Federal Court of Appeal  Cour d'appel fédérale

Date: 20181018

Docket: A-427-15

Citation: 2018 FCA 186

CORAM: **PELLETIER J.A.**
NEAR J.A.
RENNIE J.A.
WOODS J.A.
ZINN J.A. (*ex officio*)

BETWEEN:

KIEN BENG TAN

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Vancouver, British Columbia, on January 29, 2018.

Judgment delivered at Ottawa, Ontario, on October 18, 2018.

REASONS FOR JUDGMENT BY:	RENNIE J.A.
CONCURRED IN BY:	NEAR J.A. ZINN J.A. (*ex officio*)
DISSENTING REASONS BY:	PELLETIER J.A.
CONCURRED IN BY:	WOODS J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20181018

Docket: A-427-15

Citation: 2018 FCA 186

CORAM: **PELLETIER J.A.**
NEAR J.A.
RENNIE J.A.
WOODS J.A.
ZINN J.A. (*ex officio*)

BETWEEN:

KIEN BENG TAN

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT

RENNIE J.A.

I. Overview

[1] Mr. Tan, the appellant, a foreign national who was surrendered to Canadian authorities following a request by the Minister of Justice under the *Extradition Act*, S.C. 1999, c. 18 (*Extradition Act*), was convicted of an offence under the *Criminal Code*, R.S.C. 1985, c. C-46 (*Criminal Code*) and, while currently serving a sentence in a Canadian penitentiary, filed a

complaint of discrimination under the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (CHRA). The Canadian Human Rights Commission declined to process the claim and when the appellant challenged this decision in the Federal Court, it decided that the Commission's decision was reasonable. He now appeals to this Court.

[2] The Commission refused to deal with the appellant's complaint of discrimination against the Correctional Service of Canada (CSC) for lack of jurisdiction under paragraph 41(1)(*c*) of the CHRA because, in its view, he was not "lawfully present in Canada" at the time of the alleged discrimination as required by paragraph 40(5)(*a*) of the CHRA. The Federal Court, *per* Justice Heneghan (2015 FC 907), dismissed his application for judicial review of the Commission's decision.

[3] In reaching their conclusion, the Commission and the Federal Court properly considered themselves bound by the decision of this Court in *Forrest v. Canada (Attorney General)*, 2006 FCA 400, 357 N.R. 168 (*Forrest FCA*). Both the appellant and the Crown contend that *Forrest FCA* was wrongly decided and urge this Court to depart from precedent and to set it aside.

[4] For the reasons which follow, I am of the view that *Forrest FCA* and the Federal Court's decision in the same case, *Forrest v. Canada (Attorney General)*, 2004 FC 491 (*Forrest FC*), ought not to be followed.

[5] I would therefore allow the appeal.

II. The context

[6] The appellant is a citizen of Malaysia. In May 2004, while in Canada on a temporary visa, he committed murder and fled to Belgium. In March 2008, he was arrested and extradited to Canada to stand trial for second-degree murder under section 235 of the *Criminal Code*.

[7] The appellant was subsequently convicted and sentenced to life in prison (*R. v. Tan*, 2011 BCSC 335; *R. v. Tan*, 2011 BCSC 595). An inadmissibility report was prepared under subsection 44(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) based on serious criminality as defined in paragraph 36(1)(*a*) of the IRPA. A deportation order was issued, but its execution was stayed under paragraph 50(*b*) of the IRPA until completion of the sentence. The appellant remains in custody at Mission Institute, a federal prison in British Columbia.

[8] The appellant is Buddhist. He filed a complaint with the Commission that the CSC had discriminated against him on religious grounds by failing to provide access to chaplains of minority faiths while continuing to provide access to Christian chaplains to other inmates.

[9] The Commission refused to consider the appellant's complaint because he was not "lawfully present in Canada" as required by paragraph 40(5)(*a*) of the CHRA. In reaching this decision, the Commission referred the question of his status to "the appropriate minister" under subsection 40(6), which, in this case, it considered to be the Minister of Citizenship and Immigration. The Deputy Minister informed the Commission that the appellant, at the time of the alleged discrimination, "did not have any status as a temporary resident, permanent resident or citizen in Canada".

[10] The Commission considered the Deputy Minister's statement conclusive of the question of whether the appellant was lawfully present in Canada. Relying on *Forrest FCA*, the Commission found that he was not lawfully present in Canada "because he was under a deportation order and [had] no legal status in Canada" (Commission Decision citing para. 24 of the Section 40/41 Report prepared by the Commission investigator).

[11] The Federal Court dismissed the appellant's judicial review application to set aside the Commission's decision. In so doing, it made two main rulings.

[12] First, the Court concluded that the Commission did not err in referring the appellant's status to the Minister of Citizenship and Immigration under subsection 40(6) of the CHRA because that Minister "is tasked with the regulation of the admission of non-citizens into Canada" (at para. 44). As the appellant lacked citizenship or immigration status, and because *Forrest FCA* was binding, the Commission's conclusion that he was not lawfully present in Canada was reasonable (at paras. 43, 45–50).

[13] Secondly, the Federal Court rejected the appellant's argument that limiting paragraph 40(5)(*a*) and subsection 40(6) to immigration status infringed his rights under section 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 (*Charter*). Relying on this Court's decision in *Toussaint v. Canada (Attorney General)*, 2011 FCA 213, [2013] 1 F.C.R. 374, the Federal Court ruled that immigration status is not an analogous ground (at paras. 51–58).

III. The Legislation

[14] The two subsections of the CHRA in issue in this appeal are set out below:

No complaints to be considered in certain cases	**Recevabilité**
40 (5) No complaint in relation to a discriminatory practice may be dealt with by the Commission under this Part unless the act or omission that constitutes the practice	**40 (5)** Pour l'application de la présente partie, la Commission n'est validement saisie d'une plainte que si l'acte discriminatoire :
(a) occurred in Canada and the victim of the practice was at the time of the act or omission either lawfully present in Canada or, if temporarily absent from Canada, entitled to return to Canada;	*a)* a eu lieu au Canada alors que la victime y était légalement présente ou qu'elle avait le droit d'y revenir;
(b) occurred in Canada and was a discriminatory practice within the meaning of section 5, 8, 10 or 12 in respect of which no particular individual is identifiable as the victim;	*b)* a eu lieu au Canada sans qu'il soit possible d'en identifier la victime, mais tombe sous le coup des articles 5, 8, 10 ou 12;
(c) occurred outside Canada and the victim of the practice was at the time of the act or omission a Canadian citizen or an individual lawfully admitted to Canada for permanent residence.	*c)* a eu lieu à l'étranger alors que la victime était un citoyen canadien ou qu'elle avait été légalement admise au Canada à titre de résident permanent.
Determination of status	**Renvoi au ministre compétent**
40 (6) Where a question arises under subsection (5) as to the status of an individual in relation to a complaint, the Commission shall refer the question of status to the appropriate Minister and shall not proceed with the complaint unless the question of status is resolved thereby in favour of the complainant.	**40 (6)** En cas de doute sur la situation d'un individu par rapport à une plainte dans les cas prévus au paragraphe (5), la Commission renvoie la question au ministre compétent et elle ne peut procéder à l'instruction de la plainte que si la question est tranchée en faveur du plaignant.

IV. Issues on appeal

[15] As noted, the appellant contends that the Commission's interpretation of paragraph 40(5)(*a*) of the CHRA was unreasonable, and that this Court should overrule its decision in *Forrest FCA*. In the alternative, if the Commission's interpretation is reasonable, then the appellant submits that paragraph 40(5)(*a*) infringes section 15 of the Charter and is not justified under section 1.

[16] The argument advanced by the appellant requires us to revisit *Forrest FC* and *Forrest FCA* in order to determine if they are conclusive of his lawful presence in Canada, as found by the Commission and the Federal Court and, if so, whether they are wrongly decided, as alleged.

V. Standard of Review

[17] When this Court sits in appeal from the Federal Court on judicial review, it must ask itself if the Federal Court identified the appropriate standard of review and applied it correctly. As a practical matter, this means that we step into the shoes of the Federal Court so that our focus is on the decision of the administrative decision maker: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para. 46, [2013] 2 S.C.R. 559. As a result, the discussion which follows will focus on the Commission's decision rather than that of the Federal Court.

[18] Given the interaction between paragraph 40(5)(*a*) and subsection 40(6), and the involvement of another decision maker when subsection 40(6) is triggered, the standard of review is not as straight forward as it may first appear.

[19] The Commission found that because the appellant was under a deportation order and had no legal (immigration or citizenship) status in Canada, he was not lawfully present in Canada. It was also clear that, as far as the Commission was concerned, "status of an individual" in subsection 40(6) meant immigration status, and that when the question of a complainant's status arises, the appropriate minister is the Minister of Citizenship and Immigration (Section 40/41 Report at paras. 18–19).

[20] The Commission also implicitly, if not explicitly, found that it is the Minister's determination of the complainant's status that determines whether "the question of status is resolved thereby in favour of the complainant" and, consequently, whether the Commission may "proceed with the complaint" as stated in subsection 40(6).

