S.C.C. File No. 34258

IN THE SUPREME COURT OF CANADA

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Between:

MUHSEN AHEMED RAMADAN AGRAIRA

Appellant
(Respondent in the Court of Appeal)

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent
(Appellant in the Court of Appeal)

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(Pursuant to Rules 35 and 42 of the *Rules of the Supreme Court of Canada*)

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PART I – STATEMENT OF FACTS

A. Overview

1. This case concerns the effect that a transfer in responsibility from one minister to another can have on the interpretation of legislation and the applicability of previously established guidelines. In reversing the Application Judge's decision, the Federal Court of Appeal held that the transfer of the discretion to grant an exemption from a finding of inadmissibility from the Minister of Citizenship and Immigration to the Minister of Public Safety meant that the Minister of Public Safety need only consider "national security and public safety" when determining what is in the national interest. In doing so, the Federal Court of Appeal significantly narrowed the meaning of "national interest", and departed from well-established jurisprudence.

2. This appeal challenges the Federal Court of Appeal's conclusion that the transfer of ministerial responsibility is the determinative factor in a statutory interpretation analysis, given clearly entrenched principles of statutory interpretation to the contrary. This appeal also challenges whether a transfer of Ministerial responsibility could affect legitimate expectations that the Minister will follow publicly available ministerial guidelines regarding the decision making process, and whether the limitations that the Court of Appeal put on the applicability of the principles outlined by this Court in *Baker v. Canada (M.C.I.),* [1999] 2 S.C.R. 817 ("*Baker*") are appropriate. Finally, this case raises issues of whether the Court of Appeal unlawfully fettered the discretion of the Minister of Public Safety.

3. First, the Court of Appeal erred in holding that the transfer of responsibility between Ministers for making decisions pursuant to section 34(2) of IRPA resulted in a significant change in the meaning of that section. Second, the Court of Appeal erred by failing to consider whether there was a legitimate expectation that the Minister would adhere to publicly available guidelines in the decision making process. Finally, the Court below also erred in equating the term "national interest" in section 34(2) with "national security and public safety". This interpretation runs contrary to the rules of statutory interpretation and procedural fairness, unlawfully fetters the Minister's discretion and results in an interpretation of the provision that does not accord with *Charter* principles. Accordingly, the Appellant respectfully submits that this appeal should be allowed.

B. The Appellant's Immigration History

4. The relevant facts are not in dispute. The Appellant is a citizen of Libya. He left Libya in March of 1996 at the age of 26, and arrived in Germany where he made a claim for refugee protection, based on his membership in the Libyan National Salvation Front (the "LNSF"), a secular group which formed in 1981 to oppose Gadhafi's rule.[1] This claim was rejected as the German authorities did not believe his assertions that he was a member of the LNSF.[2]

5. The LNSF has been described as a paramilitary group which has "traditionally been supported by a majority of the other countries in the Middle East and European and western governments".[3] Indeed, in the early 1980s the United States was concerned about the Libyan government's support for terrorists, and the Reagan administration authorized the Central Intelligence Agency (CIA) to engage in a covert operation to de-stabilize the Gadhafi regime. With the support of the CIA, the LSFN unsuccessfully attacked Gadhafi in May, 1984.[4] The LNSF ceased military operations in 1995.

6. The Appellant left Germany and arrived in Canada on March 7, 1997 where he made a claim for refugee protection. His claim for refugee protection was based on his well-founded fear of persecution at the hands of the Libyan regime due to his political beliefs and involvement with the LNSF.[5] The Immigration and Refugee Board (IRB) rejected his refugee claim.[6]

7. The Appellant maintains that he was never actually a member of the LNSF, though he shared the LNSF's goal of seeing Gadhafi removed from power and democracy installed in Libya. He was ill advised when he arrived in Canada that membership in the LNSF would help his refugee claim. He exaggerated his support of the organization in order to bolster his claim.[7]

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[1] Affidavit of Muhsen Ahmed Ramadan Agraira, sworn 15 June 2009, ("Appellant's Affidavit"), Appellant's Record ("AR"), Vol. III, Tab 15 at p. 227.
[2] Appellant's Refugee Decision, Ahsan Affidavit, AR Vol. III, Tab 16 at p. 411; Appellant's Affidavit, AR Vol. III, Tab 15 at p. 227.
[3] Disclosure attached to Minister's Briefing Note, Affidavit of Humera Ahsan, sworn 14 July 2009 ("Ahsan Affidavit"), AR Vol. III, Tab 16, at p. 387.
[4] Appellant's Ministerial Relief Submissions, Ahsan Affidavit, AR, Vol. III, Tab 16 at pp. 291, 304.
[5] Appellant's Personal Information Form, Ahsan Affidavit, AR Vol. III, Tab 16 at pp. 398-400.
[6] Appellant's Refugee Decision, Ahsan Affidavit, AR Vol. III, Tab 16 at pp. 411-415.
[7] Appellant's Affidavit, AR Vol. III, Tab 15 at pp. 227, 229.

8. On March 7, 1999 the Appellant married Dawn Barnes, a Canadian citizen. Ms. Barnes submitted an application to sponsor the Appellant. The application was approved in principle in September, 1999, and the Appellant was advised to make an application for permanent residence, which he did.[8]

9. The Appellant did not hear from immigration officials again until the summer of 2000, when he was called in for an interview with the Canadian Security Intelligence Service ("CSIS"). At this interview he was asked questions about his refugee claim and the extent of his involvement with the LNSF. He explained that his involvement was minimal and that he only agreed with their democratic ideals.[9]

10. The Appellant was called in for an interview with Citizenship and Immigration Canada ("CIC") in Oshawa in May of 2002, and asked about the information he provided to CSIS. The Appellant repeated that he was not an official member of the LNSF, but that he was involved with the party. He stated that he had attended a few meetings to promote democracy, freedom of speech and human rights in Libya. He told the officer at this interview that he had never engaged in activities with the LNSF, and that he had embellished his involvement with the LNSF in order to strengthen his refugee claim. He stated that he had no knowledge of the group's violence and would not have been involved with a group that supported violence. The officer informed him that his file was being sent to Ottawa for Minister's relief.[10]

11. On July 17, 2002, the Appellant's former counsel made submissions on the Appellant's application for Ministerial relief.[11]

C. Ministerial Relief Plays an Important Role in the Functioning of the IRPA

12. In 1992, section 19 of the *Immigration Act*, S.C. 1985 c. I-2 ("the *Immigration Act*") was amended to include membership in a terrorist organization as a ground for inadmissibility:

> 19(1) No person shall be granted admission who is a member of any of the following classes:

[8] Appellant's Affidavit, AR Vol. III, Tab 15, at p. 228.
[9] Appellant's Affidavit, AR Vol. III, Tab 15 at p. 228.
[10] Appellant's Affidavit, AR Vol. III, Tab 15 at p. 228.
[11] Appellant's Ministerial Relief Submissions, Ahsan Affidavit, AR Vol. III, Tab 16 at p. 283.

…

(f) persons who there are reasonable grounds to believe…

(iii) are or were members of an organization that there are reasonable grounds to believe is or was engaged in…

(B) Terrorism

Except persons who have satisfied the Minister that their admission would not be detrimental to the national interest.[12]

13. Under the old *Immigration Act*, the Minister of Citizenship and Immigration was responsible for determining admissibility, and for determining whether Ministerial relief was warranted.

14. The *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("the IRPA") came into force on June 28, 2002. At this time, section 19 of the *Immigration Act* was carried into section 34 of the IRPA:

34(1) A permanent resident or foreign national is inadmissible on security grounds for:

(a) engaging in an act of espionage or an act of subversion against a democratic government, institution or process as they are understood in Canada;
(b) engaging in or instigating the subversion by force of any government;
(c) engaging in terrorism;
(d) being a danger to the security of Canada;
(e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or
(f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b) or (c).

(2) The matters referred to in subsection (1) do not constitute inadmissibility in respect of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest.

