of Patent Act.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE V. CANADA (COMMISSIONER OF PATENTS), [1998] 3 F.C. 510 (T.D.)

Appellant seeking patent for production of animals with susceptibility to cancer for carcinogenicity studies — Product of claims 1 to 12 in patent application referred to as transgenic non-human mammal or oncomouse — Whether patentable in accordance with interpretation of Patent Act — Oncomouse unobvious, new, useful composition of matter, therefore "invention" within Act, s. 2 — Not merely product of laws of nature, rather result of both ingenuity, laws of nature, therefore patentable — Test for usefulness of product mouse produced with all of cells affected by oncogene — Control, reproducibility tests met — No common understanding patent law not extending to living organisms — Definition of "invention" not excluding from patentability higher life forms such as oncomouse.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE V. CANADA (COMMISSIONER OF PATENTS), [2000] 4 F.C. 528 (C.A.)

ANTI-DUMPING

Judicial review of refusal to disclose information contained in Detailed Adjustment Statement, accompanying worksheets, used to assess anti-dumping duty payable by importers on goods exported by applicant to Canada under Special Import Measures Act, s. 55 — Respondent not lawfully exercising discretion under Customs Act, s. 108(3) to disclose information to person who provided it as wrongfully concluding no discretion to exercise — Identity of person who "provided" information not limited to person from whom respondent immediately obtained information — Improper delegation of power to form opinion whether information should be disclosed under s. 108.

JOHNS MANVILLE INTERNATIONAL, INC. V. DEPUTY M.N.R., CUSTOMS AND EXCISE, [1999] 3 F.C. 95 (T.D.)

Judicial review of 1998 CITT decision rescinding 1993 decision dumping in Canada of steel plates from eight named countries causing, likely to cause material injury to production of like goods in Canada — Court reluctant to intervene in CITT's decision because (i) made in exercise of discretion under Special Import Measures Act, s. 76(4)

ANTI-DUMPING—Concluded

to make order as circumstances require; (ii) facts in dispute manifestly within CITT's expertise; (iii) important role played by CITT research, extensive submissions in response thereto in fact-finding — Burden on applicant to demonstrate on balance of probabilities Tribunal's finding not rationally supported by any material — As some of Tribunal's findings not challenged, could not say no rational basis for decision — Discretionary nature of decision, relevance of Tribunal's expertise reducing detail with which Tribunal required to deal in its reasons with every factor raised — Not discussing factor on which evidence heard in reasons not meaning not considered — Tribunal must decide significance of any given factor — Applicant not demonstrating any factor on which reasoned finding not made of such manifest importance that Tribunal bound in law to deal with it expressly.

STELCO INC. V. BRITISH STEEL CANADA INC., [2000] 3 F.C. 282 (C.A.)

ARMED FORCES

Somalia Inquiry investigating how Canada's military acting before, during, after deployment — Not trivial issue, waste of public funds for Commission to make finding whether elite unit of Canadian Forces infiltrated by rogue soldiers, improperly led — Mid-way through in-theatre phase, Government imposing reporting deadline, limiting mandate to pre-deployment phase — Report on other phases discretionary — Commission issuing Inquiries Act, s. 13 notices to senior military officers indicating findings could be made against them — Scope of fairness; deference owed commissions of inquiry; rights of Inquiries Act, s. 13 notice recipients — Allegations in notices found objectionable because requiring hindsight from in-theatre stage severed — Commission able to report on pre-deployment events only.

ADDY V. CANADA (COMMISSIONER AND CHAIRPERSON, COMMISSION OF INQUIRY INTO THE DEPLOYMENT OF CANADIAN FORCES IN SOMALIA), [1997] 3 F.C. 784 (T.D.)

Appeal from Trial Division's refusal to strike judicial review application — Rear Admiral denying application for redress of grievance requesting quashing of counselling and probation — National Defence Act, s. 29, QR&O, arts. 19.26, 19.27 mandating procedure for requesting through chain of command review by higher authority — Adequate alternative remedy — Appeal allowed.

ANDERSON V. CANADA (ARMED FORCES), [1997] 1 F.C. 273 (C.A.)

Judicial review of CHRT decision denying complaint CAF engaged in discriminatory practice contrary to CHRA — Allegation Corporal subjected to sexual harrassment by N.C.O. (Unit Disciplinarian) (questioning dating habits, suggestive gestures, showing postcard of female nude), C.O. (terming Corporal a "sexatary") — Internal grievances turned down — Allegation bringing grievances punished by differential treatment — Given written reprimand for insubordination following visit by Female Advisory Committee who found complainant wearing non-regulation shoes — Evidence

ARMED FORCES—Continued

complainant willing participant in collegial atmosphere at workplace where sexual, racist jokes told — Tribunal decision reasonable.

CANADA (HUMAN RIGHTS COMMISSION) v. CANADA (ARMED FORCES), [1999] 3 F.C. 653 (T.D.)

Commission of Inquiry into deployment of Canadian Forces to Somalia — Inquiry undertaken in response to national outrage over murder of Somalis by Canadian soldiers — Commission's broad mandate including inquiring, reporting on leadership within chain of command, discipline, whether cultural differences impacted on operations, actions of Department of National Defence, allegations of cover-up, evidence destruction — Governor in Council imposing final deadlines for Commission's investigations, report — Applicant was Special Advisor to Defence Minister Campbell, directly involved in communications between C.F., Minister — Controversy between applicant, C.F. representative as to date applicant told of Somali's torture, murder by Canadian Airborne Regiment members — Media questioning whether applicant cover-up participant — Applicant denied standing due to government's imposition of final deadlines — Applicant seeking order of *mandamus* requiring Commission to comply with mandate or declaring that Governor in Council amend Commission's terms of reference and declaring decision imposing final deadlines contrary to law — Order in Council imposing final deadlines held *ultra vires*.

DIXON v. CANADA (COMMISSION OF INQUIRY INTO THE DEPLOYMENT OF CANADIAN FORCES TO SOMALIA), [1997] 2 F.C. 391 (T.D.)

Judicial review of denial of applicant's grievances by Chief of Defence Staff (CDS) — Career Medical Review Board (CRB(M)) recommending applicant's release from Armed Forces as unable to meet physical requirements for infantry — Applicant filing grievance — Superiors disagreeing as to whether applicant could be transferred to another occupation — Second CRB(M) convened, decision recommending release rendered within 24 hours — Applicant not notified — Subsequently denied promotion; application to join militia refused because of low medical release suitability — Application not premature — Recourse to Minister provided under Queen's Regulations & Orders for the Canadian Forces (QR&O) not adequate alternative remedy since QR&O precluding Minister from acting on complaint because outstanding complaint under Canadian Human Rights Act — Failure to notify applicant of second CRB(M), give opportunity to make submissions, breaching natural justice principles — Second CRB(M) not rendering independent recommendation; device of officers opposed to applicant's retention to force CDS to conclude had to be released — CDS explicitly referring to second CRB(M), holding no impropriety in process — Since breaches of natural justice, mistaken about validity of process — Court unable to say CDS not relying on CRB(M) in making decision to release — CDS not considering promotion in context of any other occupation — Decisions to release, not promote related — Court would not speculate as to CDS's conclusions if disregarded second CRB(M).

HUTTON v. CANADA (CHIEF OF DEFENCE STAFF), [1998] 1 F.C. 219 (T.D.)

ARMED FORCES—Concluded

Plaintiff, Naval Reservist, not selected for position of Executive Assistant to Commander of Canadian Forces in Middle East during Gulf War because Jewish — CFAO 20-53, s. 6(*c*) permitting consideration of cultural, religious or other sensitivities of parties to conflict and host country in determining whether participation of particular member in specific peacekeeping operation in keeping with policy all members eligible to perform peacekeeping duties unless exclusion justifiable under Charter, s. 1 or Canadian Human Rights Act, s. 5 — Impugned policy poorly drafted, containing no definition of "peacekeeping" — Although policy valid, should not have been applied since posting not involved in peacekeeping mission, but part of Canadian contingent to international forces assembling in Persian Gulf to enforce blockade of Iraq — But no basis on which to allow plaintiff's claim.

LIEBMANN V. CANADA (MINISTER OF NATIONAL DEFENCE), [1999] 1 F.C. 20 (T.D.)

Applicant, member of Armed Forces, struck by motor vehicle, injured while crossing road to return to duties from restaurant as no mess at base — Veterans Review and Appeal Board holding not entitled to disability pension under Pension Act, s. 21(2)(*a*) — S. 21(2)(*a*) permitting award of pension where member suffering disability resulting from injury "arising out of or directly connected with" military service — Army paid for meal but no military business conducted during it — Could have brought food from home, eaten at base — Not injured by Armed Forces member — Board's decision not unreasonable — Facts not so clearly pointing to finding of eligibility that Board's decision unreasonable.

MCTAGUE V. CANADA (ATTORNEY GENERAL), [2000] 1 F.C. 647 (T.D.)

BANKRUPTCY

Bank collecting bankrupt licensed manufacturers' accounts receivable assigned to it as security for loan — Minister may not require Bank pay excise tax with respect to accounts receivable — Priority of Bankruptcy Act, s. 107(1) over Excise Tax Act, s. 52(10) — Even if assignment of debt giving Bank secured creditor status, property in which security held component of assets of bankruptcy — Even though Bank secured creditor, debt owing to it gave it no absolute property right in moneys deriving from ultimate collection of account receivable — When collected accounts receivable, Bank did not become "manufacturer" or "producer" — Tax simple debt owing by vendor manufacturer and, for recovery purposes, in case of bankruptcy, has rank accorded to it in Act, s. 107(1) — Minister must make claim to trustee, and be given priority as preferred creditor, based on ranking.

CANADA V. NATIONAL BANK OF CANADA, [1997] 3 F.C. 3 (C.A.)

Judicial review of Deputy Superintendent of Bankruptcy's decision under Bankruptcy and Insolvency Act, s. 14.03 to seize records administered by applicants, entrust them to guardian until completion of investigation, disciplinary hearing — Auditor's report disclosing serious misconduct — RCMP also investigating applicants' conduct — Given seriousness of alleged irregularities, seizure intended to preserve estate records

BANKRUPTCY—Concluded

— Once relationship of trust disintegrated, Deputy Superintendent compelled to seize all records given fiduciary relationship between trustees, clients — Power to "preserve" estates in s. 14.03 not used to "recover" estate records — Conservatory measures taken to prevent further misconduct.

GROUPE G. TREMBLAY SYNDICS INC. V. CANADA (SUPERINTENDENT OF BANKRUPTCY), [1997] 2 F.C. 719 (T.D.)

Motion for order of payment of net proceeds of sale of ship to trustees in bankruptcy — Ship arrested, sold in support of Federal Court action for fees for stevedoring, related services provided in U.S.A. — Shipowners declared bankrupt in Belgium — Plaintiff entitled to maritime lien in recognition of status of claim in U.S.A. — Maritime lien created under applicable foreign law secured claim under laws of Canada — Rights of secured creditors in these circumstances not affected by Bankruptcy and Insolvency Act.

HOLT CARGO SYSTEMS INC. V. ABC CONTAINERLINE N.V. (TRUSTEE OF), [1997] 3 F.C. 187 (T.D.)

BARRISTERS AND SOLICITORS

Governing body — Commercial law publishers claiming infringement of copyright in legal materials photocopied, sold by Law Society of Upper Canada through Osgoode Hall's Great Library to members of Ontario Bar, judiciary — Court rejecting argument defendant's role in administration of justice such as to override plaintiffs' copyright interests — Cases about payment of licence fee, not access to law.

CCH CANADIAN LTD. V. LAW SOCIETY OF UPPER CANADA, [2000] 2 F.C. 451 (T.D.)

Quebec lawyer appointed *amicus curiae* by S.C.C. under Supreme Court Act, s. 53(7) to assist Court in responding to questions asked of it in Reference case — For sake of confidentiality must submit fee, disbursement accounts to third party for review, certification — Access to information coordinator for respondent authorizing disclosure of certificates confirming *amicus curiae*'s fee accounts — Relationship between *amicus curiae*, S.C.C. not solicitor-client relationship — Only particulars of *amicus curiae*'s professional services considered to be subject to privilege.

DESJARDINS, DUCHARME, STEIN, MONAST V. CANADA (DEPARTMENT OF FINANCE), [1999] 2 F.C. 381 (T.D.)

Counsel may not breach solicitor-client privilege when called upon by third party to provide information pertaining to relationship with former client, even to protect own reputation.

KELLY LAKE CREE NATION V. CANADA, [1999] 1 F.C. 496 (T.D.)

BARRISTERS AND SOLICITORS—Concluded

Law firm acting as business agent for foreign shipping company by paying hospital bills of injured seaman — Health Region purporting to serve shipping company by service upon law firm — Law firm, in absence of instructions, taking position service not accepted — Service valid under r. 135 — Law firm served not as lawyers but as business agent — Not opening floodgates to service on law firms acting for defendant but not having instructions to accept service, making mockery of necessity for personal service on defendant of statement of claim.

NORTH SHORE HEALTH REGION v. *ALPHA COSMOS* (THE), [1999] 1 F.C. 243 (T.D.)

Appeal from Prothonotary's order delivery of statement of claim to Vancouver law firm valid service under r. 135 — Plaintiff delivering statement of claim to law firm paying hospital bills of defendant's injured employee — Firm also assisting injured man's brothers to obtain visas to Canada — Law firm neither accepting service, nor stating service invalid — Challenging validity of service when plaintiff moving for default judgment — Acting as business agents, not solicitors, despite assertion to contrary in letter denying "client's" further responsibility for hospital costs — Although substantial identity of interest between P. & I. Club (insurer retaining law firm), defendant, law firm representing former only as solicitor in this claim — Such ruling not likely to have adverse effects on solicitors engaging in shipping law practice, or to jeopardize future solicitor-client privilege claims.

NORTH SHORE HEALTH REGION v. *ALPHA COSMOS* (THE), [1999] 1 F.C. 583 (T.D.)

BILL OF RIGHTS

Judicial review of visa officer's decision denying applicant permanent resident status pursuant to s. 19(1)(*c*.2) (reasonable grounds to believe member of organization reasonably believed to have engaged in criminal activity) — Submission Bill of Rights, s. 1 provision for freedom of association, requiring interpretation of "member" such that right to belong to organization, whether criminal or not, protected, contrary to objectives of Act — Rights of association in Hong Kong governed by Hong Kong law — Alien having no right to Canadian resident status.

CHIAU v. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1998] 2 F.C. 642 (T.D.)

Application to quash Immigration Act, s. 70(5) decision applicant danger to public — S. 70(5) removing statutory right of appeal from deportation order — No legislatively required decision-making process for s. 70(5) decisions — Departmental official making recommendation, concurred with or rejected by manager, Minister's delegate making final decision — No reasons given — Bill of Rights, s. 2(*e*) guaranteeing fair hearing in accordance with principles of fundamental justice to determine rights, obligations — Right of appeal, obligation to leave Canada rights, obligations — Fundamental justice requiring reasons.

WILLIAMS v. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1997] 1 F.C. 431 (T.D.)

BILL OF RIGHTS—Concluded

Appeal from order setting aside Minister's opinion respondent danger to Canadian public under Immigration Act, s. 70(5) — Motions Judge holding principles of fundamental justice requiring Minister to provide reasons for opinion — S. 2(*e*) guaranteeing right to fair hearing in accordance with principles of fundamental justice — Principles of fundamental justice not requiring reasons — S. 2(*e*) requiring fair "hearing" — Absence of reasons not necessarily affecting hearing.

WILLIAMS V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1997] 2 F.C. 646 (C.A.)

BROADCASTING

Licensed Canadian-based direct broadcast satellite (DBS) service provider seeking damages, injunctive relief against defendants re importation and sale of receivers (small satellite dishes) and decoders for receiving DBS signals originating in U.S.A. from broadcasters not licensed to broadcast in Canada — Interpretation of Radiocommunication Act, ss. 9, 10 and 18 — Act, s. 9(1)(*c*) providing absolute prohibition against decoding of encrypted subscription program signals unless emanating from lawful distributor in Canada authorizing decoding — Plaintiffs having right of civil action under Act, s. 18 as have suffered loss or damages as result of conduct of defendant, Norsat, contrary to Act, s. 10(1)(*b*).

EXPRESSVU INC. V. NII NORSAT INTERNATIONAL INC., [1998] 1 F.C. 245 (T.D.)

CHARITIES

Appeal from MNR's decision notifying of intention to revoke appellant's registration as charitable organization — Appellant "registered charity" under Income Tax Act, s. 248(1)(*a*) having as objects to educate Canadians on issues affecting human life, to provide educational services, materials for member groups — Most of appellant's activities found non-charitable by MNR as not being for advancement of education, religion, primarily of political nature — Case law on law of charity reviewed — Not all of appellant's resources devoted to charitable activities as required by Act — Appellant engaging in political activities not "ancillary and incidental" to charitable activities — Advocating strong convictions on important social, moral issues — Activities not permitted by Act.

ALLIANCE FOR LIFE V. M.N.R., [1999] 3 F.C. 504 (C.A.)

Appeal from revocation of registration as charitable organization on ground appellant not devoting substantially all resources to charitable activity — Aims, objects: to protect unborn, elderly, handicapped, to promote true Christian family values, encourage chastity, teach natural family planning — Activities including lectures, seminars, conferences, publication of literature advocating point of view — After 1989 audit, Minister not recommending appellant change conduct — In 1993, after second audit, Revenue Canada advised appellant of concerns and that revocation under consideration — Charitable organization registration revoked in 1994 — (1)

CHARITIES—Concluded

Appellant's activities not educational — Directed neither toward formal training of mind nor improvement of useful branch of human knowledge — Producing material concerned with dissemination of opinions on social issues — Activities not serving other purposes beneficial to community — Activities primarily designed to sway public opinion on social issues not charitable activities — (2) Appellant not demonstrating by systematic analysis resources devoted to political activities insubstantial — As apparently substantial part of activities devoted to political purposes, and Income Tax Act requiring all resources of charitable organization be devoted to charitable activities, appellant not demonstrating Minister erred in concluding appellant not charitable organization — (3) Minister not abusing discretion in revoking registration by changing position after second audit — No basis on which Minister precluded from changing position after four years, second audit.

HUMAN LIFE INTERNATIONAL IN CANADA INC. V. M.N.R., [1998] 3 F.C. 202 (C.A.)

CITIZENSHIP AND IMMIGRATION

Exclusion and Removal

Statutory stay of removal order — Inapplicable to those residing, sojourning in U.S.A. — Applicants, mother and two sons, natives of El Salvador — Arrived in Canada separately from U.S.A. — Claimed refugee status on ground of well-founded fear of persecution — Claim denied — Conditional departure orders made by immigration officer — Applicants seeking stay of execution of removal orders under Immigration Act, s. 49(1) — Whether applicants did "sojourn" in U.S.A. within meaning of Act, s. 49(1.1) — Interpretation of word "sojourn" required — Word to be defined according to ordinary dictionary meaning — Meaning of "sojourning" based on physical presence in American territory — Female applicant granted automatic stay of removal order as merely transited U.S.A. without sojourning — No evidence male applicants did not sojourn in U.S.A. — Judicial stay not applicable to them.

AGUILAR V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 4 F.C. 20 (T.D.)

Judicial review of Immigration Expulsion Officer's (IEO) decision to execute deportation orders by removal of applicants to Chile — Applicants unsuccessful Convention refugee claimants but in Canada for 20 years — While in Canada, implicating senior Chilean Police Force officials in human rights abuses — Fearing serious harm, death if returned to Chile — Execution of deportation orders stayed pending outcome of Immigration Act, s. 114(2) applications for landing on humanitarian, compassionate grounds.

ARDUENGO V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1997] 3 F.C. 468 (T.D.)

Validity of case law to effect no right of appeal from refusal to grant stay of deportation order pending determination of application for leave to commence judicial

CITIZENSHIP AND IMMIGRATION—Continued

Exclusion and Removal—Continued

review questioned — Doubtful Immigration Act, ss. 82, 83 precluding appeal — Arguable stay application sought under Federal Court Act, not under Immigration Act — Minister's insistence deportation be carried out forthwith short-circuiting leave application process, bewildering in view of humanitarian, compassionate circumstances.

PANCHOO V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 3 F.C. 18 (C.A.)

Immigration Inquiry Process

Motion for ruling applicant entitled to stay of execution of removal order — Citizen of Ecuador, seeking to enter Canada from U.S.A. — Claiming Convention refugee status — As not having valid visa, s. 20(1)(*a*) report made indicating entry would contravene Act — Conditional departure order issued under s. 28(1) — Convention refugee claim later denied — Leave sought to initiate judicial review proceedings of denial — S. 49(1) providing for stay of execution of removal order where application for leave to commence judicial review proceedings after IRB decision on refugee claim — S. 49(1.1) providing s. 49(1) not applicable to person residing, sojourning in U.S.A. who is subject of s. 20(1)(*a*) report — Considering statutory scheme, time fixed by Parliament for determining applicant's residency, sojournment in U.S.A. when applicant first made subject of s. 20(1)(*a*) report — Time spent in Canada pending determination of refugee claim not considered in determining whether residing, sojourning in U.S.A. — Applicant subject to s. 49(1.1) exception to s. 49(1) statutory stay.

ALBUJA V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 2 F.C. 538 (T.D.)

Reference pursuant to Federal Court Act, s. 18.3(1) — Before appeal from deportation order heard, Minister issuing danger opinion — Appeal subsequently dismissed for lack of jurisdiction — Gibson J. dismissing application for discretionary stay of removal in belief statutory stay subsisting — Application for leave, judicial review of direction to report for removal dismissed — Before removing respondent, Minister asking Court whether execution of removal order violating (1) Immigration Act, s. 49(1)(*b*); (2) Gibson J.'s order — Both questions answered in negative — (1) Case law as to effect of s. 70(5) on outstanding appeals to I.A.D. evolving since Gibson J.'s order — After s. 70(5) decision, s. 49(1) not applicable — No basis to claim statutory stay — (2) Order dismissing stay application not granting stay — Answering questions on reference not prejudicial to respondent.

CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) V. CONDELLO, [1998] 3 F.C. 575 (T.D.)

Judicial review of IAD decision to reopen earlier decision dismissing appeal from deportation order — Respondent deported before hearing of motion to reopen — Immigration Act, subsection 70(1) providing for appeals to IAD by permanent residents

CITIZENSHIP AND IMMIGRATION—Continued

Exclusion and Removal—Continued

Immigration Inquiry Process—Continued

— Definition of "permanent resident" including person who has not ceased to be permanent resident pursuant to s. 24 — S. 24 conditions under which person ceasing to be permanent resident including when removal order made against that person — Application dismissed — Minister relying on *obiter dicta* in *Grillas v. M.M.I.* (S.C.C.) for proposition Board can reopen appeal until deportation order executed — Bizarre interpretation if jurisdiction to reopen existing, but can be terminated by execution of deportation order by party to litigation — S. 75 contemplating return of person who has filed appeal of removal order, but removed from Canada — Incongruous for IAD to have jurisdiction to hear appeal after individual deported, but not to have jurisdiction to decide upon motion to reopen hearing in similar circumstances — S. 24(1) not assisting analysis: if person ceasing to be permanent resident when removal order made, IAD would be without jurisdiction to reopen in every case once removal order made — If IAD having jurisdiction to reopen to hear new evidence when equitable jurisdiction in issue, having jurisdiction to reopen when ground failure of natural justice with respect to making of decision itself.

CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) V. HARRISON, [1998] 4 F.C. 557 (T.D.)

Judicial review of I.R.B., Appeal Division's dismissal of preliminary motion to dismiss appeal from conditional removal order for lack of jurisdiction — Permanent residence application containing false information as to previous marriage — Applicant complying with conditional immigrant visa by marrying Canadian fiancée within 90 days of landing — Subsequently convicted of bigamy — After inquiry, respondent found to be person within ss. 27(1)(*d*)(ii) (convicted of offence for which term of imprisonment of five or more years may be imposed), 27(1)(*e*) (granted landing by misrepresentation of material fact) — Conditional removal order issued — Under words, scheme of Act, applicant entitled to appeal removal order — Only permanent resident can be directed to inquiry under s. 27(1) — S. 32(2) recognizing fact person held to come within s. 27(1) remaining permanent resident despite finding — Argument adjudicator's decision as to validity of visa stripping respondent of right of appeal as permanent resident status void *ab initio* inconsistent with language of ss. 27, 32 — Also, once person formally granted permanent resident status, provisions specifying how may be taken away clearly contemplating appellate rights — Finally, s. 70(1) conferring right of appeal on any ground involving question of fact, law — Status of person appealing removal order cannot be invoked to deny appeal right conferred by s. 70(1)(*a*) where conclusion with respect to status necessarily consequence of adjudicator's finding of fact, law — "Lawful" admission meaning permission ostensibly given by appropriate authority regardless of how obtained — Statutory amendment required if positive determination under s. 27(1)(*e*) to be without appeal.

CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) V. SENECA, [1998] 3 F.C. 494 (T.D.)

CITIZENSHIP AND IMMIGRATION—Continued

Exclusion and Removal—Continued

Immigration Inquiry Process—Continued

As applicant landed in Canada under "backlog program", no assessment of risk to him if returned to Iran — Subsequently found to constitute danger to public in Canada, ordered deported to Iran where fears torture — Danger opinion not assessing such risk, or providing insufficient attributes of natural, fundamental justice — Legislative scheme not requiring danger opinion to do more than determine danger to Canadian public — Removal decision not assessing risk — Canada's international obligations as signatory to Convention against Torture mandating risk assessment before removal — Informing interpretation of Charter — Procedural safeguards of danger opinion process may be inadequate to meet Charter requirements — Applicant entitled to risk assessment conducted in accordance with principles of natural, fundamental justice, rendered by competent authority — Question certified: whether risk assessment conducted in accordance with principles of natural justice, fundamental justice condition precedent to valid determination to remove individual, landed on basis of credible basis to Convention refugee claim; and if so, whether process used herein incorporating such assessment.

FARHADI V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1998] 3 F.C. 315 (T.D.)

Judicial review of CRDD decision applicant not Convention refugee — Applicant, national of Venezuela, removed thereto, when Court denied application to stay removal order — Deportation not eliminating all rights accruing to individual under Immigration Act where decision under review based upon error of law — S. 48 requiring respondent to execute removal order as soon as reasonably practicable — S. 82.1(1) conferring on applicant right to seek judicial review of CRDD's decision — Against overarching, clear human rights object, purpose as background for interpretation of Act, in absence of express words so requiring, s. 82.1 should not be interpreted so that rendered nugatory by performance by respondent of s. 48 duty.

FREITAS V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1999] 2 F.C. 432 (T.D.)

Appeal from F.C.T.D. judgment affirming IRB's refusal to hear appeal from adjudicator on ground lacked jurisdiction — Appellant granted landing based on statement still single as indicated on information form, qualified as father's dependant — In fact married after obtaining visa, before arriving in Canada — Immigration Act, s. 27(1)(*e*) requiring immigration officer to forward to Deputy Minister written report setting out information indicating permanent resident granted landing by reason of misrepresentation of material fact — At s. 27(1)(*e*) inquiry adjudicator holding landing granted by reason of misrepresentation, issuing deportation order — IRB refusing to hear appeal on ground appellant not having right to appeal as not permanent resident — Acceptance of argument landing absolute nullity based on s. 2(*n*) definition of "landing" as lawful admission for permanent residence in Canada contrary to procedure

CITIZENSHIP AND IMMIGRATION—Continued

Exclusion and Removal—Continued

Immigration Inquiry Process—Continued

in Immigration Act for granting, revoking landing, would lead to absurdities — If persons described in s. 27(1)(*e*) not having right of appeal because not lawfully admitted, none of persons listed in s. 27 having right of appeal, despite procedure set out in s. 70 — Concept of "permanent resident" in s. 70 same as in s. 27, fitting into logical fair system intended to establish whether landing granted at point of entry to Canada lawful — Answers to certified questions: (1) Where person granted landing by means of misrepresentation of marital status appeals removal order pursuant to s. 70(1), Appeal Division may not dismiss appeal for want of jurisdiction without hearing merits; (2) Appeal Division having jurisdiction under s. 70(1) to entertain appeal of person landed on basis of fraudulent misrepresentation; (3) Person landed on basis of fraudulent misrepresentation given "lawful permission to establish permanent residence in Canada" so as to be "permanent resident" who can appeal under s. 70(1); (4) Appeal Division having jurisdiction under s. 70(1) to entertain appeal of person, whether or not report on person made under s. 27(1)(*e*), S. 27(2)(*g*).

JABER V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 1 F.C. 603 (C.A.)

Tribunal having jurisdiction under Immigration Act, s. 77(3) to entertain appeal from refusal of sponsored in-land application for landing of father, mother, brother — S. 77(1) permitting immigration or visa officer to refuse to approve sponsored application for landing where member of family class not meeting requirements of Act, regulations — Refusals appealable under s. 77(3) — "Member of family class" not limited to those issued immigration visas — As contemplating action by "immigration officer", including those performing functions within Canada, s. 77(1) contemplating refusal of applications from within Canada regardless of whether applicants have visas — Whether "member of family class" in s. 77(1) referring only to those having applied for visas certified question.

KIRPAL V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1997] 1 F.C. 352 (T.D.)

Appeal from F.C.T.D. decision allowing application for judicial review of I.R.B., Appeal Division decision quashing exclusion orders against appellants on compassionate, humanitarian grounds — Principal visa applicant died after visas issued, but before presentation in Canada for landing — Two-stage immigration process: (1) issuance of visa if visa officer concluding applicant admissible; (2) upon presentation of visa holder at Canadian port of entry, immigration officer, acting under Immigration Regulations, 1978, s. 12(1) determining if admissible i.e. whether visa still sufficient in circumstances to authorize admission — No need to imply visa invalidation through change of circumstances from language of Immigration Act because second-stage process designed to deal with that problem.

MCLEOD V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1999] 1 F.C. 257 (C.A.)

CITIZENSHIP AND IMMIGRATION—Continued

Exclusion and Removal—Continued

Immigration Inquiry Process—Continued

Application for order prohibiting Minister from taking steps to issue "danger opinion" pursuant to Immigration Act, s. 46.01(1)(*e*) — Applicant's Convention refugee claim as yet not dealt with — Acquired permanent resident status under "backlog" — Convicted of drug trafficking offence, sentenced to eight years' imprisonment — Upon release on parole, conditional deportation order issued — Could not be executed until determination not Convention refugee — In 1998 applicant's case raised during Question Period in House of Commons — Applicant alleging Minister's replies raising reasonable apprehension of bias, breach of principles of fundamental justice — Application dismissed — No reasonable apprehension of bias reading Minister's comments in context — Minister maintained awareness of legal obligation to deal fairly with applicant in any consideration of danger opinion.

PUSHPANATHAN V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1999] 4 F.C. 465 (T.D.)

Certified question: does SIO have jurisdiction to reopen hearing which resulted in removal order to allow person to make Convention refugee claim? — Doctrine of *functus officio* must be more flexible where no right of appeal — Where justice requires, administrative bodies should be able to reopen proceedings, but must be indications in enabling statute decision can be reopened — No such indication herein — Immigration Act, s. 44 stating refugee claims may not be determined if initiated after removal order made — Parliament thereby determining refugee claims must be initiated before removal order made — Refugee claims may not be heard in one specific circumstance: where refugee claim made after removal order — By referring to "appeal" from removal order in Immigration Act, s. 44(1), when no "appeal" actually exists, Parliament intending "appeal" to encompass judicial review — Judicial review appropriate process by which to contest removal order — Any common law right to reopen ousted by s. 44(1).

RAMAN V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1999] 4 F.C. 140 (C.A.)

Judicial review of immigration officer's decision applicant ineligible pursuant to Immigration Act, s. 44 to have refugee status claim referred to CRDD because removal order against him not executed — Applicant voluntarily leaving Canada after exclusion order issued, but without confirming departure with immigration authorities — S. 54 making it clear Minister's consent required when person voluntarily executing deportation order — Failure to obtain consent resulting in removal order not being executed — Questions certified: (1) does senior immigration officer have jurisdiction, either at common law or pursuant to Charter, s. 7, Constitution Act, 1982, s. 52(1), to reconsider re-opening hearing which resulted in issuance of removal order for person

CITIZENSHIP AND IMMIGRATION—Continued

Exclusion and Removal—Continued

Immigration Inquiry Process—Continued

to claim protection as Convention refugee; (2) if so, is such jurisdiction limited to instances where breach of natural justice in respect of original decision?

RAZA V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1999] 2 F.C. 185 (T.D.)

Judicial review of Minister's opinion applicant danger to Canadian public, immigration officer's decision notifying him of removal date — Applicant, Convention refugee, convicted of trafficking in heroin — Upon notification Minister considering issuing danger opinion, applicant filing submissions with Minister regarding risks faced if returned to Afghanistan — February 1996 Ministerial Opinion Report concluding applicant not at risk if returned to Afghanistan; risk to Canadian society outweighing any risk applicant might face on return — Danger opinion issued — Removal date delayed almost two years because applicant not cooperating in obtaining Afghan travel documents — Neither statutory requirement nor other reason for risk assessment separate from assessment of applicant's danger to public — Even if separate risk assessment undertaken, results would have to be balanced against danger individual posing to Canadian public — No prejudice to applicant requiring separate assessments — Combining two in one procedure more efficient — No requirement for oral hearing as no indication anything applicant submitted relative to risk of danger upon return to Afghanistan of own personal knowledge, and disbelieved — No duty on courts, tribunals to provide reasons where not required by statute — No evidence danger opinion formulated without regard to risk assessment contained in Ministerial Opinion Report — Risk assessment adequate — No general obligation on Minister to provide periodic updated risk assessments.

SAID V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1999] 2 F.C. 592 (T.D.)

Judicial review of destination decision — Applicant, citizen of India, convicted in Pakistan for role in hijacking of Air India plane — Upon release from jail, arriving in Canada without status — In immigration detention since 1995 — Conditional removal order issued — Before Convention refugee claim determined, danger opinion issued — Ineligible to have Convention refugee claim determined — Applicant making submissions as to risk faced if returned to India — Removal officer informing applicant would be removed to India — No assessment of risk of harm to applicant if returned to India — Application allowed — Risk assessment, determination required on facts herein — Under Immigration Act, s. 48 removal officers having discretion to delay execution of removal order pending risk assessment determination — Removal officer may have regard to evidence of risk in removal to particular destination, and as to whether risk assessment conducted, evaluated, solely for purpose of exercising discretion regarding deferral — Appropriate risk assessment not conducted — Danger opinion process not amounting to risk assessment — Removal officer's failure to

CITIZENSHIP AND IMMIGRATION—Continued

Exclusion and Removal—Continued

Immigration Inquiry Process—Concluded

consider whether or not to exercise discretion under Immigration Act, s. 48, pending conduct of appropriate risk assessment, making of risk determination, reviewable error in nature of failure, refusal to exercise jurisdiction — Questions certified.

SAINI V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1998] 4 F.C. 325 (T.D.)

Application for stay of removal order pending disposition of application for leave to apply for judicial review, for judicial review, including application for extension of time within which to bring application — Immigration Act, s. 49(1)(*c*)(i) staying execution of removal order where person, found not to be Convention refugee, filing application for leave to commence judicial review, or where time normally limited for filing application for leave elapsed, and where leave granted, until judicial review proceeding heard, disposed of — In *Sholev v. Canada (M.E.I.)*, F.C.T.D. finding statutory stay applied when application for leave to apply for judicial review of CRDD decision rejecting refugee claim made out of time, and after making of removal order — Relied upon discretionary power in s. 82.1(5) allowing judge for special reasons to extend time for making application for leave, judicial review — S. 82.2 prohibiting any appeal from F.C.T.D. judgment on application for leave to commence application for judicial review — Application dismissed on ground removal order stayed by s. 49(1)(*c*)(i) — Support for argument *Sholev* wrongly decided as s. 49(1)(*c*)(i) speaking of "time normally limited" — S. 82.1(5) arising from special circumstances, different from time normally limited — But *Sholev* applied in interest of rationality, consistency in law, as not ignoring relevant authority, statutory provision, no possibility of appeal to resolve conflicting opinions — Questions certified: does s. 82.2 preclude appeal of serious question of law of general importance arising from interlocutory proceedings in course of application for leave, judicial review; where s. 82.1 application filed out of time, does s. 49(1)(*c*)(i) apply to preclude execution of removal order pending disposition of application by Court?

ZIYADAH V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1999] 4 F.C. 152 (T.D.)

Inadmissible Persons

Jurisdiction in Immigration Appeal Division, under Immigration Act, s. 70(5), to hear appeal from deportation order made by adjudicator even though latter has not made specific finding person to be deported convicted of offence for which sentence of ten years or more could have been imposed — Literal approach to interpretation of Act, s. 70(5) (whereby adjudicator must make finding) producing result inconsistent with adjudicator's jurisdiction and transitional provision accompanying adoption of new s. 70(5).

ATHWAL V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1998] 1 F.C. 489 (C.A.)

CITIZENSHIP AND IMMIGRATION—Continued

Exclusion and Removal—Continued

Inadmissible Persons—Continued

Judicial review of visa officer's denial of application for permanent residence as investor — Applicant having certificate of selection issued by Quebec Immigration — Given disparity between salary, net worth, visa officer requesting documents establishing source of funds to ensure legality thereof — Immigration Act, s. 9(3) requiring production of documentation as required by visa officer to establish admission not contrary to Act, regulations — Given applicant's income, net worth, visa officer's request proper, visa denied on appropriate grounds i.e. unable to verify applicant's admissibility with respect to s. 19 without documentation requested — Burden on applicant to prove entry into Canada would not contravene Act — Applicant not meeting obligation under s. 9(3) — Canada-Québec Accord, s. 12 indicating Quebec having exclusive jurisdiction over selection, Canada having exclusive jurisdiction over admissibility — Accord not precluding federal immigration authorities from verifying origin of applicant's assets to determine whether should be admitted to Canada — Accord providing for exchange of information, documents between Canada, Quebec — Provincial authorities may examine source of funds for selection purposes; federal authorities may examine source of funds in determining admissibility — Serious question of general importance certified: does Canada-Québec Accord limit visa officer's jurisdiction to question source of funds of Quebec-destined applicant for permanent residence in Canada, in order to establish admissibility?

BIAO V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 2 F.C. 348 (T.D.)

Visa officer refusing to approve respondent's application for landing of adopted son as definition of "son" in Immigration Regulations, 1978, s. 2(1) not met — Adoption taking place 5 days after son's 19th birthday — Respondent able to sponsor adopted son for landing if son unmarried, under 19 years of age — Age 19 restriction creating distinction between parents of biological, adopted sons under 19 and parents adopting sons over 19 — Distinction amounting to discrimination under Charter, s. 15 but saved by s. 1 as objective (preventing use of adoption provisions to circumvent immigration requirements) pressing, substantial.

CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) V. DULAR, [1998] 2 F.C. 81 (T.D.)

Respondent resident of Canada since 1950 although not Canadian citizen — Reports under Immigration Act, s. 27 indicating respondent, convicted in Czechoslovakia as German collaborator who was responsible for execution of civilians during World War II, had come into Canada by material misrepresentation — Whether "lawfully admitted" to Canada under Immigration Act, s. 2(*l*) — Immigrant obtaining leave to enter Canada by fraud, deception not "lawfully" admitted — All requirements of Act in force at time immigrant entered Canada must be complied with — Term "came into" in Act, s. 19(1)(*e*)(viii) not synonymous with "admission", "landing" — Statutory

CITIZENSHIP AND IMMIGRATION—Continued

Exclusion and Removal—Continued

Inadmissible Persons—Continued

protection against removal limited to Canadian citizens, domiciled persons "lawfully admitted" — Adjudicator erred in law in holding respondent could not be subject to deportation order.

CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) v. NEMSILA, [1997] 1 F.C. 260 (T.D.)

Appellant denied refugee status by virtue of Convention, Art. 1F(b) — Convention, Art. 1F(b) not applicable to refugee claimant who has been convicted of crime committed outside Canada and has served sentence prior to coming here — Persons such as appellant entitled to have refugee claim heard unless declared danger to Canadian public.

CHAN V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 4 F.C. 390 (C.A.)

Applicant, citizen of Pakistan, convicted of trafficking in narcotic, ordered deported — Seeking order requiring Adjudication Division to review reasons for continued detention under Immigration Act, s. 103(6) — Person subject to order under s. 105(1) could be "detained" pursuant to Immigration Act, s. 103(6) — S. 103(6) providing important procedural protections when examination, inquiry, removal cannot take place promptly — Should be interpreted to protect liberty of person, to provide for review by Adjudication Division of reasons for continuation of s. 105(1) order — Detention review of order not required until convict eligible for day parole, unescorted temporary absence (UTA).

CHAUDHRY V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1999] 3 F.C. 3 (T.D.)

Application for permanent residence denied as applicant's dependent daughter medically inadmissible under Immigration Act, s. 19(1)(*a*)(ii) — Admission expected to cause excessive demands on health, social services — Visa officer's refusal letter based on medical officers' opinion — Valid medical opinion under s. 19(1)(*a*)(ii) binding on visa officer — Medical officers indicating criteria in medical narrative but failing to seek necessary information — Erred in applying statutory test under s. 19(1)(*a*)(ii).

FEI V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1998] 1 F.C. 274 (T.D.)

Before interview, SIO indicating not necessary for lawyer to accompany applicant — After applicant's arrival, SIO unsuccessfully attempting to call lawyer — Interview proceeding in absence of lawyer — SIO issuing exclusion order on ground applicant not having travel documents normally required of person seeking entry to Canada —

CITIZENSHIP AND IMMIGRATION—Continued

Exclusion and Removal—Continued

Inadmissible Persons—Continued

Because of limited scope of issues; SIO's discretion under s. 23(4) to issue exclusion orders against inadmissible persons; summary, expeditious nature of proceeding contemplated by statutory scheme, no automatic right to counsel, but discretion in officer to permit person to have lawyer present — No duty on officer to advise claimant should be represented, and in absence of request therefor, SIO not refusing to permit applicant to have lawyer with her at interview — Reasonable in circumstances for SIO to decide not to adjourn interview — Question certified: was exclusion order in breach of duty of fairness, in that SIO interviewed applicant in absence of counsel when counsel may have been available to attend interview if SIO had not advised applicant lawyer's attendance at interview not necessary?

JEKULA V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1999] 1 F.C. 266 (T.D.)

Judicial review of IRB, Appeal Division's dismissal of appeal from refusal of sponsored application for landing of father, mother, brother — Order in council exempting them from requirement of obtaining visa before coming to Canada — Father medically inadmissible — S. 77(3) conferring right to appeal refusal of landing based on compassionate, humanitarian considerations — Tribunal erred in weighing excessive demands father's admission likely to place on Canadian medical, social services against compassionate, humanitarian considerations — Had Parliament so intended, could have adopted wording of s. 70(1)(*b*) i.e. "having regard to all the circumstances" — Tribunal erred in failing to consider separately whether compassionate, humanitarian considerations warranting grant of special relief to mother, brother — Act, Regulations not requiring uniform result in exercise of equitable jurisdiction — Tribunal erred in applying Regulations, s. 6(1) — S. 6(1) applies "where a member of the family class makes an application for an immigrant visa" — Father, mother, brother exempted from applying for visa — Whether sponsor of family members exempted from visa requirement having right of appeal under s. 77(3) certified question.

KIRPAL V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1997] 1 F.C. 352 (T.D.)

Mr. Li convicted in Hong Kong under Prevention of Bribery Ordinance — Adjudicator concluding Hong Kong offence, Criminal Code, s. 426 equivalent, appellant inadmissible under Immigration Act, s. 19(2)(*a*.1)(i) — Motions Judge upholding Adjudicator, holding not necessary to compare defences, burdens of proof — Appeal allowed — Comparison of "essential elements" requiring comparison of definitions of offences, including defences — Dissection of offences into "elements", "defences" not serving purpose of provision (exclusion of persons guilty of serious misconduct) — Definition of offences similar if involving similar criteria for establishing offence occurred, whether manifested in "elements", "defences" — Examining comparability of offences, not of possible convictions — As Canadian offence narrower, could be convicted of Hong Kong offence but not of Canadian

CITIZENSHIP AND IMMIGRATION—Continued

Exclusion and Removal—Continued

Inadmissible Persons—Continued

offence — No evidence what Li did also constituting offence in Canada — Not necessary to compare adjectival law by which conviction might be entered — Act not contemplating retrial applying Canadian rules of justice.

LI V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1997] 1 F.C. 235 (C.A.)

Plaintiff sexually assaulted by landed immigrant with criminal record — Immigrant ordered deported following parole after serving time for previous offences — Deportation stayed by IRB, AD — Plaintiff suing MEI for negligence in failing to execute removal order in timely manner, to detain immigrant pending removal — Whether all reasonable steps taken by MEI, public servants to ensure deportation order executed "as soon as reasonably practicable" under Immigration Act, s. 48 — Class of "neighbours" to which victim belonged not sufficient to create relationship of proximity — No private law duty owed by MEI to plaintiff.

MARTIN V. CANADA (MINISTER OF EMPLOYMENT AND IMMIGRATION), [1999] 3 F.C. 287 (T.D.)

Judicial review of visa officer's refusal of visa application under Immigration Act, s. 19(1)(*f*)(i), prohibiting admission of persons who there are reasonable grounds to believe "have engaged in acts of espionage or subversion against democratic government, institutions or processes, as they are understood in Canada" — Visa officer finding applicant, member of Chinese students association at Concordia University, engaged in constant pattern of reporting to Chinese Embassy in Ottawa, provided intelligence on activities of association members, attempted to subvert organization to meet goals, objectives of foreign government i.e. changing previous mission from pro-democracy activist association critical of Chinese authorities to one not speaking out against that government — "Reasonable grounds to believe" is *bona fide* belief in serious possibility based on credible evidence — Standard of review of factual findings patent unreasonableness — No basis for Court's intervention in visa officer's factual findings — Applicant's activities constituted espionage, subversion within ordinary meaning of those words, nourished by examination of federal legislation *in pari materia* — Espionage is information gathering — Subversion means accomplishing change by illicit methods or for improper purposes — But must be directed against democratic government, institutions, processes as understood in Canada — Notion of democracy — Parliament restricting paragraph to public authorities elected by, responsible to constituency — Student association not democratic institution or process — Question certified: do reasons correctly interpret s. 19(1)(*f*)(i).

QU V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 4 F.C. 71 (T.D.)

CITIZENSHIP AND IMMIGRATION—Continued

Exclusion and Removal—Continued

Inadmissible Persons—Continued

Judicial review seeking declaration 1995 deportation order should not be executed — Applicant convicted in Pakistan of hijacking plane — Original death sentence commuted to life imprisonment — Later, applicant granted parole, ordered to leave Pakistan — President of Pakistan exercising powers under Art. 45 of Constitution of Islamic Republic of Pakistan, granting pardon in 1998 "on conviction/term of imprisonment already undergone" — Valid pardon in another country with similar justice system cannot be ignored — According to experts, President's pardon means remission of all legal consequences of conviction — Pakistani judicial system somewhat similar to ours — Grave assault on Canadian sense of justice if Canadian immigration department deeming person convicted of offence if deemed not convicted in jurisdiction where offence allegedly committed — Applicant not exempted from deportation on other grounds — Questions certified: (1) absent evidence as to motivating considerations leading to grant of pardon by another jurisdiction, is Canadian court bound by pardon; (2) does pardon "on conviction/term of imprisonment already undergone" erase conviction and consequences; (3) does nature of offence of hijacking provide solid rationale to depart from principle pardon granted by another jurisdiction whose laws based on similar foundation as Canadian laws, recognized in Canada?

SAINI V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 3 F.C. 253 (T.D.)

Interim application to obtain release from detention pending determination under Immigration Act, s. 40.1(4)(*d*) of reasonableness of Ministers' certificate — Applicant involved in fundraising, recruiting, organizing for allegedly terrorist organization — Ministers filing certificate with immigration officer applicant person described in Immigration Act, s. 19(1)(*e*), (*f*) — Applicant challenging constitutionality of s. 19(1)(*e*), (*f*) as violating rights to freedom of expression, association — Ministers' certificate final decision — Tripartite test for interim relief applied — No serious issue raised with respect to freedoms of expression, association — Balance of inconvenience favouring Ministers.

SINGH V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1998] 3 F.C. 616 (T.D.)

Removal orders for deportation of applicants to country engaged in armed conflict constitutionally valid — Not violating Canada's statutory obligations under Geneva Conventions Act.

SINNAPPU V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1997] 2 F.C. 791 (T.D.)

Applicant found to be inadmissible under Immigration Act, s. 19(1)(*c*) as convicted of narcotics trafficking — Adjudicator issuing deportation order under Act, s. 32(5)(*a*)

CITIZENSHIP AND IMMIGRATION—Continued

Exclusion and Removal—Continued

Inadmissible Persons—Continued

— Before order executed, applicant left Canada, returned without obtaining Ministerial consent — Exclusion order issued by senior immigration officer under Act, s. 19(1)(*i*) — After latter decision, applicant granted pardon under Criminal Records Act — Whether pardon expunged conviction — Case law as to effect of pardon under Criminal Records Act — Conviction not deemed not to have existed by virtue of pardon — Pardon must be given effect prospectively — Deportation, exclusion order "disqualification" within Criminal Records Act, s. 5(*b*) — Execution of deportation, exclusion order would enforce disqualification removed by pardon contrary to Criminal Records Act, s. 5.

SMITH V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1998] 3 F.C. 144 (T.D.)

Appeal from Immigration Act, s. 40.1(9) order releasing appellant from detention on ground conditions therein infringing Charter guaranteed rights of freedom of expression, association — Appellant inadmissible as person reasonable grounds to believe engaged in terrorism — Incarcerated almost two years when removal order issued — Ontario Court, General Division injunction precluding removal — F.C.T.D. Judge allowing s. 40.1(8) application for release on conditions — Appellant not raising constitutional issues before Trial Division Judge — Appeal allowed to extent matter remitted to designated F.C.T.D. Judge — Constitutional concerns properly raised before designated Judge.

SURESH V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1998] 4 F.C. 192 (C.A.)

Appeal on certified question: does "special education" fall within "social services" in Immigration Act, s. 19(1)(*a*)(ii) — S. 19(1)(*a*)(ii) prohibiting admission to Canada of persons whose admission might reasonably be expected to cause excessive demands on social services — Respondent's moderately mentally retarded son excluded from admission on ground admission would create excessive demands on Canadian social services — Motions Judge holding special education for mentally challenged children within public school system not social service within s. 19(1)(*a*)(ii) — Appeal allowed, question answered in affirmative — S. 19(1)(*a*) triggered when prospective immigrant found to be suffering from disease, disorder, disability or other health impairment — "Social services" in s. 19(1)(*a*)(ii) contemplating services provided to those in need after assessment of nature, severity or probable duration of disease, disorder, disability or other health impairment — As requirement for publicly funded special education arising from assessment of nature, severity, probable duration of mental disability, no reason why Parliament would exclude special education from ambit of social services in s. 19(1)(*a*)(ii) — Movement away from institutionalization of mentally disabled toward community living — As institutionalization would constitute social service for purposes of s. 19(1)(*a*)(ii), substitute publicly provided program, such as special

CITIZENSHIP AND IMMIGRATION—Continued

Exclusion and Removal—Continued

Inadmissible Persons—Concluded

education, also social service for those purposes — "Social services" meaning more than welfare.

THANGARAJAN V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1999] 4 F.C. 167 (C.A.)

Appellant foreign national, neither Canadian citizen nor registered as Indian under Indian Act — Convicted in British Columbia of cultivating cannabis — Ordered to depart from Canada — Whether departure notice infringing appellant's Aboriginal right — Right not extinguished by Immigration Act, ss. 4, 5 — Adjudicator having jurisdiction under Act to deal with matter, to refuse to issue removal order if Aboriginal right infringed — Matter referred back to Adjudicator for determination of questions of fact, law.

WATT V. LIEBELT, [1999] 2 F.C. 455 (C.A.)

Removal of Permanent Residents

Judicial review of Immigration and Refugee Board, Appeal Division's refusal to declare deportation order invalid — Board holding F.C.A. decision in *Hoang v. Canada (M.E.I.)* precluding assessment of possible physical harm to applicant if returned to country of origin — Immigration Act, s. 70(1)(*b*) permitting Board to consider all circumstances on appeal from removal order — *Hoang* not determining issue herein — In absence of s. 70(5) danger to public opinion, Board having jurisdiction to stay deportation order against permanent resident on equitable grounds — Including every extenuating circumstance i.e. financial, social hardships, physical dangers awaiting individual in country of origin — Dangers assessed as of Board hearing date.

AL SAGBAN V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1998] 1 F.C. 501 (T.D.)

Judicial review of SIRC investigation, report recommending issuance of certificate in respect of applicant pursuant to Immigration Act, s. 40(1) — Report triggered by Minister of Citizenship, Solicitor General's opinions applicant person described in s. 19(1)(*e*) (reasonable grounds to believe will engage in acts of subversion against democratic government, institutions, processes), (*g*) (reasonable grounds to believe will engage in acts of violence endangering Canadians) based on involvement with Popular Front for the Liberation of Palestine (PFLP) — SIRC concluding reasonable grounds to believe applicant engaged in acts of subversion, likely to participate in unlawful activities of PFLP — SIRC erred in law in relying, without further analysis, on definition of "subversion" in *Shandi, Re* (any act intended to contribute to process of overthrowing government) — Ignored testimony concept of subversion involving two essential elements: clandestine or deceptive element, element of undermining from

CITIZENSHIP AND IMMIGRATION—Continued

Exclusion and Removal—Continued

Removal of Permanent Residents—Continued

within — Applicant not engaged in subversion against Israel — Analysis in support of finding applicant person described in s. 19(1)(*g*) even less compelling — Citing no evidence supporting conclusion possibility PFLP may commit acts of violence in Canada.

AL YAMANI V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 3 F.C. 433 (T.D.)

Danger opinion — Impact upon F.C.A. judgment in *Williams* of S.C.C. decision in *Baker v. Canada (Minister of Citizenship and Immigration)*, — Danger opinion important decision fundamentally affecting future of individual's life — Duty of fairness not simply minimal — Respondent breached duty of fairness owed to applicant by failing to share summary documents, provide reasonable opportunity to respond to them, and include any such response in material going before respondent's delegate — Obiter: standard of review herein reasonableness *simpliciter*.

BHAGWANDASS V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 1 F.C. 619 (T.D.)

Appeal from dismissal of application for judicial review of IRB, Appeal Division's decision to reopen appeal of deportation order when respondent deported after filing motion to reopen, but before granting of motion by Appeal Division — *Ratio decidendi* of S.C.C. in *Grillas* not authority for proposition appeal cannot be reopened if unsuccessful appellant removed from Canada before motion to reopen heard, decided — Current Immigration Act recognizing Appeal Division having continuing jurisdiction to reopen appeal where continuing jurisdiction already engaged when removed from Canada — Filing motion to reopen appeal not preventing Minister from executing deportation order "as soon as reasonably practicable" — Deportation order remaining valid even if stayed — Given modern communications, removed person rarely need return for rehearing.

CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) V. TOLEDO, [2000] 3 F.C. 563 (C.A.)

In exercise of jurisdiction to have regard to all circumstances of case under Immigration Act, s. 70(1)(*b*), IRB (AD) may not consider country (and conditions thereof) to which non-refugee appellant likely to be removed when assessing whether person should not be removed from Canada.

CHIEU V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1999] 1 F.C. 605 (C.A.)

Judicial review of decision applicant danger to public in Canada — Found not guilty of crime due to mental disorder, detained in psychiatric hospital by order of Ontario

CITIZENSHIP AND IMMIGRATION—Continued

Exclusion and Removal—Continued

Removal of Permanent Residents—Continued

Criminal Code Review Board — While appeal from deportation order pending, letter advising Minister considering rendering opinion applicant "danger to public" sent to parents' address — Copy sent to solicitor representing him in deportation appeal — Latter responding, describing circumstances of detention — Application allowed — Applicant under disability — Federal Court Rules, R. 1700(1)(*a*) applied i.e. procedures of Ontario Court (General Division) should be adhered to — No evidence service of Minister's possible opinion made in accord with Ontario law — Provincial officials, responsible for applicant's interests, not notified of proceedings — Decision set aside — Questions certified: (1) Whether notice of Immigration Act, s. 70(5) proceedings in accord with provincial law required to be provided to those responsible for person held in provincial facility by decision of Criminal Code Review Board; (2) if so, whether absence of evidence of such notice ground for setting aside opinion person constituting danger to public in Canada.

DA COSTA V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1998] 2 F.C. 182 (T.D.)

Judicial review of IRB, Appeal Division's affirmation of Adjudicator's decision applicant entering Canada by reason of "fraudulent or improper means or misrepresentation" of "material fact" pursuant to Immigration Act, s. 27(1)(*e*) — Wording of provision interpreted — Applicant not disclosing change in marital status because unaware necessary to do so — Immigration forms completed by others — Not understanding English, French — Person may only enter Canada, if at time of entry, fulfils requirements of Act, Regulations — Onus of establishing that on applicant — Duty to inform immigration officials of any change in circumstances relevant to issuance of visa, both at stage of process for gaining admission to Canada, and upon entering Canada, particularly in regard to marital status — Lack of knowledge of English, French not absolving applicant of failure to meet statutory obligation.

MOHAMMED V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1997] 3 F.C. 299 (T.D.)

Applicant in Canada since 1986 as refugee from Guatemala — Subsequently convicted of serious criminal offences — Application for discretionary stay of execution of removal order — Appeal from deportation order to Immigration and Refugee Board, Appeal Division outstanding when Minister's delegate issuing danger opinion — Immigration Act, s. 49(1)(*b*) providing where appeal filed with Appeal Division, execution of removal order stayed until appeal heard and disposed of or declared abandoned — Since neither condition fulfilled, statutory stay still in existence; no need for discretionary stay — Issuance of danger opinion not precluding Appeal Division from hearing, determining jurisdiction under s. 69.4(2) — Application of s. 49(1)(*b*) not dependent upon Appeal Division having jurisdiction over appeal — Statutory stay triggered by filing appeal, not by Appeal Division's jurisdiction.

SOLIS V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1997] 2 F.C. 693 (T.D.)

CITIZENSHIP AND IMMIGRATION—Continued

Exclusion and Removal—Continued

Removal of Permanent Residents—Concluded

Application to quash Immigration Act, s. 70(5) decision applicant danger to public — No legislatively required decision-making process — Departmental official making recommendation, concurred with or rejected by manager, Minister's delegate making final decision — No reasons given — Although Charter, s. 7 applied, s. 70(5) not unconstitutionally vague — Natural justice, fairness, Canadian Bill of Rights, s. 2(*e*) guarantee of fair hearing in accordance with principles of fundamental justice to determine rights, obligations, requiring reasons.

WILLIAMS V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1997] 1 F.C. 431 (T.D.)

Questions certified: whether Immigration Act, s. 70(5), giving Minister discretion to issue opinion person danger to public in Canada, engaging interests affecting liberty, security of person pursuant to Charter, s. 7 — If yes, whether s. 70(5) inconsistent with fundamental justice, and of no force or effect as unconstitutionally vague and/or as not providing for rendering of reasons — Whether Minister's exercise of discretion, in context of procedure used, inconsistent with fundamental justice, Charter, s. 7, where no reasons provided.

WILLIAMS V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1997] 1 F.C. 457 (T.D.)

Appeal from order setting aside Minister's opinion respondent danger to Canadian public — Respondent, permanent resident, convicted of serious criminal offences — Deportation order issued — While appeal therefrom pending, Minister forming opinion under Immigration Act, s. 70(5) — Effect of Minister forming opinion to substitute (i) right of judicial review for right of appeal of deportation order; (ii) exercise by Minister of discretion to relieve from lawful deportation for exercise of similar discretion by Appeal Division; (iii) right to seek judicial stay instead of statutory stay — Minister's opinion not *causa causans* of deportation — Respondent facing deportation because as non-citizen, committing serious crimes in Canada.

WILLIAMS V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1997] 2 F.C. 646 (C.A.)

Removal of Refugees

Convention refugee convicted, sentenced to penitiary for criminal offences — Judicial review of Minister's delegate denial of request for reconsideration of danger opinion as insufficient grounds justifying re-opening decision — Original application dismissed by F.C.T.D. for failure to perfect — Applicant changing solicitors, providing new documents not before Minister's delegate when made original decision, indicating little or no risk of re-offending — Effectively first request for judicial review of Minister's danger opinion — Manifestly unfair to summarily reject new information,

CITIZENSHIP AND IMMIGRATION—Continued

Exclusion and Removal—Continued

Removal of Refugees—Concluded

send courtesy letter — New documents extremely important to applicant, family — Minister's delegate having duty to give documents careful attention; at least provide reasons why documents insufficient to justify re-opening of decision.

NEMOUCHI V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 2 F.C. 529 (T.D.)

Appellant, Tamil of Sri Lanka, recognized as Convention refugee by IRB, applying for landing under Immigration Act — Certificate issued by Solicitor General, MCI alleging applicant inadmissible under Act, s. 19 as fundraiser for terrorist organization — Minister issuing danger opinion under Act, s. 53(1)(*b*) — S. 53(1)(*b*) contrary to Charter, s. 7 but saved by s. 1.

SURESH V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 2 F.C. 592 (C.A.)

Removal of Visitors

Appellant having children born in Jamaica, Canada — Suffering from mental illness, ordered deported — Whether best interests of Canadian child primary consideration in assessing applicant under Immigration Act, s. 114(2) — Proceeding under s. 114(2) involving deportation of parent, not child — Convention on the Rights of the Child not part of domestic law of Canada — Not limiting discretionary authority granted by s. 114(2) — Doctrine of legitimate expectations not creating substantive rights, inapplicable.

BAKER V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1997] 2 F.C. 127 (C.A.)

Respondent incarcerated upon criminal conviction — Ordered deported — Warrant for arrest, detention issued under Immigration Act, s. 103(1) as Minister concerned would not otherwise appear for removal — Order made under s. 105(1) directing continued detention until expiration of sentence — NPB refusing to consider eligibility for parole because subject to detention under s. 105(1) order — IRB refusing to order detention review under s. 103(6) — S. 105(1) order operative order causing continued detention — If individual detained because reasonable grounds to believe poses danger to public or would not appear for removal (s. 103), not being detained because of criminal conviction — S. 103(6), providing for periodic review of detention, applies.

CHAUDHRY V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 1 F.C. 455 (C.A.)

Owners, operators of vessels engaged in fishing operations legally obliged, under Immigration Act, ss. 91.1(1)(*b*) and 92(1), to pay administration fees and make security

CITIZENSHIP AND IMMIGRATION—Continued

Exclusion and Removal—Concluded

Removal of Visitors—Concluded

deposits with respect to deserting crew members as "transportation companies" within meaning of Immigration Act, ss. 2, 91.1(1)(*b*), 92(1).

FLOTA CUBANA DE PESCA (CUBAN FISHING FLEET) V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1998] 2 F.C. 303 (C.A.)

Immigration Practice

Applicant claiming well-founded fear of persecution based on political grounds if returned to Pakistan — Claim denied by Refugee Division — Tribunal not satisfied with documentation provided by applicant's counsel at refugee hearing, asking for more material — Preferred Research Directorate's opinion as based on information from neutral source — Not convinced applicant facing charges of murder in Pakistan — Refugee Division not bound by legal, technical rules of evidence under Immigration Act, s. 68(3) — Tribunal entitled to investigate issue to satisfy itself — Case law on necessity for reopening hearing reviewed — Reopening of hearing best practice — Issue of availability of First Information Reports should have been addressed at reconvened hearing.

AFZAL V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 4 F.C. 708 (T.D.)

Abandonment of refugee claim — Applicant failing to appear at refugee claim hearing — Counsel invoking medical reasons, presenting doctor's certificates — CRDD denying adjournment, determining refugee claim abandoned — CRDD could not have reasonably concluded claim abandoned.

AHAMAD V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 3 F.C. 109 (T.D.)

Statutory duty of CRDD to designate representative where claimant, whether or not under 18, unable to understand nature of proceedings includes duty to assess whether proposed representative appreciates nature of proceedings — Especially so where outcome of child's claim contingent upon designation — Since duty is that of CRDD, not enough that claimants represented by counsel.

ESPINOZA V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1999] 3 F.C. 73 (T.D.)

Judicial review of Refugee Division's refusal to reopen hearing — Two-member panel of Refugee Division dismissing Convention refugee claim — One of those members subsequently dismissing application to reopen claim — Immigration Act, s. 69.1(7), prescribing two-member quorum, applying only to hearings "under this section", i.e. hearing into refugee claim, abandonment thereof — In absence of

CITIZENSHIP AND IMMIGRATION—Continued

Immigration Practice—Continued

statutory provision dealing with quorum, tribunal having implicit discretion over process by which discharges statutory responsibilities, subject to limitations expressly, impliedly imposed by enabling Act, other statutes, delegated legislation, including statutory rules of procedure, principles of administrative law, Constitution — Immigration Act neither expressly, nor impliedly requiring two members to hear application to reopen — Interpretation Act, s. 22(2), providing quorum comprise at least half members, not applicable as Immigration Act not prescribing number of members who may be appointed to Refugee Division — S. 22(2) applies only to bodies in respect of which Parliament fixing number of members to be appointed — Nothing in CRDD Rules requiring motions to reopen be heard by two-member panels — Implicit discretion over own process not displaced by presumption against sub-delegation of exercise of statutory powers affecting rights of individuals — Question certified: is Refugee Division properly constituted by single member when determining motion to reopen decision dismissing refugee claim on ground of procedural unfairness?

FAGHIHI V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 1 F.C. 249 (T.D.)

SIO finding applicant ineligible to have refugee claim determined by virtue of Immigration Act, s. 46.01(1)(*a*) on ground recognized as Convention refugee in Sierra Leone — Applicant having only refugee identity card issued by Sierra Leone — SIO may normally assume evidence establishing country granting asylum will also enable claimant to re-enter country — If evidence country of asylum will not readmit claimant, SIO may only find claimant ineligible under s. 46.01(1)(*a*) if satisfied, on reasonable grounds, claimant will be readmitted — No evidence applicant would not be readmitted to Sierra Leone where lived for seven years — Reasonable basis for belief could be returned to Sierra Leone — "Can be returned" not requiring SIO to determine whether claimant having well-founded fear of persecution in country already granting asylum — Repeal in 1993 of specific provision dealing with issue suggesting should not be read back into statute — Requiring SIO to determine whether claimant satisfying definition of Convention refugee incompatible with expeditious process contemplated by statutory scheme for screening certain claims out of Refugee Division's jurisdiction — Other provisions providing protection for persons in need of Canada's protection because fearing persecution in country of asylum i.e. s. 53 — Question certified: did SIO err in law in concluding for purpose of s. 46.01(1)(*a*) applicant "can be returned" to country where documentary evidence recognized as refugee, in absence of both travel document establishing right to enter or reside in that country, and of evidence will not be admitted?

JEKULA V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1999] 1 F.C. 266 (T.D.)

Appeal from dismissal of application for judicial review of IRB, Appeal Division's dismissal of appeal — Appellant applying for permanent residence of wife in 1993,

CITIZENSHIP AND IMMIGRATION—Continued

Immigration Practice—Continued

again in 1995 — Both applications refused on ground spouse excluded from family class by Immigration Regulations, 1978, s. 4(3) as marriage not *bona fide* — IRB,AD confirming visa officer's decision, dismissing first appeal — Dismissing second appeal on basis of *res judicata* — No new evidence — Under Immigration Act, s. 69.4(1), (3) IRB,AD "court of record" having "as regards matters necessary or proper for due exercise of jurisdiction all such powers, rights, privileges as are vested in a superior court of record" — Thus having jurisdiction to control process, prevent abuse — Second appeal abusive attempt to relitigate matter litigated in previous appeal — IRB,AD having jurisdiction to summarily dispose of such appeal.

KALOTI V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 3 F.C. 390 (C.A.)

Post-claims determination officer consulting articles published after appellant filing submissions with respect to application for consideration as member of PDRCC class — Motions Judge finding not introducing new information not otherwise readily available; reference thereto not constituting breach of duty of fairness — Answer to certified question: remembering each case decided according to own circumstances, with respect to documents relied upon from public sources in relation to general country conditions available, accessible (a) when applicant making submissions, fairness not requiring disclosure in advance of determination of matter; (b) after applicant filing submissions, fairness requiring disclosure where novel, significant, evidencing changes in country conditions possibly affecting decision — Regard had to nature of proceeding, rules under which decision-maker acting; context of proceeding; nature of documents at issue in proceeding — Question of fact for Motions Judge to determine whether failure to disclose document unfair — Motions Judge applying proper test — Within domain to decide evidence not affecting immigration officer's decision.

MANCIA V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1998] 3 F.C. 461 (C.A.)

Applicant found not entitled to landing under deferred removal orders class regulations as not in possession of passport, travel document — Passport subsequently issued to applicant by Iranian embassy — Original decision to refuse application for landing maintained — Whether immigration officer could reconsider decision on basis of new evidence — Immigration Act silent, case law unsettled as to application of doctrine of *functus officio* to decisions of immigration officers — Decision herein new decision subject to judicial review — Applicant not trying to avoid expiration of limitation period — Immigration officer having authority to reconsider decision on basis of new evidence — Principle of *functus officio* to be applied flexibly — Parliament's silence not intended to restrict immigration officer from reopening file in interests of justice.

NOURANIDOUST V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 1 F.C. 123 (T.D.)

CITIZENSHIP AND IMMIGRATION—Continued

Immigration Practice—Continued

Evidence — Appellant denied refugee status as serious reasons to believe had committed crimes against humanity and acts contrary to principles of United Nations — Minister's disclosure obligation regarding anticipated evidence of witnesses — Admissibility of expert evidence where expert not cross-examined.

SIAD V. CANADA (SECRETARY OF STATE), [1997] 1 F.C. 608 (C.A.)

Appeal from F.C.T.D. order setting aside I.R.B., Refugee Division decision respondent not Convention refugee — Decision signed by only one of two Board members hearing matter — Stating other member ceased to hold office — S. 69.1(7) conferring right to decision by two-member panel of Board — S. 63 indicating right can be abridged in event one of board members resigned, ceased to hold office, died, or unable to participate in decision — S. 69.1(10) granting claimants benefit of disagreement between Board members — That not taking part in disposition indicating "unable" to do so — Statute not requiring explanation for why decision not rendered by both members during extension, but F.C.A. decision in *Weerasinge v. Canada (M.E.I.)* requiring remaining Board member to place on record complete statement of material circumstances giving rise to invocation of s. 63(2) — Intended to inform claimants why lost advantage conferred by s. 69.1(10) — Bald statement departed member participated in disposition in accordance with s. 63(1) not satisfying *Weerasinge* as not indicating why two-member panel could not render decision before expiry of 8-week extension — Statement reasons reflecting thinking of panel when decision made ambiguous as not revealing when decision made — S. 69.1(10) requiring absolute certainty as to views of each Board member.

SINGH V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1998] 3 F.C. 127 (C.A.)

Motion for stay of appellant's removal from Canada pending disposition of appeal from dismissal of application for judicial review of Minister's danger opinion — Applicant, Tamil from Sri Lanka, Convention refugee — Member of LTTE, terrorist organization — Minister issuing security certificate pursuant to Immigration Act, s. 40.1 — Deportation order issued — In dismissing judicial review application, McKeown J. certifying questions for consideration — Application of tripartite test for granting stay formulated in *American Cyanamid Co. v. Ethicon Ltd.* — (1) Serious issues raised in certified questions — (2) When test formulated, H.L. probably not considering applicability in human rights context — Irreparable harm characterized in terms of that which cannot be compensated in monetary terms only in commercial context — No transgression of human right accurately measured, compensated by money, particularly in immigration cases involving deportation to country failing to abide by international norms respecting human rights — Two approaches to irreparable harm: assessment of risk of personal harm if person deported; assessment of effect of denial of stay application on person's right to have merits of case determined and to enjoy benefits associated with positive ruling — Subject to balance of convenience, if F.C.T.D. judges certifying questions of general importance, not unreasonable to defer

CITIZENSHIP AND IMMIGRATION—Continued

Immigration Practice—Concluded

execution of deportation orders where serious Charter issues relating to complex scheme for removing persons from this country and possibility would be exposed to inhumane treatment on arrival in former homeland — (3) Appellant's private interest outweighing public interest.

SURESH V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1999] 4 F.C. 206 (C.A.)

Judicial Review

Action for declarations Immigration Act, s. 52 unconstitutional and Charter rights infringed parallelling application for judicial review seeking same relief — Statement of claim should be struck as disclosing no reasonable cause of action — Availability of declaratory relief upon judicial review as much matter of statutory interpretation as of practical necessity in immigration law field — Given number of judicial review applications in immigration matters, initiation of parallel but unnecessary proceedings not in best interests of justice.

MOKTARI V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 2 F.C. 341 (C.A.)

Federal Court Jurisdiction

Motion for ruling Minister cannot execute departure order pending determination of application for leave to initiate judicial review proceedings of denial of Convention refugee status pursuant to Immigration Act, s. 49(1) — Applicant also seeking certification of question for appeal to F.C.A. — Under s. 83, certified question can be formulated only at time of judgment on judicial review — Court not having jurisdiction to certify question on motion incidental to leave application for judicial review.

ALBUJA V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 2 F.C. 538 (T.D.)

Muldoon J. ordering Minister to decide landing application — Landing subsequently refused — Applicant's wife, sponsor, appealing refusal — Court having jurisdiction to hear application for judicial review of refusal under jurisdiction to oversee, supervise execution of orders — Court issuing specific directions for Minister's guidance, previous Court order not having been complied with.

DEE V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 3 F.C. 345 (T.D.)

Application to set aside dismissal of application for leave, judicial review — Due to misunderstanding of Federal Court Rules, applicant's counsel not perfecting, within legal delays, application for leave to apply for judicial review — Notwithstanding Court's inherent jurisdiction to deal with matter involving law of immigration because

CITIZENSHIP AND IMMIGRATION—Continued

Judicial Review—Continued

Federal Court Jurisdiction—Continued

of Federal Court's exclusive jurisdiction in immigration matters, only F.C.A. having jurisdiction to review final decision of F.C.T.D. — Applicant's lack of English skills not basis for reopening matter already dismissed by final order — Questions certified: given that Federal Court Act, s. 18 grants F.C.T.D. exclusive jurisdiction to review decisions of immigration tribunals, whether F.C.T.D. having inherent jurisdiction to (1) vindicate legal right independent of statutory grants contained in Federal Court Act, Federal Court Rules, 1998, Immigration Act; (2) set aside order dismissing application for leave, judicial review, independent of rr. 397, 398.

GUZMAN V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 1 F.C. 286 (T.D.)

Judicial review of Senior Immigration Officer's (SIO) decision applicant ineligible pursuant to Immigration Act, s. 46.4(1) to have refugee status claim determined by CRDD, declaring Refugee Division's decision re: claim null, void — Applicant granted Convention refugee status — SIO subsequently concluding applicant obtained referral to Refugee Division by fraud, misrepresentation of material fact — Court lacking jurisdiction on judicial review to decide constitutional questions because SIO lacking power to determine questions of law — Administrative tribunal not having independent source of jurisdiction pursuant to Constitution Act, 1982, s. 52(1) — Powers to determine questions of law must be conferred either expressly or implicitly — Immigration Act not expressly conferring on SIO authority to consider questions of law — Courts have yet to decide whether jurisdiction conferred implicitly on SIO to consider questions of law — S.C.C. case suggesting tribunal should have adjudicative role to have power to determine questions of law — SIO not having adjudicative function — Simple administrative procedure whereby SIO making decision as to refugee claimant's eligibility — Parliament not intending to confer on SIO s. 52(1) jurisdiction — Question certified: Whether SIOs having implied jurisdiction to decide questions of law; if not, whether F.C.T.D., when hearing judicial review application under Federal Court Act, s. 18.1, having jurisdiction to decide constitutional validity of Immigration Act section.

GWALA V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1998] 4 F.C. 43 (T.D.)

Certified question — Senior immigration officer not having implied jurisdiction to decide questions of law for reasons given by F.C.T.D. Judge reported at [1998] 4 F.C. 43.

GWALA V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1999] 3 F.C. 404 (C.A.)

Judicial review of immigration officer's decision applicant ineligible pursuant to Immigration Act, s. 44 to have refugee status claim referred to CRDD because removal

CITIZENSHIP AND IMMIGRATION—Continued

Judicial Review—Concluded

Federal Court Jurisdiction—Concluded

order against him not executed — Respondent submitting constitutionality of s. 44(1) must be raised by way of action, not by application for judicial review under Federal Court Act, s. 18.1 because applicant not seeking declaratory relief, immigration officer not having authority to make constitutional determinations — Court may grant declarations of invalidity under s. 18.1(3)(*b*) giving Court power to "declare invalid or unlawful" decision of federal board, commission, tribunal — Under s. 18.1(4)(*f*), F.C.T.D. may grant relief where federal board, commission tribunal acting in any other way contrary to law, Court may consider constitutional arguments even where tribunal whose decision under review cannot make constitutional decisions.

RAZA V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1999] 2 F.C. 185 (T.D.)

Status in Canada

Citizens

Citizenship of foreign-born children adopted abroad by Canadian citizens resident in foreign country — Added requirements for citizenship pursuant to Citizenship Act, ss. 3(1)(*e*), 5(2)(*a*) discrimination prohibited by Canadian Human Rights Act (CHRA), ss. 3, 5 — *Prima facie* discrimination — Appellant qualifying as victim under CHRA — Tribunal erred in ruling on whether permanent residency requirements justified by CHRA, s. 15(*g*) — Breach of natural justice as Minister not on notice Citizenship Act, s. 5(2)(*a*) at issue until end of argument in reply — In dissenting opinion, Linden J.A. considering issue whether necessary to discriminate against foreign-born adopted children to achieve policy objective of legislation: prevent abuse of immigration system by phony adoptions.

CANADA (ATTORNEY GENERAL) V. MCKENNA, [1999] 1 F.C. 401 (C.A.)

Citizenship Act, s. 18(1)(*b*) reference to determine whether respondent obtaining citizenship by false representation, fraud, knowingly concealing material circumstances — After Canadian citizenship application filed, but before hearing before Citizenship Judge, respondent charged with criminal offences — Convicted after swearing oath of citizenship — Subsequently found guilty under Citizenship Act, s. 29(2)(*a*) of knowingly concealing from Citizenship Judge material circumstance i.e. charged with criminal offence at time of hearing — Notice of revocation of citizenship issued — On evidence of Citizenship Judge, citizenship officer, and according to standard of high degree of probability, respondent knowingly concealed outstanding criminal charges.

CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) V. COPELAND, [1998] 2 F.C. 493 (T.D.)