[21] These questions involve the Commission interpreting its home statute. Thus, reasonableness applies unless the issue falls into one of the correctness categories (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at paras. 54, 58–61, [2008] 1 S.C.R. 190 (*Dunsmuir*)). This Court has previously reviewed the Commission's decisions under subsection 41(1) for reasonableness (see e.g. *PSAC v. Canada (Attorney General)*, 2015 FCA 174 at paras. 27–29, 475 N.R. 232; *Hagos v. Canada (Attorney General)*, 2015 FCA 83 at paras. 8–11), except where correctness was explicitly required (see e.g. *Keith v. Canada (Correctional Service)*, 2012 FCA 117 at paras. 50–53, 40 Admin. L.R. (5th) 1 where the Commission's decision under paragraph 41(1)(*c*) engaged a question regarding the division of powers and the jurisdictional lines between two competing tribunals).

[22] In this case, the appellant alleges that the Commission based its interpretation of "lawfully present in Canada" in paragraph 40(5)(*a*) and "status of an individual" in subsection

40(6) on *Forrest FC* or *Forrest FCA*. The jurisprudence is to the effect that the doctrine of *stare decisis* requires an administrative tribunal to follow a Court's interpretation of the law: *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2003 FCA 53 at para. 54, [2003] 3 F.C. 529; *Régie des rentes du Québec v. Canada Bread Company Ltd.*, 2013 SCC 46 at paras. 46 and 68, [2013] 3 S.C.R. 125; *Corlac Inc. v. Weatherford Canada Ltd.*, 2012 FCA 261 at para. 18, 440 N.R. 113.

[23] The appellant goes one step further in his argument when he alleges that the jurisprudence upon which the Commission relied was wrongly decided. In those circumstances, different considerations apply.

[24] Decisions of a panel of this Court are decisions of the Court as a whole. When a panel of appellate judges speak, they do so not for themselves, but for the court. This is reflected in the principle of horizontal *stare decisis*, which dictates that decisions of a panel of an appellate court bind future panels of the court.

[25] Important values underlie this doctrine. Consistency, certainty, predictability and institutional integrity are enhanced by *stare decisis*. "Consistency" wrote Lord Scarman, "is necessary to certainty—one of the great objectives of law" (*Farrell v. Alexander, [1976] 1 All E.R. 129 (C.A. Civ. Div.), at 147, revd on other grounds [1977] A.C. 59 (H.L.)*). To this I would add that there is a link to the rule of law, which requires that the law be normative, that is to say it must be capable of being discerned in order that individuals can conduct themselves in accordance with it. These considerations have an added dimension, particularly so in the context of the Federal Courts' jurisdiction, where decisions may have significant consequences on a national scale affecting government, corporations and individuals alike.

[26] So important are these values that appellate courts must follow decisions of other panels, even though, if called on to decide the matter afresh, they would decide the matter differently. Trial courts are also bound by appellate decisions, even if the lower court thinks the decision is incorrectly decided (*Apotex Inc. v. Pfizer Canada Inc.* 2014 FCA 250, at para. 114, 465 N.R. 306 (*Apotex*)).

[27] Nevertheless, courts must balance certainty and predictability with the need for the law to evolve in response to new economic, social and societal circumstances. As Lord Denning noted, "[t]he doctrine of precedent does not compel [us] to follow the wrong path until [we] fall over the edge of a cliff" (*Ostime v. Australian Mutual Provident Society*, [1959] 3 All E.R. 245 at 256, [1960] A.C. 459 (H.L.)). Courts also recognize that with the perspective of time, fresh arguments, and hindsight, decisions may not have been correctly decided. In consequence, the Supreme Court of Canada and most Canadian appellate courts have elaborated criteria to be considered when they might, to continue the metaphor, take a different path.

[28] The circumstances under which the Supreme Court of Canada will depart from precedent have received considerable attention as of late (see e.g. *Ontario (Attorney General) v. Fraser*, 2011 SCC 20 at paras. 56–57 (but see also paras. 129–139 per Rothstein J.), [2011] 2 S.C.R. 3; *Canada v. Craig*, 2012 SCC 43 at paras. 24–27, [2012] 2 S.C.R. 489 (*Craig*); *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at para. 47, [2013] 3 S.C.R 1101). In its most recent articulation (*Teva Canada Ltd. v. TD Canada Trust*, 2017 SCC 51, [2017] 2 S.C.R. 317 (*Teva*)) the Court stated that "the Court must be satisfied based on compelling reasons that the precedent was wrongly decided and should be overruled" (at para. 65 citing *Craig* at para. 25).

[29] The language of *Teva* is significant. It requires a finding that the precedent was "wrongly decided". As gleaned from Supreme Court decisions, a case may be considered to be "wrongly decided" where the prior decision does not reflect Charter values, where a decision is attenuated by or inconsistent with another decision of the Court, where the social, political and economic assumptions that underlie the decision are no longer extant or where the law is uncertain. In *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, decided two years earlier, the Supreme Court said that settled rulings of higher courts may be reconsidered by trial courts, where a new issue is raised, "where there is a change in the circumstances" or there is evidence that "fundamentally shifts the parameters of the debate" (at para. 44). Although these criteria were identified in the context of a discussion of vertical *stare decisis*, they are equally pertinent to a discussion of horizontal *stare decisis*.

[30] In this Court, a three judge panel may depart from a decision of another panel in three circumstances.

[31] The first arises when the panel is satisfied that the decision was "manifestly wrong, in the sense that the Court overlooked a relevant statutory provision, or a case that ought to have been followed" (*Miller v. Canada (Attorney General)*, 2002 FCA 370 at para. 10, 220 D.L.R. (4th) 149 (*Miller*)). The second arises when the decision has been overtaken by subsequent Supreme Court jurisprudence. The third arises where there are compelling reasons to do so and correctness prevails over certainty (*J.P. v. Canada (Public Safety and Emergency Preparedness)*, 2013 FCA 262 at para. 72, [2014] 4 F.C.R. 371 (*J.P.*)).

[32] The manifestly wrong test has been consistently applied in this Court's jurisprudence when it sits in its usual three-judge formation (see e.g. *Kossow v. Canada*, 2013 FCA 283 at

para. 33, [2014] 2 C.T.C. 1; *Apotex Inc. v. Eli Lilly Canada Inc.*, 2016 FCA 267 at para. 2, [2017] 3 F.C.R. 145). It is also the test in other appellate courts (see e.g. the cases reviewed at paragraph 126 of *David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co.* (2005), 76 O.R. (3d) 161, 255 D.L.R. (4th) 633 (C.A.) (*Polowin Real Estate*)); see also the discussion at paragraphs 77 to 94 of *R v. Neves*, 2005 MBCA 112, 201 Man. R. (2d) 44; *R. v. Grumbo* (1998), 159 D.L.R. (4th) 577 at para. 54, 168 Sask. R. 78; *United Brotherhood of Carpenters and Joiners of America, Locals 527, 1370, 1598, 1907 and 2397 v. Labour Relations Board*, 2006 BCCA 364 at para. 24, 272 D.L.R. (4th) 253).

[33] The question that arises here, however, is the standard to be applied when a five-judge panel considers a decision of a three-judge panel.

[34] In *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 F.C.R. 331 (*Hospira*), a five-judge panel of this Court reversed a three-judge majority of a five-member panel decision in *Canada v. Aqua-Gem Investments Ltd. (C.A.)*, [1993] 2 F.C. 425, 149 N.R. 273 (F.C.A.) (*Aqua-Gem*) which established the standard of review on appeal from decisions of prothonotaries. Nadon J.A., writing for the five-member panel, noted that the *Miller* test was not applicable because *Aqua-Gem* could not be said to be manifestly wrong, but that the rationalization of the law with respect to the standard of review had "fundamentally shifted the parameters of the debate" (*Hospira* at paras. 61–64).

[35] Other courts have stated that a five-judge panel may overrule a prior decision of a three-judge panel when the "earlier decision was wrong, or [where] for any other reason, the earlier decision ought to be overruled" (*Nathanson, Schachter & Thompson v. Inmet Mining Corp.*, 2009 BCCA 385 at para. 62, 96 B.C.L.R. (4th) 342). The Ontario Court of Appeal stated that the

inquiry should be on the nature of the error, its impact and the consequences of maintaining it (*Polowin Real Estate* at para. 127).

[36] These statements echo the compelling reasons test articulated by the Supreme Court in *Craig* and *Teva* and developed by this Court in *J.P.* Subject to what follows, I would apply this test in a five-judge panel context as well.

[37] The decision which we are asked to overturn consists essentially of two paragraphs in a decision dismissing an appeal on very narrow grounds. While *Forrest FCA* has been cited on a few occasions on the issue of whether immigration status is an analogous ground under section 15 of the *Charter*, in the twelve years since it was decided, it has never been cited on the issue at the heart of this appeal, except in the appellant's case. As a result, this is not a case in which certainty and predictability in the law are in issue. Similarly, this is not a case in which the parameters of the debate have shifted.