15. The Courts have interpreted each of the actions described in s. 34(1) of the IRPA broadly. As a result, individuals can be rendered inadmissible to Canada on the basis of activities that are legal and in accordance with Canadian values. For example, subversion has been defined as

[12] *An Act to amend the Immigration Act and other Acts in consequence thereof*, S.C. 1992, c. 49, s. 11.

having two essential elements—a clandestine or deceptive element and an element of undermining from within.[13] Under this broad interpretation of "subversion", individuals who worked with Canadian forces or the United Nations against dictatorial governments that have committed mass human rights violations could be found to have engaged in "subversion by force".

16. Perhaps the best example of how broadly the s. 34 provisions in the IRPA have been defined is the Courts' interpretation of the term "membership" in section 34(1)(f). In *Poshteh* the Federal Court of Appeal adopted "an unrestricted and broad interpretation" of the term "member" in the *Immigration Act*.[14]

17. Currently, there is no requirement that a person has actually engaged in prohibited acts, or has knowledge that such acts have been committed to be found inadmissible for membership pursuant to s. 34(1)(f).[15]

18. There is no temporal requirement to the membership definition. A person can be found inadmissible even if he or she was not a member at the time the organization engaged in prohibited acts.[16] That is, a person may join an organization at a time when it was engaged in strictly legitimate activities. They can still be found inadmissible if that organization engaged in one of the prohibited activities set out in section 34(1)(a)-(c) years after the person severed all ties with the organization. Similarly, a person may be found inadmissible for joining an organization engaged only in legitimate activities if that organization engaged in prohibited activities years before the person had any ties to the organization.

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[13] *Al Yamani v. Canada (M.C.I.)*, [2000] 3 F.C. 433 at para. 85 ["*Al Yamani*, 2000"].
[14] *Poshteh v. Canada (M.C.I.)*, 2005 FCA 85, at paras 27-29 ["*Poshteh*"]. The Court relied primarily on Justice Rothstein's analysis in in *Canada (M.C.I.) v. Singh* (1998), 151 F.T.R. 101: "[t]he provisions deal with subversion and terrorism. The context in immigration legislation is public safety and national security, the most serious concerns of government. It is trite to say that terrorist organizations do not issue membership cards. There is no formal test for membership and members are not therefore easily identifiable. The Minister of Citizenship and Immigration may, if not detrimental to the national interest, exclude an individual from the operation of subparagraph 19(1)(f)(iii)(B). I think it is obvious that Parliament intended the term "member" to be given an unrestricted and broad interpretation".
[15] See e.g. *Tjiueza v. Canada (M.C.I.)*, 2009 FC 1260 at paras. 30-31, 36.
[16] *Al Yamani v. Canada (M.C.I.)*, 2006 FC 1457 at paras. 11-12, 19, 24.

19. A person can also be found inadmissible even if his or her membership occurred at a time when the person was a minor.[17]

20. The Courts have acknowledged that in some cases this broad interpretation of membership may result in unduly harsh or unfair consequences for individuals subjected to this provision. However, this broad definition of membership continues to be upheld, in large part because of the availability of an exemption pursuant to s. 34(2), from the operation of s. 34(1)(f) in appropriate cases.[18] Indeed, it was relied on by this Court as a basis for finding that membership as a ground of inadmissibility was not too overbroad.[19]

D. Citizenship and Immigration Canada and the Canada Border Services Agency Share the Administration of the IRPA

21. Under the former *Immigration Act*, the Minister of Citizenship and Immigration was responsible for determining admissibility and whether Ministerial relief from inadmissibility was warranted. When the IRPA first came into force, section 4 specified that the Minister of Citizenship and Immigration remained responsible for determining inadmissibility and whether Ministerial relief was warranted.

22. In 2005, Parliament passed the *Canada Border Services Agency Act* ("the CBSA Act").[20] This Act created the Canada Border Services Agency ("CBSA"), and vested in the CBSA some of the powers and authorities that had previously existed in three legacy organizations: Citizenship and Immigration Canada, the Canada Customs and Revenue Agency, and the Canadian Food Inspection Agency.

23. The CBSA Act contained consequential amendments to the statutes that governed the three legacy organizations, including the IRPA. In particular, the IRPA was amended to transfer responsibility for making Ministerial relief determinations under s. 34(2) of the IRPA from the

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[17] *Poshteh*, *supra* at paras. 48, 53-56.
[18] *Khalil v. Canada (M.P.S.E.P.)*, 2011 FC 1332 at para. 14 ["*Khalil*"].
[19] *Suresh v. Canada (M.C.I.)*, [2002] 1 S.C.R. 3 at para. 110 ["*Suresh*"]: "Section 19 must therefore be read as permitting a refugee to establish that his or her continued residence in Canada will not be detrimental to Canada, notwithstanding proof that the person is associated with or is a member of a terrorist organization" .
[20] *Canada Border Services Agency Act*, S.C. 2005, c. 38.

Minister of Citizenship and Immigration to "the Minister as defined in section 2 of the *Canada Border Services Agency Act*", and then later, to the Minister of Public Safety.[21]

24. As a result of these amendments, CBSA and CIC share the administration of the IRPA. Section 4 sets out which powers are administered by CIC, and which are administered by CBSA:

> Minister of Citizenship and Immigration
>
> 4. (1) Except as otherwise provided in this section, the Minister of Citizenship and Immigration is responsible for the administration of this Act.
>
> **…**
>
> Minister of Public Safety and Emergency Preparedness
>
> (2) The Minister of Public Safety and Emergency Preparedness is responsible for the administration of this Act as it relates to
>
> (*a*) examinations at ports of entry;
>
> (*b*) the enforcement of this Act, including arrest, detention and removal;
>
> (*c*) the establishment of policies respecting the enforcement of this Act and inadmissibility on grounds of security, organized criminality or violating human or international rights; or
>
> (*d*) determinations under any of subsections 34(2), 35(2) and 37(2).

25. Given their shared responsibilities for administering Canada's immigration and refugee protection program, CIC and CBSA signed an umbrella Memorandum of Understanding (MOU) on March 27, 2006, to set out principles to guide the working relationship between the two agencies. The MOU also sets out governance mechanisms which allow the two agencies to jointly develop policy and resolve disputes.[22]

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[21] Federal Court of Appeal's Reasons for Judgment, AR Vol. I, Tab 5 at para. 43.

[22] Canada Border Services Agency, *Audit of the CIC-CBSA Memorandum of Understanding (MOU*), Final Report, July 2010, online: < http://www.cic.gc.ca/english/resources/audit/CIC-CBSA-MOU.asp> ["*Audit of the CIC-CBSA MOU*"].

26. CIC, CBSA and the IRB have also signed a Memorandum of Understanding, which states that "all Parties are Government of Canada institutions with a common commitment to realizing the goals of Canada's *Immigration and Refugee Protection Act*, S.C. 2001 c. 27".[23]

27. The final report of the audit of the CIC-CBSA MOU provides more detail on how CIC and CBSA work together. This document states: "while CIC administers the IRPA legislation, the CBSA operationally delivers the IRPA legislation at ports of entry by processing over 90 million travellers a year and conducting over two million detailed immigration examinations".[24]

28. When Anne McClellan was Minister of Public Safety and Emergency Preparedness, she described the relationship between CIC and CBSA as follows:

> Administration of the IRPA is now the shared responsibility of CIC and the CBSA, with CIC focusing on selection, settlement, and integration, and the CBSA becoming the operational arm of immigration policies and procedures developed by CIC.[25]

29. The relationship between CIC and CBSA is complex. Responsibility for administering the various aspects of the IRPA can occur in six different ways:

- CIC can be responsible for policy and services delivery;
- CBSA can be responsible for policy and service delivery;
- CIC can develop policy and the CBSA can be responsible for service delivery;
- CBSA can develop policy and CIC can be responsible for service delivery;
- CIC can develop policy, and both CIC and CBSA can share responsibility for service delivery; and
- CBSA can develop policy and both CIC and CBSA share responsibility for service delivery.[26]

30. Regardless of which agency is responsible for policy development or service delivery, the guiding principles of the CIC-CBSA MOU include "uncompromising focus on working together

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[23] Citizenship and Immigration Canada, *Memorandum of Understanding between the Department of Citizenship and Immigration, the Canada Border Services Agency and the Immigration and Refugee Board of Canada*, online: <http://www.cic.gc.ca/english/department/laws-policy/mou/mou-cbsa.asp> ["*MOU Between CIC, CBSA and the IRB*"].