Reference under Citizenship Act, ss. 10, 18 as to whether respondent obtained citizenship by false representation, fraud, concealing material circumstances —

CITIZENSHIP AND IMMIGRATION—Continued

Status in Canada—Continued

Citizens—Continued

Proceedings said to be prosecution for war crimes under guise of citizenship reference — Citizenship reference civil in nature without penal consequence — Decision under Act, s. 18 factual finding not determinative of legal rights — Forfeiture of fruits of fraud not punishment *per se* — No retribution involved — Act imposing on citizenship applicants duty to be truthful.

CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) V. DUECK, [1998] 2 F.C. 614 (T.D.)

Revocation of citizenship — Reference seeking declaration respondent obtained citizenship by false representation, fraud, knowingly concealing material circumstances — In 1948 respondent's uncle in Saskatchewan applied for admission of respondent, then DP living in Austria, by completing Form 55 sponsorship application — Form not requiring information on wartime activities — Respondent's travel document bearing medical, visa stamps, but not security officer's stamp — Court finding respondent acting as translator for auxiliary police in German occupied Ukraine during World War II — Respondent becoming Canadian citizen in 1957 — Applicant not demonstrating respondent admitted to Canada by failing to disclose collaborationist past — (1) Not establishing consistent process applied to all immigrants from Austria in July 1948, that process, if applicable, would have elicited answers about respondent's wartime activities, or that collaborators "generally" prohibited from entering Canada — To demonstrate respondent personally interviewed, necessary to establish respondent admitted under special employment category — Applicant admitting respondent probably admitted as agriculturalist — In 1948 some immigration officers of view agriculturalists not to be security screened — (2) Unlikely security criteria applicable in July 1948 would have resulted in respondent being prohibited from entering Canada — Screening criteria applied in July 1948 imprecise — Evidence suggesting application of prohibition relating to collaborators directed to specific instances of collaboration — No blanket prohibition for collaborators — (3) In July 1948 security officers not having legal authority to reject respondent on ground collaborated with enemy during World War II — Cabinet considered security of uppermost concern, but decided to deal with security screening by administrative, rather than legislative means — Immigration Act, s. 38 providing required authority for doing so, subject to passage of appropriate order — Order in council, amendments permitting admission of DPs, not legal authority for rejection of immigrants on security grounds.

CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) V. DUECK, [1999] 3 F.C. 203 (T.D.)

Motion to stay revocation of citizenship proceedings — Motion based on ground of non-disclosure of evidence; unfairness; fact Rules changed in midst of proceedings — Crown's explanation for destruction of evidence satisfactory given perceived relevance of file at time of destruction — Delay between filing statement of claim, unfolding of

CITIZENSHIP AND IMMIGRATION—Continued

Status in Canada—Continued

Citizens—Continued

these proceedings not prejudicial — When multiple avenues of proceeding open to Crown, i.e. criminal prosecution, revocation of citizenship, Crown at liberty to pursue whichever avenue chooses — No basis to grant stay that revocation proceedings not instituted against all those named in Deschênes Commission Report.

CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) V. KATRIUK, [1999] 3 F.C. 143 (T.D.)

References filed by Minister under Citizenship Act, s. 18 seeking declarations respondents admitted to Canada for permanent residence by false representations, fraud or by concealing material circumstances — Assistant Deputy Attorney General privately meeting with Chief Justice of Federal Court to discuss slow pace of proceedings — Judicial independence not breached — Stay of proceedings inappropriate remedy.

CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) V. TOBIASS, [1997] 1 F.C. 828 (C.A.)

Practice — Application for citizenship left in abeyance more than three years on ground CSIS investigation not concluded — Unreasonable delay — Where applicant *prima facie* satisfying conditions precedent specified in Citizenship Act, s. 5(1) and where demand for performance, authorities have duty to act — *Mandamus* — Registrar of Citizenship must inform CSIS unless justification for continuing investigation provided as soon as Registrar shall consider appropriate, investigation will be considered closed and application will be forwarded to citizenship judge to consider and decide application.

CONILLE V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1999] 2 F.C. 33 (T.D.)

Application for permanent residence for husband, wife and children, cosigned by husband, wife — Family granted landing — Adjudicator later found husband inadmissible by reason of previous criminal conviction and having misrepresented material facts in application by failing to disclose conviction — Three years after landing, Citizenship Judge, unaware of fact Minister considering proceedings against appellants (wife and children) on basis of same misrepresentation, approved appellants for citizenship — Appellants never called to take citizenship oath — *Mandamus* not available to compel government to administer citizenship oath to appellants — Appellants have not satisfied all conditions precedent as not having established lawfully admitted to Canada — Reasonable to withhold citizenship until status of husband finalized — Question whether appellants coming to Court with clean hands as wife signed sworn application containing material misrepresentation — As *mandamus* within

CITIZENSHIP AND IMMIGRATION—Continued

Status in Canada—Continued

Citizens—Concluded

discretion of Motions Judge and as discretion exercised judicially, appellate court will not interfere.

KHALIL V. CANADA (SECRETARY OF STATE), [1999] 4 F.C. 661 (C.A.)

Whether employment preference in favour of Canadian citizens created by PSEA, s. 16(4)(*c*) violating Charter, s. 15(1) — Application of citizenship preference discretionary at referral stage under s. 16(4)(*c*) — Preference not excluding non-citizens from competing in open competitions but qualified Canadian candidates given priority — Citizenship requiring attachment to Canadian laws, institutions, commitment to duties — Impugned legislation reasonable exercise by Parliament of power with respect to citizenship — Disadvantage created by impugned statutory provision not pertaining to human dignity of permanent residents — Canadian citizens, permanent residents not "similarly situated".

LAVOIE V. CANADA, [2000] 1 F.C. 3 (C.A.)

Application for judicial review of Passport Office decision revoking applicant's Canadian passport pursuant to Canadian Passport Order (CPO), s. 10(*b*) for having used passport to assist cousin to enter Canada illegally, contrary to CPO, s. 94(2) (hybrid offence punishable by indictment or by way of summary conviction) — CPO, s. 10(*b*) providing for revocation of passport where passport used to assist in commission of indictable offence — Case law establishing hybrid offence indictable offence even when, as herein, Crown electing proceed by way of summary conviction — Director erred in exercising discretion as mistakenly believed applicant had given cousin opportunity to "jump ahead" of other refugee claimants — In fact, no queue for refugee claimants.

VITHIYANANTHAN V. CANADA (ATTORNEY GENERAL), [2000] 3 F.C. 576 (T.D.)

Respondent applying for Canadian citizenship — Minister reporting pursuant to Citizenship Act, s. 19(2) to SIRC outlining reasonable grounds to believe respondent would engage in activity constituting threat to security of Canada, based on information, advice provided by CSIS — SIRC commencing investigation — SIRC involved in report on which Minister relying to report to SIRC — While SIRC's functions having some adjudicative characteristics, important policy considerations coming into play — Applying standard of impartiality closer to "open mind" than "informed bystander", SIRC's statements in report focusing primarily on CSIS's activities not preventing conduct of another investigation focused on respondent in light of information supplied by him in citizenship proceeding.

ZÜNDEL V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1998] 2 F.C. 233 (C.A.)

CITIZENSHIP AND IMMIGRATION—Continued

Status in Canada—Continued

Convention Refugees

Appeal from F.C.T.D. judgment reversing in part Refugee Division's decision — Refugee Division vacating visa officer's determination respondents Convention refugees; determining respondents not Convention refugees on application pursuant to Immigration Act, s. 69.2(2) — First respondent admitting false statements in application for permanent residence — S. 69.2(2) permitting application to Refugee Division "to reconsider and vacate" determination person Convention refugee on ground determination obtained by fraudulent means, misrepresentation — S. 69.3(4) providing Refugee Division shall "approve or reject" application under s. 69.2(2) — Under s. 69.3(5) may reject application if other sufficient evidence on which application could have been based — Motions Judge setting aside portion of Refugee Division's decision respondents not Convention refugees — Appeal allowed (Robertson J.A. dissenting) — Refugee Division not limited to "vacating" determination person Convention refugee on application under s. 69.2(2), but may "reconsider, vacate" any such determination under Act, regulations — Under s. 69.3(4) may approve or reject "application" (referring to s. 69.2(2) application) — When ss. 69.3(4), 69.2(2) read together, Refugee Division authorized to "approve or reject" application to "reconsider and vacate" — "Reconsider" not limiting power of Refugee Division to dealing with prior determination of own — Power of reconsideration in addition to that of vacating determination.

BAYAT V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1999] 4 F.C. 343 (C.A.)

Applicants, Polish Gypsies, habitual shoplifters before, after seeking refuge in Canada — Whether "serious non-political crime" under U.N. Convention Relating to the Status of Refugees, Art. 1F(b) — Authorities on meaning of "serious non-political crime" reviewed — *Travaux préparatoires* disclosing intention of Convention signatories to exclude minor crime even when repeated — "Theft under", shoplifting not "serious" crimes within meaning of Art. 1F(b) — Applicants' convictions in Canada not relevant — Questions certified for appeal.

BRZEZINSKI V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1998] 4 F.C. 525 (T.D.)

Judicial review of IRB decision claimant Convention refugee, not excluded from protection because of membership in Mujahideen — Immigration Act, s. 2(1) definition of "Convention refugee" excluding any person to whom Convention not applying pursuant to Art. 1E, F — Art. 1F(*a*) excluding from definition persons with respect to whom serious reasons for considering committed crime against peace, war crime or crime against humanity — Signed document stating claimant member of Mujahideen from 1979 to 1985, but claimant asserting notation "member" not in his handwriting — Board focusing on claimant's lack of personal involvement in specific acts, referring to organization as terrorist organization — Reference to international instruments for

CITIZENSHIP AND IMMIGRATION—Continued

Status in Canada—Continued

Convention Refugees—Continued

definitions of war crimes, crimes against humanity — F.C.A. cases dealing with Art. 1F(*a*) reviewed — Analysis in Art. 1F(*a*) case where membership in organization alleged to constitute presumption of complicity in crimes against humanity requiring: (a) assessment of nature of organization, i.e. whether directed to limited brutal purpose; (b) assessment of individual's involvement with organization, i.e. whether member thereof, or involvement such that inference sharing group's common purpose — (a) Board not analyzing evidence respecting nature of Mujahideen — Although not immediately obvious evidence supporting conclusion organization directed to limited brutal purpose, Board should have made clear finding on issue — (b) Board making no decision with respect to claimant's involvement in Mujahideen — In absence of some reason to believe form altered after signed, reasonable to assume alteration made at claimant's direction or with acquiescence — Board not analyzing evidence adduced to support inference of involvement — Applied incorrect test by asking whether claimant personally involved in crimes alleged, in sense of physically present, rather than whether involvement such as to encourage, enable commission of alleged crimes by others — Characteristics transforming common crime into crime against humanity not well articulated — Material on record not immediately supporting finding organization's activities crimes against humanity — Matter referred back to differently constituted Board.

CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) V. HAJIALIKHANI, [1999] 1 F.C. 181 (T.D.)

Judicial review of CRDD decision respondents Convention refugees based on conclusion "clear, convincing" proof U.K., U.S.A. not providing state protection for sexually molested child — Absent complete breakdown of state apparatus, presumption state capable of protecting claimant — Regarding democratic state, claimant must do more than show went to some members of police force, efforts unsuccessful — In U.K., respondents lodged complaints with Office of Local Ombudsman, one police station, social services agency — In U.S.A. lobbied senior levels of U.S. Department of Justice — Evidence substantially short of discharging burden of proof — CRDD decision finding "clear and convincing" proof required to rebut presumption of state protection unreasonable, clearly wrong or even perverse.

CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) V. SMITH, [1999] 1 F.C. 310 (T.D.)

Judicial review of CRDD's decision applicants not Convention refugees — Applicant citizen of El Salvador — Marrying citizen of Mexico where lived since 1981 — Three children (minor applicants) born in Mexico — Board holding children having dual nationalities — Finding applicant, children not having fear of persecution in El Salvador — Immigration Act, s. 69(4) providing Refugee Division shall designate another person to represent applicants under 18 or unable to appreciate nature of

CITIZENSHIP AND IMMIGRATION—Continued

Status in Canada—Continued

Convention Refugees—Continued

proceedings — (1) Imposing duty to assess whether person to be designated appreciating nature of proceedings, particularly in case of designated representative for children as outcome of claim may be contingent upon such designation — Minor applicants denied fair hearing because lack of knowledge of meaning of "designated representative" precluding full presentation of claim — Duty exists even if refugee claimants represented by counsel — (2) Open to Board, given documentary evidence relied upon, to conclude applicants nationals of El Salvador — (3) No need for Board to consider claim of persecution with respect to another country where already found applicant not having well-founded claim in country where returning applicant not facing reasonable possibilty of persecution.

ESPINOZA V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1999] 3 F.C. 73 (T.D.)

Judicial review of CRDD decision applicant not Convention refugee — Applicant, national of Venezuela, convicted in Canada of conspiracy to effect escape from Canadian jail of Colombian drug traffickers — CRDD holding applicant excluded from consideration as Convention refugee by United Nations Convention Relating to the Status of Refugees, Art. 1F(c): Convention not applicable to persons whom serious reasons for considering guilty of acts contrary to purposes of UN — CRDD erred in law — S.C.C. in *Pushpanathan* holding until international community makes clear its view drug trafficking serious violation of fundamental human rights amounting to persecution, no rationale for including it among grounds for exclusion.

FREITAS V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1999] 2 F.C. 432 (T.D.)

Principal applicant, five others filing complaint with regional governing authority in Ukraine about widespread corruption of government officials — Suffering retaliation thereafter — Claimed Convention refugee status based on political opinion — IRB relying upon S.C.C. decision in *Ward*, defining political opinion as opinion on any matter in which machinery of state, government, policy may be engaged, and on F.C.T.D. decision in *Femenia v. Canada (MCI)*, specifying for matter to be so "engaged", must be sanctioned, condoned, supported by state — Motions Judge erred in accepting *Femenia* interpretation of *Ward* — Meaning given to "engaged" in *Femenia* inconsistent with *Ward* — In *Ward*, S.C.C. holding opinion "political" for purposes of s. 2(1) definition of Convention refugee whether or not accorded with official government position — Application of *Femenia* test also creating inconsistency among grounds of persecution — Under *Femenia*, only those persecuted for political opinion at hands of third parties who disobey official government policy, not other enumerated grounds, not qualifying for Convention refugee status — Inconsistency resulting from confusion between nature of political opinion, state's willingness to protect victims of persecution — Opinion not ceasing to be political because

CITIZENSHIP AND IMMIGRATION—Continued

Status in Canada—Continued

Convention Refugees—Continued

government agreeing with it — Widespread government corruption matter in which machinery of state "may be engaged".

KLINKO V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 3 F.C. 327 (C.A.)

Quality of interpretation — In proceedings before CRDD, refugee claimants have Charter-guaranteed right to interpretation which is continuous, precise, competent, impartial and contemporaneous — Proof of prejudice not required — However, complaints about quality of interpretation must be made at first opportunity.

MOHAMMADIAN V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 3 F.C. 371 (T.D.)

Application for judicial review of CRDD decision applicant not Convention refugee — Applicant, Tamil woman of Sri Lanka, seeking refugee status on ground of well-founded fear of persecution by reason of membership of particular social group — Whether fact having relatives in Canada, none in safe place relevant in determining whether unreasonable to expect applicant to live in Colombo — Case law on unreasonableness issue reviewed — Correctness appropriate standard of review of determination by CRDD of whether claimant has IFA — As CRDD erred in failing to take into account applicant has family in Canada, no relatives in Colombo but not in finding applicant having no grounds to fear persecution in Colombo, case remitted to different panel to decide whether, for second limb of Rasaratnam test, unduly harsh to expect applicant live in Colombo.

RANGANATHAN V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1999] 4 F.C. 269 (T.D.)

Exclusion — Crimes against humanity — Complicity — Need not be shown that claimant linked to specific crimes as actual perpetrator.

SUMAIDA V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 3 F.C. 66 (C.A.)

Judicial review of SIO's decision applicant ineligible to have Convention refugee claim referred to CRDD pursuant to Immigration Act, s. 46.01(1)(*d*) — S. 46.01(1)(*d*) prohibiting determination by Refugee Division if Convention refugee claimant determined under this Act, regulations to be Convention refugee — Applicant citizen of Ethiopia in 1981 — Determined to be Convention refugee in 1984 against Ethiopia, including what now Eritrea — Applicant now citizen of Eritrea, having no right of return to Ethiopia — Acquired landed status in 1986 — Conditional deportation order issued in 1998 — Seeking Convention refugee status against Eritrea — Application dismissed — Applying purposive approach to statutory construction, "this Act"

CITIZENSHIP AND IMMIGRATION—Continued

Status in Canada—Continued

Convention Refugees—Concluded

referring to Act in which appears, not as it read when those words inserted into Act and thereafter, but as read before, since words inserted, and until words "this Act" changed, or Act repealed, reenacted — Applicant cannot have refugee claim determined against country not in existence when determination made and to which will be removed — Result inconsistent with objective of immigration policy set out in Act, s. 3(*g*), recent history i.e. fragmentation of countries.

TEWELDE V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1999] 4 F.C. 522 (T.D.)

How stateless person habitually residing in more than one country may establish claim for Convention refugee status — Appellant, stateless Palestinian, lived in Kuwait and U.S.A. before applying for refugee status in Canada — Whether claim must be established in respect of all countries of habitual residence — Persecuted persons not having absolute right to demand protection by Canada: *Canada (Attorney General) v. Ward* — Claim to refugee status not to be resorted to unless all other possibilities exhausted — Person not refugee solely by virtue of statelessness — Test to be applied as to which country relevant to determination of claim: any country plus Ward factor — Immigration and Refugee Board asking appropriate question as to why applicant denied entry to Kuwait, country of former habitual residence.

THABET V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1998] 4 F.C. 21 (C.A.)

State protection — Judicial review of CRDD decision applicants not Convention refugees because no refusal of state protection in failure by Russian police to act on complaints, simply no basis on which to proceed with investigation — Where state not agent of persecution, lack of state protection assessed as matter of state capacity to provide protection rather than from perspective of whether local apparatus provided protection in given circumstance — Where evidence situating individual claimant's experience as part of broader pattern of state inability or refusal to extend protection, absence of state protection established — Local refusal to provide protection not state refusal in absence of evidence of broader state policy to not extend state protection to target group — In states where internal movement restricted, failure to remedy local conditions may amount to state failure to provide protection — CRDD's cursory analysis insufficient — Persistent failure by police to act requiring close examination of reasonableness, *bona fides* of police action, particularly where citizen's right to internal movement limited.

ZHURAVLVEV V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 4 F.C. 3 (T.D.)

CITIZENSHIP AND IMMIGRATION—Continued

Status in Canada—Continued

Permanent Residents

Judicial review of visa officer's decision denying applicant permanent resident status as inadmissible under Immigration Act, s. 19(1)(*c.2*) (reasonable grounds to believe member of organization reasonably believed to have engaged in criminal activity) — Applicant well-known Hong Kong actor — Prior to interview, visa officer informing applicant reasons to believe may be person described in s. 19(1)(*c.2*), explaining aim of interview to ascertain whether maintained links with triads, other organized criminal elements — In decision visa officer stressing applicant's long-term relationship, business association with member of ruling council of powerful triad, which controlled film company with which applicant made several films — "Reasonable grounds" *bona fide* belief in serious possibility based on credible evidence — Visa officer outlining facts on which relied to believe applicant triad member — As having extensive experience, specialized knowledge of triad activities in Hong Kong, elsewhere, Court viewing his definition of "reasonable grounds", "member" with considerable deference — Difficulty investigating member of organized crime, that membership lifelong, enforcement objectives of Act (s. 3(*i*), (*j*)) leading to conclusion "member" of criminal organization meaning "belonging" — Not limited to formal membership coupled with active participation in unlawful acts — Onus on applicant to disabuse visa officer of concerns — Information before visa officer sufficient to allow for determination applicant member of criminal organization — Question certified as to proper interpretation of "reasonable grounds", "member".

CHIAU V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1998] 2 F.C. 642 (T.D.)

Application to set aside refusal of landing because Minister not satisfied applicant rehabilitated — Application allowed — Refusal based on ancillary decision as to rehabilitation which was set aside because of denial of natural justice, procedural fairness — Also serious questions as to whether landing decision properly made, communicated.

DEE V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 3 F.C. 345 (T.D.)

Post-determination refugee claimants in Canada class (PDRCC) — Applicant's refugee status claim rejected in February 1994 on ground excluded from Convention refugee definition by Convention, Art. 1F(a) (crime against humanity) — Applicant advised in August 1997 did not qualify for risk assessment as member of PDRCC class — Applicant's deemed application for landing as member of PDRCC class to be determined under Immigration Regulations in force when August 1997 decision made (including amendment to Immigration Regulations, in force as of May 1997, excluding those whose refugee claims rejected under Art. 1F(a)) — Question certified.

DIAZ V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1999] 2 F.C. 496 (T.D.)

CITIZENSHIP AND IMMIGRATION—Continued

Status in Canada—Continued

Permanent Residents—Continued

F.C.T.D. dismissing application for judicial review, certifying question as to whether sponsor can re-apply for admission to Canada of spouse as member of family class under Immigration Regulations, 1978, s. 4(3) on ground of change of circumstances where previous application denied on ground immigrant entered into marriage primarily to gain admission to Canada — Question going beyond circumstances — Inviting opinion as to right to even re-apply to visa officer — Inappropriate to speak of change of circumstances in s. 4(3) proceedings — Intent of sponsored spouse at time of marriage fixed in time, cannot change.

KALOTI V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 3 F.C. 390 (C.A.)

Principal applicant, citizen of Afghanistan, determined to be Convention refugee — MCI failing to grant him permanent resident status, record of landing document — Also failing to issue immigrant visas to other applicants, to return identity documents seized under Immigration Act, s. 110(2) — No reasons provided as to why identity documentation presented by principal applicant determined to be insufficient — MCI committing reviewable error in processing of application for landing — Also erred in not providing reasons for rejection of identity documents provided by applicant.

POPAL V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 3 F.C. 532 (T.D.)

Appeal from dismissal of application for judicial review of visa officer's second refusal of application for permanent residence based on exercise of discretion under Immigration Regulations, 1978, s. 11(3)(*b*) — Application first refused on ground insufficient units of assessment, but error in calculation and that appellant having 2 more points than normally required later acknowledged — S. 11(3)(*b*) extraordinary power intended for exceptional cases — Not providing visa officers with general discretion to revisit assessment — In exercising power under s. 11(3)(*b*) after appellant satisfying selection criteria, visa officer depriving appellant of legitimate expectation visa would be issued — Visa officer should have explained concerns to appellant permitting him to respond.

SADEGHI V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 4 F.C. 337 (C.A.)

Humanitarian and Compassionate Considerations

Since S.C.C. decision in *Baker*, content of duty of fairness owed by immigration officers deciding inland humanitarian and compassionate applications no longer minimal, requiring applicant be fully informed of PCDO's risk assessment report, and be permitted to comment on it, even if report based on information submitted by or reasonably available to applicant.

HAGHIGHI V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 4 F.C. 407 (C.A.)

CITIZENSHIP AND IMMIGRATION—Concluded

Status in Canada—Concluded

Persons with Temporary Status

Judicial review of T.C.C. decision upholding denial of U.I. benefits — While permanent resident application pending, applicant working as housekeeper without permit — Immigration Regulations, s. 18(1) prohibiting those without permanent resident status from working without authorization — Tax Court holding applicant's contract of service illegal as violating s. 18 — Applicant legal immigrant, acting in good faith — Penalty disproportionate to breach — Not disentitled to benefits on ground of statutory illegality — Regulations encourage persons in applicant's position to take job Canadians unwilling to accept or for which insufficient qualified Canadian — Unnecessary to deny relief to preserve integrity of legal system.

STILL V. M.N.R., [1998] 1 F.C. 549 (C.A.)

CIVIL CODE

Prescription — Appeal from trial judgment holding Civil Code, Art. 2261 prescribing patent infringement actions — For prescription purposes, patent infringement characterized as offence, quasi-offence under law of Quebec — Art. 2261 barring such action if not brought within two years of act complained of.

BELOIT CANADA LTD. V. VALMET-DOMINION INC., [1997] 3 F.C. 497 (C.A.)

Limitation of actions — Applying transitional provisions, instant case governed by new Code — Prescription cannot be pleaded by appellant as had demonstrated intention of renouncing it (Code, Art. 2881) — Respondents would suffer harm if appellant allowed to invoke ground of defence for first time on appeal.

HAMEL V. CANADA, [1999] 3 F.C. 335 (C.A.)

Preliminary article of Civil Code of Québec stating Code foundation of all other laws, although other laws may complement, make exceptions to Code — Art. 620 providing persons convicted of making attempt on life of deceased unworthy of inheriting — Predecessor providing those convicted of killing or attempting to kill deceased unworthy of inheriting — While old wording excluding need for any conscious intent, since person can be convicted of killing without having intended it, phrase "making an attempt on the life" in Art. 620 implying intent to kill — Homicidal intent necessary condition for unworthiness.

ST-HILAIRE V. CANADA (ATTORNEY GENERAL), [1999] 4 F.C. 23 (T.D.)

CONSTITUTIONAL LAW

Responsible government — Law and convention — Executive branch — Cabinet and Privy Council — In 1946, Cabinet deciding to deal with security screening of immigrants otherwise than by legislation — Security process not to be made public —

CONSTITUTIONAL LAW—Continued

Dealt with by departmental administrative action — RCMP given duty of conducting screening process abroad — Applicable security criteria provided in verbal instructions given by headquarters — No appeal from rejection as such considered impracticable — Grounds for rejection reported only to superior officers — Fear of communist infiltration at heart of preoccupation with secrecy — Although Secretary to Cabinet specifically asked by Prime Minister whether any authority for rejecting immigrants on security grounds, he advised only that matter dealt with by "administrative means" — Cabinet decisions of 1946, 1947 set government policy — But Cabinet decisions must be made legally effective by statute or through Governor in Council's legal authorities — As of July 1948 such had not taken place — Contemporary Cabinet papers reveal existing Order in Council neither intended nor considered as authority for security screening — No legal authority in July 1948 to reject immigrant as enemy collaborator.

CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) V. DUECK, [1999] 3 F.C. 203 (T.D.)

F.C.T.D. Judge declaring Order in Council truncating Somalia inquiry *ultra vires* Governor in Council as breaching rule of law — F.C.A. hearing appeal, although moot, as decision below going to heart of division of powers between Judiciary, Executive — Extent to which court may interfere with discretionary decisions of Governor in Council — Trial Judge should have denied judicial review application for lack of justiciable issue — Outside court's adjudicative role to consider whether Governor in Council's decision motivated by political expediency.

DIXON V. CANADA (GOVERNOR IN COUNCIL), [1997] 3 F.C. 169 (C.A.)

Fundamental principles — Objection to disclosure of information pursuant to Canada Evidence Act, ss. 38(6), 39 — S. 38(6) permitting *ex parte* objections to disclosure of information relating to national security — S. 39 providing where Clerk of Privy Council objecting to disclosure of information, disclosure shall be refused without judicial examination — Applicants submitting s. 39 unconstitutional as contrary to largely unwritten fundamental, organizing principles of Constitution i.e. separation of powers, independence of judiciary, rule of law — Unwritten constitutional norms may be used to fill gap in express terms of constitutional text, or as interpretative tools where section of Constitution not clear — Principles of judicial review not enabling Court to strike down legislation in absence of express provision of Constitution contravened by legislation — Requisite express constitutional provision not existing herein — No gap in Constitution to be filled — Largely unwritten constitutional norms not sufficient to invalidate otherwise properly enacted legislation — Applicants argued by giving executive judicial function (discretion to determine whether relevant evidence should be disclosed), s. 39 offending doctrine of separation of powers — S.C.C. holding Parliament can confer legal functions on courts, certain judicial functions on bodies not courts — Therefore Parliament can confer judicial powers on executive — S. 39 not immunizing executive decisions (to exempt Cabinet documents from disclosure) from judicial review on jurisdictional grounds — S. 39 not contrary to

CONSTITUTIONAL LAW—Continued

Constitution Act, 1867, s. 96 — Implied doctrine of separation of powers not recognized in Canadian Constitution, cannot be used to strike down *intra vires* legislation not contrary to Charter — S. 39 not contravening independence of judiciary — No breach of rule of law — Rule of law cannot strike down legislation — Parliament, not courts, free to review Crown's rights, privileges — S. 39 privilege given to executive in legislation enacted by Parliament — Statute law may modify, rather than declare, common law — Parliament's failure to amend s. 39 in light of *Carey v. Ontario*, setting out common law principles of executive privilege, indicative of unwillingness to modify law.

SINGH V. CANADA (ATTORNEY GENERAL), [1999] 4 F.C. 583 (T.D.)

Fundamental principles — Appeal from F.C.T.D. judgment dismissing action for declaration Canada Evidence Act, s. 39 unconstitutional — S. 39 providing where Clerk of Privy Council certifying in writing document confidence of Queen's Privy Council, disclosure shall be refused without examination, hearing of information by court — Constitution supreme over ordinary laws — Legislation not presumed unconstitutional because alters common law — History of s. 39 in light of common law — *Prima facie* s. 39 *intra vires* measure to define privileges of federal Executive in furtherance of well-established principles of Cabinet secrecy — No clear, compelling contrary constitutional imperative — Separation of powers should embrace mutual respect among "branches" of government — Certification of fact binding on courts because nature of subject-matter consistent with traditional bounds of mutual respect owed by each "branch" of government to others — Maintenance of Cabinet secrecy fundamental policy reason of quasi-constitutional nature for identification by Executive of documents generated in internal decision-making process which should not be disclosed — Review of elements of rule of law — Not basis for ignoring s. 39 — As to independence of judiciary, s. 39 not interfering with security of tenure, financial security, administrative independence of judges — Constitutional limitations on withdrawal of functions from courts in Constitution Act, 1867, s. 96, Charter, s. 11(*d*) not applicable.

SINGH V. CANADA (ATTORNEY GENERAL), [2000] 3 F.C. 185 (C.A.)

Fundamental principles — Judicial immunity not inconsistent with Charter equality rights as itself fundamental constitutional principle — In light of constitutional importance of judicial immunity,"bad faith" exception to judicial immunity narrow — Not engaged merely where error in exercise of judicial discretion, as herein — Recognition of exception to judicial immunity not opening floodgates to vexatious claims — Legal system providing sufficient protection against totally unmeritorious claims.

TAYLOR V. CANADA (ATTORNEY GENERAL), [2000] 3 F.C. 298 (C.A.)

Aboriginal and Treaty Rights

Appeal from F.C.T.D. judgment holding Indian Act, s. 77(1), requiring band members to be "ordinarily resident" on reserve to vote in Band Council elections,

CONSTITUTIONAL LAW—Continued

Aboriginal and Treaty Rights—Continued

violating Charter, s. 15 equality guarantees — To establish right to exclude non-resident members of Band from democratic decision-making protected, must demonstrate right is practice, custom or tradition integral to distinctive culture of Band — Factors to consider when applying preceding test — Prior to 1902 no electoral system for selection of band chief to which residency requirement could be directed — Existence of practice prior to contact with European societies not established — Right to s. 35(1) protection, recognizing prior occupancy of lands by Aboriginal peoples, not established.

BATCHEWANA INDIAN BAND (NON-RESIDENT MEMBERS) V. BATCHEWANA INDIAN BAND, [1997] 1 F.C. 689 (C.A.)

Actions for reimbursement of tuition, instructional fees, accommodation, travel costs for Aboriginal children not living on reserve — Crown agreeing to pay salaries of teachers to instruct children under Treaty No. 11 — Actions dismissed — Benefits so conferred not extending beyond treaty area — Court must take into account context in which treaty negotiated; words interpreted in sense naturally understood by Indians at time of signing — When treaty executed, Native children receiving free education — Treaty confirming pre-existing situation — Bands' main concern medical attendance, schools at each post — Natives at time of signing not understanding education provision as conferring on them universal right to education — Constitution Act, 1982, s. 35(1) guaranteeing (i) access to free education (ii) confined to area defined in treaty (iii) akin or equivalent to education provided to non-native children in public school system.

BEATTIE V. CANADA (MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT), [1998] 1 F.C. 104 (T.D.)

Negotiation of aboriginal land claims in context of treaty process — Minister of Canadian Heritage desiring to create Torngat National Park in Northern Labrador — Negotiations thereon between Minister of Canadian Heritage, Newfoundland and Labrador Government, and Labrador Inuit Association — Nunavik Inuit, with whom Federal Crown engaged in comprehensive land claims settlement negotiations, excluded from process because provincial government not recognizing them — Duty to consult and negotiate in good faith — Agreement in principle between federal government and applicant constituting recognition park cannot be established until negotiations completed.

MAKIVIK CORP. V. CANADA (MINISTER OF CANADIAN HERITAGE), [1999] 1 F.C. 38 (T.D.)

Respondent, as Mohawk of Akwesasne, granted Aboriginal right to cross Canada-United States border, including right to bring goods for personal, community use, without having to pay customs duties — Right protected under Constitution Act, 1982, ss. 35, 52 — Trial Judge failing to impose geographical restrictions upon Aboriginal

CONSTITUTIONAL LAW—Continued

Aboriginal and Treaty Rights—Concluded

right — Respondent's Aboriginal right including right to duty-free trade with other First Nation Communities on non-commercial scale — Jay Treaty not limiting scope of Aboriginal right — Right protected by Constitution unless extinguished — Aboriginal right not extinguished by Customs Act.

MITCHELL V. M.N.R, [1999] 1 F.C. 375 (C.A.)

F.C.T.D. Judge dismissing action for declaration 1985 amendments to Indian Act concerning registration in band lists infringing rights recognized by s. 35, Constitution Act, 1982 — Judge revealing bias against special status for Indians — Characterizing s. 35 as racist — Not for Judge to oppose Constitution — New trial ordered as reasonable apprehension of bias.

SAWRIDGE BAND V. CANADA, [1997] 3 F.C. 580 (C.A.)

Band Council refused to allow Indian to vote at Band Council elections on ground had married non-Indian and lost legal status as registered Indian — Band control over membership not permitting Band to disregard Bill C-31 which entitled her to reinstatement of registration and to vote at Band Council elections — Applicant's right to vote not subject to any conflicting Aboriginal rights (such as control over band membership) under Constitution Act, 1982, s. 35(1) as such conflicting rights not established by evidence adduced and as argument herein limited in regard to relationship of Charter, ss. 25, 28 and Constitution Act, 1982, s. 35.

SCRIMBITT V. SAKIMAY INDIAN BAND COUNCIL, [2000] 1 F.C. 513 (T.D.)

Whether Immigration Act departure order against Aboriginal foreign national contrary to existing Aboriginal right as guaranteed by Constitution Act, 1982, s. 35 — Appellant claiming right as one of "Aboriginal peoples of Canada" to enter, remain in Canada for spiritual, political, economic, social purposes — Adjudicator unduly limiting jurisdiction to deal with constitutional issue — Motions Judge wrong in finding appellant's Aboriginal right extinguished by Immigration Act, ss. 4, 5 — No clear governmental intention to extinguish right in question — Sovereign nature of Canada not legal barrier to existence of Aboriginal rights — Infringement of Aboriginal rights justified if in furtherance of legislative objective, consistent with special fiduciary relationship between Crown, Aboriginal peoples.

WATT V. LIEBELT, [1999] 2 F.C. 455 (C.A.)

Charter of Rights

Respondent in Citizenship Act, ss. 10, 18 reference seeking Charter protection as person accused of war crimes, "charged with an offence" under Charter, s. 11 — Freedom not to be forcibly moved said to be "liberty" under Charter, s. 7 — Reference not criminal, quasi-criminal proceeding — Taking back of privilege acquired by fraud

CONSTITUTIONAL LAW—Continued

Charter of Rights—Continued

not punishment — Proceedings intended to obtain removal of inadmissible person not within Charter, s. 11.

CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) V. DUECK, [1998] 2 F.C. 614 (T.D.)

Legal rights — Search or seizure — CSIS applying for warrants under Canadian Security Intelligence Service Act, s. 21 — Whether "visitors" clause unlawfully delegates to Service employee functions of judge under s. 21 — Issue related to s. 8 Charter right to be secure against unreasonable search, seizure — Prior authorization precondition for valid search, seizure, should not be delegated to investigatory body — Person authorizing search must be judge, person capable of acting judicially — Purpose of judicial control under Act, s. 21 to ensure objective, detached analysis of facts set out in warrant application to determine whether interests of state prevail over individual's constitutional right to be secure from unreasonable search, seizure.

CANADIAN SECURITY INTELLIGENCE SERVICE ACT (RE), [1998] 1 F.C. 420 (T.D.)

Legal Rights — Whether depriving convict of eligibility for day parole, unescorted temporary absence detention, imprisonment within meaning of Charter, s. 9 — Person subject to s. 105(1) detained pursuant to Immigration Act, also "detained or imprisoned" under Charter, s. 9 — To establish violation of s. 9, applicant must show detention, imprisonment arbitrary — Inmate subject to s. 105(1) order arbitrarely detained if reasons for continuation of order not subject to review by Adjudication Division.

CHAUDHRY V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1999] 3 F.C. 3 (T.D.)

Charter as interpretive tool — Absent Charter challenge, Charter cannot be used as interpretive tool to defeat purpose of legislation or to give it effect Parliament clearly intended it not to have.

EXPRESSVU INC. V. NII NORSAT INTERNATIONAL INC., [1998] 1 F.C. 245 (T.D.)

Judicial review of decision to remove applicant to Iran where fears torture — Applicant landed under backlog program without examination of risk to him if returned to Iran — Neither opinion constituting danger to Canadian public nor removal decision involving risk assessment — Alleging removal without assessment of such risk violation of Charter, ss. 7, 12 rights — International human rights obligations informing interpretation of Charter — Canada signatory to international Convention prohibiting expulsion to state where "substantial grounds" for believing danger of torture — High evidentiary basis necessary to support Charter arguments — On material filed, no "substantial grounds" for believing applicant in danger of torture if returned to Iran — Determination of whether grounds for applicant's fear of torture must be made in fair, reasonable manner to honour Canada's international human rights

CONSTITUTIONAL LAW—Continued

Charter of Rights—Continued

obligations — Risk assessment, opportunity to assess fairness thereof, implicit in ss. 7, 12 — Applicant entitled to risk assessment in accordance with principles of natural, fundamental justice — Application allowed with respect to removal decision.

FARHADI V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1998] 3 F.C. 315 (T.D.)

Aboriginal Peoples

Charter, s. 25 requiring Charter guarantees of certain rights and freedoms not be construed so as to abrogate or derogate from any Aboriginal, treaty or other rights or freedoms pertaining to Aboriginal peoples — S. 25 not independently enforceable — Since right to limit voting to on-reserve Band members not Aboriginal right under s. 35, s. 25 not applicable — Residency requirement not "other right or freedom pertaining to Aboriginal peoples" — Exclusion of non-resident Band members from voting neither reflecting distinctive Aboriginal culture of Band, nor integral to maintenance of distinctive form of Aboriginal government.

BATCHEWANA INDIAN BAND (NON-RESIDENT MEMBERS) V. BATCHEWANA INDIAN BAND, [1997] 1 F.C. 689 (C.A.)

Criminal Process

Immigration Expulsion Officer making travel arrangements to remove applicants to Chile — While in Canada, applicants exposing human rights abuses of senior Chilean Police Force officials — Fearing serious harm, death if returned to Chile — Request for declaration Immigration Act, ss. 48, 52 unconstitutional not properly before Court as no notice of constitutional question — While Charter, s. 12 engaged in removal process, not violated where risk assessment conducted under provisions of Act, Regulations — No assessment of current risk herein — Inadmissible evidence on both sides of issue — Removal of applicants stayed until decision made on Immigration Act, s. 114(2) applications for landing on humanitarian, compassionate grounds.

ARDUENGO V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1997] 3 F.C. 468 (T.D.)

Citizenship Act, s. 18(1)(*b*) reference to determine whether respondent obtaining citizenship by false representation, fraud, knowingly concealed material circumstances — Between filing citizenship application and hearing, respondent charged with criminal offences — Respondent arguing no duty to disclose charges as presumed innocent until convicted — Procedural safeguards in Charter, s. 11 including presumption of innocence apply only to criminal, penal matters — Citizenship Act, s. 18 reference civil proceeding — Delay from August 1993 to March 1995 in referring matter to Court caused by departmental reorganization — Principles applicable in immigration context to assess whether delay resulting in breach of Charter rights applicable in citizenship revocation matters — Delay may result in breach of Charter rights where

CONSTITUTIONAL LAW—Continued

Charter of Rights—Continued

Criminal Process—Continued

evidence of prejudice, unfairness — No evidence herein of prejudice, unfairness — Delay only assisted respondent to stay in Canada — No Charter right breached.

CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) v. COPELAND, [1998] 2 F.C. 493 (T.D.)

Judicial review of RCMP adjudication board's decision quashing summons to prosecuting officer to appear as witness — Board investigating allegations of breach of RCMP Code of Conduct — Charter, s. 11(*d*) guaranteeing right of persons charged with offence to hearing by fair, impartial tribunal — Disciplinary proceedings not attracting application of s. 11 unless involving true penal consequences i.e. imprisonment or fine, magnitude of which indicating imposed to redress wrong done to society rather than to maintain internal discipline — RCMP disciplinary process neither inherently criminal, quasi-criminal nor involving proceedings of public nature — Sanctions intended to reinforce discipline — RCMP Act not providing for imprisonment as sanction for breach of Code of Conduct — Dismissal not penal consequence.

CANNON V. CANADA (ASSISTANT COMMISSIONER, RCMP), [1998] 2 F.C. 104 (T.D.)

Charter, s. 12 guaranteeing right not to be subjected to cruel, unusual treatment — Defect in service of notice of Immigration Act, s. 70(5) proceedings not cruel, unusual treatment.

DA COSTA V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1998] 2 F.C. 182 (T.D.)

Del Zotto suspected of tax evasion — Inquiry convened under Income Tax Act, s. 231.4 into his financial affairs — Entitled to attend, representation by counsel — Noble subpoenaed to attend, give evidence, produce documents — Del Zotto not subpoenaed — Inquiry adjourned before any witness giving evidence — Neither s. 231.4 nor inquiry contravening Charter, s. 8 — *Hunter et al. v. Southam Inc.* standards to determine reasonableness of search, seizure not applicable — Categorization of context of search, seizure but one factor to be considered — All circumstances fully weighed — Determination of intrusiveness of search, seizure based on scale of interests ranging from bodily integrity to requests for production of documents — Tax inquiry lesser form of intrusion than search of private premises — Expectation of privacy pertaining to business affairs relatively low compared to matters of intimate, personal nature — Determination of reasonable expectation of privacy not dependent on personal preference.

DEL ZOTTO V. CANADA, [1997] 2 F.C. 428 (T.D.)

Appeal from dismissal of actions for declarations Income Tax Act, s. 231.4 contravening Charter, s. 8 — S. 231.4 permitting Minister to authorize inquiry into

CONSTITUTIONAL LAW—Continued

Charter of Rights—Continued

Criminal Process—Continued

anything relating to administration, enforcement of Act — After indicating intention to charge Del Zotto with tax evasion under s. 239(1)(*a*), (*d*), Revenue Canada commencing s. 231.4 inquiry — Only Noble subpoenaed — Appeal allowed — S. 8 right evolving into right to reasonable security of one's privacy — Intrusiveness of search, gathering of evidence for prosecution of taxpayer determining whether preconditions for search established in *Hunter et al. v. Southam Inc.* apply — S. 231.4 inherently oriented towards criminal prosecution — Trial Judge not giving sufficient weight to fact inquiry criminal investigation — Search involving order to appear for examination under oath with documents sufficient for violation of s. 8 — Any threatened seizure bringing s. 8 into play — Since s. 8 protecting privacy rights of people, not places, Del Zotto having reasonable expectation of privacy over documents, information held by others at different places — Right to privacy protected prior to actual physical search, i.e. as soon as any government action threatens security of individual's privacy interest — S. 231.4 struck down as violating Charter, s. 8.

DEL ZOTTO V. CANADA, [1997] 3 F.C. 40 (C.A.)

Judicial review of Deputy Superintendent of Bankruptcy's decision, pursuant to Bankruptcy and Insolvency Act, s. 14.03, to take possession of records administered by applicants, entrust them to guardian until completion of investigation, disciplinary hearing — Taking of possession constituting seizure — As applicant not consenting freely, voluntarily to seizure, not waiving s. 8 guarantee — Purpose of ss. 14.01, 14.02, 14.03 supervision of trustees' administrative conduct — Documents administered by trustees public — Expectation of privacy lower than that associated with private, personal documents — Not requiring strict application of criteria established by S.C.C. in *Hunter et al. v. Southam Inc.* for determining whether seizure reasonable — Necessary to balance reasonable expectation of privacy, seriousness of intrusion — Since search of private premises, not part of regulatory inspection, degree of intrusion greater — Must be reasonable grounds to believe conservatory measures involving search, seizure will make it possible to "preserve" records of estates — To extent authorizing conservatory measures in nature of seizure where no reasonable grounds to believe measures enabling preservation of records, s. 14.03(1)(*b*) infringing Charter, s. 8 — Reasonable grounds herein to believe conservatory measures enabling preservation of records of estates.

GROUPE G. TREMBLAY SYNDICS INC. V. CANADA (SUPERINTENDENT OF BANKRUPTCY), [1997] 2 F.C. 719 (T.D.)

Judicial review of Senior Immigration Officer's (SIO) decision applicant ineligible pursuant to Immigration Act, s. 46.4(1) to have claim for refugee status determined by CRDD, declaring Refugee Division's decision re: claim null, void — Applicant granted Convention refugee status — SIO subsequently concluding applicant obtained referral to Refugee Division by fraud, misrepresentation of material fact — Charter, s. 12 not

CONSTITUTIONAL LAW—Continued

Charter of Rights—Continued

Criminal Process—Continued

offended by s. 46.4 — Refugee claimant obliged to truthfully present circumstances of case to SIO under s. 45(5) — To allow refugee claimants who misrepresent themselves or attempt by fraud to obtain protection of Canadian state to gain rights, would outrage society's standards of decency.

GWALA V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1998] 4 F.C. 43 (T.D.)

Action for damages following boarding, seizure on high seas, arrest, detention of Spanish fishing trawler, arrest of master by Canadian authorities — Claim Coastal Fisheries Protection Regulations, by applying only to Spanish, Portuguese vessels authorizing unreasonable search, seizure, struck as disclosing no reasonable cause of action — Provisions governing search, seizure, use of reasonable force to detain vessels at sea not specifying nationality — Contravention of s. 10(*b*) right to retain, instruct counsel allowed to stand, provided amendment pleading facts underlying claim filed.

JOSE PEREIRA E HIJOS, S.A. V. CANADA (ATTORNEY GENERAL), [1997] 2 F.C. 84 (T.D.)

Appeal from refusal to quash Immigration and Refugee Board decision appellants inadmissible to Canada pursuant to Immigration Act, s. 19(2)(*a*.1)(i) — Mr. Li convicted in Hong Kong under Prevention of Bribery Ordinance — Adjudicator, Motions Judge concluding offences equivalent to Criminal Code, s. 426 — Holding not necessary to compare defences, burdens of proof — Not necessary to categorize requirements for offences into "elements", "defences" — Characterization of factor as element or defence not affecting presumption of innocence guaranteed in Charter, s. 11(*d*) — Absent s. 1 justification, accused may not be required to prove some fact on balance of probabilities to avoid conviction.

LI V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1997] 1 F.C. 235 (C.A.)

Motion to admit as evidence in Federal Court show cause proceedings true copies of documents in judicial review application in Ontario Court — Plaintiffs intending to use such evidence, particularly affidavits, cross-examination thereon, as part of evidence in chief — Charter ss. 11(*c*), 13 protecting against self-incrimination, applied — Contempt show cause proceeding quasi-criminal as fine, imprisonment could be imposed — Affidavits, cross-examination thereon admissible to question credibility if defendant's CEO choosing to testify, but not compellable in light of s. 11(*c*) — S. 13 precluding admission of prior testimony as evidence in later proceedings, limited by case law to oral testimony, excluding from scope, documents or real evidence from prior proceedings — But where affidavits, cross-examination from prior judicial review application that of person subsequently ordered in other proceedings to show cause

CONSTITUTIONAL LAW—Continued

Charter of Rights—Continued

Criminal Process—Continued

why should not be found in contempt, and that person not testifying in later proceedings, affidavit, cross-examination thereon, within meaning of "testimony" within s. 13, inadmissible.

MERCK & CO., INC. V. APOTEX INC., [1998] 3 F.C. 400 (T.D.)

Right to assistance of interpreter under s. 14 — Whether extending to proceedings before CRDD — Quality of interpretation — S.C.C. decision in *R. v. Tran* applied — In proceedings before CRDD, interpretation provided to refugee claimants must be continuous, precise, competent, impartial and contemporaneous — Proof of prejudice not required — Failure to complain about quality of interpretation at first opportunity fatal to judicial review application.

MOHAMMADIAN V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 3 F.C. 371 (T.D.)

Deportation of permanent resident granted landing by misrepresentation of marital status not cruel, unusual treatment contrary to s. 12 — No evidence deportation would expose applicant to danger of persecution, torture, death — Nothing in applicant's circumstances "grossly disproportionate" or so excessive as to outrage public standards of decency.

MOHAMMED V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1997] 3 F.C. 299 (T.D.)

Deportation not cruel and unusual treatment: *Chiarelli v. Canada (Minister of Employment and Immigration)* — Hard to imagine public standards of decency would be outraged by applicant's deportation where reason therefor fact represents danger to Canadians.

MOUMDJIAN V. CANADA (SECURITY INTELLIGENCE REVIEW COMMITTEE), [1999] 4 F.C. 624 (C.A.)

Search and seizure — Letter of request — Canadian standard for issuance of search warrant to be satisfied before submitting letter of request asking Swiss authorities to search for, seize Canadian citizen's banking records — Charter protection for Canadians same whether search undertaken here or abroad — Right to be secure against unreasonable search or seizure justifying requirement of prior authorization.

SCHREIBER V. CANADA (ATTORNEY GENERAL), [1997] 2 F.C. 176 (C.A.)

Charter, s. 11(*d*) guaranteeing right of accused to presumption of innocence until proven guilty according to law in fair, public hearing by independent, impartial tribunal — Issuance of certificate under Canada Evidence Act, s. 39 certifying document confidence of Queen's Privy Council not integral to conduct of trial within contemplation

CONSTITUTIONAL LAW—Continued

Charter of Rights—Continued

Criminal Process—Concluded

of s. 11(*d*) — RCMP Public Complaints Commission inquiry into allegations of misconduct by RCMP members not trial of guilt.

SINGH V. CANADA (ATTORNEY GENERAL), [2000] 3 F.C. 185 (C.A.)

Removal orders for deportation of applicants to country engaged in armed conflict not in violation of Charter, s. 12 — Deportation not punishment — Given legislative safeguards, deportation would not offend "standards of decency", "gross disproportionality" tests — Legislative scheme for post-claim review complying with Canada's international human rights obligations.

SINNAPPU V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1997] 2 F.C. 791 (T.D.)

Democratic Rights

Application to stay effect of declaration Canada Elections Act provision denying certain convicts right to vote in federal elections violating Charter, s. 3 — Crown not meeting onus of establishing irreparable harm to public interest — Public interest also including protection of democratic rights enshrined in Charter.

SAUVÉ V. CANADA (CHIEF ELECTORAL OFFICER), [1997] 3 F.C. 628 (T.D.)

Respondents challenging constitutionality of Canada Elections Act, s. 51(*e*) — Crown conceding impugned provision violates Charter, s. 3 — Whether provision saved by Charter, s. 1 — *Oakes* test applied — Objectives of legislation sufficiently pressing, substantial to warrant infringement of Charter right — Legislation rationally connected to intended objective — S. 51(*e*) impairing Charter right in appropriately minimal way — Parliament not bound to use least restrictive means to achieve legislative objectives — Legislation targeted to disqualify most serious offenders from voting — Reasonable limit demonstrably justified in free, democratic society under Charter, s. 1.

SAUVÉ V. CANADA (CHIEF ELECTORAL OFFICER), [2000] 2 F.C. 117 (C.A.)

Enforcement

Indian Act, s. 77(1) requiring band members to be "ordinarily resident" on reserve to vote in Band Council elections violating Charter, s. 15 equality guarantee — Not saved by Charter, s. 1 — Appropriate case for constitutional exemption, purpose of which to ensure applications of particular unconstitutional law remedied to extent of inconsistency only — History of other bands not before Court — To strike down s. 77 in respect of all bands overshooting mandate of Constitution Act, 1982, s. 52 — Words "ordinarily resident on the reserve" in s. 77(1) of no force, effect with respect to Band

CONSTITUTIONAL LAW—Continued

Charter of Rights—Continued

Enforcement—Continued

— Charter, s. 24 providing anyone whose Charter protected rights, freedoms infringed or denied may apply to court of competent jurisdiction to obtain such remedy as Court considering appropriate, justified in circumstances — Remedy should be granted on individual basis, rather than partial declaration of invalidity under Constitution Act, 1982, s. 52(1) — Granting exemption from residency requirement to Band not altering s. 77(1)'s fundamental purpose: implementation of voting regime granting right to vote to those having interest in, affected by, outcome of electoral process.

BATCHEWANA INDIAN BAND (NON-RESIDENT MEMBERS) V. BATCHEWANA INDIAN BAND, [1997] 1 F.C. 689 (C.A.)

Tax Court Judge justified in vacating income tax reassessments on basis of Charter, s. 24 where evidence obtained in violation of Charter, s. 8 — Without evidence initially obtained illegally and reseized improperly, unlikely MNR could have discharged statutory burden — Under Charter, s. 24, Court given authority to grant remedy "appropriate and just in the circumstances".

CANADA V. O'NEILL MOTORS LTD., [1998] 4 F.C. 180 (C.A.)

Charter, s. 24(2) permitting exclusion of evidence obtained in violation of Charter rights, freedoms where admission would bring administration of justice into disrepute — Appellant in income tax reassessment case submitting cumulative effect of wrongs committed against him sufficient basis to exclude evidence pursuant to s. 24(2) — (1) That auditor filing appellant's return without authorization not serious violation of rights — (2) That auditors cooperating with criminal investigators without appellant's knowledge not warranting exclusion of evidence herein — S.C.C. test for exclusion of evidence pursuant to s. 24(2), articulated in criminal context — Courts excluding such tainted evidence in criminal proceedings — But discretion to exclude evidence used with more restraint in civil matters — (3) Search warrants issued under Income Tax Act, s. 231.3 unconstitutional pursuant to subsequent S.C.C. decision — Although search pursuant thereto serious, unreasonable, not in bad faith — Admission of resulting evidence not bringing administration of justice into disrepute — (4) But subsequent search pursuant to new warrant obtained based on incomplete information unreasonable, would bring administration of justice into disrepute — T.C.C. decision varied to exclude new evidence related to income obtained pursuant to second warrant.

DONOVAN V. CANADA (ATTORNEY GENERAL), [2000] 4 F.C. 373 (C.A.)

Human rights — Effect of O.C.A. declaration "sexual orientation" had to be added to grounds of discrimination proscribed by CHRA — Dispositions open to courts where legislation held in conflict with Charter — Questions that arise: whether judgment speaks only to future or also to past; who is bound? — S.C.C. decision in *Schachter v. Canada* judicially considered — Question of retroactivity of judgment upon constitutional challenge cannot be separated from question as to who is bound —

CONSTITUTIONAL LAW—Continued

Charter of Rights—Continued

Enforcement—Concluded

Where decision that of provincial court, not binding on third parties outside court's territorial jurisdiction [obiter] — In instant case, CHRC bound as party to O.C.A. case.

NIELSEN V. CANADA (EMPLOYMENT AND IMMIGRATION COMMISSION), [1997] 3 F.C. 920 (C.A.)

Child seeking to prevent father's deportation — Only victim of Charter infringement can seek remedy under Charter, s. 24.

PANCHOO V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 3 F.C. 18 (C.A.)

Appeal from order striking out paragraphs of prayer for relief seeking letters of apology, directing adoption of special program to rectify adverse effect of discriminatory practices, directing employer to implement Employment Equity Program — Action alleging individual, systemic discrimination based on race, national or ethnic origin, colour — Founded on Charter, s. 24, conferring right to seek remedy from competent court — In action under s. 24, courts free to fashion remedies deemed appropriate in circumstances — As remedy requiring letter of apology, may contravene Charter, s. 2(*b*) (freedom of expression), must be justifiable under s. 1 — That question not answerable without trial — As CHRT having jurisdiction to impose programs to rectify effects of discrimination, supervisory courts having power to impose similar remedies when deemed appropriate.

PERERA V. CANADA, [1998] 3 F.C. 381 (C.A.)

Equality Rights

Whether "subversion" in Immigration Act, s. 19(1)(*e*) infringing Charter, s. 15 equality rights — Applicant not deprived of hearing in investigation, recommendation by SIRC — If deprivation of right to hearing at later stage, not on basis applicant permanent resident, but on basis reasonable grounds to believe engaged in subversion, or might engage in activity described in s. 19(1)(*g*).

AL YAMANI V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 3 F.C. 433 (T.D.)

Whether Canadian Wheat Board Act distinguishes between plaintiffs, farmers not residing in designated area — Residence in "designated area" not analogous ground under Charter, s. 15(1) — Plaintiffs not discreet, insular minority discriminated against on basis of irrelevant personal characteristics — Agronomic equality not Charter right — Legislation not violating plaintiffs' human dignity, freedom.

ARCHIBALD V. CANADA, [1997] 3 F.C. 335 (T.D.)

CONSTITUTIONAL LAW—Continued

Charter of Rights—Continued

Equality Rights—Continued

Compulsory pooling under Canadian Wheat Board Act — No discrimination on basis of geography (place of residence and production of grain within designated area) as not analogous ground.

ARCHIBALD V. CANADA, [2000] 4 F.C. 479 (C.A.)

Action for declarations Framework Agreement breaches Crown's fiduciary duty, plaintiffs' Charter, ss. 7, 15 rights, injunctive relief — Crown seeking to strike from statement of claim references to Framework Agreement providing for delegation of federal powers so that First Nations may withdraw lands from management provisions of Indian Act — Indian Act, Framework Agreement not making provision for matrimonial property rights for Indian women on reserves — Framework Agreement not treaty to which Constitution Act, 1982, s. 35(4), guaranteeing male/female equality rights, applies — All other Canadian women subject to provincial legislation governing division of matrimonial property — Not plain, obvious, beyond reasonable doubt portion of statement of claim relating to Framework Agreement cannot succeed.

B.C. NATIVE WOMEN'S SOCIETY V. CANADA, [2000] 1 F.C. 304 (T.D.)

Appeal from F.C.T.D. judgment declaring Transport Canada's Personnel Licensing Handbook, s. 3.18 contrary to Charter, s. 15 — S. 3.18 providing persons having diabetes mellitus controllable without drugs assessed as fit — Respondent, insulin-dependent diabetic, denied medical certificate for private pilots' licence — S. 3.18 offending Charter, s. 15(1) because discriminating on basis of physical disability — Deeming all insulin-dependent diabetics unfit, regardless of individual risk of incapacitation — Individual risk of incapacitation never determined — Respondent excluded from eligibility for medical certificate because of presumed group characteristic, i.e. susceptibility to incapacitation of insulin-dependent diabetics — Impugned provision saved by Charter limitation clause.

BAHLSEN V. CANADA (MINISTER OF TRANSPORT), [1997] 1 F.C. 800 (C.A.)

Indian Act, s. 77(1) requiring band members to be "ordinarily resident" on reserve to vote in Band Council elections — Charter, s. 15 guaranteeing equality before, under law, right to equal protection, benefit of law — By prohibiting non-resident Band members from participating in selection of Band Council, or as electors of Band, s. 77(1) denying significant benefit of law — Application of analogous grounds approach to whether distinction discriminatory — Right to vote denied on basis of characteristic, residence off reserves, to which stereotype attached — Fear non-resident Band members could not be trusted to use electoral power in best interests of Band based on stereotypical assumption about personal characteristic of non-residency — Also many members of group suffering historical disadvantage based on personal characteristics of race, sex — Disenfranchisement of group guaranteeing powerless to hold accountable elected officials — When political powerlessness, historical disadvantage

CONSTITUTIONAL LAW—Continued

Charter of Rights—Continued

Equality Rights—Continued

added to stereotyping, Trial Judge's finding difficult to change residence, equality guarantee must be extended to non-resident band members.

BATCHEWANA INDIAN BAND (NON-RESIDENT MEMBERS) V. BATCHEWANA INDIAN BAND, [1997] 1 F.C. 689 (C.A.)

Age condition in Income Tax Act, s. 118(1)(*b*)(ii)(D) not infringing Charter, s. 15(1) — Relevancy test — In any event, justified under Charter, s. 1.

CANADA V. MERCIER, [1997] 1 F.C. 560 (T.D.)

Immigration and Refugee Board finding age 19 restriction concerning adopted children in Immigration Regulations, 1978, s. 2(1) contravenes Charter, s. 15 — Respondent entitled to sponsor adopted son's application for landing only if son unmarried, under 19 years of age — Restriction creating distinction based on biological parents of children over 19, adoptive parents of children over 19 — Distinction discriminatory on basis of analogous ground of adoptive parentage — Age 19 restriction violating Charter, s. 15 but saved by s. 1 as objective (preventing use of adoption provisions to circumvent immigration requirements) pressing, substantial.

CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) V. DULAR, [1998] 2 F.C. 81 (T.D.)

Respondent seeking stay of revocation of citizenship proceedings on ground discriminatory, breach of Charter, s. 15 to bring proceedings against him but not others named in Deschênes Commission Report — No reasonable basis for stay — That Commission may not have sufficient evidence to bring proceedings against everyone allegedly committing criminal acts not preventing Crown from proceeding against those with respect to whom has sufficient evidence.

CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) V. KATRIUK, [1999] 3 F.C. 143 (T.D.)

Plaintiff, husband separated in 1975 — In 1984, at age 65, husband receiving old age security (OAS), guaranteed income supplement (GIS) — OAS Act, s. 19(1)(*a*) providing for payment of spousal allowance (SPA) to 60-to-64-year-old spouses of pensioners provided not separated — On turning 61, plaintiff applying for SPA, but application denied because separated from pensioner spouse — Charter, s. 15(1), guaranteeing equal benefit of law, breached — (i) Act, s. 19(1)(*a*), Regulations, s. 17 making formal distinction between those entitled, not entitled to SPA, on basis of spousal separation — Being separated personal characteristic — Denial of eligibility for SPA imposing substantial differential treatment upon separated spouses by expressly denying economic benefit on ground of separation, affecting freedom to make choice in personal matter (continued cohabitation with spouse) — (ii) Being

CONSTITUTIONAL LAW—Continued

Charter of Rights—Continued

Equality Rights—Continued

separated form of marital status; marital status analogous ground for purposes of Charter, s. 15(1) — (iii) Economic hardship of separated spouses who would otherwise qualify for SPA not recognized by legislation — Inappropriate at s. 15(1) stage to inquire whether provincial legislation correcting denial of benefit under federal Act — Denial of SPA to separated spouses otherwise entitled to it, solely because separated, violation of human dignity — Defendant arguing denial of SPA benefit to separated spouses ameliorative program within Charter, s. 15(2); as separated spouses outside scope of SPA, cannot sustain claim SPA underinclusive — Relying on O.C.A. interpretation of s. 15(2) in *Lovelace v. Ontario* — S.C.C. decision in *Law v. Canada* with respect to underinclusive ameliorative laws, programs under s. 15(1) superceding Lovelace — When violation of s. 15(1) found, focus shifting to s. 1 to determine whether violation justified.

COLLINS V. CANADA, [2000] 2 F.C. 3 (T.D.)

Adverse effect discrimination — Eligibility requirements for disability benefits in Canada Pension Plan, s. 44 violating Charter, s. 15 — However, requirements justified under Charter, s. 1.

GRANOVSKY V. CANADA (MINISTER OF EMPLOYMENT AND IMMIGRATION), [1998] 3 F.C. 175 (C.A.)

Action for damages following boarding, seizure on high seas, arrest, detention of Spanish fishing trawler, arrest of master by Canadian authorities — Statement of claim alleging Coastal Fisheries Protection Regulations, by prescribing measures applicable only to vessels of Spain, Portugal violated plaintiffs' s. 15 rights — While Regulations apply only to vessels, would ignore substantive effect of Regulations to preclude opportunity for argument, at trial, persons sailing vessels, ordinarily nationals of state whose flag vessel sails, directly affected by application of Regulations — Corporate plaintiff not having cause of action under s. 15.

JOSE PEREIRA E HIJOS, S.A. V. CANADA (ATTORNEY GENERAL), [1997] 2 F.C. 84 (T.D.)

Appellants contending citizenship preference for employment in public service contrary to equality principle in Charter, s. 15, not saved by s. 1 — Non-citizens not referred as candidates in open competitions until inventory of qualified Canadian candidates exhausted — Appellants' basic rights under Charter, s. 15 not breached by PSEA, s. 16(4)(*c*) — Equality principle not applicable — Citizenship preference not giving rise to discrimination under Charter, s. 15 — *Oakes* test applied — Impugned legislation not disguise, abuse of powers — Importance of legislative objectives outweighing disadvantage created by impugned statutory provision.

LAVOIE V. CANADA, [2000] 1 F.C. 3 (C.A.)

CONSTITUTIONAL LAW—Continued

Charter of Rights—Continued

Equality Rights—Continued

Action for declaration Canadian Forces Administrative Orders (CFAO) 20-53 infringing equality rights — CFAO 20-53, s. 6(*c*) permitting consideration of cultural, religious or other sensitivities of parties to conflict and host country in determining whether participation of particular member in specific peacekeeping operation in keeping with policy all members eligible to perform peacekeeping duties unless exclusion justifiable under Charter, s. 1 or Canadian Human Rights Act, s. 5 — Plaintiff not selected for position of Executive Assistant to Commander of Canadian Forces in Middle East during Gulf War because Jewish — Any distinction drawn by CFAO 20-53 based upon cultural, religious or other characteristics of members relevant to underlying premise of policy i.e. successful peacekeeping missions without endangering lives of those involved — Effect or impact of distinctions not suggesting based on stereotypical applications of presumed group or personal characteristics — Policy applied on case-by-case basis to sensitivities identified in theatres of operations, not to screen classes of members based upon stereotypical views of groups to which belong — Distinctions under CFAO 20-53, s. 6(*c*) not discriminatory — Terms "cultural", "religion" should be replaced with more general terms "background", "circumstance" — Definition of peacekeeping should be provided.

LIEBMANN V. CANADA (MINISTER OF NATIONAL DEFENCE), [1999] 1 F.C. 20 (T.D.)

Judicial review of IRB, Appeal Division's affirmation of Adjudicator's decision applicant entering Canada by reason of "fraudulent or improper means or misrepresentation" of "material fact" pursuant to Immigration Act, s. 27(1)(*e*) — Applicant not disclosing change in marital status because unaware necessary to do so — Ignorance of law, Canada's official languages, neither "disability" nor any other enumerated ground under Charter, s. 15 — Not "analogous" ground of discrimination, but personal capacities particular to applicant — Differential treatment based on particular personal capacities, divorced from historically disadvantaged group, rarely characterized as discrimination.

MOHAMMED V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1997] 3 F.C. 299 (T.D.)

Saskatchewan enacting no-fault automobile accident insurance scheme — Legislation prohibiting litigation before Federal Court of Canada — Charter s. 15 having no application herein — Plaintiff not discriminated against, singled out — All those in Saskatchewan involved in auto accidents equally governed by scheme.

MOXHAM V. CANADA, [1998] 3 F.C. 441 (T.D.)

Under Old Age Security Act entitlement to full monthly pension at age 65 requiring 10 years of residence in Canada immediately preceding day on which person's application approved, or 40 years of residence in Canada since age 18 — Plaintiff

CONSTITUTIONAL LAW—Continued

Charter of Rights—Continued

Equality Rights—Continued

coming from India in 1987 when 58 — At age 65 denied old age security pension benefits because not meeting requirement of being resident in Canada for 10 years — Legislation drawing distinction leading to denial of equal benefit of law — Distinction based on residence in Canada not based on characteristic enumerated in Charter, s. 15 — Nor does expansion of group entitled to benefits by reference to entitlement under pension plans of countries with which Canada having reciprocal agreements convert distinction to one based on national origin — Expansion not based on citizenship, national origin, but on entitlement under plans in other countries — Group of individuals not entitled to benefits not comprising category analogous to those listed in s. 15 — Category of persons not qualifying for benefits not suffering historical disadvantage — Pension entitlement based on residency not reinforcing societal stereotypes as no stereotypes particular, unique to this group — Persons over 65 who have not lived in Canada for 10 years not discrete, insular minority, but diffuse, disparate group — Members of group not facing discrimination because not residing in Canada for 10 years — Applying for social assistance not denial of essential human dignity — Distinction not offending Charter, s. 15.

PAWAR V. CANADA, [1999] 1 F.C. 158 (T.D.)

Respondents seeking declaration Canada Elections Act, s. 51(*e*) contrary to Charter, s. 15 — Status of prisoner not analogous ground for purposes of Charter, s. 15 — Not personal characteristic immutable, changeable only at unacceptable cost to personal identity — Prisoners not constituting analogous group warranting protection under Charter's equality provision — Canada Elections Act, s. 51(*e*) not violating Charter, s. 15(1).

SAUVÉ V. CANADA (CHIEF ELECTORAL OFFICER), [2000] 2 F.C. 117 (C.A.)

Judicial review of Public Service Staff Relations Board's denial of grievance of termination — Applicant afflicted with chronic fatigue syndrome in 1985 — On leave without pay for eight years prior to termination — Question whether suffered discrimination on ground of disability not having much precedential value, considered as question of mixed fact, law requiring review according to standard of correctness — Treasury Board policy under which granted leave without pay flexible enough to accommodate even those whose illness preventing them from returning to work for many years — Treatment of applicant not *prima facie* discriminatory under Charter, s. 15(1) — No evidence applicant suffered discrimination as result of not being able to peruse transcript of hearing.

SCHEUNEMAN V. CANADA (ATTORNEY GENERAL), [2000] 2 F.C. 365 (T.D.)

Band Council refused to allow Indian to vote at Band Council elections on ground had married non-Indian and lost legal status as registered Indian — Band's anti-Bill C-31 policy reflecting that of other Saskatchewan First Nations — Band control over

CONSTITUTIONAL LAW—Continued

Charter of Rights—Continued

Equality Rights—Concluded

membership not entitling Band to disregard Bill C-31 which entitled her to reinstatement of registration and to vote at Band Council elections — Refusal violating Charter, s. 15 equality rights and not demonstrably justified under Charter, s. 1 — Discrimination based on gender, marital status.

SCRIMBITT V. SAKIMAY INDIAN BAND COUNCIL, [2000] 1 F.C. 513 (T.D.)

Immigration Act, s. 3(*f*) requiring standards of admission not discriminating in manner inconsistent with Charter — Immigration Act, s. 19(1)(*a*) prohibiting admission of persons whose admission might reasonably be expected to cause excessive demands on social services — Respondent submitting s. 19(1)(*a*) discriminatory, should be narrowly construed so as to exclude special education from "social services" — In absence of proper debate with respect to Charter, s. 15, and s. 1 analysis, Court not prepared, on basis of general argument, to hold interpretation of "social services" in s. 19(1)(*a*)(ii) as including special education inconsistent with s. 3(*f*).

THANGARAJAN V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1999] 4 F.C. 167 (C.A.)

Collective agreement providing certain Federal Public Servants in Saskatchewan paid less than those elsewhere in Canada — Creating distinction constituting denial of equal benefit of law — Charter, s. 15 applies to collective agreement to which Government of Canada party — Province of residence analogous ground only if used in manner giving rise to questions of violation of dignity, freedom of individual — Provincial disparity in bargained rates of pay not, without further evidence, raising question of violation of human dignity, freedom — No evidence of violation of human dignity, freedom — Plaintiffs' claim purely economic — Charter not concerned with economic rights — Defendant's motion for summary judgment granted as no genuine issue for trial.

WONG V. CANADA, [1997] 1 F.C. 193 (T.D.)

Fundamental Freedoms

Whether "subversion" in Immigration Act, s. 19(1)(*e*) infringing Charter, s. 2 freedoms — Interpreted in manner consistent with terminology of CSIS Act, s. 2(*d*) definition of "threats to the security of Canada", "subversion" neither without definitional boundaries nor so overly broad as to infringe s. 2 freedoms.

AL YAMANI V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 3 F.C. 433 (T.D.)

Freedom of association — Canadian Wheat Board Act compelling farmers living in "designated area" to sell grain to CWB in extraprovincial market — Freedom of

CONSTITUTIONAL LAW—Continued

Charter of Rights—Continued

Fundamental Freedoms—Continued

association in Charter, s. 2(*d*) including right not to be compelled to associate — Plaintiffs not associated with Board, with each other, free to form preferred associations — Charter not protecting economic freedom, commercial or property rights.

ARCHIBALD V. CANADA, [1997] 3 F.C. 335 (T.D.)

Freedom of association — Compulsory pooling under Canadian Wheat Board Act — Although Charter, s. 2(*d*), in some circumstances, protecting right not to associate, activity herein (marketing of grain) not constitutionally protected — Also, as activity not constitutionally protected, no constitutional basis for arguing appellants should be able to sell grain in voluntary association with others.

ARCHIBALD V. CANADA, [2000] 4 F.C. 479 (C.A.)

Judicial review of visa officer's decision denying applicant permanent resident status pursuant to s. 19(1)(*c*.2) (reasonable grounds to believe member of organization reasonably believed to have engaged in criminal activity) — Submission Charter, s. 2 guarantee of freedom of association requiring interpretation of "member" such that right to belong to organization, whether criminal or not, protected, contrary to objectives of Act — Rights of association in Hong Kong governed by Hong Kong law — Alien having no right to Canadian resident status.

CHIAU V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1998] 2 F.C. 642 (T.D.)

Freedom of expression — Whether union posters, leaflets depicting plaintiff's corporate logo, "Bibendum", forms of expression protected by Charter, s. 2(*b*) — Sufficient if expression conveys meaning — Not all forms of expression protected — Defendants not permitted to appropriate plaintiff's private property as vehicle for conveying anti-Michelin message — Form of expression prohibited, not protected under s. 2(*b*) — Expression protected by s. 2(*b*) only if compatible with primary function of property — Subjecting plaintiff's "Bibendum" to ridicule as object of parody not compatible with function of copyright — Copyright Act, ss. 3, 27 reasonable limits prescribed by law under Charter, s. 1 — "Reading down" Act, s. 27(2)(*a*.1) inappropriate remedy — Defendants' freedom of expression not infringed.

COMPAGNIE GÉNÉRALE DES ÉTABLISSEMENTS MICHELIN — MICHELIN & CIE V. NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA), [1997] 2 F.C. 306 (T.D.)

Appellant's registration as charitable organization revoked on ground not devoting substantially all resources to charitable activity — Appellant arguing denial of tax exemption to those wishing to advocate certain opinions denial of freedom of expression — Income Tax Act not restricting appellant from disseminating any views —

CONSTITUTIONAL LAW—Continued

Charter of Rights—Continued

Fundamental Freedoms—Concluded

certainly exercise discretion in favour of Crown; (iii) remedy not related to alleged breach — S. 51(2)(*a*), (3) infringing Charter, s. 2(*b*), but justified under s. 1.

RUBY V. CANADA (SOLICITOR GENERAL), [2000] 3 F.C. 589 (C.A.)

Ministers filing certificate with immigration officer under Immigration Act, s. 19(1)(*e*), (*f*) — Applicant challenging constitutionality of provision as violating rights to freedom of expression, association (Charter, s. 2(*b*), (*d*)) — Whether serious issue disclosed — Applicant's alleged activities terrorism, subversion by force of Indian Government — Terrorism not constitutionally protected form of expression — Effect, not purpose, of government action that limits expression — No serious issue with respect to freedoms of expression, association.

SINGH V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1998] 3 F.C. 616 (T.D.)

Appeal from Immigration Act, s. 40.1(9) order releasing appellant from detention on ground conditions therein infringing rights of freedom of expression, association — Appellant not raising constitutional issues before F.C.T.D. Judge designated under s. 40.1(8) — Matter remitted to designated Judge — In best position to rule on Charter issues, including whether terms of order can be upheld under s. 1, as heard witnesses, determined credibility, having full factual record before him/her — As judge issuing release order, having continuing jurisdiction as to impact, including constitutionality of order — Also in best position to decide whether appellant waived any future right to have order reviewed on constitutional grounds.

SURESH V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1998] 4 F.C. 192 (C.A.)

Appellant submitting Immigration Act, s. 19(1)(*e*), (*f*) infringes right to freedom of expression, association — Expression involving violence outside protected sphere — Terrorism unacceptable means of attempting to effect political change — LTTE engaging in indiscriminate killing, torture of innocent civilians amounting to crimes against humanity — Fundraising in pursuit of terrorist violence not protected expression.

SURESH V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 2 F.C. 592 (C.A.)

Life, Liberty and Security

Vagueness — Whether Immigration Act, s. 19(1)(*e*), (*g*) unconstitutionally vague — Law unconstitutionally vague if so lacking in precision as not to give sufficient guidance for legal debate — Case law cautioning against use of doctrine of vagueness

CONSTITUTIONAL LAW—Continued

Charter of Rights—Continued

Life, Liberty and Security—Continued

to impede State action in furtherance of valid social objectives by requiring law to achieve degree of precision to which subject-matter not lending itself — Necessary to balance societal interests against individual rights — Vagueness analysis requiring development of full interpretive context — S. 19(1)(*e*) very broad — Absence of definition of "subversion" necessitating consideration of underlying objectives, use of similar concepts in CSIS Act, Access to Information Act — Charter provision must be engaged before doctrine of unconstitutional vagueness can be invoked — Security certificate pursuant to Immigration Act, s. 40 issued against applicant without knowledge of applicant, counsel — As result of s. 39 report, applicant will be deported — Deportation necessarily implying interference with liberty of applicant — Breach of fundamental justice requirement in steps following SIRC's recommendation — Use of "subversion" in Immigration Act, s. 19(1)(*e*) violating Charter, s. 7 since incapable of framing legal debate in any meaningful manner or structuring discretion in any way.

AL YAMANI V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 3 F.C. 433 (T.D.)

Immigration Expulsion Officer making travel arrangements to remove applicants to Chile — Applicants unsuccessful refugee claimants but in Canada some 20 years — While in Canada, implicating senior Chilean Police Force officials in human rights abuses — Fearing serious harm, death if returned to Chile — Request for declaration Immigration Act, ss. 48, 52 unconstitutional not properly before Court as no notice of constitutional question — Removal provisions not violating principles of fundamental justice — Immigration Act, s. 114(2) application for landing on humanitarian, compassionate grounds according sufficient procedural safeguards to unsuccessful refugee claimants to satisfy principles of fundamental justice.

ARDUENGO V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1997] 3 F.C. 468 (T.D.)

Motion to stay citizenship revocation proceedings — As respondent's life, liberty, security not at stake, Charter, s. 7 not applicable.

CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) V. KATRIUK, [1999] 3 F.C. 143 (T.D.)

Judicial review of RCMP adjudication board's decision quashing summons to prosecuting officer to appear as witness — Board investigating allegations of breach of RCMP Code of Conduct — Disciplinary proceedings under RCMP Act, even if possible sanction loss of employment, not giving rise to application of Charter, s. 7 (right not to be deprived of life, liberty and security of person, except in accordance with principles of fundamental justice) — Fundamental justice not demanding more

CONSTITUTIONAL LAW—Continued

Charter of Rights—Continued

Life, Liberty and Security—Continued

than procedural fairness — No violation of fundamental justice by board's interlocutory decision dealing with preliminary evidentiary issue.

CANNON V. CANADA (ASSISTANT COMMISSIONER, RCMP), [1998] 2 F.C. 104 (T.D.)

Del Zotto suspected of tax evasion — Inquiry convened under Income Tax Act, s. 231.4 into his financial affairs — Del Zotto entitled to attend, representation by counsel — Noble subpoenaed to attend, give evidence, produce documents — Del Zotto not subpoenaed — Inquiry adjourned before any witness giving evidence — Neither s. 231.4 nor inquiry contravening Charter, s. 7 — Principles of fundamental justice under s. 7 encompassing protection against self-incrimination in some circumstances, related principles i.e. Crown must establish case before accused required to respond, right to silence, right to claim exception under s. 7 where Crown engaging in fundamentally unfair conduct — S. 7 not applicable as Del Zotto not subpoenaed, not conscripted against self; Noble not facing criminal charges, not compelled to testify as to own affairs — Right not to speak to police not recognized principle of fundamental justice under s. 7.

DEL ZOTTO V. CANADA, [1997] 2 F.C. 428 (T.D.)

Judicial review of Deputy Superintendent of Bankruptcy's decision pursuant to Bankruptcy and Insolvency Act, s. 14.03, to seize records administered by applicants, entrust them to guardian until completion of investigation, disciplinary hearing — Right to liberty including right to practice profession — Not at issue herein as conservatory measures not affecting existence, validity of trustee licence — S. 14.03 not affecting right to practice profession — Doctrine of vagueness inapplicable as circumstances, purpose of conservatory measures specified, sufficient guidance for legal debate provided.

GROUPE G. TREMBLAY SYNDICS INC. V. CANADA (SUPERINTENDENT OF BANKRUPTCY), [1997] 2 F.C. 719 (T.D.)

Judicial review of Senior Immigration Officer's (SIO) decision applicant ineligible pursuant to Immigration Act, s. 46.4(1) to have claim for refugee status determined by CRDD, declaring Refugee Division's decision re: claim null, void — Applicant granted Convention refugee status — SIO subsequently concluding applicant obtained referral to Refugee Division by fraud, misrepresentation of material fact — Application dismissed — S. 46.4 providing for "redetermination of eligibility" where prior positive finding on eligibility induced by fraud, misrepresentation — Not amounting to return to country where found to have well-founded fear of persecution — Applicant not Convention refugee — But for fraud, would never have been considered refugee — Argument once Convention refugee determination made, finding of misrepresentation, fraud cannot supplant it, creating distinction based on stage at which fraud, misrepresentation found out — Cannot make such distinctions — As any right applicant may

CONSTITUTIONAL LAW—Continued

Charter of Rights—Continued

Life, Liberty and Security—Continued

have had as Convention refugee obtained by fraud, not entitled to it — Furthermore, s. 46.4 eligibility provision — F.C.A. holding eligibility screening terminating right of refugee claimants to claim protection under Charter, s. 7 — No s. 7 right engaged by s. 46.4.

GWALA V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1998] 4 F.C. 43 (T.D.)

Judicial review of Commissioner's Directive 085, codifying Commissioner's decision to implement new inmate telephone system (i) restricting inmate calls to pre-authorized list of telephone numbers; (ii) including voice-over message at beginning of call, repeated at regular intervals; (iii) monitoring number called, when call made, duration — Charter, s. 8 protecting reasonable expectation of privacy from government intrusion — Applicants not having reasonable expectation of privacy with respect to monitoring, authorized call list features — Even if gathering of such information constituting search or seizure, not unreasonable within s. 8 — Charter, s. 7 guaranteeing right not to be deprived of life, liberty, security of person in manner not in accordance with principles of fundamental justice — In determining whether breach, principles of fundamental justice must be interpreted in context in which raised — New telephone system not "substantial change" — As no reasonable expectation of privacy, neither s. 8 nor s. 7 involved.

HUNTER V. CANADA (COMMISSIONER OF CORRECTIONS), [1997] 3 F.C. 936 (T.D.)

Senior immigration officer (SIO) finding applicant ineligible for refugee determination by virtue of Immigration Act, s. 46.01(1)(*a*) on ground recognized as Convention refugee in Sierra Leone; issuing exclusion order — That applicant not represented by counsel at interview not breach of Charter, s. 7 — Right to have claim determined by Refugee Division not included in right to life, liberty, security of person — Applicant cannot be lawfully removed from Canada without assessment of risks may face if returned to Sierra Leone — That assessment must comply with principles of fundamental justice — That issue of exclusion order important step in process that may lead to person's removal not sufficient to attract s. 7 to exercise of power to issue exclusion order, even where person apprehending serious risk of death, other physical violence or detention if returned to particular country — Immigration Act, ss. 53, 114(2) providing opportunities for assessment of risks facing person before exclusion order executed.

JEKULA V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1999] 1 F.C. 266 (T.D.)

Action for damages following boarding, seizure on high seas, arrest, detention of Spanish fishing trawler, arrest of master by Canadian authorities — Allegation

CONSTITUTIONAL LAW—Continued

Charter of Rights—Continued

Life, Liberty and Security—Continued

violation of Charter, s. 7 struck as disclosing no reasonable cause of action — Corporate plaintiff cannot claim rights under s. 7 — Complaint master of vessel treated differently than others based on nationality, within scope of s. 15.

JOSE PEREIRA E HIJOS, S.A. V. CANADA (ATTORNEY GENERAL), [1997] 2 F.C. 84 (T.D.)

Appeal from trial judgment holding inmate serving indeterminate sentence deprived of right to liberty under Charter, s. 7 in violation of principles of fundamental justice by National Parole Board procedures at biennial review — NPB refusing convict's request to appear by counsel, examine authors of clinical reports — Convict permitted to be represented by barrister, given copies of clinical reports, allowed to submit written interrogatories — S. 7 engaged in hearings before NPB — Fundamental justice not requiring requested procedures — Requirements of fundamental justice in administrative context reviewed — As ample opportunity to challenge reports, cross-examination of authors not necessary to ensure fairness — Board's procedural rulings sufficiently addressed dual requirements of protecting society, giving convict fair hearing as required by s. 7 — Refusal to grant enhanced procedures not violating right to liberty under s. 7.

MACINNIS V. CANADA (ATTORNEY GENERAL), [1997] 1 F.C. 115 (C.A.)

Judicial review of IRB, Appeal Division's affirmation of Adjudicator's decision applicant entering Canada by reason of "fraudulent or improper means or misrepresentation" of "material fact" pursuant to Immigration Act, s. 27(1)(*e*) — Applicant not disclosing change in marital status as unaware necessary to do so — S. 27(1)(*e*) not contravening Charter, s. 7 as no violation of principles of fundamental justice — S. 27(1)(*e*) dealing with circumstances of misrepresentation of material facts by one entering Canada — No larger social purpose, no public redressing of wrong done to society to maintain public order and welfare within public sphere of activity — No public goal of deterrence — Application of regime provided by Parliament for removal on ground landing improperly obtained not violating principles of fundamental justice.

MOHAMMED V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1997] 3 F.C. 299 (T.D.)

S.C.C. decision in *Chiarelli v. Canada (Minister of Employment and Immigration)* followed: SIRC procedures not infringing Charter, s. 7 rights of applicant as no breach of principles of fairness and fundamental justice therein — Assuming standard of reasonableness applicable, SIRC's conclusion not unreasonable as sufficient evidence in support thereof.

MOUMDJIAN V. CANADA (SECURITY INTELLIGENCE REVIEW COMMITTEE), [1999] 4 F.C. 624 (C.A.)

CONSTITUTIONAL LAW—Continued

Charter of Rights—Continued

Life, Liberty and Security—Continued

Upon arrival in Canada as visitor, appellant offered, declined to claim Convention refugee status, interpreter — Principles of fundamental justice mandate different procedures in different circumstances — Visitors have no right to enter into or remain in Canada — May be excluded with minimal procedural rights.

RAMAN V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1999] 4 F.C. 140 (C.A.)

Judicial review of immigration officer's decision applicant ineligible to have refugee status claim referred to CRDD — Applicant voluntarily leaving Canada after exclusion order against him issued, but without confirming departure with immigration authorities — On return to Canada, again claiming refugee status alleging persecution in Pakistan — Immigration Act, s. 44 prohibiting person against whom removal order made, but not executed, from seeking determination of Convention refugee claim — Applicant alleging s. 44 contrary to Charter, s. 7 guarantee not to be deprived of life, liberty, security of person except in accordance with principles of fundamental justice — Eligibility screening to make claim to refugee status not infringing Charter, s. 7 — Parliament having right to declare certain persons ineligible to make refugee claim — S. 7 not engaged.

RAZA V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1999] 2 F.C. 185 (T.D.)

Privacy Act, s. 51(2) providing application under s. 41 relating to personal information institution head refused to disclose under ss. 19(1)(*a*), (*b*), 21 shall be heard *in camera* — S. 51(3) permitting institution head to make representations *ex parte* — S. 51 merely procedural provision aimed at preventing accidental disclosure of national security information, foreign confidences — Tied to process requiring disclosure of personal information to judge to assess whether exemption justified — Such procedural safeguard not depriving applicant of liberty interest.

RUBY V. CANADA (SOLICITOR GENERAL), [2000] 3 F.C. 589 (C.A.)

Judicial review of Minister's opinion applicant danger to Canadian public, immigration officer's decision notifying him of removal date — Immigration Act, s. 53(1)(*d*) permitting refoulement of Convention refugees when found to constitute danger to public in Canada — Applicant, Convention refugee, convicted of trafficking in heroin — Arguing contrary to Charter, s. 7 to remove person to country where found to have well-founded fear of persecution — Question of constitutional validity cannot be determined on judicial review as no tribunal decision thereon — Requiring action for declaration of invalidity.

SAID V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1999] 2 F.C. 592 (T.D.)

CONSTITUTIONAL LAW—Continued

Charter of Rights—Continued

Life, Liberty and Security—Continued

Band Council refused to allow Indian to vote at Band Council elections on ground had married non-Indian and lost legal status as registered Indian — Band control over membership not permitting Band to disregard Bill C-31 which entitled her to reinstatement of registration and to vote at Band Council elections — Although evolving case law suggesting tendency to interpret liberty interest protected by Charter, s. 7 as broader than freedom from physical restraint, no precedent as yet for finding s. 7 protecting applicant's right to vote.

SCRIMBITT V. SAKIMAY INDIAN BAND COUNCIL, [2000] 1 F.C. 513 (T.D.)

Removal orders for deportation to country engaged in armed conflict — Act and Regulations scheme for risk assessment following unsuccessful refugee claim not violating principles of fundamental justice — Not for Court to determine country conditions as matter for immigration officers with specialized training — Systemic delay cannot vitiate constitutional validity of legislative scheme — Two separate avenues of post-claim review available to unsuccessful refugee claimant conform to requirements of fundamental justice.

SINNAPPU V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1997] 2 F.C. 791 (T.D.)

Refoulement of person to country where may be tortured engaging right to security of person under Charter, s. 7 — Whether deportation contrary to principles of fundamental justice in substantive, procedural sense — Deprivation of security of person breach of s. 7 only if not in accordance with principles of fundamental justice — Minister must assess risk of torture, balance competing interests under Charter, s. 7, principles of fundamental justice — Case law reviewed — Law exposing person to risk of torture breach of principles of fundamental justice.

SURESH V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 2 F.C. 592 (C.A.)

Criminal Code, s. 690 application for mercy — Adverse decision by Justice Minister potentially resulting in continuation of incarceration — Deprivation of liberty engaging Charter, s. 7 — Minister required to act fairly in exercising discretion.

THATCHER V. CANADA (ATTORNEY GENERAL), [1997] 1 F.C. 289 (T.D.)

Immigration Act, s. 70(5) removing statutory right of appeal from deportation order where Minister of opinion subject danger to public and serious offence committed — No legislatively required decision-making process — Departmental official making recommendation, concurred with or rejected by manager, Minister's delegate making final decision — No reasons given — S. 7 applies as (1) liberty interest engaged when person deported; (2) decision removing avenue of legal redress otherwise available —

CONSTITUTIONAL LAW—Continued

Charter of Rights—Continued

Life, Liberty and Security—Concluded

S. 70(5) not unconstitutionally vague — Different descriptions of burden of proof in cases, Guidelines not indicating uncertainty — "Danger to the public" not so lacking in precision informed legal debate on content not possible.

WILLIAMS V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1997] 1 F.C. 431 (T.D.)

Questions certified: whether Immigration Act, s. 70(5), giving Minister discretion to issue opinion person danger to public, engaging interests affecting liberty, security of person pursuant to Charter, s. 7 — If yes, whether s. 70(5) inconsistent with fundamental justice, and of no force or effect as unconstitutionally vague and/or as not providing for rendering of reasons for determination — Whether Minister's exercise of discretion, in context of procedure used, inconsistent with fundamental justice, Charter, s. 7, where no reasons provided.

WILLIAMS V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1997] 1 F.C. 457 (T.D.)

Appeal from order setting aside Minister's opinion respondent danger to Canadian public — Respondent, permanent resident, convicted of serious criminal offences — Deportation order issued — While appeal therefrom pending, Minister forming opinion under Immigration Act, s. 70(5) — Motions Judge holding principles of fundamental justice requiring reasons for opinion — Appeal allowed, certified questions answered — (1) S. 70(5) not engaging interests affecting liberty and/or security of person pursuant to Charter, s. 7 — Refusal of discretionary exemption from lawful deportation order (effect of s. 70(5) opinion) as applied to non-refugee having no legal right to be in country not involving deprivation of liberty — "Liberty" not including right of personal choice for permanent residents to stay in country where violated essential condition under which permitted to remain in Canada — (2) S. 70(5) not inconsistent with requirements of fundamental justice — (i) Not unconstitutionally vague — Giving sufficient direction to Minister so that both Minister, Court can determine whether Minister exercising power for purposes intended by Parliament — (ii) S. 70(5) not invalid for not requiring reasons — Possible to render proper decision without reasons, particularly where tribunal exercising discretionary powers — Principles of fundamental justice as guaranteed by Charter, s. 7 not requiring reasons — (3) No infringement of fundamental justice herein in failure to give reasons — No evidence Minister's delegate acting in bad faith, on basis of irrelevant criteria or without regard to material — (4) Failure to provide reasons in context of procedure used not breaching natural justice, procedural fairness — Requirements of natural justice subsumed under fairness — Given consequences, nature of decision, minimal requirements of fairness imposed, met.

WILLIAMS V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1997] 2 F.C. 646 (C.A.)

CONSTITUTIONAL LAW—Continued

Charter of Rights—Continued

Limitation Clause

Whether use of "subversion" in Immigration Act, s. 19(1)(*e*) unconstitutionally vague — Against *Oakes* test, cautionary guidance in case law regarding findings of unconstitutional vagueness, use of "subversion" in context under review reasonably justified in free and democratic society — While vague, "subversion" having some meaning although not enough to provide sufficient guidance for legal debate — But social, security objectives use of term designed to achieve of sufficient importance to warrant overriding constitutionally protected right of persons that is infringed — Use of "subversion" impairing constitutionally protected right of applicant as little as possible; achieving defensible balance between deleterious effects flowing from use of term, social and security objectives to which use directed — While importing vagueness, use of "subversion" in context not resulting in unconstitutional vagueness.

AL YAMANI V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 3 F.C. 433 (T.D.)

Application of *Oakes* test — Deference essential aspect of s. 1 analysis — Objective of Canadian Wheat Board Act to provide for orderly grain marketing — Board given monopoly to avoid fluctuation of grain prices — Rational connection between objective, achievement of legislation — Minimal impairment of plaintiff's rights — Deleterious effects of impugned legislation not outweighing salutary benefits provided by CWB monopoly — S. 1 test met.

ARCHIBALD V. CANADA, [1997] 3 F.C. 335 (T.D.)

Application of *Oakes* test — Pressing and substantial objective: to secure orderly marketing, in interprovincial and export trade, of grain grown in Canada — Rational connection — Minimal impairment: no reasonable alternatives to Wheat Board monopoly in meeting Act's objectives — Proportionality of effects test met: deleterious effects on appellants' rights outweighed by salutary effects of orderly marketing of grain under Wheat Board — Weighing of competing interests — If any of appellants' Charter rights breached by Act, reasonable limits in free and democratic society.

ARCHIBALD V. CANADA, [2000] 4 F.C. 479 (C.A.)

Transport Canada's Personnel Licensing Handbook, s. 3.18 providing persons having diabetes mellitus controllable without drugs assessed as fit, declared contrary to Charter, s. 15(1) equality rights — Trial Judge holding s. 3.18 not proportional to objective of flight safety as not impairing equality rights of insulin-dependent diabetics "as little as possible" — S.C.C. adopting flexible approach to application of *Oakes* test for Charter, s. 1 justification — Trial Judge applied rigid formulation of *Oakes* test — Not reflecting appropriate deference to legislature — Also failed to advert to context of s. 3.18, including Canada's undertaking to adopt measures similar to those of International Civil Aviation Organization respecting licensing of insulin-dependent

CONSTITUTIONAL LAW—Continued

Charter of Rights—Continued

Limitation Clause—Continued

diabetics, conflict of medical opinion on licensing insulin-dependent diabetics — Reasonable basis to conclude s. 3.18 respecting Charter rights as much as possible — Pressing and substantial legislative objective (flight safety) not outweighed by minimal impairment of equality rights.

BAHLSEN V. CANADA (MINISTER OF TRANSPORT), [1997] 1 F.C. 800 (C.A.)

Indian Act, s. 77(1), requiring band members to be "ordinarily resident" on reserve to vote in Band Council elections, violating Charter, s. 15 equality guarantee — S. 77(1) not saved by Charter, s. 1 — While goal of s. 77(1) pressing, substantial, no rational connection between legislative objective and means taken to achieve it — Discriminatory prohibition on voting by off-reserve members not justified by fact Band governance often concentrated on matters of interest exclusively to those on reserve — Non-resident Band members bound by decisions of chief, Band Council in so far as decisions may impact on them, but lacking ability to hold chief, Band Council accountable — Exclusion of non-resident Band members from participation in selection contrary to principles on which electoral provisions of Indian Act built.

BATCHEWANA INDIAN BAND (NON-RESIDENT MEMBERS) V. BATCHEWANA INDIAN BAND, [1997] 1 F.C. 689 (C.A.)

Immigration Regulations, 1978, s. 2(1) concerning age 19 restriction for adopted sons found to contravene Charter, s. 15 — Whether saved by s. 1 — Application of test in *The Queen v. Oakes* — S. 1 analysis exercise based on facts, not abstractions — While state's justification need not be established to scientific certainty, must provide something sufficient in way of justification — One underlying purpose of provision to prevent adoptions of children over 19 to circumvent immigration requirements — Board erred in confusing s. 15(1) analysis of discriminatory effect with objectives of measure — Objective of age 19 restriction pressing, substantial — Where social science evidence inconclusive, sufficient Parliament had reasonable basis for means chosen.

CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) V. DULAR, [1998] 2 F.C. 81 (T.D.)

Old Age Security Act, s. 19(1)(*a*), providing for payment of spousal allowance (SPA) to 60-to-64-year-old spouses of pensioners provided not separated, found to breach Charter, s. 15 — On whether violation justified under Charter, s. 1 *Egan v. Canada* binding, but framework in *R. v. Oakes* applied since group excluded from benefit herein different — (a) In respect of Charter, s. 1 courts must be guided by values, principles essential to free, democratic society — Such values, principles including respect for inherent dignity of individuals, social justice — Where impugned legislation having two objectives, one of which pressing, substantial, other contrary to

CONSTITUTIONAL LAW—Continued

Charter of Rights—Continued

Limitation Clause—Continued

Charter, legislation will satisfy first stage of s. 1 inquiry — Exclusion of separated spouses having two objectives: denial of benefits to members of this group; provision of benefits to particularly disadvantaged group — First discriminatory, second pressing, substantial — Thus exclusion satisfying pressing, substantial test — (b)(i) Restriction of SPA benefit to non-separated spouses rationally connected to objective of legislation — Rational that program designed to benefit couples when one person in couple becoming pensioner focussing on cohabiting spouses, excluding separated spouses — (ii) Parliament considered situation of separated spouses when created SPA — Basis for concluding reasonable alternative to address needs of low-income separated individuals existed — Reasonable basis for confining SPA to cohabiting spouses — (iii) That impugned provisions pass rational connection, minimal impairment tests indicative objective of legislation not outweighed by deleterious effects — Salutary effects to provide benefits to spouses of pensioners in amounts provided — Deleterious effect denial of financial assistance to separated spouses when otherwise qualifying therefor — That separated persons may have other means of support under provincial programs mitigating (in this case eliminating) deleterious effect — Negative social stigma associated with social assistance (welfare) not outweighing salutary effects of SPA — Exclusion of separated spouses from SPA justified under Charter, s. 1.

COLLINS V. CANADA, [2000] 2 F.C. 3 (T.D.)

Eligibility requirements for disability benefits in Canada Pension Plan, s. 44 in violation of Charter, s. 15 — However, requirements reasonable and demonstrably justified in free and democratic society — Given social, economic and fiscal considerations involved, government has made reasonable attempt to calculate and allocate disability benefit in most reasonable manner.

GRANOVSKY V. CANADA (MINISTER OF EMPLOYMENT AND IMMIGRATION), [1998] 3 F.C. 175 (C.A.)

Judicial review of Commissioner's Directive 085, codifying Commissioner's decision to implement new inmate telephone system (i) restricting inmate calls to pre-authorized list of telephone numbers; (ii) including voice-over message at beginning of call, repeated at regular intervals; (iii) monitoring number called, when call made, duration — Authorized call list, voice-over infringing Charter, s. 2(*b*) — Corrections and Conditional Release Act, s. 71 authority for Commissioner to make rules, directives with respect to prisoners contacting members of public — Corrections and Conditional Release Regulations, ss. 94, 95 necessarily imply authorization of telephone communications for inmates — No disruption in chain of statutory authority flowing from Act, Regulations to Commissioner's Directive 085 — Limits in directive "prescribed by law" — Government's objectives in enhancing inmate telephone communications to assist in rehabilitation, control communications possibly resulting in crime — Both objectives reflecting pressing substantial concerns in democratic

CONSTITUTIONAL LAW—Continued

Charter of Rights—Continued

Limitation Clause—Concluded

society — Authorized call list reasonable means of fulfilling objective of enhancing rehabilitation through family, community telephone communications, while minimally impairing inmates' freedom of expression — Weighed against seriousness of need for security measures against importing of weapons, breakouts, smuggling of drugs, harassment of victims, witnesses, proportionality between objectives of authorized call list and inconvenience, harm flowing from its implementation — Authorized call list limitation justified under s. 1 — Voice-over not justified — Not meeting minimal impairment test — To extent authorized call list preventing inmate from initiating calls to persons not wishing to speak with inmates, voice-over extraneous — Assisting in neither rehabilitation not precautionary objectives.

HUNTER V. CANADA (COMMISSIONER OF CORRECTIONS), [1997] 3 F.C. 936 (T.D.)

Immigration Act, s. 53(1)(*b*) infringing Charter, s. 7, whether saved under s. 1 — *Oakes* test applied — Objectives of Act, s. 53(1)(*b*) sufficiently important to warrant overriding constitutional right — Rational connection between objective, means — Minimal impairment requirement met — Salutary effects of legislation outweighing deleterious effects — Charter not movable barrier lowered to permit entry of terrorists, raised to prevent removal — S. 53(1)(*b*) saved under Charter, s. 1.

SURESH V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 2 F.C. 592 (C.A.)

Mobility Rights

Charter, s. 6(2)(*b*) guarantees right to pursue gaining of livelihood anywhere in Canada, not right to livelihood itself — Case law on mobility rights reviewed — Economic disadvantage not impairment of ability to pursue livelihood — Western farmers challenging Canadian Wheat Board, single-desk marketing agency — No denial of plaintiffs' mobility rights to pursue gaining of livelihood — "Designated area" most natural, efficient, economic area to grow grain, not impeding mobility.

ARCHIBALD V. CANADA, [1997] 3 F.C. 335 (T.D.)

Compulsory pooling under Canadian Wheat Board Act — Act law of general application in force throughout Western provinces (but only part of British Columbia) — Fact Act creating different marketing scheme for grain grown in designated area from that grown outside designated area not creating distinction constituting discrimination primarily on basis of province of present or previous residence.

ARCHIBALD V. CANADA, [2000] 4 F.C. 479 (C.A.)

Unreasonable Search or Seizure

Income Tax Act, s. 176(1) providing MNR must, where taxpayer appeals assessment, transfer all appellant's tax documents to T.C.C., documents thereupon open

CONSTITUTIONAL LAW—Continued

Charter of Rights—Concluded

Unreasonable Search or Seizure—Concluded

to public inspection — Even though only small degree of privacy attaching to tax returns, Act, s. 176(1), admittedly no longer serving useful purpose, unconstitutional as authorizing unreasonable seizure, contrary to Charter, s. 8 and unjustified under Charter, s. 1 — Seizure within Charter, s. 8 not limited to "investigative activities".

GERNHART V. CANADA, [2000] 2 F.C. 292 (C.A.)

Distribution of Powers

Charter cannot override head of legislative power distributed in original Constitution — Canadian Wheat Board Act valid exercise of Parliament's power over trade and commerce under Constitution Act, 1867, s. 91, class 2.

ARCHIBALD V. CANADA, [1997] 3 F.C. 335 (T.D.)

Minister of Canadian Heritage desiring to create Torngat National Park in Northern Labrador — Negotiations thereon between Minister, Newfoundland and Labrador Government, and Labrador Inuit Association — Nunavik Inuit, represented by Makivik Corp., with whom Federal Crown engaged in comprehensive land claims settlement negotiations, excluded from process because provincial government not recognizing them — Province of Newfoundland questioning Court's jurisdiction to grant relief impacting directly or indirectly on Province's constitutional authority over its lands, resources.

MAKIVIK CORP. V. CANADA (MINISTER OF CANADIAN HERITAGE), [1999] 1 F.C. 38 (T.D.)

Provincial no-fault automobile insurance legislation prohibiting individual from suing federal Crown in Federal Court — Whether constitutionally invalid as binding Crown without adoption by Parliament — Plaintiffs' arguments: Crown's rights affected as province having relieved federal Crown of statutory liability under Crown Liability and Proceedings Act; Federal Court jurisdiction unconstitutionally restricted — Crown's arguments: legislation affecting only plaintiff's rights, not those of Crown; provincial legislation adopted by Crown Liability and Proceedings Act, s. 32 — On facts of case at bar, rights of federal Crown not affected — Might be otherwise if federal Crown suing for losses caused by accident — Furthermore, provincial legislation adopted by federal statute, Crown Liability and Proceedings Act.

MOXHAM V. CANADA, [1998] 3 F.C. 441 (T.D.)

Social assistance provided to non-Indian spouses originating with federal spending power — Federal spending within Parliament's legislative authority under CHRA, s. 2 — Jurisdiction of Human Rights Tribunal over Band Council's distribution of social assistance funds not "regulation" of provincial matter — Band Council statutory body

CONSTITUTIONAL LAW—Concluded

Distribution of Powers—Concluded

under Indian Act, subject to CHRA — Indian Act not conferring authority on Band Council to decide on eligibility for social assistance.

SHUBENACADIE INDIAN BAND V. CANADA (HUMAN RIGHTS COMMISSION), [1998] 2 F.C. 198 (T.D.)

Constitution Act, 1867, s. 96 requiring Governor General to appoint judges of superior courts — Issuance of certificate under Canada Evidence Act, s. 39 certifying information confidence of Queen's Privy Council not traditional, necessary function of superior court of kind contemplated in 1867, not within scope of s. 96.

SINGH V. CANADA (ATTORNEY GENERAL), [2000] 3 F.C. 185 (C.A.)

CONSTRUCTION OF STATUTES

Migratory Birds Regulations, s. 35 prohibiting deposit of oil, oil wastes, or "any other substance harmful" to migratory birds in any area frequented by migratory birds — Considering expressed purpose of Migratory Birds Convention Act, pursuant to which Regulations established, Convention implemented thereby, Governor in Council's regulation-making power, clear intention to provide wide protection to migratory birds — Therefore, words "any other substance" should be given wide interpretation — Any substance, including oil, oil wastes, capable of being prohibited if "harmful" — Interpretation of "harmful" to migratory birds, depending on facts of case — Millions of tonnes of inert rock deposited into creek beds constituting threat to preservation of migratory birds nesting there — In such circumstances "harmful" within s. 35(1).

ALBERTA WILDERNESS ASSN. V. CARDINAL RIVER COALS LTD., [1999] 3 F.C. 425 (T.D.)

Immigration Act, s. 49(1.1) providing s. 49(1) stay of execution of removal order not applicable to person "residing or sojourning" in U.S.A. who is subject of s. 20(1)(*a*) report — Applicant, citizen of Ecuador, seeking admission to Canada from U.S.A., where stayed three months — S. 20(1)(*a*) report issued as lacking valid visa — Claimed Convention refugee status — Conditional departure notice under s. 28 issued — Living in Canada since 1996 — Convention refugee claim rejected in 1999; applicant seeking judicial review of that decision — Statutory scheme indicating time fixed by Parliament for determining residence, sojournment in U.S.A. when applicant first subject of s. 20(1)(*a*) report — Applicant's days in Canada pending determination of refugee claim or subsequent appeal proceedings not considered in determining whether residing, sojourning in U.S.A. — Any other interpretation doing substantial violence to statutory scheme, nullifying enforcement provisions related to actions taken at port of entry — Also leading to absurd result, rendering s. 49(1.1) meaningless — Presumption Parliament intending to enact workable laws.

ALBUJA V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 2 F.C. 538 (T.D.)

CONSTRUCTION OF STATUTES—Continued

Amendment to Patent Act abolishing compulsory licence system in respect of drug products except for those granted before December 29, 1991 — Applicant's application for Notice of Compliance (NOC) outstanding when Patented Medicines (Notice of Compliance) Regulations changing scheme for obtaining NOC adopted — Interpretation Act, s. 12 providing every enactment deemed remedial, to be given fair, large, liberal interpretation to ensure attainment of objects — Contrary to purpose of Patent Act to grant NOC — Interpretation Act, s. 44(*c*) providing where enactment repealed, another substituted therefor, proceeding under former enactment continued in conformity with new enactment — Amending Act, Regulations apply to outstanding application for NOC.

APOTEX INC. V. CANADA (ATTORNEY GENERAL), [1997] 1 F.C. 518 (T.D.)

Retroactivity — Application of Patented Medicines (NOC) Regulations to new drug submissions in pipeline when 1993 Regulations came into effect did not engage presumption against retroactivity — No vested right abrogated: in absence of clear legislative indication to contrary, no legal right to have application for statutory benefit determined in accordance with eligibility criteria in place when application made.

APOTEX INC. V. CANADA (ATTORNEY GENERAL), [2000] 4 F.C. 264 (C.A.)

Immigration Act, s. 70(5) — Motions Judge finding no ambiguity, rejecting invocation of "golden rule" of statutory interpretation — Literal approach not to be followed if resulting in absurdity.

ATHWAL V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1998] 1 F.C. 489 (C.A.)

Canada Labour Code, s. 240(1)(*a*), permitting any person completing 12 consecutive months of continuous employment to make unjust dismissal complaint — Appellants employed 10 to 12 weeks per year for more than 10 years when dismissed — Motions Judge holding s. 240(1)(*a*) requiring 12 consecutive months of continuous work based on use of verb "*travailler*" in French version — Applying shared meaning rule, holding French text should prevail as English version uncertain — Not discussing Parliament's intention in enacting unjust dismissal provisions — Where one language version capable of broader meaning, issue which meaning best according with Parliament's intention in enacting both versions — Objective of unjust dismissal provisions to afford non-unionized workers within federal jurisdiction protection similar to that enjoyed by unionized workers under collective agreements — Court ought to resolve in favour of complainants any variance between English, French texts respecting qualifying conditions for such protection — S. 240(1)(*a*) not intended as onerous exclusionary provision excluding from Code's protection all seasonal employees — If employment, work interpreted as synonymous, all seasonal employees excluded from Code's protection because any period not working for salary rupturing employment relationship — Parliament intending s. 240(1)(*a*) to avoid potential for overload of applications — Employment relationship, not active work, important — French version originally identical to English — Changed under authority of Statute Revision Act — Statute

CONSTRUCTION OF STATUTES—Continued

Revision Commission exceeding powers in changing substance of legislation — Amendment to Canada Labour Standard Regulations, s. 29 (deeming absence from employment as result of lay-off not interruption of continuity of employment), after these complaints filed, reflecting state of law at time of enactment — Interpretation Act, s. 45 providing amendment not deemed to involve declaration law changed or any declaration as to previous state of law.

BEOTHUK DATA SYSTEMS LTD., SEAWATCH DIVISION V. DEAN, [1998] 1 F.C. 433 (C.A.)

Retroactivity — Appeal from T.C.C. decision amendments to Excise Tax Act applied to management fees paid to trustees/managers by mutual fund trusts between 1991, 1995 — Amendments to Act making GST payable on management, administrative fees of mutual fund trusts passed March 20, 1997 "deemed to have come into force on December 17, 1990" — Language sufficiently clear to rebut presumption against retroactive application — Legislation applicable to actions commenced after deemed coming into force date — Interpretation Act, s. 43 not preserving vested rights of trustees because (1) s. 43 dealing with repeal of enactments; (2) trustees had no vested rights.

C.I. MUTUAL FUNDS INC. V. CANADA, [1999] 2 F.C. 613 (C.A.)

Income Tax Act, s. 110.6(2.1) increasing maximum exemption available for capital gains on dispositions of qualified small business corporation shares "in the year or a preceding taxation year and after June 17, 1987" — Under amending legislation enhanced deduction applicable to 1988 and subsequent taxation years — Effect of s. 110.6(2) with respect to transactions between June 17, 1987 and beginning of 1988 unclear — While not binding, technical notes widely accepted by courts as aids to interpretation — Interpretive weight of technical notes particularly great where legislature enacting amendment when aware of particular administrative interpretation thereof — White Paper introducing legislative amendments, explanatory notes published after White Paper tabled considered — Parliament aware when passed legislation Department of Finance considered enhanced deduction to apply to 1987 transactions occurring after June 17, 1987 only in respect of reserves carried over into subsequent years — Presumption Parliament intended effect described in White Paper, explanatory notes.

CANADA V. AST ESTATE, [1997] 3 F.C. 86 (C.A.)

Meaning of Income Tax Act, s. 55(2) — Contextual, purposive approach should apply to statutory interpretation unless meaning of provision clear, plain — When no doubt as to meaning of legislation, no ambiguity in application to facts, statutory provision must be applied regardless of object, purpose — Act, s. 55 not having clear, plain meaning — Court bound to give sensible meaning to provision.

CANADA V. BRELCO DRILLING LTD., [1999] 4 F.C. 35 (C.A.)

CONSTRUCTION OF STATUTES—Continued

Income Tax Act, s. 147.2(4)(*a*) permitting deduction of contributions to registered pension plan to extent contribution made in accordance with plan as registered — Taxpayer member of pension plan governed, prior to 1991 by Newfoundland's The Public Service (Pensions) Act (1970 Act) — Electing in 1989 pursuant to s. 32 thereof to purchase seven years of service for pension purposes — 1970 Act repealed in 1991 — Replacement legislation (1991 Act) not expressly allowing purchase of service to be counted as pensionable service, but s. 4 continuing as pension plan, plan established under 1970 Act, subject to 1991 Act, regulations; s. 39 expressly protecting "all benefits" acquired under 1970 Act — Minister disallowing deductions as not "made in accordance with plan as registered — T.C.C. allowing appeal — Judicial review application dismissed — Absence of provision in 1991 Act equivalent to s. 32 not retrospectively abrogating contracts for purchase of service made in accordance with plan as registered before 1991 Act in force — 1991 Act, ss. 4, 39 expressly continuing pension plan provided for, by, under 1970 Act and protecting benefits acquired thereunder — Interpretation supported by Newfoundland Interpretation Act, s. 29 providing repeal, revocation of Act not affecting previous operation of Act, or any right acquired under previous Act — Also supported by presumption in statutory interpretation legislature not intending to abolish, limit, otherwise interfere with rights of subjects unless expressly doing so.

CANADA V. CORBETT, [2000] 2 F.C. 81 (C.A.)

Indian Act, s. 87 exempting from taxation Indians' personal property situated on reserve — *Situs* of employment income — *Situs* principle firmly entrenched in language of section — Reliance on test for *situs* unconnected to purpose of tax exemption arbitrary in application — Policy of legislation: shield Indians from being dispossessed of property by non-natives — Purpose neither to afford Indians unlimited protection from taxation nor to remedy economic disadvantage — Court not to stretch tax exemption beyond what supportable by purposive reading of legislation — Purposive interpretation necessary to preserve substance of tax exemption, economic situation on reserves having changed since enactment — Statutes express will of Parliament and, unlike treaties, ambiguities not necessarily resolved in Indians' favour — Revenue Canada's interpretation guidelines useful in routine cases but Court decides each case by relative weighting of connecting factors.

CANADA V. FOLSTER, [1997] 3 F.C. 269 (C.A.)

Indian Act, s. 90 deeming always situated on reserve personal property purchased by Crown with (a) Indian moneys or moneys appropriated by Parliament for use, benefit of Indians, bands or (b) personal property given to Indians under treaty, agreement — S. 87 exempting from taxation personal property of Indians situated on a reserve — Taxability of Indian Chief's salary paid out of funds provided by Crown under Band Support Funding program — (1) Meaning of "agreement" in s. 90(1)(*b*) — S. 90(1)(*b*) must be interpreted in context of treaty-making process — Notion of entitlement stemming from exchange involved in treaty-making process — Basic rules of legislative interpretation requiring link between "treaty", "agreement" — Interpreta-

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tion supported by use of "accord" in French version of s. 90(1)(*b*) — "Accord" having clear connotation of idea of pact arrived at by giving, taking by both parties — (2) Money not excluded from "personal property" in s. 90 (Marceau J.A. dissenting) — (i) As no bar to purchase of money with money, no basis for suggestion by definition "personal property" excluding money — (ii) Parliament's contemplation not significant as statutory language embracing notion of "personal property" without express limitation as to form, character — (iii) Money, as any other fungible property, can be segregated in which case maintains character, identity — As money cannot be excluded from s. 90(1)(*a*), no such limitation in s. 90(1)(*b*).

CANADA V. KAKFWI, [2000] 2 F.C. 241 (C.A.)

Whether Government Wharves Regulations, imposing charge per passenger solely in respect of cruise vessels engaged in voyage during which passengers on board for at least one overnight period, *ultra vires* Public Harbours and Port Facilities Act — Vessels offering day cruises, using dock in same manner for same purposes not subject to charge — Act, s. 3 definition of "national ports policy" including objective of accessibility, equitable treatment in movement of goods and persons to users of Canadian ports — Exceptional requirement of "equitable treatment" intended to confer broader rights on users of Canadian harbours than those stemming from implied requirement of non-discrimination generally read into enactments — Act not authorizing raising revenues unless in connection with use made of facilities — Charges not complying with principle of equitable treatment — Definition of "cruise vessel" in Regulations invalid.

CANADA V. ST. LAWRENCE CRUISE LINES INC., [1997] 3 F.C. 899 (C.A.)

Taxpayer liable for underpayment of GST, assessed for additional tax, interest, 6% penalty under Excise Tax Act, s. 280(1) — Whether implied due diligence defence available where taxpayer exercising required standard of care — Conventional interpretative principles applicable in deciding whether due diligence defence available — "Modern" approach to statutory interpretation involving contextual, purposive analysis of legislation — Relevant factors to be considered in determining whether s. 280 gives rise to strict liability — S. 280 not giving rise to absolute liability — Implied due diligence not incompatible with legislative scheme — Presumption in favour of strict liability not rebutted.

CANADA (ATTORNEY GENERAL) V. CONSOLIDATED CANADIAN CONTRACTORS INC., [1999] 1 F.C. 209 (C.A.)

Merger doctrine — Canadian Human Rights Act, s. 62 exempting from application of Act all pension, superannuation plans established by Act of Parliament before March 1, 1978 — Canadian Forces Superannuation Act established in 1959, amended several times before, after March 1, 1978 — CHRC arguing post-1978 amendments having effect of bringing Act within its jurisdiction under doctrine of merger — As Parliament not addressing effect of amendments on pension, superannuation plans subject of s.

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62(1), post-1978 amendments to CFSA not creating new plan — Act not within Commission's jurisdiction.

CANADA (ATTORNEY GENERAL) v. MAGEE, [1998] 4 F.C. 546 (T.D.)

Meaning of "on a casual basis" in par. (*g*) exception to s. 2(1) definition of "employee" in Public Service Staff Relations Act — Whether interpreted in light of Public Service Employment Act, s. 21.2 or having regard to factual circumstances — S. 21.2 permitting appointments for periods not exceeding 90 days, providing PSEA not applicable to such employees — Nothing in s. 21.2 indicating those employed pursuant to that section casual employees, except heading, marginal note: "Casual employment" — Ambiguity in PSEA, s. 21.2 when read with heading — Interpretation Act not covering headings, but S.C.C. holding must be considered in determining meaning, application of provision — Inconsistencies in French version of s. 21.2; using different terms where English using same term — Violation of rule same word in English should be translated by same word in French — Application of principle favouring consistent version — Heading clarified s. 21.2 — In adopting PSEA, s. 21.2 Parliament creating discrete category of casual employees — As employee appointed under PSEA, s. 21.2, respondent employed on casual basis under PSSRA, s. 2(1)(*g*).

CANADA (ATTORNEY GENERAL) v. MARINOS, [2000] 4 F.C. 98 (C.A.)

CHRA, s. 11 providing discriminatory practice for employer to establish, maintain differences in wages between male, female employees employed in same establishment, performing work of equal value — Unlike employment equity legislation addressing underrepresentation of women, minorities in certain employment, s. 11 addressing systemic wage discrimination attributable to historic pattern of job segregation — Within CHRT's mandate when dealing with complaints under s. 11 to take into account existence of underrepresentation of women in higher paying positions — Parliament aware s. 11 represented more statement of principle than complete prescription — Consistent with Parliament's intention "living tree" of Act should be nourished by experience of other jurisdictions in dealing with social injustice at which s. 11 aimed — CHRT entitled to rely on evidence of expert witnesses who drew on experience with specialized pay equity legislation — Differences between s. 11, other statutes not so significant as to make more modern pay equity legislation irrelevant to resolution of issues before Tribunal.

CANADA (ATTORNEY GENERAL) v. PUBLIC SERVICE ALLIANCE OF CANADA, [2000] 1 F.C. 146 (T.D.)

Canadian Human Rights Act, s. 25 definition of "disability" including dependence on drugs — Whether intent of statute to extend protection to those dependent on illegal substances — Majority holding s. 25, as human rights legislation, not to be narrowly construed by reading in "legal" as modifying drugs.

CANADA (HUMAN RIGHTS COMMISSION) v. TORONTO-DOMINION BANK, [1998] 4 F.C. 205 (C.A.)

CONSTRUCTION OF STATUTES—Continued

Meaning of Income Tax Act section providing code for fair, consistent treatment of dispositions where no definite figure (as foreclosures) — Meaning of language clear but interpretation supported by marginal notes — Forming no part of enactment but can be used to aid Court — Interpretation Bulletin has no binding effect but looked at as part of context of legislation — Here no conflict between specific, general statutory provision.

CORBETT V. CANADA, [1997] 1 F.C. 386 (C.A.)

Retroactivity — Application of amended definition of post-determination refugee claimants in Canada class (PDRCC) — Applicant's claim for refugee status rejected in February 1994 on ground excluded from Convention refugee definition by Convention, Art. 1F(a) (crime against humanity) — Applicant advised in August 1997 did not qualify for risk assessment as member of PDRCC class as amendment to Regulations in force as of May 1997 excluding those whose refugee claims rejected under Art. 1F(a) — Applicant's deemed application for landing as member of PDRCC class to be determined under Immigration Regulations in force when August 1997 decision made — New, amended, definition clearly meant to apply to claims determined prior to May 1997 — Applying new definition not giving legislation retroactive effect, merely ascribing different consequence to continuing fact — Simply giving immediate effect — Effect of amendment not punitive in nature — Amendment did not deprive applicant of any existing right of substantive nature — Question certified.

DIAZ V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1999] 2 F.C. 496 (T.D.)

Licensed Canadian-based direct broadcast satellite (DBS) service provider seeking damages, injunctive relief against defendants re importation and sale of receivers (small satellite dishes) and decoders for receiving DBS signals originating in U.S.A. from broadcasters not licensed to broadcast in Canada — Radiocommunication Act, ss. 9, 10, 18 — Adoption of thorough, compelling analysis of interpretation of Act, s. 9(1)(*c*) by Provincial Court Judge in *R. v. Knibb*: applying modern purposive approach to statutory interpretation (establishing legislative purpose by relying on legislator's statements, commission reports, Hansard, academic texts, as well as words of legislation read in context), Act, s. 9(1)(*c*) providing absolute prohibition against decoding of encrypted subscription program signals unless emanating from lawful distributor in Canada authorizing decoding — Interpretation authorizing completely unregulated broadcasting in Canada not consistent with purpose, object of Broadcasting Act which must be considered when reading provisions of Radiocommunication Act — As Act, s. 9(1)(*c*) has not been directly challenged under Charter, s. 2(*b*) (freedom of expression), Charter cannot be used as interpretive tool to defeat purpose of legislation or to give it effect Parliament clearly intended it not to have.

EXPRESSVU INC. V. NII NORSAT INTERNATIONAL INC., [1998] 1 F.C. 245 (T.D.)

Customs Act, s. 12 providing "all goods that are imported" shall be reported at nearest customs office — S. 18 providing all goods reported under s. 12 deemed

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imported — CITT holding "import" meaning to bring into country, applying to all goods regardless of origin — Interpretive guidelines applied: grammatical/literal; contextual; purposive; parliamentary history; pragmatic; previous interpretations — Act, Tariff intended to assess duties only on foreign goods entering country.

FLAVELL V. DEPUTY M.N.R., CUSTOMS AND EXCISE, [1997] 1 F.C. 640 (T.D.)

Whether owners, operators of vessels engaged in fishing operations "transportation companies" within meaning of Immigration Act, ss. 2, 91.1(1)(*b*), 92(1) for purposes of legal obligation to pay administration fees and make security deposits with respect to deserting crew members — Discrepancy between English, French versions of definition of "transportation company" in Act, s. 2 — Examination of legislative context in which term used and purpose, object of Act — Principles applicable when construing changes made in course of consolidating public statutes — English text best reflecting Act's objectives of controlling illegal entry of persons to Canada, recouping removal expenses.

FLOTA CUBANA DE PESCA (CUBAN FISHING FLEET) V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1998] 2 F.C. 303 (C.A.)

Canadian Environmental Assessment Act, s. 15(3) requiring conduct of environmental assessment in respect of every construction, operation, modification, decommissioning, abandonment or other undertaking in relation to physical work in opinion of responsible authority likely to be carried out in relation to physical work — Coast Guard (responsible authority) determining proposed bridges over navigable waters not likely to cause significant adverse environmental effects — Determining scope of bridge project not including new logging road, forestry operations — In concluding Coast Guard obliged under s. 15(3) to include road, forestry operations within scope of environmental assessment because "in relation to" bridges, Motions Judge relying on independent utility principle: where individual project not having independent utility, but inextricably intertwined with other projects, must consider all projects — Not helpful in interpretation of s. 15(3) as originating in U.S.A. where constitutional jurisdiction, applicable statutory scheme very different.

FRIENDS OF THE WEST COUNTRY ASSN. V. CANADA (MINISTER OF FISHERIES AND OCEANS), [2000] 2 F.C. 263 (C.A.)

Canada Mining Regulations — S. 49(1) prohibiting for one year holder of claim at time lapsed from (*a*) relocating or having "any interest" in claim or any part thereof or (*b*) having claim recorded in name of any corporation "controlled" by him — Golden Rule assigning mineral claims to Tyler — Tyler's claims lapsed because not making statutorily required investment in exploration of claims — 18 days later, claims overlapping Tyler's former claims recorded in Warner's name — Applicants, seeking to record claims overlapping Warner's claims, filing notices of protest against Warner's claims, alleging Tyler beneficial owner thereof — Supervising Mining Recorder (SMR) upholding protests — Assistant Deputy Minister (ADM) reversing SMR, on basis Warner holding claims in trust for Golden Rule; corporation only "controlled" by

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person owning 50% of shares, and Tyler owning no shares in Golden Rule; "any interest" meaning proprietary interest — Application for judicial review allowed — (1) If Golden Rule beneficial owner of mineral claims, immaterial whether Tyler "controlled" Golden Rule because s. 49(1)(*b*) only forbidding holder of claim at time lapsed from having claim or part thereof "recorded . . . in name of any corporation controlled by" Tyler — Warner recorded owner — Not "corporation controlled by" Tyler — S. 49(1)(*a*) precluding former owner from having legal, beneficial interest in claim — Not saying when bare nominee recorded owner, claim thereby recorded in name of corporation having beneficial ownership, even though beneficial owner may be entitled to call for transfer of legal title to its name — (2) "Any interest" not limited to legal, equitable rights — Purpose of s. 49(1) to support statutory policy inherent in "representation work" requirements (i.e. investment in exploration of claim) — S. 49(1)(*a*) preventing circumvention of policy prohibiting accumulation of unexplored mineral claims to exclusion of others willing to make investments necessary to develop claim — If purposive interpretation leading to conclusion same word should be interpreted differently, single meaning presumption rebutted — Although if "any interest" not restricted to legal or equitable interests in property, difficult to know where to draw line along range of meanings words may bear, legal certainty should not be purchased at expense of effective regulation — Meaning of "any interest" should be applied on case-by-case basis.

GERLE GOLD LTD. V. GOLDEN RULE RESOURCES LTD., [1999] 2 F.C. 630 (T.D.)

Bankruptcy and Insolvency Act, s. 14.03(1)(*b*) found to have infringed Charter, s. 8 to extent authorizing conservatory measures in nature of seizure where no reasonable grounds to believe measures enabling preservation of records — S. 14.03(1)(*b*) "read down" so that conservatory measures in nature of "seizure" not authorized unless Superintendent of Bankruptcy or delegate having reasonable grounds to believe measures enabling preservation of records of estates.

GROUPE G. TREMBLAY SYNDICS INC. V. CANADA (SUPERINTENDENT OF BANKRUPTCY), [1997] 2 F.C. 719 (T.D.)

Vagueness doctrine — Income Tax Act provisions referring to charitable organizations requiring better definition by Parliament, but vagueness not exceeding constitutionally permissible — Courts should not use vagueness doctrine excessively.

HUMAN LIFE INTERNATIONAL IN CANADA INC. V. M.N.R., [1998] 3 F.C. 202 (C.A.)

Coastal Fisheries Protection Regulations — Action for damages following boarding, seizure on high seas, arrest, detention of Spanish fishing trawler, arrest of master by Canadian authorities — Allegation vessel not subject to amendments because engaged in fishing voyage in international waters prior to enactment thereof struck — According to Statutory Instruments Act, Interpretation Act, Regulations in force March 2, 1995 — If *intra vires*, Regulations apply to plaintiff.

JOSE PEREIRA E HIJOS, S.A. V. CANADA (ATTORNEY GENERAL), [1997] 2 F.C. 84 (T.D.)

CONSTRUCTION OF STATUTES—Continued

Export and Import Permits Act — Logs placed on Export Control List "to ensure . . . an adequate supply . . . in Canada for defence or other needs" — Minister arguing "other needs" allowing export control to uphold provincial policies, for environmental considerations or for reasons of international trade — Phrase "for . . . other needs" to be interpreted in accordance with *ejusdem generis* rule of statutory construction — "Other needs" must have national or federal character — Must be a "need" — Difficult to accept existence of provincial policy within "defence or other needs".

K.F. EVANS LTD. V. CANADA (MINISTER OF FOREIGN AFFAIRS), [1997] 1 F.C. 405 (T.D.)

Taxing statutes — Narrow construction in favour of taxpayer, giving taxpayer benefit of doubt, replaced by rule tax legislation should be subject to ordinary rules of construction — However, given special nature of tax legislation, and reliance placed upon its provisions by those planning their affairs so as to minimize or avoid tax liability, and because business practice has often contextualized meaning of words used in tax statutes, "plain meaning" rule should be given priority over purposive or "modern" approach generally used by courts in interpreting legislation.

MARKEVICH V. CANADA, [1999] 3 F.C. 28 (T.D.)

Complaint of discrimination relating to employer's refusal to provide dental care insurance coverage to same-sex partner, child filed in 1989 — Held in abeyance pending judicial determination of case dealing with similar issues: *Canada (Attorney General) v. Mossop* — In 1992 O.C.A., in *Haig* case, declaring "sexual orientation" added to grounds of discrimination proscribed by Canadian Human Rights Act, s. 3 — S.C.C. delivering judgment in *Mossop* in 1993 — CHRC taking position would not proceed with complaints based on sexual orientation if alleged discriminating conduct antedating *Haig* — Appeal allowed — *Haig* having retroactive effect — Review of four dispositions courts may make upon holding law contravening Charter — Addition to statute of what was improperly excluded (reading in) retroactive, while legislative amendment prospective only — Pronouncement on state of law by provincial court, not binding on third parties outside tribunal's jurisdiction — But CHRC bound as party to proceedings in *Haig* — As CHRC erred in view complaint not subject to *Haig* declaration, Trial Judge required to set aside CHRC's decision.

NIELSEN V. CANADA (EMPLOYMENT AND IMMIGRATION COMMISSION), [1997] 3 F.C. 920 (C.A.)

Patented Medicines (Notice of Compliance) Regulations, s. 4(5) — English version clearly requiring any new patent to have been applied for prior to filing of new drug submission, not have been issued more than 30 days prior to filing of patent list — No merit to argument French text supporting interpretation filing of new patent list subject to conditions, but amendment to patent list may be made at any time, without conditions — Reference in French text to "*un brevet . . . qui était fondé sur une demande au tribunal*" puzzling — Court (tribunal) not issuing patents — As French text ambiguous, common meaning rule requiring adoption of interpretation consistent with

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unambiguous English text — Proposed interpretation untenable in context — No rational policy objective for imposing tight time restrictions on filing new original patent list, but allowing amendments at any time, without conditions — Patent applications filed long after issuance of NOCs could not be added by amendment to patent lists.

NOVOPHARM LTD. V. CANADA (MINISTER OF NATIONAL HEALTH AND WELFARE), [1998] 3 F.C. 50 (T.D.)

National Energy Board Act, s. 24.1 giving NEB power to make regulations for recovery of costs attributable to responsibilities under any Act of Parliament — National Energy Board Cost Recovery Regulations, s. 6, determining cost recovery charges, passed at same time as s. 24.1 introduced — Same words used in Act, s. 24.1, Regulations, s. 6 — Trial Judge interpreting Regulations without regard to enabling statute — Where statute, regulations closely meshed so as to form integrated scheme, provisions of both interpreted in light of overall scheme — Some value had to be given scheme of Regulations in interpreting Act — When read in conjunction with Regulations, ss. 4, 6, Act, s. 24.1 permitting recovery of program costs related to Board's program; not including costs of NEB's relocation to Calgary from Ottawa.

ONTARIO HYDRO V. CANADA, [1997] 3 F.C. 565 (C.A.)

Disclosure of information by National Revenue (Customs) to CEIC pursuant to understanding regarding data capture and release of customs information on travellers (program aimed at catching those receiving UI benefits while out of Canada) not authorized by Privacy Act, s. 8 and Customs Act, s. 108 — As no Charter argument made, case to be decided by statutory interpretation, using contextual approach — Information provided by travellers "personal information" as defined in Privacy Act, s. 3 — Privacy Act, s. 8(2)(*b*) authorizing disclosure of personal information for any purpose in accordance with any Act of Parliament authorizing disclosure — Customs Act, s. 108(1)(*b*) authorizing disclosure, but only in limited circumstances, not, as here, pursuant to blanket authorization of disclosure for enforcement of any law of Canada or province — Reliance on extraneous considerations, fettering of discretion.

PRIVACY ACT (CAN.) (RE), [1999] 2 F.C. 543 (T.D.)

Access to Information Act, s. 16(1)(*c*) exempting from disclosure information reasonably expected to be injurious to conduct of lawful investigations — French text employing phrase "*déroulement d'enquêtes licites*" to correspond to "conduct of lawful investigations" — "*Déroulement*" translating as "development, progress, unfolding" — Having temporal quality not found in "*conduite*" (used to correspond to "conduct" in other sections) — Suggesting s. 16(1) concerned with unfolding of particular, ongoing investigation, rather than general investigative process — Use of future tense in other sections indicating had Parliament wanted s. 16(1)(*c*) to refer to future could have so specified — Use of plural of investigations meaning more than one investigation concerning same event may be undertaken — To apply to future, exemption must be

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limited, specific, known — Examples in 16(1)(*c*)(i), (ii), (iii) not limiting general nature of s. 16(1)(*c*).

RUBIN V. CANADA (MINISTER OF TRANSPORT), [1998] 2 F.C. 430 (C.A.)

Immigration Act, s. 49(1)(*b*) providing where appeal filed with Appeal Division, execution of removal order stayed until appeal heard and disposed of or declared abandoned — Statutory language conjunctive — Requiring appeal to be both heard and disposed of — Insufficient to merely "dispose" of appeal by Minister issuing "danger to the public" opinion — S. 49(1)(*b*) not leading to absurdity, repugnancy, inconsistency, requiring reading in — To adversely affect rights, legislature must do so expressly — Right not to have outstanding removal order executed where appeal therefrom filed not expressly abrogated.

SOLIS V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1997] 2 F.C. 693 (T.D.)

Income Tax Act, s. 227.1(3) enabling directors to escape liability for unremitted amounts required to be withheld from employees' salaries if establishing exercised degree of care, diligence, skill to prevent failure that reasonably prudent person would have exercised in comparable circumstances — Whether, to what extent modifying common law standard of care — As presumption of coherence, Canada Business Corporations Act, s. 122(1)(*b*), setting out standard of care to be exercised by directors for corporate law purposes, in virtually identical language, considered — Since Canada Business Corporations Act mirroring Ontario Business Corporations Act, inference Parliament intending to send same message to existing, potential directors — S. 227.1(3) containing both subjective, objective elements — Had Parliament wished to strengthen common law standard of care could have done so by omitting "in comparable circumstances".

SOPER V. CANADA, [1998] 1 F.C. 124 (C.A.)

Applicant denied unemployment insurance benefits as violating Immigration Regulations, s. 18 prohibiting person not having permanent resident status from working without authorization — T.C.C. holding contract of service illegal — Whether employment under void contract insurable employment not depending on application of ordinary rules of statutory construction — Parliament's intention not ascertained from contextual purposive analysis — If benefits denied, because of public policy — Policy considerations: (1) person should not benefit from own wrongdoing; (2) relief should not undermine purposes, objects of either legislation — Latter not determinative — Community values relevant to moral disapprobation — Applicant legal immigrant, acting in good faith — Penalty disproportionate to breach — Not disentitled to benefits on ground of statutory illegality — Relief need not be denied to uphold integrity of legal system.

STILL V. M.N.R., [1998] 1 F.C. 549 (C.A.)

CONSTRUCTION OF STATUTES—Continued

Copyright Act — Prior to 1993 amendments to Act, compilations protected only in so far as characterized as literary works — Compilations may now also be related to artistic, dramatic, musical works — Earlier cases to be applied with caution — Compilations not qualifying for copyright protection as literary work possibly qualifying under new legislation — As definition of "compilation" introduced to implement NAFTA, Art. 1705, where feasible, without departing from fundamental principles, Canadian courts interpreting provisions of Copyright Act tracking wording of American legislation should adopt interpretation satisfying both Anglo-Canadian wording of provision and American standards.

TELE-DIRECT (PUBLICATIONS) INC. v. AMERICAN BUSINESS INFORMATION, INC., [1998] 2 F.C. 22 (C.A.)

Immigration Act, s. 46.01(1)(*d*) providing Convention refugee claimant ineligible to have claim determined by Refugee Division if determined under this Act or regulations to be Convention refugee — Judicial review of senior immigration officer's decision applicant ineligible to have Convention refugee claim referred to CRDD pursuant to s. 46.01(1)(*d*) — Applicant citizen of Ethiopia in 1981 — Determined to be Convention refugee in 1984 as against Ethiopia, including what now Eritrea — Acquired landed status in 1986 — Applicant now citizen of Eritrea, having no right of return to Ethiopia — In 1998 conditional deportation order issued — Applicant claiming Convention refugee status against Eritrea — Application dismissed — Interpretation Act, s. 12 requiring such fair, large, liberal interpretation as best ensures attainment of objects; s. 44(*f*) providing where former enactment repealed, new enactment substituted therefor, new enactment shall not be held to operate as new law, but shall be construed as consolidation, declaratory of law as contained in former enactment except to extent provisions of new enactment not in substance same as those of former enactment — Narrow interpretation of "this Act" allowing applicant to have redetermination consistent with objective of Canadian immigration policy (Immigration Act, s. 3(*g*)), but inconsistent with purposive approach to statutory interpretation, Interpretation Act, ss. 12, 44(*f*) — Act in force in 1984 same Act in force today, although substantially amended — "[T]his Act" referring to Act in which appearing, not as it read when those words inserted, but as read before and since inserted and until words "this Act" changed or Act repealed, reenacted — Question certified: does "this Act" in s. 46.01(1)(*d*) refer to Immigration Act as read at time current form of s. 46.01(1)(*d*) came into force and form since that date, or to Act in all of its forms since 1983?

TEWELDE v. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1999] 4 F.C. 522 (T.D.)

Under NAFTA, Art. 1015(4)(*c*) government entity must award contract to supplier whose bid meeting certain criteria, unless deciding in public interest not to award contract — Submission "public interest" ascertained by balancing interest in open, fair procurement process against interest in obtaining goods, services at most efficient, lowest price rejected — "Public interest" in context of Art. 1015(4)(*c*) permitting Minister to make discretionary, administrative decisions in which may weigh, evaluate

CONSTRUCTION OF STATUTES—Concluded

broad range of considerations beyond those in dispute between parties with view to determining what is in best interests of Canadian public.

WANG CANADA LTD. V. CANADA (MINISTER OF PUBLIC WORKS AND GOVERNMENT SERVICES), [1999] 1 F.C. 3 (T.D.)

CONTRACTS

On May 1, 1992 taxpayer instructing accountant to transfer farming assets to company of which taxpayer sole shareholder, director — Signing blank Income Tax Act, s. 85 election form — Form lost, election not filed prior to taxpayer's accidental death — Majority (Robertson J.A. dissenting) holding valid disposition of farming equipment — Taxpayer making firm decision to transfer all farming assets to company on May 1, 1992 — Only formal paperwork, determination of fair market value to be done — Contractual commitment between shareholder, closely held corporation, not formed by decision in mind of shareholder unless decision accompanied by overt corporate act — Sufficient overt acts herein i.e. signing of joint election form — (i) Lack of finalized list of assets to be transferred not significant because all farming assets transferred — (ii) By fixing consideration at fair market value, price sufficiently clear to be accepted as valid term of contract — Merely housekeeping measures required to document agreement already concluded — (iii) Since assets to be transferred at fair market value, consideration for assets could be ascertained — No requirement party actually receive consideration for disposition to have taken place — Agreement entitling party to payment in future satisfying s. 85.

BARNABE ESTATE V. CANADA, [1999] 4 F.C. 541 (C.A.)

Option to purchase clause in charter party conditional upon full performance of all obligations — One payment late due to bank error — Option treated as void — F.C.T.D. Judge granting equitable relief, relying on *de minimis* rule, doctrine of "spent breach" — Issue on appeal whether Judge erred in granting relief where charter party obligation breached — *De minimis* rule one of limited application where parties implicitly agreed substantial performance acceptable — Could not be invoked once found breach committed — Trial Judge misapplied "spent breach" doctrine — Courts examine language of contract not to determine "if equity will intervene" but to identify parties' true intention — Rights of parties under option to purchase — Basic principle: strict compliance required — Whether compliance required at given time prior to exercise of option matter of construction of each contract — Not for courts to rewrite contracts — Cases on relief against forfeiture inapplicable as courts lack power to excuse non-performance of conditions precedent — Open to parties to commercial contract, bargaining on equal terms, to make time of the essence.

SAIL LABRADOR LTD. V. *CHALLENGE ONE* (THE), [1997] 3 F.C. 157 (C.A.)

Doctrine of illegality — Judicial review of T.C.C. decision upholding denial of U.I. benefits as contract of service illegal for breach of Immigration Regulations, 1978 — Classical, modern models of illegality reviewed — Classical model rejected as (1)

CONTRACTS—Concluded

having lost persuasive force, no longer applied consistently; (2) not accounting for reality finding of illegality dependent on purpose underlying statutory prohibition, remedy sought herein, consequences flowing from finding contract unenforceable; (3) common law of illegality varying from province to province — As illegality doctrine not statutory but of judicial creation, current judges must ensure it accords with contemporary values — Up to F.C.A. to chart course reflecting modern approach, public law milieu — Following principle better serving doctrine of statutory illegality in federal context: where contract expressly or impliedly prohibited by statute, court may refuse to grant relief when, in all circumstances and having regard to objects, purposes of statutory prohibition, contrary to public policy, as reflected in relief claimed, to do so — Purpose of Unemployment Insurance Act, restrictions in Immigration Regulations — Neither determinative — Policy considerations: (1) person should not benefit from own wrongdoing; (2) relief should not undermine purposes, objects of legislation — Community values relevant to moral disapprobation — Applicant legal immigrant, acting in good faith — Penalty disproportionate to breach — Not disentitled to benefits on ground of statutory illegality.

STILL V. M.N.R., [1998] 1 F.C. 549 (C.A.)

COPYRIGHT

Attack on constitutionality of Copyright Act, Part VIII (system for payment of royalties to copyright holders to be imposed by levies on importers, manufacturers of blank tapes) — Whether legislation in respect of copyright or taxation — Motion for prohibition or stay of Copyright Board proceedings dismissed as issues of irreparable harm, balance of convenience favouring respondents.

EVANGELICAL FELLOWSHIP OF CANADA V. CANADIAN MUSICAL REPRODUCTION RIGHTS AGENCY, [2000] 1 F.C. 586 (C.A.)

Appeal from F.C.T.D. judgment holding no copyright in compilation of information in Yellow Pages as only minimal degree of skill, judgment, labour in organization of information — Copyright Act amended in 1993 to implement NAFTA — Definitions of artistic, dramatic, literary, musical works amended to include compilations thereof — Events herein occurring pre-, post-1993 amendments — (1) 1993 amendments not altering state of copyright law with respect to compilations of data — Selection, arrangement of data protected compilation only if end result original intellectual creation — (2) Where work sought to be protected by copyright compilation of data appearing within larger compilation of data, more correct to begin assessment of originality with fragment — Trial Judge looked at fragments of directory first because directory as whole not at issue — (3) For compilation to be original, must be work independently created by author, display at least minimal degree of skill, judgment and labour — Labour alone not determinative of originality — Sub-compilation neither new product of inventive labour nor intellectual creation within NAFTA Implementation Act, Art. 1705 — Compilation so obvious, commonplace not meriting copyright protection.

TELE-DIRECT (PUBLICATIONS) INC. V. AMERICAN BUSINESS INFORMATION, INC., [1998] 2 F.C. 22 (C.A.)

COPYRIGHT—Continued

Infringement

Law publishers suing Law Society of Upper Canada regarding custom photocopy service, self-service photocopiers provided to members of Ontario Bar, judiciary — Plaintiffs claiming copyright in reported judicial decisions, headnotes, case summaries, topical index, legal textbooks — Defendant allegedly infringing copyright by photocopying, distributing materials — Copyright subsisting in every original literary work, subject to Copyright Act — Case law on "originality" for copyright reviewed — Commercial law publishers having no copyright in reported judicial decision including headnotes, other value added features as lacking in "imagination", "creative spark" — Plaintiffs owner of copyright, where copyright found to exist, in certain of works at issue — Copying from textbooks "substantial" — Copying of works affecting prejudicially copyright owner under Copyright Act, s. 27(2)(*b*) — Transmission of copies by facsimile communication of literary work by telecommunication — Not telecommunication "to the public" under Act, s. 3(1)(*f*) — Defendant's arguments in respect of works for which copyright held to exist ill-founded.

CCH CANADIAN LTD. V. LAW SOCIETY OF UPPER CANADA, [2000] 2 F.C. 451 (T.D.)

"Bibendum" on defendant union's leaflets, posters reproducing substantial part of plaintiff's copyright — Test for infringement whether act complained of could only be done by copyright owner under Copyright Act, s. 27(1) — No sufficient mental effort, independent thought in union's "Bibendum" to be entirely new work — Parody not form of "criticism" as exception to copyright infringement under Act, s. 27(2)(*a*.1) — Exceptions to copyright infringement to be interpreted restrictively — Defendants not mentioning source, author's name of original on "Bibendum" leaflets, poster — Not treating original work in fair manner — Plaintiff's copyrights infringed.

COMPAGNIE GÉNÉRALE DES ÉTABLISSEMENTS MICHELIN — MICHELIN & CIE V. NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA), [1997] 2 F.C. 306 (T.D.)

Appellant claiming copyright in price guides for used automobiles, trucks — Guides directed at consumer clientele using three markets described in three columns — Whether "compilation" protected by Copyright Act — Originality for copyright purposes found in form chosen to express idea — Appellant's copyright resulting from selection, layout of two juxtaposed columns dealing with "Private Sale" market, "Retail Value" market — Work independently created by author, displaying minimal degree of skill, judgment, labour — Respondent reproducing in own guide original feature of appellant's guide — "Substantial part" of appellant's work appropriated — Permanent injunction granted — Matter referred back to F.C.T.D. for assessment of damages other than exemplary, moral damages.

ÉDUTILE INC. V. AUTOMOBILE PROTECTION ASSN., [2000] 4 F.C. 195 (C.A.)

Plaintiff writing book on well known Aboriginal Canadians — Alleging major passages from chapter of book on singer Shania Twain incorporated into defendants'

COPYRIGHT—Concluded

Infringement—Concluded

book about same performer, infringing copyright — Chapter based on interviews with Twain — No permission given for copied excerpts — Substantial amount of work taken — Case law on quotations from interviews reviewed — F.C.A. decision in *Tele-Direct* not realigning Canadian copyright law from U.K. to U.S.A. — Not intending significant departure from pre-existing law — Copyright not covering facts — Fair dealing exception in Copyright Act, ss. 29, 29.1, 29.2 not applicable — Use of plaintiff's work not made for purpose of research, criticism — Evidence concerning industry practice confused, unreliable — "Industry practice" not sanctioning copyright breaches — Defendants breaching plaintiff's copyright, liable to damages under Act, s. 35.

HAGER V. ECW PRESS LTD., [1999] 2 F.C. 287 (T.D.)

Plaintiffs say defendant infringed copyright in Mangrove design by supplying, installing carpet tiles — Whether Mangrove design entitled to copyright protection depending on design's date of creation — Designs created prior to June 1988 subject to original version of Copyright Act, s. 64 — No mention of date of creation of design in assignment of copyright — Plaintiffs' failure to adduce evidence as to creation date leading Court to conclude design created prior to June 1988, governed by former Act, s. 64 — Not protected by copyright — Primary infringement conceded by defendant at trial — But for Court's finding as to applicable legislation, corporate defendant liable for secondary copyright infringement.

MILLIKEN & CO. V. INTERFACE FLOORING SYSTEMS (CANADA) INC., [1998] 3 F.C. 103 (T.D.)

CORPORATIONS

Appeals from T.C.C. decision respondent benevolent directors of not-for-profit corporation not vicariously liable under Income Tax Act, s. 227.1 for unremitted federal income tax withheld from wages of employees — T.C.J. holding as respondents not *de jure* directors, s. 227.1 not applicable — Létourneau J.A. (concurring in result) holding s. 227.1(1) applicable to all directors; s. 227.1(3) imposing one standard of care — Respondents not meeting that standard — Noël J.A. (Desjardins J.A. concurring) examining Nova Scotia Companies Act to determine legislative intent as to who has status of director under law — Neither Act nor common law conferring status of director on those not qualified — But principle underlying remedies devised by courts to protect third parties that person lacking requisite qualifications prevented from pleading such failure to escape liability attaching to director — Respondents cannot raise lack of qualifications as defence to liability under s. 227.1.

CANADA V. CORSANO, [1999] 3 F.C. 173 (C.A.)

CRIMINAL JUSTICE

Letter of request — Canadian standard for issuance of search warrant to be satisfied before submitting letter of request asking Swiss authorities to search for, seize

CRIMINAL JUSTICE—Concluded

Canadian citizen's banking records — As information may be used for criminal prosecution in Canada, plaintiff entitled to benefit of Charter, s. 8 right to be secure against unreasonable search, seizure — Prior authorization ensuring impartiality in balancing individual's reasonable expectation of privacy against government's interest in law enforcement.

SCHREIBER V. CANADA (ATTORNEY GENERAL), [1997] 2 F.C. 176 (C.A.)

Convicted murderer's Criminal Code, s. 690 application for mercy of Crown dismissed — Content of Minister's duty of fairness — Nature of proceedings, consequences of decision for individual, applicable statutory provisions considered — Duty of fairness met herein — S. 690 process independent of trial, appeals — Final appeal disposed of prior to *Stinchcombe* decision holding Crown, in prosecuting indictable offence, required to disclose all relevant information to defence — Once no longer in judicial system, cannot seek to re-open case on basis of subsequently decided case changing law.

THATCHER V. CANADA (ATTORNEY GENERAL), [1997] 1 F.C. 289 (T.D.)

CROWN

Fiduciary duties — Delegation — Crown seeking to strike references in statement of claim to Framework Agreement providing for delegation of federal powers so that First Nations may withdraw lands from management provisions of Indian Act — Provincial legislation governing division of matrimonial property not applicable to reserve land because conflicting with Indian Act — Indian Act, Framework Agreement not dealing with property rights of Indian women living on reserves on marital breakdown — Arguable Crown having fiduciary duty to Indian women on reserves to give them same property rights on marriage breakdown as enjoyed by other Canadian women — Delegation, subject to limits, necessity — That Crown may not abdicate function one such limit — Arguable delegation of fiduciary duty may be abdication of legislative function by Crown — Not plain, obvious, beyond reasonable doubt portion of claim relating to Framework Agreement cannot possibly succeed.

B.C. NATIVE WOMEN'S SOCIETY V. CANADA, [2000] 1 F.C. 304 (T.D.)

Action for breach of fiduciary duty by Indian Band following contruction of dam by Manitoba on Indian Reserve — Band members allegedly suffering loss from breach of fiduciary duties owed to Band — Relying on Indian Act, s. 18(1) to argue defendant breached fiduciary duty in study, planning approval of dam — Case law on fiduciary duty reviewed — Dependency, vulnerability requirement indispensable to fiduciary duty — For fiduciary duty to arise, one party must have ceded power to other — No fiduciary duty herein under reasonable expectations, ceding of power-vulnerability approaches — Actions taken by defendant public law duties, not giving rise to fiduciary relationship — Defendant acting in conformity with Indian Act in permitting Manitoba to use Reserve for coffer dam, in obtaining Band Council resolution authorizing such use — Defendant having no discretion, power to control operation of

CROWN—Continued

dam — Not breaching fiduciary duty in failing to use provisions of Navigable Waters Protection Act as leverage to exact concessions from Manitoba respecting flooding of Reserve land — Duty of consultation on Crown in questions involving surrenders of reserve land, extending to dispositions of reserve land by defendant under Indian Act, s. 35 — Consultation conducted in 1971 between Indian Affairs, Band Council according with standard of consultation prescribed by S.C.C. — Defendant in breach of fiduciary duty to Band from 1978 to 1984 in failing to address deficiencies of compensation agreement in timely manner, in failing to consult with Band — From September 1984 to February 1986, defendant's actions, except for failure to consult, diligent, consistent with those expected of fiduciary.

FAIRFORD FIRST NATION V. CANADA (ATTORNEY GENERAL), [1999] 2 F.C. 48 (T.D.)

Duty to abide by laws — Question of restitution where Crown unjustly enriched by installment overpayments under taxing statute — Argument Crown precluded from making repayment by Financial Administration Act, s. 26 — Not for Court to discover Parliamentary authority for paying amount due to plaintiff — Executive's problem to figure out how judgment to be complied with.

FOREST OIL CORP. V. CANADA, [1997] 1 F.C. 624 (T.D.)

Contracts

Judicial review of Minister's delegate's decision not in public interest within NAFTA, Art. 1015(4)(*c*) to award contract — Following inquiry, CITT holding PWGSC not conducting procurement for provision of computer maintenance services to Revenue Canada according to requirements of NAFTA, Agreement on Internal Trade — Recommending PWGSC award contract to Wang, subject to Art. 1015(4)(*c*) — PWGSC deciding not to award contract to Wang as not in public interest — Issuing new RFP — Under Art. 1015(4)(*c*) government entity must award contract to supplier whose bid meeting certain criteria, unless deciding in public interest not to award contract — Public interest exception may be invoked by government entity only where decision made not to award contract — Minister's delegate never deciding contract would not be awarded — Not entitled to rely on Art. 1015(4)(*c*) exception given intention to award contract.

WANG CANADA LTD. V. CANADA (MINISTER OF PUBLIC WORKS AND GOVERNMENT SERVICES), [1999] 1 F.C. 3 (T.D.)

Practice

Parties — Action for damages following boarding, seizure on high seas, arrest, detention of Spanish fishing trawler, arrest of master by Canadian authorities — Action initiated against Attorney General, Minister of Fisheries and Oceans (MFO) — Ministers should not be named as defendants where no claim against them in personal capacities — Federal Court Act, s. 48(1) directing, except where otherwise authorized,

CROWN—Continued

Practice—Concluded

proceeding against Crown to be instituted in form set out in Schedule — Form 2(2) naming Her Majesty as sole defendant — Crown Liability and Proceedings Act, s. 23(1) providing proceedings against Crown may be taken in name of Attorney General — Optional whether Crown named as Attorney General of Canada or Her Majesty the Queen — Since alleged abuse of office struck, MFO struck from style of cause, statement of claim.

JOSE PEREIRA E HIJOS, S.A. v. CANADA (ATTORNEY GENERAL), [1997] 2 F.C. 84 (T.D.)