[38] In the end, this panel was formed by the Chief Justice in response to a request from the parties who allege that *Forrest FCA* is wrongly decided and should be set aside. Given the inapplicability of the factors referred to earlier in these reasons, and in the particular circumstances of this case, I believe that this panel's mandate is simply to decide if *Forrest FCA* and, by extension, *Forrest FC* were wrongly decided and if so, to provide further guidance to the Commission.

VI. Analysis

A. Forrest FC and Forrest FCA

[39] The saga begins with consideration of the Federal Court's decision in *Forrest FC*.

[40] The facts of *Forrest FC* are practically identical to the facts of this case, except that Mr. Forrest was not extradited to Canada. Like the appellant, he was convicted of serious crimes, he was sentenced to a long period of imprisonment, and at the time of the alleged discrimination, he was subject to a deportation order whose execution was stayed by operation of paragraph 50(*b*) of the IRPA. In the course of his incarceration, he was allegedly the victim of one or more discriminatory practices. Mr. Forrest filed a complaint with the Commission, which the Commission dismissed on the basis that it lacked the jurisdiction to deal with it.

[41] In a first judicial review, which is not reported, the Commission's decision was set aside on consent and the matter was returned to the Commission for re-determination "in accordance with the Direction of this Court that the question of the Applicant's status in Canada at the relevant time be referred to the Minister of Citizenship and Immigration as contemplated by [subsection 40(6)] of the *Canadian Human Rights Act*" (*Forrest FC* at para. 7).

[42] A review of the Federal Court's file shows that the Commission initially decided, without reference to an appropriate minister, that Mr. Forrest was not lawfully present in Canada. Mr. Forrest filed an application for judicial review which was allowed on the basis of a joint submission that the matter should be referred to the Minister of Citizenship and Immigration. As a result, the Commission referred the question of Mr. Forrest's status to the Minister of Citizenship and Immigration under subsection 40(6). The latter responded that Mr. Forrest was

neither a Canadian citizen nor a permanent resident of Canada and that he was under an order of deportation. The Minister reported that Citizenship and Immigration Canada (CIC) took the position that Mr. Forrest was not lawfully present in Canada at the material time (*Forrest FC* at para. 8).

[43] The Commission's investigator who received the Minister's reply summarized their position with respect to this advice as follows:

> 7. Following the Federal Court order [in the previous application for judicial review], the Minister of Citizenship and Immigration was asked to confirm the complainant's legal status in Canada. By letter dated February 28, 2000, the Minister informed the Commission that the complainant has "no status" in Canada. The letter indicates that the complainant is under an order of deportation from Canada and that the order was issued following an immigration hearing on November 23, 1995.
>
> 8. Section 40(6) of the CHRA gives the Minister of Citizenship and Immigration the jurisdiction to determine an individual's status in Canada and states that the Commission cannot proceed unless the question of status is resolved in favour of the complainant. In light of the Minister's determination that the complainant has no status in Canada, the Canadian Human Rights Commission does not have the jurisdiction to deal with the complaint.
>
> (*Forrest FC* at para. 22)

[44] In the end, the Commission wrote to Mr. Forrest to advise him that it would not deal with his complaint because it was "beyond its jurisdiction in that the victim of the alleged discriminatory practice was, at the time of such acts or omissions, not lawfully present in Canada" (*Forrest FC* at para. 1).

[45] The Federal Court pointed out that CIC's opinion that Mr. Forrest was not lawfully present in Canada was simply gratuitous advice which was not binding on the Commission. The

Court was of the view that it was the Commission's responsibility to determine if Mr. Forrest was lawfully present in Canada and that the Commission could not rely upon the Minister's or CIC's advice on that issue to relieve it of its responsibility (*Forrest FC* at para. 21).

[46] However, the Federal Court considered the Minister's response as to Mr. Forrest's standing under the IRPA as "status advice". The Federal Court's treatment of that "status advice" is important enough to be quoted at length:

> I conclude that the foregoing advice, particularly that contained in the quoted paragraph 8 [quoted above] is correct. As earlier noted, the Minister of Citizenship and Immigration provided the Minister with "status" advice, that being that since the Applicant is neither a Canadian citizen nor a permanent resident of Canada, he has no "status" in Canada. […] Given the Minister's "status" advice, by virtue of subsection 40(6) of the *Canadian Human Rights Act*, the Commission had no authority to further examine the question of whether or not the Applicant was "lawfully present in Canada" since the question of status was not resolved in favour of the Applicant. In effect, the question of lawful presence in Canada became irrelevant and the Minister's gratuitous advice in that regard was similarly irrelevant.
>
> (*Forrest FC* at para. 23)

[47] The significance of the Federal Court's reasoning in this paragraph is its conclusions that subsections 40(5) and 40(6) are two distinct mechanisms for determining if the Commission can proceed with a complaint and that it is necessarily the Minister of Citizenship and Immigration who has the authority and responsibility to resolve the question of status under subsection 40(6), once the question is referred to him. I will elaborate on this reasoning shortly but for the present, suffice it to say that both conclusions are incorrect.

[48] Since, in the Federal Court's view, the Minister's determination that Mr. Forrest had no immigration status meant that the question of status was not resolved in his favour, the

Commission was barred from proceeding with the complaint by the terms of subsection 40(6). In the result, the Federal Court found that the Commission did not err in concluding that it lacked the jurisdiction to deal with Mr. Forrest's complaint.

[49] I turn now to *Forrest FCA*.

[50] The argument advanced in *Forrest FCA* was that Mr. Forrest was lawfully present in Canada within the meaning of paragraph 40(5)(*a*) of the CHRA because he was in lawful custody (*Forrest FCA* at para. 8). This Court's reasoning is contained in a single paragraph:

> [9] In my respectful view, the appellant looks at the issue from the wrong end of the telescope. His custody is lawful because he is unlawfully present in Canada. It is also lawful because he has been convicted of serious crimes (possession of a restricted weapon, possession of cocaine for the purpose of trafficking, forcible confinement, assault, possession of a dangerous weapon, pointing a firearm and attempted murder). From an immigration perspective, the legality of his custody is determined both by the illegality of his presence in Canada and his criminal convictions, not the other way around as suggested by the appellant. The fact that he is in lawful custody does not clothe him with an immigration status.

[51] Although being unlawfully present in Canada would be grounds for lawful custody, Mr. Forrest's custody was of a different nature. At the time of the alleged discrimination, his custody was lawful not because he was illegally in Canada, but because he was serving a prison sentence for committing various criminal offences (*Forrest FCA* at paras. 6–7; *Forrest FC* at para. 14).

[52] The reasoning of the Court in *Forrest FCA* must be understood in this factual context, and the context of the appellant's argument. Since Mr. Forrest based his appeal on the basis that he was lawfully present in Canada, thereby invoking paragraph 40(5)(*a*), the fact of his lack of

immigration status is material only to the extent that one accepts that "lawfully present in Canada" requires one to have some status under the IRPA. Implicit in paragraph 9 of *Forrest FCA* is that the absence of immigration status meant that Mr. Forrest was not lawfully present in Canada. In finding as it did, the Court was necessarily rejecting the Federal Court's conclusion that once the question of status was referred to the Minister under subsection 40(6), the question of "lawfully present in Canada" was no longer relevant.

[53] Indeed, Mr. Forrest was determined by this Court not to be lawfully present in Canada solely because he lacked immigration status. The fact that he was serving an imprisonment sentence for being convicted of criminal offences at the time of the alleged discrimination made no difference.

[54] As noted, the salient features of the present case match those of *Forrest FCA*. As in that case, the complainant in this case lacks immigration status and is serving a term of imprisonment for a criminal conviction at the time of the alleged discrimination. The sole distinction here is that the appellant's original entry into Canada was authorized by the *Extradition Act* and the charges which he faced were circumscribed by the terms of surrender made under the *Extradition Act*.

[55] With this background in mind, I turn to the Commission's decision.

B. Analysis of the Commission's decision

[56] As in Mr. Forrest's case, the Commission appointed an investigator to examine whether the Commission had jurisdiction to deal with the appellant's complaint. The investigator prepared a Section 40/41 Report (Appeal Book, at 138-43)(the Report) in which the investigator

noted at paragraph 12 that when the Commission was informed that the appellant was not a Canadian citizen and that he had been convicted of murder, "the question of his status in Canada was raised." It further notes that the parties were not consulted with respect to this referral: see Report at para. 9.

[57] The Minister responded by the hand of his Deputy Minister who advised that the appellant was found to be inadmissible to Canada and was issued a deportation order whose enforcement was stayed until the completion of his sentence. In addition, the Deputy Minister reported that the appellant was not, at the material time, a Canadian citizen, a permanent resident, a visitor whose who had not ceased to be a visitor or a person holding a valid and subsisting Minister's permit. The Deputy Minister closed by writing that "In other words, during the period in question, [the appellant] did not have any status as a temporary resident, permanent resident or citizen in Canada and as such, was not lawfully present in Canada": Appeal Book at p. 145.

[58] At paragraph 16, the Report concluded that in light of the information received from the Minister's office, the question of the complainant's status was not resolved in his favour "which means he was not lawfully present in Canada within the meaning of section 40(5) of the Act." This conclusion is inconsistent with *Forrest FC* and with subsection 40(6) of the Act.