[24] *Audit of the CIC-CBSA MOU*, *supra* at section 1.2.

[25] House of Commons, Subcommittee on Public Safety and National Security of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, *Evidence*, No. 3 (1 February 2005) at p. 3 (Hon. Anne McLellan).

[26] *Audit of the CIC-CBSA MOU*, *supra* at Appendix C: Responsibility for Policy and Service Delivery.

to ensure that the objectives of the IRPA are met" and "ongoing opportunities for interaction between staff administering the IRPA in both organizations at all levels".[27]

31. CIC and CBSA also consult each other on policy development. Under the MOU, "both organizations agreed to work cooperatively, keep each other informed of changes impacting the other, and meet regularly on a formal basis to resolve emerging issues". The organizations communicate regularly through the Joint Consultative Committee, which meets annually to ensure that both organizations can contribute to each other's policy and program development.

32. In sum, CIC and the CBSA work closely together in policy development and implementation. Depending on the circumstances, CIC may develop policy to be carried out by CBSA, or *vice versa*. The two organizations also consult one another when developing policy, and may jointly develop policy.

E. Citizenship and Immigration Canada Guidelines for Applying the IRPA

33. Citizenship and Immigration Canada publishes a list of "Operational Manuals" on its website. The website states that "Citizenship and Immigration Canada and Canada Border Services Agency employees consult operational chapters and operational bulletins for guidance in the exercise of their functions, and in applying the *Immigration and Refugee Protection Act*, the *Citizenship Act*, and their Regulations".[28]

34. The "Operational Manuals" are guidelines that cover all aspects of immigration processing. They are divided into different categories depending on the type of immigration processing, for example the Enforcement Manual (ENF) or the Inland Processing Manual (IP). Each of the manuals is divided into specific chapters which are assigned a number. In this case, the Court of Appeal considered chapter 10 of the Inland Processing Manual, *Refusal of National Security Cases/ Processing of National Interest Requests* ("the IP 10 guidelines").

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[27] *Audit of the CIC-CBSA MOU*, *supra* at Appendix B: CIC-CBSA MOU Guiding Principles.
[28] Citizenship and Immigration Canada, "Operational Manuals", online: <http://www.cic.gc.ca/english/resources/manuals/index.asp>.

35. Some of the manuals or guidelines are directed at functions that are exclusively carried out by CBSA officers. For example, under section 4 of the IRPA, the Minister of Public Safety is responsible for enforcement of the IRPA, including arrests, detention and removals. The ENF 3 guidelines on *Admissibility, Hearings and Detention Review Proceedings* states that "this chapter provides functional direction and guidance to hearings officers when acting as counsel for the Public Safety and Emergency Preparedness (PSEP) Minister at admissibility hearings and detention reviews before the Immigration Division of the Immigration and Refugee Board". All of these functions are carried out by CBSA officers.[29]

36. These guidelines appear on the CIC website, on CIC letterhead. However, there is no specific information in the record before this Court, or before the lower Courts, as to how the guidelines were developed.

37. The IP 10 guidelines were most recently updated on October 24, 2005, but no information is provided as to when the guidelines were first introduced. The IP 10 guidelines explain their purpose:

> … this chapter outlines procedures to be applied in cases involving possible inadmissibility on grounds of national security. It describes the process to be followed when an applicant requests relief under the national interest provisions. These guidelines are issued to ensure consistency in the application of procedural fairness requirements.[30]

38. The Court of Appeal's analysis focuses on the IP 10 guidelines. In the past, the Federal Court has found that both the IP 10 guidelines and the ENF 2/OP 18 guidelines are relevant to Ministerial relief applications under s. 34(2) of the IRPA.[31] The ENF 2/OP 18 guidelines, entitled *Evaluating Inadmissibility*, are directed to CIC and CBSA officers who need to

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[29] Citizenship and Immigration Canada, *ENF 3: Admissibility, Hearings, and Detention Review Proceedings*, online: <http://www.cic.gc.ca/english/resources/manuals/enf/enf03-eng.pdf> at section 1 ["ENF 3 guidelines"].

[30] IP 10 guidelines, Affidavit of Humera Ahsan, sworn February 17, 2012, Exhibit "A", AR Vol. III, Tab 18 at p. 426.

[31] In *Naeem v. Canada (M.C.I.)*, 2007 FC 123 at para. 57 ["*Naeem*"], *Ramadan v. Canada (M.C.I.)*, 2008 FC 1155 at paras. 18, 21 ["*Ramadan*"], *Kablawi v. Canada (M.P.S.E.P.)*, 2008 FC 1011 at para. 21 ["*Kablawi*"], *Yamani v. Canada (MPSEP)*, 2007 FC 381 at para. 15 ["*Yamani*"], the Federal Court found that the ENF 2/OP 18 guidelines were applicable to s. 34(2) Ministerial relief applications. In *Ismael v. Canada (M.P.S.E.P.)*, 2008 FC 1366 at para. 15 ["*Ismael*"], *Abdella v. Canada (M.P.S.E.P.)*, 2009 FC 1199 at para. 19 ["*Abdella*"], and *Afridi v. Canada (M.P.S.E.P.)*, 2008 FC 1192 at para. 38 ["*Afridi*"], the Federal Court found that the IP 10 guidelines were applicable to s. 34(2) Ministerial relief applications.

determine whether a person is inadmissible to Canada. Section 13 addresses four different relief mechanisms for inadmissible persons, including relief for persons who satisfy the Minister that their presence in Canada would not be detrimental to the national interest.

39. The Appellant submits that both the IP 10 and ENF 2/OP 18 guidelines are relevant to section 34(2) Ministerial relief applications. In any event, both guidelines contain the same broad approach to Ministerial relief. Both guidelines include the same detailed list of questions relating to national interest considerations, which officers are instructed to address when preparing a briefing note to the Minister.[32] As such, which guidelines are applied does not affect the substance of the national interest analysis.

The Guidelines Are Meant to Apply to the Actions of the Minister of Public Safety

40. The Court of Appeal erred in finding that the guidelines have limited application to the Minister of Public Safety's exercise of discretion, because they were promulgated by the Department of Citizenship and Immigration. The Court below erred when it assumed the guidelines were solely the work product of CIC, and were therefore irrelevant to the Minister of Public Safety's exercise of discretion.

41. All of the manuals used by the officers who administer the IRPA are published under the CIC logo on the CIC website. This does not mean that CIC was solely responsible for the content of each one, or that CBSA had no input into the guidelines. There simply was no evidence on the record on this point. In fact, CBSA and CIC have a formalized relationship where they jointly develop policy, they comment on each other's policy, or they simply adopt each other's policy.[33]

42. The IP 10 guidelines recognize that the Minister of Public Safety is ultimately responsible for making Ministerial relief decisions, but also reflect the collaborative relationship between CIC and CBSA. The IP 10 guidelines indicate that CIC officers make the initial determination on admissibility, after consulting CBSA. CIC officers can raise the possibility of seeking Ministerial relief, and if relief is sought, CIC officers are responsible for gathering

[32] ENF 2/OP 18 guidelines, Affidavit of Sherif Ashamalla, sworn 20 July 2009, Exhibit "A", AR Vol. III, Tab 17, at pp. 418; IP 10 guidelines, AR Vol. III, Tab 18, at p. 437.
[33] *Audit of the CIC-CBSA MOU, supra*, and *MOU Between CIC, CBSA and the IRB, supra*.

information and providing a report to CBSA. CBSA analysts review the evidence and prepare a recommendation to the Minister. The recommendation is returned to CIC, who discloses it to the applicant. After receiving the applicant's response, the Minister of Public Safety renders the decision.