Prerogatives

Reference seeking declaration respondent obtained citizenship by false representation, fraud, knowingly concealing material circumstances — Respondent, a displaced person (DP) from Austria, admitted to Canada in 1948, becoming Canadian citizen in 1957 — Applicant seeking to revoke citizenship based on undisclosed collaborationist activities during World War II — Applicant submitting if no authority in Immigration Act for rejection of prospective immigrants on security grounds, process supported by Crown prerogative — Prerogatives collection of powers, duties exercised, assumed by Crown under common law — Once statute occupies ground formerly occupied by prerogative, Crown must comply with terms of statute — Immigration Act covering whole of prerogative applicant claiming as authority for rejection of potential immigrants on security grounds — Once decided complied with Act, met conditions of applicable orders in council, respondent entitled to enter Canada.

CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) v. DUECK, [1999] 3 F.C. 203 (T.D.)

Crown's common law prerogative against discovery not overriding equitable remedy of bill of discovery — Crown's immunity from discovery not absolute and has been abridged by statute both federally and provincially — Not clear Crown prerogative at common law overriding exceptional equitable remedy of bill of discovery — In absence of binding authority that Crown immunity from disclosure extending to exercise of Court's equitable jurisdiction, should not be considered as doing so.

GLAXO WELLCOME PLC v. M.N.R., [1998] 4 F.C. 439 (C.A.)

Application for *mandamus* ordering withdrawal of letter of request from Minister of Justice to Swiss authorities seeking assistance with RCMP investigation into fraud on government — Statutes, prerogatives sources of authority for Crown — Prerogative residue of powers inherent in Crown, recognized as essential even in absence of statutory provision enacted by Parliament — Issuance of request for assistance to foreign state for assistance lawful by virtue of prerogative in respect of administration of justice, including investigation of alleged criminal activities, initiation of means of fostering international co-operation for this purpose — In issuing request, Attorney

CROWN—Continued

Prerogatives—Concluded

General not acting simply as any other person, but as chief law officer, adviser of Crown federal.

SCHREIBER V. CANADA (ATTORNEY GENERAL), [2000] 1 F.C. 427 (T.D.)

Criminal Code, s. 690 codifying, delegating to Minister of Justice sovereign's discretion in respect of one aspect of royal prerogative of mercy — Minister's dismissal of convicted murderer's application for mercy meeting duty of fairness — Minister conducting meaningful review, no evidence considering information not available to applicant, applicant having reasonable opportunity to state case.

THATCHER V. CANADA (ATTORNEY GENERAL), [1997] 1 F.C. 289 (T.D.)

Torts

Negligence — Routine destruction of inactive government files does not constitute negligence on government's part — Context: immigration application form destroyed not knowing citizenship revocation would subsequently be sought based on false representations in application.

CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) V. KATRIUK, [1999] 3 F.C. 143 (T.D.)

Wrongful search and seizure of horses and vehicle by RCMP, reckless communication of information to media, public — No reasonable ground to suspect respondents' horses transporting cocaine in bodies.

HAMEL V. CANADA, [1999] 3 F.C. 335 (C.A.)

Action for damages following boarding, seizure on high seas, arrest, detention of Spanish fishing trawler, arrest of master by Canadian authorities — Allegations of malicious prosecution struck as not all elements of tort established — No evidence corporate plaintiff charged with offence — As to master, absence of reasonable, probable cause — Plaintiffs' pleadings established those acting on behalf of defendants acted with reasonable, probable cause under Act, Regulations — Actions supported by presumption of validity of legislation — Applies until contrary finding at trial — References to piracy, other criminal activity struck as having legal significance only in regard to criminal activity.

JOSE PEREIRA E HIJOS, S.A. V. CANADA (ATTORNEY GENERAL), [1997] 2 F.C. 84 (T.D.)

Appeal from F.C.T.D. judgment dismissing tort, contract action against Crown — Crown leasing appellant's downtown Ottawa building since 1975 — Entering into negotiations for renewal — Appellant planning to renovate in conjunction with renewal — Crown not communicating to appellant further information required — Went to

CROWN—Continued

Torts—Continued

tenders — Although lowest bidder, appellant not awarded contract because Crown adding to bid for fit-up, other costs — Appeal allowed — Duty of care arising where sufficiently close relationship between parties, foreseeability of harm to appellant — That long-standing lessor/lessee relationship, lease contemplating possibility of renewal, Crown only tenant in building since construction, Crown dominant player in leasing rental space in area, supporting conclusion sufficiently close relationship to give rise to duty of care in negotiation process — Trial Judge not addressing duty of care in tendering process — Implied contractual obligation on Crown under bidding contract to treat all bidders fairly according to good faith principle giving rise to common law duty of care — Relationship between parties sufficiently close, Crown ought to have contemplated injury to appellant by breach of duty — Crown breached duty of care in tendering process by not mentioning fit-up requirement to appellant, adding costs of fit-up to appellant's bid, while no such costs added to successful bid — As to causation, question whether Crown's negligence causing appellant to lose opportunity to renegotiate renewal fairly, participate in tender — Clearly causal link between appellant's loss, Crown's negligence — Trial Judge concluding loss of opportunity to complete negotiations not justifying amount of damages equal to 10-year contract — Degree of probability of contract being awarded future event irrelevant in assessment of causation, although relevant in assessment of damages — Defendant's conduct need not be sole cause of loss.

MARTEL BUILDING LTD. V. CANADA (C.A.), [1998] 4 F.C. 300 (T.D.)

Plaintiff physically, sexually assaulted by landed immigrant subject to deportation order — Suing MEI for negligence in failing to execute responsibilities under Immigration Act in timely manner, to detain convict pending removal — Crown liability vicarious, not direct under Crown Liability and Proceedings Act, ss. 3, 10 — To establish private law duty of care, foreseeability of risk must coexist with special relationship of proximity — Plaintiff only known as member of broad class of young, single women frequenting London, Ontario bars — Class not sufficient to create relationship of proximity — Government officials subject to resource constraints, Minister's priorities — No private law duty of care owed by MEI to plaintiff.

MARTIN V. CANADA (MINISTER OF EMPLOYMENT AND IMMIGRATION), [1999] 3 F.C. 287 (T.D.)

Plaintiff injured in car accident caused by negligence of Crown officer — No right of action against defendants in Federal Court under no-fault scheme created by Saskatchewan's Automobile Accident Insurance Act, ss. 102, 103(2) — Provisions adopted by Parliament via Crown Liability and Proceedings Act, s. 32.

MOXHAM V. CANADA, [1998] 3 F.C. 441 (T.D.)

Fatal maritime accident involving self-propelled barge — Action against Crown for failure to set proper standards for such vessels, approval by Coast Guard of contruction

CROWN—Continued

Torts—Concluded

sketch in breach of statutory duties — All claims statute-barred, except estate's claim by means of survival action.

NICHOLSON V. CANADA, [2000] 3 F.C. 225 (T.D.)

Pure economic loss — Third-party goods supplier seeking recovery against Crown for pure economic loss argues to have been suffered due to Crown's negligence when failed to take into account plaintiff's interests before paying contractor money owing under building maintenance contract as contractor had no capacity to satisfy any judgment — Insufficient proximity necessary to support duty of care — Loss not reasonably foreseeable — Risk of liability in indeterminate amount — Case not one in which new category of claim for pure economic loss should arise — Damage to plaintiff did not flow from conduct of defendant.

OLYMPIA JANITORIAL SUPPLIES V. CANADA (MINISTER OF PUBLIC WORKS), [1997] 1 F.C. 131 (T.D.)

Action under Crown Liability and Proceedings Act, s. 3(*a*) based on alleged act of negligence by public servants — Plaintiffs arguing defendant responsible for failing to designate, under PSSRA, s. 78, employees required to ensure safety, security of public — Duty of care owed by Canadian Coast Guard to assure safety of public using St. Lawrence River — No duty on part of employer to file list of designated employees — Omission by Treasury Board employees to file lists not "negligence" under law of tort — Breach of common law duty requiring direct relation between individual servants, plaintiffs — Defendant not breaching common law duty in failing to make timely designation — "Governing", "servicing" functions distinguished — Acts, omissions by public servants "governing", not subject to law of tort.

THE CSL GROUP INC. V. CANADA, [1997] 2 F.C. 575 (T.D.)

Action under Crown Liability and Proceedings Act, s. 3(*a*) for reimbursement of revenue lost by shipping companies due to restrictions, necessitated by Coast Guard Ships' Crews being on strike, imposed by authority responsible for traffic on St. Lawrence Seaway — Restrictions necessary for security reasons — Plaintiffs' argument: Treasury Board (TB) negligent in failing to file "designated employees" list within statutory limitation period after receiving notice to bargain — Alleged wrongdoing not within maritime law as damages claimed economic only, unrelated to appellants' ships, cargoes — Delay in filing list of designated employees not wrongful — Crown's only duty in respect of seaway to ensure security of public — May be discharged by methods other than designation of employees in case of strike — TB, in filing "designated employees" list under rights conferred by PSSRA, not dispensing service to public.

THE CSL GROUP INC. V. CANADA, [1998] 4 F.C. 140 (C.A.)

CROWN—Concluded

Trusts

Native peoples — Interest of Indian bands as beneficiaries of trust-like arrangements with Crown warranting disclosure of any document in nature of legal advice received by Crown in administration of surrendered oil, gas resources in reserve lands and revenues derived therefrom.

SAMSON INDIAN NATION AND BAND V. CANADA, [1998] 2 F.C. 60 (C.A.)

CUSTOMS AND EXCISE

Customs Act

Appeal from CITT decision houseboat of Canadian origin on which new engine installed in U.S.A. imported, subject to duty on value of boat — Customs Act, s. 12 providing all goods imported shall be reported at nearest customs office — S. 18 providing all goods reported under s. 12 deemed imported — Interpretive guidelines discussed, applied — Argument legislation intending "punitive effect" on everyone crossing border to protect Canadian goods from competition rejected — New Act not mere housecleaning but to replace obsolete, punitive, unfair provisions — Deputy Minister's interpretation promoting current widespread systemic differential enforcement of s. 12 reporting provisions to detriment of ordinary Canadian citizens — CITT erred in not paying sufficient attention to legislation, commercial context in assigning meaning to "import", "export" — Act, Tariff intended to assess duties only on foreign goods entering country.

FLAVELL V. DEPUTY M.N.R., CUSTOMS AND EXCISE, [1997] 1 F.C. 640 (T.D.)

Practice — Decision under Customs Act, s. 108 concerning request for information (names of importers allegedly importing drug into Canada in violation of appellant's patent rights) obtained under Act matter within discretion of Minister — In judicial review of Minister's decision, no basis to interfere with respondent's exercise of discretion where exercised in good faith, in accordance with principles of natural justice and relying on relevant considerations — Herein, no evidence of fettering of discretion or of irrelevant considerations.

GLAXO WELLCOME PLC V. M.N.R., [1998] 4 F.C. 439 (C.A.)

Cross-appeal from order requiring disclosure of information supplied by appellant contained in Minister's Detailed Adjustment Statement pursuant to Customs Act, s. 108(3) — S. 108(3) permitting disclosure of any book, record, writing, other document obtained for purpose of Customs Act, Tariff to person by or on behalf of whom book, record, writing or other document provided — Distinction between disclosure of information in s. 108(1), disclosure in s. 108(3) — S. 108(3) not authorizing disclosure of information herein as not "book, record, writing or other document" — Order based on misinterpretation of s. 108(3), quashed in entirety.

JOHNS MANVILLE INTERNATIONAL, INC. V. DEPUTY M.N.R., CUSTOMS AND EXCISE, [2000] 4 F.C. 404 (C.A.)

CUSTOMS AND EXCISE—Continued

Customs Act—Continued

S. 107 prohibiting disclosure of any information "obtained by" Minister for purposes of Customs Act, Customs Tariff — S. 108(1)(*c*) permitting disclosure of such information to any person "legally entitled" thereto — S. 108(3) permitting disclosure to person who "provided" information — "Obtained" meaning documents created by respondent containing information obtained from importer, some other source — Immaterial that respondent created document — That information obtained from importers in discharge of duty under Customs Act, subsequently copied onto other forms for purposes of Special Import Measures Act not changing original purpose for which obtained — Therefore within prohibition against disclosure imposed by s. 107(1)(*a*) — Identity of person who "provided" information not limited to person from whom respondent immediately obtained information — Rationale permitting disclosure to immediate provider of information extending to person supplying it to that person — "Legally entitled" narrowly construed to mean only statutory powers conferred by federal statutes authorizing particular departments, officials to obtain information for government purposes.

JOHNS MANVILLE INTERNATIONAL, INC. V. DEPUTY M.N.R., CUSTOMS AND EXCISE, [1999] 3 F.C. 95 (T.D.)

Respondent, Mohawk resident of Akwesasne, allegedly evading payment of duties on goods contrary to Customs Act, s. 153(*c*) — Claiming right to be exempt from payment of customs duties when crossing Canadian border for goods bought in U.S.A. — Customs Act, 1970, s. 22(1) governing provision for payment of duty — Ability to regulate application of duties integral part of Act — Aboriginal right not extinguished prior to 1982 by Customs Act.

MITCHELL V. M.N.R, [1999] 1 F.C. 375 (C.A.)

Disclosure of "personal information" by Revenue Canada (Customs) to CEIC pursuant to understanding regarding data capture and release of customs information on travellers (program aimed at catching those receiving UI benefits while out of Canada) not authorized by Privacy Act, s. 8 and Customs Act, s. 108 — Blanket authorization issued by Minister (allowing disclosure of information obtained for Customs Act purposes if required for enforcement of laws of Canada or province) invalid exercise of discretion: under Customs Act, s. 108, confidential information to be disclosed only in limited circumstances; Minister had fettered his discretion, there being no examination of particular circumstances.

PRIVACY ACT (CAN.) (RE), [1999] 2 F.C. 543 (T.D.)

Disclosure of information by Revenue Canada (Customs) to CEIC pursuant to memorandum of understanding regarding data capture and release of customs information on travellers (program aimed at catching those receiving EI benefits while out of Canada) authorized by Privacy Act, s. 8 and Customs Act, s. 108 — In exerci-

CUSTOMS AND EXCISE—Continued

Customs Act—Concluded

sing discretion under Customs Act, s. 108, Minister duly took into consideration objectives of Privacy Act.

PRIVACY ACT (CAN.) (RE), [2000] 3 F.C. 82 (C.A.)

Excise Tax Act

Appeal from T.C.C. decision management fees paid between 1991, 1995 by mutual fund trusts to trustees/managers subject to GST — (1) Amendments to Excise Tax Act "deemed to have come into force on December 17, 1990" expressly making GST payable on management, administrative fees of mutual fund trusts applicable — (2) Management fees subject to GST under old legislation — (i) ETA providing service provided in course of commercial activity subject to GST — Provision of management services by trustee to trust within definition of "commercial activity" — (ii) Trustees' services provided to mutual funds relating to management activities, not trustee activities, and subject to GST — (iii) Services provided by managers not exempt financial services — Definition of "financial services" in s. 123(1)(*g*) excluding services provided to trust, principal activity of which investing funds on behalf of other persons — "On behalf of" meaning "for benefit of" in mutual fund context — (3) Fees for costs of employees providing administrative services taxable; securities filing fees paid by managers as agents for trusts not subject to GST.

C.I. MUTUAL FUNDS INC. V. CANADA, [1999] 2 F.C. 613 (C.A.)

Excise Tax Act, s. 52(10) cannot apply to allow M.N.R. to claim excise tax from banks with respect to licensed manufacturers' goods on which security given to banks under Bank Act, s. 178.

CANADA V. MERCANTILE BANK OF CANADA, [1997] 3 F.C. 29 (C.A.)

Bank collecting bankrupt licensed manufacturers' accounts receivable assigned to it as security for loan — Minister may not require Bank pay excise tax with respect to accounts receivable — Priority of Bankruptcy Act, s. 107(1) over Excise Tax Act, s. 52(10) — Minister must make claim to trustee, be given priority as preferred creditor, based on ranking.

CANADA V. NATIONAL BANK OF CANADA, [1997] 3 F.C. 3 (C.A.)

Taxpayer building contractor using "zero rated" supplies — Supplies not GST exempt as part of entire construction project, not acquired by taxpayer as agent for school boards — T.C.C. finding in favour of Minister but setting aside 6% penalty as due diligence exercised by taxpayer in attempting to ascertain correct amount of GST — Whether "due diligence" defence available to persons subject to automatic penalty for failing to remit correct amount of GST under Excise Tax Act, s. 280 — S. 280 administrative penalty — *Mens rea*, strict liability, absolute liability offences distinguished — Administrative penalties giving rise to strict, absolute liability — Patent

CUSTOMS AND EXCISE—Concluded

Excise Tax Act—Concluded

unfairness not sufficient reason to imply due diligence defence under s. 280 — Implied due diligence not contrary to legislative scheme, purposes underlying s. 280.

CANADA (ATTORNEY GENERAL) v. CONSOLIDATED CANADIAN CONTRACTORS INC., [1999] 1 F.C. 209 (C.A.)

Marginal manufacturing — Respondent not manufacturer or producer of imported vehicles within meaning of Excise Tax Act — Preparation and conditioning of vehicles at dealership not manufacturing for purposes of Act, not performed by dealer on behalf of respondent — Work performed by dealers not preparation of goods for sale as vehicle already sold by respondent to dealer — Minister's treatment of other importers not determinative of tax liability of respondent.

FORD MOTOR CO. OF CANADA, LTD. v. M.N.R., [1997] 3 F.C. 103 (C.A.)

Refund under Excise Tax Act, s. 68.2 — Legally effective sale — General Anti-Avoidance Rule under ETA, s. 274 applied — Circumstances surrounding transactions fail to establish any *bona fide* purpose other than to obtain tax benefit — Transaction devoid of commercial objective.

MICHELIN NORTH AMERICA (CANADA) INC. v. CANADA, [2000] 3 F.C. 418 (T.D.)

Appeal from disallowance of claim for refund of excise tax paid in respect of Sample Tobacco in 1987, 1988 — No difference between products sold in normal course of business to customers and sample tobacco — Sample tobacco provided free for advertising, promotional purposes to employees, wholesalers, retailers, business contacts, company and consumer events, to satisfy consumer complaints, short shipments to customers — Excise Tax Act, s. 23(1) imposing excise tax when goods mentioned in Schedule II (including cigarettes, manufactured tobacco) manufactured in Canada, delivered to purchasers — S. 23(2) providing tax payable by manufacturer at time of delivery — S. 23(10) providing goods manufactured for use by manufacturer and not for sale deemed delivered to purchaser when goods used or appropriated for use by manufacturer — S. 52(1)(*d*) permitting Minister to determine value for tax whenever difficult to determine value of goods manufactured in Canada because for use by manufacturer, and not for sale — Appeal allowed — S. 23(1), (2) must be read together — S. 23(10) concerning deemed delivery — Not providing for deemed sale, essential element of charging formula in s. 23(1), (2) taken together — S. 52(1) only applicable when circumstances, conditions rendering it difficult to determine value for consumption, sales tax because goods for use by manufacturer, producer and not for purpose of computing tax — Condition as to application of s. 52(1) not met — As neither sale nor deemed sale, plaintiff not liable to pay excise tax on sample tobacco.

RJR-MACDONALD INC. v. CANADA, [1999] 4 F.C. 3 (T.D.)

DAMAGES

Party unsuccessfully moving to set aside *Anton Piller* order seeking damages as compensation for lost day of work because firm preoccupied with execution of *Anton*

DAMAGES—Concluded

Piller order — Day not write-off as work completed, billed to clients — Time spent planning, preparing legal submissions not damages flowing from execution of *Anton Piller* order — No evidence of any damage to reputation as result of issuance of order — As plaintiffs not guilty of improper conduct no ground for punitive damages.

ADOBE SYSTEMS INC. v. KLJ COMPUTER SOLUTIONS INC., [1999] 3 F.C. 621 (T.D.)

Trial Judge finding patent infringement where invention configuration of old, previously known parts — Directing assessment of damages based on sales of other components with infringing press sections — Patentee entitled to damages assessed upon sale of non-infringing components where finding of fact such sale arose from infringing patented component — As not making such specific finding, Trial Judge erred in direction for assessment of damages.

BELOIT CANADA LTD. v. VALMET-DOMINION INC., [1997] 3 F.C. 497 (C.A.)

Compensatory

Plaintiff claiming general, special damages for defendant's negligence in failing to detain, deport in timely manner immigrant having record of violent, sexual offences against women — Breach of duty of care, if found to exist, "causing" damage to plaintiff — Case law on non-pecuniary damages reviewed — Considering principles of general damages assessment, impact upon sexual assault victims Court would have awarded $140,000 for general damages plus amounts for lost wages, special damages — Children would have been awarded damages for loss of care, guidance, companionship of mother under Family Law Act.

MARTIN v. CANADA (MINISTER OF EMPLOYMENT AND IMMIGRATION), [1999] 3 F.C. 287 (T.D.)

Non-compensatory

Exemplary

Judicial review of Public Service Staff Relations Board decision employer violated collective agreement by refusing request for vacation leave, ordering employer to grant one day of vacation leave in addition to entitlement under collective agreement — Board expressing concern over "number of cases" where employee's wishes disregarded for reasons Board finding improper — Necessity relief granted address concerns — Tribunal imposing remedy for conduct considered worthy of punishment with respondent being beneficiary, over-compensated — Remedy constituting punitive damages — Punitive damages awarded only where conduct deserving of punishment as harsh, vindictive, reprehensible, malicious — Nothing justifying such remedy herein.

CANADA (ATTORNEY GENERAL) v. HESTER, [1997] 2 F.C. 706 (T.D.)

ELECTIONS

Application to stay, pending appeal, effect of F.C.T.D. judgment declaring Canada Elections Act, s. 51(*e*) (prohibiting certain convicts from voting in federal elections)

ELECTIONS—Concluded

in violation of Charter, s. 3 — Appeal would not be heard prior to next general election — Crown not meeting onus of establishing irreparable harm to public interest.

SAUVÉ V. CANADA (CHIEF ELECTORAL OFFICER), [1997] 3 F.C. 628 (T.D.)

Canada Elections Act, s. 51(*e*), as amended, disqualifying from voting only prisoners serving sentences of two years or more — Whether provision meets minimal impairment, proportionality tests mandated by Charter, s. 1 — History of prisoner disenfranchisement in pre-Charter, post-Charter eras reviewed — Former s. 51(*e*) invalidated by S.C.C. as drawn too broadly — Parliament seeking to enact new law in conformity with Charter, case law — Provision being of hybrid criminal, electoral nature — Tailored to affect only most serious offenders — Proportionality between deleterious, salutary effects of measure.

SAUVÉ V. CANADA (CHIEF ELECTORAL OFFICER), [2000] 2 F.C. 117 (C.A.)

EMPLOYMENT INSURANCE
See: Unemployment Insurance

ENERGY

Overpayment by installments under Petroleum and Gas Revenue Tax Act — Act, s. 91(1) complete code on question of refunds — To affect taxpayer's right, Legislature must do so expressly — Unjust enrichment — Constructive trust.

FOREST OIL CORP. V. CANADA, [1997] 1 F.C. 624 (T.D.)

Appeal from F.C.T.D. judgment dismissing action to recover portion of costs of relocating National Energy Board from Ottawa to Calgary which utility had been required to pay — National Energy Board Act, s. 24.1 giving NEB power to make regulations for recovery of costs attributable to responsibilities under any Act of Parliament — Giving NEB discretionary power to determine what costs attributable to statutory responsibilities — Limited to costs attributable to statutory responsibilities — Relocation not within dictionary meaning of "responsibilities" — National Energy Board Cost Recovery Regulations, s. 6 defining costs attributable to statutory responsibilities of NEB as "program costs" — Program costs described in Expenditure Plan — Nothing therein contemplating relocation — When read in conjunction with Regulations, ss. 4, 6, Act, s. 24.1 permitting recovery of costs related to Board's program; not including relocation costs.

ONTARIO HYDRO V. CANADA, [1997] 3 F.C. 565 (C.A.)

ENVIRONMENT

Appeal from dismissal of application for judicial review of Joint Review Panel's report containing environmental assessment of proposal to build, operate open-pit coal mine near Jasper National Park — After report issued, Minister of Fisheries and Oceans issuing federal response, indicating authorizations would be issued under

ENVIRONMENT—Continued

Fisheries Act — Applications Judge holding appellants obligated to challenge federal response in order to question sufficiency of panel report, ground claim of prohibition — As federal response issued by Minister not challenged, constituted barrier to appellant's claim — Requirements of CEAA legislated directions explicit in mandating necessity for environmental assessment as pre-requisite to ministerial action — Minister having no jurisdiction to issue authorizations in absence of environmental assessment — Assessment must be conducted in accordance with Act, including requirement imposed under s. 16 — That federal response issued, remaining unchallenged, not changing requirements — Federal response, panel report two separate statutory steps with distinct purposes, functions — Former neither superseding nor potentially curing deficiencies in latter — Combined effect of ss. 34(*c*), (*d*), 2(1), 37 that before taking course of action Minister must consider environmental assessment conducted in accordance with CEAA — Appellants entitled to question report even though not challenging federal response.

ALBERTA WILDERNESS ASSN. V. CANADA (MINISTER OF FISHERIES AND OCEANS), [1999] 1 F.C. 483 (C.A.)

Judicial review of DFO's authorization to begin construction of open-pit coal mine near Jasper National Park, Joint Review Panel's report — Millions of tonnes of waste rock to be deposited in stream valleys, other areas — Fisheries Act, s. 35(2) requiring ministerial authorization prior to alteration, disruption, destruction of fish habitat — Environmental assessment pursuant to CEAA must be conducted before authorization issued — S. 16 listing factors to be considered; s. 34(*a*) requiring information be obtained, made available to public; s. 35 imposing duty to use production of evidence powers to full extent necessary to obtain, make available all information required for conduct of review — Since environmental review also required under Alberta legislation, joint federal, provincial review conducted — Joint Review Panel's terms of reference set out in Joint Panel Agreement — Pursuant to Panel's recommendation Minister issuing authorization — Panel required to perform to high standard of care to meet s. 16 consideration duty — Duty to obtain all available information required to conduct environmental assessment — Must require production of information which it knows exists, and relevant to one or more of s. 16 factors — Panel breaching duty to obtain all available information about likely mining, forestry activities in vicinity of project, to consider information with respect to cumulative environmental effects, to reach conclusions, make recommendations — Simply identifying potential "alternative means" (without discussing underground mining) not meeting requirements of s. 16(2)(*b*) — Comparative analysis between open-pit, underground mining required — As project cannot proceed until environmental assessment conducted in compliance with CEAA, under s. 24(2) Minister having responsibility, authority to direct Panel to reconvene, direct it to do what necessary to make report comply.

ALBERTA WILDERNESS ASSN. V. CARDINAL RIVER COALS LTD., [1999] 3 F.C. 425 (T.D.)

Regulations Amending Migratory Birds Regulations *ultra vires* in so far as purporting to authorize killing of Ross geese and other species not easily distinguishable from snow geese during certain periods — Nothing in Migratory Birds

ENVIRONMENT—Continued

Convention Act, 1994 or Migratory Birds Convention to support provisions of Amending Regulations relating thereto.

ANIMAL ALLIANCE OF CANADA V. CANADA (ATTORNEY GENERAL), [1999] 4 F.C. 72 (T.D.)

Closing of airstrips in Banff, Jasper National Parks — Airstrips under Parks Canada jurisdiction — Comprehensive environmental assessment required prior to decommissioning of either airstrip.

BOWEN V. CANADA (ATTORNEY GENERAL), [1998] 2 F.C. 395 (T.D.)

Application for declaration federal Minister of Environment exceeding jurisdiction when signed federal-provincial agreements regarding environmental harmonization — Accord contemplating signing of sub-agreements, but not specifying subject-matter — Subject-matter of sub-agreements couched in general terms — Accord, two sub-agreements entered into pursuant to authority conferred by Department of the Environment Act, s. 7, permitting Minister to enter into agreements respecting carrying out of programs for which Minister responsible — Authority conferred by s. 7 not limited to operational programs — Including programs dealing with preliminary activities, initiatives, agreements in principle — Third sub-agreement signed under authority of Canadian Environmental Assessment Act, ss. 58(1)(*c*),(*d*) — Providing Minister with sufficient authority to enter sub-agreement — Minister also having authority to enter into federal-provincial agreements under Canadian Environmental Protection Act (CEPA), ss. 6, 98, 99 — Although latter provisions more specific than Department of Environment Act, s. 7 and according to ordinary principles of statutory interpretation specific prevailing over general, without details as to subject-matter of future agreements, extent to which CEPA should have been relied upon could not be assessed — That sub-agreement specifying factors to be considered in environmental assessment different from mandatory considerations in Act, s. 16 not conflicting with CEPA because sub-agreement not limiting what may be considered.

CANADIAN ENVIRONMENTAL LAW ASSN. V. CANADA (MINISTER OF THE ENVIRONMENT), [1999] 3 F.C. 564 (T.D.)

Judicial review of Screening Environmental Assessment Reports, addenda, approvals issued under Navigable Waters Protection Act (NWPA), s. 5(1) — Proponent (not party herein) applying for approval to construct two bridges over navigable waters — Triggering requirement for environmental assessment under Canadian Environmental Assessment Act — Reports, addenda concluding bridges not likely to cause significant adverse environmental effects — Approvals issued by Canadian Coast Guard on behalf of Minister of Fisheries and Oceans (MFO) based on Order in Council P.C. 1998-527 transferring to Department of Fisheries and Oceans control and supervision of Canadian Coast Guard — Public Service Rearrangement and Transfer of Duties Act, s. 2 authorizing Governor in Council to transfer powers, duties, functions from one minister to another, and to transfer supervision of any portion of public service from one department to another — Order in Council not transferring powers, duties, functions

ENVIRONMENT—Continued

of "Minister" defined in NWPA, s. 5(1) as Minister of Transport, to MFO — Although issuance of approvals by MFO irregular, not in interests of justice to declare approvals void — In American case law, principle of independent utility of proposed work critical factor in determining scope of project — Canadian Environmental Assessment Act: Responsible Authority's Guide extending principle on mandatory basis to defining scope of assessment — While s. 15(2) indicating responsible authority having discretion as to whether multiple projects forming single project, ss. 15(3), 16(1) indicating mandatory application of independent utility principle to definition of scope of assessment — Reasonably open to responsible authority to treat bridges as separate projects for purposes of environmental assessments — But environmental assessments deficient as (1) not conducted in respect of construction or other undertaking "in relation to" projects, namely Mainline Road; (2) failed to include consideration of cumulative environmental effects likely to result from each project in combination with Mainline Road project — Deficiencies constituting errors in law justifying judicial intervention — Preamble to CEAA committing Government to facilitating public participation in environmental assessment of projects — CEAA, s. 55 requiring establishment of public registry in respect of every project for which environmental assessment conducted — Public registry herein maintained at Sarnia, Ontario — Applicant comprised mainly of residents of rural Alberta in region where bridges to be built — Not complying with requirement of convenient access for most concerned public — Inviting applicant to request copies of materials in registry through Access to Information Act not meeting s. 55, preamble obligations, constituting reviewable error.

FRIENDS OF THE WEST COUNTRY ASSN. V. CANADA (MINISTER OF FISHERIES AND OCEANS), [1998] 4 F.C. 340 (T.D.)

Appeal from order allowing application for judicial review of Coast Guard's decisions proposed bridges over navigable waters not likely to cause significant adverse environmental effects — Logging company obtaining provincial approval to build road; applied for approval to construct bridges over navigable waters, triggering federal environmental assessments — (1) CEAA, s. 15(1) conferring on responsible authority (Coast Guard) power to determine scope of project in relation to which environmental assessment to be conducted — Coast Guard determined scope of bridge projects not including road, forestry operations — S. 15(3) requiring environmental assessment in respect of every construction, operation, modification, decommissioning, abandonment, or other undertaking likely to be carried out "in relation to" physical work — S. 15(3) subsidiary to s. 15(1) — Not imposing obligation on responsible authority to conduct environmental assessment outside scope of project determined by s. 15(1) — "In relation to" in s. 15(3) referring to construction, operation, modification, decommissioning, abandonment or other undertakings pertaining to life cycle of physical work itself or that are subsidiary or ancillary to physical work — Independent utility principle, applied by Motions Judge, not applicable to interpretation of s. 15(3) — Once each project scoped under s. 15(1), s. 15(3) not requiring environmental assessment to include construction, operation, modification, decommissioning, abandonment or other undertaking outside scope of projects — (2) S. 16(1)(*a*)

ENVIRONMENT—Continued

requiring assessment to consider environmental effects and any cumulative environmental effects likely to result from projects in combination with other projects, activities that have been, will be carried out — S. 16(3) providing scope of factors to be considered under s. 16(1)(*a*) to be determined by responsible authority — Within responsible authority's discretion to decide which other projects, activities to include, exclude for purposes of cumulative environmental effects assessment — In not considering matters outside defined scope of projects, and outside federal jurisdiction, Coast Guard misinterpreted s. 16(1)(*a*), (3) — Assessment not limited to sources within federal jurisdiction — Finding of insignificant environmental effects sufficient to open possibility of cumulative significant environmental effects when other projects taken into account — Not precluding application of cumulative effects portion of s. 16(1)(*a*), (3) — Coast Guard erred in declining to exercise jurisdiction in cumulative effects analysis under s. 16(1)(*a*) — (3) S. 55 requiring establishment of public registry to facilitate public access to records — Registry established at Sarnia, Ontario, 2000 miles from projects — Establishment, operation of public registry subject to discretion of responsible authority, but if not established, operated in close proximity to relevant geographic area of environmental assessment, other reasonable means (e.g. e-mail, fax) must be provided to comply with s. 55 — Coast Guard's actions with respect to access to public registry patently unreasonable.

FRIENDS OF THE WEST COUNTRY ASSN. V. CANADA (MINISTER OF FISHERIES AND OCEANS), [2000] 2 F.C. 263 (C.A.)

Appeal from Canadian Transportation Agency's approval of construction of railway line — Agency finding, upon Canadian Pacific Railway (CPR) filing Canada Transportation Act (CTA), s. 98(2) application for approval, Agency "responsible authority" under Canadian Environmental Assessment Act (CEAA) — CEAA, s. 16(1)(e) requiring assessment of need for, alternatives to, project in environmental assessment process — Agency opining need, alternatives dependent on Union Carbide of Canada's (UCC) decision required direct access to CPR for plant expansion, CPR's objective to improve market share — Agency having obligation to carry out assessment itself — Although deferring to views, objectives of UCC, CPR, Agency expressing own view as to need, alternatives — Business, commercial needs legitimate basis for rejecting alternatives — As determination of whether to consider need, alternatives discretionary, within Agency's discretion to decide nature, extent of consideration of factors — Unless clear conflict, Agency must respect both Parliament's express deregulatory intention under CTA and Parliament's vesting it with environmental decision-making power under CEAA — Agency concluding construction of railway not having adverse environmental effects upon implementation of CPR's proposed mitigation measures — Performed duties under CEAA, s. 16.

SHARP V. CANADA (TRANSPORTATION AGENCY), [1999] 4 F.C. 363 (C.A.)

Decisions on behalf of Ministers of Fisheries and Oceans, Environment to approve screening report dredging project not likely to have significant impact upon environment — Whether assessment process met requirements, standard under

ENVIRONMENT—Concluded

Canadian Environmental Assessment Act—Responsible authorities taking into account general mitigation measures, conducting careful review — Failing, however, to consider fiduciary duty owed to native people.

UNION OF NOVA SCOTIA INDIANS V. CANADA (ATTORNEY GENERAL), [1997] 1 F.C. 325 (T.D.)

EQUITY

Appeal from trial judgment awarding damages instead of accounting of profits in patent infringement action — Accounting of profits equitable remedy — Patentee arguing as coming to equity with clean hands entitled *prima facie* to elect accounting of profits — Trial Judge not bound by maxims of equity because election provided as statutory alternative to damages in Patent Act, s. 57(1)(*b*).

BELOIT CANADA LTD. V. VALMET-DOMINION INC., [1997] 3 F.C. 497 (C.A.)

Equitable remedy of bill of discovery — Form of pre-action discovery — Whether available in F.C.T.D. — Ancient remedy of renewed interest since 1974 House of Lords decision in *Norwich Pharmacal Co. v. Customs and Excise Comrs.* — Enables person injured by wrongdoing to bring action to discover name of wrongdoer — As equitable remedy is discretionary in nature — Considerations in determining whether to grant — Must have *bona fide* claim against alleged wrongdoer — Not issued against disinterested bystander — Person from whom discovery sought must be only information source — Necessity for balancing public interests in favour of, against disclosure — Jurisdictions where remedy recognized since *Norwich Pharmacal* — Federal Court is court of law, equity — Court not dissuaded from recognizing bill of discovery as remedy because of novelty in Canadian jurisprudence — Case at bar involving overlapping of legislation, rules of equity — Necessity for determining legislative intent — Application of principles in *Norwich Pharmacal* to instant case — Whether courts of equity can compel Crown to submit to discovery not settled by caselaw — In absence of binding authority, Crown not granted immunity.

GLAXO WELLCOME PLC V. M.N.R., [1998] 4 F.C. 439 (C.A.)

Doctrine of marshalling — As between mortgagee, creditor — Priorities to proceeds of judicial sale of ship — Authoritative definitions of marshalling referred to — Whether unsecured creditors have benefit of marshalling — Equity engineered redress of marshalling so that no man made rich by another's injury — Canadian case law limiting availability of marshalling to be departed from to uphold obvious legal principles.

GOVERNOR AND COMPANY OF THE BANK OF SCOTLAND V. *NEL* (THE), [1998] 4 F.C. 388 (T.D.)

Judgment declaring infringement of patent relating to additive for motor oils — Plaintiffs electing account of profits — Reference to determine amount of profits

EQUITY—Concluded

ordered — Defendant seeking production of plaintiffs' documents to support contention entitled to apportion profits on sales of infringing motor oils — Prothonotary, Motions Judge erred in holding terms of formal judgment excluding possibility of leading evidence at reference on issue of apportionment — Account of profits equitable remedy designed not to punish, but to have defendant surrender profits made at plaintiff's expense — Apportionment question of fact bearing on relationship between profits earned, appropriation of plaintiff's invention, to be decided on reference — Judgment not finding all profits from sales of motor oils arising from infringement, but as documents sought irrelevant, motion dismissed.

LUBRIZOL CORP. V. IMPERIAL OIL LTD., [1997] 2 F.C. 3 (C.A.)

ESTOPPEL

Somalia Inquiry investigating how Canada's military acting before, during, after deployment — Commission issuing Inquiries Act, s. 13 notices to senior military officers indicating findings could be made against them — Some applicants refusing to participate in s. 13 hearings — Estoppel to preclude allegations of procedural unfairness not applicable — Most of applicants did participate in s. 13 hearing process — Respondents not suffering detriment from any refusal to participate — No deceit, ill-will on part of applicants — Those who chose not to participate cannot now seek relief for procedural unfairness.

ADDY V. CANADA (COMMISSIONER AND CHAIRPERSON, COMMISSION OF INQUIRY INTO THE DEPLOYMENT OF CANADIAN FORCES IN SOMALIA), [1997] 3 F.C. 784 (T.D.)

Practice — *Res judicata* — Issue estoppel — Claim for wrongful filing of writ of *fieri facias* with respect to certificate registered under Income Tax Act, s. 223 — Not case of issue estoppel as plaintiff not seeking to relitigate validity of tax assessed against her, but rather arguing writ flowing from assessment wrongfully filed.

ALBION TRANSPORTATION RESEARCH CORP. V. CANADA, [1998] 1 F.C. 78 (T.D.)

Whether doctrine of issue estoppel applies to prevent Canadian Human Rights Commission from investigating complaints already subject of unsuccessful grievance — S. 41(*a*) (exempting CHRC from requirement to deal with complaint where grievance, review procedures not exhausted) showing Parliament had in mind possibility of overlap between CHRC, grievance procedures, and gave CHRC discretion not to investigate until procedures exhausted — Would have expressly so stated had it intended to also give CHRC discretion not to investigate when procedures exhausted — Even assuming arbitrator's decision can estop CHRC from investigating, only possible to decide whether doctrine should apply after careful consideration of all circumstances — Cannot require CHRC at preliminary stage of investigation to engage in extensive investigation of facts, law to determine whether to apply doctrine of issue estoppel — Question should be addressed only after CHRC investigating complaint —

ESTOPPEL—Continued

CHRC may not refuse to investigate complaint on ground complainant pursued matter before labour arbitrator who decided grievance against complainant.

CANADA POST CORP. v. BARRETTE, [1999] 2 F.C. 250 (T.D.)

Appeal from Trade-marks Opposition Board decision *res judicata* not applicable in opposition proceedings — Relied upon T.M.O.B. decision in *Sunny Crunch Foods Ltd. v. Robin Hood Multifoods Inc.*, based on F.C.T.D. decision in *The Molson Companies Ltd. v. Halter — Molson* not directly speaking to issue of whether issue estoppel applies in opposition to registration of trade-mark on basis of confusion — Stating doctrine of *res judicata* not applicable to s. 44 proceedings in which only Registrar involved in making decision — *Molson* not authority for position adopted in *Sunny Crunch*, subsequent cases, issue estoppel not applicable in opposition proceedings — Issue estoppel requiring determination of whether same question already determined — Confusion common element to statutory opposition proceedings, common law passing-off action — Test therefor substantially similar in passing-off action, subsequent opposition proceedings — "Same question" if goods at issue in passing-off action same as those in opposition proceeding — Each case must be assessed on facts to determine effect of doctrine — Issue estoppel having no effect herein as necessary criteria not proved.

DISNEY ENTERPRISES INC. v. FANTASYLAND HOLDINGS INC., [1999] 1 F.C. 531 (T.D.)

Minister auditing appellant, registered charitable organization, in 1989 — Not recommending any change of conduct — Auditing appellant again in 1993, result of which revocation of registration as charitable organization on ground appellant not devoting substantially all resources to charitable activity — Appellant submitting Minister's silence after 1989 audit representation appellant's activities within requirements for charitable organization — Key requirement of estoppel that representation by word or conduct lead representee to act to his detriment — Assuming silence "representation", appellant not suffering detriment up to July 1993 when "representation" ended with Revenue Canada's letter warning appellant revocation might ensue — Continued to enjoy benefits of registration for further 10 months until revocation decision taken.

HUMAN LIFE INTERNATIONAL IN CANADA INC. v. M.N.R., [1998] 3 F.C. 202 (C.A.)

Appeal from extension granted pursuant to Patented Medicines (Notice of Compliance) Regulations, s. 7(5) — S. 7(5) permitting court to vary 30-month period during which Minister prohibited from issuing notice of compliance after application for prohibition commenced where party to application failing to reasonably co-operate in expediting application — Appeal allowed — No evidence of pre-conditions for estoppel.

MERCK FROSST CANADA INC. v. APOTEX INC., [1997] 2 F.C. 561 (C.A.)

ESTOPPEL—Concluded

Motions to stay Federal Court action for damages to cargo in favour of (i) arbitration in London in accordance with contract of affreightment; (ii) litigation in Japan in accordance with bill of lading — Day after litigation commenced, letter of undertaking issued to accept service, file defence in accordance with Federal Court Rules, in consideration for ship not being arrested — Letter of undertaking superseding arbitration provision, estopping defendant, Tokyo Marine, from applying for stay — Contractual agreement as to jurisdiction not immutable — Plaintiff keeping its part of bargain by not arresting ship — Having agreed to file defence on behalf of all defendants, without reference to arbitration, no right of arbitration in London or of litigation in Japan remaining.

METHANEX NEW ZEALAND LTD. V. *KINUGAWA* (THE), [1998] 2 F.C. 583 (T.D.)

EVIDENCE

Letters from realtors to Revenue Canada as to fair market rental value of luxury condo apartment provided to shareholder not evidence — Not sworn opinions subject to cross-examination — Not admissions against interest by MNR who produced them because happened to be in files.

CANADA V. FINGOLD, [1998] 1 F.C. 406 (C.A.)

Reference seeking declaration respondent obtained citizenship by false representation, fraud, knowingly concealing material circumstances — Respondent, DP from Austria, admitted to Canada in 1948, becoming Canadian citizen in 1957 — Applicant seeking to revoke citizenship based on undisclosed collaborationist activities during World War II — Reliance can be placed on subsequent documents to attest to prior state of affairs when situation shown to have been relatively constant — Inappropriate to do so when situation in state of flux, rapid evolution, as was state of affairs with respect to security screening in 1948 when immigration from continental Europe increased dramatically, RCMP struggling to comply with Cabinet direction to maintain security screening without impeding flow of immigrants.

CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) V. DUECK, [1999] 3 F.C. 203 (T.D.)

Canada Evidence Act, s. 39 according Crown power to refuse to disclose certain documents in situations where to do so would breach confidence of Queens Privy Council — Respondent arguing use of s. 39 certificate inappropriate — Once s. 39 certificate issued, not open to Court to review documents to ensure government made reasonable decision — Only way to attack such certificate to attack wording as too vague — No such attack brought — Neither provision nor certificate challenged — As nothing in statute prohibiting use of certificate with respect to situation, proper use of certificate not supporting motion to stay proceedings.

CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) V. KATRIUK, [1999] 3 F.C. 143 (T.D.)

EVIDENCE—Continued

Objection to admissibility of commission evidence taken in Poland — Mutual Understanding providing when Canadian Court requesting to take evidence in Polish People's Republic, Polish Judge will preside at hearing in accordance with requirements of Polish law, and will enable Canadian Judge to take evidence in accordance with Canadian rules of evidence, procedure — Presiding Polish Judge examining, cross-examining witness in belief authorized to do so — Canadian Judge's mandate to take evidence in accordance with Canadian rules of evidence, procedure — Unable to fulfill mandate because of fundamental differences between Polish, Canadian procedures.

CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) v. KATRIUK, [1999] 3 F.C. 164 (T.D.)

Admissibility of documents tendered as exhibits by Minister in reference relating to respondent's acquisition of citizenship — At issue German war documents, originating in central or field offices of armed forces or police, serving government of Third Reich, during World War II; testimonial documents prepared for or provided in Canadian judicial proceedings, including affidavits, affiants of which either deceased or unable to testify; miscellaneous documents — (1) War documents containing hearsay — Supported by affidavit of archivists, others attesting to authenticity of copy of document — Canada Evidence Act, s. 30 providing where oral evidence in respect of matter admissible, record made in usual, ordinary course of business containing information in respect of that matter admissible on production of record — War documents records — Activity in which originated clearly within broad definition of "business" in s. 30(12) (i.e. in relation to ordinary activities of government agencies) — Documents should not be excluded as not meeting requirement for reliability because only persons available to attest to original production of documents in usual, ordinary course those historical experts who gained knowledge second-hand — S. 30 not requiring attestation document made in usual, ordinary course of business be made by someone who knows that from personal experience and who was involved in producing document — Expertise of historians providing necessary threshold reliability for admission of documents in evidence as official documents — (2) Testimonial documents hearsay — Test for reliability of documents not met where documents prepared as affidavits for legal proceedings in anticipation of cross-examination, but ultimately none possible — Test of necessity not met as similar evidence already before Court — S. 30(10) excluding admission of record made in contemplation of legal proceedings or transcripts of evidence taken in course of another legal proceeding — As documents within those specific descriptions, inappropriate to admit them on basis of principled exception to common law rule — (3) Miscellaneous documents admitted except copy of verdict of German Court in criminal trial of another person — Clearly irrelevant.

CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) v. OBERLANDER, [1999] 1 F.C. 88 (T.D.)

Patented medicines notice of compliance proceedings — Types of burden of proof in civil, criminal cases — "Persuasive (or legal) burden" — "Evidential burden" —

EVIDENCE—Continued

Evidential burden under relevant Regulations — Legal burden to show facts alleged in notice of allegation not true — Whether common law imposing burden of showing process not infringing patent — Common law presumption: Court will infer facts adverse to party's interest if failing to lead evidence of fact in better position to establish.

ELI LILLY AND CO. V. NU-PHARM INC., [1997] 1 F.C. 3 (C.A.)

Motion to allow plaintiff to rely, as evidence, on documents, not appended to affidavits, it has produced at request of various claimants to sale proceeds of ship at or following cross-examination of plaintiff's witness — Documents merely produced to and examined by counsel do not form part of evidence of case, but should counsel for claimants who cross-examined plaintiff's deponent wish to rely upon any document in package or set, then necessarily related documents in package or set may be relied upon by plaintiff.

GOVERNOR AND COMPANY OF THE BANK OF SCOTLAND V. *NEL* (THE), [1999] 2 F.C. 417 (T.D.)

Judicial review of RCMP Commissioner's dismissal of appeal from Adjudication Board's finding applicant should resign or be dismissed for disgraceful conduct bringing discredit to RCMP — Applicant identified, but not with absolute certainty, as man seen climbing backyard fence, masturbating in street — No criminal charges laid, but internal investigation conducted — Adjudication Board taking view of area where incident occurred in presence of applicant, counsel — As result of view, Board doubting applicant's explanation for presence in area — Where tribunal taking view, not to gather evidence, but to understand evidence submitted, entitled to make observations inconsistent with evidence adduced by parties.

JAWORSKI V. CANADA (ATTORNEY GENERAL), [1998] 4 F.C. 154 (T.D.)

Similar fact evidence — Collision possibly caused by confusing use of lights by tug/barge combination — Fishermen testifying as to own experiences encountering said combination at night — Where similar fact evidence adduced in civil case to prove fact in issue, reversible error for Trial Judge not to determine whether evidence sufficiently probative to be admissible.

KAJAT V. *ARCTIC TAGLU* (THE), [2000] 3 F.C. 96 (C.A.)

Motion to admit as evidence in Federal Court show cause proceedings true copies of documents filed in judicial review application in Ontario Court — Plaintiffs intending to use documents as evidence of assertions contained therein — Relying on Canada Evidence Act ss. 23, 24, 30 (CEA) — Evidence of assertions made in affidavits or cross-examination in Ontario Court proceedings precluded from admission by hearsay rule, unless within exception to rule — CEA facilitating admission of documentary evidence meeting requirements for admission under some exception to hearsay rule — Not providing exceptions, except to extent permitting admission

EVIDENCE—Continued

without formal proof of authenticity of documents otherwise required at common law — Ontario Court records not questioned as to authenticity but said to be hearsay and irrelevant — CEA not providing evidence admissible regardless of relevance — Plaintiffs not establishing relevance of evidence in Ontario Court proceedings — Testimony from prior judicial proceedings admissible in later proceedings involving same parties, issues — Ontario Court proceedings involving different issues, parties — Contempt show cause proceedings quasi-criminal — Charter, ss. 11, 13, protecting against self-incrimination, applied — Affidavits admissible to question credibility if CEO testifying, but CEO not compellable in light of s. 11(*c*) — Affidavits in Ontario Court proceeding of witness already testifying herein, inadmissible as would constitute unfair process i.e. other parties deprived of opportunity to cross-examine on matters dealt with therein.

MERCK & CO., INC. V. APOTEX INC., [1998] 3 F.C. 400 (T.D.)

Reviewing Judge in Privacy Act matter refusing to admit expert evidence of appellant's former law partner on grounds marginally relevant, evidence contained not necessary, witness not independent — Affidavit should have been admitted upon judicial review — Satisfied logical, legal relevancy tests as value outweighed impact on process — Satisfying necessity test as asserting facts outside experience, knowledge of Judge — Should not have been excluded for possible bias of affiant, as going to credibility, not admissibility.

RUBY V. CANADA (SOLICITOR GENERAL), [2000] 3 F.C. 589 (C.A.)

Immigration — Proceedings before Convention Refugee Determination Division — Minister's disclosure obligation regarding anticipated evidence of two witnesses satisfied where summary given over telephone — Admissibility of expert evidence where expert not cross-examined.

SIAD V. CANADA (SECRETARY OF STATE), [1997] 1 F.C. 608 (C.A.)

Canada Evidence Act, s. 39, providing where Clerk of Privy Council objecting to disclosure of information, disclosure shall be refused without judicial examination — Applicants submitting s. 39 unconstitutional as contrary to unwritten, fundamental principles of Constitution i.e. separation of powers, independence of judiciary, rule of law — Unwritten constitutional norms may be used to fill gap in express terms of constitutional text or used as interpretative tools where section of constitution not clear — But principles of judicial review not enabling Court to strike down legislation in absence of express provision of Constitution contravened by legislation in question — Requisite express constitutional provision not existing herein — No gap in Constitution to be filled — Largely unwritten constitutional norms not sufficient to invalidate otherwise properly enacted legislation — S. 39 not breaching separation of powers, independence of judiciary, rule of law.

SINGH V. CANADA (ATTORNEY GENERAL), [1999] 4 F.C. 583 (T.D.)

EVIDENCE—Concluded

Canada Evidence Act, s. 39 providing where Clerk of Privy Council certifying in writing document confidence of Queen's Privy Council, disclosure shall be refused without examination, hearing of information by court — *Prima facie intra vires* measure to define privileges of Executive — Fundamental unwritten principles of Constitution (independence of judiciary, rule of law, separation of powers) not constitutional imperative to contrary.

SINGH V. CANADA (ATTORNEY GENERAL), [2000] 3 F.C. 185 (C.A.)

EXPROPRIATION

Motion seeking interim injunctions to restrain expropriation by federal government of provincial Crown lands used for torpedo testing by American, Canadian military — British Columbia had licensed Crown federal to use property for 10 years but cancelled licence in retaliation for failure of U.S.A. to comply with terms of fishing treaty — When subsequent federal-provincial licensing negotiations broke down over provincial objections to nuclear powered submarines, federal government issued expropriation notice — Whether Expropriation Act providing for expropriation of provincial Crown lands — Whether such expropriation unconstitutional — Whether sufficient for Minister of Public Works to issue notice of intention to expropriate or must statute be enacted.

HUMAN RIGHTS INSTITUTE OF CANADA V. CANADA (MINISTER OF PUBLIC WORKS AND GOVERNMENT SERVICES), [2000] 1 F.C. 475 (T.D.)

FEDERAL COURT JURISDICTION

Appeal from order striking out paragraphs of prayer for relief seeking letters of apology, directing employer to adopt program to rectify adverse effect of discriminatory practices, directing CIDA to implement Employment Equity Program on ground outside Court's jurisdiction — Statement of claim alleging individual, systemic discrimination — As superior court of record with supervisory jurisdiction, Federal Court having jurisdiction to enforce constitutional equality rights in federal sphere by providing appropriate, just remedy pursuant to Charter, s. 24 — As CHRT having jurisdiction to impose programs to remedy effects of discrimination, courts must have power to impose similar remedies if deemed appropriate — In context of systemic discrimination, such remedies, in order to be just, appropriate may take form of orders sought by appellants.

PERERA V. CANADA, [1998] 3 F.C. 381 (C.A.)

Appeal Division

Appeal from Motions Judge's order setting aside Human Rights Tribunal's decision Bank's substance abuse policy not discriminatory; cross-appeal from finding policy not direct discrimination — Whether F.C.A. having jurisdiction to address issue of direct discrimination because not raised as ground for judicial review before Motions Judge — Motions Judge's failure to deal with issue in reasons not transforming issue into

FEDERAL COURT JURISDICTION—Continued

Appeal Division—Concluded

new one raised for first time on appeal as Tribunal addressing issue — Even if new, issue one of law, further evidence not required — All relevant evidence before Tribunal — Argument based on record not new evidence — Right to argue direct discrimination fully debated before Motions Judge who ruled could be — Pleadings not so defective as to take Bank by surprise — Allegation of direct discrimination at centre of legal controversy from outset — Motions Judge's decision as to sufficiency of originating motion upheld.

CANADA (HUMAN RIGHTS COMMISSION) v. TORONTO-DOMINION BANK, [1998] 4 F.C. 205 (C.A.)

Jurisdiction in Court to review Security Intelligence Review Committee report and conclusion as "decision or order" within meaning of Federal Court Act, s. 28.

MOUMDJIAN v. CANADA (SECURITY INTELLIGENCE REVIEW COMMITTEE), [1999] 4 F.C. 624 (C.A.)

Trial Division

Judicial review of Canadian Wheat Board's grain delivery program — Federal Court Act, s. 18 giving Court jurisdiction to grant relief against any federal board, commission or other tribunal — S. 2 definition of "federal board, commission or other tribunal" including any body exercising jurisdiction conferred by Act of Parliament — In establishing grain delivery program, Board federal board, commission or other tribunal — Power to establish grain delivery program deriving directly from Canadian Wheat Board Act — Central to Board's function — S. 18.1 permitting anyone directly affected by "matter" in respect of which relief sought to apply for judicial review — Board's objective directed to implementation of public policy — As such, not subject to judicial review — Parliament not intending judicial review of such programs when enacting Federal Court Act, ss. 18, 18.1.

ALBERTA v. CANADA (WHEAT BOARD), [1998] 2 F.C. 156 (T.D.)

Federal Court Act, s. 18.1(4)(*f*), permitting Trial Division to grant relief if satisfied federal tribunal acted "contrary to law" — Migratory Birds Regulations, s. 35 prohibiting deposit of substance harmful to migratory birds in any area frequented by them — Joint Review Panel concluding proposed open-pit coal mine would have significant adverse effect on migratory birds — Even if Minister acting under lawful authority to issue authorization under Fisheries Act, s. 35(2) to "allow the harmful alteration, disruption or destruction of fish habitat", liable under Migratory Birds Regulations, s. 35(1) for so doing — Such liability making issuance of authorization "contrary to law" within s. 18.1(4)(*f*) — As Minister can avoid liability for contravention of s. 35(1) by passage of appropriate regulations, Court not exercising discretion to prohibit issuance of further authorizations.

ALBERTA WILDERNESS ASSN. v. CARDINAL RIVER COALS LTD., [1999] 3 F.C. 425 (T.D.)

FEDERAL COURT JURISDICTION—Continued

Trial Division—Continued

Appeal from Trial Division refusal to strike application for judicial review — Rear Admiral refusing application to quash counselling and probation — Decision within Federal Court Act, s. 18.1(2) as decision of federal board or tribunal settling matter before him, binding on respondent — That entitled to pursue matter up chain of command not rendering decision less final.

ANDERSON V. CANADA (ARMED FORCES), [1997] 1 F.C. 273 (C.A.)

Within Court's jurisdiction to grant accounting of profits under Patent Act, s. 57(1)(*b*), Federal Court Act, ss. 3, 20 — Patent Act, s. 57(1)(*b*) expressly permitting Court to order accounting in infringement actions — Federal Court Act, s. 20(2) giving Trial Division concurrent original jurisdiction in all cases, other than those mentioned in s. 20(1), in which remedy sought under authority of any Act of Parliament or at law or in equity respecting any patent — Accounting of profits equitable remedy.

BELOIT CANADA LTD. V. VALMET-DOMINION INC., [1997] 3 F.C. 497 (C.A.)

Whether issue of jurisdiction could be raised on judicial review of Adjudicator's decision appellants unjustly dismissed — Canada Labour Code, s. 243 providing every order of Adjudicator appointed under s. 242 final — Interpretation by Adjudicator of statutory conditions precedent to complaints validly filed under Canada Labour Code, s. 240(1) subject to review on correctness standard — Jurisdictional issues always alive, may be raised at any point in proceedings.

BEOTHUK DATA SYSTEMS LTD., SEAWATCH DIVISION V. DEAN, [1998] 1 F.C. 433 (C.A.)

Motion to strike originating notice of motion — Within Court's inherent jurisdiction to strike, but discretion exercised only where clear no basis for proceeding by originating motion.

CANADA (ATTORNEY GENERAL) V. CANADA (INFORMATION COMMISSIONER), [1998] 1 F.C. 337 (T.D.)

Application for declaration Minister exceeded authority in signing federal-provincial agreements concerning environment or certain sections thereof invalid as fettering discretion — Under Federal Court Act, s. 18(1)(*a*) Court having authority to grant declaratory relief against any federal board, commission, other tribunal — In setting out time limitations for commencement of judicial review applications, s. 18.1(2) referring to decision, order of federal board, commission, other tribunal — S. 18.1(3) giving F.C.T.D. option to declare invalid, unlawful decision, order, act or proceeding of federal board, commission, other tribunal — Although federal-provincial agreements may not be decisions, orders of Minister, Minister's decision to sign, acts of signing reviewable under ss. 18, 18.1 — As several parties to agreements, even if Minister lacking authority to sign, agreements may remain valid in so far as other signatories

FEDERAL COURT JURISDICTION—Continued

Trial Division—Continued

concerned — Any s. 18.1 remedy should be directed to decision, act of Minister in signing agreements, not to validity of agreements — Agreements containing statements of political intention, objectives respective governments hope to implement — Interpretation of federal statutes at heart of some issues raised — Sufficient legal component to justify Court's consideration.

CANADIAN ENVIRONMENTAL LAW ASSN. V. CANADA (MINISTER OF THE ENVIRONMENT), [1999] 3 F.C. 564 (T.D.)

Immigration and Refugee Board's (IRB) policy of not translating most decisions into other official language but providing translation if requested not "decision" within meaning of Federal Court Act, s. 2 — Furthermore, in context of Official Languages Act, "federal board, commission or other tribunal" Commissioner of Official Languages, not IRB — Therefore, F.C.T.D. without jurisdiction to hear Federal Court Act, s. 18.1 application for judicial review against IRB challenging Board's "official languages" policy.

DEVINAT V. CANADA (IMMIGRATION AND REFUGEE BOARD), [1998] 3 F.C. 590 (T.D.)

Immigration and Refugee Board's (IRB) on-request translation policy in violation of Official Languages Act, s. 20 — IRB "federal board, commission or other tribunal" — Absent Parliament's express intention to depart from general system of law, IRB cannot be excluded from application of Federal Court Act, s. 18.1 — Appellant "directly affected by matter in respect of which relief sought" — IRB's omission to translate orders and decisions unless translation requested based on "decision", in each case, not to translate — Jurisdiction in F.C.T.D. to hear s. 18.1 application for judicial review challenging IRB's official languages policy.

DEVINAT V. CANADA (IMMIGRATION AND REFUGEE BOARD), [2000] 2 F.C. 212 (C.A.)

Equitable bill of discovery permitting Court, exercising equitable jurisdiction, in order to discover name of person responsible for damage to plaintiff, to order discovery of person against whom applicant for bill of discovery has no cause of action and not party to contemplated litigation — Equitable jurisdiction in Court to grant bill of discovery to patent owner to obtain from MNR names of importers allegedly importing drugs into Canada in violation of patent rights.

GLAXO WELLCOME PLC V. M.N.R., [1998] 4 F.C. 439 (C.A.)

Judicial review of Deputy Superintendent of Bankruptcy's decision to seize records administered by applicants, entrust them to guardian until completion of investigation, disciplinary hearing — "Decision" within Federal Court Act, s. 18.1 — Having final effect on applicants' rights as seized records not likely to be returned until end of

FEDERAL COURT JURISDICTION—Continued

Trial Division—Continued

disciplinary process — Administration of seized records probably complete by end of that process.

GROUPE G. TREMBLAY SYNDICS INC. V. CANADA (SUPERINTENDENT OF BANKRUPTCY), [1997] 2 F.C. 719 (T.D.)

Certified question — Contrary to Trial Judge's finding, reported at [1998] 4 F.C. 43, F.C.T.D., when hearing application for judicial review, having jurisdiction to decide constitutional challenge to validity of section of Immigration Act although tribunal lacking jurisdiction to decide question — Relevant provisions of Federal Court Act amended since cases upon which Trial Judge relied — Tribunal basing decision on constitutionally invalid provision committing jurisdictional error — To determine whether tribunal acting within jurisdiction, constitutionality of conferring provision must be assessed.

GWALA V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1999] 3 F.C. 404 (C.A.)

Appeal from A.S.P.'s decision striking out statement of claim for failure to disclose cause of action within Court's jurisdiction — Statement of claim alleging maladministration of Income Tax Act, seeking declarations against Crown, Minister — Federal Court Act, s. 17(1) giving F.C.T.D. concurrent original jurisdiction where relief claimed against Crown; s. 17(5)(*b*) conferring jurisdiction on F.C.T.D. in proceedings where relief sought against person involving performance of duties as officer, agent, servant of Crown — A.S.P.'s decision vital to final resolution of case as terminating action — Court having right to exercise discretion *de novo* — As action unique, not within stricture "when disputed point before lower court, no basis for declaratory action".

HARRIS V. CANADA, [1999] 2 F.C. 392 (T.D.)

Motion for order of payment of net proceeds of sale of ship to trustees in bankruptcy — Ship seized, sold in support of Federal Court action for fees for stevedoring, related services provided in U.S.A. — Plaintiff entitled to maritime lien based on status of claim in U.S.A. — Quebec Superior Court in Bankruptcy approving sale, but ordering net proceeds be paid to trustees for distribution — Appeal suspending effect of that judgment — Federal Court Act, s. 17(6) providing where Act of Parliament conferring jurisdiction in respect of matter on provincial court, Trial Division having no jurisdiction to entertain any proceeding in respect of same matter unless Act expressly conferring jurisdiction on Court — Bankruptcy and Insolvency Act, s. 183 assigning jurisdiction in relation to bankruptcy to provincial superior courts — Federal Court Act, s. 17(6) irrelevant — Enacted as part of revision of s. 17 replacing previously exclusive original jurisdiction in claims against Crown with concurrent original jurisdiction — S. 17(6) implicitly relating to proceedings against Crown — Regardless, only precluding Court from proceeding in bankruptcy matters — Federal Court's

FEDERAL COURT JURISDICTION—Continued

Trial Division—Continued

determinations relating to arrest, default judgment, sale, secured creditor's claim to proceeds of sale, not bankruptcy proceedings.

HOLT CARGO SYSTEMS INC. V. ABC CONTAINERLINE N.V. (TRUSTEE OF), [1997] 3 F.C. 187 (T.D.)

Motion for interim injunction to prevent hearing officer from delivering report on objections to proposed expropriation by federal government of provincial Crown lands until challenge to validity of expropriation determined — Hearing officer appointed pursuant to Expropriation Act, s. 10(2); report required by s. 10(4)(*d*) — "Federal board, commission, or other tribunal" defined as "any person . . . having jurisdiction . . . conferred by Act of Parliament" — Hearing officer, pursuant to Expropriation Act, s. 10, within definition — Holding public hearings, evaluation of objections decision-making functions — But no application for judicial review of any decision by hearing officer, independent of challenges to Minister's authority, legislative jurisdiction of Parliament — Injunction to prevent hearing officer from making report to Minister not justified.

HUMAN RIGHTS INSTITUTE OF CANADA V. CANADA (MINISTER OF PUBLIC WORKS AND GOVERNMENT SERVICES), [2000] 1 F.C. 475 (T.D.)

Appeal from order striking out originating notice of motion for *mandamus*, prohibition, declaration as outside time limit prescribed in s. 18.1(2) to bring application for judicial review of federal tribunal's decision or order — Appellants alleging ongoing improper amortization of portions of Public Service, Canadian Forces surpluses since 1993-1994, breach of Minister's duties under Public Service, Canadian Forces Superannuation Acts — Appeal allowed — S. 18.1(1) permitting anyone directly affected by matter in respect of which relief sought to bring application for judicial review — "Matter" including any matter in respect of which remedy available under s. 18 — S. 18.1(3)(*a*),(*b*) contemplating *mandamus*, declaratory relief, prohibition — Exercise of s. 18 jurisdiction not depending on existence of "decision or order".

KRAUSE V. CANADA, [1999] 2 F.C. 476 (C.A.)

Indian Band elections — Action for declaration plaintiffs duly elected chief and councillor respectively, and for damages — Action by counterclaim seeking declaration election of plaintiffs null, void and *mandamus* for new election — Whether statutory grant of jurisdiction — Defendants merely band members, no evidence acting as Crown agents — Even if band federal board, relief available only upon judicial review — Court lacking jurisdiction to determine action or counterclaim.

LOWER SIMILKAMEEN INDIAN BAND V. ALLISON, [1997] 1 F.C. 475 (T.D.)

Federal Court Act, s. 43(2) allowing exercise of Court's jurisdiction under s. 22 *in rem* against ship that is subject of action — S. 22(2)(*i*) giving Court jurisdiction over claim arising out of agreement relating to use, hire of ship — When *Bocsa* unable to

FEDERAL COURT JURISDICTION—Continued

Trial Division—Continued

load cargo because detained by Coast Guard due to deficiencies, action for breach of contract and in tort commenced — Vessel arrested based on breach of contract — Sufficient connection between plaintiff, *Bocsa*, including delivery of ship to Vancouver, provision of cargo to preclude finding tort action futile — Agreement for use of ship bringing matter within s. 22(2)(*i*), enforceable in contract, tort.

MARGEM CHARTERING CO. INC. V. *BOCSA* (THE), [1997] 2 F.C. 1001 (T.D.)

Judicial review — Revenue Canada letter informing applicant owed unpaid "written off" taxes plus interest — Federal Court Act, s. 18.1(3), reference to "decision, order, act or proceeding", broad enough to cover administrative action herein — Would be serious gap in Court's supervisory jurisdiction if it could not entertain challenge to issuance of requirement to pay as Income Tax Act providing no remedy.

MARKEVICH V. CANADA, [1999] 3 F.C. 28 (T.D.)

Appeal from extension granted pursuant to Patented Medicines (Notice of Compliance) Regulations, s. 7(5) — Appeal allowed — 30-month bar to marketing by competitors legislative stay, subject to terms imposed by Regulations — Only s. 7(5) authorizing Trial Division to alter legislative duration of 30-month stay directly, and only where court finding party to application failing to reasonably co-operate in expediting application — No such failure alleged, proven — Extension granted without jurisdiction — Court's inherent power to control own process irrelevant as respondent seeking order to control exercise of Minister's authority — Patent Act, s. 55.2(5) providing Regulations overriding any other Act, regulation including Federal Court Act, s. 18.2, Federal Court Rules, R. 1614.

MERCK FROSST CANADA INC. V. APOTEX INC., [1997] 2 F.C. 561 (C.A.)

Jurisdiction in Federal Court to grant declaratory relief in judicial review proceedings brought pursuant to Federal Court Act, s. 18 — Where action seeking declaration parallelling judicial review application seeking same relief, statement of claim should be struck as disclosing no reasonable cause of action — To permit parallel proceedings arising from single decision would diminish capacity of Court to dispense justice in expedient, efficient manner.

MOKTARI V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 2 F.C. 341 (C.A.)

Plaintiff submitting no-fault scheme established by Saskatchewan Automobile Accident Insurance Act, ss. 102, 103 constitutionally invalid as binding Crown without adoption by Parliament — Further arguing provincial legislation unconstitutionally restricting Federal Court jurisdiction — Federal Court without jurisdiction to hear action for negligence against Crown servant as not arising from federal law — Insufficient relationship between action, existing federal law — Action based upon

FEDERAL COURT JURISDICTION—Continued

Trial Division—Continued

common law of tort — That reference must be made to Crown Liability and Proceedings Act not underpinning action in federal law.

MOXHAM V. CANADA, [1998] 3 F.C. 441 (T.D.)

No inherent jurisdiction in Federal Court to extend limitation period in Canada Shipping Act, s. 649 with respect to fatal maritime accidents.

NICHOLSON V. CANADA, [2000] 3 F.C. 225 (T.D.)

Application to prohibit Registrar of Trade-marks from proceeding with application for registration of trade-marks — Prohibition available where jurisdictional error, violation of natural justice or procedural fairness — Issue of distinctiveness relied upon herein will be raised in opposition proceedings — Distinctiveness within Registrar's jurisdiction to consider — Court lacking authority to prohibit Registrar from performing statutory duties where no evidence acting outside jurisdiction.

NOVOPHARM LTD. V. ELI LILLY AND CO., [1999] 1 F.C. 515 (T.D.)

F.C.T.D. can set aside order made by it, order new hearing at request of person who ought to have been made party to proceeding — Relief available upon motion analogous to Federal Court Rules, r. 399 or to Ontario Rules of Civil Procedure, r. 38.11 — Even if no equitable jurisdiction, even if Rules providing no remedy, and even if no inherent jurisdiction, jurisdiction in Court by virtue of "jurisdiction by implication" — Such power necessary for Court to fully exercise jurisdiction.

NU-PHARM INC. V. CANADA (ATTORNEY GENERAL), [2000] 1 F.C. 463 (C.A.)

Third party claim based on misrepresentations by respondent as to adequacy of plastic drums for carriage of canola oil by sea — Whether F.C.T.D. has jurisdiction over claim under Federal Court Act, s. 22 — Case law on Federal Court's maritime jurisdiction reviewed — *ITO* case applied — That alleged misrepresentation made on land not sufficient to establish want of jurisdiction — Claim integrally connected to Court's admiralty, maritime jurisdiction.

PAKISTAN NATIONAL SHIPPING CORP. V. CANADA, [1997] 3 F.C. 601 (C.A.)

Whether refusal to withdraw letter of request from Minister of Justice to Swiss authorities seeking assistance with RCMP investigation into fraud on government decision of federal board, commission or other tribunal — Decision made pursuant to Crown prerogative within respondent's authority as chief law officer of Crown federal — Subject to judicial review.

SCHREIBER V. CANADA (ATTORNEY GENERAL), [2000] 1 F.C. 427 (T.D.)

Appeal from Immigration Act, s. 40.1(9) order releasing appellant from detention on ground conditions therein infringing Charter guaranteed rights of freedom of

FEDERAL COURT JURISDICTION—Concluded

Trial Division—Concluded

expression, association — Appellant not raising constitutional issues before Trial Judge designated under s. 40.1(8) — Appeal allowed to extent matter remitted to designated F.C.T.D. Judge — Under s. 40.1(8) having jurisdiction, compelled to consider constitutionality of terms of any order made under s. 40.1(9) — In best position to do so, having heard witnesses, determined credibility, having full factual record — Also has remedy available: appropriate wording of release conditions — As Judge issuing release order having continuing jurisdiction as to impact — Also in best position to determine whether appellant's conduct amounting to waiver of Charter attack.

SURESH V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1998] 4 F.C. 192 (C.A.)

Judicial review of dismissal by Minister of Justice of application for mercy of Crown under Criminal Code, s. 690 — Cabinet decisions made under authority of royal prerogative subject to judicial review for compatibility with Charter.

THATCHER V. CANADA (ATTORNEY GENERAL), [1997] 1 F.C. 289 (T.D.)

FINANCIAL INSTITUTIONS

Banks — Where security given under Bank Act, s. 178 by licensed manufacturers to banks (bills of lading and warehouse receipts), Excise Tax Act, s. 52(10) cannot apply to allow M.N.R. to claim excise tax from banks.

CANADA V. MERCANTILE BANK OF CANADA, [1997] 3 F.C. 29 (C.A.)

Banks — Bank collecting bankrupt licensed manufacturers' accounts receivable assigned to it as security for loan — Bank not liable for excise tax under Excise Tax Act, s. 52(10) with respect to accounts receivable — Priority of Bankruptcy Act, s. 107(1) over Excise Tax Act, s. 52(10) — Even if assignment of debt giving Bank secured creditor status, property in which security held component of assets of bankruptcy — Even though Bank secured creditor, debt owing to it gave it no absolute property right in moneys deriving from ultimate collection of accounts receivable — When collected accounts receivable, Bank did not become "manufacturer" or "producer" — Tax simple debt owing by vendor manufacturer and, for recovery purposes, in case of bankruptcy, has rank accorded to it in Act, s. 107(1).

CANADA V. NATIONAL BANK OF CANADA, [1997] 3 F.C. 3 (C.A.)

FISHERIES

Judicial review of DFO's authorization to begin construction of open-pit coal mine near Jasper National Park, Joint Review Panel's report — Millions of tonnes of waste rock to be deposited in stream valleys, other areas — Fisheries Act, s. 35(1) prohibiting harmful alteration, disruption, destruction of fish habitat — S. 35(2) providing such alteration, disruption, destruction not unlawful if authorized by Minister

FISHERIES—Continued

or under regulations made by Governor in Council — Migratory Birds Regulations, s. 35 prohibiting deposit of substances harmful to migratory birds in area frequented by them — Joint Review Panel concluding proposed open-pit coal mine would have significant adverse effect on migratory birds — Even if Minister acting under lawful authority to issue authorization under Fisheries Act, s. 35(2) to "allow the harmful alteration, disruption or destruction of fish habitat", liable under Migratory Birds Regulations, s. 35(1) for so doing — Such liability making issuance of authorization "contrary to law" within Federal Court Act, s. 18.1(4)(*f*) — As Minister can avoid liability for contravention of s. 35(1) by passage of appropriate regulations, Court not exercising discretion to prohibit issuance of further authorizations.

ALBERTA WILDERNESS ASSN. V. CARDINAL RIVER COALS LTD., [1999] 3 F.C. 425 (T.D.)

Application for declaration current owner restriction (COR), part of formula to determine halibut quota, unlawful — Implementation of COR authorized decision of Department of Fisheries and Oceans (DFO) administration, not Minister — DFO administration having implied delegated authority to decide to implement COR on Minister's behalf — Minister required to act within purposes, objects of Fisheries Act, s. 43 i.e. proper management, control, conservation of fisheries — Purpose of COR to discriminate against some licence holders to benefit, gain support of others — Defect in jurisdiction as outside allowed purposes, objects, policy.

CARPENTER FISHING CORP. V. CANADA, [1997] 1 F.C. 874 (T.D.)

Quota system established by Minister of Fisheries and Oceans for halibut fishing on West Coast — Respondents challenging process leading to adoption of catch history allocation — Trial Judge declaring Minister's decision to implement current owner restriction unlawful — Erred in treating Minister's decision not as legislative action — Imposition of quota policy discretionary decision in nature of policy, legislative action — Fisheries Act, s. 7(1) giving Minister absolute discretion to issue fishing licences — Courts to intervene only when Minister's actions beyond broad purposes permitted under Act — Court should not question Minister's judgment as to propriety of quota policy.

CARPENTER FISHING CORP. V. CANADA, [1998] 2 F.C. 548 (C.A.)

Canada v. Spain "turbot war" — Canadian position Spanish vessels exceeding quota — Action for damages following boarding, seizure on high seas, arrest, detention of Spanish fishing trawler, arrest of master by Canadian authorities — Pleadings raising issue of *vires* of Coastal Fisheries Protection Regulations — Motion to strike portions of statement of claim, reply to demand for particulars relating to international law, Charter rights — Motion allowed in part.

JOSE PEREIRA E HIJOS, S.A. V. CANADA (ATTORNEY GENERAL), [1997] 2 F.C. 84 (T.D.)

FISHERIES—Concluded

Judicial review of Minister of Fisheries and Oceans' decision not to issue to applicant snow crab fishing licence for first three weeks of 1995 season and to reduce quota during 1995 season — Fisheries Act, s. 7 giving Minister absolute discretion to issue, authorize issuance of fishing licences — Decision intended to penalize applicant for violations of 1994 licence conditions — Act specifically providing variety of penalties to be imposed by court — Implicit Parliament not intending penal powers to be exercised by Minister — Applicant entitled to procedural safeguards envisioned by penal provisions — Declaration Minister's discretion under s. 7 not including authority to impose licence conditions to penalize for violations of Act, Regulations, licence conditions.