[59] The Report then referred to *Forrest FC*, noting that it was authority for the proposition that where the question of a complainant's status is not resolved in the latter's favour, the Commission does not have jurisdiction over the allegations in the complaint.

[60] In response to submissions made by the appellant's counsel as to the appellant's status, the Report reasoned that the determination as to whether a person is lawfully present in Canada within the meaning of subsection 40(5) does not turn on whether the person entered the country legally or was convicted of an offence: "Rather, 'the status of an individual' referred to in [sub]section 40(6) refers to that individual's immigration status […] A person against whom a deportation order has been issued no longer has status in Canada and is not 'lawfully present in Canada' within the meaning of section 40(5)": Report at para. 18.

[61] The Report went on to say that given this interpretation of "the status of an individual", the appropriate minister pursuant to subsection 40(6) is the Minister of Citizenship and Immigration, not the Minister of Justice or the Attorney General as counsel for the appellant had argued: Report at para. 19.

[62] The Report then referred to this Court's decision in *Forrest FCA*, quoting paragraphs 8 and 9 of the decision, which are reproduced above, without commenting on their significance for the appellant's case: Report at para. 20.

[63] As a result, the Commission found that it did not have jurisdiction over the appellant's complaint because he was not lawfully in Canada within the meaning of paragraph 40(5)(*a*) of the Act: Report at para. 23.

[64] The Report then stated its conclusion which was adopted verbatim by the Commission as its decision with respect to the appellant's complaint:

> Citizenship and Immigration Canada has advised the Commission that at the time of the alleged discrimination raised in this complaint, the complainant was under a deportation order and has

> no legal status in Canada. This means that the complainant was not lawfully present in Canada within the meaning of subsection 40(5) of the Act at the time of the alleged acts of discrimination raised in this complaint. Thus, the question of the complainant's status was not resolved in his favour. Given the wording of section 40(6) of the Act, the fact that the question of status was not resolved in favour of the complainant means that the Commission does not have jurisdiction over the allegations in the complaint.
>
> Appeal Book at 29

[65] As a result, it is reasonably clear that the Commission's decision rests on the proposition that because the appellant had no immigration status, he was not lawfully present in Canada. This proposition, which comes from *Forrest FCA*, is the question whose correctness is challenged in these proceedings. This leads us to an examination of the statutory scheme.

C. The interpretation of subsections 40(5) and 40(6) of the CHRA

[66] I begin where any statutory interpretation exercise must: the modern approach, that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21, 154 D.L.R. (4th) 193 (*Rizzo*) citing E. A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at 87). Another way of expressing the same principle is that "[t]he interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole": see *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54 at para. 10, [2005] 2 S.C.R. 601.

[67] The crux of this appeal is the reasonableness of the Commission's interpretation of "lawfully present in Canada" in paragraph 40(5)(*a*) and of "status of an individual" in subsection

40(6). Recall that the Commission determined that the absence of immigration status meant that the appellant was not lawfully present in Canada, and that "status of an individual" in subsection 40(6) only refers to immigration status such that it was required to refer the question of status to the Minister of Citizenship and Immigration alone.

[68] When the appellant was extradited to Canada, he entered Canada under the authority of the *Extradition Act*. In particular, he entered Canada as a result of the Minister of Justice making a request to Belgium for his extradition under both section 78 of the *Extradition Act* and the Treaty Between the United Kingdom and Belgium for the Mutual Surrender of Fugitive Criminals (29 October 1901) (Extradition Treaty).

[69] The *Extradition Act* remained the legal authority for the appellant's continued presence in Canada while in detention prior to and during trial. The specific legal authority for his detention during the trial is the surrender order, which, subject to section 80 of the *Extradition Act* and article 6 of the Extradition Treaty, gives Canada jurisdiction to detain and prosecute the extradited person.

[70] In the case of an individual, extradited or not, who lacks immigration status but who receives a sentence of imprisonment for a criminal conviction, a Warrant of Committal issues under the *Criminal Code* which commands the keeper of the institution to which he is committed to "to receive the accused into custody and to imprison him or her there for the term(s) of his or her imprisonment" (Criminal Code, R.S.C. 1985 c. C-46, Form 21), as well as sections 11-14 of the *Corrections and Conditional Release Act*, provide authority for their detention of the convicted person in a Canadian prison.

[71] The *Extradition Act* is also a continuing source of authority for the appellant's presence in Canada post-conviction in that it continues to circumscribe Canada's jurisdiction over him by ensuring that he is not detained, prosecuted, or imprisoned with respect to any offences other than those for which he was extradited. Here, there is no question that the appellant's imprisonment falls within the scope of his surrender order. Consequently, while the *Extradition Act* provides a basis, parallel to the *Criminal Code*, for the legality of his presence in Canada, it is not sufficient to distinguish this case from *Forrest FCA*.

[72] It is opportune to begin by considering subsections 40(5) and (6) within the scheme of the Act, that is, by a consideration of the contextual factors.

[73] In interpreting these provisions, it is also important to recall that section 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21 states:

Enactments deemed remedial	**Principe et interprétation**
12 Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.	**12** Tout texte est censé apporter une solution de droit et s'interprète de la manière la plus équitable et la plus large qui soit compatible avec la réalisation de son objet.

[74] This principle of interpretation takes on added significance in the human rights context, where the Supreme Court has long held that rights-conferring provisions are to be interpreted broadly and liberally, while exceptions are to be narrowly construed (see e.g. *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321 at 339, 93 D.L.R. (4th) 346; *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc.*, 2008 SCC 45 at paras. 65–67 (per McLachlin C.J.C., concurring in part), [2008] 2 S.C.R. 604; see also

Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed., (Markham: LexisNexis Canada Inc., 2014) at §19.1–§19.10).

[75] The CHRA is concerned with discriminatory practices. The sections which define discriminatory practices proscribe those practices with respect to "any individual" or "an individual": see paragraphs 5(*a*) and (*b*), paragraphs 6(*a*) and (*b*), paragraph 7(*a*), paragraphs 9(1)(*a*) and (*c*), section 10, and subsection 14(1) of the CHRA. In some cases, a more restrictive descriptor is used because the focus is persons with a particular status: see, for example, the reference to "employee" in paragraph 7*(b*) dealing with discrimination in employment, the reference to "members of [an] organization" in paragraph 9(1)(*b*) dealing with discrimination in employee organizations, the reference to "male and female employees" in subsection 11(1) dealing with equal wages.

[76] In my view, these inclusive references demonstrate an intention to extend the benefit of the legislation to as broad a group of persons as possible.

[77] The process of extending the benefits of the CHRA includes providing recourse to those who believe that they have been denied the rights protected by the CHRA. This is done through the complaint process described at subsection 40(1) of the CHRA:

40 (1) Subject to subsections (5) and (7), any individual or group of individuals having reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice may file with the Commission a complaint in a form acceptable to the Commission.	**40 (1)** Sous réserve des paragraphes (5) et (7), un individu ou un groupe d'individus ayant des motifs raisonnables de croire qu'une personne a commis un acte discriminatoire peut déposer une plainte devant la Commission en la forme acceptable pour cette dernière.

[78] This provision also uses “any individual” to describe those who are entitled to file a complaint, subject to the exceptions found in subsections (5) and (7). Once again, a very broad class of persons are given access to the Commission’s remedial jurisdiction. While exceptions to this broad class are identified, the jurisprudence is consistently to the effect that such exceptions should be narrowly construed (see e.g. *Insurance Corporation of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145, 137 D.L.R. (3d) 219; *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321 at 339, 93 D.L.R. (4th) 346; *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*, 2000 SCC 27 at para. 29, [2000] 1 S.C.R. 665).

[79] In addition, the powers of the Commission are broadly framed, giving it overall responsibility for the administration of the Act. The opening words of section 27 make this clear:

27 (1) In addition to its duties under Part III with respect to complaints regarding discriminatory practices, the Commission is generally responsible for the administration of this Part and Parts I and III and […]	**27 (1)** Outre les fonctions prévues par la partie III au titre des plaintes fondées sur des actes discriminatoires et l’application générale de la présente partie et des parties I et III, la Commission […]

[80] Part I of the Act deals with discriminatory practices, Part II deals with the organization, powers and duties of the Commission, while Part III sets out the statutory framework for the making and investigation of complaints, the conciliation and settlement of complaints and the referral of complaints to the Human Rights Tribunal. Every step of the process leading to the referral of a complaint to the Human Rights Tribunal established pursuant to section 48.1 of the Act is under the control of the Commission.

[81] Subsection 40(5) of the Act identifies three circumstances in which the Commission is barred from proceeding with complaints. Paragraph 40(5)(*a*) has already been described. Paragraph 40(5)(*b*) deals with the situation in which a discriminatory practice within the meaning of sections 5, 8, 10 or 12 of the Act occurred in Canada and in respect of which there is no identifiable victim. Paragraph 40(5)(*c*) prevents the Commission from dealing with acts which occurred outside Canada in respect of which the victim, at the time of the discriminatory practice, was not a Canadian citizen or a permanent resident.