43. In sum, although the guidelines are all published on the CIC website, the Federal Court of Appeal's assertion that the guidelines were solely promulgated by CIC may be incorrect. CIC and CBSA collaborate on policy, and the guidelines could be the result of this collaborative effort.

44. More importantly, the source of the guidelines is not determinative of whether the guidelines are relevant. Regardless of their source, the guidelines have in fact been adopted by the Minister of Public Safety, and applied to Ministerial relief applications. As such, they reflect the Minister of Public Safety's administrative policy with respect to Ministerial relief cases. Therefore, the Court of Appeal erred in assuming that the guidelines are not relevant to the Minister's determination of whether it is in the national interest to grant relief from a finding of inadmissibility.

The Ministerial Relief Process Under the IRPA s. 34(2)

45. The IP 10 guidelines explain the procedures for Ministerial relief applications in national security cases. If an officer is satisfied that an applicant is inadmissible on grounds of security, the guidelines state that the officer should provide the applicant with a copy of the *National Interest Information Sheet* (Appendix B in the IP 10 guidelines). This information sheet instructs applicants to provide submissions that address the following questions:

- Why are you seeking admission to Canada?
- Are there any special circumstances surrounding your application?
- Provide evidence that you do not constitute a danger to the public.
- Explain current activities you are involved in (employment, education, family situation, involvement in the community, etc.).[34]

[34] IP 10 guidelines, AR Vol. III, Tab 18 at p. 435.

46. In cases where the ground of inadmissibility involves membership in a regime or organization, the National Interest Information Sheet suggests that applicants provide details on the purpose of the organization, the length and nature of their association with the organization, and proof of whether they have disassociated from the organization. Applicants are also expected to provide information regarding their current attitude towards the organization, its goals and objectives. Finally, the National Interest Information Sheet tells applicants that their submissions "need not be restricted to the above. You may provide any information and documents you think may strengthen your request for an exemption".[35]

47. Upon the receipt of the Applicant's submission, the officer prepares a report. According to the guidelines, the report should address the list of questions included in Appendix D.[36] Then the report is forwarded to the National Security Division, Intelligence Directorate CBSA, with the Applicant's submissions and all supporting documentation. A CBSA analyst conducts any further inquiries that are necessary, and prepares the recommendation for the Minister.[37]

48. A copy of the recommendation, with all supporting documentation (other than classified information), is returned to CIC for disclosure to the Applicant. CIC will then forward to CBSA a copy of the letter which was sent to the applicant and any additional submissions the applicant provides.[38]

F. Settled Federal Court Jurisprudence Established the Relevance of the Guidelines

49. Prior to the Federal Court of Appeal's decision in this case, the law on the application of the guidelines to Ministerial relief applications was well settled.

50. The Federal Court jurisprudence established that the guidelines are not law, but are a useful indicator of what constituted a reasonable exercise of discretion:

> … the Minister's guidelines are intended to be instructive to the official responsible for preparing the memorandum and recommendation to the Minister. … In *Baker*, at paragraph 72, the Court described the ministerial guidelines as 'a useful indicator of what constitutes a reasonable interpretation of the power' conferred by the applicable section

[35] IP 10 guidelines, AR Vol. III, Tab 18 at p. 435.
[36] IP 10 guidelines, AR Vol. III, Tab 18 at p. 437.
[37] IP 10 guidelines, AR Vol. III, Tab 18 at p. 432.
[38] IP 10 guidelines, AR Vol. III, Tab 18, at p. 432-433.

> of the Act. The 'fact that this decision was contrary to their directives is of great help in assessing whether the decision was an unreasonable exercise' of the discretion conferred by the Act".[39]

51. Prior to the Federal Court of Appeal's ruling in the case at bar, it was not necessary for the Minister to address each and every factor listed in the guidelines in every Ministerial relief application. However, the Minister had to assess and balance all of "the factors that are central to the grounds being advanced in support of a particular application".[40]

52. In Ministerial relief cases, the burden of proof is always on the applicant to establish that his or her admission to Canada will not be detrimental to the national interest. The Minister is to consider, notwithstanding the applicant's admissibility, the impact the continued presence of the applicant in Canada would have on the national interest. It is open to the Minister to ascribe whatever weight is deemed appropriate to the evidence before him. The Minister is not obligated to follow the recommendation in the briefing note. The Minister can conclude that the positive evidence put forward by an applicant does not outweigh the impact of the applicant's inadmissibility.[41] Prior to the Court of Appeal's ruling in the case at bar, as long as the Minister had provided reasons which acknowledged the relevant factors identified in the guidelines, and engaged in an assessment and balancing of those factors, the Minister's decision would be upheld as reasonable.[42]

G. The Appellant's Ministerial Relief Decision

The Briefing Note

53. In the Appellant's case, the Ministerial relief process followed the process set out in the IP 10 guidelines.

54. The CBSA prepared a Briefing Note for the Minister, which recommended granting relief to the Appellant. The Briefing Note concluded that there was not enough evidence to suggest that the Appellant's continued presence in Canada would be detrimental to the national interest.

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[39] *Naeem*, *supra* at paras. 54-56.
[40] *Yamani*, *supra* at para. 91.
[41] *Chogolzadeh v. Canada (M.P.S.E.P.)*, 2008 FC 405 at para. 3 ["*Chogolzadeh*"].
[42] *Afridi*, *supra* at paras. 43-45.

Specifically, the Briefing Note highlighted that the Appellant stated that he had exaggerated his involvement in the organization, and that this was supported to some extent by the fact that his German and Canadian refugee claims were both rejected on credibility grounds. The Briefing Note also stated that he was a regular member of the LNSF who did not occupy a position of trust, at a time when the organization was not particularly active, and that there is no evidence that the Appellant was ever involved in any acts of violence or terrorism.[43]

55. In cases where the Minister adopts the recommendation of the Briefing Note, the reasons for decision are taken to be the Briefing Note. When the Minister rejects the findings of the Briefing Note, then the Minister must provide his own reasons for decision. In such cases, the Minister has not adopted the recommendations of the Briefing Note, which therefore does not form part of the reasons for decision.[44]

The Minister's Decision

56. On March 24, 2009, the Appellant received a letter stating that he is inadmissible to Canada under sections 34(1)(f) and (1)(c) of the IPRA. As a result, his permanent residence application was refused. In a separate letter, Ministerial relief was denied.[45]

57. In the case at bar, the Minister did not adopt the recommendation of the Briefing Note. The Minister's reasons for refusing the Appellant's application for Ministerial Relief are very brief. They state as follows:

> The applicant offered contradictory and inconsistent accounts of his involvement with the Libyan National Salvation Front (LNSF).
>
> There is clear evidence that the LNSF is a group that has engaged in terrorism and has used terrorist violence in attempts to overthrow a government.
>
> There is evidence that LNSF has been aligned at various times with Libyan Islamic opposition groups that have links to Al-Qaeda.
>
> It is difficult to believe that the applicant, who in interviews with officials indicated at one point that he belonged to a "cell" of the LNSF which operated to recruit and raise funds for LNSF, was unaware of the LNSF's previous activity.[46]

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[43]Briefing Note for the Minister, AR Vol. I, Tab 2, at p. 9.
[44]*Miller v. Canada (Solicitor General)* 2006 FC 912 at paras. 61-63 ["*Miller*"].
[45]Appellant's Affidavit, AR Vol. III, Tab 15 at p. 228.

58. The Minister concluded: "it is not in the national interest to admit individuals who have had sustained contact with known terrorist and/or terrorist-connected organizations".[47] The Appellant filed an application for leave and for judicial review of the Minister's decision to deny him Ministerial Relief.