MATTHEWS V. CANADA (ATTORNEY GENERAL), [1997] 1 F.C. 206 (T.D.)

1993 land claims agreement creating relationship between Nunavut Inuit, Government of Canada respecting co-ordinated wildlife management within, outside geographic area covered by Agreement — Agreement imposing on Minister substantive, procedural requirements affecting manner in which decision-making process including ministerial discretion to fix fishing quotas to be exercised — Minister's discretion in Fisheries Act, s. 7 no longer absolute when exercise thereof affecting wildlife marine areas of Nunavut Settlement Area (NSA), and wildlife management in adjacent Zones I, II — Within NSA, Nunavut Wildlife Management Board main instrument of wildlife management — In Zones I, II outside NSA, primary overall responsibilities over wildlife management given to Government, subject to conditions.

NUNAVUT TUNNGAVIK INC. V. CANADA (MINISTER OF FISHERIES AND OCEANS), [1998] 4 F.C. 405 (C.A.)

FOOD AND DRUGS

Motion for summary judgment declaring Food and Drug Regulations, C.08.004.1 confers on first manufacturer five-year period free from competition from other manufacturers of drugs functionally identical to drug first manufacturer authorized to sell in Canada — Applicant filing new drug submission (NDS) in respect of drug X to be used in connection with disease X — Applicant innovator of drug X — C.08.004.1 providing where manufacturer filing abbreviated new drug submission (ANDS) to establish safety, effectiveness of new drug, and Minister examining any information in NDS filed by innovator, and relying on data contained therein, NOC shall not issue earlier than five years after date of issuance — Parties agreed drug X "new drug" — "Drug" defined as substance sold for treatment of diseases in humans or animals — Drug X containing substance approved for sale in Canada in connection with animal diseases — C.08.004.1 applies in respect of drug containing substance not previously approved for sale in Canada — But when material filed by innovator of drug intended for human use, relevant inquiry whether contains substance previously approved for sale for human use i.e. read in "human" to qualify "drug" whenever context required — Such interpretation consistent with overall purposes of statutory scheme — C.08.004.1 must be read in context of overall scheme to facilitate approval

FOOD AND DRUGS—Concluded

process for new drugs, thus reducing cost — Not intended to create protection analogous to patent for all innovators of new drugs who have obtained NOC — Minister not "relying" on innovator's information for purpose of C.08.004.1 when issuing NOC solely on basis of information contained in ANDS i.e. relying on fact NOC already issued as proof of safety, effectiveness — "Indirectly" should not be read into C.08.004.1 so as to broaden scope of "relies" — Evidence decision whether to issue NOC normally based on information in ANDS, not on information supplied by innovator — Minister may issue NOC as soon as generic manufacturer establishing, based on ANDS, pharmaceutical equivalence, bioequivalence of its product to drug X.

BAYER INC. V. CANADA (ATTORNEY GENERAL), [1999] 1 F.C. 553 (T.D.)

Abbreviated new drug submission (ANDS) — "Canadian reference product" in Food and Drug Regulations, s. C.08.001.1 — Acceptable for generic drug company to submit ANDS for drug X based on comparison with NOC-sanctioned generic drug rather than comparison with "original" drug for which NOC originally granted.

NU-PHARM INC. V. CANADA (ATTORNEY GENERAL), [1999] 1 F.C. 610 (T.D.)

FOREIGN TRADE

Applicant innovator of drug X — Filing new drug submission (NDS) — Food and Drug Regulations, C.08.004.1 providing where manufacturer filing abbreviated new drug submission (ANDS) to establish safety, effectiveness of new drug, and Minister examining any information in NDS filed by innovator, and relying on data contained therein, NOC shall not issue earlier than five years after date of issuance — Included in regulations to comply with Canada's obligations under NAFTA, particularly Art. 1711 — Par. 6 requiring each party to provide that no person, other than person that submitted test data, shall rely on such data in support of application for product approval during reasonable period of time after submission — "Reasonable period" normally no less than five years from date when party granted approval to person producing data — Applicant submitting as Art. 1711 not requiring examination of information submitted by innovator as condition precedent to manufacturer's entitlement to five year's protection from generic manufacturers, examination requirement in C.08.004.1 should not be interpreted as imposing additional requirement beyond those in Art. 1711 — Par. 6 contemplating situation in which competitor "relying" on information submitted by manufacturer to obtain marketing approval — Appears to provide remedy when party failed to keep data confidential by preventing issue of approval to competitor for five years — Consistent with par. 1 statement each party to provide legal means for preventing unauthorized disclosure, use of trade secrets in manner contrary to honest commercial practices — Had Art. 1711 been intended to impose delay of five years in abbreviated submission process, would have said so expressly — Minister only "examining" data supplied by applicant in connection with drug X, within C.08.004.1, if in exercise of discretion under C.08.003, consulting previously filed material — Such interpretation not depriving applicant of Art. 1711 protection.

BAYER INC. V. CANADA (ATTORNEY GENERAL), [1999] 1 F.C. 553 (T.D.)

FOREIGN TRADE—Concluded

NAFTA — Government procurement contracts — DND, government agency contracting out for Fire Fighter Training System — RFP containing mandatory qualification requirement — Agency awarding contract to applicant, an Ontario company — Respondent, unsuccessful American bidder, filing first complaint regarding procurement process — Alleging in second complaint mandatory qualification not met — CITT making decisions on each complaint — Under NAFTA, "any aspect" of procurement process open to challenge — Tribunal's recommendations should be implemented "to the greatest extent possible" — Contract let by DND through agency, subject to NAFTA — Parties may not design procurement contracts to avoid NAFTA obligations — Tribunal correct on merits.

CANADA (ATTORNEY GENERAL) v. SYMTRON SYSTEMS INC., [1999] 2 F.C. 514 (C.A.)

Foreign Affairs Minister denying permit to export unprocessed logs under Export and Import Permits Act, applicant not having secured approval of provincial advisory committee — Committee established by B.C. government to advise provincial Minister of Forests regarding exemptions from provincial legislation requiring use or processing in B.C. of timber harvested from certain lands — Applicant's logs not caught by provincial statute but requiring federal export permit — Logs under federal export control since 1940 (War Measures Act) — Minister's officials adopting practice of deferring to provincial advisory committee regarding B.C. logs — Applicant making application, under protest, to B.C. Ministry of Forests — Provincial advisory committee recommending to Minister export permits be refused as fair offer received for purchase of logs by B.C. processor — Price lower than available on international market — Minister's decision quashed upon judicial review as Minister, delegates fettering discretion, abdicating decision-making responsibility.

K.F. EVANS LTD. v. CANADA (MINISTER OF FOREIGN AFFAIRS), [1997] 1 F.C. 405 (T.D.)

Judicial review of Minister's delegate's decision not in public interest within NAFTA, Art. 1015(4)(*c*) to award contract — Following inquiry, CITT holding Department of Public Works and Government Services not conducting procurement for provision of computer maintenance services to Revenue Canada according to requirements of NAFTA, Agreement on Internal Trade — Recommending Department award contract to Wang, subject to Art. 1015(4)(*c*) — Department deciding not to award contract to Wang as not in public interest — Issuing new RFP — In taking procedural steps to circumvent Tribunal's determination, Minister's delegate acting contrary to purpose, intent of legislative scheme, particularly CITT Act, s. 30.18(1) requiring implementation of Tribunal's recommendations to greatest extent possible — Legislative scheme implementing important trade agreements must be rigorously respected — Delegate erred in law by misinterpreting scope of authority under Art. 1015(4)(*c*).

WANG CANADA LTD. v. CANADA (MINISTER OF PUBLIC WORKS AND GOVERNMENT SERVICES), [1999] 1 F.C. 3 (T.D.)

HEALTH AND WELFARE

Inquiry on blood system in Canada — Notices sent to individuals, corporations, governments under Inquiries Act, s. 13 — Commissioner not entitled to make conclusions of law in respect of appellants' civil, criminal liability — Public inquiry under Inquiries Act not trial — Report not judgment — Commissioner having broad latitude, discretion — Rules of procedural fairness followed.

CANADA (ATTORNEY GENERAL) V. CANADA (COMMISSIONER OF THE INQUIRY ON THE BLOOD SYSTEM), [1997] 2 F.C. 36 (C.A.)

Control of narcotics — Pharmacists — Application to set aside decision of Director, Bureau of Drug Surveillance to issue notices to Ontario College of Pharmacists, members prohibiting them from dispensing narcotic drugs upon applicant's order — Serious shortages in employer's narcotic inventory during period applicant pharmacist responsible — Narcotic Control Regulations imposing almost strict liability on pharmacists to control narcotic inventory — Applicant not providing satisfactory explanation for shortages — Based on evidence 8000 narcotic tablets missing, Director not making patently reviewable error in deciding to notify College, narcotics dealers.

ELGUINDI V. CANADA (MINISTER OF HEALTH), [1997] 2 F.C. 247 (T.D.)

Old Age Security Act — Argument residency requirement discriminatory, contrary to Charter equality provision — Came from India at 58 — Denied benefits at 65 as not resident 10 years — Canada not having reciprocal agreement with India as its hybrid form of provident fund does not coordinate with Canadian legislation — Argued that reliance on provincial social assistance carries stigma — Plaintiff not member of group suffering from stereotyping, social prejudice — Action dismissed upon application for summary judgment, there being no Charter violation.

PAWAR V. CANADA, [1999] 1 F.C. 158 (T.D.)

HUMAN RIGHTS

Application to quash CHRC's dismissal of complaint alleging discriminatory policies in fellowship program administered by Social Sciences and Humanities Research Council — Applicant, dyslexic, denied fellowship — Screening, selection criteria based on academic merit — Applicant disclosing dyslexia on application as explanation for low grades — University allowing learning disabled students extra time to write exams, submit papers, but applicant not requesting such accommodation — After unsuccessful appeal, filing complaint with CHRC — Investigator concluding accommodation for learning disability built into educational system, but applicant not taking advantage of it — CHRA, s. 25 definition of "disability" including learning disability — Alternatively, learning disability analogous ground — As creature of Parliament, SSHRC subject to all laws enacted by Parliament, including CHRA — Must comply in own right with CHRA in matter of accommodation, not adopt "surrogate" accommodation by university, which SSHRC unable to configure, control, enforce as to quality, extent — CHRC erred in assuming SSHRC according accommodation, exonerating SSHRC from duty of direct compliance with CHRA.

ARNOLD V. CANADA (HUMAN RIGHTS COMMISSION), [1997] 1 F.C. 582 (T.D.)

HUMAN RIGHTS—Continued

Human Rights Tribunal's institutional independence and impartiality — Statutory scheme failing to provide Tribunal members with sufficient guarantee of security of tenure, financial security — Therefore, Tribunal lacking requisite level of institutional independence, giving rise to reasonable apprehension of bias — Presently binding guidelines which Commission may issue on Tribunal with respect to manner in which any provision of Act applies in particular case should be non-binding — Pay equity case cannot be decided by Tribunal until legislation amended.

BELL CANADA V. CANADIAN TELEPHONE EMPLOYEES ASSN., [1998] 3 F.C. 244 (T.D.)

Unions filing complaints of discriminatory practice under CHRA, s. 11 on basis of differences in wages between male, female employees performing work of equal value — Respondent seeking to set aside decision of CHRC to request appointment of Tribunal to investigate complaints — Conclusions of Joint Study, Commission's own findings suggesting possibility of discrimination contrary to s. 11 — Motions Judge applying wrong principle of law in raising issue of correct interpretation of s. 11.

BELL CANADA V. COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA, [1999] 1 F.C. 113 (C.A.)

Judicial review of Adjudicator's decision under PSSRA respondent entitled to marriage leave under collective agreement for same sex union — PSSRA, s. 91(1) depriving employee of right to grieve where another statutory procedure for redress — CHRA, ss. 41(1)(*a*), 44(2)(*a*) permitting CHRC to require complainant to exhaust grievance procedures — Indicating Parliamentary intention to permit CHRC to determine whether matter should proceed as grievance under other legislation or as complaint under CHRA, in event of overlap between legislatively mandated grievance procedures — Where substance of grievance involving complaint of discriminatory practice in context of interpretation of collective agreement, CHRA governing procedure to be followed — Employee must file complaint with CHRC — May proceed under PSSRA only if Commission determining, in exercise of discretion under ss. 41(1)(*a*), 44(2), grievance procedure ought to be exhausted — Grievance alleging discrimination based on denial of employment benefit for reasons directly related to sexual orientation — Within CHRT, CHRC's mandate under CHRA — CHRA "administrative procedure for redress" within PSSRA, s. 91(1) — Respondent not entitled by s. 91(1) to present grievance — Adjudicator lacked jurisdiction.

CANADA (ATTORNEY GENERAL) V. BOUTILIER, [1999] 1 F.C. 459 (T.D.)

Appeals from F.C.T.D. judgments holding adjudicators lacking jurisdiction to decide human rights disputes arising under collective agreements — PSSRA, s. 91 conferring right to grieve interpretation, application of statute dealing with terms, conditions of employment in respect of which "no administrative procedure for redress" provided in Act of Parliament — Courts consistently holding Parliament, by language used in s. 91, intending to remove from certain specialized areas grievance procedures under PSSRA — In federal labour matters, if another administrative procedure available to

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grievor, process must be used, provided "real" remedy — Gives primacy in dispute resolution to human rights administration, other expert administrative schemes, where expertise, consistency favoured by Parliament, over decisions by ad hoc adjudicators — Up to Human Rights Commission to send matters to arbitration pursuant to CHRA, s. 41 if appropriate.

CANADA (ATTORNEY GENERAL) v. BOUTILIER, [2000] 3 F.C. 27 (C.A.)

Respondent denied PM-6 bilingual non-imperative position on basis could not meet language qualifications — Denial of entry into PSC's full-time French language training program, on basis of negative prognosis following testing and evaluation by PSC, discrimination on ground of disability (dyslexia in auditory processing) — Burden of proof — Adverse effect discrimination — Obligation to accommodate — Systemic remedies — Personal awards to respondent.

CANADA (ATTORNEY GENERAL) v. GREEN, [2000] 4 F.C. 629 (T.D.)

Judicial review of CHRC's decision to appoint Human Rights Tribunal to inquire into respondent's complaint alleging discrimination in provision of services on grounds of marital, family status — Treasury Board denying application for surviving spouse's benefits pursuant to Canadian Forces Superannuation Act (CFSA), s. 30 since respondent, husband separating four years prior to his death — CHRA, s. 62 exempting from application of Act pension, superannuation plans established by Act of Parliament before March 1, 1978 — CFSA established in 1959, amended several times before, after March 1, 1978 — CHRC's governing legislation explicitly barring any inquiry by HRT into complaints arising out of application of pre-March 1978 legislation — Complaint grounded in CFSA, s. 30 outside scope of CHRA as former Act established in 1959 — Complaint cannot be referred to HRT — S. 62(2) avenue for addressing discriminatory provisions in Acts outside CHRC's jurisdiction i.e. to include in s. 61 report any provision inconsistent with principle described in CHRA, s. 2.

CANADA (ATTORNEY GENERAL) v. MAGEE, [1998] 4 F.C. 546 (T.D.)

Citizenship — Adoption — Requirements for citizenship imposed on foreign-born children adopted abroad by Canadian citizens resident in foreign country pursuant to Citizenship Act, ss. 3(1)(*e*), 5(2)(*a*) discrimination prohibited by CHRA, ss. 3, 5 — *Prima facie* discrimination — Adoptive mother qualifying as victim under CHRA — Breach of natural justice as issues not adequately identified or defined — Tribunal's conclusion granting of citizenship service customarily available to general public within CHRA disagreed with — Such conclusion not supported by F.C.A. decision in *Druken*.

CANADA (ATTORNEY GENERAL) v. MCKENNA, [1999] 1 F.C. 401 (C.A.)

Public servants filing complaints under CHRA, ss. 7, 9, 10 alleging discrimination regarding ineligibility for spousal benefits based on sexual orientation — Complaints allowed by CHRT — Treasury Board creating new category, "same-sex partner" eligible for same benefits as common-law spouses — "Separate but equal" scheme

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proposed by employer discriminatory practice prohibited by Act, s. 7 on basis of sexual orientation — "Spouse" to be defined without reference to "opposite sex", gender — Employer failing to cease applying discriminatory definition of "spouse".

CANADA (ATTORNEY GENERAL) v. MOORE, [1998] 4 F.C. 585 (T.D.)

Judicial review of CHRT decision Treasury Board in breach of CHRA, s. 11 by maintaining differences in wages between male, female employees employed in same establishment performing work of equal value — Methodology adopted by CHRT for selecting male comparators for employees in each level of predominantly female complainants group omitting observations from male population where value of work performed higher/lower than highest/lowest value of work performed by female occupational group — Not error of law — Methodology indirectly comparing wages of employees in complainant group performing work having central tendency of value of that group with wages of employees in predominantly male occupational groups performing work of equal value — S. 11 providing only broad, legal framework within which problems of wage discrimination between men, women to be tackled in light of facts of particular employment situation, evidence of expert witnesses, underlying purposes of statute — Methodology calculated to determine extent of systemic discrimination resulting from application over time of wage policies, practices tending either to ignore, undervalue work typically performed by women, by comprehensively viewing pay practices, policies of employer as affecting wages of men, women — Rational basis in evidence supporting CHRT's exercise of discretion — (2) CHRT holding not necessary to prove differences in wages paid to men, women performing work of equal value based on sex, once established difference in wages paid to men, women performing work of equal value — CHRA, s. 27(2) authorizing CHRC to issue guidelines setting out extent to, manner in which Act applies — Inference Parliament contemplating CHRC's acquired expertise more important than political accountability for ensuring appropriate exercise of legislative power — Equal Wages Guidelines, 1986 s. 14 deeming as one groups with which complainant group alleging difference in wages, neither incompatible with terms of grant of statutory power, in light of purposes of Act, nor unreasonable exercise of CHRT's discretion — (3) CHRT holding occupational groups used only to identify in context of group complaints comparators of opposite gender — References to "occupational group" in Guidelines, ss. 12 to 15 simply referring to groups identified under ss. 12, 13 as predominantly male or predominantly female — S. 15 not mandating comparisons be based on employees in predominantly male occupational groups sampled by group — Even if CHRT committed error of law because s. 15 requiring CHRT to base conclusion on wage curve of predominantly male occupational groups, error not warranting quashing of CHRT's decision — (4) When wages paid to female employees adjusted upwards pursuant to s. 11 complaint, and in accordance with methodology used, any wage difference thereby created statutorily authorized — Not difference established, maintained by employer — (5) Open to CHRT to adopt annual recalculation method whereby wage gap for each year recalculated by taking into account salary increases paid not only to members of complainant group, but also to employees in predominant-

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ly male occupational groups included in segmented line in light of imperfect information available.

CANADA (ATTORNEY GENERAL) v. PUBLIC SERVICE ALLIANCE OF CANADA, [2000] 1 F.C. 146 (T.D.)

Judicial review of CHRT's denial of complaint employer, Canadian Armed Forces, engaged in discriminatory practice contrary to CHRA, ss. 7, 14 — Senior N.C.O. allegedly repeatedly inquiring about complainant's dating habits, making suggestive gestures — C.O. referring to her as "sexatary", "Biker Mama" — Application of legal test for sexual harassment to impugned conduct mixed question of fact, law — Appropriate standard of review "reasonableness" — Sexual harassment unwelcome conduct of sexual nature detrimental to work environment — Whether conduct unwelcome determined by complainant's reaction, whether express or by behaviour, at time incident occurred — Complainant must establish signalled harasser conduct unwelcome — Whether conduct "sexual in nature" determined on case-by-case basis, based on standard of reasonable person in circumstances bearing in mind stereotypical acceptable social conduct, considering context in which impugned conduct necessary to determine whether conduct detrimental to work environment — Harassment requiring element of persistence, repetition — Less severe conduct requiring more persistence — Fairness requiring employee, whenever possible, to notify employer of alleged offensive conduct — Tribunal applied proper test for sexual harassment: looked at comments to determine whether unwelcome at time made, and whether, being sexual in nature, serious enough to constitute sexual harassment — Evidence that complainant actively participated in collegial atmosphere at workplace including telling of sexual jokes — Where bulk of evidence supporting Tribunal's finding, and task of weighing evidence lying with Tribunal, Court will not find Tribunal ignored relevant evidence or that finding patently unreasonable — Complainant not subjected to adverse treatment based on sex.

CANADA (HUMAN RIGHTS COMMISSION) v. CANADA (ARMED FORCES), [1999] 3 F.C. 653 (T.D.)

Bank's substance abuse policy requiring as condition of employment all new, returning employees submit to urine drug test — Refusal to do so grounds for dismissal — Drug dependent employees may lose employment if refusing rehabilitation services, or rehabilitation efforts unsuccessful — Non-dependent drug users may lose employment if persisting in drug use after testing positive three times — Bank bearing cost of rehabilitation — CHRA, s. 10 making it discriminatory practice for employer to establish policy depriving, tending to deprive individual or class of individuals of employment opportunity on prohibited ground of discrimination — S. 3 listing "disability" as prohibited ground — "Disability" defined in s. 25 as including drug dependence — Policy constituting prohibited discriminatory practice within CHRA, s. 10. — (i) Drug testing policy *prima facie* discriminatory because raising likelihood of drug dependent employees losing employment — (ii) Robertson J.A. holding policy constituting direct discrimination as having direct effect on drug dependent persons;

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McDonald J.A. holding policy indirectly discriminatory because impacting adversely on employees dependent on drugs, protected class of individuals under CHRA — Characterization important because different defences available — (iii) Robertson J.A. holding policy fails as BFOR defence not available — No evidence of drug problem in Bank's workforce, no causal relationship between illegal drug use, crime; policy not reasonably necessary to assure job performance; Bank not showing mandatory drug testing least intrusive of reasonable methods for assessing job performance — (iv) Where indirect discrimination, issue whether rational connection between policy, job performance — MacDonald J.A. holding policy not rationally connected to objective — Not sound business, economic policy to implement drug testing affecting small portion of employees, and no evidence employee work performance affected by drugs — To comply with reasonable accommodation component, employee cannot be tested unless, after receiving treatment, work performance inadequate — Must be objective evidence of poor performance — As policy not tied to concerns with job performance, not satisfying duty to accommodate — Per Isaac C.J. (dissenting): Motions Judge misapprehended Tribunal's reasons for concluding policy not discriminatory — Not showing Tribunal erred in fact or law — Absent finding of error, reviewing court should not interfere — If policy constituting adverse effect discrimination, satisfies rational connection test, given underlying concerns, as policy acknowledging impact of drugs on work performance as affecting alertness, perception, other working abilities — Providing reasonable accommodation to point of undue hardship.

CANADA (HUMAN RIGHTS COMMISSION) v. TORONTO-DOMINION BANK, [1998] 4 F.C. 205 (C.A.)

Judicial review of CHRC's decision to investigate complaints of discrimination on ground of disability though out of time — CHRA, s. 41(*e*) providing CHRC shall deal with any complaint filed unless complaint based on acts, omissions, last of which occurring more than one year, or such longer period of time as CHRC considering appropriate in circumstances, before receipt of complaint — Respondent, Nolan, filing complaint 10 months outside one-year period that applies unless CHRC exercising discretion to extend — Court can only set aside CHRC's decision to proceed with complaint under s. 41(*e*) if satisfied CHRC manifestly refusing to exercise discretion, or exercise of discretion patently unreasonable — (1) (i) Investigator's report, on which CHRC based decision to proceed outside time limit, deficient as not covering issue of public interest in complaint as required in Compliance Manual — But failure to comply with non-statutory formal requirement not error of law — (ii) While neither CHRC's letter of decision nor s. 41 report providing positive rationale for exercise of s. 41(*e*) discretion, no statutory duty on CHRC to give reasons for proceeding in face of s. 41 objection; duty of fairness not imposing on CHRC duty to give complete statement of reasons for deciding to conduct investigation — CHRC neither erring in law nor abusing discretion when deciding to extend time by two months to enable it to deal with respondent, Barrette's, complaint — (2) CHRC's failure to refer to issue of whether should investigate complaint apparently made in bad faith, not leading to inference CHRC not considering it — Court should not impose stringent procedural standards on CHRC at this early stage — (3) As Nolan's complaint asserting discrimi-

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nation on ground contained in CHRA, and limited facts before CHRC, its decision to proceed to investigation not patently unreasonable.

CANADA POST CORP. V. BARRETTE, [1999] 2 F.C. 250 (T.D.)

Grievances under Canada Labour Code dismissed by arbitrator — Grievor then complaining of discrimination in contravention of CHRA — Preliminary screening process set out in CHRA, s. 41 — CHRC failing to consider one of appellant's arguments for not dealing with respondent's complaint — CHRC failing to take preliminary screening process seriously — Doubtful that CHRC understands employer's rights, Commission's duty at preliminary screening stage.

CANADA POST CORP. V. BARRETTE, [2000] 4 F.C. 145 (C.A.)

Allegations of age, sex discrimination against CBC — Jurisdiction of CHRC due to paramountcy of CHRA, s. 41(1) over collective agreement arbitration of differences provision of Canada Labour Code — Decision to appoint Tribunal quashed as material omissions in investigator's report casting serious doubts on investigator's neutrality, insufficient evidence upon which to base decision — Disclosure of conciliator's report to CHRC, thereby revealing parties' position without parties' consent, vitiating decision to appoint Tribunal as based on material not properly before it, in breach of Act and undermining purpose of confidential negotiations, mediation scheme.

CANADIAN BROADCASTING CORP. V. PAUL, [1999] 2 F.C. 3 (T.D.)

Unemployment Insurance Act, s. 11(7) said to contravene Canadian Human Rights Act, s. 5 on prohibited ground of family status in provision of services — Whether distinction between parents of children arriving home after or before age of six months discriminatory — Relationship between age of child, legislative objective not apparent — No rational connection between six-month age requirement, child's condition — Distinction unreasonable where no rational connection with legislative objective — Unemployment insurance system service customarily available to general public under CHRA, s. 5 — Distinction in respect of age discriminatory within meaning of s. 5.

GONZALEZ V. CANADA (EMPLOYMENT AND IMMIGRATION COMMISSION), [1997] 3 F.C. 646 (T.D.)

Judicial review of PSSRB decision refusal to allow applicant to return to job part-time not breach of duty to accommodate — Applicant becoming ill after exposure to chemical fumes in workplace — Request to return to job part-time refused on basis of operational requirements, financial constraints — Applicant refusing offer of training, employment at same pay rate at another location — Adjudicator finding offer of alternate employment constituting reasonable accommodation, grievor not providing reasonable explanation for refusal — Application dismissed — Employer having duty to accommodate disabled employees to point of undue hardship — Employee having duty to accept reasonable compromise — Employer's concerns for not accepting applicant part-time within factors relevant to determination of what constitutes undue hardship — No evidence applicant conveying concerns of medical nature relating to

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alternative work location — That wanted own job back only reason provided — Open to Adjudicator to hold applicant breached duty to express concerns re: detrimental effects to health of new location, thus preventing identification, development of suitable accommodation.

GUIBORD V. CANADA, [1997] 2 F.C. 17 (T.D.)

Appeal from Trial Division's dismissal of application for judicial review of CHRC's dismissal of complaint of discrimination based on employer's refusal to provide dental care coverage to same-sex partner — Complaint filed in 1989 — Held in abeyance pending determination of *Canada (Attorney General) v. Mossop* — In 1992 O.C.A. in *Haig* case declaring "sexual orientation" had to be added to proscribed grounds of discrimination in CHRA, s. 3 — In 1993 S.C.C. holding same-sex couples not included in definition of "family" under CHRA: *Mossop* — CHRC dismissing complaint as not subject to *Haig* as alleged discrimination antedated that case — Appeal allowed — "Reading in" in *Haig* retroactive — As CHRC party to Haig case, judgment binding on it.

NIELSEN V. CANADA (EMPLOYMENT AND IMMIGRATION COMMISSION), [1997] 3 F.C. 920 (C.A.)

Appellants filing grievances against employer on basis of discrimination under Canadian Human Rights Act, s. 3(1) as refused leave with pay to observe Jewish High Holy Days — Claim based on "no discrimination" clause in collective agreements — "Designated Paid Holidays" calendar discriminatory in effect — Case of indirect discrimination — Employer must make real efforts, short of undue hardship, to eliminate adverse effect discrimination suffered by employees — Onus upon employer under undue hardship doctrine met.

RICHMOND V. CANADA (ATTORNEY GENERAL), [1997] 2 F.C. 946 (C.A.)

Human Rights Tribunal finding Indian Band guilty of discrimination based on race, marital status — Band denying social assistance benefits to non-Indian spouses of Band members living on Indian reserve — Band Council' s policy allowing all non-Indian spouses to reside on Reserve — Social assistance not available from other sources — Non-Indian spouses members of "general public" for whom social assistance services customarily available on Reserve under CHRA, s. 5 — Act, s. 67 not precluding Tribunal's jurisdiction — No *bona fide* justification for discrimination.

SHUBENACADIE INDIAN BAND V. CANADA (HUMAN RIGHTS COMMISSION), [1998] 2 F.C. 198 (T.D.)

Appeal from dismissal of application for judicial review of CHRC's decision not having jurisdiction to deal with complaint concerning Ontario Court, General Division Judge's ruling regarding wearing of religious head coverings in Court — O.C.A. holding Judge may have created impression of insensitivity to minority rights, erred in suggesting only certain religious groups protected by Charter — CHRC holding Judge protected by absolute immunity of judges — Neither CHRC nor CHRT providing

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sufficient safeguards to protect integrity of principle of judicial independence — To afford Commission power to investigate whether Judge acting in judicial capacity would completely destroy judicial immunity, independence — Remedies under CHRA, s. 53(2) if complaint substantiated harmful to unwritten principle of judicial independence — CHRA, s. 41(1)(*c*), requiring Commission to deal with complaints except those beyond its jurisdiction, preventing Commission from dealing with complaint.

TAYLOR V. CANADA (ATTORNEY GENERAL), [2000] 3 F.C. 298 (C.A.)

Judicial review of CHRT decision applicant discriminated against employee on basis of disability under CHRA, s. 7 — Employee working for VIA Rail as chef, cook, service attendant — Suffering from recurring back problems throughout employment exacerbated by heavy lifting, bending — Put on disability leave — Denied reinstatement although cleared for return to work by family doctor — Tribunal's appreciation of employee's disability in conformity with law — Conclusions in relation to medical evidence findings of fact, not erroneous — Tribunal failing to advert to distinction between direct, indirect discrimination — Defences, reasoning different for each type of discrimination — CHRT abdicating responsibility in failing to specify type of discrimination.

VIA RAIL CANADA INC. V. CANADA (HUMAN RIGHTS COMMISSION), [1998] 1 F.C. 376 (T.D.)

Application for judicial review of CHRC's decision to request appointment of Tribunal to inquire into complaints applicant causing hate messages to be communicated through computer Web site (server computer and Web site manager located outside Canada) — Past speech by Deputy Chief Commissioner on subject of hate propaganda not indication of bias herein — Legal test of bias — Interpretation of enabling statute (communicate telephonically, extra-territorial issue, causing to communicate) by Commission not automatically justifying judicial review — Not appropriate at this stage to determine issue of whether provision in violation of Charter, s. 2(b) as, in any event, recent amendment to Human Rights Act, s. 50(2) giving Tribunal jurisdiction to determine constitutional issue.

ZÜNDEL V. CANADA (ATTORNEY GENERAL), [1999] 4 F.C. 289 (T.D.)

Judicial review of HRT's dismissal of motion to quash proceedings on ground of reasonable apprehension of bias — HRT already holding 13 days of hearings into complaints applicant distributing hate messages via California Website when decision rendered in *Bell Canada v. Canadian Telephone Employees Assn.*, [1998] 3 F.C. 244 (T.D.) — Court in *Bell* holding terms of appointment of Tribunal members, mechanism by which remuneration set, Commission's ability to issue binding guidelines, creating reasonable apprehension of bias — Applicant impliedly waiving right to object to HRT's jurisdiction on ground of reasonable apprehension of bias by not raising issue at outset — While applicant may not have appreciated legal consequences of facts on which *Bell* decision based, ignorance of law not excusing delay in objecting.

ZÜNDEL V. CANADA (HUMAN RIGHTS COMMISSION), [1999] 3 F.C. 58 (T.D.)

HUMAN RIGHTS—Concluded

CHRC hearing complaint alleging discrimination against applicant regarding Web site exposing Jews to hatred, contempt — Member of CHRC sitting as member of Ontario HRC in 1988 when Chair issuing press release, apparently on behalf of all members, commending applicant's conviction for publishing false statements denying Holocaust — Reasonable conclusion members of Ontario HRC held strong actual bias against applicant — Not erased by passage of time, but as not made by present CHRC member and as denying bias, insufficient evidence of actual bias — Denial of bias not admissible to correct appearance of bias — Under CHRA one Tribunal member having jurisdiction to complete hearing if other members unable to continue — Member prohibited from continuing as Tribunal member for reasonable apprehension of bias.

ZÜNDEL V. CITRON, [1999] 3 F.C. 409 (T.D.)

Zündel convicted of wilfully publishing pamphlet likely to cause injury, mischief to public interest contrary to Criminal Code, s. 177 — Conviction overturned by S.C.C. as Code, s. 177 infringing Charter — CHRT inquiring into complaints Web site operated by Zündel likely to expose people to hatred, contempt contrary to CHRA, s. 13(1) — One of CHRT members had been member of Ontario Human Rights Commission that previously issued press release applauding Zündel's conviction — Whether subject to reasonable apprehension of bias — Press release not addressing same issue as complaint before CHRT — Related to charge under Criminal Code, s. 177 to which truth defence — CHRA, s. 13 providing no defence, even if discriminatory statement truthful — Impugned statement should not be attributed to member in question.

ZÜNDEL V. CITRON, [2000] 4 F.C. 225 (C.A.)

INCOME TAX

Enforcement — Inquiries — Del Zotto suspected of tax evasion — Inquiry convened under Act, s. 231.4 into his financial affairs from 1979 to 1985 — Entitled to attend, representation by counsel — Noble subpoenaed to attend, give evidence, produce documents — Del Zotto not subpoenaed — Inquiry adjourned before any witness giving evidence — Neither s. 231.4 nor inquiry contravening Charter, ss. 7, 8 — Principles of fundamental justice encompassed by s. 7 canvassed — S. 7 not applicable as no self-incrimination, Del Zotto not being subpoenaed to give evidence, Noble not charged, not giving evidence against self — As to reasonableness of search, seizure, *Hunter et al. v. Southam Inc.* standards not applicable — Intrusiveness of search depending on scale of interests ranging from bodily integrity to requests for production of documents — Tax inquiry lesser form of intrusion than search of private premises.

DEL ZOTTO V. CANADA, [1997] 2 F.C. 428 (T.D.)

Appeal from dismissal of application for judicial review of decision of hearing officer under Income Tax Act, s. 231.4 permitting Minister to authorize inquiry with reference to anything relating to administration, enforcement of Act — In alleging terms of reference too broad, appellants seeking to challenge terms of reference, but

INCOME TAX—Continued

that decision not subject of judicial review — Prior disclosure of names of witnesses, subject-matter of evidence, documents not required by statute, procedural fairness, although within hearing officer's discretion to require — Statutory right to representation by counsel not implying right to cross-examine witnesses — No authority for proposition subpoena expiring with passage of time — Open to hearing officer to order prior disclosure of questions to be asked if necessary to efficacy of inquiry — Noble's counsel not wrongly excluded — Inquiry private to assist in efficacy of investigation — Right to have counsel present not converting inquiry into public investigation at taxpayer's discretion.

DEL ZOTTO V. M.N.R., [2000] 4 F.C. 321 (C.A.)

Taxpayer bringing class action alleging MNR acted illegally in according taxpayer preferential treatment by advance tax ruling — In moving to strike, MNR arguing no cause of action as no one may challenge another's tax treatment — MNR's public opinion conflicting with non-public rulings — Auditor General issuing strongly-worded report critical of MNR's conduct herein — Action seeking declaration MNR having duty to use all statutory measures to collect any tax payable — Relief sought much more than mere interpretation of ITA — Bad faith administration alleged — Unlike IRC in U.K., Revenue Canada lacking broad discretionary power to make deals with taxpayers — MNR must follow ITA absolutely — Not plain and obvious action cannot succeed — Not plain and obvious MNR owes no fiduciary duty to taxpayers — Allegation of preferential treatment of certain taxpayers raising issue of limits of statutory authority — Public interest standing granted as no other effective manner for bringing issue before Court — Any concerns about taxpayer confidentiality matter for case management or trial judge.

HARRIS V. CANADA, [2000] 4 F.C. 37 (C.A.)

Charitable organization registration — Appellant's registration revoked under Income Tax Act, s. 168(1) as not devoting substantially all resources to charitable activity — Statutory appeal directly to F.C.A. under s. 180 — Appellant's aims to protect unborn, promote true Christian family values, encourage chastity — M.N.R. audited appellant in 1989 but appellant not warned to change conduct — After second audit in 1993, M.N.R. expressed concerns whether appellant's activities qualified as charitable, warned revocation under consideration — Registration revoked in 1994 — Appellant arguing political activities incidental to charitable objects — Income Tax Act nowhere defines "charity" — Principles based on old English cases, statute enacted in 1601 — Federal Court having developed principles appropriate for Canada — Area crying out for clarification by legislation — Onus on appellant to show M.N.R. erred in conclusions upon which registration revoked — Onus not discharged — Appellant's activities directed to dissemination of opinions on social issues, not research or systematic development of body of knowledge — Case law to effect activities designed to sway public opinion not charitable — Not for courts to grant, deny legitimacy to political views, decide which worthy of support by tax exemption — M.N.R. not estopped from changing position regarding appellant's activities after 4-year lapse,

INCOME TAX—Continued

further audit — Provisions of Act relating to charities not so vague as to exceed that constitutionally permissible.

HUMAN LIFE INTERNATIONAL IN CANADA INC. v. M.N.R., [1998] 3 F.C. 202 (C.A.)

Corporations

Appeals from T.C.C. decision respondents, benevolent directors of not-for-profit corporation, not responsible for unremitted federal income tax withheld from wages of employees — Income Tax Act, s. 227.1 holding jointly, severally liable directors of corporation failing to remit taxes due on salary, wages — S. 227.1(3) providing director not so liable where exercising degree of diligence, care, skill to prevent failure reasonably prudent person would exercise — Respondents, acting as directors, aware of failure to remit sums 9 or 10 months before Corporation bankrupt — T.C.J. holding as respondents not *de jure* directors as defined by incorporating legislation, not liable under s. 227.1(1) — *Per* Letourneau J.A (concurring in result): S. 227.1 intended to cover all types of directors as evidenced by nature of obligation imposed on corporation, directors; nature of debt owed; nature of relationship between corporation, directors, employees, Crown — Unduly restrictive interpretation of s. 227.1(1) compromising valid social objectives of provision — S. 227.1(3) imposing one standard of care on all directors — Application of standard flexible because different skills, factors, circumstances weighed in measuring whether director met standard of care — On learning of Corporation's financial difficulties or failure to remit, respondents under positive duty to act to prevent failure to make current, future remittances — No positive steps taken to correct, prevent Corporation's failure to remit deductions — Delegation of authority to Manager amounting to abdication — Directors not exercising degree of care, diligence expected to prevent failure to withhold, remit — *Per* Noël J.A. (Desjardins J.A. concurring) — Neither Nova Scotia Companies Act nor common law conferring status of director on those not qualified — But principle underlying common law remedies devised to assist third parties dealing with unqualified directors, person lacking requisite qualifications prevented from pleading such failure to escape liability attaching to director — Respondents cannot raise lack of qualification as defence to liability under s. 227.1(1).

CANADA V. CORSANO, [1999] 3 F.C. 173 (C.A.)

Cross-appeal from Tax Court judgment holding s. 85 rollover valid — Income Tax Act, s. 85 requiring consideration on rollover of property from individual to corporation to include at least one share of capital stock — As consideration for transfer of apartment building to corporation, preference shares issued to taxpayers — To effect necessary increase in authorized capital, supplementary letters patent required, but not obtained — Eventually corporation obtaining provincial superior court order deeming preference shares to have been validly issued within taxation year — Cross-appeal dismissed — Provincial superior court order binding on Minister, constituting proof shares validly issued as of December 31, 1985 — Rollover valid.

DALE V. CANADA, [1997] 3 F.C. 235 (C.A.)

INCOME TAX—Continued

Corporations—Concluded

Appeal from T.C.C. decision taxpayer not satisfying "due diligence" defence in Income Tax Act, s. 227.1(3) — S. 227.1(3) enabling directors to escape liability for unremitted amounts required to be withheld from employees' salaries if establishing exercised degree of care, diligence and skill to prevent failure that reasonably prudent person would have exercised in comparable circumstances — When taxpayer, experienced businessman, becoming director, receiving balance sheet showing net loss of $132,000 — Neither employees nor other Board members discussing with taxpayer company's failure to make tax remittances — Taxpayer never inquiring whether company complying with remittance obligations — Appeal dismissed — Analysis of common law duty of care, set out in *City Equitable Fire Insurance Co., In re*, [1925] Ch. 407 (C.A.), whether and to what extent modified by s. 227.1(3) — Meaning of each component i.e. skill, care diligence — Standard of care under s. 227.1(3) containing both objective, subjective elements — More difficult for inside directors to establish due diligence defence — Unless reasons for suspicion, outside directors may rely on day-to-day corporate managers to pay debt obligations — Positive duty to act arising when aware of facts leading to conclusion could reasonably be potential problem with remittances — Whether standard of care met question of fact to be resolved in light of personal knowledge, experience of director — Given ample business experience, taxpayer under positive duty to act when received balance sheet — Not misled, frustrated by other company officials — Doing nothing inadequate to discharge burden imposed by s. 227.1(3).

SOPER V. CANADA, [1998] 1 F.C. 124 (C.A.)

Exemptions

Fraternal benefit society life insurance fund — Where assets in life insurance fund exceed amount necessary for purposes of life insurance business, only investment income earned on necessary amounts should be treated as taxable income under Income Tax Act, s. 149 — Canadian and British Insurance Companies Act, s. 81(1) examined — Decision not to withdraw surplus monies out of fund not determinative of appeal — Inference all assets in fund necessary for life insurance operation rebuttable — Objective standard applicable.

ACTRA FRATERNAL BENEFIT SOCIETY V. CANADA, [1997] 3 F.C. 441 (C.A.)

MNR giving notice of intention to revoke appellant's registration as charitable organization under Income Tax Act, s. 168(1)(*b*) for failure to devote all of resources to charitable activities, to meet definition of "charitable organization" in Act, s. 149.1(1)(*b*) — Appellant may devote limited amount of resources to "political activity" if ancillary, incidental to charitable activities under Act, s. 149.1(6.2) — Much of appellant's materials aimed at presenting one-sided view on controversial social issues such as abortion, euthanasia — Activities "political" rather than for advancement of education, other stated purposes — Appellant not devoting all of resources exclusively

INCOME TAX—Continued

Exemptions—Continued

to charitable activities contrary to Act, s. 149.1(1) — Arguments based on: lack of procedural fairness; legitimate expectation; estoppel; Charter, rejected.

ALLIANCE FOR LIFE V. M.N.R., [1999] 3 F.C. 504 (C.A.)

Indians — Personal property of Indian situated on reserve — Employment income — Employee of Federally-funded hospital not on but adjacent to reserve, patients mostly Indians — Reliance on test for *situs* unconnected to purpose of tax exemption arbitrary in application — Purpose of exemption neither to afford Indians unlimited protection from taxation nor to remedy economic disadvantage — Indian not tax exempt if entering "commercial mainstream" — Ultimate question: whether taxing particular property causing erosion of entitlement of Indian *qua* Indian — Trial Judge's "slippery slope" worries, that allowing exemption herein meaning all Indians resident on reserves escaping income tax, unjustified as ignoring factors connecting employment income to reserve — Revenue Canada guidelines useful in routine cases but Court having to conduct relative weighting of connecting factors in each case.

CANADA V. FOLSTER, [1997] 3 F.C. 269 (C.A.)

Indians — Salary paid Indian Band Chief from monies furnished by Crown under Band Support Funding program — Assessment appealed on basis salary tax exempt under Indian Act, ss. 87, 90 — T.C.J. erred in holding amounts paid under "agreement" within Indian Act, s. 90(1)(*b*) — Respondent's employment income taxable.

CANADA V. KAKFWI, [2000] 2 F.C. 241 (C.A.)

Whether lump sum payment exempt from taxation in Canada by reason of Canada-United States Income Tax Convention (1980) — Payment received by taxpayer while resident of Canada on winding up of pension fund operated by former American employer — Not exempt from taxation under Convention, Art. XVIII — No double taxation where Contracting State providing tax credit for taxes paid in other — Itemized deduction under U.S. Internal Revenue Code, s. 402(*c*)(3) not "personal allowance" — Benefit of Art. XVIII available as matter of right, not election — Purpose of Art. XVIII to ensure portion of lump sum payment exempt from taxation in U.S.A. remains exempt in Canada — Entire payment taxable under American law, not exempt from taxation in Canada.

COBLENTZ V. CANADA, [1997] 1 F.C. 368 (C.A.)

General principle against double taxation at corporate level — "Safe income" — Taxpayer Canadian corporation shareholder of another Canadian corporation — Latter purchasing taxpayer's shares for certain amount — Taxpayer deemed to have received dividend in same amount under Income Tax Act, s. 84(3) — Minister treating amount as gain from disposition of capital property under Act, s. 55(2) — S. 55 anti-avoidance provision intended to limit use of tax exempt intercorporate dividends otherwise taxable — Provision not applicable where intercorporate dividend attributable to "income

INCOME TAX—Continued

Exemptions—Concluded

earned or realized by any corporation" under s. 55(2) — Whether term "any corporation" limited to types of corporations referred to in s. 55(5)(*b*), (*c*), (*d*) — Income earned, realized of foreign non-affiliate capable of determination, even if rules not specified in s. 55(5) — Foreign non-affiliate not excluded from types of corporations entitled to "safe income" calculation in s. 55(2) — No necessary implication in language used by Parliament — Term "any corporation" unrestricted, includes foreign non-affiliates.

LAMONT MANAGEMENT LTD. V. CANADA, [2000] 3 F.C. 508 (C.A.)

Indians — Whether employment income of Indian from Rama reserve working at native health centre in Toronto exempt as income "situated on a reserve" (Indian Act, s. 87) — Employer an Indian carrying on business at Six Nations of Grand River reserve — Historical review of Crown's position, case law interpretation of s. 87 — Purpose of s. 87 — Location of employment income — Situs-of-debtor rule — Connecting factors test — Stress placed on employee's residence as connecting factor in Revenue Canada "Guidelines" may require amendment — Crown's argument employer's location only weak connecting factor, plaintiff having contracted with him for tax advantage, rejected — Indians, like others, may arrange affairs so as to reduce tax burden — Plaintiff's employment income tax exempt as located on reserve.

SHILLING V. M.N.R., [1999] 4 F.C. 178 (T.D.)

Income Calculation

Taxpayer, employee of car dealership, provided with automobile under leasing agreement — Reassessed by MNR under Income Tax Act, s. 6 on basis of "reasonable standby charge" for use of car "made available" to him — Term "made available" in Act, s. 6(1)(*e*) not bearing restricted, narrow interpretation adopted by T.C.C. — Unrestricted use of automobile not condition precedent to imposition of standby charge — Act, s. 6(2) deeming employee to have made personal use of employer's automobile subject to minimal personal use exception — Standby provisions intended to promote certainty at expense of flexibility — Actual usage of car, for personal or business purposes, not required — "Fair market value" argument not valid — Lease of car tied to employer's business, not in ordinary course of business

CANADA V. ADAMS, [1998] 3 F.C. 365 (C.A.)

Appeal from T.C.C. decision trust not carrying on active business because neither exercised management role nor took any part in business of partnership under Manitoba law — Income Tax Act, s. 122(2)(*c*) exempting trust not carrying on active business from 29% tax rate imposed by s. 122(1) — Trust created to enter into partnership to carry on business — Partnership entered into to build, operate nursing home — Appeal allowed — S. 122(2)(*c*) construed in light of statutory matrix under which partnership formed, registered, operated; facts — Partnership Act of Manitoba, ss. 54, 63, when

INCOME TAX—Continued

Income Calculation—Continued

viewed in context of statute as whole, particularly s. 3 and definitions of "partnership", "person" in s. 1, contemplating all partners of limited partnership carrying on business thereof — Persons composing partnership carry on business rather than limited partnership itself — That taking no part in management of business not meaning taxpayer not carrying on that business — That all of partners carried on business in 1988 what agreed to do pursuant to partnership agreement.

CANADA V. ROBINSON, [1998] 2 F.C. 569 (C.A.)

Appeal from trial judgment holding Income Tax Act, s. 79(*c*) governing tax treatment of proceeds of disposition — Court issuing "Rice Order", allowing mortgagee to purchase property for $49,000 and including judgment for balance owing — Taxpayer, relying on ss. 13(21)(*d*)(i), 54(*h*)(i) (proceeds of disposition including sale price of property), reporting value of disposition as $49,000 — Minister reassessing, relying on s. 79(*c*) (where taxpayer acquiring, reacquiring beneficial ownership of property in consequence of other party's failure to pay amount owing, other person's proceeds of disposition including principal amount of taxpayer's claim plus principal amount of any debt owing by other person, to extent extinguished by acquisition, reacquisition) — Holding proceeds of disposition full principal amount still outstanding, $63,785 — Ss. 13(21)(*d*)(i), 54(*h*)(i) applied — Taxpayer receiving specific amount — Ss. 13(21)(*d*)(i), 54(*h*)(i) covering sales, other situations where precise compensation figure known — S. 79(*c*) applying to foreclosures, repossessions where no ascertained amount.

CORBETT V. CANADA, [1997] 1 F.C. 386 (C.A.)

Appeal from T.C.C. decision including commissions paid by American insureds to two related American corporations in appellant's business income — Appellant "middleman" negotiating complex insurance packages on behalf of American insureds with insurers — As insurance laws in 11 American states prohibiting insurers from paying appellant commission because not holding state insurance broker's licence, appellant using two affiliated American corporations as intermediaries — Insured remitting premium to appellant's New York bank account — Appellant investing premium — When due to be remitted to insurer, appellant transferring premium to intermediary, retaining interest for own account — Intermediaries performed "essential service" of providing brokerage licence, although performed little work compared to appellant — T.C.C. holding appellant "earned", "received" income — Appeal allowed (Létourneau J.A. dissenting on second issue) — (1) I.T.A., s. 56(2) requiring inclusion in income of payments made to some other person at direction or with concurrence of taxpayer where payments for benefit of taxpayer, or benefit taxpayer desiring to have conferred on other person — S. 56(2) neither basis of reassessment nor pleaded, argued before T.C.C. — Unfair to taxpayer to apply s. 56(2) as neither explored matter on discovery nor introduced evidence contradicting application of s. 56(2) — (2) T.C.C. erred in holding commissions not impressed with trust — Appellant viewed premiums as trust funds — No part of premiums appellant's own funds — Appellant accepting

INCOME TAX—Continued

Income Calculation—Continued

obligation to pay full amount of premiums to American insurers — Premiums paid by American insureds clearly destined to American insurers — By merely holding, receiving premiums, earning interest thereon, appellant not receiving commissions from American insurers — According to case law, amount not income where no absolute ownership over it — Because of state insurance laws, appellant neither owner of nor having absolute right to commissions — Commissions not income from business.

MINET INC. V. CANADA, [1998] 3 F.C. 638 (C.A.)

Capital Gains and Losses

Appeal from T.C.C. decision no valid election under Income Tax Act, s. 85 — S. 85 permitting taxpayer to defer payment of capital gains where property transferred from individual to corporation for shares — On May 1, 1992 taxpayer instructing accountant to transfer farming assets to holding company of which taxpayer sole shareholder, director — Signing blank s. 85 election form — Form lost, election not filed prior to taxpayer's accidental death — Executors filing new election form — Appeal allowed (Robertson J.A. dissenting) — (1) Executors making valid election — Under s. 85(6) "any taxpayer" required to make election — Considering definitions of "taxpayer", "person", "taxpayer" including "executor" — Entitled to file joint election on behalf of taxpayer after death — Consistent with Revenue Canada form permitting "authorized person" to sign election as transferor — Authorized persons herein executors — (2) Valid disposition of farming equipment — Taxpayer making firm decision to transfer all farming assets to company on May 1, 1992 — Only formal paperwork, determination of fair market value to be done — Contractual commitment between shareholder, closely held corporation, not formed by decision in mind of shareholder unless decision accompanied by overt corporate act — Sufficient overt acts herein i.e. signing of joint election form — (i) Lack of finalized list of assets to be transferred not significant because all farming assets transferred — (ii) By fixing consideration at fair market value, price sufficiently clear to be accepted as valid term of contract — Merely housekeeping measures remaining to document agreement already concluded — (iii) Since assets to be transferred at fair market value, consideration for assets could be ascertained — Actual receipt of consideration not necessary for disposition to have taken place — Agreement entitling party to payment in future satisfying s. 85.

BARNABE ESTATE V. CANADA, [1999] 4 F.C. 541 (C.A.)

Shares in pharmacy business sold in September 1987 — Maximum capital gains deduction claimed in 1987 — S. 110.6(2.1) added to Income Tax Act in 1988 — Increasing maximum exemption available for capital gains on dispositions of qualified small business corporation shares "in the year or a preceding taxation year and after June 17, 1987" — Under amending legislation enhanced deduction applicable to 1988 and subsequent taxation years — Taxpayer dying in 1989 — Estate claiming enhanced deduction in respect of 1987 sale of shares in terminal return — Interpretation urged

INCOME TAX—Continued

Income Calculation—Continued

Capital Gains and Losses—Continued

by taxpayer rejected as absurd, unreasonable — Enhanced deduction available in respect of 1987 share dispositions occurring after June 17, 1987 only in so far as reserves carried over into subsequent years — Consistent with language of s. 110.6(2.1), s. 39(1) definition of "capital gain" as capital gain realized in particular taxation year.

CANADA V. AST ESTATE, [1997] 3 F.C. 86 (C.A.)

Appeal from T.C.C. decision allowing appeal from reassessment disallowing, pursuant to Income Tax Act, s. 55(1), capital losses claimed in 1986 tax return — Respondent incurring substantial capital losses on disposition of worthless shares through series of planned transactions, executed over short time period — Minister arguing loss shares neither capital property nor inventory — *Friesen v. Canada* holding Act recognizing two categories of property: inventory, capital property — Appellant's proposal would create third category not contemplated by Act, unrelated to type of income, sources of revenue envisaged by Act — Would create unwarranted vacuum, uncertainty with respect to characterization of items of property — Shares capital asset, sale of which giving rise to capital gain or loss.

CANADA V. HOLLINGER INC., [2000] 1 F.C. 227 (C.A.)

Appeal from Tax Court decision allowing appeal from reassessment — Respondent disposing of shares — Accountants mistakenly reporting difference between paid-up capital, purchase price as deemed dividends pursuant to Income Tax Act, ss. 84(3), 112 — Minister reassessing, applying s. 55(2), whereby dividends converted into taxable capital gain — Refusing to allow respondent to file s. 55(5)*(f)* designation attributing portion of dividends to "safe income" — S. 55(2) applies if Minister's method of allocating safe income reasonable, even if respondent's method also reasonable — Pro rata method for allocating safe income reasonable — Respondent required to file designation under s. 55(5)*(f)* at time return filed — Election cases distinguished — Inference Parliament not intending to allow amendment of return rebutted — Respondent entitled to file s. 55(5)*(f)* designation after notice of reassessment issued, s. 55(2) invoked.

CANADA V. NASSAU WALNUT INVESTMENTS INC., [1997] 2 F.C. 279 (C.A.)

To raise funds for general corporate purposes taxpayer borrowing NZ$ at 15.4% interest — Future rate for NZ$ discounted against US$ — As costing less to buy NZ$ in future, taxpayer receiving more US$ with proceeds of loan than cost of repaying loan when due, creating certain gain — T.C.C. correctly holding gain on account of capital — Why capital acquired important — NZ$ providing working capital for business — In absence of extraordinary circumstances, borrowing of fixed sum for five years normally capital transaction.

CANADA V. SHELL CANADA LTD., [1998] 3 F.C. 64 (C.A.)

INCOME TAX—Continued

Income Calculation—Continued

Capital Gains and Losses—Concluded

Appeal from T.C.C. decision upholding assessment whereby untaxed portion of capital gain realized on disposition of interest in commercial building added back to calculate minimum tax payable under Income Tax Act, s. 127.5 — S. 127.5 clawing back into taxable income non-taxable portion of capital gain — Under s. 127.5(1)(*d*) disposition to which s. 79 applies not included in computation of adjusted taxable income to calculate minimum tax — Taxpayer transferring interest in commercial building to unsecured creditors — Agreement containing guarantees respecting minimum rental income, ultimate sale price — (1) T.C.J. correctly holding transfer not made to secure pre-existing debts — Right of debtor to obtain reconveyance of property given as security upon repayment of indebtedness quintessential feature of secured transaction — Both creditors receiving indefeasible right of co-ownership, incompatible with concept of secured transaction — (2) S. 79 not applicable — History, purpose of s. 79 — S. 79 applies only when no fixed price paid — Fixed price paid herein notwithstanding no monies changing hands, debts not extinguished — Correlation between value of property conveyed, amounts owing — T.C.J. erred in holding creditor only acquiring beneficial ownership of property "in consequence of" debtor's default where creditor having right to acquire property — Would render s. 79 inapplicable to unsecured creditors — S. 79 equally applicable to secured, unsecured creditors.

HALLBAUER V. CANADA, [1998] 3 F.C. 478 (C.A.)

Deductions

Appeal from Tax Court decision allowing deductions under Income Tax Act, s. 66.1 — Respondents purchasing interests in partnerships engaged in financing unsuccessful oil, gas exploration project on final day of partnerships' fiscal year — Disposing of limited partnership interests next day — Income Tax Act, s. 245 prohibiting deductions in respect of disbursement, expense, made or incurred in respect of transaction, operation that if allowed would unduly or artificially reduce income — "Artificial", "undue" referring to reduction of income, not expense — Application of majority opinion as to role of s. 245, 3 relevant considerations set out by F.C.A. in *Canada v. Fording Coal Ltd.* — (1) As not engaging in business exploration expense provisions designed to promote, respondents outside their intended object, spirit — (2) Transactions allowing respondents to claim cumulative Canadian exploration expense deductions far removed from normal commercial practice — (3) No business purpose attached to respondents' participation in limited partnerships — Attempting to achieve unlawful tax avoidance.

CANADA V. CENTRAL SUPPLY COMPANY (1972) LTD., [1997] 3 F.C. 674 (C.A.)

Judicial review of T.C.C. decision allowing appeal from reassessment disallowing contributions to pension plan — Taxpayer member of pension plan governed by

INCOME TAX—Continued

Income Calculation—Continued

Deductions—Continued

Newfoundland's The Public Service (Pensions) Act (1970 Act) — In 1989 electing under s. 32 to purchase service to be counted as pensionable service — Contracting to pay for service over seven years by payroll deductions — 1970 Act repealed in 1991 — Replacement legislation (1991 Act) not expressly providing for purchase of service — 1991 Act, s. 4 continuing pension plan as established under 1970 Act, subject to 1991 Act, regulations — S. 39 expressly protecting "all benefits" acquired under 1970 Act — Minister determining deductions not "made in accordance with plan as registered" as required by Income Tax Act, s. 147.2(4)(*a*) — Application dismissed — Absence of provision equivalent to s. 32 in 1991 Act not having retrospective effect of abrogating purchase of service contracts made before 1991 Act in force — S. 4 continuing rights, benefits acquired under 1970 Act — Rights, benefits under 1970 plan interfered with only to extent expressly provided for in 1991 Act — Nothing in 1991 Act interfering with purchase of service contracts entered into pursuant to 1970 Act, s. 32 — Conclusion supported by 1991 Act, s. 39 — "All benefits" broad enough to encompass contractual entitlements acquired by taxpayer pursuant to terms of purchase of service contract.

CANADA V. CORBETT, [2000] 2 F.C. 81 (C.A.)

Act, s. 118(1)(*b*)(ii)(D), granting deduction in respect of persons under 18 years old or over 18 but dependent by reason of mental or physical infirmity not infringing Charter, s. 15(1).

CANADA V. MERCIER, [1997] 1 F.C. 560 (T.D.)

Appeal from T.C.C. decision permitting deduction of interest expenses under Income Tax Act, s. 20(1)(*c*) — Taxpayer needing money for general corporate purposes — To reduce cost of financing, borrowing NZ$ at 15.4% interest — Future rate for NZ$ discounted against US$ — As costing less to buy NZ$ in future, taxpayer receiving more US$ with proceeds of loan than cost of repaying loan when due, creating certain gain — Interest rate for direct borrowing of US$ 9.1% — To implement strategy taxpayer entering Debenture Purchase Agreements with lenders, Master Forward Agreement with bank — Taxpayer deducting interest expenses of 15.4% each year of five-year loan — M.N.R. disallowing deduction on ground 15.4% not reasonable as required by Act, s. 20(1)(*c*) — T.C.C. looking at transactions separately, holding 15.4% reasonable as market established rate — Appeal allowed — Taxpayer's transactions should be assessed in light of commercial, economic realities — Form not always reflecting true situation — Act concerned with how transactions affect taxpayer's economic situation — T.C.C. erred in looking at transactions in isolation — True interest rate determined when transactions looked at in entirety — 15.4% rate not reasonable — Three of four conditions in s. 20(1)(*c*) not met: claimed expenses not interest, not used for purpose of earning income; not reasonable — S. 245, prohibiting deductions artificially or unduly lowering income, not applicable — Deduction not

INCOME TAX—Continued

Income Calculation—Continued

Deductions—Continued

contrary to object, spirit of s. 20(1)(*c*) — Borrowing accorded with normal business practice, having *bona fide* business purpose (to secure capital for legitimate purpose).

CANADA V. SHELL CANADA LTD., [1998] 3 F.C. 64 (C.A.)

Appeal from Tax Court decision permitting deduction of participatory interest payments pursuant to Income Tax Act, s. 20(1)(*e*) — To avoid heavy debt servicing obligation in financing major shopping centre construction project, bonds issued at below market rate plus participatory interest equal to 15% of operating surplus in excess of $2.9 million — 15% rate expected to increase yield on loan to prevailing market rate provided project reaped benefits of inflation over term of loan — S. 20(1)(*c*) permitting deduction of interest on borrowed money used to earn income from business or property — S. 20(1)(*e*) permitting deduction of expenses associated with issuing, selling of units, interests or shares or cost of borrowing money — T.C.C. holding payments not interest because neither accruing day to day, nor based on principal outstanding — Deduction proper under both s. 20(1)(*c*), (*e*) — Definition of interest, limiting essential characteristics considered — Daily accrual of interest meaning each holder's entitlement ascertainable on daily basis — While payable only once per year, participatory interest based on percentage of operating surplus, capable of being allocated on day-to-day basis — Participating interest percentage of, or related to, principal sum because payable only so long as principal outstanding — Payments also deductible under s. 20(1)(*e*) as cost of borrowing money because "in connection with", "incidental to" or "arising from" borrowing — Disallowing deduction would disregard new commercial realities, send message I.T.A. discourages entrepreneurship.

CANADA V. SHERWAY CENTRE LTD., [1998] 3 F.C. 36 (C.A.)

S. 8(1)(c) clergy residence deduction — Access to Information Act request regarding interpretation of "religious order", one of terms defining scope of entitlement to deduction — MNR refusing access as disclosure could injure Government's financial interests by encouraging others to claim deduction — Also concerned taxpayers' identity not be revealed — "Injurious to financial interest of Government" in Access to Information Act, s. 18(*d*) not including revenue lost due to increase in legitimate claims for Income Tax deductions — If clergy residence deduction inadequately drafted for contemporary conditions, up to Finance Department to propose statutory reform.

CANADIAN COUNCIL OF CHRISTIAN CHARITIES V. CANADA (MINISTER OF FINANCE), [1999] 4 F.C. 245 (T.D.)

Taxpayer deducting interest paid in 1987 on mortgage before judicial sale — Income Tax Act, s. 20(1)(*c*) permitting deduction of interest on amount payable for property acquired to gain or produce income therefrom — Minister (affirmed by Trial Judge) correctly disallowing deduction because no reasonable expectation of profit (*Moldowan*

INCOME TAX—Continued

Income Calculation—Continued

Deductions—Continued

test) — Where clear no profit can be earned in year or forever after because of judicial sale proceedings, *Moldowan* applicable.

CORBETT V. CANADA, [1997] 1 F.C. 386 (C.A.)

Taxpayers purchasing land for subdivision, building houses for sale — Title transferred to holding companies — Taxpayers required to extend personal guarantees to finance project — Called on to honour guarantees — Land not purchased as investment — Case law on tax treatment of advances, outlays by shareholders reviewed — Law presuming shares acquired for investment purposes, loss arising from advance, outlay by shareholder also on capital account — Taxpayers could not claim business loss as not in business of lending money, extending guarantees — Failed to rebut presumption losses from payment on guarantees on capital account.

EASTON V. CANADA, [1998] 2 F.C. 44 (C.A.)

Appeal from Tax Court's dismissal of appeal from assessment disallowing deduction of payment to City of Montréal as reimbursement for cost of relocating street — Expansion of shopping centre's parking facilities necessary to improve competitiveness — Appellants exchanging undeveloped land near centre with City, using former street as parking lot — Agreed to pay $480,900 as reimbursement for cost of street relocation — Appeal dismissed (Létourneau J.A. dissenting) — Expansion of parking facilities direct advantage — Requiring exchange of land, street relocation — Both part of single arrangement to permit expansion — Capital expenditure — Létourneau J.A. (dissenting) holding three distinct, severable expenditures — Payment to reimburse City for cost of relocating street — No land acquisition cost as property of comparable value exchanged.

GLADSTONE INVESTMENT CORP. V. CANADA, [1999] 3 F.C. 485 (C.A.)

Judicial review of T.C.C. decision taxpayers entitled to deduct share of rental loss incurred on property purchased as principal residence from other income — Holding reasonable expectation of profit, but M.N.R. not establishing "personal element" or "foreseeable tax advantage" accruing to taxpayers during taxation year as required by *Tonn v. Canada* — T.C.C. erred in understanding, application of *Tonn* — *Tonn* not altering law as stated in *Moldowan v. The Queen*: (1) to have source of income, taxpayer must have reasonable expectation of profit; (2) whether reasonable expectation of profit objective determination — *Tonn* affirming courts not to second guess business decisions of taxpayers — "Personal element" existing as property purchased as principal residence; no evidence considering whether could be rented profitably.

MASTRI V. CANADA (ATTORNEY GENERAL), [1998] 1 F.C. 66 (C.A.)

Appeal from 1998 T.C.C. decision court ordered damages for breach of contract not deductible as expenses to earn income from business under ITA, s. 18(1)(*a*) —

INCOME TAX—Continued

Income Calculation—Continued

Deductions—Continued

B.C.S.C. ordering appellant to pay damages for breach of restrictive covenant in agreement for sale of chartered accountancy practice — 1999 S.C.C. decision in *65302 British Columbia Ltd. v. Canada* holding fines, penalties incurred to earn income from business deductible under s. 18(1)(*a*) applicable to court ordered damages — Analysis pertaining to tax neutrality, equity of taxation system, Parliament's ability to expressly prohibit deductions equally apt herein — Damages awarded for lost profits — Damages deductible in 1994, when court ordering their payment.

MCNEILL V. CANADA, [2000] 4 F.C. 132 (C.A.)

Judicial review of T.C.C. decision reducing amount of deductible interest under Income Tax Act, s. 67 — Taxpayer co-purchasing residential property for rental purposes, intending to realize capital gain — Purchasers assuming existing mortgage, each contributing $25,000 which taxpayer borrowing — Act, s. 67 requiring deductible outlay, expense to be reasonable — M.N.R. disallowing deduction of rental losses on grounds no reasonable expectation of profit — T.C.J. holding unreasonable to finance 100% of purchase price, therefore interest paid on $25,000 not deductible — Judicial doctrine of reasonable expectation of profit, concept of reasonable expenses under s. 67 must be invoked, applied independently — S. 67 must not be used in arbitrary manner, to soften strictures of reasonable expectation of profit test — Must be applied as objectively as possible — Full financing neither bar to deducting rental loss nor ground for reducing amount of interest deductible — Reasonableness of otherwise deductible expense not assessed by reference to whether any one expense, or collective expenses, disproportionate to revenues — *Ramsay v. M.N.R.*, *Elliott v. M.N.R.* line of cases no longer good law — Refusal to permit deduction of interest on personal loan arbitrary because no principled basis on which to determine amount by which interest expense must be reduced — T.C.C. misinterpreting, misapplying s. 67.

MOHAMMAD V. CANADA, [1998] 1 F.C. 165 (C.A.)

Deductibility, under ITA, s. 20(1)(*c*), of interest on law firm partner's bank loan to replace funds withdrawn from law firm's capital account to buy house, both transactions taking place same day — Transactions must be treated independently, not as series of connected transactions — S. 20(1)(*c*) not excluding refinancing with borrowed funds partner's investment of own funds in firm, withdrawn for non-eligible purpose — Direct use doctrine applied — Fact phrase "series of transactions", used 41 times in ITA, not used in s. 20(1)(*c*) indication no legislative intent to import "series test".

SINGLETON V. CANADA, [1999] 4 F.C. 484 (C.A.)

Appeal from Trial Division judgment dismissing appeal from Tax Court decision dismissing appeal from reassessment under Income Tax Act, s. 20(1)(*c*)(i) (permitting deduction of interest on borrowed money used to earn non-exempt income from

INCOME TAX—Continued

Income Calculation—Continued

Deductions—Concluded

business or property) — Parent company obtaining $7.4 million credit facility with CIBC of which $3.3 million available as line of credit to taxpayer, related companies — Remainder representing pre-existing indebtedness of group — Taxpayer guaranteeing loan — Borrowing money to honour guarantee — Appeal dismissed — Purpose of loan to honour guarantee, not earn income — Borrowed funds not used to produce income — Interpretation Bulletin IT-445 (permitting deduction of interest on money borrowed to honour guarantee, given for "adequate consideration") inapplicable as inadequate consideration — Robertson J.A.'s concurring reasons analysis of *Bronfman v. The Queen* indicating S.C.C. recognizing possibility of exceptions to direct-use rule — IT-445 restatement of reasonable expectation of profit requirement.

74712 ALBERTA LTD. V. M.N.R., [1997] 2 F.C. 471 (C.A.)

Taxpayer employed by Province of New Brunswick to perform services in Africa — Claimed deductions, tax credit for overseas employment under Income Tax Act, ss. 8(10), 122.3(1) — MNR rejecting claims on ground employer not carrying on business outside Canada for profit, reasonable expectation of profit — Trial Judge interpreting "carried on business" as requiring predominant profit motive — Judge erred in application of S.C.C. decision involving Assessment Act (Ontario statute) — Employer at least engaged in "undertaking of any kind whatever" under definition of "business" in Act, s. 248(1) — Not required to carry on business for "predominant" purpose of earning profit — Profit, big or small, still profit — Trial Judge erred in holding employer did not have reasonable expectation of profit.

TIMMINS V. CANADA, [1999] 2 F.C. 563 (C.A.)

Dividends

Appeal from T.C.C. decision to ignore losses, other liabilities of foreign subsidiaries in determining deemed "income earned or realized" under ITA, s. 55(2) — Taxpayer receiving cash dividend of $32 million, including same in income — Dividend deemed to be proceeds of disposition under s. 55(2) — Unrealized gain in subsidiaries, foreign affiliates consolidated in parent company — Affiliates having both income, debt — Whether foreign affiliates reducing taxpayer's "safe income" — Object of s. 55 to prevent capital gains stripping, double taxation — T.C.C. failing to determine amount of safe income on facts of case — S. 55(2) requiring net calculation of all amounts which could reasonably be attributed to anything other than income earned, realized by foreign affiliate.

CANADA V. BRELCO DRILLING LTD., [1999] 4 F.C. 35 (C.A.)

Appeal from T.C.C. decision setting aside Minister's assessment of income — Taxpayer's company purchasing, renovating luxurious 5-bedroom penthouse apartment in Florida for $4 million — Condo used for business entertaining 26, 45 times in 2

INCOME TAX—Continued

Income Calculation—Continued

Dividends—Continued

taxation years at issue — In same building as mother's apartment where taxpayer traditionally holidayed in winter — Income Tax Act, s. 15 deeming amount of benefit conferred on shareholder to be dividend — Whether equity rate of return (interest on amount spent on acquisition, renovation of condominium), or fair market rental value, proper method for assessing shareholder benefits — Existence of business purpose in acquisition, use of property not necessarily determining nature of benefit conferred on shareholder — Trial Judge failed to consider facts leading to conclusion selection, character of apartment primarily for personal accommodation of taxpayer, essentially for his benefit — Respondent would have had to pay equity rate of return to get same benefit from company of which not shareholder.

CANADA V. FINGOLD, [1998] 1 F.C. 406 (C.A.)

Appeal from trial judgment, affirming Tax Court's decision allowing taxpayer's appeal from reassessment under Income Tax Act, s. 56(2) including corporate dividend paid to wife in respondent's income — S. 56(2) providing payment or transfer of property, made with concurrence of taxpayer, to some other person for benefit of taxpayer shall be included in taxpayer's income — Taxpayer incorporating company to split income with wife — Taxpayer, wife officers of company — While sole director, wife declaring dividend on her shares — Taxpayer ratifying declaration — Wife neither contributing to company nor assuming risks — Immediately thereafter loaning taxpayer amount of dividend — Evidence establishing wife acted with taxpayer's concurrence in declaring dividend — Concurrence inferred from circumstances, including degree of control taxpayer entitled to exercise over corporation conferring benefit — Four elements laid down in *Fraser Companies Ltd. v. The Queen* required for invocation of s. 56(2) satisfied — Minister not required to prove taxpayer's wife not subject to tax on dividend — Taxpayer, wife not dealing at arm's length — S. 56(2) applied.

CANADA V. NEUMAN, [1997] 1 F.C. 79 (C.A.)

Taxpayer disposing of interest in mining company, soliciting bids for shares held — Latter successful bidder, agreeing to pay dividends while acquiring shares — Taxpayer reassessed on basis of Income Tax Act, s. 55(2), purpose of which to prevent "capital gains stripping" — Tax-free intercorporate dividends deemed under s. 55(2) not to be dividends, rather proceeds of disposition of capital property — Whether transaction intended to effect significant reduction in portion of capital gain — Term "purposes" in s. 55(2) to be understood in subjective sense — Words "purpose", "result" distinguished — Nature of evidence required of taxpayer to discharge onus of establishing inapplicability of s. 55(2) — No tax-avoidance purpose on taxpayer's part.

CANADA V. PLACER DOME INC., [1997] 1 F.C. 780 (C.A.)

Tax Court judgment holding dividend payment taxable shareholder benefit under Income Tax Act, s. 15(1) — As consideration for transfer of apartment building to

INCOME TAX—Continued

Income Calculation—Concluded

Dividends—Concluded

corporation, preference shares issued to taxpayers — To effect necessary increase in authorized capital, supplementary letters patent required, but not obtained — Eventually corporation obtaining provincial superior court order deeming preference shares to have been validly issued within taxation year — Appeal allowed as provincial superior court order binding on Minister, constituting proof shares validly issued as of December 31, 1985 — Dividends not shareholder benefits.

DALE V. CANADA, [1997] 3 F.C. 235 (C.A.)

Farming

Appeal from T.C.C. decision farming chief source of taxpayer's income, permitting deduction of full amount of farming losses from professional income — Taxpayer urologist — In 1970 joining partnership, enabling him to reduce hours worked, devote more time to horse-breeding farm — Yearly losses could not have been sustained without taxpayer's professional income — Taxpayer must establish farming (1) giving rise to reasonable expectation of profit; (2) chief source of income, to deduct full amount of farming losses — Determination of whether farming chief source of income dependent upon cumulative effect of capital committed, time spent, profitability — Tax Court erred in assessment of evidence as to taxpayer's occupational direction, potential profitability of horse-breeding business — No change in occupational direction — As to profitability, evidence to support finding of reasonable expectation of "substantial" profits from farming required — No evidence showing what profit taxpayer might reasonably have earned but for setbacks giving rise to loss, and whether amount substantial compared to professional income — Medical practice chief source of income — Horse-breeding merely sideline — Hobby farmers seeking tax relief should pursue legislation, not litigation — Courts cannot afford to encourage hopeless cases.

CANADA V. DONNELLY, [1998] 1 F.C. 513 (C.A.)

Income or Capital Gain

$9.25 million buy-out of taxpayer's long-term lease participation clause in shopping centre's annual net profits — Capital gain for taxpayer — Facts clause integral component of capital asset and cancellation of clause impacted significantly on value of leasehold estate overriding considerations, displacing general rule that compensation serving as substitute for surrender of future profits is on revenue account.

T. EATON CO. V. CANADA, [1999] 3 F.C. 123 (C.A.)

Partnerships

Limited partnership (Commons) created by U.S. residents under laws of Texas — Acquired land, constructed apartment building — Losses arising from difference

INCOME TAX—Continued

Partnerships—Concluded

between original cost in 1985, market value of apartment building in 1988 — To secure losses, taxpayer, other Canadians acquired interests of original U.S. partners in Commons — MNR disallowing partnership losses claimed by taxpayer — T.C.C. finding taxpayer, others not engaged in partnership as not carrying on business in common with view to profit — No profit anticipated, earned during few minutes Canadians owned apartment building — No business carried on by Commons after Canadians took up assignments — No ancillary profit sharing purpose — Under Alberta Partnership Act, limited partnership may be formed to carry on business — Definition of partnership applicable to limited partnerships — Taking of assignments not obviating need to comply with definition — Appellant not partner when Commons disposed of apartment building.

BACKMAN V. CANADA, [2000] 1 F.C. 555 (C.A.)

Appeal from reassessments whereby MNR added certain profits to taxpayer's income — Road Contract bid submitted by taxpayer to Manitoba Hydro on behalf of undisclosed partnership (Road Partnership) — Profits from Road Contract to be divided among partners in accordance with respective partnership interests — Taxpayer, partner sole contributors to Road Partnership — Bid with respect to construction of dike (Dike Contract) submitted by taxpayer on behalf of second undisclosed partnership — Whether partnerships valid or sham — To be sham, taxpayer must purposefully, effectively mislead MNR — Evidence not sufficient to support finding of "sham" — Several named partners not involved in either partnership — Key requirements under both partnership agreements pertaining to capital contributions, liquidity of individual partners not met — Partnership agreements legally ineffective as partners not carrying on business "in common".