[82] Subsection 40(7) describes another circumstance which precludes the Commission from dealing with a complaint, specifically a complaint with respect to the terms and conditions of a superannuation or pension fund or plan where the relief to be accorded pursuant to a complaint would deprive a person of rights under that fund or plan which vested prior to March 1, 1978. The Commission is the entity which must interpret and apply these limitations on its ability to proceed with a complaint.

[83] Turning to subsection 40(6), one notes that the Commission is required to refer a question to an appropriate minister only when one "arises under subsection 40(5) as to the status of an individual in relation to a complaint." This suggests that there may be cases under subsection 40(5) where no question arises because the Commission is able to resolve the question for itself. In light of the Commission's overall responsibility for the complaint process, one can reasonably ask whether Parliament intended to deprive the Commission of the ability to decide for itself if a complaint is barred by the terms of subsection 40(5) simply because of the presence of facts which come within the mandate of another decision-maker.

[84] With that context in mind, I return to subsections 40(5) and (6) of the CHRA.

[85] It will be useful to clarify questions of terminology at this point. Paragraph 40(5)(*a*) says that at the time the act or omission that constitutes the practice occurred, the complainant was either "lawfully present in Canada" or "if temporarily absent from Canada, entitled to return to Canada." Given that the issue in this case whether the appellant was lawfully present in Canada, I shall refer only to that condition in the following discussion, to avoid repetition of the cumbersome phrase "lawfully present in Canada or, if absent from Canada, entitled to return to Canada."

[86] Since the Commission based its failure to proceed with the appellant's complaint on the basis of its lack of jurisdiction pursuant to paragraph 41(1)(*c*) of the Act, it is tempting to view the conditions set out in subsections 40(5) and (6) as jurisdictional. In fact, subsections 40(5) and (6) stipulate that where the identified conditions are present, the Commission may not deal with (subsection (5)) or proceed with (subsection (6)) the complaint.

[87] Given the difficulty identifying a "true" question of jurisdiction (see *Human Rights Commission 2018* at paras. 31-41), it appears that the better view is that the constraints imposed on the Commission by subsection 40(5), 40(6), as well as that imposed by subsection 40(1) quoted earlier, are free-standing procedural bars which are effective whether or not they can successfully be brought within paragraph 41(1)(*c*) of the Act. As a result, I will refer to procedural bars and not to jurisdiction in the comments which follow.

[88] Paragraph 40(5)(*a*) establishes a procedural bar to dealing with a complaint if the complainant is not lawfully present in Canada at the time the acts constituting the discriminatory practice occurred. The text itself, as well as the contextual factors to which I referred earlier,

both support the view that it is the Commission and not a minister who is to decide what is meant by "lawfully present in Canada."

[89] However, subsection 40(6) is less clear on the issue of the decision-maker. That provision introduces a number of difficulties to be navigated on the way to a resolution of that question. The first is the stipulation that when "a question arises under subsection (5) as to the status of an individual in relation to a complaint, the Commission shall refer the question of status to the appropriate Minister."

[90] While this appeal deals with the question of whether a complainant is lawfully present in Canada at the material time, subsection (5) identifies other circumstances in which the Commission cannot proceed with a complaint. As noted above, there is the question of whether a person who is temporarily absent from Canada is entitled to return to Canada. In addition, 40(5)(*c*) raises the issue as to whether, in the case of acts which occurred outside Canada, the victim was a Canadian citizen or a person "lawfully admitted to Canada for permanent residence."

[91] Thus, questions may arise as to whether a person is lawfully present in Canada, whether a person temporarily absent from Canada is entitled to return to Canada, whether a person is a Canadian citizen or whether a person was lawfully admitted to Canada for permanent residence. Questions may arise because the individual does not provide the information or because the Commission is unsure as to whether the information which it has been provided is credible. But, where the information is provided and the Commission considers it reliable, I can see no reason why the Commission could not determine, on the basis of the information before it, whether or not the complainant satisfied the relevant condition.

[92] But subsection 40(6) is not simply concerned with status, it is concerned with "status in relation to a complaint." Both the Federal Court in *Forrest FC* and the Commission in this case treated the Minister's advice in response to "status" as a full answer to the question of status in relation to a complaint. This led the appellant's counsel, in an attempt to avoid the application of *Forrest FCA*, to argue that the appropriate minister in the case of an extradited person is the Minister of Justice or the Attorney General.

[93] Presumably, counsel's expectation was that the Minister of Justice or the Attorney General would advise that the appellant was legally present in Canada because he entered Canada via an extradition order or because he was serving a sentence of imprisonment while the Minister of Citizenship and Immigration would advise that the appellant was not lawfully present in Canada because he had no immigration status. It may not have occurred to counsel that the Minister of Justice or the Attorney General might answer that they could not offer any advice since the effect of the extradition order was spent. Though the issue was not raised, another minister who could be considered "appropriate" would be the Minister of Public Safety and Emergency Preparedness as the minister responsible for the *Corrections and Conditional Release Act*. In any case, the advice offered by the minister to whom the question was referred appears to have been considered by the Commission as determinative of the question of status in relation to the complaint.

[94] A few observations are in order. Firstly, no matter which minister's advice is sought, that minister can only answer the question by reference to his or her legislative mandate. Thus, the answer provided by the Minister of Citizenship and Immigration will necessarily be expressed in terms of the IRPA or perhaps, in the case of new citizens, the *Citizenship Act*, R.S.C. 1985, c. C-

29. A question to the Minister of Justice or the Attorney General will necessarily be framed in terms of the legislation for which that minister is responsible.

[95] Secondly, as this case illustrates, this possibility leads to a kind of forum shopping. Counsel may seek to persuade the Commission to refer the question of status to the minister most likely to give the answer most favourable to their client's position. Forum shopping is not generally regarded as a desirable quality in a legal scheme.

[96] Finally, and most importantly, the fact that each minister is bound to answer the question from the point of view of their mandate means that they are unable to take account of considerations arising outside their mandate. This is significant because the question of status arises in relation to a complaint, and the only entity whose mandate includes human rights complaints is the Commission. This suggests that advice received from an appropriate minister cannot be conclusive of the question of status in relation to a complaint even though it is material to that question.

[97] This leads to the next difficulty which is the meaning of "the question of status is resolved thereby in favour of the complainant" or "la question est tranchée en faveur du plaignant" in the French version. I note that subsection 40(6) requires the Commission to refer a question as to status to the appropriate minister. It also provides that "[the Commission] shall not proceed with the complaint…". This shows that the Commission is the decision-maker in subsection 40(6) which suggests that it is the Commission which must resolve the question of status in relation to the complaint.

[98] If a question arises about status in relation to a complaint because the Commission lacks the information to make the determination as to lawful presence or is unsure as to whether it can rely on the information which it has been given, then once the minister's advice has been received, the Commission can use that information, together with other information which has been brought to its attention, to resolve the question which has arisen under subsection 40(5).

[99] In this view of subsection 40(6), the bars against dealing with (or proceeding with) a complaint in subsection (5) and (6) are the same bar, applied under different circumstances. The bar in subsection (5) applies if the Commission is able to make the required determination on the basis of the information which is provided by the complainant or which arises in the course of its investigation. The bar in subsection (6) applies if the Commission requires further information in order to make the determination and makes its determination as to the complainant's status in relation to a complaint after it has received the advice of the appropriate minister. But in both cases, the determination is the same: does the complainant satisfy the applicable condition set out in paragraph 40(5)(*a*) or (*c*) when viewed from the perspective of the administration of the CHRA? In both cases, it is the Commission who must resolve the question of status not the appropriate minister.

[100] This result allows the Commission to take into account all relevant factors in deciding whether a complainant satisfies the conditions set out in subsection 40(5) without being bound by the limitations imposed by an appropriate minister's legislative mandate. This leads to more nuanced decision-making and allows the Commission to exercise its discretion in the way which most advances the objects of the Act. It also does away with the issue of forum shopping since the choice of the appropriate minister is driven by the information which the Commission

requires to make its determination and not by counsel's view as to which minister's determination might be most favourable to a complainant. But because the minister's advice is not conclusive, the complainant is still able to bring relevant considerations to the Commission's attention notwithstanding the minister's advice.

D. Another Look at the Jurisprudence

[101] On the basis of this interpretation of subsections 40(5) and 40(6) of the Act, it is possible to address certain propositions put forward in *Forrest FC*.

[102] The first is the proposition that any issue as to lawful presence in Canada requires the Commission to refer the matter to the Minister of Citizenship and Immigration. The Commission may believe that it is bound to do so by the order made at the conclusion of the first application for judicial review brought by Mr. Forrest. On the basis of the analysis undertaken above, it is my opinion that this is not the case.

[103] If a question arises, that is, if the Commission lacks the information to answer the question or is uncertain as to whether it can rely on the information it has, then the Commission must refer the matter to the minister within whose mandate the question falls. In the case of immigration status, that will normally be the Minister of Citizenship and Immigration. Having received the Minister's advice, the Commission may also take into account other relevant factors.