H. The Federal Court Judgment

59. In reasons dated December 23, 2009, Mr. Justice Mosley granted the Appellant's judicial review application. Mr. Justice Mosley identified the sole issue in the application as whether the Minister's decision was reasonable.[48]

60. Justice Mosley held that although the decision of the Minister is subject to considerable deference, it is reviewable. According to Justice Mosley, the Minister placed considerable weight on the "clear evidence that the LNSF has engaged in terrorism" and has "links with Al Qaeda". However, Justice Mosley emphasized that the evidence that the LNSF engaged in terrorism or is linked to Al Qaeda was minimal, and "it would have been contrary to the evidence for the Minister to find that the LNSF is directly linked to Al Qaeda". Justice Mosley noted that the question of whether the LNSF is a terrorist organization is not at issue in the application, but he found "it difficult to understand from the record why this factor was considered to be deserving of significant weight".[49]

61. Justice Mosley noted that the IP 10 guidelines set out five questions to be examined in the Minister's analysis. Justice Mosley concluded that "it does not appear from the reasons that the Minister addressed the questions set out in IP 10 nor does he seem to have balanced the factors which prior decisions had identified as relevant to the determination of what is in the 'national interest'".[50]

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[46]Minister's Decision, AR Vol. I, Tab 2 at p. 11.
[47]Minister's Decision, AR Vol. I, Tab 2 at p. 11.
[48]Federal Court's Reasons for Judgment, AR Vol. I, Tab 3 at p. 15, para. 11.
[49]Federal Court's Reasons for Judgment, AR Vol. I, Tab 3, at p. 18, paras. 19, 21-22.
[50]Federal Court's Reasons for Judgment, AR Vol. I, Tab 3, at p. 20 at paras. 23-25.

62. Furthermore, Justice Mosley noted that the Minister failed to consider the Appellant's positive establishment in Canada, and that there was concern that the Minister's reasons suggested that allowing someone who may have belonged to a terrorist organization abroad can never be in the national interest of Canada. According to Justice Mosley, this would render the exercise of discretion meaningless, and the Minister's decision unreasonable.[51]

63. Justice Mosley certified the following question:

> When determining a ss. 34(2) application, must the Minister of Public Safety consider any specific factors in assessing whether a foreign national's presence in Canada would be contrary to the national interest? Specifically, must the Minister consider the five factors listed in the Appendix D of IP10?[52]

I. The Federal Court of Appeal Judgment

64. In response to the certified question, the Court of Appeal held that the IP-10 guidelines "are not relevant to the Minister of Public Safety's exercise of his discretion since the Minister is the one responsible for setting policy in this area…". The Court of Appeal found that the Minister need not consider the five factors referred to in the certified question, simply because the factors were found in the IP-10 guidelines. The Court of Appeal further found that when the legislative scheme is taken as a whole, the notion of "national interest" in the context of ss. 34(2) is concerned principally, if not exclusively, with national security and public safety.[53]

65. The Court of Appeal reached this conclusion primarily on the basis that the responsibility for determining applications for Ministerial relief was transferred from the Minister of Citizenship and Immigration to the Minister of Public Safety. According to the Court, this transfer demonstrated Parliament's intention to bring security and public safety issues to the forefront of the assessment of those applications, and in particular, the assessment of what constituted the "national interest".

66. The transfer of responsibilities from the Minister of Citizenship and Immigration to the Minister of Public Safety also contributed to the Court's conclusion that the test of whether a

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[51] Federal Court's Reasons for Judgment, AR Vol. I, Tab 3 at p. 21 at paras. 26-27.
[52] Federal Court's Reasons for Judgment, AR Vol. I, Tab 3 at p. 23.
[53] Federal Court of Appeal's Reasons for Judgment, AR Vol. I, Tab 5 at paras. 50, 54, 61.

foreign national's presence in Canada is detrimental to the national interest is not a net detriment test. Therefore, the Minister of Public Safety is not required to balance an applicant's possible contribution to the national interest against the possible detriment to the national interest.[54]

67. Finally, the Court of Appeal found that this Court's dicta in *Baker v. Canada (MCI)*, [1992] 2 S.C.R. 817 ("*Baker*") did not justify the use of the IP 10 guidelines in the Minister's decision making process. The Court of Appeal distinguished *Baker* on the grounds that the guidelines in *Baker* provided instances of circumstances where the granting of a Humanitarian & Compassionate (H&C) application was warranted, whereas the IP 10 guidelines listed questions which were designed to identify foreign nationals whose presence in Canada would be detrimental to the national interest. Therefore, according to the Court below, the IP 10 guidelines could only assist in eliminating unsuitable applicants, and did not assist in identifying suitable applicants. For this reason, the Court of Appeal concluded that the principles outlined in *Baker* did not apply.

PART II – STATEMENT OF THE QUESTIONS IN ISSUE

68. The Appellant will argue that:

1. The Federal Court of Appeal erred by failing to follow the well-established principles of statutory interpretation. Specifically, the Federal Court of Appeal erred by finding that a transfer in Ministerial responsibility was the determinative factor in interpreting s. 34(2) of IRPA.
2. The guidelines create a legitimate expectation that must be taken into account when interpreting s. 34(2) of IRPA.
3. The Federal Court of Appeal unlawfully fettered the discretion of the Minister of Public Safety and Emergency Preparedness by limiting the interpretation of "national interest" to issues of national security and public danger.

69. In appellate review, the nature of the question at issue determines the applicable standard of review. Questions of law are reviewable on a standard of correctness, while findings of fact

[54] Federal Court of Appeal's Reasons for Judgment, AR Vol. I, Tab 5 at paras. 39, 51, 61.

or of mixed law and fact will be set aside only if it is determined that the application judge has committed a palpable and overriding error.[55]

70. The Appellant submits that the three issues raised are questions of pure law and natural justice, and can be reviewed by this Court on a correctness standard.

PART III -- STATEMENT OF THE ARGUMENT

A) The Court Erred in its Reliance on the Transfer of Ministerial Responsibility

71. The well-established modern approach to statutory interpretation is 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."[56] There is no definition of "national interest" in the IRPA. The Federal Court of Appeal erred in its interpretation of "national interest" by relying too heavily on the legislative transfer of responsibility between Ministers and in construing the term too narrowly. Indeed, the Court of Appeal's interpretation does not accord with the ordinary meaning of the term, basic principles of statutory interpretation, international law or the *Charter*.

The Court of Appeal Placed too much Emphasis on the Ministerial Transfer of Responsibility

72. The Court of Appeal's decision to limit national interest considerations in Ministerial relief applications to national security and public safety was primarily based on the fact that the responsibility for disposing of applications for ministerial relief had been transferred from the Minister of Citizenship and Immigration to the Minister of Public Safety in an amendment to the IRPA. Although not argued by either party, the Court found that this transfer of responsibility demonstrated Parliament's intent to bring security and public safety issues to the forefront in its assessment of ministerial relief applications. The Court therefore concluded that "the aspect of the national interest which is in issue in these applications is national security and public safety" (emphasis added).[57]

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[55] *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 at paras. 8-10.
[56] *Bell ExpressVu v. Rex*, [2002] 2 S.C.R. 559 at para. 26 ["*Bell ExpressVu*"]].
[57] Federal Court of Appeal's Reasons for Judgment, AR Vol. I, Tab 5 at para. 61.

73. The Court below erred in finding that this transfer of ministerial responsibility is sufficient to justify adopting a new interpretation for the term "national interest" in s. 34(2) of the IRPA. There was insufficient evidence to demonstrate that such a change reflected any kind of legislative intent to impact the interpretation of the IRPA, and its interpretation of the statute runs counter to the principles of statutory interpretation adopted by this Court.

74. The Appellant does not dispute that legislative evolution can be used as part of a legislative contextual analysis in appropriate circumstances. However, even using a contextual analysis, there is nothing in either the 2005 or the 2008 amendments to the IRPA which indicate that the transfer of responsibility for making decisions under s. 34(2) away from the Minister of Citizenship and Immigration was meant to have any effect on the interpretation given to section 34(2) itself. There was no evidence put forward that demonstrates that the legislature intended the change in ministerial responsibility to be anything more than administrative in nature. Without such evidence, the Court of Appeal erred in relying upon this transfer of responsibility.