MCEWEN BROTHERS LTD. V. CANADA, [1999] 4 F.C. 225 (C.A.)

Taxpayer, group of individuals purchasing interests in California partnership which owned apartment, condominium project — Project generating tax losses as development costs far exceeding fair market value — Partnership still existing despite withdrawal of original partners, admission of Canadian partners — Claiming loss of US$10 million in respect of project sale, capital loss of US$367,000 in respect of sale of shares — Taxpayer's primary intention to acquire non-capital losses of condominium project — Finding of partnership mixed question of fact and law — Intention of parties at time of entering contract question of fact — Only activities carried on with view to profit, including ancillary purpose of profit making, may form basis of partnership — No partnership if no intention to carry on business with view to profit — Case law on partnerships reviewed — Taxpayer intending to carry on business with view to loss, not profit — No evidence to demonstrate intention to earn profit, ancillary or otherwise — Transaction motivated entirely by tax losses not formed with view to profit.

SPIRE FREEZERS LTD. V. CANADA, [1999] 4 F.C. 381 (C.A.)

INCOME TAX—Continued

Practice

Action for conversion of chattels (funds and assets), for wrongful filing of writ of *fieri facias*, and for damages — Action statute barred pursuant to Alberta Limitation of Actions Act, s. 51(g) — Also, Federal Court Act, s. 18.5 barring Court from adjudicating claim entailing challenge to validity of tax assessment or of collection proceedings taken in respect thereof as alternative right of appeal to T.C.C.

ALBION TRANSPORTATION RESEARCH CORP. V. CANADA, [1998] 1 F.C. 78 (T.D.)

Appeal from T.C.C. decision allowing appeal from reassessment disallowing, pursuant to Income Tax Act, s. 55(1), capital losses claimed in 1986 tax return — Taxpayer incurring substantial capital losses on disposition of worthless shares through series of planned transactions, executed over short time period — Minister arguing loss shares neither capital property nor inventory for first time before T.C.C. — *Continental Bank* holding Crown not permitted to advance new basis for reassessment after limitation period expired — Not applicable as limitation date not in evidence — *Continental Bank* addressing possible unfairness to taxpayer when notification of new basis inadequate, thus depriving taxpayer of opportunity to respond — View supported by recent legislative amendment permitting alternative argument in support of assessment to be advanced at any time after normal reassessment period, subject to Court's discretion to refuse it if resulting in prejudice to taxpayer — Crown entitled to argue new basis advanced.

CANADA V. HOLLINGER INC., [2000] 1 F.C. 227 (C.A.)

Appeal from order striking statement of claim filed on behalf of all taxpayers, except few benefitting from disputed tax ruling — Seeking declarations to compel Minister, Crown to comply with declaration as to meaning of "taxable Canadian property" in Income Tax Act — Action raising issues of maladministration of Income Tax Act, erosion of tax base — Court having jurisdiction to hear action for declaration against Crown, Minister — Plaintiff having public interest standing.

HARRIS V. CANADA, [1999] 2 F.C. 392 (T.D.)

No limitation period in Income Tax Act regarding collection of unpaid tax for which taxpayer assessed — MNR's exercise of statutory collection powers not subject to limitation period in Crown Liability and Proceedings Act, s. 32 or in relevant provincial limitation statute.

MARKEVICH V. CANADA, [1999] 3 F.C. 28 (T.D.)

Reassessment

Appeal from T.C.C. judgment holding ITA, s. 165(1.1) not preventing taxpayer from pursuing issues in computation of resource profits raised in objections other than those already withdrawn, specifically dealt with in consent judgment — S. 165(1.1) permitting filing of notice of objection only if relating to matter giving rise to

INCOME TAX—Continued

Reassessment—Continued

assessment not conclusively determined by Court — Consent judgment referring matter back to MNR for reassessment — Subsequently memorandum of understanding between petroleum industry, Revenue Canada setting out manner in which certain expenditures to be deducted in computation of resource profits — Taxpayer reassessed in conformity with consent judgment — Two weeks later filing notices of objection — Appeal allowed — S. 165(1.1) precluding right to file notices of objection — (1) T.C.J. finding matter giving rise to reassessments including computation of resource allowance; additional expenditures claimed by notices of objection reasonably related to that computation — Open to T.C.J. to so characterize matter — Relationship existing in terms of expenditures falling within same narrow computation, and because prior to issuance of consent judgment all expenditures acknowledged by Revenue Canada, industry as governed by *Gulf Canada Ltd. v. Canada* — (2) Computation of taxpayer's resource allowance conclusively determined by consent judgment — Issues now seeking to raise forming logical, integral part of litigation before T.C.C. prior to consent judgment — Could, should have been raised at same time — Party failing to raise issue forever barred from raising it again.

CANADA V. CHEVRON CANADA RESOURCES LTD., [1999] 1 F.C. 349 (C.A.)

MNR with warrant under I.T.A. s. 231.3 seized taxpayer's documents — Using information thus obtained issued reassessments — When F.C.A. declared s. 231.3 of no force, effect as unconstitutional, taxpayer applied to S.C. Nfld. for return of documents — Government officials failing to disclose relevant facts upon application to J.P. for seizure of documents under Code s. 487 — Warrant issued — Taxpayer prosecuted under Act, s. 239 — Acquitted for abuse of process, violation of Charter rights — T.C.C. deciding vacation of reassessments appropriate, just remedy under Charter, s. 24(1) — MNR's argument: exclusion of evidence only remedy where obtained in violation of Charter rights — T.C.J. correct in considering both official seizures in deciding proper remedy — Did not err in use of harsh words to describe conduct of Crown agents — T.C.J. correct in decision exclusion of evidence inadequate remedy herein — Court having general power under Charter, s. 24(1) to grant "appropriate and just" remedy — Extreme remedy granted herein to be reserved for serious violation cases where other remedies inadequate.

CANADA V. O'NEILL MOTORS LTD., [1998] 4 F.C. 180 (C.A.)

Vacating reassessment — Appeal from T.C.C. decision dismissing appeal from reassessments involving income received, not reported — Appellant arguing wrongs committed against him should be considered cumulatively as sufficient grounds to vacate reassessments — For reassessment to be vacated, conduct must be flagrant, egregious violation of appellant's rights; lesser remedy of exclusion of evidence must be inadequate to vindicate Charter violation; illegally obtained evidence must be so fundamental to reassessments they cannot be sustained without it — Cumulative effect of wrongs not so flagrant, egregious as to support extreme remedy of vacating reassessments in light of minimal importance of additional evidence obtained by

INCOME TAX—Continued

Reassessment—Concluded

violations — Not unfair to force appellant to go to trial as Crown having reasonable chance of proving case on basis of legally obtained evidence.

DONOVAN V. CANADA (ATTORNEY GENERAL), [2000] 4 F.C. 373 (C.A.)

Taxpayer found by T.C.C. to have appropriated to himself net proceeds of sale of lot, farmhouse in 84-acre parcel of land, deposit on agreement to sell 16 other lots in same parcel — Parcel belonging to corporation controlled by taxpayer — Appropriation of proceeds of sale, deposit on agreement for sale not basis of Minister's reassessment, not pleaded by Minister before T.C.C. — Minister bound by own basis of assessment — Not open to Court to construct own basis of assessment different from reassessement — T.C.J. changing basis of assessment without taxpayer having opportunity to address change — Crown, Court bound by assessment appealed from, unless amended, adequate notice given of intention to rely on different basis within limitation period — T.C.J. erred in finding taxpayer liable on basis different from that in Minister's notice of reassessment.

PEDWELL V. CANADA, [2000] 4 F.C. 616 (C.A.)

Seizures

Appeal from F.C.T.D. order dismissing judicial review application challenging validity, enforceability of notices of requirements under Act, s. 231.2(1) — AGT providing documents to CRTC in rate setting process — CRTC ordering documents sealed from public access — M.N.R. issuing notices of requirements requiring AGT to produce documents — Minister unable to determine whether documents relevant without examining them — That documents prepared for another forum, sealed by CRTC not preventing access by M.N.R. since relevant to potential tax liability, M.N.R. engaged in enforcing Act — S. 231.2 applies where information sought by M.N.R. relevant to tax liability of specific person(s), and when tax liability subject of genuine, serious inquiry.

AGT LTD. V. CANADA (ATTORNEY GENERAL), [1997] 2 F.C. 878 (C.A.)

Appeal from trial judgment dismissing actions for declarations Income Tax Act, s. 231.4 contravening Charter, ss. 7, 8 — S. 231.4 permitting Minister to authorize inquiry into anything relating to administration, enforcement of Act — Revenue Canada proposing to charge Del Zotto with tax evasion under s. 239(1)(*a*),(*d*) — S. 231.4 inquiry commenced — Only Noble summoned as witness — Appeal allowed — S. 231.4 inquiry inherently oriented towards criminal prosecution — Trial Judge not giving adequate weight to fact inquiry criminal investigation — Possibility Del Zotto could be subpoenaed — Reasonable expectation of privacy in peril from beginning of inquiry — Given inherent orientation of s. 231.4, any threatened seizure sufficient to bring s. 8 into play — Unlimited investigation into financial affairs over six years revealing many aspects of private life — Revenue Canada must have reasonable,

INCOME TAX—Concluded

Seizures—Concluded

probable cause to set up criminal inquiry into financial affairs of taxpayer — As violating Charter, s. 8, s. 231.4 struck down.

DEL ZOTTO V. CANADA, [1997] 3 F.C. 40 (C.A.)

Where taxpayer appeals assessment, ITA, s. 176(1) providing MNR must transfer all appellant's tax documents to T.C.C., documents thereupon open to public scrutiny — Even though only small degree of privacy attaching to tax returns, Act, s. 176(1) unconstitutional as authorizing unreasonable seizure, contrary to Charter, s. 8 and unjustified by Charter, s. 1.

GERNHART V. CANADA, [2000] 2 F.C. 292 (C.A.)

INDUSTRIAL DESIGN

Actions for copyright infringement concerning carpet tiles of Mangrove design — Plaintiff Milliken claiming rights to design through assignment by author of artistic work — Designs created after June 8, 1988 subject to current Copyright Act, s. 64 — Design created when artistic work created — Plaintiffs failing to adduce evidence of creation date, Court concluding Mangrove design created prior to June 1988 — Not protected by copyright as capable of registration under Industrial Design Act, used as pattern to be multiplied by industrial process.

MILLIKEN & CO. V. INTERFACE FLOORING SYSTEMS (CANADA) INC., [1998] 3 F.C. 103 (T.D.)

INJUNCTIONS

Interlocutory injunctions pursuant to Trade-marks Act, s. 7 prohibiting sale of defendants' products — Incumbent on plaintiff to meet underlying responsibility to pursue matters with due diligence — Injunctions dissolved as inordinate and inexcusable delay in proceeding with actions, plaintiff treating interlocutory injunctions as resolution of disputes.

CIBA-GEIGY LTD. V. NOVOPHARM LTD., [1998] 2 F.C. 527 (T.D.)

INQUIRIES

Judicial review of dismissal by Somalia Inquiry Commissioners of motions to prevent issuing of final report, or to withdraw Inquiries Act, s. 13 notices — Commission's mandate to investigate how Canada's military acting before, during, after deployment — Notices issued to applicants, senior military officers, advising findings could be made against them because of leadership, discipline problems with Canadian Airborne Regiment — Hearings divided into pre-deployment, in-theatre, post-

INQUIRIES—Continued

deployment phases — In midst of receiving in-theatre evidence, Government imposing deadline, limiting mandate to pre-deployment issues, although Commission granted discretion to report on other phases — Standard of review for public commissions of inquiry restraint, vigilance — (1) Applicants submitting three phases of mandate so inextricably linked will shape public perception of final report, unfairly single them out for blame — (i) Although Commission triggered by in-theatre incidents, Commission can make findings of misconduct for pre-deployment events — Judicial deference to Commission's reasonable interpretation of mandate — (ii) Mandate, terms of reference supporting division of findings of misconduct into discrete, autonomous packages — (iii) Commission conducting hearings as if discrete, autonomous — (iv) Finding that flagrant breach of justice should not be based on conjecture as to what Commission will write in report, speculation as to public perception — Court must balance risk to individual's reputation, social interests in publication of report in determining standard of fairness — (v) Allegations in s. 13 notices concerning "adequacy" of Military Police contingent, "confusing" nature of Rules of Engagement, "impact" of manning ceiling, objectionable as requiring hindsight from in-theatre phase, severed — (2) Meaning of "reasonable notice", "full opportunity to be heard" in s. 13 — Reasonableness including timing, particulars — S. 13 notice "reasonable" even if timing creating difficulties for recipient — As long as not impossible to respond adequately, timing of s. 13 notice not violating procedural fairness — Within context, progress of Commission's hearings, Commission responding to requests for particulars with sufficiently detailed, comprehensive letters — That delivery of particulars belated in some instances not fatal misstep — As to nature of "full" opportunity, number, choice of witnesses key issue — Commission correctly rejecting witnesses based on relevancy, time, duplication, insufficient justification for *viva voce* testimony — As long as respecting rules of fairness, Commission could devise own hearing schedule, relevancy criteria — Speculation not basis for remedies sought.

ADDY V. CANADA (COMMISSIONER AND CHAIRPERSON, COMMISSION OF INQUIRY INTO THE DEPLOYMENT OF CANADIAN FORCES IN SOMALIA), [1997] 3 F.C. 784 (T.D.)

Bias — Commissioners' duty to act fairly towards applicant — No jurisdiction in Commission to rule on disqualification of Chairperson — Chairperson's negative remarks on applicant; credibility indication of bias.

BENO V. CANADA (COMMISSIONER AND CHAIRPERSON, COMMISSION OF INQUIRY INTO THE DEPLOYMENT OF CANADIAN FORCES TO SOMALIA), [1997] 1 F.C. 911 (T.D.)

Commission appointed under Inquiries Act, s. 3 to conduct inquiry, report on actions, decisions of Canadian Forces in Somalia — Officer served with notice under Act, s. 13 to face allegations of misconduct — Commission Chairman prohibited from making finding adverse to officer due to reasonable apprehension of bias — Trial Judge wrong in assimilating commissioners to judges — Public inquiry not equivalent to civil, criminal trial — Inquiry commissioners have broad investigative powers —

INQUIRIES—Concluded

Rules of evidence, procedure less strict — Reasonable apprehension of bias standard to be applied flexibly — Chairman not reaching conclusion on basis other than evidence.

BENO V. CANADA (COMMISSIONER AND CHAIRPERSON, COMMISSION OF INQUIRY INTO THE DEPLOYMENT OF CANADIAN FORCES TO SOMALIA), [1997] 2 F.C. 527 (C.A.)

Commission of Inquiry into deployment of Canadian Forces to Somalia — Order in Council establishing Commission to investigate, report on 6 topics, 19 issues — Final report due December 22, 1995 but two extensions granted — Commission needing even more time but Order in Council imposing final deadlines — Motion for order of *mandamus* requiring Commission to comply with mandate or declaring that Governor in Council amend Commission's terms of reference by limiting inquiry and order declaring Governor in Council's decision on final deadlines contrary to law — Importance, independence of public inquiries — Whether Commission required to report on all matters mandated — Who decides whether investigation complete — Whether commission unable to report on full mandate — Original reporting date unrealistic, never intended to be final — Commission of Inquiry not like government department to be created, directed, disbanded as Governor in Council sees fit — Governor in Council not entitled to decide when enough evidence received — To lawfully curtail mandate, Governor in Council must list items deleted from Commission's mandate — Order in Council imposing final deadlines *ultra vires* for (1) non-compliance with Interpretation Act, s. 31(4); (2) breaching rule of law by requiring the impossible; (3) breaching rule of law by disrespect of Commissioners' independence.

DIXON V. CANADA (COMMISSION OF INQUIRY INTO THE DEPLOYMENT OF CANADIAN FORCES TO SOMALIA), [1997] 2 F.C. 391 (T.D.)

Order in Council setting final deadlines for Somalia inquiry not *ultra vires* — Nature of commissions of inquiry — Creatures of Governor in Council, required to operate within parameters established thereby — Not courts of law — Not meant to pronounce judgment, but to inquire, report, recommend — Inquiries Act, not Interpretation Act, source of Governor in Council's power to revoke, amend or vary terms of appointment of commission of inquiry.

DIXON V. CANADA (GOVERNOR IN COUNCIL), [1997] 3 F.C. 169 (C.A.)

Practice — Commission of Inquiry into Conflict of Interest Allegations concerning Hon. Sinclair Stevens — Commissioner not necessary party to action challenging Commission's Report — Respondent seeking setting aside of Report and its removal into Court; no remedy sought against Commissioner personally — Inquiry ended long ago — Fact evidence of Commissioner may be needed at trial not sufficient reason for requiring him to remain as party defendant — Possibility, under Federal Court Rules, of obtaining Commissioner's evidence, production of relevant documents in his possession even if not party.

STEVENS V. CANADA (COMMISSIONER, COMMISSION OF INQUIRY), [1998] 4 F.C. 125 (C.A.)

INSURANCE

Fraternal benefit society life insurance fund — Income tax payable on investment income — Where assets in life insurance fund exceed amount necessary for purposes of life insurance business, tax payable on investment income earned on necessary amounts only — Canadian and British Insurance Companies Act, s. 81(1) examined — Decision not to withdraw surplus monies out of fund not determinative of appeal — Inference all assets in fund necessary for life insurance operation rebuttable.

ACTRA FRATERNAL BENEFIT SOCIETY v. CANADA, [1997] 3 F.C. 441 (C.A.)

Plaintiff injured in motor-vehicle accident caused by negligence of RCMP officer in Saskatchewan — Provincial legislation establishing no-fault automobile insurance prohibiting plaintiff from proceeding in Federal Court — Automobile Accident Insurance Act, ss. 102, 103 constitutionally valid as only plaintiff, an individual, directly affected by being unable to sue in F.C.T.D. — Could be otherwise if federal Crown wishing to sue — No violation of plaintiff's Charter s. 15 equality rights — All people in province governed by legislation — Plaintiff not singled out.

MOXHAM v. CANADA, [1998] 3 F.C. 441 (T.D.)

Appeal from Minister of Finance's direction to Superintendent of Financial Institutions to take control of life insurance company — Insurance Companies Act, s. 680(2) permitting Minister of Finance to make such direction where believing circumstances in s. 680(1)(*b*) existing — Minister required to give company reasonable opportunity to make representations — After Superintendent recommending such action in report, appellant making oral representations to Minister of State appointed to assist Minister, submitting written representations — Not having opportunity to respond to Minister of State's report, letter from corporate administrator of industry's protection plan supporting Superintendent's recommendations — Minister not fettering discretion by simply acting on Superintendent's recommendations — Adopting only two of three — "Reasonable opportunity to make representations" satisfied by opportunity to provide written representations — Although s. 704 permitting delegation of powers to Minister of State appointed to assist Minister, entrusting Minister of State to hear appellant's oral representations not delegation of powers as no obligation to provide such hearing — In making decision of such wide import, Minister of Finance entitled to seek advice — As not acting under delegation of powers, Minister of State not constrained in making recommendations — Ministerial decision based on policy grounds affording no procedural protection except that required by statute — Neither Minister of State's report nor letter from corporate administrator containing new information — Minister not required to share either with appellant.

SOVEREIGN LIFE INSURANCE CO. v. CANADA (MINISTER OF FINANCE), [1998] 1 F.C. 299 (T.D.)

INTERNATIONAL LAW

Convention on the Rights of the Child — Whether officer, Minister in exercising discretionary authority under Immigration Act, s. 114(2) must give priority to best

INTERNATIONAL LAW—Continued

interests of Canadian child where deportation order made against child's parent — Case law on applicability of conventions, treaties — Convention herein not implemented by Canadian law — Not applicable as not part of law of Canada — Considering separation of powers, executive cannot alter Canadian law or infringe on provincial jurisdiction by making treaty — Though courts to interpret legislation to avoid Canada breaching international obligations, principle not applied to bring about unconstitutional results.

BAKER V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1997] 2 F.C. 127 (C.A.)

Judicial review of decision to remove applicant to Iran where fears torture — Applicant landed under backlog program without examination of risk to him if returned to Iran — Neither opinion constituting danger to Canadian public nor removal decision involving risk assessment — Canada signatory to international Convention prohibiting expulsion to state where "substantial grounds" for believing danger of torture — Not implemented into relevant domestic law but informing Charter interpretation — Determination of whether grounds for applicant's fear must be made in fair, reasonable manner to honour Canada's international obligations — To support removal to Iran, risk assessment must be conducted in accordance with principles of natural justice, fundamental justice, rendered by competent authority.

FARHADI V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1998] 3 F.C. 315 (T.D.)

Action for damages following boarding, seizure on high seas, subsequent arrest, detention of Spanish fishing trawler, arrest of master by Canadian authorities — Plaintiffs seeking to establish at trial amended Coastal Fisheries Protection Regulations *ultra vires* — Issue may be raised without reference in pleadings, particulars to specific international treaties, conventions, which will be applied only if incorporated in Canadian domestic law by legislation specifically so providing — To extent international conventions, treaties considered authority for international law principles, unnecessary to plead them specifically as not pleading facts, but law.

JOSE PEREIRA E HIJOS, S.A. V. CANADA (ATTORNEY GENERAL), [1997] 2 F.C. 84 (T.D.)

Implementation of treaties — World Trade Organization Agreement Implementation Act provisions stating WTO Agreement approved (s. 8) and purpose of Act to implement Agreement (s. 3) not sufficient to legislate into federal domestic law WTO Agreement and Agreement on Trade-Related Aspects of Intellectual Property Rights provision requiring member countries to provide minimum 20-year protection for patents.

PFIZER INC. V. CANADA, [1999] 4 F.C. 441 (T.D.)

In context of criminal investigation of kickbacks allegedly received by respondent, high-level politicians, Minister of Justice sending letter of request to Swiss authorities

INTERNATIONAL LAW—Concluded

asking search, seizure of banking records — Under Swiss law, Swiss authorities seizing records — Applicability of Charter, s. 8 — A.G. arguing Charter lacking extraterritorial effect — Letters of request recognized method of cooperation between states in absence of mutual assistance treaty — Governing principles silent as to internal standards of requesting state — Where letter of request sent to friendly state, reasonable expectation will be acted upon — Charter inapplicable to acts of foreign police — Here no extraterritorial Charter application as letter of request imposing no Canadian legal requirement on Swiss authorities thereby fettering their sovereign authority — Increasing recognition Charter may apply outside Canada in special circumstances.

SCHREIBER V. CANADA (ATTORNEY GENERAL), [1997] 2 F.C. 176 (C.A.)

Appellant, Convention refugee facing removal to country where may be tortured, arguing right under international law to be secure against torture absolute, binding on Canada — Whether prohibition against *refoulement* of Convention refugees non-derogable right — Prohibition against torture restricted to conduct over which state has control — No conflict between three international conventions applicable herein — *Refoulement* of Convention refugee posing security risk to Canada not contravening any international Convention ratified by Canada.

SURESH V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 2 F.C. 592 (C.A.)

JUDGES AND COURTS

Upon question as to role of counsel at discovery, A.S.P. purporting to lay down general rules of conduct — Federal Court Act, s. 46 vesting power to make rules of Court in rules committee with approval of Governor in Council following legislatively mandated consultative process — Neither judge nor prothonotary having power to make rules of court.

ANDERSEN CONSULTING V. CANADA, [1997] 2 F.C. 893 (T.D.)

Stare decisis — Appeal from T.C.C. decision allowing taxpayer's appeal from reassessment regarding capital loss where worthless shares of U.S. subsidiary acquired, sold over short period in scheme to reduce Canadian tax liability — Though Court disturbed by result, case to be decided according to legality of transaction, not its morality and bound by judicial comity, *stare decisis* to follow F.C.A. decision in *Nova Corp. of Alberta v. R.*, which could not be distinguished from instant case.

CANADA V. HOLLINGER INC., [2000] 1 F.C. 227 (C.A.)

Supreme Court of Canada in *McClurg v. Canada* holding Income Tax Act, s. 56(2) not applicable to declaration of dividends including those declared pursuant to discretionary power, but Dickson C.J. adding s. 56(2) may apply to exercise of discretionary power to distribute dividends when non-arm's length shareholder making no contribution to company — Applicability of s. 56(2) to non-

JUDGES AND COURTS—Continued

arm's length transactions live issue, although unnecessary for disposition of that appeal as wife making legitimate contribution to company — That opinion, representing considered opinion of majority of S.C.C., binding on courts below.

CANADA V. NEUMAN, [1997] 1 F.C. 79 (C.A.)

Limits of judicial discretion in statutory interpretation and policy-making role of courts — Automatic penalty for insufficient GST remittance — Whether Court may read in due diligence defence — Statutory interpretation leading to absurd result, manifest injustice undermines public confidence in, respect for, judicial system — Reason for "golden rule" as qualification to literal rule of construction — Case law on what constitutes absurdity irreconcilable at time of Canadian legal realist movement — "Golden rule" device used by judges to achieve desired result — Whether concept of absurdity extends to consequences contradicting values considered important by courts (such as principle no punishment without fault) — Fear that statutory interpretation will dissolve into judge-made law — Influence of judicial values on interpretation of tax law — Historically, courts have resisted giving effect to statutes imposing absolute liability in absence of negligence — Common law principle no punishment without fault capable of giving rise to rebuttable presumption Parliament not intending to enact absolute liability under Excise Tax Act, s. 280 — Still, Court must consider legislative context, purpose of provision — Court justified in reading in to avoid unfairness, manifest injustice if relief granted compatible with legislative scheme, not frustrating purposes — These restrictions should silence argument Court exceeding constitutional role.

CANADA (ATTORNEY GENERAL) V. CONSOLIDATED CANADIAN CONTRACTORS INC., [1999] 1 F.C. 209 (C.A.)

Minister, at respondent's request, referring to Federal Court (Citizenship Act, s. 18(1)(*b*)) question whether respondent secured citizenship by knowingly concealing material circumstances — Subsequent to filing citizenship application but prior to Citizenship Court hearing charged with criminal offences — At Citizenship Court hearing signed under oath that since filing citizenship application not subject to criminal proceedings — Subsequently pleaded guilty to criminal charges — Convicted in Provincial Court of knowingly concealing material circumstance from Citizenship Judge (Citizenship Act, s. 29(2)(*a*)) — Evidence of conviction *prima facie* proof of fact of guilt — F.C.T.D. Judge having to decide, on civil standard of proof, same issue determined by Provincial Court Judge on criminal law standard — Respondent trying to launch collateral attack on final decision of criminal court of competent jurisdiction — Abuse of process doctrine applies to prohibit respondent from rebutting fact of conviction.

CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) V. COPELAND, [1998] 2 F.C. 493 (T.D.)

Judicial independence — Secret meeting between Assistant Deputy Attorney General and Chief Justice of Federal Court to discuss slow pace of citizenship revocation

JUDGES AND COURTS—Continued

references before A.C.J. — Latter recusing from further involvement in cases — Motions Judge finding breach of judicial independence, abuse of process — Ordering stay of proceedings — Case involving individual, not institutional independence — Role of C.J. to ensure "timely justice" — Intervention of C.J. not interference with judicial independence of A.C.J. — A.D.A.G. not using C.J. as mere instrument — Delay in progress of cases primary focus of meeting, correspondence with C.J. — No judicial interference, no harm to respondents.

CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) V. TOBIASS, [1997] 1 F.C. 828 (C.A.)

Old Age Security Act, s. 19(1)(*a*), providing for payment of spousal allowance (SPA) to 60-to-64-year-old spouses of pensioners provided not separated, found to breach Charter, s. 15 — Degree of curial deference owed to Parliament considered at minimal impairment stage of Charter, s. 1 analysis — Curial deference more appropriate where government balancing competing social interests, less so when acting as singular antagonist of individual whose right infringed — Difficult to apply formal legal tests with any degree of certainty as to correct conclusions where Parliament mediating competing interests — Where large number of interlocking, interacting interests, considerations involved, or distribution of significant public resources at issue, deference to Parliament recognizing Parliament's democratically representative role in mediating various claims, fact Court not in position to ascertain with certainty whether least drastic means chosen to achieve desired objective — Deferential approach by courts required with respect to social benefit programs because public funds not unlimited, judicial activism tending to make governments reluctant to create new programs because of uncertainty of potential liability involved — In establishing SPA, Parliament confronted with competing concerns of various groups — Policy choices herein of type Parliament in better position than courts to make; Court would be overstepping bounds of institutional competence to rigorously review Parliament's approach to providing SPA in attempting to ascertain whether least drastic means chosen to achieve legislative objective — Social, economic implications of broadening SPA (encouraging individuals to retire earlier than age 65) further justifying restraint.

COLLINS V. CANADA, [2000] 2 F.C. 3 (T.D.)

Appeal from dismissal of application for judicial review of decision of hearing officer under Income Tax Act, s. 231.4 — Prior to appointment to Court, F.C.T.D. Judge partner in law firm acting for appellant Del Zotto — Logged 0.4 hours on file — Del Zotto since changing counsel — Cases suggesting fact judge hearing case in which firm was involved not raising reasonable apprehension of bias were ones where no direct, indirect involvement by judge in matter when at firm — In abundance of caution, appeal allowed notwithstanding Judge's involvement minimal, peripheral, six years before heard application — Under Federal Court Act, s. 52(*b*)(*i*), judicial review application dismissed.

DEL ZOTTO V. M.N.R., [2000] 4 F.C. 321 (C.A.)

JUDGES AND COURTS—Continued

Judicial review of CRDD decision applicant not Convention refugee on grounds excluded under United Nations Convention Relating to the Status of Refugees, Art. 1F(c) — Applicant, national of Venezuela, removed thereto, when Court denied application to stay removal order — Application not moot — Live controversy — Deportation not eliminating all rights accruing to individual under Immigration Act where decision under review based upon error of law — S. 48 requiring respondent to execute removal order as soon as reasonably practicable — S. 82.1(1) conferring on applicant right to seek judicial review of CRDD's decision — Against overarching, clear human rights object, purpose as background for interpretation of Act, in absence of express words so requiring, s. 82.1 should not be interpreted so that rendered nugatory by performance by respondent of s. 48 duty — In circumstances, significant weight not given to concern for judicial economy — In any event, Court having discretion to hear moot matter — Criteria set out by S.C.C. in *Borowski* for exercise of discretion applied — Not improper assumption of law-making function, but deference to Parliament which created conflict between respondent's duty, applicant's right without expressly stating priority.

FREITAS V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1999] 2 F.C. 432 (T.D.)

Tax Court of Canada Rules (General Procedure), s. 124 treating documents transmitted by MNR as "part of the record of the Court" but not evidence unless tendered as such — Inappropriate for judge to examine record as may contain material not adduced in accordance with rules of evidence — In our adversarial system, trial not scientific exploration with judge acting as research director.

GERNHART V. CANADA, [2000] 2 F.C. 292 (C.A.)

Court not considering moot question — Appeal pending in another case in which issue material — Inappropriate to pre-empt discussion of material point by way of *obiter*, particularly as not fully canvassed as not central focus of appeal.

KLINKO V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 3 F.C. 327 (C.A.)

Judicial review of T.C.C. decision taxpayer entitled to deduct share of rental loss on property purchased as principal residence from other income — Relying on *Tonn v. Canada* — M.N.R. submitting *Tonn* should be overruled as wrongly decided — Incorrect to speak of recent F.C.A. panel overruling earlier one — Rule of *stare decisis* dictates both decisions of equal weight — Formal means for overruling earlier decision to strike enlarged F.C.A. panel where conflicting decisions, lines of authority on issue of fundamental significance to area of federal law.

MASTRI V. CANADA (ATTORNEY GENERAL), [1998] 1 F.C. 66 (C.A.)

Effect of O.C.A. declaration "sexual orientation" must be added to grounds of discrimination proscribed by Canadian Human Rights Act — Considering Canadian

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judicial system, having no binding effect on third parties outside Court's territorial jurisdiction — Inconceivable unappealed decision of any provincial court, even a court of first instance presided over by judge alone, determining law for all Canadians — Territorial limitations of *Haig* decision explains why Parliament had to amend law by adding "sexual orientation" to Act, s. 3 — Opinion obiter as, in instant case, CHRC party to case before O.C.A.

NIELSEN V. CANADA (EMPLOYMENT AND IMMIGRATION COMMISSION), [1997] 3 F.C. 920 (C.A.)

Fettering discretion — Privacy Act, s. 46 authorizing reviewing judge to receive ex parte representations, hold in camera hearings when claims for exemptions based on other than ss. 19(1)(*a*),(*b*), 21 — Both ex parte representations, in camera hearings mandatory when ss. 19(1)(a),(b), 21 claims made — Only written ex parte representations filed in relation to refusals to disclose by RCMP, DEA, CSIS — Reviewing Judge of view sound practice for Court to receive ex parte submissions in proceedings contesting such refusal — Such evidence assisting judge, ensuring secret information not disclosed where exemption from disclosure justified — Judge of opinion ex parte submissions effective compromise making sense generally — Judge not fettering his discretion.

RUBY V. CANADA (SOLICITOR GENERAL), [2000] 3 F.C. 589 (C.A.)

Application to recuse Teitelbaum J. from hearing these cases — Associate Chief Justice (ACJ) assigning Campbell J. to hear trial, but removing him when Campbell J. raising issue of friendship with Band members — Plaintiffs requesting ACJ not participate in assignment of new Trial Judge while complaint pending before Canadian Judicial Council alleging discrimination against them by ACJ — Committee of three judges recommending Teitelbaum J. as Trial Judge — Test for reasonable apprehension of bias, disqualification — (1) Manner in which decided Campbell J. should not be Trial Judge not raising reasonable apprehension of bias — Within ACJ's jurisdiction to designate trial judge — Irrelevant to issue of reasonable apprehension of bias of Teitelbaum J. — (2) No reasonable apprehension of bias in manner of appointment of Teitelbaum J. — Federal Court Act, s. 15(2) providing ACJ shall make all arrangements for trials — Neither requiring personal performance nor prohibiting delegation of duties — S. 6(3) requiring performance of ACJ's duties by senior judge not applicable — ACJ not participating in selection of trial judge at plaintiffs' request — (3) Previous comments relating to issue not giving rise to reasonable apprehension of bias — Earlier cases in which Teitelbaum J. deciding issues appealed — FCA pronouncements binding in all future cases where same issue raised — (4) Submission that knowing individuals involved in governing country, or of having been member or fund raiser for political party giving rise to reasonable apprehension of bias, outrageous — Also irrelevant to issue of reasonable apprehension of bias — Being fundraiser, friend of Prime Minister not bar to appointment to superior court — (5) Formal application to recuse in open court not giving rise to reasonable apprehension of bias — (6) That Teitelbaum J. deciding application for own recusal not giving rise to

JUDGES AND COURTS—Continued

reasonable apprehension of bias — Otherwise mere making of allegations would taint process, force disqualification of judge.

SAMSON INDIAN NATION AND BAND V. CANADA, [1998] 3 F.C. 3 (T.D.)

F.C.T.D. decision appealed for reasonable apprehension of bias based on Judge's colourful remarks during 75-day trial, repeated in considered reasons for judgment — Appellate court to approach such allegations with great caution — Wide margin of discretion accorded Trial Judges in conduct of cases — Remarks not to be taken out of context — Case involving claim by Indians aboriginal, treaty, Charter rights infringed by 1985 Indian Act amendments — Judge expressing view s. 35 Constitution Act, 1982, Indian Act racist legislation — Reasonable observer would have formed opinion Judge biased against special status for Indians — Not for Judge to go against Constitution — New trial ordered.

SAWRIDGE BAND V. CANADA, [1997] 3 F.C. 580 (C.A.)

Appeal, cross-appeal from orders declaring two Ontario judges entitled to reimbursement of expenses of commuting between residences outside judicial district to which assigned and chambers — Judges Act, s. 38 providing judge of Ontario Court (General Division) who, for purposes of performing any function, duty in that capacity, attending at any judicial centre within region for which assigned, other than judicial centre at which or in immediate vicinity of which resides, entitled to reasonable travel, other expenses incurred in so attending — S. 34 providing judge of superior court or Tax Court of Canada who for purposes of performing any function, duty in that capacity attending at any place other than that at which or in immediate vicinity of which "by law obliged to reside" entitled to reasonable travel and other expenses incurred in so attending — Residency requirements pertaining to federally appointed judges in Ontario abolished in 1990 — Motions Judge holding travel expenses recoverable under s. 34(1) as neither Judge by law obliged to reside within respective region — S. 38 not permitting payment of travel allowance to Ontario judge residing outside region where chambers located — Second reference to "judicial centre" in s. 38 referring to same kind of "judicial centre" as that first mentioned: namely judicial centre within region for which appointed or assigned — Indicating intention allowance authorized by section must be for travel by judge from home at or near judicial centre within region for which assigned to another judicial centre in same region — S. 38 authorizing travel allowance only if judge claiming it residing within region to which assigned — Consistent with payment of travel allowances to judges who travel for purposes of performing function or duty in capacity as judge — As neither judge resident within region to which assigned, travel expenses for commuting not authorized by s. 38 — As s. 34 subject to s. 38, reference in s. 34 to attendance at "place" for purpose of performing function, duty therefore construed as place other than "judicial centre" located within "region" to which Ontario judge assigned.

SHEPPARD V. CANADA (COMMISSIONER FOR FEDERAL JUDICIAL AFFAIRS), [1998] 4 F.C. 487 (C.A.)

JUDGES AND COURTS—Continued

Prothonotaries — Appeal from dismissal of motion to strike Sierra Club's application for judicial review of Ministers' refusal to subject to full environmental assessment sale to China of two CANDU nuclear reactors, their construction, operation in China — Discretionary orders of prothonotaries granting standing not raising questions vital to final issue of case — Court should defer to prothonotary's exercise of discretion to grant standing unless based on wrong principle.

SIERRA CLUB OF CANADA V. CANADA (MINISTER OF FINANCE), [1999] 2 F.C. 211 (T.D.)

Open justice — Confidentiality order sought regarding affidavits containing confidential documents upon application for judicial review of Government's decision to provide financial assistance for sale of nuclear reactors to People's Republic of China by AECL — Confidential documents property of Chinese authorities — Whether public interest in disclosure exceeding risk of harm to party from disclosure consideration in public law cases — Matter of considerable interest to Canadians — Continuing public debate over Canada's role as nuclear technology vendor — Court not satisfied need for confidentiality exceeding public interest in open justice — Conclusion reached without examining voluminous documents on technical aspects of nuclear installation as Judge would be no wiser from perusal.

SIERRA CLUB OF CANADA V. CANADA (MINISTER OF FINANCE), [2000] 2 F.C. 400 (T.D.)

Open Justice — Prothonotary ordering *in camera* hearing of application to file supplementary affidavit including confidential materials and for confidentiality order; materials filed to be treated as confidential — Prothonotary's order silent as to Court's reasons — Pelletier J. inviting parties to make submissions regarding placing of reasons on public file — Reasons published on Federal Court Reports Web site — Also may have been available on QUICKLAW — Notice of appeal filed — Reasons not containing information which, if disclosed, would harm interests of parties — That appeal taken not precluding release of reasons — If reasons not containing confidential information, no reason in principle why should not be released — Conclusion would have been same had reasons not been publicized, but in fact have — If reasons accessible to part of public, ought to be accessible to all — Reasons dated October 26, 1999 ordered placed on public file.

SIERRA CLUB OF CANADA V. CANADA (MINISTER OF FINANCE), [2000] 2 F.C. 423 (T.D.)

Open justice — Appeal from refusal to grant confidentiality order for documents describing environmental assessment undertaken under Chinese laws — Documents prepared by or with assistance of Chinese — Litigation seeking judicial review of federal government's decision to provide financial assistance for sale, construction of nuclear reactors in China without subjecting project to environmental assessment in accordance with Canadian Environmental Assessment Act — Openness, public participation in assessment process of fundamental importance in Act — Although

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commercial interests of AECL directly implicated in outcome of litigation, focus of application alleged breach of statutory duty — Having considered nature of litigation, extent of public interest in openness of proceedings, Motions Judge not giving public interest factor undue weight.

SIERRA CLUB OF CANADA V. CANADA (MINISTER OF FINANCE), [2000] 4 F.C. 426 (C.A.)

Judicial independence — Judicial review challenging objection to disclosure of information pursuant to Canada Evidence Act, ss. 38(6), 39 — S. 38(6) permitting *ex parte* objections to disclosure of information relating to national security — S. 39 providing where Clerk of Privy Council objecting to disclosure of information, disclosure shall be refused without judicial examination — Applicants submitting s. 39 contrary to largely unwritten, fundamental organizing principles of Constitution including independence of judiciary — Characteristics of judicial independence: security of tenure, financial security, administrative independence — Canada Evidence Act, s. 39 not affecting security of tenure, financial security — If administrative independence defined as control by courts over administrative decisions bearing directly, immediately on exercise of judicial function, s. 39 not contravening independence of judiciary as constitutional norm — S. 38(6) not affecting "administrative independence" of judiciary — Applicants' submission s. 38(6) eliminating judicial discretion to decide whether to allow *ex parte* submissions cannot be maintained given two-stage hearing implemented by Federal Court which, in some cases, eliminates need for *ex parte* submissions.

SINGH V. CANADA (ATTORNEY GENERAL), [1999] 4 F.C. 583 (T.D.)

Canada Evidence Act, s. 39 providing where Clerk of Privy Council certifying in writing document confidence of Queen's Privy Council, disclosure shall be refused without examination, hearing of information by court — S. 39 not interfering with security of tenure, financial security, administrative independence of judges — Not putting improper pressure on Judge as to outcome of given case, but form of privative clause.

SINGH V. CANADA (ATTORNEY GENERAL), [2000] 3 F.C. 185 (C.A.)

F.C.T.D. denying Convention refugee's application for interlocutory injunction to prevent removal from Canada pending disposition of leave application — Ontario Court (General Division) granting interlocutory injunction to prevent deportation, but staying declaratory component — Problems with exercise of concurrent jurisdiction by two superior courts of record with respect to same constitutional challenges to federal legislation — Prohibition against collateral attacks on orders of superior court — One superior court may not exercise supervisory jurisdiction over another — Only S.C.C. having such power — Ontario courts prepared to entertain concurrent proceedings as denial of injunctive relief would render proceedings in F.C. moot.

SURESH V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1999] 4 F.C. 206 (C.A.)

JUDGES AND COURTS—Continued

Judicial immunity from suit — Appeal from dismissal of application for judicial review of CHRC's decision not having jurisdiction to deal with complaint about Ontario Court, General Division Judge's ruling regarding wearing of religious head coverings by spectators at criminal trial — CHRC holding Judge protected by absolute immunity of judges — Appeal dismissed — If judges could be sued for decisions, would be no certain end to disputes, cases would take longer to be heard, resolved, judicial independence would be severely compromised — Need to protect public, not judges, basis for judicial immunity — Judicial immunity not applicable where judge knowingly acting beyond jurisdiction — Impugned order not within exception because Judge not only had jurisdiction under Criminal Code, s. 486 to make order, even if erred in exercise of discretion, thought had jurisdiction — Because order within inherent jurisdiction of court, not administrative act not protected by judicial immunity — Exception to judicial immunity not opening floodgates to vexatious claims as system (motion to strike, summary judgment award of costs) guarding against vexatious claims.

TAYLOR V. CANADA (ATTORNEY GENERAL), [2000] 3 F.C. 298 (C.A.)

Canada Labour Relations Board Chair appointed during good behaviour for 10 years — Governor in Council ordering his removal before expiry of term based on Auditor General's findings travel, hospitality expenses not reasonable compared to those of others in similar positions — S. 69 requiring Canadian Judicial Council, at Minister's request, to conduct inquiry into whether person (other than judge of superior court or T.C.C.) appointed during good behaviour pursuant to Act of Parliament should be removed from office for certain reasons, including misconduct — Language of s. 69 parallel to that of s. 63(1), applicable to superior court judges — Answer to whether inquiry under Judges Act, s. 69 precondition to removal from office of person appointed pursuant to Act of Parliament to hold office during good behaviour same for superior court judges, persons to whom s. 69 applies — Whether constitutional validity of CLRB decisions requiring Board members have same security of tenure as have superior court judges — Board not a court though quasi-judicial body making very important decisions — Charter, s. 11(*d*) inapplicable to matters before CLRB — Assuming some need for security of tenure for CLRB members, requirement met by combination of three elements: statutory requirement of "cause" as ground for removal (Canada Labour Code, s. 10(2)); Governor in Council's obligation to observe principles of natural justice when making removal decision; potential for independent inquiry under s. 69 (at Minister's request) — If s. 69 never enacted, first two elements would suffice — Natural justice principles just as binding on Governor in Council's exercise of statutory removal power as any statutory procedural requirements — Tribunal not lacking security of tenure merely because no statutory procedural protections regarding removal — Removal of person from office held during good behaviour cannot be done without affording person procedural protection, but full hearing with examination, cross-examination of witnesses, full disclosure of documents not essential.

WEATHERILL V. CANADA (ATTORNEY GENERAL), [1999] 4 F.C. 107 (T.D.)

Application for stay of removal order pending disposition of applications for leave to apply for judicial review, for judicial review, including application for extension of

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time within which to bring application — In *Sholev v. Canada (M.E.I.)*, MacKay J. finding statutory stay applied when application for leave to apply for judicial review of CRDD decision rejecting refugee claim made out of time, and after making of removal order — Relied upon discretionary power in Immigration Act, s. 82.1(5) allowing judge for special reasons to extend time for making application for leave, judicial review — Notwithstanding question certified for appeal, no appeal taken because of view appeal barred by s. 82.2, prohibiting appeal from F.C.T.D. judgment on application for leave to commence application for judicial review — Minister arguing *Sholev* should be disagreed with as wrongly decided — Independence of judiciary, necessity for certainty in law competing interests to be reconciled by thoughtful application of *stare decisis* doctrine — Decision of judge of co-ordinate Court should be given considerable weight unless cogent reasons to depart therefrom, particularly when no possibility of appeal to resolve uncertainty — Such reasons including: validity of impugned judgment affected by subsequent decisions; some binding authority in case law or relevant statute ignored; judgment unconsidered — As *Sholev* not ignoring any relevant authority, statutory provision, reasoning adopted, notwithstanding some support for argument wrongly decided.

ZIYADAH V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1999] 4 F.C. 152 (T.D.)

LABOUR RELATIONS

Judicial review of adjudicator's refusal to recuse himself on ground of bias — Five days into projected 23-day unjust dismissal hearing, employer learning adjudicator lawyer acting for an employee in unjust dismissal case under provincial legislation — That issue never before litigated some evidence labour lawyers not considering practising labour law inconsistent with serving as adjudicator — Hearing delayed nearly two years pending outcome of this application — Absence of right of appeal, inclusion of strong preclusive provision in Labour Code evidencing legislative intention to minimize judicial oversight of proceedings before adjudicator — Inconsistent with unjust dismissal provisions in Code for Court to exercise discretion in way potentially increasing delay, costs of adjudication — Avoidance of delay, fragmentation of issues carrying considerable weight in context of statutory scheme — Substantial delay herein, real possibility of fragmentation of issues weighed against reduced possibility of waste, strength of allegation.

AIR CANADA V. LORENZ, [2000] 1 F.C. 494 (T.D.)

Unjust dismissal — Adjudicator allowing unjust dismissal complaint but denying reinstatement — Employee's back injured at work, incapacitated temporarily — Deemed fit for return to work after time upon review of medical evidence — Failed to return — Dismissed for abandonment of position — Information as to other employment while declaring self unfit for work concealed at hearing of unjust dismissal complaint — Adjudicator's decision not based solely on observations of parties' conduct during hearing — Reinstatement not wrongfully dismissed employee's right — Adjudicator acting within jurisdiction in denying employee's reinstatement —

LABOUR RELATIONS—Continued

No duty on tribunals to give reasons for decisions but preferable to do so — Adjudicator's decision justified by respondent's dishonesty, attempt to defraud employer.

ATOMIC ENERGY OF CANADA LTD. V. SHEIKHOLESLAMI, [1998] 3 F.C. 349 (C.A.)

Appellants working 10 to 12 weeks per year for more than 10 years as river guardians — Initially employed by Department of Fisheries and Oceans, then by Beothuk, successful contractor, on call-back basis — Since 1988 Department exercising option to renew contract — Canada Labour Code, s. 240(1)(*a*) permitting any person completing 12 consecutive months of continuous employment to file complaint of unjust dismissal — Requiring continuous employment relationship, not continuous work — Question of fact whether employment relationship surviving annual lay-off — Application of s. 240(1)(*a*) to facts within Adjudicator's expertise — Motions Judge ought to have accorded deference to Adjudicator's finding on evidence appellants permanent seasonal employees whose employment relationship not interrupted by annual lay-off.

BEOTHUK DATA SYSTEMS LTD., SEAWATCH DIVISION V. DEAN, [1998] 1 F.C. 433 (C.A.)

Collective agreement arbitration of differences provision of Canada Labour Code superseded by CHRA, s. 41(1) in case of discrimination complaint.

CANADIAN BROADCASTING CORP. V. PAUL, [1999] 2 F.C. 3 (T.D.)

Certification — Reapplications — Authority in CLRB, pursuant to CLRB Regulations, s. 31(3), to abridge time period for filing new certification application — Board did not exceed jurisdiction in adopting Regulations, s. 31(3) and correctly interpreted its Code, s. 15(*e*) mandate.

DYNAMEX CANADA INC. V. CANADIAN UNION OF POSTAL WORKERS, [1999] 3 F.C. 349 (C.A.)

Powers of inspector under Canada Labour Code with respect to unjust dismissal complaint — Inspector without power to determine complaint unfounded on ground not in relation to true dismissal as merely non-renewal of determinate contract — Matter for adjudicator.

LEMIEUX V. CANADA (LABOUR AFFAIRS OFFICER, HUMAN RESOURCES DEVELOPMENT), [1998] 4 F.C. 65 (C.A.)

Termination of employment — Unjust dismissal — Former employee filing complaint of unjust dismissal under Canada Labour Code despite release discharging employer from claims, actions in consideration of lump sum payment — Adjudicator appointed by Minister under Code, s. 242 to hear complaint — Minister's jurisdiction to appoint adjudicator at issue — Former employee entitled to file complaint notwithstanding settlement — Under s. 168, Code Part III applies regardless of settlement — Parties may not contract out of Code Part III — Adjudicator empowered only to

LABOUR RELATIONS—Concluded

consider whether dismissal unjust — Minister may have exercised discretion not to appoint adjudicator had employer provided details of settlement.

NATIONAL BANK OF CANADA V. CANADA (MINISTER OF LABOUR), [1997] 3 F.C. 727 (T.D.)

CLRB Chair appointed during good behaviour for 10 years — Governor in Council ordering removal before expiry of term based on Auditor General's findings travel, hospitality expenses not reasonable compared to those of others in similar positions — Inquiry under Judges Act, s. 69 not pre-condition to removal of person appointed pursuant to Act of Parliament to hold office during good behaviour — No denial of fundamental fairness in procedure leading to removal order.

WEATHERILL V. CANADA (ATTORNEY GENERAL), [1999] 4 F.C. 107 (T.D.)

MARITIME LAW

Whether bailment or sale of goods — Canada shipping agent as ad hoc necessaries supplier — Application to recover from sale price of ship value of bunkers — Supplier agreeing to sell bunkers to shipping agent — Bunkers delivered to ship — Agent not issuing invoice, but obtaining authorization from ship's owner to deduct price of bunkers from freight — Ship sold by Court-approved sale before voyage — That no invoice issued consistent with bailment, rather than sale — Indicating intention to delay transfer of property in bunkers — Placing of bunkers on board not consistent with absolute appropriation, given Canserv's contrary intention — Seller's intention paramount — Considering terms of agreement between Canserv, ship's owner, conduct of those involved, surrounding circumstances, Canserv showing satisfactory manifest intention, contemporary with making of bunker supply agreement with owners, to delay passing of property in bunkers — No evidence of unconditional sale.

GOVERNOR AND COMPANY OF THE BANK OF SCOTLAND V. *NEL* (THE), [1999] 2 F.C. 578 (T.D.)

Carriage of Goods

Appeal from trial judgment allowing action for damages for loss of part of cargo of lumber stowed on deck — Trial Judge holding loss caused by master's negligence — Bills of lading, Clause 8 exempting carrier from liability for loss, damage to deck cargo howsoever caused — Trial Judge holding Clause 8 not excluding liability for negligence — Applying third test for construction of such exclusion clause in Canada Steamship Lines Ld. v. The King — *Canada Steamship* tests not displaced by *Hunter Engineering Co. v. Syncrude Canada Ltd.* — Latter distinguishable, based on 1980 H.L. decision; subsequent English cases not indicating ratio thereof should be preferred to *Canada Steamship* — English, Canadian courts continuing to apply *Canada Steamship* — Apart from statute, and subject to terms of contract, at common law carrier of goods by sea undertaking to carry goods at own absolute risk, except for loss, damages caused by acts of God or of Queen's enemies or inherent defect in goods

MARITIME LAW—Continued

Carriage of Goods—Concluded

themselves or default of shipper — Also impliedly undertaking ship seaworthy unless relieved of that obligation by contract — Applying *Canada Steamship* tests, Clause 8 broad enough to exclude "negligence", but not intended to exclude liability for negligence — Intended to exclude liabilities other than negligence imposed at common law i.e. damage naturally concomitant with deck stowage including damage by sea-water, rain or wind — Implied warranty of seaworthiness exposing appellants to another potential head of liability apart from negligence to which Clause 8 would also apply.

CANADIAN PACIFIC FOREST PRODUCTS LTD.-TAHSIS PACIFIC REGION V. *BELTIMBER* (THE), [1999] 4 F.C. 320 (C.A.)

Appeal from order allowing stay of proceedings — Statement of claim alleging cargo "carried and handled" by three defendants — Standard liner bill of lading jurisdiction clause providing for dispute resolution in country where carrier having principal place of business — Jurisdiction clause not void for uncertainty as matter of principle — Not ambiguous — Application question of fact — No precedent for saying lack of information as to names of parties, vessels, principal places of business resulting in uncertainty sufficient to invalidate bills of lading — Standard clause applied for ages in industry — If application giving rise to too much uncertainty, relief not to declare clause invalid, but for Court to exercise discretion not to enforce it — Onus on defendant to show jurisdiction clause applied — Must show (1) carrier; (2) where principal place of business is — Prothonotary erred in relying on Professor Tetley's joint venture of owners, charterers principle — Stringent test for principal place of business — Imposing on defendant obligation to come forward with as much information as possible, as such information within defendant's control, not generally available to plaintiff — Defendant herein saying nothing as to location of principal place of business, names of officers, where control over employees, business exercised — All necessary information defendant required to provide to Court, within its knowledge — Courts may make negative inferences where party failing to bring forward evidence within its knowledge necessary to resolution of dispute — To allow carrier to get away with so little evidence would make mockery of jurisdiction clause.

JIAN SHENG CO. V. GREAT TEMPO S.A., [1998] 3 F.C. 418 (C.A.)

Appeal from Trial Division order striking out third party claim against respondent for want of jurisdiction — Claim in main action arising out of carriage of cargo of canola oil — Cargo damaged during voyage due to defective drums — Third party claim for negligent misrepresentation drums could withstand stresses of sea transport — Integrally connected to Court's admiralty, maritime jurisdiction — Words "maritime", "admiralty" to be interpreted within modern context of commerce, shipping.

PAKISTAN NATIONAL SHIPPING CORP. V. CANADA, [1997] 3 F.C. 601 (C.A.)

MARITIME LAW—Continued

Contracts

Defendants claiming, by counterclaim, costs of discharging, restowing plaintiffs' on-deck lumber cargo — Lumber shifted when ship struck by large wave — Ship diverted before reaching final destination — Responsibility for discharge, restowing expenses determined by bill of lading, freight agreement — Stowage responsibility of carrier, not shipper or other cargo interest — Bill of lading addressing condition of goods themselves, not condition of stowage — Defendants not liable to plaintiffs under bill of lading — Under common law, carrier having duty to preserve plaintiffs' cargo — Carrier not entitled to additional compensation for unforeseen costs while fulfilling contractual responsibilities — Common law principles of bailment, *quantum meruit*, agency of necessity, unjust enrichment not applicable.

CANADIAN PACIFIC FOREST PRODUCTS LTD. v. TERMAR NAVIGATION CO., [1998] 2 F.C. 328 (T.D.)

Application to set aside statement of claim, strike out *in rem* portion of statement of claim, set aside arrest warrant — Agreement for carriage of coal from Vancouver to Turkey on *Bocsa* embodied in Americanized Welsh Coal Charter between International Broking Agency, disponent owner, and plaintiff — Upon arrival in Vancouver, ship detained by Coast Guard because of deficiencies — Unable to load cargo — Action in contract, tort commenced — Arrest warrant based on claim for breach of contract — Application allowed with respect to portions of statement of claim relating to breach of contract — Must be *in personam* claim against shipowner to give rise to *in rem* claim against ship — Abuse of process, scandalous, frivolous, vexatious for plaintiff subcharterer to claim against owner, arrest ship when no privity of contract with owner — Claim in contract abusive, futile — Arrest warrant not set aside as inaccuracy, failure to refer to tort claim not enabling plaintiff to obtain relief not available had correct relief been set out in affidavit to lead warrant.

MARGEM CHARTERING CO. INC. v. *BOCSA* (THE), [1997] 2 F.C. 1001 (T.D.)

Motions to stay Federal Court action for damages to cargo in favour of (i) arbitration in London in accordance with contract of affreightment; (ii) litigation in Japan in accordance with bill of lading — Upon commencement of action, P&I issuing letter of undertaking to file defence to Federal Court action in consideration of ship not being arrested — Motions denied — Letter of undertaking superseding contractual arbitration provision, bill of lading jurisdiction clause — Constituting strong reason to depart from *prima facie* rule, jurisdiction clauses must, as contractual undertakings, be honoured — Substantial factors to deny Tokyo District Court as venue for litigation also constituting strong reasons.

METHANEX NEW ZEALAND LTD. v. *KINUGAWA* (THE), [1998] 2 F.C. 583 (T.D.)

Bill of lading marked "FISLO" (Free in Stow, Liner Out), indicating shipper's obligation to load, stow, with cost of discharge included in ocean freight — Commercial invoice indicating sale FOB — When goods sold FOB, immediate transfer

MARITIME LAW—Continued

Contracts—Concluded

of risk on loading to buyer — Cash against documents not defeating intent contract terms be FOB — Once cargo loaded, stowed, supplier having no further interest.

OLBERT METAL SALES LTD. v. CERESCORP INC., [1997] 1 F.C. 899 (T.D.)

Creditors and Debtors

Motion by necessaries supplier to compel production of documents showing any collateral benefits obtained by mortgagee for which should account, making more funds available to lien claimants — Procedure preliminary to determination of priorities to proceeds of judicial sale of ship — Bank's claim as mortgagee will substantially exhaust sale proceeds — Documents relevant if necessaries claimants, holding only statutory rights *in rem*, able to require Bank to marshal — Marshalling equitable right whereby Court ordering creditor, having secured right on more than one res or fund belonging to debtor, or security from two or more debtors for same debt, to exercise right on security in manner in best interests of all creditors — Formerly, unsecured creditors had right to benefit of marshalling — Overlooked in recent Canadian cases concerned with in personam right of creditors — Those cases limited to facts, not to be followed as contrary to equitable doctrine of marshalling — Production of commitment letter ordered.

GOVERNOR AND COMPANY OF THE BANK OF SCOTLAND v. *NEL* (THE), [1998] 4 F.C. 388 (T.D.)

Motion for order of payment of net proceeds of sale of ship to trustees in bankruptcy — Ship arrested in support of Federal Court action for fees for stevedoring, related services provided in U.S.A. — Shipowners declared bankrupt in Belgium — Plaintiff entitled to maritime lien in recognition of status of claim in U.S.A. — Whether claim secured claim determined by Canadian maritime law — Maritime lien, long recognized in maritime law as secured claim attaching *in rem* to ship, secured claim — Maritime lien attaching before shipowners' bankruptcy enforceable — Claim based thereon may be realized from proceeds of sale of ship without restriction under Bankruptcy and Insolvency Act — Plaintiff secured creditor entitled to payment from proceeds of sale in priority to payment to trustees.

HOLT CARGO SYSTEMS INC. v. ABC CONTAINERLINE N.V. (TRUSTEE OF), [1997] 3 F.C. 187 (T.D.)

Harbours

Government Wharves Regulations imposing charge per passenger solely in respect of cruise vessels engaged in voyage during which passengers on board for at least one overnight period — Vessels offering day cruises, using dock in same manner, for same purposes not subject to charges — Public Harbours and Port Facilities Act, s. 3 definition of "national ports policy" including objective of accessibility, equitable treatment in movement of goods, persons to users of Canadian ports — Act permitting raising revenue, but only in connection with use made of facilities — Charges not

MARITIME LAW—Continued

Harbours—Concluded

complying with principle of equitable treatment — Definition of "cruise vessel" in Regulations invalid.

CANADA V. ST. LAWRENCE CRUISE LINES INC., [1997] 3 F.C. 899 (C.A.)

Insurance

Policy incorporating company's by-laws requiring certain disputes be submitted to arbitration — Appeal from order setting aside order staying action under marine insurance policy for total constructive loss of ship, referring matter to arbitration — Whether dispute required to be submitted to arbitration — Rules of construction of insurance contracts — Nature of dispute; disputes arbitration clause covers — Dispute whether claim covered by policy — S. 15 of by-laws providing disputes arising out of affairs of company between member or shareholder and company with respect to claim against company shall be determined by arbitration — Not including disputes under s. 13 — Use of "policy holder", "claimant" in s. 13, unlike "member or shareholder" in s. 15 indicating s. 13 covering disputes under insurance policy — Dispute as to coverage between member or shareholder and company required to arise out of affairs of company to be within s. 15 — Use of "affairs", "business" in by-laws indicating different meanings — Examples cited of disputes between member or shareholder and company arising out of latter's affairs, involving interpretation/application of by-laws or claim against company, but not under insurance policy — S. 15 not applicable to dispute herein.

OCEAN FISHERIES LTD. V. PACIFIC COAST FISHERMEN'S MUTUAL MARINE INSURANCE CO., [1998] 1 F.C. 586 (C.A.)

Practice

Motion to strike out portions of defence in limitation of liability action — Limitation of liability under Canada Shipping Act (CSA) and 1976 Convention on Limitation of Liability for Maritime Claims — Damage caused by dumb barge, in tow of tug, to CPR bridge — Whether allegations of "wilful default" (as used in CSA) sufficiently close to "intent to cause loss or committed recklessly with knowledge of probable result" in Convention, Art. 4 — Whether, despite S.C.C. decision in *The Rhone*, limitation fund should be based, according to flotilla principle, on combined tonnages of tug, barge — Not obvious allegation of recklessness could not succeed — Allegation based on *res ipsa loquitur* struck as no longer applicable in Canada — Allegation of statutory breach struck as nominate tort of statutory breach not recognized in Canada.

BAYSIDE TOWING LTD. V. CANADIAN PACIFIC RAILWAY, [2000] 3 F.C. 127 (T.D.)

Motion for summary judgment — Action to recover expenses incurred to raise barge sunk in 1970 while carrying cargo of bunker oil — Initial oil spill extensively damaging shore of Magdalen Islands — Small, intermittent oil leaks since giving rise

MARITIME LAW—Continued

Practice—Continued

to minor preventive measures — 1992 report recommending immediate preventive action considering progressive deterioration of barge, risk of massive oil escape — In 1996 barge raised — 1997 action alleging liability based on Canada Shipping Act, Part XVI; negligence, nuisance — (1) Act, s. 677(10) providing no action in respect of matter referred to in subsection (1) lies unless commenced (*a*) where pollution damage occurred, within 3 years after day pollution damage occurred, and within 6 years after occurrence causing pollution; or (*b*) where no pollution damage occurred, within 6 years after occurrence — S. 677(1)(*a*) imposing liability on ship owner for pollution damage, applied since damage occurred in 1970 — Assuming s. 677(1)(*b*), imposing liability on ship owner for preventive measures, applied, "occurrence" meaning event causing, likely to cause pollution damage, based on history, purpose of Part XVI, consequences of proposed interpretations — S. 677(10) barring claim as out of time — Reasonable grounds for Minister to believe pollution damage from barge likely before 1992 report on which now relies — Proper application of discoverability principle requiring time to start running from 1970 — (2) S. 681 exempting owner of Convention ship from liability for matters referred to in s. 677(1) otherwise than as provided by Part — As unclear barge still Convention ship, J.D. Irving, Limited still owner, s. 681 may not apply — Also torts of negligence, nuisance may be of continuing nature — No evidence on alleged torts, when might have occurred — Impossible to find facts necessary to release defendant from claim for liability in tort outside scope of s. 677(1) — (3) Liability under Part XVI limited to owner of vessel — While definition of owner including charterer, bare-boat charter to Atlantic Towing Ltd. terminated without notice in accordance with conditions upon sinking of vessel — Part XVI action dismissed against defendants other than J.D. Irving, Limited — (4) S. 84(1) (enacting Part XVI) expressly applies in respect of expenses incurred after coming into force — Event/occurrence taking place prior to April 24, 1989 when Part XVI not in force may produce legal effects, give rise to claim thereunder after such time — Since claim against SOPF arising entirely under statute, provision must be given full force, effect — Presumption against retroactivity displaced — (5) S. 710(1)(*a*) permitting claim to be filed with Administrator of Ship-source Oil Pollution Fund for expenses referred to in s. 677(1) in respect of oil pollution damage where oil pollution damage occurred within 2 years after day damage occurred, and 5 years after occurrence causing damage — Claim against SOPF time-barred — (6) S. 699 providing International Oil Pollution Compensation Fund liable where claimant unable to obtain full compensation from ship owner after occurrence — Fund's liability under Part XVI contingent upon liability under Fund Convention — Fund Convention coming into effect in 1978 — Acceded to by Canada more than 10 years later — No indication in Fund Convention intended to have retroactive effect — Presumption against retroactivity fully applicable — (7) Claim time-barred against IOPC Fund under s. 677(10).

CANADA V. J.D. IRVING, LTD., [1999] 2 F.C. 346 (T.D.)

Barge, in tow of tug, striking CPR bridge — Motion to stay damages action so defendants might pursue limitation action under 1976 Convention without interruption

MARITIME LAW—Continued

Practice—Continued

— Consolidation of damages and limitation actions as alternative to stay rejected as actions incompatible — *Mon-Oil Ltd. v. Canada* two-part test (whether continuation of action would cause prejudice or injustice to defendants and whether would be unjust for plaintiff in liability action) appropriate where, as here, stay of Court's own proceeding at issue — Stay granted.

CANADIAN PACIFIC RAILWAY CO. V. *SHEENA M* (THE), [2000] 4 F.C. 159 (T.D.)

Arbitration — Plaintiff may have ship arrested in Canada to obtain security for arbitration award at New York — Where plaintiff has no assets within jurisdiction of Court, defendant may not ask Court to order security for counterclaim at arbitration.

FRONTIER INTERNATIONAL SHIPPING CORP. V. *TAVROS* (THE), [2000] 2 F.C. 427 (T.D.)

Arbitration — On motion for stay of Federal Court action for breach of charter party in favour of arbitration at New York, Prothonotary granted stay but awarded defendant shipowner costs of action as "interim protection" — Appeal by way of motion from part of order awarding costs against plaintiff — Interim protection within Commercial Arbitration Code, Art. 9 not permitting costs to be awarded in advance, without determination on merits — Such award payment, not "interim", and not "protective" in nature.

FRONTIER INTERNATIONAL SHIPPING CORP. V. *TAVROS* (THE), [2000] 2 F.C. 445 (T.D.)

Motions to stay Federal Court action for damages to cargo in favour of (i) arbitration in London in accordance with contract of affreightment; (ii) litigation in Japan in accordance with bill of lading — Defendants not denying responsibility for contamination of cargo — Party may not give notice of arbitration, Court will not order stay of action in favour of arbitration, if no genuine dispute — Usually application for stay of action in Federal Court, commenced contrary to contractual agreement to submit disputes to foreign court, must be allowed in accordance with general rule to honour contractual undertakings, unless strong reasons by virtue of which justice requiring trial should take place where action commenced — Substantial factors to deny Tokyo District Court as litigation venue — Must be *bona fide* reason to litigate in another jurisdiction — Defendants not showing *bona fides* by making necessary concessions which would allow procedure in another jurisdiction with minimum of prejudice to plaintiff i.e. security for claim, waiver of limitation provisions.

METHANEX NEW ZEALAND LTD. V. *KINUGAWA* (THE), [1998] 2 F.C. 583 (T.D.)

Service — Motion to declare statement of claim validly served upon defendant shipowner under r. 135 — Crew member seriously injured when boarding ship — Medical expenses paid by shipowner through law firm as business agent — Plaintiff suing shipowner by serving statement of claim upon agent — Service not accepted —

MARITIME LAW—Continued

Practice—Continued

R. 135 dealing with personal service on foreign entity with business roots in Canada — Securing care, hospitalization of crew member part of ordinary business of shipowner — R. 135 requiring entering into business in Canada — Shipowner foreign enterprise making use of Canadian entity in order to assist in business transaction — Properly served under r. 135.

NORTH SHORE HEALTH REGION V. *ALPHA COSMOS* (THE), [1999] 1 F.C. 243 (T.D.)

Service — Appeal from Prothonotary's order delivery of statement of claim to Vancouver law firm of Campney & Murphy valid service under Federal Court Rules, 1998, r. 135 — Action seeking to recover costs of hospital care of crew member employed by defendant, injured when boarding ship — Law firm paying hospital bills until sending August 1998 notice "client" shipowner no longer accepting responsibility for medical costs — R. 135 permitting service on person resident outside Canada by personally serving person resident in Canada where former, in ordinary course of business, entering into business transactions in Canada in connection with which regularly making use of services of latter, and made use of such services in connection with business transaction in proceeding arising therefrom — R. 135 interpreted strictly as exception to general rule originating documents should be served personally — Arrangements to discharge legal liability for medical expenses of crew member constituting entering into business transactions in Canada in ordinary course of business — Law firm rendering services in connection with business transaction when paid hospital bills for which defendant liable — Four monthly payments establishing sufficient "regularity" for purpose of r. 135 — Law firm acting as business agent — Although substantial identity of interest between defendant, P. and I. Club, law firm representing only latter so that any services rendered to defendant not as solicitor in this claim — Service complying with r. 135 — Alternatively service validated under r. 147 — Defendant's knowledge of statement of claim inferred either from insurer, or fact law firm instructed to appear on this motion on behalf of defendant and to defend claim by injured man's wife.

NORTH SHORE HEALTH REGION V. *ALPHA COSMOS* (THE), [1999] 1 F.C. 583 (T.D.)

Motion by supplier of steel rods arriving damaged at Vancouver to discontinue as plaintiff four and one half years after action for damages commenced by subrogated cargo underwriters — Motion dismissed — Some evidence damages occurred prior to or during loading while supplier owner — Sufficient to give supplier interest as plaintiff — Potential prejudice to defendants, late date, possible motivation avoidance of discovery, plaintiff's location in remote part of world, likelihood plaintiffs uncooperative, also considered.

OLBERT METAL SALES LTD. V. CERESCORP INC., [1997] 1 F.C. 899 (T.D.)

Scope of cross-examination on affidavits of claim in proceeding to determine priorities to ship sale proceeds — Extent of deponent's duty to seek information in

MARITIME LAW—Continued

Practice—Concluded

case of corporate affidavit — Extent of production of documents on which deponents of affidavits might be cross-examined.

ROYAL BANK OF SCOTLAND PLC. V. *GOLDEN TRINITY* (THE), [2000] 4 F.C. 211 (T.D.)

Appeal from stay of action for damage to cargo in favour of London arbitration — Bills of lading for two shipments of steel coils incorporating terms and conditions of charter party, including law and arbitration clauses — Both relevant charter parties, time and voyage, providing for arbitration at London, English law governing — (1) Arbitration clauses not required to expressly extend ambit to disputes under bill of lading — Deemed incorporated into bill of lading as three conditions precedent met: (i) bill of lading specifically referring to incorporation of arbitration clause in charter party; (ii) arbitration clause so worded as to make sense in context of bill; (iii) arbitration clause not conflicting with express terms of bill — (2) Voyage charter party not unenforceable because shipowner not party thereto — (3) Once arbitration clause in another document incorporated into bill of lading, consignee bound — Since arbitration clauses essentially same, unnecessary to decide which charter party relevant document — Arbitration clauses not unenforceable on ground of uncertainty because bills of lading not specifically identifying in which charter party arbitration clause found — Appellant bound by provision in charter party even if no knowledge thereof when accepted bills of lading — Parties, sophisticated, familiar with exigencies of marketplace — Appellant not informing itself of terms — Hamburg Rules, in force in Romania, not applicable to provide choice of forum for arbitration as contrary to choice of law provisions in both charter parties, irrelevant to whether stay should be granted — Under Commercial Arbitration Code, once court finds arbitration clause effectively incorporated into bills of lading, not unenforceable, must grant stay in favour of arbitration.

THYSSEN CANADA LTD. V. *MARIANA* (THE), [2000] 3 F.C. 398 (C.A.)

Salvage

Underwriter claiming salvage from sale proceeds of salved vessel — When vessel sank, plaintiff denying insurance claim as suspected owner of scuttling vessel — (1) Canada Shipping Act, s. 452 providing for award payable by owner of wrecked ship, not applicable as not granting right to look to salved ship for salvage award — Even if entitled to award under International Convention on Salvage 1989, Art. 12 underwriter also entitled to salvage award at common law — Elements necessary to constitute salvage: (i) danger to salved vessel; (ii) voluntary rendering of services; (iii) success or contribution to success — Location, recovery of vessel from deep water where suffering ongoing damage satisfying (i), (iii) — Underwriter, having denied coverage, acting as volunteer in that no duty or overriding self-serving interest precluding salvage claim — (2) Generally underwriter may not claim salvage as interested in vessel — After ship abandoned at sea, underwriter salving ship entitled to claim salvage if hiring salvage ship, thus becoming owners of salving ship —

MARITIME LAW—Continued

Salvage—Concluded

Underwriter herein hiring ship, equipment, personnel to recover vessel — Oral agreement whereby owners of ships, equipment, personnel agreeing not to claim salvage — Authorities not denying standing of non-demise charterer to claim salvage — Policy justification for salvage to encourage salvage services — Also important aspect of public policy to encourage discovery of insurance fraud — Salvage award herein appropriate expression of community values or public policy — Self-interest not barring salvage as (i) result of intended salvage speculative; (ii) to negate salvage award, services must be rendered with intent not to claim salvage — Underwriter intending salved value to go toward cost of salvage — Meritorious agency cases distinguished — (3) Amount of salvage discretionary — Factors for assessment of quantum set out in *Humphreys et al. v. M/V Florence No. 2* considered — Indicating award should be generous — $12,000 awarded on salved value of $30,100.

GENERAL ACCIDENT INDEMNITY CO. V. *PANACHE IV* (THE), [1998] 2 F.C. 455 (T.D.)

Torts

Collision between fishing vessel and tug/barge combination at night — Possibly confusing lighting arrangement on tug/barge and use of searchlight — Similar fact evidence of two fishermen's encounter with tug/barge at night in same vicinity played critical role in ultimate decision on liability — However, Trial Judge's failure to make clear evaluation as to whether witnesses' evidence logically probative constituting error in law and new trial ordered.

KAJAT V. *ARCTIC TAGLU* (THE), [2000] 3 F.C. 96 (C.A.)

Action against ship to recover damages occasioned by oil spill at plaintiff's refinery — Both parties at fault — Contributory negligence bar no longer to be applied — In maritime law, liability for tort should be borne in relation to degree of fault of parties following tradition in collision cases — Cost of clean-up apportioned equally between parties.

NEWFOUNDLAND PROCESSING LTD. V. *SOUTH ANGELA* (THE), [1997] 1 F.C. 154 (T.D.)

Self-propelled barge struck rock in river, capsized, sank — Allegation Coast Guard breached statutory duties in failing to set standards, approving of construction sketch — Limitation of actions — Action commenced three days short of two years after death of Master who was plaintiffs' husband/father — Canada Shipping Act, s. 649 one-year limitation period applicable to bar all claims save estate's claim by means of survival action — Two-year period under Ontario Trustees Act would apply to survival action through incorporation by reference under Federal Court Act, s. 39 and Crown Liability and Proceedings Act, s. 32.

NICHOLSON V. CANADA, [2000] 3 F.C. 225 (T.D.)

MARITIME LAW—Concluded

Torts—Concluded

Plaintiffs seeking damages for alleged act of negligence by public servants — Ships delayed on St. Lawrence Seaway due to weather conditions, strike by Ships' Crews Groups (public servants) — Contracts with shippers, receivers of cargo not performed — Defendant failing to make timely designation, under PSSRA, s. 78, of employees required to ensure safety, security of public — Canadian Coast Guard's primary responsibility under Shipping Act to ensure safety, security of those using waterways — No duty to take all reasonable means to enable plaintiffs' ships to transit Seaway without delays.

THE CSL GROUP INC. V. CANADA, [1997] 2 F.C. 575 (T.D.)

NATIVE PEOPLES

Actions for reimbursement of tuition, instructional fees, travel, accommodation costs for Aboriginal children not living on reserve — Crown agreeing to pay teachers' salaries under Treaty No. 11 — Actions dismissed — Principles of treaty interpretation — Treaty benefits not extending beyond treaty area.

BEATTIE V. CANADA (MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT), [1998] 1 F.C. 104 (T.D.)

Respondent registered Mohawk of Akwesasne residing on Cornwall Island — Entered Canada from New York State with various goods — Declared goods at customs office but refused to pay customs duties alleging Aboriginal right, treaty rights — Aboriginal right claimed right to be exempted from payment of customs duties when entering Canada from U.S.A. — Trial Judge failing to determine geographical scope of right — Right limited to non-commercial trade of goods acquired in New York State with other First Nation communities in Quebec, Ontario.

MITCHELL V. M.N.R, [1999] 1 F.C. 375 (C.A.)

Capacity of Indian bands to sue and be sued — No need for separate representative as guardian *ad litem* for those under legal disability.

MONTANA BAND V. CANADA, [1998] 2 F.C. 3 (T.D.)

Crown claiming privilege in breach of trust actions brought by Indian bands relating to Crown management of oil, gas resources and revenues derived therefrom in respect of reserve lands surrendered by three bands — Documents for which legal advice privilege claimed ordered to be produced in light of special trust-like relationship between Crown, Indians — Production ordered for documents relating to Crown programs, services including reference to oil and gas assets, or financial revenues therefrom.

SAMSON INDIAN NATION AND BAND V. CANADA, [1998] 2 F.C. 60 (C.A.)