[104] This case illustrates the kind of considerations which the Commission is entitled to take into account in making the determination which the Act has asked it to make. The Minister's advice in this case was clearly premised on the view that the appellant, because of his lack of

immigration status, was not entitled to be in Canada. The argument advanced by the appellant is that his obligation to remain in Canada by virtue of his lawful detention means that his presence in Canada is lawful. The Commission has never had the opportunity to answer that question because of the Federal Court's decision following the first judicial review application that the question must be referred to the Minister of Citizenship and Immigration and this Court's teaching in *Forrest FCA* that the Minister's determination was conclusive.

[105] The proposition in paragraph 23 of *Forrest FC* to the effect that the Minister's advice that Mr. Forrest had no immigration status meant that the Commission "had no authority to further examine the question of whether or not the Applicant was 'lawfully present in Canada' since the question of status was not resolved in favour of the Applicant" is incorrect and does not bind the Commission. A minister's advice is relevant to the extent that it relates to a matter within the minister's legislative mandate. However, the only entity with a mandate over "status… in relation to a complaint" is the Commission. To that extent the Federal Court was correct when it said that the Minister's advice as to whether Mr. Forrest was lawfully present in Canada was gratuitous advice which was not binding on the Commission. The Federal Court was also correct in holding that the Commission could not avoid its responsibility to decide if a complaint was lawfully present in Canada by deferring to another decision-maker. As a result, the Minister's advice that the appellant was not lawfully present in Canada does not bind the Commission when determining whether he is lawfully in Canada as described in paragraph 40(5)(*a*).

[106] As for the decision in *Forrest FCA*, the conclusion that lack of immigration status is determinative of whether a complainant is lawfully present in Canada is incorrect for the reasons set out above.

VII. Remedy

[107] On the basis of this analysis, it is apparent that the Commission's decision is based upon legal error and cannot stand. The question which remains is the appropriate remedy.

[108] It is my conclusion that the only reasonable interpretation of "lawfully present in Canada" within the meaning of paragraph 40(5)(*a*) of the CHRA encompasses the appellant's circumstances. The appellant was lawfully present in Canada because he was sentenced to a term of imprisonment in Canada after being convicted under the *Criminal Code* (for an offence to which his extradition related), because of his continued detention under the *Corrections and Conditional Release Act*, and because of the legislative stay of his removal order under paragraph 50(*b*) of the IRPA. His entry into Canada was also lawful as it was authorized under the *Extradition Act*.

[109] The appellant alleges he was discriminated against while in prison serving such a sentence. As such, the appellant was, and continues to be, "lawfully present in Canada" based on the ordinary – and, unambiguous – text of paragraph 40(5)(*a*). Certainly, the appellant was not, at the time of the alleged act of discrimination, "unlawfully" present in Canada. Were that the case, he would be removed, or detained pending removal.

[110] Accordingly, if there were any ambiguity in paragraph 40(5)(*a*), which there is not, it would have to be resolved in favour of the interpretation which furthers the purpose and objects of the CHRA. The appellant is required by Canadian law to remain in Canada for the duration of his sentence – he is not in immigration detention awaiting deportation. The appellant's situation

is legally and factually discrete from those who, but for pending legal proceedings or administrative delay, would be removed from Canada.

[111] Finding that "lawfully present in Canada" under paragraph 40(5)(*a*) is not limited to immigration status is also supported by the text of subsection 40(6) and the "status of an individual". Parliament's decision to use the word "status" instead of "immigration status" and to permit the Commission to refer the question of "status" to the "appropriate Minister" indicates that different ministers, and therefore different legislation, may be involved: the Minister of Justice up to the point of conviction; the Minister of Citizenship and Immigration with respect to the entry of foreign nationals into Canada; the Minister of Public Safety, responsible for the CSC and charged with administering the *Corrections and Conditional Release Act*, up to the end of the Warrant of Committal, and who, following the expiry of the Warrant of Committal, is responsible for removal of foreign nationals.

[112] Therefore, it was unreasonable to limit the interpretation of "status of an individual" to immigration status and to only refer the question of status to the Minister of Citizenship and Immigration. As noted, any ambiguity in the meaning of "status" must be resolved in favour of the interpretation which furthers the purpose and objects of the CHRA.

[113] It must be kept in mind that if *Forrest FCA* continues to stand the appellant will spend at least 10 years to possibly his entire life in a Canadian prison, under the greatest restriction of liberty and government control possible, in all aspects of life and wellbeing, yet cannot make a human rights complaint merely because he does not hold some form of immigration status and is subject to a deportation order if ever he is released.

[114] In contrast, a visitor from the United States, granted entry to Canada for a day of cross-border shopping, would have standing to make a complaint about discriminatory treatment at the border. The aggrieved tourist can leave Canada at any time, continue to prosecute the complaint and recover damages, even though they might never step foot in Canada again. Similarly, under *Forrest FCA* and the Commission's interpretation, a Canadian inmate who could launch a complaint for religious discrimination, but the foreign national without immigration status could not, even though the latter may be serving a life sentence and the former a minimum federal term. Since it is well-established that Parliament does not intend to produce absurd consequences (*Rizzo* at para. 43), this cannot be the result.

[115] This analysis demonstrates the compelling reasons that form the basis of my conclusion that immigration status is not necessarily a prerequisite to being lawfully present in Canada, and that *Forrest FCA* was wrongly decided and ought no longer to be followed. While this Court's finding that lawful detention does not confer status under the IRPA is unassailable, that proposition is not in dispute, and is not at issue in this appeal. What is in issue is its ruling that lack of immigration status is determinative of whether a complainant is "lawfully present in Canada". For the foregoing reasons, this is incorrect.

[116] Moreover, when a question of status arises, the Minister of Citizenship and Immigration is not necessarily the only appropriate minister to whom the question of status should be referred. The Commission may believe that it is bound to do so by the order made at the conclusion of the first application for judicial review brought by Mr. Forrest to refer the question of status to the Minister any time the question of status arises. But based on the analysis undertaken above, this is not the case. Thus, to the extent that *Forrest FCA* also implicitly confirmed that the only

appropriate minister is the Minister of Citizenship and Immigration, it ought not to be followed either.

[117] Correctness concerns in this case outweigh concerns about certainty, especially in light of the fact that only one other case, *Sylla v. Canada (Attorney General)*, 2005 FC 905, has considered this issue.

[118] To summarize, the only reasonable interpretation of "lawfully present in Canada" encompasses the appellant's circumstances, namely, the situation wherein a complainant is serving a prison sentence for a criminal conviction, and "status of an individual" does not refer only to immigration or citizenship status.

[119] Moreover, at the risk of appearing to state a tautology, a question only arises if the Commission has a question. If the Commission has the necessary information, then it can decide if the complainant is lawfully present in Canada. On the facts of this case, there is no question as to the appellant's circumstances: he is currently serving a prison sentence in a federal penitentiary for committing a criminal offence that fell within his surrender order. As a result, no question of status even arises. The only reasonable outcome, therefore, is to find that the appellant is lawfully present in Canada for the purposes of paragraph 40(5)(*a*).

[120] Before concluding, an important observation is required. All detentions in Canada have a legal basis; they are necessarily founded in statute. This does not result in the legal conclusion that all detained persons are "lawfully present in Canada". Foreign nationals who arrive in Canada and are detained because they are unlawfully in Canada cannot be said to be lawfully present. It would be circular reasoning to say that someone who is detained for being unlawfully

present in Canada is lawfully present in Canada because they are detained. So too in respect of failed refugee and pre-removal risk assessment claimants. The legality of their presence has been considered and rejected. Unlike the appellant, they are being ordered to leave, while he is required to stay.

[121] Based on the foregoing reasons, I would not remit the question to the Commission for re-determination as there is only one reasonable outcome open to the Commission – "lawfully present in Canada" within the meaning of paragraph 40(5)(*a*) of the CHRA encompasses the appellant's circumstances. The interests of judicial efficiency and economy are better served by avoiding a subsequent hearing which can only result in one possible outcome.

VIII. Conclusion

[122] For the foregoing reasons, I conclude that an individual serving an imprisonment sentence for a criminal conviction is "lawfully present in Canada" for the purposes of 40(5)(*a*) of the CHRA and that the Commission's decision was unreasonable. I would allow the appeal and remit the matter back to the Commission to determine, otherwise than on the basis of paragraph 40(5)(*a*), whether it will hear the complaint. I would make no order as to costs.

"Donald J. Rennie"
J.A.

"I agree
D. G. Near J.A."

"I agree
Russel W. Zinn J.A. (*ex officio*)"

PELLETIER J.A. (dissenting)

[123] I have read my colleague's reasons and I substantially agree with them. As I understand his reasons, the only reasonable conclusion to which the Commission could come, if the matter were to be remitted to it for reconsideration, is that a person who is serving a sentence of imprisonment is lawfully present in Canada, notwithstanding any defect in that person's standing under Canada's immigration legislation. As a result, no useful purpose would be served by remitting the matter to the Commission to examine a question to which there is only one answer. I am not persuaded that this is the case.