75. Had the legislature intended to narrow the scope of section 34(2), it would have done so directly by altering the language of the provision. Such an amendment could have been accomplished quite easily in the same amending legislation that the Court of Appeal relies upon, which transferred authority for the decision making process. The fact that the legislature chose not to amend the clearly broad phrase "national interest" creates a presumption that there was no intent to amend the meaning of the provision.[58]

76. This presumption cannot be rebutted on the mere fact that the legislature transferred authority from one Minister to another. It does not make sense that every time Parliament decides to change the responsibilities of particular Ministers for administrative purposes, or without indicating that there is a substantive reason for a change, the words of a statute should be given different meanings. A mere transfer in Ministerial responsibility is not sufficient to establish that the change is meant to have a substantive effect on the rights of persons who are affected by legislation administered by the various ministers. The Court of Appeal's

[58] *Hilewitz v. Canada (M.C.I.)*, [2005] 2 S.C.R. 706 at para. 95.

interpretation of national interest effectively amends section 34(2). Amending legislation is a legislative function, and falls outside of the judicial function.[59]

77. Furthermore, it is not necessary for the meaning of "national interest" to be narrowed in order to adhere to the "presumption of coherence" relied upon by the Court of Appeal. Public security and national defence are both factors that can be taken into account even when section 34(2) is given a broader meaning than accorded to it by the Court of Appeal. Indeed, both of these factors *can* be determinative in appropriate circumstances when a Minister decides to exercise his or her discretion pursuant to s. 34(2). However, the principles of statutory interpretation outlined above mandate that a variety of other factors must also be considered when they are relevant to the Minister's decision.

The Court of Appeal did not Appropriately Apply Principles of Statutory Interpretation

i. Ordinary Meaning of National Interest is Broad

78. The ordinary meaning of the phrase "national interest" is much broader than the meaning that was ascribed to it by the Court below. Applying its ordinary meaning in s. 34(2), this phrase requires that a broad array of factors be considered by the Minister when he or she is making a determination on whether to exercise his or her discretion pursuant to this section.

79. In the *Canadian Oxford Dictionary*, "national" is defined as "of or pertaining to a nation" and "interest" is defined as "a principle in which a party or group is concerned." The ordinary meaning of this phrase is therefore quite broad in scope as it captures the key principles in which Canadians are concerned.[60] The French version of s. 34(2) uses the same term, "intérêt national". The Applicant submits the French term "intérêt national" has the same ordinary meaning as the English term "national interest". In the Micro Robert dictionary, the word "national" is defined as "qui appartient à une nation", or "qui intéresse la nation entire, qui appartient à l'État". The word "intérêt" is defined as "ce qui importe, ce qui convient à quelqu'un (en quelque domaine

[59] *R. v. McIntosh*, [1995] 1 S.C.R. 686 at para. 26.
[60] *Canadian Oxford Dictionary*, (Don Mills, Ontario: Oxford University Press Canada, 1998), *s.v.* "national" and "interest".

que ce soit)".[61] The French meaning of "intérêt national" is also broad in scope, and captures what is of concern to all Canadians.

80. Prior to the ruling made by the Federal Court of Appeal in the case at bar, the jurisprudence of the Federal Court reflected this broad interpretation of national interest.[62] The Federal Court jurisprudence established that assessing what is in the national interest "involves the exercise of broad discretion" and "is necessarily a multi-faceted task importing considerations over which the Minister has particular expertise including national security, international relations, and public confidence".[63]

81. In *Miller*, the Federal Court held that "[t]he broad language used in subsection 34(2) speaks to Parliament's intention that the Minister be free to take into account a wide range of factors in exercising [his] discretion".[64] Similarly, in *Ramadan*, the Federal Court held that a ministerial relief decision implements or reflects "broad public policy."[65] The Court of Appeal erred in dismissing this well-established jurisprudence that more adequately reflected the ordinary meaning of the phrase.

82. The Court of Appeal also erred in dismissing the Federal Court's express rejection of the assimilation of national interest with national security. For example, relying on jurisprudence from the House of Lords, the Federal Court stated in *Charkaoui (Re)*, [2009] F.C.J. No. 396 at paragraph 58:

> In applying these principles, the House of Lords in *A (FC) and others (FC) v. Secretary of State for the Home Department*, [2004] UKHL 56, set aside the indefinite detention of foreigners who cannot be deported from the United Kingdom, stating that national security demands more than a threat of isolated terrorism and cannot be assimilated to the national interest. The national interest is defined as that which "concerns the defence and maintenance of the social, political and economic stability of Canada" (Government Security Policy, February 1, 2002, Treasury Board of Canada Secretariat, available at http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=12322).

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[61] *Le Micro Robert*, (Paris: Dictionnaires Le Robert, 2006), *s.v.* "intérêt" and "national".
[62] Federal Court's Reasons for Judgment, AR Vol. I, Tab 3 at para. 25; *Soe v. Canada (M.P.S.E.P.)*, 2007 FC 461 at paras. 22, 27 ["*Soe*"]; *Kablawi*, *supra* at para. 20.
[63] *Kablawi*, *supra* at para. 23.
[64] *Miller*, *supra* at para. 73.
[65] *Ramadan*, *supra* at para. 16.

83. Similarly, in *Kablawi*, the Federal Court concluded: "what is in the national interest is not determined solely by national security considerations".[66]

84. A broad interpretation of "national interest" is also in accordance with the jurisprudence on s. 38 of the *Canada Evidence Act* which often refers to the key considerations that must be weighed pursuant to s. 38 (that is international relations, national defence or national security), as being a part of the "national interest".[67] Referring to the national interest in this non-exhaustive way indicates that the term is broader than any one of these three components.

ii. The Court of Appeal's Interpretation is Not in Accordance with the Presumption of Coherence

85. With respect, the Court of Appeal also failed to consider other relevant principles of statutory interpretation in its decision including the presumption that Parliament is consistent with the choice of words used in a statute.[68] According to this well-established principle of statutory interpretation, there is a presumption that different meanings are to be accorded to different terms that are used in the same Act. The rational for this is that Parliament made different word choices within the act intentionally, to signal different meanings.

86. According to this principle of statutory interpretation, there is a presumption that the phrase "national interest" is not synonymous with either "national security" or "danger to the public", though both concepts may be part of the overall national interest analysis. The Court of Appeal completely failed to take this principle of statutory interpretation into consideration in its decision.

87. The use of the term "national interest" in the IRPA is confined to Division 4 of the Act, specifically sections 34, 35 and 37. Other phrases, such as "national security/danger to the security of Canada" and "danger to the public" are used in other places within the IRPA. For example, the phrase "national security" is used in most of the sections having to do with security

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[66] *Kablawi*, *supra* at para. 23.
[67] *Canada Evidence Act*, R.S.C., 1985 c. C-5, s. 38; See for example *Canada (A.G.) v. Ribic*, 2003 FCT 43 at paras. 14-15; *O'Neill v. Canada (Attorney General)*, [2006] O.J. No. 4189.
[68] *R. v. Zeolkowski* [1989] 1 S.C.R. 1378 at 1387*:* "[giving] the same words the same meaning throughout a statute is a basic principle of statutory interpretation" (per Sopinka J.). See also: *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc.*, [2008] 2 S.C.R. 604 at para. 71.

certificates including ss. 82.2, 83, 85. The phrase "danger to the public" is used in s. 115(2). Both of these phrases have been interpreted by the Courts as having specific meanings.[69] Had Parliament intended to have limited the considerations under section 34(2) of the Act to those of national security and public danger, it is presumed that Parliament would have used the same language as is used in these other sections. The Federal Court of Appeal failed to address this presumption in its reasons.

iii. The Humanitarian and Other Objects of the Act Were Not Taken into Consideration

88. The Federal Court of Appeal's decision is not supported by the overall objectives of the IRPA. The object of an Act is an important interpretive tool when determining the meaning of individual provisions.[70] Consequently, ss. 34(2) of IRPA must be interpreted in a way that is consistent with the overall purposes of the Act.[71] The Court of Appeal erred in not doing so.