Shubenacadie Band Council administers federally funded welfare program — Denying social assistance to non-Indian spouses of Band members living on Reserve

NATIVE PEOPLES—Continued

Lands

Crown seeking to strike references in statement of claim to Framework Agreement, providing for delegation of federal powers so that First Nations may withdraw lands from management provisions of Indian Act — Provincial legislation governing division of matrimonial property not applicable to reserve land because conflicting with Indian Act — Indian Act, Framework Agreement not dealing with property rights of Indian women living on reserves on marital breakdown — Applying test in *Frame v. Smith*, [1987] 2 S.C.R. 99, arguable Crown having fiduciary duty to Indian women on reserves to give them same property right on marriage breakdown as enjoyed by other Canadian women — Also arguable delegation of fiduciary duty abdication of legislative function by Crown — Impugned portions of statement of claim not futile.

B.C. NATIVE WOMEN'S SOCIETY V. CANADA, [2000] 1 F.C. 304 (T.D.)

Appeal from Band Board of Review's decision appellant subject to taxation by Band for use, occupation of reserve lands over which its fibre optic cable hung — Indian Act, s. 83 permitting bands to tax land, interest in land in reserve — For land to be within reserve, must satisfy definition of "reserve" in s. 2(1) — 1956 order in council authorizing taking of certain reserve lands by province — Application of principles of interpretation, special principles relevant when native interests involved — Federal Crown must display plain, clear intention to extinguish Native right — Separate tests for extinguishment, ascertaining nature of interest taken — As to extinguishment, old Highway Act indicating province's intention to extinguish all interests, transfer to itself fee simple in lands taken for highway purposes — Nothing in 1956 order in council detracting from intention expressed in Highway Act — Use of "take", "lands", "right of way", "administration and control" considered — Reservation of mineral, mining rights, implying absolute transfer of surface rights — Payment of lump sum implying absolute transfer — What province sought to acquire, federal Crown intended to transfer — Province acquired absolute title to surface of land — As not exercising any powers in corridor lands, Band not retaining sufficient interest to tax use thereof.

BC TEL V. SEABIRD ISLAND INDIAN BAND, [2000] 4 F.C. 350 (T.D.)

Indian Band suing Crown Federal for breach of fiduciary duty relating to construction of dam by Manitoba — Dam causing extensive flooding on Indian reserve — Manitoba accepting responsibility for flooding, providing Band with compensation land — Crown refusing to ratify compensation agreement, but accepting transfer of compensation lands — Band not satisfied with compensation land for losses suffered by members — Whether Crown liable for breach of fiduciary duty owed to Band — Plaintiffs' case based on Indian Act, s. 18(1) — Fiduciary duty arising only upon surrender of land to Crown — Defendant in breach of fiduciary duty to Band in failing to address deficiencies of compensation agreement in timely manner, to consult with Band.

FAIRFORD FIRST NATION V. CANADA (ATTORNEY GENERAL), [1999] 2 F.C. 48 (T.D.)

NATIVE PEOPLES—Continued

Lands—Continued

Action for declarations, damages re Aboriginal rights in land and breach of trust, fiduciary, legal and equitable duties by Crown — Plaintiffs say ancestors on land since time immemorial, prior to The Royal Proclamation, 1763 — Lands exploited by others since 1899 — Statement of claim not establishing material facts to disclose cause of action in damages, or for most of declaratory relief sought — Plaintiffs must establish facts demonstrating legal right stemming from Aboriginal title or Royal Proclamation; concomitant duty of Crown, breach thereof, damages arising therefrom — Plaintiffs given opportunity to amend statement of claim to plead, in conformity with Rules, facts underlying claims.

KELLY LAKE CREE NATION v. CANADA, [1998] 2 F.C. 270 (T.D.)

Negotiation of aboriginal land claims in context of treaty process — Minister of Canadian Heritage desiring to create Torngat National Park in Northern Labrador — Negotiations thereon between Minister, Newfoundland and Labrador Government, and Labrador Inuit Association — Nunavik Inuit, represented by Makivik Corp., with whom Federal Crown engaged in comprehensive land claims settlement negotiations, excluded from process because provincial government not recognizing them — Duty to consult and negotiate in good faith — Agreement in principle between federal government and applicant constituting recognition park cannot be established until negotiations completed.

MAKIVIK CORP. V. CANADA (MINISTER OF CANADIAN HERITAGE), [1999] 1 F.C. 38 (T.D.)

Lots located on Indian reserve, surrendered to Crown by Indian Band for leasing — Crown entering into Master Agreement with private developer to subdivide land, install services — Developer receiving leases for each subdivided lot, assigning them to individuals for residential use — Annual rent under lease to be 6% of "current land value" — Whether "current land value" meaning value of 99-year leasehold on Indian Reserve or fee simple value of land — Parties intending Band to be entitled to receive as rent 6% of fee simple value of land — Band's intention to receive fair, conservative return on value of capital investment — Case law on Aboriginal land valuation reviewed — "Current land value" meaning fee simple value of land — Indian reserve feature not diminishing market value of property — Trial Judge wrong in imposing 50% reduction on reserve land — Parties intending land to be valued in unserviced form — Costs of servicing, development to be deducted from fee simple value of lots to determine "current land value".

MUSQUEAM INDIAN BAND V. GLASS, [1999] 2 F.C. 138 (C.A.)

Appeal from Motions Judge's decision setting aside Minister of Fisheries and Ocean's decision fixing turbot quotas in area adjacent to Nunavut Settlement Area (NSA) — Land claims agreement creating relationship between Nunavut Inuit, Government of Canada respecting co-ordinated wildlife management within, outside geographic area covered by Agreement — S. 15.3.4 requiring Government to seek

NATIVE PEOPLES—Continued

Lands—Continued

advice of Nunavut Wildlife Management Board (NWMB) with respect to management decisions in adjacent zones affecting substance, value of Inuit harvesting rights, opportunities within marine areas of NSA — Minister increasing total allowable catch, but decreasing Nunavut Inuit's share thereof — Appeal dismissed, but portion of order requiring reconsideration in accordance with Motions Judge's reasons deleted — (1) Motions Judge erred in concluding Minister's decision infringing on NWMB's sole authority to establish levels of allowable harvest in NSA pursuant to s. 5.6.16 — S. 5.6.16 applicable in NSA only — Conditions of exploitation of area concerned governed by Art. 15 — (2) Also erred in concluding Minister failed to consider advice of NWMB — Procedural restrictions on Minister's exercise of discretion imposed by S. 15.3.4 satisfied when Minister in good faith seeks, considers NWMB's views — NWMB's function advisory, Minister not bound by such advice — Clear evidence Minister sought, received NWMB's advice — S. 15.4.1 permitting several Boards to advise, make recommendations — When they do so, Government obliged to consider it, but not obliged to seek their advice with respect to decisions affecting defined marine areas — (3) S. 15.3.7 obliging Minister to give "special consideration" to principles of adjacency, economic dependence — Purposive interpretation indicating parties intended to establish principle of equity, not one of priority, in distribution of commercial fishing licences — "Special consideration" meaning particular, appropriate attention, when balancing competing interests at stake, with view to promoting fair balance in distribution of commercial fishing licences — Application of principles should be reflected in final distribution of licences, quotas — (4) In absence of reasons for allocation of quotas, circumstances indicating Minister not giving special consideration to adjacency, economic dependence principles or misconstrued principles — Minister aware of Nunavut Inuit's demands for additional quotas based on adjacency, economic dependence principles — Notwithstanding 20% increase of Canada's share of TAC, allocating only slight portions of increase to Nunavut Inuit, thereby reducing share of overall TAC.

NUNAVUT TUNNGAVIK INC. V. CANADA (MINISTER OF FISHERIES AND OCEANS), [1998] 4 F.C. 405 (C.A.)

Crown obtaining absolute surrender of reserve land as needed to expand customs facilities — Most of surrendered land remaining unused for customs facilities, other public purpose for 40 years — Crown refusing to return land to Band — Inalienability of Indian reserve land except upon surrender to Crown — Crown in breach of fiduciary duty — Constructive trust appropriate remedy as giving back to Band interest in surrendered land.

SEMIAHMOO INDIAN BAND V. CANADA, [1998] 1 F.C. 3 (C.A.)

Calculation, by Manager responsible for discharging Crown's fiduciary and statutory obligations under Indian Oil and Gas Act, of royalty on production of natural gas under leases located on reserve land — Minister of Indian Affairs and Northern Development correctly concluding applicant required to compute Gas Cost Allowance on basis of

NATIVE PEOPLES—Continued

Lands—Concluded

original capital cost of relevant assets reduced by subtracting investment tax credits earned under Income Tax Act — However, decision set aside as applicant not given opportunity to respond and as decision given retroactive or retrospective operation.

SHELL CANADA LTD. V. CANADA (ATTORNEY GENERAL), [1998] 3 F.C. 223 (T.D.)

Minister leasing land on Indian reserve under Indian Act, s. 58(3) — Respondents given rights of exclusive possession, occupation of two lots on reserve — Intending to develop manufactured home park on one lot for use of non-Indians — Band Council members opposing project — Lease issued to respondent corporation despite Band's opposition — No fiduciary obligation owed by Crown to Band — Standard of review of Minister's decision reasonableness — Decision unreasonable as Band's concerns discarded without proper consideration.

TSARTLIP INDIAN BAND V. CANADA (MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT), [2000] 2 F.C. 314 (C.A.)

Registration

F.C.T.D. Judge denying declarations 1985 Indian Act amendments regarding control of band membership lists infringing Indians' aboriginal, treaty, Charter rights — Judge characterizing s. 35 Constitution Act, 1982, Indian Act as racist legislation similar to apartheid in South Africa — Opposed to special status for Indians — Reluctant to accept oral history of Indians as "historical stories . . . become mortally skewed propaganda" — Judgment set aside for reasonable apprehension of bias.

SAWRIDGE BAND V. CANADA, [1997] 3 F.C. 580 (C.A.)

Taxation

Exemptions — Personal property of Indian situated on reserve — Appellant employed at Government-funded hospital located adjacent to reserve (formerly on reserve), serving mostly status Indians on reserve — Difficulty in formulating rule governing *situs* of intangible property (such as wages) — Purpose of legislative provision must be considered in selecting criteria for determining *situs* — Policy to prevent erosion of Indians' property held *qua* Indians — Purpose not to remedy Indians' economic disadvantage — Indians' employment income not tax exempt if earned in "commercial mainstream" — Connecting factors test — Weight to be assigned each factor varies from case to case — Necessity for purposive interpretation to preserve substance of tax exemption, economic climate of reservations having changed — Trial Judge accorded excessive weight to geographical location of employment, employer's place of residence — More weight to be placed on: circumstances of taxpayer's employment, place of residence, hospital's history — Tax exemption necessary herein to avoid erosion of Indian entitlement — Income not earned in commercial mainstream.

CANADA V. FOLSTER, [1997] 3 F.C. 269 (C.A.)

NATIVE PEOPLES—Continued

Taxation—Continued

Appeal from T.C.C. decision salary received by respondent as Chief of Indian Band exempt from taxation — Indian Act, s. 87 exempting from taxation personal property of Indian situated on reserve — S. 90(1)(*b*) deeming personal property given to Indians under treaty, agreement "always" situated on reserve — Salary paid out of funds provided by Crown under Band Support Funding (BSF) program — Tax Court holding BSF agreement within s. 90(1)(*b*) — Appeal allowed — (1) BSF program not agreement within s. 90(1)(*b*) — S. 90(1)(*b*) must be interpreted within context of treaty-making process — Tax benefits, protection from attachment in Indian Act, means of ensuring ongoing existence of interests granted in exchange for acknowledgment of Crown sovereignty — Notion of entitlement stemming from exchange involved in treaty-making process reason for deeming property given according to s. 90(1)(*b*) situated on reserve, regardless of actual *situs* — "Treaty", "agreement" in s. 90(1)(*b*) linked to limit extent of agreement to agreement in nature of treaty — (2) Per Noël J.A. (Sexton J.A. concurring; Marceau J.A. dissenting): money not excluded from personal property in s. 90 — (i) As no bar to purchase of money with money, no basis for suggestion by definition "personal property" excluding money — (ii) Parliament's actual contemplation not significant as statutory language embracing notion of "personal property" without express limitation as to form, character — (iii) Money, as any other fungible property, can be segregated in which case maintains character, identity — As money cannot be excluded from s. 90(1)(*a*), no such limitation in s. 90(1)(*b*).

CANADA V. KAKFWI, [2000] 2 F.C. 241 (C.A.)

Notices of assessment issued pursuant to taxation by-laws under Indian Act, s. 83 against Canadian Pacific with respect to rights-of-way traversing reserves in British Columbia invalid — Whether rights-of-way "lands within reserve" over which bands had jurisdiction — Whether by-laws discriminatory as only property interests of non-Indians situate on reserves taxed.

CANADIAN PACIFIC LTD. V. MATSQUI INDIAN BAND, [2000] 1 F.C. 325 (C.A.)

Income Tax — Member of Rama band of Indians living in Toronto where working at native health centre — Employed by Indian, sole proprietor of native employment agency, at Six Nations of Grand River reserve — Indian Act, s. 87 providing Indians tax exemption for personal property situated on reserve — Historical review of Crown's position, case law on determination of whether employment income personal property of Indian situated on a reserve — Objective, interpretation of s. 87 — Whether situs-of-debtor rule surviving S.C.C. decision in *Williams* — Balance of connecting factors on case by case basis — Application of connecting factors test — Residence of employee — Location, nature of work, benefit to reserve — Indians, like other taxpayers, may arrange affairs for sole purpose of taking advantage of tax reductions permitted by Income Tax Act — No matter that employer on different reserve than plaintiff's Band — S. 87 broad, referring to property on "a reserve" not

NATIVE PEOPLES—Concluded

Taxation—Concluded

"the reserve" — Employer's location most inportant factor herein — Plaintiff's employment exempt from income tax as located on reserve.

SHILLING V. M.N.R., [1999] 4 F.C. 178 (T.D.)

OFFICIAL LANGUAGES

Public service — Respondent denied PM-6 bilingual non-imperative position on basis could not meet language qualifications — Denial of entry into PSC's full-time French language training program, on basis of negative prognosis following testing and evaluation by PSC, discrimination on ground of disability (dyslexia in auditory processing) — Burden of proof — Adverse effect discrimination — Obligation to accommodate — Systemic remedies — Personal awards to respondent.

CANADA (ATTORNEY GENERAL) V. GREEN, [2000] 4 F.C. 629 (T.D.)

Immigration and Refugee Board's policy of not translating most decisions into other official language but providing translation if requested not meeting obligation imposed by Official Languages Act, s. 20 — Budget cuts no excuse for failure to discharge statutory duty — However, Federal Court Act, s. 18.1 not available to challenge policy.

DEVINAT V. CANADA (IMMIGRATION AND REFUGEE BOARD), [1998] 3 F.C. 590 (T.D.)

Scope of Official Languages Act (OLA), s. 20 — Immigration and Refugee Board's on-request translation policy in violation of OLA, s. 20 — Federal Court Act, s. 18.1 available to challenge policy — However, in view of practical effect of requiring translation of thousands of decisions of little or no interest, and bearing in mind balance of convenience, not advisable to grant *mandamus* for past — As of judgment date, IRB required to comply with Act, unless OLA, s. 20 amended.

DEVINAT V. CANADA (IMMIGRATION AND REFUGEE BOARD), [2000] 2 F.C. 212 (C.A.)

Commissioner of Official Languages finding public servant's language of work rights infringed and making recommendations — Extent of remedies under Official Languages Act, s. 77(4) — Damages — Formal apology.

LAVIGNE V. CANADA (HUMAN RESOURCES DEVELOPMENT), [1997] 1 F.C. 305 (T.D.)

PAROLE

Convict, citizen of Pakistan whose visitor status had expired, serving sentence for drug trafficking — Deportation ordered — Arrest, detention warrant issued under Immigration Act, s. 103(1) — Order under Act, s. 105 for delivery into custody of immigration officer upon sentence expiration rendering convict ineligible for day

PAROLE—Concluded

parole, UTA — Parliament having created statutory eligibility for parole, denial of right to be considered for parole may constitute detention, convict having to serve sentence under more restrictive conditions than general population — Detention arbitrary absent s. 103(6) review by IRB's Adjudication Division.

CHAUDHRY V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1999] 3 F.C. 3 (T.D.)

If NPB ordering release on day parole of individual subject to Immigration Act, s. 105 order directing head of institution where incarcerated to continue detention until expiration of sentence or term of confinement as reduced by statute, and then to deliver person to immigration officer, s. 105(1) order becoming operative to continue detention — Detention then reviewable under Immigration Act, s. 103(6) — If NPB ordering continued detention, but not because of s. 105(1), detention reviewable in same manner as persons not subject to Immigration Act proceedings.

CHAUDHRY V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 1 F.C. 455 (C.A.)

Appeal from trial judgment holding inmate serving indeterminate sentence deprived of right to liberty under Charter, s. 7 in violation of principles of fundamental justice by NPB procedures at biennial review — NPB refusing convict's request to appear by counsel, examine authors of clinical reports — Convict permitted to be represented by barrister, given copies of clinical reports, allowed to submit written interrogatories — Criminal Code, s. 761 stipulating dangerous offender incarcerated for indeterminate period entitled to review of "condition, history and circumstances" every two years by Board — Corrections and Conditional Release Act providing limited right to counsel for convicts appearing before Board — Provisions, terminology leading to assumption Parliament not intending assistant's role before Board to be equivalent to counsel's role before judge, jury — Parole system unique, separate from courts, different considerations apply — Board's refusal to grant enhanced procedures not violating right to liberty under s. 7.

MACINNIS V. CANADA (ATTORNEY GENERAL), [1997] 1 F.C. 115 (C.A.)

PATENTS

Application for declaration Patented Medicines (Notice of Compliance) Regulations *ultra vires* — Patent Act, s. 55.2(4) permitting Governor in Council to make regulations considered necessary for preventing patent infringement — Regulations not exceeding Governor in Council's authority — Purpose of Act to abolish system of compulsory licences, except those granted prior to December 20, 1991 — Contrary to purpose of Act to grant licence pursuant to application outstanding when compulsory licensing system abolished — New licensing system expressly paramount — Amending Act, Regulations applicable to outstanding NOC applications.

APOTEX INC. V. CANADA (ATTORNEY GENERAL), [1997] 1 F.C. 518 (T.D.)

PATENTS—Continued

Validity of Patented Medicines (NOC) Regulations upheld as not *ultra vires* Patent Act, s. 55.2(4) — Latter provision to be construed broadly, not limited to those who have availed themselves of benefits conferred by Act, s. 55.2(1) or (2) in connection with particular medicine in dispute — Within Governor in Council's authority conferred by Act, s. 55.2(4) to provide expressly Regulations apply to submissions made before they came into effect, but not yet decided by Minister.

APOTEX INC. V. CANADA (ATTORNEY GENERAL), [2000] 4 F.C. 264 (C.A.)

Patented medicines — Notice of compliance — Appeal from order prohibiting Minister of National Health and Welfare from issuing notice of compliance to appellant until expiry of first respondent's patent — Appellant alleging under Patented Medicines (Notice of Compliance) Regulations, s. 5(1)(*b*)(iv) making, constructing, using or selling capsules of fluoxetine hydrochloride not infringing patent — Respondents applying for prohibition order under Regulations, s. 6 as allegation not providing detailed statement of legal, factual basis — S. 6 proceedings not action for infringement of patent — Burden of proof on respondents — Statement submitted by appellant not detailed statement required under Regulations.

ELI LILLY AND CO. V. NU-PHARM INC., [1997] 1 F.C. 3 (C.A.)

Patented medicines — Application for *mandamus* directing Minister to file applicant's patent lists in register, declaration Patented Medicines (Notice of Compliance) Regulations, s. 4(3), (5) (now s. 4(4)) *ultra vires* Patent Act, s. 55.2(4) — S. 4(3) requiring patent list be submitted at same time as submission for notice of compliance (NOC) — S. 4(4) stipulating patent list must be filed within 30 days of issuance of patent where submission for NOC already filed — Patent Act, s. 55.2(4) conferring on Governor in Council authority to make such regulations as considers necessary for preventing patent infringement — Applicant waiting until 1997 to submit patent lists for patents granted in 1993 — Health Canada refusing to register patent lists on ground not complying with s. 4(3), (5) — S. 55.2(4) discretion, authority sufficiently broad to embrace enactment of s. 4(3), (4) — Evidence not demonstrating subsections unreasonable, unfair, unnecessary, constituting abuse of power — Subsections in conformity with purpose of Regulations, objects of Patent Act to strengthen position, rights of patentees while protecting consumers by ensuring availability of reasonably priced medicine — Evidence not providing basis to find Regulations *ultra vires*.

FOURNIER PHARMA INC. V. CANADA (ATTORNEY GENERAL), [1999] 1 F.C. 327 (T.D.)

Appeal from dismissal of application for judicial review of Patented Medicine Prices Review Board decision Board having jurisdiction to determine Canadian prices charged by ICN for Virazole excessive — Ribavirin only active ingredient in Virazole — ICN holding three patents pertaining to ribavirin — Patent Act, s. 83(1) providing where Board finding patentee of invention pertaining to medicine selling medicine in Canada at excessive price, may order patentee to reduce price — S. 79(2) providing invention

PATENTS—Continued

pertaining to medicine if intended or capable of being used for medicine or for preparation or production of medicine — S. 83(1) conditions precedent for Board's jurisdiction met: (1) ICN patentee of inventions; (2) inventions pertaining to a medicine; (3) ICN selling the medicine in Canada — Subrequirements of second condition: pharmaceutical end product qualifying as medicine; rational connection between invention, medicine — Having regard to use in treatment of severe respiratory infections in infants, children, ribavirin/Virazole medicine — No need to go beyond face of patent to establish connection — Broad language in ss. 83(1), 79(2) indicating connection could be of merest slender thread — Chemical formulation of ribavirin/Virazole same — Connection established — Board having jurisdiction to examine pricing of Virazole until disclaimer filed.

ICN PHARMACEUTICALS, INC. V. CANADA (STAFF OF THE PATENTED MEDICINE PRICES REVIEW BOARD), [1997] 1 F.C. 32 (C.A.)

Power of Minister to examine, remove patents from Register pursuant to Patented Medicines (Notice of Compliance) Regulations — Meaning of "maintain a register" in Regulations, s. 3 — Powers not improperly delegated to Canadian Intellectual Property Office.

MERCK FROSST CANADA INC. V. CANADA (MINISTER OF NATIONAL HEALTH AND WELFARE), [1997] 3 F.C. 752 (T.D.)

Judicial review of Minister's refusal to issue notice of compliance (NOC) to Novopharm — NOCs issued to Abbott in 1985, 1992 for same drug — Within 30 days of coming into force of Patented Medicines (Notice of Compliance) Regulations, Abbott filing patent lists in respect of individual dosages for which NOCs issued — Patents listed with expiry dates of July 1996, July 1997 — In 1995 NOC issued to Abbott in respect of starter pack, consisting of three different dosages — In 1997 Abbott obtaining three new patents based upon applications filed between 1991, 1995 — Within 30 days, filing amendments to patent lists filed in respect of NOCs issued for individual dosages, but not for starter pack — Minister accepting amended lists, holding prohibiting issuance of NOC to Novopharm — Regulations, s. 4(5) providing at any time after date of filing submission for NOC, first person may submit patent list or amend existing patent list in respect of patent issuing within previous 30 days, on basis of application filed before date of filing of submission — Since Abbott's three new patents applied for long after issuance of 1985, 1992 NOCs, could not be added by amendment to patent lists — Minister erred in treating out-of-time amendment as if original patent list — Minister's duty to identify, not correct, errors — Meaning of "drug", "medicine" in Regulations — Drug (subject of NDS), not medicine (subject of patent), link between patent lists/register and Regulations — Since NOC issued in respect of starter pack, "drug" in respect of which patent list filed — Novopharm's new drug submission only referring to drugs subject of Abbott's 1985, 1992 NOCs — Patents listed on patent list filed in respect of those drugs expired — S. 5 not applying to prohibit issuance of NOC to Novopharm.

NOVOPHARM LTD. V. CANADA (MINISTER OF NATIONAL HEALTH AND WELFARE), [1998] 3 F.C. 50 (T.D.)

PATENTS—Continued

Duration — Patent Act providing 17-year protection for patents — Agreement on Trade-Related Aspects of Intellectual Property Rights provision requiring member countries to provide minimum 20-year protection for patents not applicable in Canada as not implemented into Canadian domestic law — Furthermore, defendant barred from commencing action as failed to obtain consent of Attorney General required by World Trade Organization Agreement Implementation Act, ss. 5, 6 — Latter provisions not contrary to Bill of Rights nor to rule of law as not constituting denial of access to courts.

PFIZER INC. V. CANADA, [1999] 4 F.C. 441 (T.D.)

Appellant seeking to patent transgenic mice containing gene artificially introduced into chromosomes of mammal at embryonic stage — Gene introduced predisposing mammal to developing malignant tumours — Whether higher life form, mammal, patentable — Case law reviewed — Ordinary tests of patentability applicable: subject-matter must be "invention", new, useful, unobvious — Patent Act not requiring all characteristics be under direct control of inventor but must be element of control and everything about oncomouse except transgene independent of human intervention — Creation of oncomouse marriage between nature, human intervention — Invention must be reproducible to be patentable — Mouse not reproducible as term understood in Patent Act.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE V. CANADA (COMMISSIONER OF PATENTS), [1998] 3 F.C. 510 (T.D.)

Patentability of genetically altered non-human mammals for use in carcinogenicity studies — Commissioner of Patents rejecting claims 1 to 12 in patent application as outside definition of "invention" in Patent Act, s. 2 but allowing claims 13 to 26 — Appeal to F.C.T.D. dismissed — Object of Patent Act to promote development of inventions for benefit of inventor, public — Invention must be new, useful, unobvious — As Act silent regarding biotechnological inventions, new life forms, claims in relation thereto decided according to traditional patent requirements — Oncomouse unobvious, new, useful "composition of matter", therefore "invention" within meaning of Act, s. 2 — Patent Act not excluding living organisms, e.g. non-human mammals, from definition of "invention" — Product herein result of human ingenuity at genetic level, laws of nature, therefore patentable — Complex life forms within parameters of Patent Act — Provisions of Act cast in broad terms to fulfil Parliament's objective to promote invention — Human beings not patentable but Parliament or courts will have to decide as to human genes, products at genetic level.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE V. CANADA (COMMISSIONER OF PATENTS), [2000] 4 F.C. 528 (C.A.)

Appeal from F.C.T.D. judgment granting summary judgment — Appellant patentee for cable tie having oval-shaped head — Patent neither claiming oval-shaped head as innovative feature nor referring to oval-shaped head — Patent expired in 1984 — Appellant commencing trade-mark infringement action in 1996 when respondent

PATENTS—Continued

manufacturing virtually identical cable tie — Motions Judge holding patentee cannot, after expiration of patent, assert trade-marks rights to prevent public from making same preferred embodiment as described in patent — Appeal allowed — Motions Judge erred in focussing on "invention" under Patent Act, rather than on "wares" under Trade-marks Act — Validity, scope of patent not at issue — Issue whether oval-shaped head distinguishing guise within meaning of Trade-marks Act, requiring examination of facts in light of trade-marks principles including doctrine of functionality — Summary judgment premature.

THOMAS & BETTS, LTD. V. PANDUIT CORP., [2000] 3 F.C. 3 (C.A.)

Infringement

Appeal from trial judgment holding (1) sale of component parts of press section of paper machines for assembly, use outside Canada and (2) provision of spare parts, services not infringement — (1) Where elements of invention sold in substantially unified combined form for purpose of later assembly, infringement not avoided by separation of parts leaving to purchaser task of integration, assembly — Trial Judge failed to consider contracts for complete machines, not just components — While delivery format in unassembled parts, whole press section sold, made — Manufacture of all components later sufficiently assembled to test fitting of parts constituting "making" of invention for purposes of Patent Act, s. 44 — (2) Supply of spare parts, services for continued running of press sections not infringement unless knowingly, for own benefit, inducing or procuring another to infringe patent — No evidence manufacturer (VDI) participated in decision by others to continue running infringing press sections.

BELOIT CANADA LTD. V. VALMET-DOMINION INC., [1997] 3 F.C. 497 (C.A.)

Practice

Appeal from order allowing appeal from Prothonotary's order affidavit filed by generic drug manufacturer in NOC proceedings not confidential — Protective orders in NOC proceedings do not imperil principle of open justice — Issuance of protective order creating rebuttable presumption any information of type described in order subsequently filed will be kept confidential — Only in clearest cases, where obvious document not within terms of protective order should motion challenging confidential nature of document be granted — Once *prima facie* evidence document within class of documents contemplated by order, treated as confidential, heavy burden on challenging party to demonstrate otherwise — Information at issue *prima facie* within protective order — As Prothonotary applied improper test, Motions Judge right to interfere — Latter not applying test set out herein, but would have reached same conclusion had she had benefit of these reasons.

AB HASSLE V. CANADA (MINISTER OF NATIONAL HEALTH AND WELFARE), [2000] 3 F.C. 360 (C.A.)

Limitation of actions, remedies — Appeal from trial judgment holding Civil Code, Art. 2261 prescribing certain patent infringement actions, awarding damages in others

PATENTS—Concluded

Practice—Concluded

— For prescription purposes, patent infringement characterized as offence, quasi-offence under law of Quebec — Art. 2261 barring such action if not brought within two years of act complained of — Plaintiff pleading suspension of limitation period must demonstrate lack of awareness of material facts giving rise to cause of action existed despite having exercised due diligence — Trial Judge's inference patentee knew or ought to have known of infringing sales because aware of respondent's activities not reversed as no evidence of due diligence — Activities more than two years prior to filing statements of claim prescribed — Award of accounting of profits discretionary under Patent Act, s. 57(1)(*b*) — May reasonably be refused where excessive delay, misconduct by patentee — Within Trial Judge's discretion to consider lengthy delay in proceedings, relief leading to further delay, expense, infringing parties acting in good faith when entered contracts at time when Court declaring patent invalid — Accounting of profits inappropriate herein.

BELOIT CANADA LTD. V. VALMET-DOMINION INC., [1997] 3 F.C. 497 (C.A.)

International patent application for meat packing system filed at Patent Cooperation Treaty (PCT) section of Canadian Patent Office — Application deemed abandoned as deadline to enter into national phase of process in Canada not met — Applicant requesting extension of time under Patent Rules, R. 139 to enter into national phase — Request denied as more than twelve months since application deemed abandoned — PCT, art. 48(2)(*b*) conferring broad discretion on Commissioner of Patents to excuse delay — No duty on Commissioner to provide applicant with notice of abandonment in international phase — Commissioner's discretion to be exercised under PCT, art. 48(2)(*b*) — Fettering discretion by treating guidelines as binding.

FIRST GREEN PARK PTY. LTD. V. CANADA (ATTORNEY GENERAL), [1997] 2 F.C. 845 (T.D.)

Appeal from extension granted pursuant to Patented Medicines (Notice of Compliance) Regulations, s. 7(5) — Appeal allowed — 30-month bar to marketing by competitors legislative stay subject to s. 7(5) only — S. 7(5) permitting alteration of duration of stay only where court finding party to application failing to reasonably co-operate in expediting application — Duty to document delay tactics to establish failure to co-operate.

MERCK FROSST CANADA INC. V. APOTEX INC., [1997] 2 F.C. 561 (C.A.)

PENITENTIARIES

Judicial review of Commissioner's Directive 085, codifying Commissioner's decision to implement new inmate telephone system (i) restricting inmate calls to pre-authorized list of telephone numbers; (ii) including voice-over message at beginning of call, repeated at regular intervals; (iii) monitoring number called, when call made, duration — Voice-over feature infringing Charter, s. 2(*b*), not saved by limitation clause — Corrections and Conditional Release Act, s. 71 and Corrections and Conditional

PENITENTIARIES—Concluded

Release Regulations, s. 95 envisaging inmates' rights to telephone communications subject to reasonable limits as are prescribed for protecting penitentiary or safety of persons — Inmates consulted prior to implementation of new telephone system — New telephone system not exceeding Service's jurisdiction.

HUNTER V. CANADA (COMMISSIONER OF CORRECTIONS), [1997] 3 F.C. 936 (T.D.)

Respondents disqualified from voting at federal election as serving sentence of two years or more — Canada Elections Act, s. 51(*e*) denying vote only to those serving two years or more, not to all of those in penal institutions — Parliament entitled to add civil consequences to criminal sanction — Deleterious effects of impugned provision proportional to significance of objectives, beneficial effects of measure — Context of each case paramount — Canada Elections Act, s. 51(*e*) infringing Charter, s. 3, but saved by s. 1.

SAUVÉ V. CANADA (CHIEF ELECTORAL OFFICER), [2000] 2 F.C. 117 (C.A.)

PENSIONS

Deductibility of contributions pursuant to Income Tax Act, s. 147.2(4)(*a*) permitting deduction of contributions made in accordance with plan as registered — Taxpayer member of pension plan governed until 1991 by Newfoundland's The Public Service (Pensions) Act (1970 Act), expressly permitting purchase of service to count as pensionable service in recognition of fact women often out of workforce for years due to pregnancy, child rearing — Electing in 1989 to purchase seven years of service — Payments spanning seven years — 1970 Act repealed in 1991 — New legislation no longer expressly permitting purchase of service, but continuing 1970 plan as pension plan, protecting all benefits acquired under 1970 Act — Minister determining 1994, 1995 contributions not made in accordance with registered plan — T.C.C. allowing appeal — Judicial review application dismissed — Determination of plan as registered — Defined by 1991 Act — When Newfoundland Interpretation Act, s. 29 (prohibiting repeal of Act from affecting rights acquired thereunder), considered in conjunction with ss. 4, 39, repeal of 1970 Act, subsequent enactment of 1991 Act not affecting rights acquired by, accruing to taxpayer through purchase of service contract — Supported by presumption legislature not intending to interfere with rights of subjects unless doing so expressly — Contributions satisfying Income Tax Act, s. 147.2(4)(*a*).

CANADA V. CORBETT, [2000] 2 F.C. 81 (C.A.)

Treasury Board denying respondent's application for surviving spouse's benefits pursuant to Canadian Forces Superannuation Act, s. 30 because respondent informally separating from husband four years prior to death — Respondent filing complaint alleging discrimination in provision of services on grounds of marital, family status — Canadian Human Rights Commission deciding to appoint Human Rights Tribunal to inquire into complaint — CHRA, s. 62 exempting from application of Act all pension, superannuation plans established by Act of Parliament before March 1, 1978 — Complaint grounded in CFSA, s. 30, Act established in 1959, though amended several times before, after March 1, 1978, outside scope of CHRA.

CANADA (ATTORNEY GENERAL) V. MAGEE, [1998] 4 F.C. 546 (T.D.)

PENSIONS—Continued

Respondent receiving CPP disability pension while residing in Germany — Whether "subject to the Canada Pension Plan" under Agreement between Canada and Germany, Art. 11(*a*) — Review Committee under Old Age Security Regulations defining "subject to" as including persons making contributions to Plan and those receiving benefits thereunder — Applicable standard of review patent unreasonableness — Review Committee's decision not patently unreasonable — Committee correctly excluding evidence ("supplementary means of interpretation") regarding interpretation of Art. 11(*a*) — Provision affecting only Canadian Government, persons living in Germany entitled to pension under Canada's Old Age Security Act.

CANADA (ATTORNEY GENERAL) V. SIMON, [1998] 4 F.C. 3 (T.D.)

Surviving spouse's benefit denied on ground deceased not contributing for minimum qualifying period under CPP — Law, as amended, governing spouse's claim — Pension Appeals Board holding spouse entitled to benefit — Standard of review of Board decisions correctness — Board right in holding new law applicable — Words "within his contributory period" serving only to define number of years for which contributions must be made, not to prescribe when they must be made — Deceased's contributions satisfying minimum qualifying period.

CANADA (MINISTER OF HUMAN RESOURCES DEVELOPMENT) V. SKORIC, [2000] 3 F.C. 265 (C.A.)

Action to have Old Age Security Act, s. 19(1)(*a*) providing for payment of spousal allowance (SPA) to 60-to-64-year-old spouses of pensioners provided not separated, declared of no force, effect — Plaintiff's application for SPA denied on ground separated — S. 19(1)(*a*) found to breach Charter, s. 15 — Curial deference at minimal impairment stage discussed, applied — S. 19(1)(*a*) justified under Charter, s. 1.

COLLINS V. CANADA, [2000] 2 F.C. 3 (T.D.)

Recency of contributions requirements for disability benefits in Canada Pension Plan, s. 44 creating distinction, in its effect, between disabled and able-bodied persons — Although in violation of Charter, s. 15, justified under Charter, s. 1.

GRANOVSKY V. CANADA (MINISTER OF EMPLOYMENT AND IMMIGRATION), [1998] 3 F.C. 175 (C.A.)

Judicial review of Veterans Review and Appeal Board decision applicant not entitled to disability pension under Pension Act, s. 21(2)(*a*) — S. 21(2)(*a*) permitting award of pension where member suffering disability resulting from injury arising out of or directly connected with military service — Applicant injured crossing road to return to base where on duty after dining in restaurant as no mess at base — Board's decision not unreasonable in light of requirement of causal connection between injury, military service — Some facts indicating injury satisfied definition of eligibility, while others not — Cannot be inferred Board failed to interpret s. 21(2)(*a*) in statutory context —

PENSIONS—Concluded

Statement that injury occurred during working day merely "setting", not "contributing cause" distinguishing stronger from weaker causal connections between injury, performance of military service — "Directly connected" requiring Board to consider strength of causal connection between injury, military service — No error of law as not sufficient for pension purposes applicant serving in military when injured — Difficult to maintain Board not considering statutory provisions requiring liberal interpretation when expressly stating so considered.

MCTAGUE V. CANADA (ATTORNEY GENERAL), [2000] 1 F.C. 647 (T.D.)

Separation agreement releasing applicant from all claims in consideration of lump sum payment — Minister not bound by agreement under Act, s. 55.2(2) — Minister's decision granting female respondent division of unadjusted pensionable earnings under CPP — Applicant's appeal to CPP Review Tribunal denied — Pension Appeals Board allowing appeal but referring matter back to Minister for consideration — Board's decision "is final and binding for all purposes of this Act" — Minister's delegate (respondent Ganim) making decision restoring Minister's decision — Board empowered to take any action Minister could have, lacking statutory authority to refer back — Ganim's decision cannot stand as no lawful basis for his intervention, decision breaching natural justice, made without regard to material before him — Minister, delegate *functus officio*.

WIEMER V. GANIM, [1997] 1 F.C. 759 (T.D.)

PRACTICE

Notice of constitutional question — Motion by Attorney General of Canada to prevent applicant from questioning constitutional validity, applicability, operability of Canada Labour Code—Applicant seeking judicial review of decisions of CLRB—Failing to give notice to Attorney General of constitutional question in proceedings before Board as required by Federal Court Act, ss. 57(1), (2)—S. 57(1) applying to proceedings before Federal Court, federal boards, commissions, other tribunals—Requirement to give notice under s. 57(1) mandatory—Argument notice requirement could not be complied with as Board never convened oral hearing rejected—Notice must be given even if not known whether oral hearing will be held—Form 2.1 (notice form) must be adapted to particular circumstances—If no hearing to be held, tribunal will so advise attorneys general, give deadline for written submissions—Presence of prejudice irrelevant—Attorneys general having demonstrated prejudice—On judicial review evidence extrinsic to record before tribunal whose decision reviewed may be introduced—Issue one of constitutional jurisdiction of Board under Canada Labour Code, not one in which want of jurisdiction of Board only apparent on new evidence—Review of decisions, not determination, by trial *de novo*, of questions not adequately canvassed in evidence at tribunal, trial court essential purpose of judicial review.

GITXSAN TREATY SOCIETY V. HOSPITAL EMPLOYEES' UNION, [2000] 1 F.C. 135 (C.A.)

PRACTICE—Continued

Dispensing with compliance — Originating notice of motion alleging ongoing improper amortization of portion of surpluses in Public Service, Canadian Forces pension accounts, breach of Minister's duties under Public Service, Canadian Forces Superannuation Acts — If breach of statutory duties, occurring because of acts of responsible Ministers in implementing 1988 recommendation as to accounting procedures, not because of decision to implement those procedures — When originating document filed, Federal Court Rules, R. 1602(4) required motion to be in respect of single decision, order, other matter — Former R. 6 giving Court authority in special circumstances to dispense with compliance with any Rule where necessary in interest of justice — That power continued in new r. 55 — Appropriate in circumstances to dispense with requirement by permitting "matters" to be brought in same proceeding.

KRAUSE V. CANADA, [1999] 2 F.C. 476 (C.A.)

Appeals and new trials — Appeal allowed, new trial ordered for reasonable apprehension of bias on part of F.C.T.D. Judge — Case involving claim by Indians amendments to Indian Act infringing aboriginal, treaty, Charter rights — Judge's colourful remarks at trial, repeated in considered reasons for judgment, giving rise to reasonable apprehension of bias against special status for Indians.

SAWRIDGE BAND V. CANADA, [1997] 3 F.C. 580 (C.A.)

Affidavits

Judicial review of Immigration Expulsion Officer's (IEO) decision to execute deportation orders by removal of applicants to Chile — Affidavits in application record as to: medical opinion regarding applicants' children; human rights conditions in Chile; translation of news articles, inadmissible — Facts contained therein not before IEO — Court bound to record before tribunal — Although difficult to characterize IEO's act as decision of tribunal, record of what was before IEO proper evidentiary basis on which to proceed.

ARDUENGO V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1997] 3 F.C. 468 (T.D.)

Scope of cross-examination on affidavits of claim in proceeding to determine priorities to ship sale proceeds — Extent of deponent's duty to seek information in case of corporate affidavit — Extent of production of documents on which deponents of affidavits might be cross-examined.

ROYAL BANK OF SCOTLAND PLC. V. *GOLDEN TRINITY* (THE), [2000] 4 F.C. 211 (T.D.)

Convention refugee determination — On appeal from CRDD, Trial Judge holding expert's affidavit inadmissible — Tribunal relieved by statute from technical rules binding courts — Affidavit relevant to allegations against claimant — Affidavit originating in State of New Jersey — Where no evidence as to requirements for valid affidavit in originating State, Judge cannot conclude document not affidavit.

SIAD V. CANADA (SECRETARY OF STATE), [1997] 1 F.C. 608 (C.A.)

PRACTICE—Continued

Affidavits—Continued

In camera application for leave pursuant to Federal Court Rules, 1998, r. 312 to file additional affidavit, containing as exhibits confidential documents prepared for purpose of Chinese regulatory process — Arising in course of application for judicial review of Canadian Government's decision to provide financial assistance with respect to sale of nuclear reactors by AECL to People's Republic of China — AECL submitting documents required to defend against possibility Sierra Club will seek environmental assessment pursuant to Canadian Environmental Assessment Act, ss. 8, 54 — Main concerns in application of r. 312 whether additional material would serve interests of justice, assist Court, not seriously prejudice other side — If documents permit Court to have before it evidence material to issues, interests of justice served, unless prejudice to another party shown — Confidential documents relevant to issue of appropriate remedy — Any prejudice caused to Sierra Club arising from delay caused by introduction of documents — Delay explained; not due to AECL's indolence — Delay balanced by desirability of having entire record before Court — Leave granted.

SIERRA CLUB OF CANADA V. CANADA (MINISTER OF FINANCE), [2000] 2 F.C. 400 (T.D.)

Cross-appeal from order granting leave to file supplementary affidavit, additional documents describing environmental assessment undertaken under Chinese laws — Litigation seeking judicial review of federal government's decision to provide financial assistance for sale, construction of nuclear reactors in China without subjecting project to environmental assessment in accordance with Canadian Environmental Assessment Act (CEAA), s. 5(1)(*b*) — Sierra Club seeking declaration construction in China subject to environmental assessment in accordance with Canadian legislation — Atomic Energy of Canada Limited (AECL), government respondents submitting either CEAA not applicable, or relying on statutory defences under ss. 8, 54 — Documents technical, voluminous — Cross-appeal dismissed — Documents relevant to AECL's defence under s. 54(2)(*b*) exemption from processes otherwise required by Act where arrangements between countries that environmental assessment consistent with CEAA to be conducted — Sufficient to demonstrate relevance to any one issue — Documents also potentially relevant to exercise of Court's discretion to refuse remedy (i.e. order quashing decision to grant financial assistance) — If defence established, purpose of CEAA met, wasteful to require another assessment — Discretionary remedies not granted if serve no useful purpose — Benefit intervener of being able to file documents, assistance will provide to Court, outweighing any prejudice to applicant as result of delay.

SIERRA CLUB OF CANADA V. CANADA (MINISTER OF FINANCE), [2000] 4 F.C. 426 (C.A.)

Affidavits of lawyer acting for applicant, but not in these proceedings, only evidence adduced by applicant — Federal Court Rules, 1998, r. 82 (prohibiting solicitor from both deposing to affidavit, presenting argument in Court) not applicable as affiant not counsel herein — R. 81 requiring affidavits to be confined to facts within personal

PRACTICE—Continued

Affidavits—Concluded

knowledge of deponent — While open to Court to strike statements of fact for which applicant, executive assistant source of information, more appropriate to leave them in record, consider question of adverse inference (r. 81(2)) when dealing with issues to which relate — No reason to exclude statements on information and belief for which source of information person in PCO or Auditor General's Office merely on basis hearsay — Presumption truth of statements within respondents' knowledge — In absence of evidence to contrary, affiant open to cross-examination in same manner as any other deponent — No basis for determining whether anything in affidavits might have jeopardized applicant's solicitor-client privilege or for determining whether applicant prepared to waive privilege — That affiant acting for applicant not making it unfair to respondents for Court to permit affidavits to remain in record.

WEATHERILL V. CANADA (ATTORNEY GENERAL), [1999] 4 F.C. 107 (T.D.)

Confidentiality Orders

Application for confidentiality order in respect of application for leave to file additional affidavit containing confidential documents; affidavit, confidential documents themselves — Arising in course of application for judicial review of Canadian Government's decision to provide financial assistance with respect to sale of nuclear reactors by AECL to People's Republic of China — Under Federal Court Rules, 1998, r. 151 Court may order material filed treated as confidential provided satisfied need for confidentiality greater than public interest in open, accessible Court proceedings — Confidential documents property of Chinese authorities — Authorizing disclosure only if confidentiality order issuing — Issues in public domain, not simply matter of individual rights — Documents containing information disclosure of which could be harmful to AECL — Subjective element of test for granting confidentiality order met: AECL believing disclosure of documents harmful to competitive position — Objective part of test met as information consistently treated as confidential by AECL, Chinese authorities; on balance of probabilities disclosure could harm AECL's commercial interests — In public law cases, third component whether public interest in disclosure exceeding risk of harm to party — Where disclosure voluntary, as here, document may be put into evidence in different form or other documents may be available to prove same facts — No evidence as to how relevant evidence could be put before Court in other ways not requiring confidentiality order, but possibility of expunging sensitive information — Need for confidentiality order not exceeding public interest in open justice — Burden of justifying confidentiality order onerous where issue of significant public interest — Nothing suggesting information contained in documents of interest to Court — AECL not prevented from mounting full defence by absence of confidentiality order, except to extent chooses not to put evidence in some form before Court — Public will benefit from open access — Judge not examining documents as voluminous, dealing with technical aspects of nuclear installation and could not be assessed in context.

SIERRA CLUB OF CANADA V. CANADA (MINISTER OF FINANCE), [2000] 2 F.C. 400 (T.D.)

PRACTICE—Continued

Confidentiality Orders—Concluded

Judge inviting submissions regarding placing of reasons on public file — Reasons published on Web sites — Reasons not containing information harmful to parties' interests — That appeal taken not precluding release of reasons — Reasons ordered placed on public file.

SIERRA CLUB OF CANADA V. CANADA (MINISTER OF FINANCE), [2000] 2 F.C. 423 (T.D.)

Appeal from refusal to grant confidentiality order with respect to documents describing environmental assessment undertaken under Chinese laws — Documents allegedly containing commercially sensitive information — Prepared by or with assistance of Chinese — Litigation seeking judicial review of federal government's decision to provide financial assistance for sale, construction of nuclear reactors in China without subjecting project to environmental assessment in accordance with Canadian Environmental Assessment Act — Appeal dismissed (Robertson J.A. dissenting) — Having considered nature of litigation, extent of public interest in openness of proceedings, Motions Judge not giving public interest factor undue weight even though confidentiality claimed for only three documents, and content highly technical — Openness, public participation in assessment process of fundamental importance in CEAA — Motions Judge attaching too much weight to "voluntariness" of AECL's introduction of documents, but not vitiating decision because (1) in this case great weight attached to openness; (2) summaries may somewhat compensate for absence of originals; (3) claim for confidentiality based on fear of loss of business towards low end of confidential spectrum — Motions Judge not required to inspect documents before considering confidentiality request given volume, complexity, availability of summaries.

SIERRA CLUB OF CANADA V. CANADA (MINISTER OF FINANCE), [2000] 4 F.C. 426 (C.A.)

Costs

Special reasons to award costs on solicitor-client basis payable by applicants to individual in access to information case incurred after order of Motions Judge denying injunctive relief on basis that no serious issue — Should have been clear to applicants' counsel hopeless to pursue claim for costs, illicit purpose allegations against individual respondent.

CANADA (ATTORNEY GENERAL) V. CANADA (INFORMATION COMMISSIONER), [1998] 1 F.C. 337 (T.D.)

Fixing costs following S.C.C. decision allowing appeal from F.C.A. "with costs to appellant (Novopharm) throughout" — Jurisdiction in F.C.A. to entertain motion for lump sum in lieu of taxation — Any discretionary power granted by r. 400 (giving Federal Court full discretionary power over amount, allocation of costs) whose exercise not inconsistent with award of costs by S.C.C. can be exercised in giving effect to

PRACTICE—Continued

Costs—Continued

award of costs in Federal Court by S.C.C. on appeal — No justification for enhanced costs — Jurisdiction in present F.C.A. judge, under r. 3, to hear present motion, but, normally, applying Supreme Court Act, s. 51 and r. 403(3), F.C.A. judge who signed judgment reversed on appeal by S.C.C. appropriate judge to hear motion for direction herein — In future, preferable motions under r. 403 include request they be brought before judge who signed judgment "or such other judge as Chief Justice may direct".

ELI LILLY AND CO. V. NOVOPHARM LTD., [1999] 2 F.C. 175 (C.A.)

Security for costs — Interpretation of Federal Court Rules, 1998, rr. 416, 417 — "Other proceedings" in r. 416(1)(*f*) not limited to proceedings in Federal Court — R. 417 burden of establishing impecuniosity as shield against security for costs order not met by plaintiff.

FORTYN V. CANADA, [2000] 4 F.C. 184 (T.D.)

Security for costs — Where plaintiff has no assets within jurisdiction of Court, defendant may not ask Court to order security for counterclaim at foreign arbitration of dispute in maritime law matter — Nor can defendant obtain security for arbitration costs as matter part of arbitrators' jurisdiction, as Court's capacity to award security for costs limited to proceedings in Federal Court, and as need for security for costs not demonstrated herein — Lack of proper procedure not bar to defendant obtaining interim relief or protection (security for costs) by way of incidental request brought on occasion of plaintiff's motion for stay — Defendant awarded costs of providing security — While defendant may not take any security from this jurisdiction to New York arbitration, equitable solution that defendant be awarded costs of this Federal Court action.

FRONTIER INTERNATIONAL SHIPPING CORP. V. *TAVROS* (THE), [2000] 2 F.C. 427 (T.D.)

On motion for stay of action for breach of charter party in favour of arbitration, Prothonotary granted stay but awarded defendant shipowner costs of action as "interim protection" — Appeal by way of motion from part of order awarding costs against plaintiff — Defendant did not seek costs of action at any stage of hearing — Prothonotary erred in awarding costs when action not finally determined, and in awarding costs not sought or spoken to by defendant.

FRONTIER INTERNATIONAL SHIPPING CORP. V. *TAVROS* (THE), [2000] 2 F.C. 445 (T.D.)

Applicant refusing respondent's offer to remit matter to officer authorized to exercise statutory jurisdiction if judicial review application discontinued — Court having full discretionary power over amount, allocation of costs on applications for judicial review: Federal Court Rules, 1998, s. 400(1) — That offer made in writing factor to be considered — That relief granted by Court no more favourable to applicant than that

PRACTICE—Continued

Costs—Concluded

offered by respondent in settlement attempt may justify award of costs to respondent, even though application granted — Inappropriate to award respondent costs as applicant raising important questions of law about statutory scheme, Court finding in favour of applicant in that legal authority to exercise discretion improperly delegated, interpretation of "provided" for purposes of Customs Act, s. 108(3).

JOHNS MANVILLE INTERNATIONAL, INC. v. DEPUTY M.N.R., CUSTOMS AND EXCISE, [1999] 3 F.C. 95 (T.D.)

Case concerning validity of surrender of Indian reserve lands — Parties agreeing Band to conduct discoveries of Crown by written interrogatories — Crown failing to facilitate same, moving to strike virtually all interrogatories on numerous grounds found, for most part, invalid and verging on frivolous — Motion, which occupied two days of Court time, ought not to have been brought — Had Crown not enjoyed minor success on motion, would have been ordered to pay costs on solicitor and client basis — Costs against Crown in any event of cause.

MONTANA BAND v. CANADA, [2000] 1 F.C. 267 (T.D.)

Immigration matter — On eve of hearing, one year after commencement of judicial review application seeking prohibition, Crown submitting evidence "danger opinion" not under consideration — Federal Court Immigration Rules, 1993, R. 22 requiring "special reasons" before costs awarded in application for judicial review under Immigration Act — "Special reasons" where one party unnecessarily, unreasonably prolonged proceedings — Crown could, should have acted sooner to bring matters to where now stand — Crown raising new argument at hearing without notice to applicant, causing further delay while submissions completed — But application failed on merits — No special reasons justifying award of costs against Crown.

PUSHPANATHAN v. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1999] 4 F.C. 465 (T.D.)

Applicant seeking costs under Privacy Act, s. 52(2) — Success divided as some information released after application filed — Constitutional challenge to Act, s. 51 raising important new issue — Whether consistent practice of refusing to indicate existence of personal information in bank consistent with discretion under s. 16(2) also important — Applicant entitled to costs as applications for review raised important new issues.

RUBY v. CANADA (ROYAL CANADIAN MOUNTED POLICE), [1998] 2 F.C. 351 (T.D.)

Discovery

Anton Piller Orders

Motion to review issuance of *ex parte Anton Piller* order — Plaintiffs owning copyright in computer programs used by businesses worldwide — Problems for

PRACTICE—Continued

Discovery—Continued

Anton Piller Orders—Concluded

copyright owners, consumers caused by prevalent practice of "softlifting" — Order obtained based on informant's affidavit alleging unauthorized copies of computer programs on defendant's business premises — In executing order, plaintiffs taking away copies of documents possibly concerning infringement, floppy disk containing record of computer programs found on each computer — Moving party admitting subsequent deletion from computers of copies of unlicensed software despite Court order prohibiting such conduct — Purpose of *Anton Piller* order preservation of property where strong *prima facie* evidence of infringement of copyright, trade-marks — Obtained *ex parte* so defendant not having opportunity to dispose of infringing material — Three conditions precedent to making of *Anton Piller* order — (1) Evidence significant number of unlicensed copies of plaintiffs' programs possessed, used by moving party, thus establishing strong *prima facie* case of infringement — (2) Evidence of potential serious damage to plaintiffs in form of lost revenue, damage caused by example — Also evidence of actual monetary damage in form of unpaid licence fees — (3) As to evidence of likelihood of destruction, plaintiffs not making sufficient inquiry of additional facts i.e. credibility of sole informant (person suffering from mental disorder), further inquiries into business reputation of moving party, before obtaining *Anton Piller* order, to establish existence of third condition — But such additional facts not justifying setting order aside — Moving party possessed software copied in breach of plaintiffs' rights, erased evidence notwithstanding prohibition in *Anton Piller* order — Cannot now argue plaintiffs should be denied *Anton Piller* order preserving evidence when that evidence in fact destroyed.

ADOBE SYSTEMS INC. V. KLJ COMPUTER SOLUTIONS INC., [1999] 3 F.C. 621 (T.D.)

Plaintiff seeking Anton Piller order for detention, custody, preservation of copies of video-cassette taped programs — Defendant failing to provide accurate, complete affidavit of documents — Test for Anton Piller order met — Orders usually sought on *ex parte* basis to prevent defending party from destroying, removing offending documents, things — Granted only where ordinary discovery process ineffective — Affidavit evidence of plaintiff's investigator compelling evidence defendant not abiding by ordinary procedure of discovery — In absence of order, probability evidence sought would disappear — Plaintiff not engaging in fishing expedition.

PROFEKTA INTERNATIONAL INC. V. MAI, [1997] 1 F.C. 223 (T.D.)

Examination for Discovery

Whether person being examined entitled to advice, assistance of counsel — Examinee nominee of defendant (Crown) — Scope of litigation broad, "massive" number of documents — Question not objectionable as constituting cross-examination — In complex litigation with extensive documentation, to ensure discovery as complete as possible, examinee — especially if nominee — must continue to inform himself as lengthy examination progresses — Purpose of discovery — Cross-examination in

PRACTICE—Continued

Discovery—Continued

Examination for Discovery—Concluded

context of discovery — Words of Steele J. in *Kay v. Posluns* as to conduct of counsel at discovery adopted.

ANDERSEN CONSULTING V. CANADA, [1997] 2 F.C. 893 (T.D.)

Motion to strike out written interrogatories filed by plaintiff bands — Objections raised by Crown based on numerous grounds — Purpose of examination for discovery to render trial process fairer, more efficient — Deponent to historical facts not being asked to interpret documents, give opinion — Examination for discovery designed to deal with matters of fact, not "pure" questions of law — Proper on discovery to ask party as to facts underlying conclusion of law — Deponent speaking not for himself but for party — Interrogatories not asking questions of pure law, not to be struck out — Questions not unreasonable, irrelevant, overly broad, ambiguous — Crown's objections mostly without foundation.

MONTANA BAND V. CANADA, [2000] 1 F.C. 267 (T.D.)

Production of Documents

Act provisions precluding disclosure of information gathered in course of investigation applicable to preclude disclosure in judicial review proceedings initiated to review decision of Information Commissioner as result of investigation — Therefore, Commissioner's objection under R. 1613(2) to production of documents sought under R. 1612, upheld.

CANADA (ATTORNEY GENERAL) V. CANADA (INFORMATION COMMISSIONER), [1998] 1 F.C. 337 (T.D.)

Motion for stay of citizenship revocation proceedings on ground of non-disclosure of evidence — Immigration file, including permanent residence application wherein respondent allegedly making false representations, routinely destroyed prior to institution of proceedings — Where prosecution losing evidence, Crown must satisfactorily explain what happened to it — Whether reasonable steps taken to preserve evidence consideration as to whether explanation satisfactory — Degree of care depending on degree of relevance — At time of destruction, no indication legal proceedings would be instituted with respect to respondent's immigration, citizenship status — As no allegations of false representation against respondent when file destroyed, evidence not seen as relevant.

CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) V. KATRIUK, [1999] 3 F.C. 143 (T.D.)

Equitable bill of discovery — Remedy of ancient origin permitting court, acting through equitable jurisdiction, in order to discover name of person responsible for damage to plaintiff, to order discovery against person against whom applicant for bill

PRACTICE—Continued

Discovery—Concluded

Production of Documents—Concluded

of discovery has no cause of action and not party to contemplated action — Application of House of Lords decision in *Norwich Pharmacal Co. v. Customs and Excise Comrs.* where remedy examined, threshold requirements defined — Where drugs imported into Canada allegedly in violation of patent rights, patent owner may obtain names of importers from MNR by means of equitable bill of discovery.

GLAXO WELLCOME PLC V. M.N.R., [1998] 4 F.C. 439 (C.A.)

Appeal from dismissal by Motions Judge of appeal from Prothonotary's denial of motion for production — Judgment declaring infringement of patent relating to additive for motor oils — Plaintiffs electing account of profits — Reference to determine amount of profits ordered — Motion seeking production of plaintiffs' documents to support defendant's contention entitled to apportion profits between those attributable to infringing dispersant and those attributable to other factors — Prothonotary, Motions Judge erred in holding terms of formal judgment excluding possibility of leading evidence at reference on issue of apportionment — Judgment not finding all profits from sales of motor oils arising from infringement — That was issue of fact to be decided on reference — But examination of documents requested indicating irrelevant to determination of defendant's profits from infringement — Though test for relevance at discovery generous, fishing expeditions not allowed.

LUBRIZOL CORP. V. IMPERIAL OIL LTD., [1997] 2 F.C. 3 (C.A.)

One of plaintiffs in action by subrogated cargo underwriters seeking to discontinue when pressed for examination for discovery, production of documents — Party seeking discontinuance says documents have been destroyed — Defendants moving for affidavit verifying destruction of documents — Given plaintiff's remote location (Netherlands Antilles), attitute toward litigation, destruction of documents, justice requiring denial of motion for discontinuance.

OLBERT METAL SALES LTD. V. CERESCORP INC., [1997] 1 F.C. 899 (T.D.)

Motion pursuant to Federal Court Rules, RR. 1612, 1614 to compel production of documents considered in reaching decision to refuse to admit applicants to RCMP Witness Protection Program — Counsel advising Commissioner also defending RCMP in related provincial court action — Application for judicial review of refusal alleging bias — Applicants alleging Commissioner more concerned with impact of decision on provincial court action than merits — Also alleging counsel writing decision — Documents relevant to grounds of review should be produced under R. 1612 — Extent of counsel's involvement in writing reasons, making recommendations thereon, relevant to allegation of bias — Applicants entitled to know extent of counsel's involvement in formation, writing of decision on merits.

PERSONS SEEKING TO USE THE PSEUDONYMS OF JOHN WITNESS AND JANE DEPENDANT V. CANADA (COMMISSIONER OF THE ROYAL CANADIAN MOUNTED POLICE), [1998] 2 F.C. 252 (T.D.)

PRACTICE—Continued

"Gap" rule

Federal Court Rules, 1998, r. 4 permitting Court to provide for any procedural matter not provided for in Rules — Only applies in respect of procedural matters — Failure to file application record not merely procedural technicality, cannot be disposed of in manner provided for under r. 4.

GUZMAN V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 1 F.C. 286 (T.D.)

Interest

Appeal from trial judgment awarding simple pre-, post-judgment interest in patent infringement action — Federal Court Act, s. 36(5) providing expressly for exercise of discretion by Court in relation to award of pre-judgment interest — Although s. 37 not containing comparable provision, cases recognizing post-judgment interest also discretionary — Given finding of good faith by infringer, open to Judge to so exercise discretion.

BELOIT CANADA LTD. V. VALMET-DOMINION INC., [1997] 3 F.C. 497 (C.A.)

Judgments and Orders

Unless authorized by Federal Court Rules, only one judgment should be rendered following trial — Judgment should dispose of all issues between parties — Judgment not to be rendered "by instalments".

CARPENTER FISHING CORP. V. CANADA, [1998] 2 F.C. 548 (C.A.)

As consideration for transfer of apartment building to corporation, preference shares issued to taxpayers — To effect necessary increase in authorized capital, supplementary letters patent required, but not obtained — Building sold, dividends declared — Eventually corporation obtaining provincial superior court order based on provincial legislation deeming preference shares to have been validly issued within taxation year — Order not pronounced before reassessment assessing dividends as taxable shareholder benefit under Income Tax Act, s. 15 — General rule: superior court order cannot be attacked collaterally unless lawfully set aside — Review of principles governing binding effect of superior court orders — Retroactive orders made on basis of statutory authority generally immune from jurisdictional collateral attack — Provincial superior court order binding on Minister, constituting proof shares validly issued as of December 31, 1985.

DALE V. CANADA, [1997] 3 F.C. 235 (C.A.)

Reversal or Variation

Federal Court Rules, 1998, r. 399(2)(*a*) permitting Court, on motion, to set aside, vary order by reason of matter arising, discovered subsequent to making of order — Applicant's previous counsel not perfecting application record on time due to ignorance of Rules — Only apparent after application for leave dismissed — R. 399(2)

PRACTICE—Continued

Judgments and Orders—Concluded

Reversal or Variation—Concluded

not applicable to vary, set aside final judgment of Court because party retained services of lawyer not properly versed in rules of Court — Question certified: whether Court can set aside order pursuant to r. 399(2) granted solely due to counsel's failure to understand, comply with procedural requirements.

GUZMAN V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 1 F.C. 286 (T.D.)

Federal Court, in exercise of equitable jurisdiction, can set aside any order made by it at request of person who ought to have been made party to proceeding — Relief available upon motion analogous to Federal Court Rules, r. 399 or Ontario Rules of Civil Procedure, r. 38.11 — Alternatively, such power necessary for Court to fully exercise jurisdiction.

NU-PHARM INC. V. CANADA (ATTORNEY GENERAL), [2000] 1 F.C. 463 (C.A.)

Stay of Execution

Application to stay, pending appeal, effect of declaration Canada Elections Act provision denying certain convicts right to vote in federal elections unconstitutional — S.C.C. decision in *RJR—McDonald Inc.* applied — Balance of inconvenience not favouring applicants.

SAUVÉ V. CANADA (CHIEF ELECTORAL OFFICER), [1997] 3 F.C. 628 (T.D.)

Application to stay, pending appeal, effect of declaration Canada Elections Act provision denying certain convicts right to vote in federal Elections unconstitutional — Motions Judge did not err in applying tripartite test set out by S.C.C. in *RJR—McDonald Inc. v. Canada (Attorney General)* — In absence of error of law, appellate court cannot interfere with discretionary order of judge — Appeal dismissed.

SAUVÉ V. CANADA (CHIEF ELECTORAL OFFICER), [1997] 3 F.C. 643 (C.A.)

Summary Judgment

Application for dismissal of claim on ground no genuine issue for trial — Federal Court Rules, r. 216 permitting Court to grant summary judgment if able on whole of evidence to find facts necessary to decide questions of fact, law — Although could not conclude no genuine issue for trial, actions should not be deferred for trial on mere suggestion further evidence may be made available, or law in state of confusion — Responding party having positive responsibility to go beyond mere supposition; Court having duty to take hard look at merits of action at preliminary stage — Evidence establishing essential facts relevant to plaintiff's claim before Court — Proceeding to trial would add detail, but not significant additional evidence — Given costs involved, trial neither necessary nor justified.

PAWAR V. CANADA, [1999] 1 F.C. 158 (T.D.)

PRACTICE—Continued

Limitation of Actions

Crown Liability and Proceedings Act, s. 3(1)(*a*) — Action for conversion of chattels (funds and assets), for wrongful filing of writ of *fieri facias*, and for damages — Action statute barred pursuant to Alberta Limitation of Actions Act, s. 51(*g*) — Cause of action arising on date of allegedly wrongful seizure.

ALBION TRANSPORTATION RESEARCH CORP. V. CANADA, [1998] 1 F.C. 78 (T.D.)

Six-year limitation period on plaintiffs' claims under The Limitation of Actions Act, s. 2(1)(*k*) of Manitoba — Claims arising before September 15, 1987 statute-barred — Continuing breach of fiduciary duty argument without merit — Period of limitation to run in respect of each alleged breach — Time beginning to run upon discovery of cause of action — Delay, failures to consult occurring more than six years before statement of claim filed on September 15, 1993 — Issue when plaintiffs, with reasonable diligence, could have discovered causes of action against defendant — Plaintiffs' cause of action for delay between 1978 and September 1984 not statute-barred — Cause of action for failure to consult between September 1984 and February 1986 statute-barred in February 1992.

FAIRFORD FIRST NATION V. CANADA (ATTORNEY GENERAL), [1999] 2 F.C. 48 (T.D.)

Quebec civil law applicable herein — Prescription cannot be pleaded by appellant as had demonstrated intention of renouncing it — Respondents would suffer harm if appellant allowed to invoke ground of defence for first time on appeal.

HAMEL V. CANADA, [1999] 3 F.C. 335 (C.A.)

Appeal from order striking out November 1997 originating notice of motion for *mandamus*, prohibition, declaration regarding crediting of amounts to pension plans as required by statute — Appellants alleging ongoing improper amortization of surpluses in each fiscal year since 1993-1994 breach of Minister's duties under Public Service, Canadian Forces Superannuation Acts — Motions Judge holding accounting procedures implemented in 1993-1994 having genesis in respondent's decision in 1989-1990 — Holding originating motion filed beyond 30-day time limit prescribed in Federal Court Act, s. 18.1(2) for application for judicial review in respect of decision or order of federal tribunal — Time limit imposed by s. 18.1(2) not barring appellants from seeking *mandamus*, prohibition, declaration — S. 18.1(1) permitting anyone directly affected by matter in respect of which relief sought to bring application for judicial review — "Matter" including any matter in respect of which remedy available under s. 18 — S. 18.1(3)(*a*), (*b*) contemplating *mandamus*, declaratory relief, prohibition — Exercise of s. 18 jurisdiction not depending on existence of "decision or order" — Acts of responsible Ministers in implementing decision attacked — Decision to proceed in accordance with 1988 recommendations not resulting in breach of statutory duties.

KRAUSE V. CANADA, [1999] 2 F.C. 476 (C.A.)

PRACTICE—Continued

Limitation of Actions—Concluded

Collection of unpaid income tax — Taxpayer failing to pay taxes in early 1980s — Assessed in 1986 — In 1987 Revenue Canada took proceeds of sale of taxpayer's home, wrote off balance uncollectable — MNR reviving collection attempts in 1998 — Whether barred by limitation period in Crown Liability and Proceedings Act or provincial Limitation Act — Income Tax Act complete code containing own limitation periods, not subject to limitation periods prescribed in legislation regarding Crown proceedings or civil litigation in general — Provincial limitation statute applicable neither to federal cause of action under Income Tax Act nor to collection, by Minister of federal Crown as agent, under provincial Income Tax Act as not applying to federal Crown as matter of necessary implication.

MARKEVICH V. CANADA, [1999] 3 F.C. 28 (T.D.)

Fatality resulting from sinking of self-propelled barge after striking rock in river — Widow suing Crown in personal capacity, as executrix, litigation guardian under maritime law, statute for failure to set standards, breach of statutory duty in approving of vessel's construction sketch — Whether action time-barred by Canada Shipping Act, s. 649 — Whether limitation periods in provincial legislation applicable herein — Whether Federal Court having inherent jurisdiction to extend statutory limitation period in exceptional circumstances — Whether certain claims tolled as to limitation period under non-statutory maritime law principles.

NICHOLSON V. CANADA, [2000] 3 F.C. 225 (T.D.)

Indian Band suing Crown in 1990 for breach of fiduciary duty — British Columbia Limitation Act, s. 8 barring action after 30 years — Act, s. 3(4) prescribing 6-year limitation for actions not listed in Act, applicable herein — Action for Crown's breach of fiduciary duty in 1951 surrender of reserve land for customs facility expansion statute-barred under Act, s. 8(1)(*c*) — Second breach of fiduciary duty in 1969 not barred under 30-year ultimate limitation period of s. 8(1)(*c*) — Under s. 6(3)(*d*), running of time can be postponed in case of fraud, deceit — 6-year limitation period to run from May 23, 1989 when Band informed Crown had no intention of constructing expanded customs facility in foreseeable future.

SEMIAHMOO INDIAN BAND V. CANADA, [1998] 1 F.C. 3 (C.A.)

Parties

Appeal from Trial Division's refusal to strike application for judicial review — As Commander, Maritime Forces (Pacific) only person whose decision under review, only person properly joined — Premature to join Chief of Defence Staff, Minister, as decision of neither under review.

ANDERSON V. CANADA (ARMED FORCES), [1997] 1 F.C. 273 (C.A.)

Originating notice of motion alleging ongoing improper amortization of portion of surpluses in Public Service, Canadian Forces pension accounts since 1993-1994, breach

PRACTICE—Continued

Parties—Continued

of Minister's duties under Public Service, Canadian Forces Superannuation Acts — President of Treasury Board, Minister of Finance should have been named as respondents, rather than Her Majesty — Originating document not otherwise so defective could not be cured by simple amendment — Style of cause so amended.

KRAUSE V. CANADA, [1999] 2 F.C. 476 (C.A.)

Intervention

Canadian Pacific Hotels (CP) applying to intervene in class action involving leases in national park in Manitoba — Crown alleging perpetual renewal clauses in leases null, void — CP operating resorts on national park land in Alberta under leases containing perpetual renewal clauses — Application of three-part test for intervention — Long-term planning, future investment, development decisions seriously affected without long-term security of perpetually renewable leases — Although CP's leases subject to outcome of action, interest broader than mere jurisprudential — Custodian of part of western Canada's heritage — Federal Court Rules, 1998, r. 109 requiring prospective interveners to show how participation will assist Court in determination of issues — Must have different perspective in sense of relevant, different point of view than parties — CP, as long-term commercial user, having different perspective than individual plaintiffs leasing property for cottage, recreational use — CP's potential contribution counterbalancing disruption intervention might cause.

ABBOTT V. CANADA, [2000] 3 F.C. 482 (T.D.)

Information Commissioner applied for judicial review pursuant to Access to Information Act, ss. 3, 42(1)(*a*) of refusal to disclose names of MPs in receipt of statutory pension — Requester applied pursuant to Access to Information Act, s. 42(2) to be made party — Filing notice of intervention pursuant to R. 1611; indicating intention to raise issue of benefit amounts — R. 1611 allowing intervenor to address Court on issue already before it — S. 42(2) giving right to appear as party to review — Commissioner's application in accord with RR. 319, 321.1, setting out criteria to be met to grant Court jurisdiction to hear issues raised in application for judicial review — Not requesting disclosure of benefit amounts — Intervenor cannot circumvent process, raise issues not argued by parties.

CANADA (INFORMATION COMMISSIONER) V. CANADA (MINISTER OF PUBLIC WORKS AND GOVERNMENT SERVICES), [1997] 1 F.C. 164 (T.D.)

Joinder

Commissioner of Commission of Inquiry not necessary party to action challenging Commission's Report — Respondent seeking setting aside of Report and its removal into Court; no remedy sought against Commissioner personally — Fact evidence of Commissioner may be needed at trial not sufficient reason for requiring him to remain as party defendant — Possibility, under Federal Court RR. 238, 233 (concerning non-

PRACTICE—Continued

Parties—Continued

Joinder—Concluded

parties), of obtaining Commissioner's evidence, production of relevant documents in his possession even if not party.

STEVENS V. CANADA (COMMISSIONER, COMMISSION OF INQUIRY), [1998] 4 F.C. 125 (C.A.)

Standing

Crown in right of province lacking standing to bring application for judicial review of Canadian Wheat Board's grain delivery program — Standing acquired: as person "directly affected" by matter in respect of which relief sought under Federal Court Act, s. 18.1; on basis of public interest; or as of right — Applicant not "directly affected" — Mere interest insufficient to establish direct effect — Public interest standing requiring no other reasonable, effective way matter could come before Court — Grain farmers directly affected by grain delivery program having access to Court, but none joined as applicants — Parliament expressly conferring standing on Attorney General under s. 18.1 — Failure to grant equivalent standing to provincial attorneys general not oversight.

ALBERTA V. CANADA (WHEAT BOARD), [1998] 2 F.C. 156 (T.D.)

Respondent challenging unions' status to bring complaint under CHRA, ss. 40, 41 — Unions' status as "group of individuals" under Act, s. 40(1) not questioned — S. 40(2) allowing complaint to go forward even where consent of complainants not obtained — Alleged victims having endorsed unions' actions throughout — Absent bad faith, use of mechanism of complaint by union under Act, s. 11 to force revision of collective agreement negotiated by it not legally wrong.

BELL CANADA V. COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA, [1999] 1 F.C. 113 (C.A.)

Information Commissioner properly excluded as respondent if matter were to proceed to hearing — Proper standing that of intervenor with full party status to make submissions on issues other than merits of his decision.

CANADA (ATTORNEY GENERAL) V. CANADA (INFORMATION COMMISSIONER), [1998] 1 F.C. 337 (T.D.)

Motion for *mandamus* requiring Somalia Commission of Inquiry to comply with mandate or other relief — Applicant Special Advisor to then Minister of Defence — Directly involved with communications between Minister, representatives of Canadian Armed Forces — Disputing date Minister's staff told of torture, murder in Somalia by members of Canadian Airborne Regiment — Allegations of cover-up — Within Commission's mandate, but applicant denied standing because Commission's mandate truncated when Governor in Council deciding to end hearings March 31, 1997 —

PRACTICE—Continued

Parties—Continued

Standing—Continued

Applicant directly affected, having standing to bring motion pursuant to Federal Court Act, s. 18.1.

DIXON V. CANADA (COMMISSION OF INQUIRY INTO THE DEPLOYMENT OF CANADIAN FORCES TO SOMALIA), [1997] 2 F.C. 391 (T.D.)

Taxpayer bringing action on own behalf, and on behalf of all taxpayers, except those benefitting from disputed ruling by departmental officials — Courts have discretion to award public interest standing to challenge exercise of administrative authority — Criteria set out in *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)* for public interest standing met — (1) Serious issues as to invalidity of "favouring" acts raised: maladministration of tax collection, erosion of tax base — (2) Plaintiff having genuine interest in subject-matter of action as employed Canadian taxpayer, member of association concerned with fair taxation — All taxpayers, except favoured few, sufficiently interested class whom plaintiff representing in this litigation — (3) No other reasonable, effective way to bring matter before Court — Neither favoured few nor Attorney General likely to bring action — Only other taxpayers who bear proportionately heavier burden of taxation natural plaintiffs — Breach of confidentiality of other taxpayers unnecessary to conduct litigation.

HARRIS V. CANADA, [1999] 2 F.C. 392 (T.D.)

Whether taxpayer had public interest standing in alleging maladministration of Income Tax Act by MNR — Issue raising question of limits of statutory authority — Court may exercise discretion to recognize public interest standing where strong public interest issues arise — Case law on public interest standing reviewed — Statement of claim raising justiciable issue — Issues raised by taxpayer serious — Latter having genuine interest in issues raised — No other reasonable, effective manner in which issue could be brought before Court — Taxpayer not merely seeking to obtain interpretation of particular provision of Act — Public interest standing granted.

HARRIS V. CANADA, [2000] 4 F.C. 37 (C.A.)

Applicants residents of British Columbia — Seeking interim injunctions to prevent proposed expropriation by federal government of provincial Crown lands until challenge to validity of expropriation determined — Public interest standing requiring (i) action raising serious legal question; (ii) genuine legal interest in resolution of question; (iii) no other reasonable, effective manner in which question may be brought to Court — Where number of private litigants directly affected by legislation who could commence litigation to challenge provisions, public interest groups not granted standing — Province holding land for all residents — Not case where other private individuals who might litigate, or able to provide more extensive factual background for litigation than these litigants — Applying liberal interpretation to principles relating to standing, applicants having standing.

HUMAN RIGHTS INSTITUTE OF CANADA V. CANADA (MINISTER OF PUBLIC WORKS AND GOVERNMENT SERVICES), [2000] 1 F.C. 475 (T.D.)