[124] The question which now arises is: "Where do we go from here?" The Commission's decision was based on judicial decisions which should not be followed. How do we put the Commission back into the position in which it would have been but for the mistaken decisions on which it relied.

[125] The Commission only came to the decision it did after it had referred the matter to the Minister of Citizenship and Immigration. It says it did so after learning that Mr. Tan was not a citizen and had been convicted of a serious crime. Subsection 40(6) provides that when a question of status is referred to the appropriate Minister, the Commission may not proceed with a complaint "unless the question of status is resolved thereby in favour of the complainant."

[126] It was open to the Commission to investigate further when it learned of Mr. Tan's circumstances. It could have asked him about his immigration status which would have disclosed that he is subject to a deportation order whose execution is stayed by operation of law. The fact that he is subject to a deportation order means that, by definition, he has no status in Canada. On

the basis of that information, as well as information as to effect of Mr. Tan's sentence of imprisonment, the Commission could have come to a conclusion as to whether Mr. Tan was lawfully present in Canada.

[127] As noted, that is not what the Commission did. It referred the question to the Minister of Citizenship and Immigration. The result is that, by the terms of subsection 40(6), it cannot proceed with the complaint unless the question of status is resolved in favour of Mr. Tan. If the Commission's decision to refer the matter to the Minister is not set aside, Mr. Tan will have to show that the question of status was resolved in his favour, a burden which he would not have had to bear if the Commission had investigated before referring the matter to the Minister.

[128] It is difficult to say that the Commission's decision on this issue was unreasonable if, as I suspect, it believed it was bound to do so as a result of the consent order made in the course of Mr. Forrest's first application for judicial review. On the other hand, it is possible to say that the decision was made on the basis of an error of law which was not of the Commission's making, namely that any complainant who is not a citizen must have the question of their status referred to the Minister of Citizenship and Immigration. As noted in my colleague's reasons, such a referral is only necessary if the Commission is unable to obtain the necessary information or is not satisfied that the information which it has is reliable.

[129] In my view, the Commission should be placed in the position in which it would have been but for the misdirection in the consent order. Normally, that would require the Commission to undertake an investigation. On the facts of this case, it makes little sense to ask the Commission to engage in an investigation when the facts are now known. The Commission is entitled to proceed on the basis that (a) Mr. Tan is neither a citizen nor a permanent resident (b)

Mr. Tan is subject to a deportation order (c) Mr. Tan was convicted of murder and sentenced to a period of imprisonment (d) Mr. Tan is being held pursuant to a warrant of committal which requires the keeper of the institution in which he is detained "to imprison him or her there for the term(s) of his or her imprisonment" (e) the deportation made against Mr. Tan is stayed by operation of law so long as his sentence is not completed and (f) pursuant to subsection 48(2) of the IRPA, Mr. Tan is not required to leave Canada so long as the deportation order is stayed. With those facts in mind, the Commission should be given the opportunity to decide if Mr. Tan is "lawfully present in Canada" or whether the question of his status requires a referral to the "appropriate Minister" pursuant to subsection 40(6).

[130] Whether the Commission decides to refer the matter to the Minister or not, the Commission will have to make a decision, after receiving the Minister's advice if it has been sought, on, whether Mr. Tan is "lawfully present in Canada". This is the point at which my colleague takes the position that there is only one reasonable interpretation of "lawfully present in Canada".

[131] The jurisprudence contemplates situations in which the Court sets out an interpretation of a statutory provision which a tribunal must adopt because it is the only reasonable interpretation of that provision. The Supreme Court expressed the rationale for this approach in the following way:

> It will not always be the case that a particular provision permits multiple reasonable interpretations. Where the ordinary tools of statutory interpretation lead to a single reasonable interpretation and the administrative decision maker adopts a different interpretation, its interpretation will necessarily be unreasonable -- no degree of deference can justify its acceptance; see, e.g., *Dunsmuir*, at para. 75; *Mowat*, at para. 34. In those cases, the "range of reasonable outcomes" (*Canada (Citizenship and*

> *Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 4) will necessarily be limited to a single reasonable interpretation -- and the administrative decision maker must adopt it.
>
> *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 at para. 38, [2013] 3 S.C.R. 895 (*McLean*)

[132] The premise upon which this rationale rests is the absence of any ambiguity when the ordinary tools of statutory interpretation are applied to a statutory provision. This is made clear earlier in the Court's reasons in *McLean*:

> In plain terms, because legislatures do not always speak clearly and because the tools of statutory interpretation do not always guarantee a single clear answer, legislative provisions will on occasion be susceptible to multiple reasonable interpretations (*Dunsmuir*, at para. 47; see also *Construction Labour Relations v. Driver Iron Inc.*, 2012 SCC 65, [2012] 3 S.C.R. 405). … The question that arises, then, is who gets to decide among these competing reasonable interpretations?
>
> The answer, as this Court has repeatedly indicated since *Dunsmuir*, is that the resolution of unclear language in an administrative decision maker's home statute is usually best left to the decision maker. That is so because the choice between multiple reasonable interpretations will often involve policy considerations that we presume the legislature desired the administrative decision maker -- not the courts -- to make. Indeed, the exercise of that interpretative discretion is part of an administrative decision maker's "expertise".
>
> *McLean* at paras. 32-33.

[133] The phrase "lawfully present in Canada", it seems to me, lends itself to more than one interpretation. On the face of it, that expression can refer to whether a person is entitled to be in Canada or whether that person is obliged to be in Canada. My colleague suggests that a contextual and purposive analysis leads to the conclusion that being obliged to be in Canada, as a result of being lawfully detained in Canada pursuant to a warrant of committal, amounts to being lawfully present in Canada. On the other hand, it may be open to the Commission to conclude

that a person who could not otherwise claim to be "lawfully present in Canada" at the material time should not be able to access the complaints process solely on the basis of their incarceration, after having been convicted of a serious offence, thereby profiting from their own wrong. The result of that reasoning could be held to be consistent with the reasoning which led to the bar found in paragraph 40(5)(*a*) in the first place.

[134] I am reluctant to develop a full-throated response to my colleague's argument with respect to inevitability of his conclusion on "lawfully present in Canada" as I do not wish to give the Commission the impression that it is faced with a binary choice: to accept my colleague's position or my own. I do not say that my colleague's conclusion is unreasonable. I concede that it is. My point, simply put, is that it is not the only possible reasonable explanation and that the expression "lawfully present in Canada" is uncertain and imprecise.

[135] As the Supreme Court pointed out in paragraph 33 of *McLean*, quoted above, it is the function of the Commission to resolve ambiguities in the interpretation of its home legislation. Where the Commission has been curtailed in its ability to do so due to judicial misdirection, it should be given the opportunity to address the issue free of such constraints.

[136] The Supreme Court touched upon this, albeit tangentially, in *McLean* when it said:

> Because the legislature charged the administrative decision maker rather than the courts with "administer[ing] and apply[ing]" its home statute (*Pezim*, at p. 596), it is the decision maker, first and foremost, that has the discretion to resolve a statutory uncertainty by adopting any interpretation that the statutory language can reasonably bear.
>
> *McLean* at para. 40 (my emphasis)

[137] The use of the word "first" in this passage is not entirely serendipitous. It reflects the fact a tribunal will normally be the first entity to be called upon to interpret ambiguous passages in its legislation. It is only after the tribunal has pronounced itself that a court will be called upon to decide whether the tribunal's decision is reasonable. When certain misleading or mistaken judicial pronouncements which curtailed a tribunal's ability to interpret a legislative provision have been cleared away, a tribunal is entitled to be put in the position in which it would have been but for the judicial misdirection. This is consistent with the Court's use of the word "foremost" in the passage quoted above.

[138] The same point was made in the *British Columbia Hydro and Power Authority v. Workers' Compensation Board of British Columbia*, 2014 BCCA 353, 377 D.L.R. (4th) 517. A decision of the Worker's Compensation Board was judicially reviewed and the reviewing judge concluded that the Board's decision was unreasonable and proposed an alternate interpretation of the legislation. On appeal, the reviewing judge's decision was affirmed. However, in remitting the matter to the Worker's Compensation Board, the British Columbia Court of Appeal declined to endorse the reviewing judge's interpretation of the statute, saying at paragraph 53 of its reasons:

> I do not, however, adopt his remarks on the definition of "employer" at para. 71 of his reasons. While it may provide useful guidance on the reconsideration, the interpretation of that term rests with the Board and its Review Division, not with the courts.

[139] The same is true here. Because of the unique history of this issue in the Federal Courts, the Commission has never had the opportunity to express its views free of judicial "guidance". It should be given that opportunity at least once.

[140] If the only reasonable interpretation is as clear as my colleague suggests, there is no reason to believe that the Commission will not come to it on its own. If it comes to some other interpretation, then the Federal Courts should consider that interpretation, should they be asked to do so, with "respectful attention" to see if it demonstrates "justification, transparency and intelligibility" in the decision-making process and falls within the "range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir v. New Brunswick*, 2008 SCC 9 at paras. 48-49, [2008] 1 S.C.R. 190; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at para. 63, [2009] 1 S.C.R. 339; *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 at para. 36, 417 D.L.R. (4th) 239. If not, then the Court may intervene and could, at that time, come to the conclusion which my colleague proposes.