89. The objectives of the IRPA are set out in s. 3 of the Act. While all of the provisions are relevant, the following are particularly worth noting:

- the refugee program is first and foremost about saving lives and offering protection to the displaced and persecuted (s.3(2)(a));
- the procedures used are to be fair and efficient and must maintain the integrity of the Canadian system while upholding Canada's respect for human rights and fundamental freedoms of all human beings (s.3(2)(e));
- the health and safety of all Canadians must be protected and the security of Canadian society maintained (s. 3(2)(g) 3(1)(h));
- family reunification must be promoted (s. 3(1)(d), 3(2)(f));and
- fulfilling Canada's international human rights obligations (s. 3(2)(b), s.3(3)(f)).

90. In light of these objectives, the most reasonable interpretation of "national interest" includes considerations beyond Canada's national security interests, such as the incorporation of Canada's humanitarian ideals, the integrity of our legal system and adherence to international human rights instruments to which Canada is a signatory.

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[69] See e.g. the definitions in *Suresh*, *supra* at para. 84 and *Thompson v. Canada (M.C.I.)* (1996), 118 F.T.R. 269 at paras. 15-21.

[70] *Chieu v. Canada (M.C.I.)*, [2002] 1 S.C.R. 84 at paras. 27 and 65.

[71] ENF 2/OP 18 guidelines, *supra* AR Vol. III, Tab 17 at p. 417: "The consideration of the national interest involves the assessment and balancing of all factors pertaining to the Applicant's entry into Canada against the stated objectives of the IRPA as well as Canada's domestic and international interests and obligations."

91. The Court of Appeal noted that the CBSA's mandate emphasized national security and public safety.[72] The Appellant does not dispute that national security and public safety are central to the CBSA's mandate, but this does not mean that the other objectives of the IRPA are not relevant to the CBSA, particularly given that the CBSA operationally delivers much of the IRPA. In fact, the CBSA's administrative policy recognizes that the CBSA shares "a common commitment to realizing the goals of Canada's *Immigration and Refugee Protection Act,* S.C. 2001, c. 27" with CIC and the Immigration and Refugee Board.[73]

92. Furthermore, the provision at issue in this case is found in the IRPA, not the *Department of Public Safety and Emergency Preparedness Act,* S.C. 2005, c. 10. The objectives of the IRPA should therefore be given precedence over the objectives of other pieces of legislation, such as the terms of reference in the *Department of Public Safety and Emergency Preparedness Act* relied upon by the Court of Appeal in its decision.

iv. The Court of Appeal Failed to Consider the Guidelines as an Extrinsic Aid to Interpretation

93. The Court of Appeal concluded that the IP 10 guidelines had limited application to the Minister of Public Safety's exercise of non-delegable discretion. The Court of Appeal found that if guidelines are to be promulgated with respect to Ministerial relief decisions, they will have to be promulgated by the Minister of Public Safety, and to the Court's knowledge, no such guidelines exist.[74]

94. The Court of Appeal made this finding even though there was no factual record to establish the process by which the guidelines were developed as neither party raised this issue in evidence or in oral argument before the Court. As such, the Court of Appeal made an assumption as to how the guidelines were created without the benefit of a complete factual record or argument on that point.

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[72] Federal Court of Appeal's Reasons for Judgment, AR Vol. I, Tab 5, at para. 48.
[73] *MOU Between CIC, CBSA and the IRB, supra*.
[74] Federal Court of Appeal's Reasons for Judgment, AR Vol. I, Tab 5, at para. 53.

95. The current version of the guidelines was introduced in 2005, the same year the responsibility for Ministerial relief applications was transferred to the Minister of Public Safety. The Minister of Public Safety and the CBSA officers have continuously applied the guidelines to Ministerial relief applications since that time.

96. In relying on the transfer of Ministerial responsibility, the Federal Court of Appeal ignored the fact that the guidelines are, in practice, the administrative policy of the officials who administer the Ministerial relief program. As stated by Ruth Sullivan:

> Officials who administer legislation are often well placed to interpret it. They may develop extensive knowledge of the matters dealt with in the legislation. They usually have a clear grasp of its purpose and scheme, and they see how it operates in practice on a day-to-day basis. Because of their familiarity with this context, they can readily imagine the consequences of possible interpretations.[75]

97. The fact that the Minister routinely used the guidelines to administer the Ministerial relief program is relevant to the interpretation of s. 34(2). "Administrative policy and interpretation are not determinative, but are entitled to weight where there is doubt about the meaning of legislation".[76]

98. The Court of Appeal erred by dismissing the relevance of the guidelines, merely because they appeared on the CIC website under the CIC logo. The guidelines represent the administrative policy of the Minister and the CBSA. The Court of Appeal's approach is not consistent with the well-established principle of statutory interpretation that administrative policies are relevant when construing legislation.

99. Furthermore, this Court held in *Baker* that the IP 10 guidelines should be used by the Courts when determining whether the Minister reasonably exercised his power to decide Ministerial relief applications. In *Baker*, this Court held that the fact that the officer's "decision was contrary to their directives is of great help in assessing whether the decision was an unreasonable exercise of the H & C power".[77] Given the dicta from this Court, the IP 10

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[75] Ruth Sullivan, *Statutory Interpretation*, 2d ed. (Toronto: Irwin Law, 2007) at p. 300-301.
[76] *R v. Nowegijick* [1983] 1 S.C.R. 29 at p. 37.
[77] *Baker*, *supra* at para. 72.

guidelines should be used as an indicator of what constitutes a reasonable application of s. 34(2), as was done by the Application Judge. To do otherwise is to disregard this Court's decision in *Baker*.

100. The Court of Appeal's failure to interpret s. 34(2) in light of all of the objectives of the IRPA is also inconsistent with the CBSA's administrative policy. As noted above, the CBSA's administrative policy recognizes that the CBSA is committed to realizing all of the objectives of the IRPA, not just those that involve national security.[78]

v. The Court of Appeal Failed to Properly Consider Canada's International Obligations

101. This Court has found that international law is a relevant and persuasive source for the interpretation of Canadian legislative provisions.[79] Given the relevance of international law and the possible ramifications of a Minister's decision under s. 34(2) for any individual involved, "national interest" should be construed as requiring the Minister to take into consideration Canada's international obligations when making a decision.

102. The relevant international conventions include the following: the principle of non-refoulement (*1951 Refugee Convention*)[80]; Prohibition on torture (*Convention Against Torture*)[81]; Family reunification (*International Covenant on Civil and Political Rights "ICCPR"*)[82]; and the best interests of the child (*International Convention on the Rights of the Child*)[83]

103. These international legal obligations are clearly relevant to the determination of what factors should be considered a part of the "national interest" as it is in Canada's national interest

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[78] *MOU Between CIC, CBSA and the IRB, supra*.
[79] *Reference Re Public Service Employee Relations Act* [1987] 1 S.C.R. 313 at para. 57; *R. v. Hape*, [2007] 2 S.C.R. 292 at para. 55; *Baker*, *supra* at para. 70.
[80] UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.
[81] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* GA res. 39/46, annex, 39 UN GAOR Supp. (No. 51) at 197, UN Doc. A/39/51 (1984); 1465 UNTS 85.
[82] *International Covenant on Civil and Political Rights.* United Nations General Assembly Resolution 2200A [XX1]. 16 December 1966.
[83] *Convention on the Rights of the Child* GA res. 44/25, annex, 44 UN GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989); 1577 UNTS 3; 28 ILM 1456 (1989).

to abide by our international legal obligations. Any decision made by the Minister pursuant to section 34(2) can have direct repercussions on the individual rights protected by these international instruments.

104. The Court below erred in concluding that international obligations do not come into play in the interpretation of s. 34(2) because it does not automatically result in the removal of an individual from Canada. Even though this is the case, the Minister's decision under section 34(2) has repercussions for an individual's status in Canada and their ability to remain in the country.

105. To suggest that Canada's international obligations have no relevance to any of the procedures which lead up to the removal process is not in accordance with the principles laid out in the international conventions outlined above. For example, Article 3 of the *Convention on the Rights of the Child* states that the best interests of a child shall be a primary consideration in "all actions concerning children" (emphasis added). Similarly, Article 10 of the *Convention on the Rights of the Child* states that applications by a parent to enter or leave a country for the purpose of family reunification "shall be dealt with by State parties in a positive, humane and expeditious manner" (emphasis added).[84] These provisions of the *Convention on the Rights of the Child* could apply to the procedures which lead up to removal from Canada, including Ministerial relief.