PRACTICE—Continued

Parties—Continued

Standing—Continued

Patent Act authorizing Patented Medicine Prices Review Board to hire staff — Act not conferring independent legal status on Board staff, unlike party status conferred on federal, provincial health ministers — Board *de facto* deciding to operate independently of staff, who have assumed responsibility for pursuing cases — Board required to act as both prosecutor, judge to fulfil legislated mandate.

ICN PHARMACEUTICALS, INC. V. CANADA (STAFF OF THE PATENTED MEDICINE PRICES REVIEW BOARD), [1997] 1 F.C. 32 (C.A.)

Whether plaintiffs had standing to sue under Copyright Act, s. 36(1) — Plaintiff Milliken & Co. basing right to sue on ownership of Mangrove design — Act, s. 13(4) allowing owner of copyright to assign rights — Whether stamp affixed on invoice sufficient to satisfy requirement of s. 13(4) — Mark, facsimile of signature accepted if customary way of identification of person — First assignment not valid, could not be redeemed by confirming assignment — Plaintiff Milliken Canada claiming standing as licensee — Non-exclusive licensee deriving no right, title, interest in copyright — Having no right to sue alone in copyright infringement action.

MILLIKEN & CO. V. INTERFACE FLOORING SYSTEMS (CANADA) INC., [1998] 3 F.C. 103 (T.D.)

S.C.C. decision in *Baker v. Canada (MCI)* not authority for proposition child has independent legal right to challenge deportation order issued against parent.

PANCHOO V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 3 F.C. 18 (C.A.)

Class actions — Action on behalf of all Canadian citizens, permanent residents, aged 65, but not residing in Canada for 10 years leading up to pensionability as required by Old Age Security Act — As directly affected by legislation, taking only reasonable, effective means of bringing issues to Court, plaintiff having standing — Plaintiff would fairly, adequately represent class — Having written authorization of 250 people — Unreasonable to expect proceeding to begin with exhaustive list of class — Unnecessary to obtain consent of other members of class before commencing action — Persons for whom class action taken must be identified but defendant's revealing all class members.

PAWAR V. CANADA, [1997] 2 F.C. 154 (T.D.)

Appeal from dismissal of motion to strike Sierra Club's application for judicial review of Ministers' refusal to subject to full environmental assessment sale to China of two CANDU nuclear reactors and their construction, operation in China — Federal Court Act, s. 18.1(1) permitting anyone "directly affected" by matter in respect of which relief sought to apply for judicial review — Person who satisfies requirements for discretionary public interest standing, i.e. common law requirements, may seek

PRACTICE—Continued

Parties—Concluded

Standing—Concluded

relief under s. 18.1(1) even though not "directly affected" — In absence of explicit statutory provision excluding public interest applicants from Federal Court, incongruous to subject Court's ability to entertain judicial review applications to limitation not imposed on other courts — Common law requirements for public interest standing: (1) litigation must raise serious or justiciable issue; (2) applicant must have genuine interest in outcome or subject-matter of litigation; (3) must not be persons more directly affected than applicant who can reasonably be expected to litigate issues raised by applicant — (1) Intervener not discharging burden of showing applicant having no reasonable cause of action, as focusing on aspects of claim involving exercise of Court's discretion i.e. extension of limitation period; remedies sought — (2) Intervener, respondents not demonstrating Sierra Club lacked genuine interest in subject-matter of litigation by virtue of limited involvement with export of nuclear reactors — Theory applicant must demonstrate reasonably apprehended harm to vulnerable constituency to acquire public interest standing too narrow — Overlooks protection of constitutional precepts of rule of law, democratic accountability as reasons for extension of public interest standing beyond Attorney General — Sierra Club's interest in legal issues intimately linked to corporate objectives — Opposition to nuclear power not establishing that litigating for political reasons; not inconsistent with genuine interest in outcome — (3) Respondents, intervener not establishing on balance of probabilities other reasonable, effective ways in which subject-matter of judicial review application may be litigated — Court would be required to infer more appropriate applicants as no evidence before it of nature, scale of operations undertaken in Canada in connection with impugned project or whether those responsible will be required to clear regulatory hurdles, and if so whether local residents able to challenge sale, financing of reactors — Court also influenced by desire not to encourage preliminary motions on incomplete information.

SIERRA CLUB OF CANADA V. CANADA (MINISTER OF FINANCE), [1999] 2 F.C. 211 (T.D.)

Third Party Proceedings

Capacity of Indian bands to sue and be sued — No need for separate representative as guardian *ad litem* for members of class under legal disability.

MONTANA BAND V. CANADA, [1998] 2 F.C. 3 (T.D.)

Pleadings

Mootness, abuse of process — As Notice of Compliance (NOC) issued to Apotex for norfloxacin, request for order to issue NOC for same drug moot — Furthermore, as appellant had opportunity to challenge validity of Patented Medicines (NOC) Regulations in earlier prohibition proceedings with respect to same drug, Court could have applied *res judicata* and issue estoppel to refuse to permit Apotex to raise it here-

PRACTICE—Continued

Pleadings—Continued

in — However, proceeding not dismissed as validity of Regulations remaining live issue (NOC issued on basis of single allegation), and declaration of legal status would still serve useful purpose — Furthermore, in view of uncertainty about Regulations when litigation started, obvious and continuing interest of Apotex in having validity of Regulations determined, and fact parties had prepared full argument on merits, Motions Judge properly exercised discretion not to dismiss proceeding on this ground without getting to merits.

APOTEX INC. V. CANADA (ATTORNEY GENERAL), [2000] 4 F.C. 264 (C.A.)

Amendments

Appeal from Motions Judge's refusal to allow amendments to statement of defence in so far as withdrawing admissions — Even if motion to amend pleadings involving withdrawal of admissions, motion under R. 420 proper — As amendment to pleading replaces earlier passage, no inconsistency contrary to R. 411 prohibition against inconsistent pleading — Practice in various Canadian jurisdictions reviewed — Flexible tests for withdrawal of admissions adopted — Requiring triable issue — Inadvertence, error, haste, lack of knowledge of facts, discovery of new facts, timeliness of motion to amend considered in deciding whether triable issue — Procedure to withdraw admissions should not be so stringent as to discourage proper admissions to detriment of litigants, administration of justice.

ANDERSEN CONSULTING V. CANADA, [1998] 1 F.C. 605 (C.A.)

One day prior to end of oral arguments, Trial Judge allowing amendment to statement of claim to include, as separate cause of action, claim in negligence for respondent's failure to exercise duty of care in negotiations for lease renewal, preparation of tender documents, evaluation of appellant's bid in response to tender — Although offered opportunity to reopen case, respondent declined — Amendments pursuant to R. 420 allowed at any stage of action to determine real questions in controversy, provided not resulting in injustice to other party not compensable by award of costs, serving interests of justice — As new claims of negligence resting upon same facts as those upon which other claims based, difficult to frame what occurred herein as cause of action, respondent offered opportunity to reopen case, Trial Judge properly exercising discretion, particularly as respondent suffering no prejudice.

MARTEL BUILDING LTD. V. CANADA (C.A.), [1998] 4 F.C. 300 (T.D.)

Motion to Strike

References in statement of claim to Framework Agreement, providing for delegation of federal powers so that First Nations may withdraw lands from management provisions of Indian Act — On motion to strike for want of reasonable cause of action, facts set out in statement of claim accepted as proven prior to determination whether plain, obvious, beyond reasonable doubt claim cannot possibly succeed — Under

PRACTICE—Continued

Pleadings—Continued

Motion to Strike—Continued

balance of grounds for striking out under r. 221, test as stringent, but affidavit evidence also considered — Temptation to strike out pleadings too easily to save expense, preserve Court resources — Stringent requirements necessary to avoid depriving party of day in court, prevent stifling advancement, refinement of law — Not plain, obvious, beyond reasonable doubt impugned portion of claim cannot possibly succeed.

B.C. NATIVE WOMEN'S SOCIETY V. CANADA, [2000] 1 F.C. 304 (T.D.)

Within Court's inherent jurisdiction to strike motion, but discretion to do so should be exercised only where clear no basis for proceeding by originating motion — Motion to strike allowed: by Minister's decision not to implement Information Commissioner's recommendation, issue raised by application for judicial review became moot — Furthermore, where recommendation not clearly unreasonable in light of evidence and materials before Commissioner, and minimal standards of fairness applicable met, Court may not intervene — Discretion Commissioner's alone, not Court's — No ground upon which Court might intervene here established, even on *prima facie* basis, by application and supporting affidavits.

CANADA (ATTORNEY GENERAL) V. CANADA (INFORMATION COMMISSIONER), [1998] 1 F.C. 337 (T.D.)

Appeal from order striking statement of claim filed on behalf of all taxpayers, except few benefitting from disputed tax ruling — Seeking declarations to compel Minister, Crown to comply with declaration as to meaning of "taxable Canadian property" in Income Tax Act — Court having jurisdiction under Federal Court Act, s. 17 to grant relief against Crown — Court having right to exercise discretion *de novo* when A.S.P.'s order vital to final determination of matter — Application of criteria set out in *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)* to grant plaintiff public interest standing.

HARRIS V. CANADA, [1999] 2 F.C. 392 (T.D.)

Appeal from F.C.T.D. decision setting aside Prothonotary's decision granting motion to strike statement of claim — Taxpayer alleging MNR acted illegally by providing preferential treatment to some taxpayers in issuing advance tax ruling — MNR moving to strike out statement of claim as disclosing no cause of action — Test on motion to strike whether plain and obvious action cannot succeed — Statement of claim based on Auditor General's report — Taxpayer seeking declaration MNR obliged to use all available measures under Act to collect tax due, owing — Not mere question of administrative interpretation — Not plain and obvious MNR owes no fiduciary obligations to taxpayers — Not plain and obvious statement of claim discloses no cause of action.

HARRIS V. CANADA, [2000] 4 F.C. 37 (C.A.)

PRACTICE—Continued

Pleadings—Concluded

Motion to Strike—Concluded

Portions of statement of claim, reply to demand for particulars — Action for damages following boarding, seizure on high seas, arrest, detention of Spanish fishing trawler, arrest of master by Canadian authorities — Claiming damages for trespass, assault, malicious prosecution, negligent navigation — General principles on motion to strike — Objections to allegations relating to international law, malicious prosecution, infringement of Charter, ss. 7, 8, 10, 15 rights — Motion allowed in part.

JOSE PEREIRA E HIJOS, S.A. V. CANADA (ATTORNEY GENERAL), [1997] 2 F.C. 84 (T.D.)

Action for declarations, damages re Aboriginal rights in land and breach of trust, fiduciary, legal and equitable duties by Crown — Statement of claim not establishing material facts to disclose cause of action in damages, or for most of declaratory relief sought — Plaintiffs given opportunity to amend statement of claim to plead, in conformity with Rules, facts underlying claims.

KELLY LAKE CREE NATION V. CANADA, [1998] 2 F.C. 270 (T.D.)

Portions of statement of claim to reduce representative proceeding to action with sole plaintiff — Action on behalf of all Canadian citizens, permanent residents, aged 65, but not residing in Canada for 10 years preceding pensionability as required by Old Age Security Act — Onus on party seeking to strike under R. 419 to show plain, obvious action cannot succeed — Elements of class proceeding — Not plain and obvious action cannot succeed — Class identifiable as individual's date of arrival in Canada, status, age, part of easily accessible records in defendant's possession — Common grievance, interest, defences — Class action may be only access to judicial system for many due to cost of litigation — Possible saving to public in avoiding similar actions — Quantum of damages simple bookkeeping exercise.

PAWAR V. CANADA, [1997] 2 F.C. 154 (T.D.)

Preliminary Determination of Question of Law

Appeal from order dismissing R. 474 motion for direction certain questions of law be determined before trial — R. 474 contemplating two-stage procedure: (1) decision whether to order questions be determined before trial; (2) decision answering questions of law — On appeal from decision rendered at first stage, F.C.A. empowered only to make decision ought to have been made at that stage — R. 474 conferring discretion to order determination of question of law — Questions must be pure questions of law i.e. may be answered without requiring any findings of fact — Legal question may be based on assumption of truth of allegations in pleadings provided facts, as alleged, sufficient to enable Court to answer question — Questions must be not merely academic but conclusive of matter in dispute i.e. may probably be decided in such way

PRACTICE—Continued

Preliminary Determination of Question of Law—Concluded

as to dispose of action or substantial part thereof — R. 474 should be resorted to only when will save time, money — All circumstances must be considered — Motions Judge properly exercising discretion as believed questions would be answered in appellants' favour, thus necessitating trial.

PERERA V. CANADA, [1998] 3 F.C. 381 (C.A.)

Privilege

Appeal from A.S.P.'s decision opinion letters privileged — Anchortek, defendant in patent infringement action, forwarding opinion letters provided by counsel to distributors — Western Explosives Ltd. producing letter at examination for discovery in another action, now consolidated with this action — Anchortek refusing to answer questions about letters at examination for discovery — Appeal dismissed — (1) Common interest privilege existing — Both parties need not be represented by same counsel for common interest privilege to apply — That parties may become adverse in interest not sufficient to deny existence of common interest privilege — Anchortek, Western not now adversaries — Parties need not be parties to litigation when information shared; anticipation such might occur sufficient — (2) Western's disclosure not waiver of Anchortek's privilege — Anchortek's communications with counsel covered by solicitor-client privilege, originating with Anchortek, remaining privileged despite Western's disclosure.

ALMECON INDUSTRIES LTD. V. ANCHORTEK LTD., [1999] 1 F.C. 507 (T.D.)

Counsel may not breach solicitor-client privilege when called upon by third party to provide information pertaining to relationship with former client, even to protect own reputation.

KELLY LAKE CREE NATION V. CANADA, [1999] 1 F.C. 496 (T.D.)

Motion pursuant to Federal Court Rules, RR. 1612, 1614 to compel production of legal opinion, correspondence considered in reaching decision to refuse to admit applicants to RCMP's Witness Protection Program — Counsel advising Commissioner also advising RCMP in related provincial court action — Application for judicial review of refusal alleging Commissioner more concerned with impact of decision on provincial court action than merits — Also alleging counsel writing decision — Applicants entitled to know extent of counsel's involvement in formation, writing of decision on merits — Not everything lawyer writes protected by privilege — Any document or part thereof dealing with merits of decision, not legal opinion, relevant to counsel's involvement in decision-making process, must be produced.

PERSONS SEEKING TO USE THE PSEUDONYMS OF JOHN WITNESS AND JANE DEPENDANT V. CANADA (COMMISSIONER OF THE ROYAL CANADIAN MOUNTED POLICE), [1998] 2 F.C. 252 (T.D.)

PRACTICE—Continued

Privilege—Concluded

Parameters of Crown's right to maintain claim of privilege in respect of solicitor and client communications in context of trust-like relationship between Crown and Indians with respect to 1946 surrender of rights in oil and gas resources in reserve lands.

SAMSON INDIAN NATION AND BAND V. CANADA, [1998] 2 F.C. 60 (C.A.)

Applicant seeking from PCO legal accounts relating to Commission of Inquiry — Accounts submitted to Commission, forwarded to PCO for payment — PCO disclosing 336 pages of legal accounts, deleting narrative on 73 pages based on solicitor-client privilege — One legal account, one disbursement memo inadvertently disclosed — Solicitors' accounts privileged — Commission department of government for financial purposes — Release of privileged information by one government institution to another not normally waiver of solicitor-client privilege — That accounts given to PCO reflecting administrative arrangement between two departments of government — Solicitor-client privilege not waived — As Commissioner required by Order in Council to file papers, records with Clerk of Privy Council, disclosure compulsory — Not constituting waiver — Inadvertent release not waiver — Necessary to consider all circumstances to determine whether partial disclosure constituting attempt to mislead so that privilege over entire document lost — Partial disclosure based on mistaken belief not subject to privilege — No attempt to cause unfairness, mislead Court — Partial disclosure not waiver.

STEVENS V. CANADA (PRIME MINISTER), [1997] 2 F.C. 759 (T.D.)

Whether lawyer's billing accounts protected by solicitor-client privilege from disclosure under Access to Information Act — Appellant, former federal cabinet minister, subject of Commission of Inquiry regarding conflict of interest allegations arising from business dealings — Application to Information Commissioner for disclosure of billing accounts, supporting documents of Commission counsel partially successful — Trial Judge finding expurgated material protected by solicitor-client privilege as directly related to seeking, formulating, giving of legal advice — Conflict between public interest in free communication between lawyers, clients, and in disclosure of relevant evidence before court — Solicitor-client privilege, guarantee of confidentiality distinguished — Privilege protecting communications only, not acts of counsel, mere statements of fact — Bills of accounts privileged under case law on tax litigation — Privilege substantive right, not merely rule of evidence — Narrative portions of bills of accounts communications for purpose of obtaining legal advice.

STEVENS V. CANADA (PRIME MINISTER), [1998] 4 F.C. 89 (C.A.)

References

Appeal from dismissal of motion to have issues of damages, profits determined by reference — A.S.P. holding defendants not providing any evidence bifurcating issues of liability, remedy resulting in inevitable saving of time, expense — Appeal dismissed — R. 107 permitting Court at any time to order issues in proceeding be determined

PRACTICE—Continued

References—Concluded

separately — Exercise of r. 107 discretion subject to principles applicable under former R. 480, subject to two changes made by 1998 Rules: (1) Court having more flexibility as may now order severance of issues, even though severed issues not suitable for determination on reference because raising issues of both fact, law; (2) r. 107 must be applied so as to secure just, most expeditious, least expensive determination of every proceeding on merits as required by r. 3 — On r. 107 motion, Court may order postponement of discovery, determination of remedial issues until after discovery, trial of liability issues, if satisfied on balance of probabilities that, in view of evidence and all circumstances of case (including nature of claim, conduct of litigation, issues, remedies sought), severance more likely than not to result in just, expeditious, least expensive determination of proceeding on merits — Defendants not meeting burden — Court particularly influenced by paucity of information in defendants' affidavit; that discovery underway; existence of profits questionable; delays in final disposition of case likely to be prejudicial to plaintiff; difficulty of totally disentangling questions of law going to liability from those going to remedy.

ILLVA SARONNO S.P.A. V. PRIVILEGIATA FABBRICA MARASCHINO "EXCELSIOR", [1999] 1 F.C. 146 (T.D.)

Res Judicata

Appeal from T.C.C. decision Income Tax Act, s. 165(1.1) not preventing taxpayer from pursuing issues raised in objections — S. 165(1.1) permitting filing of notice of objection to assessment in accordance with Court order only if relating to matter giving rise to assessment not conclusively determined by Court — Appeal from objections settled — Consent order referring matter back to MNR — Taxpayer objecting to reassessments — *Res judicata* applies not only to matters decided by earlier litigation, but also to related matters which although undecided could, should have been brought forward, disposed of at time — Concern leading to enactment of s. 165(1.1) to prevent further litigation with respect to matters unrelated to prior decision — Issues taxpayer now attempting to raise logical, integral part of litigation before T.C.C. prior to consent judgment being entered — Could, should have been raised at same time — Matter of computation of taxpayer's resource allowance conclusively determined by consent judgment — S. 165(1.1) neither ousting rule of *res judicata* by necessary implication nor adopting rule only in so far as applying to matters specifically decided by Court — Court not having discretion to overlook rule of *res judicata* in special circumstances or where interests of justice so require.

CANADA V. CHEVRON CANADA RESOURCES LTD., [1999] 1 F.C. 349 (C.A.)

Reference pursuant to Federal Court Act, s. 18.3(1) — Before appeal from deportation order against respondent heard, Minister issuing opinion under Immigration Act, s. 70(5) respondent danger to public — Appeal dismissed for lack of jurisdiction — Gibson J. dismissing application for discretionary stay of removal in belief statutory stay subsisting — Application for leave, judicial review of direction to report for removal dismissed — Before removing respondent, Minister asking Court whether

PRACTICE—Continued

Res Judicata—Continued

execution of removal order violating Immigration Act, s. 49(1)(*b*), Gibson J.'s order — Doctrine of *res judicata* not applicable — Order dismissing application for stay neither final determination of questions raised herein, as neither question directly before Gibson J., nor declaration statutory stay existed — Order not interlocutory, but regardless, inappropriate to apply doctrine where permanent stay possible result — Parliament intending to create only temporary stay when eliminated appeal of deportation order while providing for judicial review.

CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) V. CONDELLO, [1998] 3 F.C. 575 (T.D.)

Removal order issued against applicant but set aside by IRB, Appeal Division — Charges against applicant originating in Philippines considered — Charges may be considered again for different reason — Issue before Appeal Division whether humanitarian, compassionate grounds to set aside applicant's removal from Canada — Issue before decision maker in considering rehabilitation application whether charges make applicant person excluded under s. 19(1)(*c.*1)(ii), whether rehabilitated — Issue not decided elsewhere — *Res judicata* not applicable.

DEE V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 3 F.C. 345 (T.D.)

Application to compel answers to questions directed to ownership, control, management, financial, commercial interests between two corporations upon cross-examination on affidavit — Applicants alleging estoppel, *res judicata* in originating notice of motion — Affidavit denying privity — "Privies" no longer defined as meaning only those claiming by inheritance, succession or assignment — On cross-examination as to denial of privity, applicants entitled to examine relationship between corporations — Control most explicit factor to determine existence of relationship.

HOFFMANN-LA ROCHE LTD. V. CANADA (MINISTER OF NATIONAL HEALTH AND WELFARE), [1997] 2 F.C. 681 (T.D.)

Appeal from dismissal of application for judicial review of IRB,AD's dismissal of appeal — Appellant applying for permanent residence of wife in 1993, 1995 — Applications refused on ground spouse excluded from family class by Immigration Regulations, 1978, s. 4(3) as marriage not *bona fide* — IRB,AD dismissing second appeal on basis of *res judicata* — Not necessary to resort to *res judicata* — Within IRB,AD's jurisdiction to summarily dismiss appeal to prevent abuse of process.

KALOTI V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 3 F.C. 390 (C.A.)

Appeal pending from dismissal of trade-marks passing-off action — Final decision pre-condition to application of *res judicata* — Decision not final as appeal pending — *Res judicata* not applicable — Applicants submitting Court should order interim relief

PRACTICE—Continued

Res Judicata—Concluded

until appeal decided — Pre-conditions for application of principle of *res judicata* should not be modified to fit relief sought — Applicants in fact seeking stay of proceedings, but such relief could not be granted as no evidence of irreparable harm.

NOVOPHARM LTD. V. ELI LILLY AND CO., [1999] 1 F.C. 515 (T.D.)

Prior to within applications for *mandamus*, declaration, earlier F.C.T.D. proceeding (subsequently reversed by S.C.C.) determining letter of request from Minister of Justice to Swiss authorities seeking assistance with RCMP investigation into fraud on government constituted breach of Charter, s. 8 right to protection against unlawful search and seizure — Attorney General submitting applicant precluded by application of *res judicata* from now questioning authority to issue request — *Res judicata* not applicable as earlier proceeding based on agreed facts to determine agreed question of law — Scope therof not providing for argument about basis of authority to issue request.

SCHREIBER V. CANADA (ATTORNEY GENERAL), [2000] 1 F.C. 427 (T.D.)

Service

Judicial review of Immigration Act decision applicant "danger to public" — Applicant under disability due to mental illness — Detained by order of Ontario Criminal Code Review Board — Letter advising Minister considering rendering opinion applicant "danger to public" sent to parents' address — Copy sent to solicitor representing him in deportation appeal — Federal Court Rules, R. 1700(1)(*a*) providing proceeding against person under disability may be brought in manner under which would be brought in superior court of province where person under disability residing — Procedures of Ontario Court (General Division) applied — No evidence service of Minister's possible opinion made in accordance with Ontario law — Provincial officials responsible for applicant's interests not notified of proceedings — Decision set aside.

DA COSTA V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1998] 2 F.C. 182 (T.D.)

Stay of Proceedings

Motion to stay application for order directing Minister to issue NOC for drug Norfloxacin and for declaration Patented Medicines (Notice of Compliance) Regulations *ultra vires* — Prohibition order preventing Minister from issuing NOC issued in proceedings commenced under Regulations, s. 6, upheld on appeal — Argued that duplication of proceedings, abuse of process — FCA decision determining result of first order sought — Not in interest of justice to stay, dismiss application for declaratory relief as (i) uncertainty about raising issue of invalidity in earlier proceedings; (ii) parties added as intervenors having interest in issue of validity of Regulations, investing considerable time, effort in preparation; (iii) intervention, preparation by third party in proceedings under Regulations, s. 6 possibly difficult

PRACTICE—Continued

Stay of Proceedings—Continued

because of statutory time limits for determination of whether prohibition order should issue; (iv) important to resolve validity issue.

APOTEX INC. V. CANADA (ATTORNEY GENERAL), [1997] 1 F.C. 518 (T.D.)

Motion for stay of citizenship revocation proceedings on ground of non-disclosure of evidence; unfairness; fact Rules changed in midst of proceedings — Immigration file, including permanent residence application wherein respondent allegedly making false representations, routinely destroyed prior to institution of proceedings — Delay between filing of statement of claim, commencement of these proceedings not detrimental to defendant — Government cannot be faulted for choosing to proceed by revocation proceedings, instead of prosecution for war crimes — Not basis to grant stay that revocation proceedings not instituted against others named in Deschênes Commission Report — No merit to argument change of Rules justifying stay of proceedings.

CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) V. KATRIUK, [1999] 3 F.C. 143 (T.D.)

Motions Judge ordering stay of citizenship revocation proceedings following secret meeting between Chief Justice of Federal Court and Assistant Deputy Attorney General — Court can order stay of proceedings in interest of justice under Federal Court Act, s. 50(1)(*b*) — Least intrusive remedy capable of curing breach to be imposed — Present cases not "clearest of cases" for granting stay — Less drastic remedy available — Motions for stay ill-founded.

CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) V. TOBIASS, [1997] 1 F.C. 828 (C.A.)

No *res judicata* based on order enjoining commencing or continuing proceedings before any court, other than Federal Court — Difference between enjoining and staying — Test for each different — Jurisdiction in Federal Court to stay proceedings under Federal Court Act, s. 50, and to enjoin proceedings under Canada Shipping Act, s. 581(1) — *Mon-Oil Ltd. v. Canada* two-part test (whether continuation of action would cause prejudice or injustice to defendants and whether would be unjust for plaintiff in liability action) appropriate where, as here, stay of Court's own proceeding at issue — Stay granted.

CANADIAN PACIFIC RAILWAY CO. V. *SHEENA M* (THE), [2000] 4 F.C. 159 (T.D.)

Motion for prohibition or stay of proceedings before Copyright Board pursuant to Copyright Act, Part VIII — Constitutionality thereof questioned — Although serious issue raised, case of irreparable harm with respect to imposition of levies if relief not granted not made out — In suspension cases, public interest carrying greater weight in favour of compliance with legislation.

EVANGELICAL FELLOWSHIP OF CANADA V. CANADIAN MUSICAL REPRODUCTION RIGHTS AGENCY, [2000] 1 F.C. 586 (C.A.)

PRACTICE—Concluded

Stay of Proceedings—Concluded

Court cannot make stay conditional upon posting of security for costs of arbitration as matter part of arbitrators' jurisdiction, as Court's capacity to award security for costs limited to proceedings in Federal Court, and as need for security for costs not demonstrated herein.

FRONTIER INTERNATIONAL SHIPPING CORP. v. *TAVROS* (THE), [2000] 2 F.C. 427 (T.D.)

Variation of Time

Reply overlooked and pleadings closed — Motion for extension of time to file reply — Reply alleging estoppel — Issue arising during discovery of Crown's witness — Underlying consideration whether, in circumstances, grant of extension required to do justice between parties — Search for justice may require balancing of principle time limits in Rules requirements to be met against principle party committing procedural default should not be denied adjudication of claim unless prejudice to other side not compensable in costs — Except in exceptional circumstances, including where costs not proper compensation, time extension should ordinarily be allowed if in overall interests of justice — Must look at whether adequate explanation for failure to act in timely manner, whether arguable case — Even though some delay since completion of discoveries, any prejudice (e.g. further discoveries) compensable in costs — Reply not fundamental alteration of case, but evolution — Liberal approach necessary to do justice between parties.

ABBOTT v. CANADA, [2000] 3 F.C. 493 (T.D.)

Motion for extension of time granted partly as new Rules came into effect shortly before motion for special directions as to costs filed — However, allowing some flexibility because of newness of Rules must be practice of short duration.

ELI LILLY AND CO. v. NOVOPHARM LTD., [1999] 2 F.C. 175 (C.A.)

Motion to file supplemental affidavit of claim to update balance owing on claim in matter of priorities to sale proceeds of ship — To extend time for filing more affidavit material contrary to Federal Court r. 492(2) and F.C.A. view stated in *National Bank of Greece S.A. v. Macoil Inc.* — R. 55 ought not to be used to amend r. 492(2), remove time bar — Furthermore, present proceeding not extraordinary case presenting special circumstances bringing it within r. 55 — Considering all circumstances, including need to move to prompt determination of entitlement to sale proceeds of ship and to bring end to legal expenses of all claimants, factors outweigh any injustice to plaintiff resulting from rejection of supplemental affidavit.

GOVERNOR AND COMPANY OF THE BANK OF SCOTLAND v. *NEL* (THE), [1999] 2 F.C. 417 (T.D.)

PRIVACY

Disclosure of information by Revenue Canada (Customs) to CEIC pursuant to understanding regarding data capture and release of customs information on travellers

PRIVACY—Continued

(program aimed at catching those receiving UI benefits while out of Canada) not authorized by Privacy Act, s. 8 and Customs Act, s. 108 — Information provided by travellers "personal information" as defined in Privacy Act, s. 3 — Privacy Act, s. 8(2)(*b*) authorizing disclosure of personal information for any purpose in accordance with any Act of Parliament authorizing disclosure — Customs Act, s. 108(1)(*b*) authorizing disclosure, but only in limited circumstances, not, as here, pursuant to blanket authorization of disclosure for enforcement of any law of Canada or province.

PRIVACY ACT (CAN.) (RE), [1999] 2 F.C. 543 (T.D.)

Disclosure of information by Revenue Canada (Customs) to CEIC pursuant to memorandum of understanding regarding data capture and release of customs information on travellers (program aimed at catching those receiving EI benefits while out of Canada) authorized by Privacy Act, s. 8 and Customs Act, s. 108 — Privacy Act, s. 8(2) not restricting disclosure of personal information only to purpose for which collected — Under Privacy Act, s. 8(2)(*b*), Parliament may, by statute, confer on any Minister wide discretion as to disclosure of information his department has collected.

PRIVACY ACT (CAN.) (RE), [2000] 3 F.C. 82 (C.A.)

Applicant denied access to personal information banks maintained by three federal government agencies — Privacy Commissioner finding complaints not well-founded in first case, but certain information held in other case should be released — Solicitor General refusing to release requested information — Review applications made under Privacy Act, s. 41 — Class exemptions, injury exemptions distinguished — RCMP authorized to refuse to disclose personal information requested on basis of Act, s. 22(1)(*a*)(ii) — Department of External Affairs, CSIS properly exercised discretion under Act, s. 16(2) in refusing to indicate whether personal information existed in information banks 040 and 010 — Alternate grounds not appropriate for refusal to disclose requested information — CSIS authorized, had reasonable grounds under Act, ss. 21, 22(1)(*b*) to refuse to disclose personal information not released from information bank 015.

RUBY V. CANADA (ROYAL CANADIAN MOUNTED POLICE), [1998] 2 F.C. 351 (T.D.)

Appeals from dismissal of judicial review of Privacy Commissioner's denial of complaints concerning refusal to disclose personal information by CSIS, RCMP, Department of External Affairs (DEA) — (1) Burden of proof — Privacy Act, s. 47 imposing burden on institution head to establish refusal to disclose authorized — Encompassing proof conditions of exemption met, discretion properly exercised — As application for judicial review pursuant to s. 41 by definition questioning validity of exercise of discretion, nothing more required of applicant — (2) Interpretation of exemptions claimed — (i) S. 22(1)(*a*) only permitting refusal to disclose personal information where information coming into existence less than 20 years prior to request — Sole document at issue in RCMP bank over 20 years old — (ii) DEA neither confirming nor denying existence of information requested under general policy never to disclose whether information in bank — S. 16(2) providing institution head not

PRIVACY—Concluded

required to indicate under s. 16(1) whether personal information exists — Not contemplating exercise of discretion, but clarifying s. 16(1) option to refuse to confirm existence of information — Even if s. 16(2) conferring discretion, not required to be exercised on case-by-case basis — Given particular nature, purpose of Act, factual circumstances, adoption of such general policy judicious exercise of discretion — DEA claiming exemption under s. 22(1)(*a*), (*b*) if information existed — Motions Judge's reasons not specifically mentioning s. 22(1)(*a*) — As some doubt as to whether reviewed exercise of discretion by DEA, new review with respect to s. 22(1)(*a*) exemption ordered — S. 22(1)(*b*) authorizing refusal of access to information where disclosure could be injurious to law enforcement — Not authorizing refusal to disclose where disclosure could have chilling effect on investigative process in general — (iii) CSIS refusing to confirm, deny existence of information, but claiming ss. 19, 21, 22, 26 exemptions — Information in CSIS banks should be reviewed to identify which information not covered by s. 22(1)(*b*) — S. 19 requiring refusal to disclose personal information obtained in confidence from another government or international organization of states without consent — Authority claiming benefit must ensure third party not consenting to disclosure — Claim under s. 19 should be reviewed to ensure CSIS made reasonable efforts to seek consent of third party — S. 26 permitting refusal to disclose personal information about third party, requiring refusal to disclose where prohibited under s. 8 — Must read ss. 8, 26 together — S. 8(2)(*m*)(i) permitting disclosure of personal information where public interest in disclosure outweighing invasion of privacy — Manner of balancing interests within institution head's discretion — Unclear whether CSIS considered s. 8(2)(*m*)(i), properly applied s. 26 exemption — New review of personal information to determine whether s. 26 exemption properly applied.

RUBY V. CANADA (SOLICITOR GENERAL), [2000] 3 F.C. 589 (C.A.)

PUBLIC SERVICE

Judicial review of decision of Canadian Human Right Tribunal (CHRT) Treasury Board in breach of CHRA, s. 11 by maintaining differences in wages between male, female employees employed in same establishment performing work of equal value — CHRT not erring in choice of methodology for selecting male comparators for employees in each level of predominantly female complainants group i.e. omitting observations from male population where value of work performed higher/lower than highest/lowest value of work performed by female occupational group — S. 11 aimed at existence of wage gap disadvantaging women as result of gendered segregation in employment, systemic undervaluation of work typically performed by women — Any wage difference created by s. 11 adjustment statutorily authorized — Would not give rise to s. 11 complaint by males then earning less — Annual recalculation of wage gap reasonable — Benefit to public interest of setting aside decision for error of technical nature outweighed by costs of so doing.

CANADA (ATTORNEY GENERAL) V. PUBLIC SERVICE ALLIANCE OF CANADA, [2000] 1 F.C. 146 (T.D.)

PUBLIC SERVICE—Continued

Appeals

Judicial review of Public Service Commission Appeal Board's refusal to disclose to applicants' representative scoring manual used to correct in-basket exercise completed by them in competition — Chairwoman holding bound by *Hasan v. Canada (Attorney General)*, wherein held applicant not entitled to access to scoring manual — Chairwoman not bound by *Hasan*, decided under previous Public Service Employment Regulations — Failed to appreciate changes implemented in amended legislative scheme, including discretionary power accorded to appeal board to order access to any document in relation to which deputy head, Commission refusing access, subject to any conditions deemed necessary to make certain continued use of standardized test will not be compromised or that results not prejudiced — Erred by failing to consider under s. 24(5), (6) whether ought to order access to scoring manual subject to conditions, given deputy head's refusal to allow access.

MURPHY V. CANADA (ATTORNEY GENERAL), [1999] 2 F.C. 326 (T.D.)

Jurisdiction

PSSRB — Judicial review of Adjudicator's decision respondent entitled to marriage leave under collective agreement for same sex union — Employee's right to grieve limited by PSSRA, s. 91(1) requirement no administrative procedure for redress in another Act of Parliament — S. 92 permitting referral of grievance to adjudication only following completion of grievance process — Where s. 91(1) depriving employee of right to grieve, cannot subsequently refer grievance to adjudication under s. 92 — Canadian Human Rights Act, ss. 41(1)(*a*), 44(2)(*a*) permitting CHRC to require complainant to exhaust grievance procedures — Where grievance involving discriminatory practice in context of collective agreement, CHRA applies — Grievance alleging discrimination based on denial of employment benefit for reasons directly related to sexual orientation — Within mandate of CHRC, Tribunal under CHRA — CHRA providing "administrative procedure for redress" — Adjudicator lacked jurisdiction to hear grievance.

CANADA (ATTORNEY GENERAL) V. BOUTILIER, [1999] 1 F.C. 459 (T.D.)

PSSRB — Appeals from F.C.T.D. judgments holding adjudicators lacking jurisdiction to decide human rights dispute arising under collective agreement — PSSRA, s. 91 conferring right to grieve interpretation, application of statute dealing with terms, conditions of employment in respect of which "no administrative procedure for redress" provided in Act of Parliament — F.C.A., F.C.T.D. consistently holding language used in s. 91 indicating Parliament intending to remove from normal grievance procedures under PSSRA certain specialized areas — Interpretation supported by French version — Also, statutory bar in s. 91 not unilaterally imposed as master collective agreement denying access to usual grievance procedure where another administrative procedure provided by Act of Parliament — In federal labour matters, if another administrative procedure available to grievor, must be used as long as "real" remedy — Need not be equivalent or better remedy provided dealing meaningfully, effectively with substance of grievance — Possible delay in securing

PUBLIC SERVICE—Continued

Jurisdiction—Concluded

redress not significant unless so pronounced as to amount to no real remedy — Differences in administrative remedy not changing it into non-remedy — Most jurisdictional matters resolved by adjudicator before commencement of grievance proceedings, but unavoidable effect of language of s. 91 that human rights issue may arise during hearing causing loss of jurisdiction — Parties should attempt to determine in advance whether human rights issues involved and act accordingly.

CANADA (ATTORNEY GENERAL) V. BOUTILIER, [2000] 3 F.C. 27 (C.A.)

Grievance — Judicial review of PSSRB decision employer violated collective agreement by refusing request for vacation leave, ordering employer to grant one day of vacation leave in addition to entitlement under collective agreement — Public Service Staff Relations Act, s. 96(2) prohibiting adjudicator from rendering decision effect of which to require amendment of collective agreement — Tribunal added to respondent's leave entitlement without justification — Contravened limitation of jurisdiction imposed by s. 96(2).

CANADA (ATTORNEY GENERAL) V. HESTER, [1997] 2 F.C. 706 (T.D.)

Appeal from Motions Judge's dismissal of application for judicial review of adjudicator's decision respondent Marinos, employee, within adjudicator's jurisdiction to hear grievance — Marinos appointed to position pursuant to PSEA, s. 21.2 permitting appointments for periods not exceeding 90 days, providing PSEA not applicable to such employees — Signing three consecutive contracts of employment for 90 days — Grieving termination of employment for disciplinary reasons — Under PSSRA, s. 92 only "employee" entitled to refer grievance to adjudication — S. 2(1) definition of "employee" excluding persons employed on casual basis (par. (*g*)) — Adjudicator holding s. 21.2 irrelevant, looking to factual circumstances to hold respondent not employed on casual basis — Since "on a casual basis" not defined in PSSRA, must refer to PSEA, s. 21.2 — Heading, "Casual Employment" used to clarify interpretation of s. 21.2 — S. 21.2 creating category of casual employees discrete from those already in existence i.e. term, indeterminate, probationary — As casual employee under s. 21.2, Marinos employed on casual basis under PSSRA, not having right to grieve — Adjudicator's decision set aside for want of jurisdiction.

CANADA (ATTORNEY GENERAL) V. MARINOS, [2000] 4 F.C. 98 (C.A.)

Judicial review of PSSRB Chairperson's refusal to refer proposals to arbitration board — PSSRA, s. 66(1) conferring on Chairperson exclusive jurisdiction to determine terms of reference of board — Assuring consistency of rulings, finality in arbitration process — Such boards now ad hoc — Not involved in process beyond rendering award — Need for consistency as award binding on parties — Avoiding revision of Chairperson's ruling on mandate.

PUBLIC SERVICE ALLIANCE OF CANADA V. NATIONAL CAPITAL COMMISSION, [1998] 2 F.C. 128 (T.D.)

PUBLIC SERVICE—Continued

Labour Relations

Grievance — Library worker exposed to fumes from chemical carpet cleaner at workplace — Developing environmental sensitivity — Off sick and underwent bronchoscopy — Doctor recommending return to work on part-time basis — Reported for work but sent home by supervisor — Request denied due to operational requirements, problems caused by financial constraints, downsizing — Offered job at another location at same pay — Grievor declining without giving valid reason — Adjudicator did not err in determining employer's duty to accommodate met.

GUIBORD V. CANADA, [1997] 2 F.C. 17 (T.D.)

Judicial review of PSSRB Chairperson's ruling Public Sector Compensation Act freezing terms, conditions of employment of NCC employees; refusing to refer to arbitration proposals respecting job evaluation, Art. 47.01 (permitting employer to contract out services if not resulting in loss of employment), Art. Y-1 (binding purchaser of respondent's business to collective agreement) — Public Sector Compensation Act applicable to respondent, employees — Job evaluation plan proposal contrary to PSSRA, s. 69(3)(*a*) because dealing with classification — Art. 47.01 proposal contrary to s. 69(3)(*a*), (*b*) because dealing with organization of respondent — Art. Y-1 proposal contrary to ss. 7 (prohibiting interference with employer's ability to organize itself), 69(2) (making s. 57(2) applicable to an arbitral award), 57(2)(*a*) (prohibiting changes to terms and conditions of employment requiring amendment of legislation), 69(3)(*a*).

PUBLIC SERVICE ALLIANCE OF CANADA V. NATIONAL CAPITAL COMMISSION, [1998] 2 F.C. 128 (T.D.)

Appellants denied paid leave of absence to observe Jewish High Holy Days — Employer offering options to permit absences without pay loss — Offer rejected — Mandatory designated paid holidays in collective agreements discriminatory in effect — Reasonable steps taken by employer, short of undue hardship, to accommodate appellants — Employer not bound under doctrine of undue hardship to grant leave with pay for religious reasons — Burden of proof on employer met.

RICHMOND V. CANADA (ATTORNEY GENERAL), [1997] 2 F.C. 946 (C.A.)

Plaintiffs' ships delayed on St. Lawrence Seaway during legal strike by public servants — Defendant missing statutory deadline to designate under PSSRA, s. 78 employees required to ensure safety, security of public — Designation process to ensure safety, security of those using waterways — No legal duty on Crown to file list of designated employees — Employer to designate employees whose work required to prevent bodily harm, loss of life, loss or damage to property — Omission to designate in timely manner under s. 78(2) beyond reach of law of tort.

THE CSL GROUP INC. V. CANADA, [1997] 2 F.C. 575 (T.D.)

Shipping companies seeking damages due to legal strike by Coast Guard members causing delays for ships using St. Lawrence Seaway — Treasury Board (TB) late in

PUBLIC SERVICE—Continued

Labour Relations—Concluded

filing list of designated employees under PSSRA, s. 79 — Delay not wrongful — Public servants not acting imprudently, in disorganized manner — Default by TB not resulting in civil liability — TB officials responsible for filing list of designated employees, Board itself not exercising rights, options conferred on them by Act as dispensers of service to public — Even if conduct complained of having significant consequences for public, economy, subject to sanction only in political arena.

THE CSL GROUP INC. V. CANADA, [1998] 4 F.C. 140 (C.A.)

Collective agreement providing certain employees in Saskatchewan paid less than those elsewhere in Canada — Creating distinction constituting denial of equal benefit of law — Charter, s. 15 applicable to collective agreement to which Government of Canada party — No discrimination herein — Province of residence analogous ground only if violation of human dignity, freedom based thereon — Plaintiffs' claim purely economic — No evidence of violation of human dignity, freedom — Crown's motion for summary judgment granted as no genuine issue for trial.

WONG V. CANADA, [1997] 1 F.C. 193 (T.D.)

Pensions

Judicial review of refusal to pay plaintiff, resident of Quebec, benefits under PSSA as surviving spouse, legal heir — Plaintiff guilty of manslaughter in stabbing death of husband, former public servant, contributor to pension fund under PSSA — Defendant citing rule of public order person may not profit from crime — PSSA, s. 12(4) rules of allocation to surviving spouse, children silent as to disentitlement in this regard — Federal statute wishing to depart from law applicable in province within its field of jurisdiction must do so expressly, as stipulated in preliminary article of Civil Code of Québec — Presumption legislation not intending to change law beyond that which declares expressly — Ordinary law of Quebec accepting person convicted of manslaughter may inherit from deceased — Rule of public order not applicable because not expressly stated in Act, contrary to ordinary law — As legal heir, surviving spouse entitled to benefits under PSSA.

ST-HILAIRE V. CANADA (ATTORNEY GENERAL), [1999] 4 F.C. 23 (T.D.)

Selection Process

Term appointee failing performance review, excluded from rehiring eligibility list — Alleging due to denial of training, work instruments in English — Commissioner of Official Languages finding language of work rights infringed, making recommendations — Extent of remedies under Official Languages Act, s. 77(4) — Damages — Formal apology.

LAVIGNE V. CANADA (HUMAN RESOURCES DEVELOPMENT), [1997] 1 F.C. 305 (T.D.)

PUBLIC SERVICE—Continued

Selection Process—Concluded

Competitions

Appellants permanent residents — Denied referral to open competition for positions in public service under PSEA, s. 16(4)(*c*) — Qualified non-Canadian candidates subject to citizenship preference when applying for positions to be filled by open competition — Citizen-based distinction drawn by Act, s. 16(4)(*c*) not discrimination within meaning of Charter, s. 15(1) — Canadian citizens, permanent residents not "similarly situated" — Preference for Canadian citizens in open competitions not violating merit principle.

LAVOIE V. CANADA, [2000] 1 F.C. 3 (C.A.)

Merit Principle

Role and function of P.S.C. Appeal Board on hearing appeal of employee not reappointed to term position for failing written knowledge examination though having successful performance record for five years — Appeal Board justified in concluding employee should be reassessed under knowledge factor with due regard to qualifications demonstrated by performance record — Merit principle to be applied in recognition of contextual realities — Purpose of appeal to expose, correct errors in application of standards having effect of undermining merit principle — Merit principle must be cognizant of, and responsive to, history of case, life situation of individuals involved.

CANADA (ATTORNEY GENERAL) V. BATES, [1997] 3 F.C. 132 (T.D.)

Discrimination on prohibited ground — Respondent denied PM-6 bilingual non-imperative position on basis could not meet language qualifications — Denial of entry into PSC's full-time French language training program, on basis of negative prognosis following testing and evaluation by PSC, discrimination on ground of disability (dyslexia in auditory processing) — Adverse effect discrimination — Obligation to accommodate — Systemic remedies — Personal awards to respondent.

CANADA (ATTORNEY GENERAL) V. GREEN, [2000] 4 F.C. 629 (T.D.)

Termination of Employment

Judicial review of P.S.S.R.B. Adjudicator's denial of grievance of termination after eight years on leave without pay — Adjudicator denying amendments to pleadings to claim additional relief — Applying test in *Baker v. Canada (Minister of Citizenship and Immigration)* for identifying appropriate rules of procedural fairness, standard of review patent unreasonableness — Critical factor that Adjudicator's decision within area of expertise — Nature of question involving interpretation, application of procedural matters — Adjudicator's expertise lies in deciding procedural matters — No regulations cover procedure governing manner in which grievances referred to adjudication — P.S.S.R.B. Regulations, s. 11 providing where procedural matter not provided for by Regulations arising during proceeding before Board, matter dealt with

PUBLIC SERVICE—Concluded

Termination of Employment—Concluded

as Board directing — Supporting conclusion certain amount of deference owed to Adjudicator's decision — Purpose of PSSRA administrative, but terms under which Board operates exception to administrative nature of PSSRA — Adjudicator's decisions establishing rights as between employees, public service — That Adjudicator's role under s. 92 rights-oriented favouring greater procedural requirements — Adjudicator relying on *Burchill v. Attorney General of Canada* — *Burchill* standing for proposition grievor may not amend grievance in respect of nature of acts complained of after beginning presentation of grievance at hearing — Not wrongly relied upon even though applicant sought to amend relief sought not acts complained of — Adjudicator not exercising discretion in patently unreasonable manner — As to error of fact, Adjudicator in better position than Court on judicial review — None of findings impugned by applicant outside Adjudicator's expertise — Though not necessarily agreeing with every finding of fact, not Court's role to substitute its opinion for that of Adjudicator.

SCHEUNEMAN V. CANADA (ATTORNEY GENERAL), [2000] 2 F.C. 365 (T.D.)

RAILWAYS

Notices of assessment issued pursuant to taxation by-laws under Indian Act, s. 83 against Canadian Pacific (CP) with respect to rights-of-way traversing reserves in British Columbia invalid — Nature of CP's tile to lands comprised in rights-of-way traversing various reserves — Interplay between Indian Act, Act respecting Canadian Pacific Railway, Railway Act — Whether Crown had requisite authority to convey fee simple title to CP — Whether CP's rights-of-way traversing reserves "lands within reserve" over which bands had jurisdiction — Whether CP discriminated against as only property interests of non-Indians situate on reserves taxed under by-laws.

CANADIAN PACIFIC LTD. V. MATSQUI INDIAN BAND, [2000] 1 F.C. 325 (C.A.)

Appeal from Canadian Transportation Agency decision apportioning capital, maintenance costs of fence along railway's right of way equally between Metropolitan Toronto, CNR — Since Metro establishing paved pathway pedestrians, cyclists, trespassing on CNR property — Other measures to discourage trespassers unsuccessful, causing complaints from residents (eg. whistle blowing) — Railway Safety Act, s. 16 permitting reference to Agency where proposing party, any other person standing to benefit from completion of work, cannot agree on apportionment of costs between them — CTA concluding fence "railway work", Metro stood to "benefit" from its installation — (i) Reasonable to conclude fence "railway work" — CTA reasoning fence preventing trespassing, thereby protecting railway line, facilitating railway operation, and within definition of "line work" — Definition of "railway work" including "line work" — (ii) Agency finding Metro stood to benefit from fence because protecting parkland users from inherent dangers created by presence of railway, addressing residents' complaints, discouraging trespassing thereby creating safer environment — Interpretation not confining "benefit" to conferral of additional legal rights correct in light of Railway Safety Act, s. 4(4) clearly indicating Agency

RAILWAYS—Concluded

must concern itself with safety of persons other than railway passengers, employees, including those using property adjacent to railway lines, who may be endangered by railway's presence — (iii) Reasonable to conclude Metro having sufficient interest in protecting park users from access to railway line in such way as to avoid inconvenience to nearby residents.

METROPOLITAN TORONTO (MUNICIPALITY) V. CANADIAN NATIONAL RAILWAY CO.,, [1998] 4 F.C. 506 (C.A.)

Appeal from Canadian Transportation Agency's approval of construction of railway line — Canada Transportation Act, s. 98(2) permitting Agency to approve location of railway line, considering requirements for railway operations — Appellant opposing application on ground line not necessary — S. 98 not requiring assessment of need — Reading in needs test would ignore national transportation policy compensation, market forces prime factors in determining whether railway line should be constructed, would impose form of economic regulation when not necessary to serve transportation needs of shippers — In keeping with trend toward deregulation, CTA limited Agency's role in regulating entry into railway business in Canada, controlling construction of new railway lines — Inconsistent with limited role to construe s. 98 as requiring needs test for construction of railway line.

SHARP V. CANADA (TRANSPORTATION AGENCY), [1999] 4 F.C. 363 (C.A.)

RCMP

Appeal from trial judgments dismissing applications to quash (i) RCMP Commissioner's dismissal of appeal from Discharge and Demotion Board's decision applicant should be discharged on ground of unsuitability; (ii) Board's decision — RCMP's evidence presented to Board in written form only — On appeal, External Review Committee finding ground of unsuitability not established — Commissioner considering résumé prepared by staff member of all information before Board — RCMP Act containing comprehensive, detailed code respecting discharge — No right to cross-examination provided — (1) Where statute silent on right to cross-examine, courts generally reluctant to impose their procedures upon board — Act's procedural requirements not violating right to fair hearing — (2) Provisions of Act ensuring Board meeting criteria for independence — (3) Court divided on propriety of staff member's comment in résumé that psychologist may have changed opinion had he known appellant's history of problems with paperwork, but as Commissioner coming to own decision, no breach of natural justice.

ARMSTRONG V. CANADA (COMMISSIONER OF THE ROYAL CANADIAN MOUNTED POLICE), [1998] 2 F.C. 666 (C.A.)

Judicial review of adjudication board's decision quashing summons to witness — Board investigating sexual harassment allegations as breach of RCMP Code of Conduct — Summons to prosecuting officer issued, executed — On motion to remove as prosecuting officer, exclude from hearing room until called to testify, Board holding insufficient evidence of conspiracy in investigation, presentation of complaints — No

RCMP—Continued

error of jurisdiction — Administrative boards masters of own procedure, subject only to express constraints of empowering legislation, requirements of procedural fairness — Act, regulations not constraining board's authority as to procedural decisions — No violation of procedural fairness — Both sides having opportunity to present positions before board making reasoned decision — No error of law — Applicant not prevented from having full opportunity to present evidence, cross-examine witnesses, make representations as required by RCMP Act — Board's decision consistent with criminal cases holding persuasive burden to show relevance, necessity on lawyer seeking to force opposing counsel into witness box, relinquish role as counsel — That standard applicable to disciplinary matters — Given finding of insufficient evidence of conspiracy, testimony irrelevant to issues before board.

CANNON V. CANADA (ASSISTANT COMMISSIONER, RCMP), [1998] 2 F.C. 104 (T.D.)

Judicial review of Commissioner's dismissal of appeal from Adjudication Board's finding applicant should resign or be dismissed for disgraceful conduct bringing discredit to RCMP — Applicant identified as man seen climbing backyard fence, masturbating in street — External Review Committee finding Board failed to adequately consider problems with identification evidence — Commissioner confirming Board's decision — Royal Canadian Mounted Police Act, s. 45.16(6) requiring Commissioner to give reasons for not acting on ERC's findings — Not requiring Commissioner to address individually every finding made by ERC — Commissioner's reasons reviewing evidence, Board's and ERC's findings, explaining why Board's decision preferred over ERC's recommendation — Meeting standard imposed by s. 45.16(6) — Commissioner entitled to decide not to act on ERC's recommendations — Decision not reviewable unless error of type referred to in Federal Court Act, s. 18.1(4) disclosed.

JAWORSKI V. CANADA (ATTORNEY GENERAL), [1998] 4 F.C. 154 (T.D.)

Applicants provided local police force with information leading to cocaine seizure — Local police requesting applicants' admission to RCMP Witness Protection Program — RCMP declined to pay associated costs as not involved in investigation — Applicants sued local police, Attorney General of Canada for damages, protection in O.C.J. — Whether O.C.J. having jurisdiction to review decisions of RCMP Commissioner — Applicants seeking judicial review in F.C.T.D. — Allegation Commissioner's decision tainted as lawyer defending RCMP in O.C.J. case advising Commissioner, writing decision denying access to Program — If Commissioner's workload excessive, may have assistance in writing reasons — Must retain control of decision-making process, not create appearance of bias — Commissioner ordered to review documents for which privilege claimed, produce any going to merits of decision, not being legal advice.

PERSONS SEEKING TO USE THE PSEUDONYMS OF JOHN WITNESS AND JANE DEPENDANT V. CANADA (COMMISSIONER OF THE ROYAL CANADIAN MOUNTED POLICE), [1998] 2 F.C. 252 (T.D.)

RCMP—Concluded

Judicial review of objections to disclosure of information relevant to enquiry of RCMP Public Complaints Commission into conduct of RCMP members in performance of duties during APEC Conference at Vancouver in November 1997 — Constitutionality of Canada Evidence Act, ss. 38(6) (permitting *ex parte* objections to disclosure), 39 (where Clerk of Privy Council objecting to disclosure of information, disclosure shall be refused without judicial examination) confirmed — Though Commission claims jurisdiction to make findings regarding improper orders by executive, inquiry concerns conduct of RCMP officers.

SINGH V. CANADA (ATTORNEY GENERAL), [1999] 4 F.C. 583 (T.D.)

RESTITUTION

Principle of unjust enrichment applicable to government in case of overpayment by taxpayer under Petroleum and Gas Revenue Tax Act — Enrichment, corresponding deprivation and absence of juristic reason (PGRT Act, s. 91(1)).

FOREST OIL CORP. V. CANADA, [1997] 1 F.C. 624 (T.D.)

Constructive trusts — Equitable principles — Crown — Indians — Crown obtaining absolute surrender of reserve land as needed for customs facilities expansion — Doing nothing with land for 40 years but denying request for return of land — Crown in breach of fiduciary duty — Constructive trust appropriate remedy as redressing Crown's unjust enrichment, giving Indians beneficial interest in land, appreciation in land value.

SEMIAHMOO INDIAN BAND V. CANADA, [1998] 1 F.C. 3 (C.A.)

SECURITY INTELLIGENCE

Whether "subversion" in Immigration Act, s. 19(1)(*e*) unconstitutionally vague — Not defined in Immigration Act — Necessary to consider CSIS Act, expressly referred to by Immigration Act — CSIS Act not using term "subversion" — In contrast to s. 19(1)(*e*), CSIS Act confining concept of "subversion" to covert unlawful acts or overthrow by violence of constitutionally established system of government in Canada — More specific, focussed than concept "subversion" in Immigration Act.

AL YAMANI V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [2000] 3 F.C. 433 (T.D.)

Application for warrants under Canadian Security Intelligence Service Act, s. 21 — CSIS seeking inclusion of provisions in warrants, including "visitors clause", to enable Service to investigate threat to security of Canada — "Visitors clause" unlawful delegation to Service employee of functions of judge under Act, s. 21 — Purpose of s. 21 to ensure objective, detached analysis of facts asserted in warrant application — Judge initially issuing edited reasons for order due to concerns for national security — Releasing unedited version after CSIS spokeswoman divulging to media information Judge had agreed to omit from reasons.

CANADIAN SECURITY INTELLIGENCE SERVICE ACT (RE), [1998] 1 F.C. 420 (T.D.)

SECURITY INTELLIGENCE—Concluded

Registrar of Citizenship causing inquiries to be commenced following application for citizenship — After three years, CSIS investigation still not complete — Unreasonable delay — CSIS has usurped decision-making powers of Registrar, citizenship judge — Requirements for writ of *mandamus* met.

CONILLE V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1999] 2 F.C. 33 (T.D.)

SIRC report and conclusion subject to judicial review as "decision or order" within meaning of Federal Court Act, s. 28 — S.C.C. decision in *Chiarelli v. Canada (Minister of Employment and Immigration)* followed: SIRC procedures not infringing Charter, s. 7 rights of applicant as no breach of principles of fairness and fundamental justice therein.

MOUMDJIAN V. CANADA (SECURITY INTELLIGENCE REVIEW COMMITTEE), [1999] 4 F.C. 624 (C.A.)

Appeal from order prohibiting SIRC from conducting proceedings under Citizenship Act, s. 19 — SIRC having dual roles: (1) review performance of CSIS under CSIS Act, s. 38; (2) investigate when report made to it pursuant to Citizenship Act, s. 19(2) — SIRC's functions under s. 19 primarily investigative — May receive any evidence, sworn or not; use information acquired earlier of which applicant may be unaware — Required to balance applicant's interest with that of security of Canada, fluid concept involving policy considerations — Not decision-maker as reports to Governor in Council — Parliament must have accepted that SIRC, while acting as investigative agency pursuant to s. 38, could acquire knowledge concerning matters subsequently required to deal with under s. 19 — Mere exercise of statutory duties not giving rise to allegation of reasonable apprehension of bias.

ZÜNDEL V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), [1998] 2 F.C. 233 (C.A.)

TORTS

Negligence

Pure economic loss — Third-party goods supplier seeking recovery against Crown for pure economic loss argued as having been suffered due to Crown's negligence when failed to take into account plaintiff's interests before paying contractor money owing under building maintenance contract as contractor had no capacity to satisfy any judgment — Insufficient proximity necessary to support duty of care — Loss not reasonably foreseeable — Risk of liability in indeterminate amount — Case not one in which new category of claim for pure economic loss should arise — Damage to plaintiff did not flow from conduct of defendant.

OLYMPIA JANITORIAL SUPPLIES V. CANADA (MINISTER OF PUBLIC WORKS), [1997] 1 F.C. 131 (T.D.)

TRADE MARKS

Infringement

Plaintiff holding trade-marks, copyrights in term "Michelin", "Bibendum" design — Labour union using Michelin logo on promotional material during organizing campaign — Whether infringing plaintiff's trade-marks — Case law on meaning of term "use" under Trade-marks Act, ss. 19, 20, 22 — Mark must be used for purpose of identifying source of goods, services — Under Act, s. 4, infringer must use mark "in association" with own wares or services — Plaintiff's trade-marks not "used" in association with defendants' wares or services under s. 4 — Handing out leaflets, pamphlets to recruit members into union not commercial activity, "advertising" — No infringement under Act, ss. 20, 22 — No prejudice to plaintiff's goodwill, reputation.

COMPAGNIE GÉNÉRALE DES ÉTABLISSEMENTS MICHELIN — MICHELIN & CIE v. NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA), [1997] 2 F.C. 306 (T.D.)

Appeal from F.C.T.D. judgment granting summary judgment — Appellant holding expired patent for cable tie having oval-shaped head — Patent neither claiming oval-shaped head as innovative feature nor referring to oval-shaped head — Patent expired in 1984 — When respondent introducing virtually identical cable tie in 1994, appellant commencing trade-mark infringement action — Motions Judge holding patentee could not, after expiration of patent, assert trade-mark rights to prevent public from making same preferred embodiment as described in patent — Motions Judge not referring to Trade-marks Act — Appeal allowed — Could not reconcile Patent Act, Trade-marks Act having regard to only Patent Act — No authority for proposition any element described in preferred embodiment, regardless of whether claimed or of importance to claimed invention, automatically disqualified from trade-mark protection — According to doctrine of functionality, any combination of elements primarily designed to perform function not fit subject-matter for trade-mark — Issue whether oval-shaped head distinguishing guise within meaning of Trade-marks Act, requiring examination of facts in light of trade-marks principles including doctrine of functionality — Summary judgment premature — American case law in this area should not be relied upon as U.S. trade-marks legislation differently drafted, doctrine of functionality may not have evolved in same way in Canada as in U.S.A.

THOMAS & BETTS, LTD. v. PANDUIT CORP., [2000] 3 F.C. 3 (C.A.)

Practice

Appeal from Trial Judge's decision reversing Registrar's decision to expunge respondent's registration of trade-mark "Swirl Design" — Respondent not furnishing evidence of use in Canada to Registrar in response to s. 45 notice — S. 56(5) providing evidence "in addition to" that adduced before Registrar may be adduced on appeal to Federal Court — "In addition to" not implying must be prior evidence to which further evidence could be adduced — S. 56 of general application — Not permitting interpretation depriving anyone of meaningful right of appeal — Denial to registered owner of right to file evidence on appeal denial for all practical purposes of any chance of succeeding — Also leading to absurd result of allowing registered owner who files

TRADE MARKS

Practice—Concluded

insignificant, irrelevant evidence to "add" evidence while those who do not file evidence not able to do so — Giving Court same discretion as "vested in Registrar" recognizing Court sitting in appeal able to decide issues as if tried for first time before Court — Suggesting registered owner having same opportunity to file evidence in appeal as before Registrar — Line of authority s. 56(5) should not be strictly construed against registered owner in appeals related to s. 45 proceedings — Court not interfering with finding differences between mark as used, registered not so significant as to mislead unaware purchaser.

AUSTIN NICHOLS & CO., INC. V. CINNABON INC., [1998] 4 F.C. 569 (C.A.)

Interlocutory injunctions under Act, s. 7 prohibiting sale of defendants' products — Injunctions dissolved where plaintiff failing to meet underlying responsibility to move actions to trial with due diligence.

CIBA-GEIGY LTD. V. NOVOPHARM LTD., [1998] 2 F.C. 527 (T.D.)

Registration

Trade mark comprising Chinese words or characters — In determining confusion issue, average consumer not "average person" but "average person likely to consume wares or services in question" — Knowledge of foreign language or characters proper consideration (surrounding circumstance) where significant proportion of clients members of substantial community familiar with foreign language or characters in city where company conducting most of business — Opponent's evidential burden — Expungement and inference of non-use.

CHEUNG KONG (HOLDINGS) LTD. V. LIVING REALTY INC., [2000] 2 F.C. 501 (T.D.)

Appeal from T.M.O.B. decision concept of *res judicata* not applicable in opposition proceedings — In passing-off action respecting use of "Fantasyland" as name of closed-in amusement park, Alberta Court of Queen's Bench, Court of Appeal finding confusion — Alberta Court dismissing second action to preclude use of unregistered trade-mark "Fantasyland Hotel", confirming injunction against use of "Fantasyland" except in conjunction with "Hotel" — In opposition proceedings to registration of "Fantasyland Hotel" appellant arguing T.M.O.B. bound by decisions in determining outcome — Nothing precluding application of doctrine of issue estoppel in opposition proceedings subsequent to passing-off action, but same question must be answered in both — Only same question if goods at issue in passing-off action same as those in opposition proceeding — Issue estoppel not applicable herein as not proven goods at issue in passing-off action same as those in opposition proceeding.

DISNEY ENTERPRISES INC. V. FANTASYLAND HOLDINGS INC., [1999] 1 F.C. 531 (T.D.)

Appeal from F.C.T.D. judgment allowing appeal from Registrar's refusal to register trade-mark "Export" in association with brewed alcoholic beverages based largely on

TRADE MARKS—Continued

Registration—Continued

additional evidence (sales, advertising figures, application by Labatt's subsidiary to register "Export" as trade-mark) filed on appeal — Basis of opposition "Export" descriptive of quality of beer, not distinctive of product in association with which used — Registrar holding even if "Export" acquiring distinctiveness in Ontario, Quebec no evidence of distinctiveness throughout Canada — F.C.T.D. Judge holding subsidiary's application admission against interest — Concluding "Export" distinctive of Molson's product in Ontario, Quebec, Molson entitled to registration pursuant to Trade-marks Act, s. 12(2) — Appeal allowed — Applicant under s. 12(2) must show proposed trade-mark, although descriptive, acquiring dominant secondary or distinctive meaning in relation to its wares, services — S. 32 permitting registration to be restricted to territorial area in which trade-mark shown to have become distinctive — Date of filing application for registration relevant date for determining distinctiveness by reason of long use under s. 12(2) — Scheme of s. 32 indicating territorially restricted trade-mark limited to cases to which ss. 12(2), 13 apply — Applying s. 32(2), *Great Lakes Hotels Ltd. v. The Noshery Ltd.* approach, if distinctiveness of "Export" mark in Ontario, Quebec established, Molson entitled to registration under s. 12(2) — Whether exclusivity essential to prove distinctiveness moot question — Exclusivity not essential to distinctiveness — Little probative value in flawed survey, self-serving evidence of Molson executives as to public recognition of "Export" in association with Molson's product — Sales, advertising evidence not proving "Export" alone distinctive of Molson product — Subsidiary's application should not have been treated as admission against interest — Applying reasonableness simpliciter standard of review, and as additional evidence would not have materially affected findings of fact, exercise of discretion, F.C.T.D. Judge should have allowed Registrar's decision to stand — Where evidence not proving, on balance of probabilities, acquired distinctiveness of descriptive term under s. 12(2) to Registrar's satisfaction, application cannot be allowed.

MOLSON BREWERIES V. JOHN LABATT LTD., [2000] 3 F.C. 145 (C.A.)

Opposition — *Res judicata* — Application to prohibit Registrar from proceeding with application for registration of trade-marks — Appeal from dismissal of trade-marks passing-off action pending — Doctrine of *res judicata* applicable where both parties having equal opportunity to present case, challenge opponent's case — Applies to opposition proceedings — *Res judicata* not applicable herein as no final decision in that appeal pending.

NOVOPHARM LTD. V. ELI LILLY AND CO., [1999] 1 F.C. 515 (T.D.)

Registrar rejecting opposition to registration of trade-mark "Circle Design" for use in association with nifedipine under brand name "Adalat" — Appellant opposing application on grounds of defects, colour claimed as trade-mark, confusion with existing trade-marks — Drawing not accurate representation of trade-mark as required by Trade-marks Act, s. 30(*h*) — Contradicting verbal description — Application not model of clarity, precision, accuracy — Whether mark distinctive of associated wares

TRADE MARKS—Concluded

Registration—Concluded

— Appellant's "sole producer" argument not supported by authorities — Non-interchangeability of product at relevant time not conclusive — No evidence physicians, pharmacists identified "Adalat" by colour, shape — Patients more likely to identify medication by brand name, that of manufacturer, rather than by colour, shape, size of tablets — Colour, shape, size of "Adalat" not distinctive of product — Applicant for trade-mark must establish distinctiveness to mediate tension between competing public policy considerations — Burden of proof with respect to distinctiveness of mark not met.

NOVOPHARM LTD. V. BAYER INC., [2000] 2 F.C. 553 (T.D.)

Appeal from Registrar's rejection of opposition to proposed trade-mark "Petro-Quebec" for use in Canada in association with "stations-service pour automobilistes" — Appellant owner of trade-mark "Petro-Canada" for use in association with "motor fuel/distributing and marketing petroleum products" — Registrar held marks not confusing — Erred in appreciation of facts — Appellant's trade-marks well known in Canada, respondent's trade-mark not known — Evidence of third party adoption of trade-names for use in Quebec that substitute "Quebec" for "Canada" — Newspaper article profiling Petro-Quebec service station business identifying station as Petro-Canada service station — Evidence showing reasonable likelihood of confusion — Because Petro-Canada mark so well known in Canada in association with service stations, public would assume Petro-Quebec service station belonged to, affiliated with, appellant — Appellant, respondent in same or similar business — Respondent not meeting onus of showing no likelihood of confusion — Opposition cases to be decided on own facts — Registrar erred in law in stating bound by *stare decisis* to follow previous Exchequer Court, F.C.T.D. decisions.

PETRO-CANADA V. 2946661 CANADA INC., [1999] 1 F.C. 294 (T.D.)

Famous marks — Mark "The Pink Panther" — No likelihood of confusion between famous mark and other mark where no connection whatsoever between respective wares, trades (motion picture business on one hand, hair care, beauty products on other).

PINK PANTHER BEAUTY CORP. V. UNITED ARTISTS CORP., [1998] 3 F.C. 534 (C.A.)

TRANSPORTATION

Appeal from Canadian Transportation Agency's order requiring removal from Tariff of restrictions with respect to applicability of rates to Canadian destinations — On final offer arbitration pursuant to Canada Transportation Act, s. 161 arbitrator selecting respondent's final offer setting out rates to Canadian destinations, formulae to determine rates to destinations in U.S.A. — Respondent providing statutory undertaking to ship goods in accordance with arbitrator's decision — Subsequently respondent issuing bills of lading for carriage of goods to American destinations indicating shipper arranging to have goods carried from Saint John to American destinations via

TRANSPORTATION—Concluded

American connecting carrier — Appellant submitting contrary to arbitrator's decision, respondent's undertaking as final offer requiring traffic moving beyond Canada to U.S.A. would be governed by formulae set out therein — Agency holding final offer not containing restriction specifying rates to Canadian points apply only to domestic movements as final destinations, or that cars had to be unloaded at these points — Bearing in mind Agency's special expertise, legislative context, decision not unreasonable — If goods carried to Saint John, unloaded there, rates specified in final offer chargeable; if appellant left to arrange carriage of goods to shipper's customers in U.S.A., formulae contained in final offer would control — Agency not erring in concluding final offer, statutory undertaking not obliging respondent to send traffic beyond Saint John under appellant's auspices — Matter within Agency's specialized expertise for determination in light of facts, statute, policy considerations.

CANADIAN NATIONAL RAILWAY CO. V. EAGLE FOREST PRODUCTS LTD. PARTNERSHIP, [2000] 3 F.C. 46 (C.A.)

Appeal from Canadian Transportation Agency's approval of construction of railway line — Canada Transportation Act (CTA), s. 98(2) permitting Agency to approve location of railway line, considering requirements for railway operations and services, interests of affected localities — Appellant opposing application on ground line not necessary — S. 98 not requiring assessment of need — Requiring Agency to focus on whether location, not construction, of railway line reasonable — "Requirements for railway operations and services" referring only to requirements enabling railway company to provide service to customers — Not referring to need for line — "Interests of the localities" contemplating Agency consider concerns respecting location of line brought to its attention by localities in determining whether location reasonable — Presumption need for line based on fact railway company making application — Reading in needs test would ignore national transportation policy that compensation, market forces prime factors in determining whether railway line should be constructed; would impose unnecessary economic regulation — In keeping with trend toward deregulation, CTA limited Agency's role in regulating entry into railway business in Canada, controlling construction of new railway lines — Inconsistent with limited role to construe s. 98 as requiring needs test for construction of railway line.

SHARP V. CANADA (TRANSPORTATION AGENCY), [1999] 4 F.C. 363 (C.A.)

UNEMPLOYMENT INSURANCE

Application for judicial review of Tax Court decision ordering Minister to reconsider position insurable employment not occupied as based on two allegedly mutually exclusive grounds: Act, s. 3(1)(*a*) and (2)(*c*) — Judge below erred in law in so concluding — Meaning of "employment" examined — Reliance on Act, s. 3(1)(*a*) and (2)(*c*) not depending on mutually exclusive findings of fact.

CANADA V. SCHNURER ESTATE, [1997] 2 F.C. 545 (C.A.)

Respondent claiming benefit based on three records of employment — Claim denied as minimum of weeks required to establish benefit period under U.I. Act, s. 6 not met

UNEMPLOYMENT INSURANCE—Continued

— Validity of Unemployment Insurance Regulations, s. 36.2 at issue — Whether discriminatory — S. 36.2 setting out method for calculating weeks of insurable employment for persons, like respondent, not paid on calendar week basis — Differences in treatment resulting from application of s. 36.2 authorized by Parliament as contemplated by Act, s. 44(*w*) — Can work to advantage, disadvantage of employee — Calculation of weeks of insurable employment same for everyone — S. 36.2 valid, not discriminatory.

CANADA (ATTORNEY GENERAL) V. BOISSINOT, [1997] 2 F.C. 928 (C.A.)

Judicial review of Umpire's decision setting aside Board of Referee's decision — Commission imposing penalty pursuant to Unemployment Insurance Act, s. 33(1) in respect of false, misleading statements — Board of Referees holding no jurisdiction to intervene, refusing to hear respondent's testimony — Umpire holding Board had duty to intervene where Commission erred i.e. by basing quantum of penalty on guidelines, precluding consideration of all circumstances — Principles established by case law summarized — Board of Referees not limited to facts before Commission — Duty to intervene if Commission's discretionary decision made without regard for relevant consideration — No evidence relevant consideration misapprehended, ignored — Umpire should not have intervened based on policy not in issue, but because Board shirked duty by refusing to hear testimony.

CANADA (ATTORNEY GENERAL) V. DUNHAM, [1997] 1 F.C. 462 (C.A.)

Appeal from T.C.C. decision quashing M.N.R.'s determination worker's employment not "insurable employment" under the Act — In earlier case, Minister finding respondent, worker not dealing at arm's length, employment not insurable — Terms, conditions of employment in instant case "basically the same" — Contract of service between worker, respondent required under Act, s. 3(1)(*a*) — Considering large number of appeals from ministerial determinations under s. 3(2)(*c*)(ii), Court providing clarification of law — T.C.C. must undertake two-stage inquiry — Discretionary power conferred upon Minister to make determinations under Act, s. 3(2)(*c*)(ii) — Judicial deference not extending to Minister's findings of fact — T.C.J. failing to consider whether Minister exercised discretionary authority properly.

CANADA (ATTORNEY GENERAL) V. JENCAN LTD., [1998] 1 F.C. 187 (C.A.)

Reference as to whether Unemployment Insurance Act, s. 11(7) contrary to Canadian Human Rights Act as discriminatory practice based on family status in provision of services — Claimant receiving ten weeks of parental benefits for caring for adopted child — Denied five weeks of additional benefits claimed under s. 11(7) as child less than six months old when placed — Adoptive, natural parents equal with respect to parental benefits — Distinction amounting to discrimination if not justified in particular legislative context — No rational connection between age of child at time of placement and legislative objective — Act, s. 11(7) discriminating against parents of children less than six months old.

GONZALEZ V. CANADA (EMPLOYMENT AND IMMIGRATION COMMISSION), [1997] 3 F.C. 646 (T.D.)

UNEMPLOYMENT INSURANCE—Concluded

Disclosure of "personal information" by Revenue Canada (Customs) to CEIC pursuant to understanding regarding data capture and release of customs information on travellers (program aimed at catching those receiving UI benefits while out of Canada) not authorized by Privacy Act, s. 8 and Customs Act, s. 108.

PRIVACY ACT (CAN.) (RE), [1999] 2 F.C. 543 (T.D.)

Disclosure of information by Revenue Canada (Customs) to CEIC pursuant to memorandum of understanding regarding data capture and release of customs information on travellers (program aimed at catching those receiving EI benefits while out of Canada) authorized by Privacy Act, s. 8 and Customs Act, s. 108 — In self-reporting scheme such as EI, Commission must be able to collect information from outside source when claimant fails to voluntarily report it.

PRIVACY ACT (CAN.) (RE), [2000] 3 F.C. 82 (C.A.)

Judicial review of Umpire's decision applicant disqualified from receiving benefits under Unemployment Insurance Act, s. 28 (employment lost due to misconduct, or for leaving job voluntarily without just cause) — Applicant quitting job as truck driver when licence suspended upon conviction for impaired driving offence committed prior to commencing employment — Desjardins J.A. examining notions of "just cause", "misconduct" — Holding conviction, resulting in loss of licence, employment, not "just cause" — That required to resign following loss of licence, breach of duty occurring during employment — Direct result of misconduct — McDonald J.A. holding misconduct occurring before employment relationship considered under s. 28 when punishment for misconduct impacting on employment relationship so as to cause employee to breach express provision of employment contract — Marceau J.A. (dissenting) holding misconduct must occur during employment for disqualification under s. 28.

SMITH V. CANADA (ATTORNEY GENERAL), [1998] 1 F.C. 529 (C.A.)

Judicial review of T.C.C. decision upholding denial of U.I. benefits — While permanent resident application pending, applicant working as housekeeper without permit — Believed lawfully entitled to work in Canada — Immigration Regulations, s. 18(1) prohibiting those without permanent resident status from working without authorization — Tax Court holding applicant's contract of service illegal as violating s. 18 — Applicant legal immigrant, acting in good faith — Not disentitled to benefits on ground of statutory illegality — Penalty disproportionate to breach — Public policy favouring legal immigrant, acting in good faith.

STILL V. M.N.R., [1998] 1 F.C. 549 (C.A.)