[141] As a result, I would therefore allow the appeal, set aside the Commission's decision and return the matter to the Commission for redetermination on the basis that (a) the referral of the question of Mr. Tan's status to the Minister of Citizenship and Immigration is set aside and that the Commission proceed with its determination on the basis of the facts set out in paragraph 133 of these reasons. Like my colleague, I would make no order as to costs.

"J.D. Denis Pelletier"
J.A.

"I agree
Judith Woods J.A."

APPENDIX A

Canadian Human Rights Act **(R.S.C., 1985, c. H-6)**	*Loi canadienne sur les droits de la personne* **(L.R.C. (1985), ch. H-6)**
No complaints to be considered in certain cases	**Recevabilité**
40 (5) No complaint in relation to a discriminatory practice may be dealt with by the Commission under this Part unless the act or omission that constitutes the practice	**40 (5)** Pour l'application de la présente partie, la Commission n'est validement saisie d'une plainte que si l'acte discriminatoire :
(a) occurred in Canada and the victim of the practice was at the time of the act or omission either lawfully present in Canada or, if temporarily absent from Canada, entitled to return to Canada;	**a)** a eu lieu au Canada alors que la victime y était légalement présente ou qu'elle avait le droit d'y revenir;
(b) occurred in Canada and was a discriminatory practice within the meaning of section 5, 8, 10 or 12 in respect of which no particular individual is identifiable as the victim;	**b)** a eu lieu au Canada sans qu'il soit possible d'en identifier la victime, mais tombe sous le coup des articles 5, 8, 10 ou 12;
(c) occurred outside Canada and the victim of the practice was at the time of the act or omission a Canadian citizen or an individual lawfully admitted to Canada for permanent residence.	**c)** a eu lieu à l'étranger alors que la victime était un citoyen canadien ou qu'elle avait été légalement admise au Canada à titre de résident permanent.
Determination of status	**Renvoi au ministre compétent**
40 (6) Where a question arises under subsection (5) as to the status of an individual in relation to a complaint, the Commission shall refer the question of status to the appropriate Minister and shall not proceed with the complaint unless the question of status is resolved thereby in favour of the complainant.	**40 (6)** En cas de doute sur la situation d'un individu par rapport à une plainte dans les cas prévus au paragraphe (5), la Commission renvoie la question au ministre compétent et elle ne peut procéder à l'instruction de la plainte que si la question est tranchée en faveur du plaignant.

…	[…]
Commission to deal with complaint	**Irrecevabilité**
41 (1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that	**41 (1)** Sous réserve de l'article 40, la Commission statue sur toute plainte dont elle est saisie à moins qu'elle estime celle-ci irrecevable pour un des motifs suivants :
…	[…]
(c) the complaint is beyond the jurisdiction of the Commission;	**c)** la plainte n'est pas de sa compétence;
…	[…]

***Corrections and Conditional Release Act* (S.C. 1992, c. 20)**	***Loi sur le système correctionnel et la mise en liberté sous condition* (L.C. 1992, ch. 20)**
General	**Disposition générale**
11 A person who is sentenced, committed or transferred to penitentiary may be received into any penitentiary, and any designation of a particular penitentiary in the warrant of committal is of no force or effect.	**11** La personne condamnée ou transférée au pénitencier peut être écrouée dans n'importe quel pénitencier, toute désignation d'un tel établissement ou lieu dans le mandat de dépôt étant sans effet.

***Criminal Code* (R.S.C., 1985, c. C-46)**	***Code criminel* (L.R.C. (1985), ch. C-46)**
Court of criminal jurisdiction	**Cour de juridiction criminelle**
469 Every court of criminal jurisdiction has jurisdiction to try an indictable offence other than	**469** Toute cour de juridiction criminelle est compétente pour juger un acte criminel autre :
(a) an offence under any of the following sections:	**a)** qu'une infraction visée par l'un des articles suivants :
(i) section 47 (treason),	**(i)** l'article 47 (trahison),
(ii) section 49 (alarming Her Majesty),	**(ii)** l'article 49 (alarmer Sa Majesté),

(iii) section 51 (intimidating Parliament or a legislature),

(iv) section 53 (inciting to mutiny),

(v) section 61 (seditious offences),

(vi) section 74 (piracy),

(vii) section 75 (piratical acts), or

(viii) section 235 (murder);

…

Detention in custody for offence listed in section 469

515 (11) Where an accused who is charged with an offence mentioned in section 469 is taken before a justice, the justice shall order that the accused be detained in custody until he is dealt with according to law and shall issue a warrant in Form 8 for the committal of the accused.

…

Warrant of committal

570 (5) Where an accused other than an organization is convicted, the judge or provincial court judge, as the case may be, shall issue or cause to be issued a warrant of committal in Form 21, and section 528 applies in respect of a warrant of committal issued under this subsection.

…

(iii) l'article 51 (intimider le Parlement ou une législature),

(iv) l'article 53 (incitation à la mutinerie),

(v) l'article 61 (infractions séditieuses),

(vi) l'article 74 (piraterie),

(vii) l'article 75 (actes de piraterie),

(viii) l'article 235 (meurtre);

[…]

Détention pour infraction mentionnée à l'article 469

515 (11) Le juge de paix devant lequel est conduit un prévenu inculpé d'une infraction mentionnée à l'article 469 doit ordonner qu'il soit détenu sous garde jusqu'à ce qu'il soit traité selon la loi et décerner à son sujet un mandat rédigé selon la formule 8.

[…]

Mandat de dépôt

570 (5) Lorsqu'un prévenu, autre qu'une organisation, est condamné, le juge ou le juge de la cour provinciale, selon le cas, décerne ou fait décerner un mandat de dépôt rédigé selon la formule 21, et l'article 528 s'applique à l'égard d'un mandat de dépôt décerné sous le régime du présent paragraphe.

[…]

Imprisonment for life or more than two years	**Emprisonnement à perpétuité ou pour plus de deux ans**
743.1 (1) Except where otherwise provided, a person who is sentenced to imprisonment for	**743.1 (1)** Sauf disposition contraire de la présente loi ou de toute autre loi fédérale, une personne doit être condamnée à l'emprisonnement dans un pénitencier si elle est condamnée, selon le cas :
(a) life,	**a)** à l'emprisonnement à perpétuité;
(b) a term of two years or more, or	**b)** à un emprisonnement de deux ans ou plus;
(c) two or more terms of less than two years each that are to be served one after the other and that, in the aggregate, amount to two years or more,	**c)** à l'emprisonnement pour deux ou plusieurs périodes de moins de deux ans chacune, à purger l'une après l'autre et dont la durée totale est de deux ans ou plus.
shall be sentenced to imprisonment in a penitentiary.	

***Immigration and Refugee Protection Act* (S.C. 2001, c. 27)**	***Loi sur l'immigration et la protection des réfugiés* (L.C. 2001, ch. 27)**
Serious criminality	**Grande criminalité**
36 (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for	**36 (1)** Emportent interdiction de territoire pour grande criminalité les faits suivants :
(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;	**a)** être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;
…	[…]

Preparation of report

44 (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.

Rapport d'interdiction de territoire

44 (1) S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de territoire, l'agent peut établir un rapport circonstancié, qu'il transmet au ministre.

Referral or removal order

(2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.

Suivi

(2) S'il estime le rapport bien fondé, le ministre peut déférer l'affaire à la Section de l'immigration pour enquête, sauf s'il s'agit d'un résident permanent interdit de territoire pour le seul motif qu'il n'a pas respecté l'obligation de résidence ou, dans les circonstances visées par les règlements, d'un étranger; il peut alors prendre une mesure de renvoi.

…

[…]

Stay

50 A removal order is stayed

Sursis

50 Il y a sursis de la mesure de renvoi dans les cas suivants :

…

[…]

(b) in the case of a foreign national sentenced to a term of imprisonment in Canada, until the sentence is completed;

b) tant que n'est pas purgée la peine d'emprisonnement infligée au Canada à l'étranger;

…

[…]

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF THE FEDERAL COURT DATED JULY 24, 2015 (2015 FC 907)

DOCKET:	A-427-15
STYLE OF CAUSE:	KIEN BENG TAN v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	JANUARY 29, 2018
REASONS FOR JUDGMENT BY:	RENNIE J.A.
CONCURRED IN BY:	NEAR J.A. ZINN J.A. (*ex officio*)
DISSENTING REASONS BY:	PELLETIER J.A.
CONCURRED IN BY:	WOODS J.A.
DATED:	OCTOBER 18, 2018

APPEARANCES:

Jennifer Metcalfe Fadi Yachoua	FOR THE APPELLANT
Banafsheh Sokhansanj Thomas Bean	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Prisoners' Legal Service Burnaby, British Columbia Embarkation Law Corporation Vancouver, British Columbia	FOR THE APPELLANT
Nathalie G. Drouin Deputy Attorney General of Canada	FOR THE RESPONDENT