106. Furthermore, a Minister's decision to grant relief will greatly impact on an individual's ability to remain in the country. In this case, the Appellant is not a refugee and has been found inadmissible to Canada. The Refugee Protection Division found that he was not at risk. Although the Applicant will be eligible for a Pre-Removal Risk Assessment (PRRA), this assessment is not a reconsideration of the refugee decision, and is limited to evidence that arose after the refugee hearing, or was not previously available to the applicant.[85] The likelihood of obtaining relief under the PRRA process is uncertain. If he does not obtain a positive PRRA decision, he will be subject to removal as a member of a terrorist organization.

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[84] *Convention on the Rights of the Child*, *supra* at Articles 3 and 10.
[85] The IRPA, *supra* at s. 113(a); *Raza v. Canada (M.C.I.)*, 2007 FCA 385 at paras. 12-13.

107. Removal of long-term residents of Canada can have significant consequences on an individual's well-being, as well as profound effects on the unification of families and the best interests of any children who are affected by the officer's inadmissibility findings. The Minister's exercise of discretion pursuant to s. 34(2) can therefore have a direct impact on Canada's compliance with international law. As a result, this section must be interpreted in a manner that requires the Minister to take into consideration Canada's international obligations.

vi. The Court of Appeal Failed to Consider the Charter

108. Section 34(2) must be interpreted in light of the comments of this Court in *Suresh*, which allowed a broad interpretation of membership to stand, because of the safeguard provided in s. 34(2).[86] As a safeguard mandated by the *Charter*, s. 34(2) should be construed broadly. The decision of the Court of Appeal unduly narrows the interpretation of s. 34(2). Given the Court of Appeal's emphasis on the fact that the provision ought only to be used in "exceptional circumstances' and the limited guidance that the Court provides as to when those circumstances exist, individuals who are engaged in legitimate political or other endeavours protected by s. 2(d) of the *Charter* could easily be denied Ministerial relief.

109. For example, under the broad interpretation of membership in a terrorist group mandated by the jurisprudence, a finding of inadmissibility does not require that a person have been a member at the time terrorist acts were committed.[87] A person who recently joined the African National Congress (ANC) in South Africa could be found inadmissible, even though the group is now the governing party in South Africa and has long since given up violence. This is because if the person was aware that the organization once engaged in violence, he or she could not claim that their membership was completely "innocent". Similarly, Libyans who handed out pamphlets in Canada on behalf of organizations that sought to remove Gadhafi from power may be found to be inadmissible, even if they themselves were not engaged in violence and simply supported the mandate that many democratic countries are currently supporting.[88]

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[86] *Suresh*, *supra* at paras. 109-111.
[87] *Gebreab v. Canada (M.P.S.E.P.)*, 2010 FCA 274 at para. 3.
[88] Section 34 (1)(b) of the IRPA renders inadmissible a person who is a member of a group that instigates the subversion by force of any government. A person could be found inadmissible for legal activities in Canada on

110. In both of these examples, the individual in question could be found to be a member pursuant to s. 34(1) because of the broad interpretation of membership and because they joined an organization that had engaged in violence. Given the Federal Court of Appeal's ruling in the case at bar, the Minister could easily conclude that neither would be eligible for ministerial relief pursuant to s. 34(2) even though the activities in question are legal in Canada.

111. Allowing the inadmissibility net to be cast this broadly--by narrowly defining section 34(2)--could result in violations of the *Charter* right to freedom of association. Simply put, the restrictive interpretation of the term "national interest" renders overbroad the term membership. The definition of membership could capture legal activities and associations that occur in Canada, but without the necessary safeguard of a broad approach to Ministerial relief, which was central to this Court's finding in *Suresh* that s. 34 of the IRPA was constitutional.

112. It is a well-established principle of statutory interpretation that where a statute is ambiguous, courts should prefer interpretations that are in accordance with the *Charter* over those that are not.[89] Given the fundamental importance of *Charter* values in our society, it is appropriate to assume the legislators had them in mind when drafting the statute. As demonstrated above, the narrow view taken by the Court of Appeal that national interest is concerned principally with national security and public safety is not in accordance with *Charter* values. In contrast, the broader interpretation of national interest consistently applied by the Federal Court until the Court of Appeal's decision in this case is in accordance with *Charter* values.[90] The Court of Appeal failed to analyze the consequences of its decision on the constitutionality of s. 34 of IRPA as a whole and consequently erred in law.

B. The Guidelines Create a Legitimate Expectation Consistent with Dicta in *Baker*

113. The Court below erred in holding that a shift in Ministerial responsibility negates the legitimate expectations that the guidelines have created. The Government of Canada publishes the guidelines. Applicants are advised to rely on them when preparing their submissions.

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behalf of a group seeking to overthrow a tyrannical regime. If the person was aware that the organization was attempting to overthrow the regime, the activities would not be considered "innocent".

[89] *Bell ExpressVu*, *supra* at paras. 62.

[90] See paras. 108-112 in Part III, above.

Regardless of their authorship, this creates a legitimate expectation that the Minister will consider the factors outlined in the guidelines when determining Ministerial relief applications. Therefore a failure to adhere to the guidelines is a breach of the principles of procedural fairness.

The Guidelines Create Legitimate Expectations

114. As set out by this Court in *Baker*, the doctrine of legitimate expectation is based on representations made by the Government to the public. Although it does not create substantive rights, it does create an expectation that certain procedures will be followed and certain factors considered.[91]

115. Legitimate expectations "looks to the conduct of the public authority in the exercise of … power … including established practices, conduct or representations that can be characterized as clear, unambiguous and unqualified".[92] Legitimate expectation prevents government officials from reneging on undertakings relating to whatever procedures are promised in the circumstances of the case.

i. The guidelines constitute a clear and unambiguous promise to follow a particular procedure

116. The IP 10 guidelines are publically available and have been routinely used by the Minister of Public Safety and Emergency Preparedness since the transfer of responsibility for decisions under s. 34(2) took place. As such, there are legitimate expectations that they will continue to be followed unless the public is notified otherwise.

117. The IP 10 guidelines set out very detailed instructions to officers on how to process Ministerial relief applications, and specifically promise to follow this procedure. Under the heading "What this chapter is about", the guidelines state:

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

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[91] *Baker*, *supra* at para. 26.
[92] *Mount Sinai Hospital Centre v. Quebec (M.H.S.S.)*,[2001] 2 S.C.R. 281at para. 29 *per* Binnie J. (concurring).

118. Under the headings "Procedure – Procedural fairness" and "Procedure – adverse information", the guidelines emphasize the need to inform applicants of concerns about their admissibility to Canada and to disclose all extrinsic information (other than classified sources) relied on. The guidelines specifically instruct officers to disclose the recommendation to the Minister to applicants, and allow applicants to comment on it, before the recommendation is sent to the Minister with the supporting documentation.[93]

119. The guidelines also instruct officers on how to prepare briefing notes for the Minister of Public Safety, stating that the report should include "any exceptional circumstances to be taken into account", including: details of immigration application; the basis for refugee protection, if applicable; other grounds of inadmissibility, if applicable; activities while in Canada; details of family or abroad; any Canadian interest; and any personal or exceptional circumstances to be considered.

120. Applicants continue to be instructed to address the factors outlined in the guidelines when structuring their submissions for ministerial relief. For example, Applicants receive a letter found at Appendix B of the IP 10 guidelines which instructs them to address a number of factors, which do not obviously relate to national security or danger to the public, such as:

- Why are you seeking admission to Canada?
- Are there any special circumstances surrounding your application?
- Explain current activities you are involved in (employment, education, family situation, involvement in the community, etc.).

121. In the case at bar, the Applicant received a letter dated May 22, 2002 regarding his Ministerial relief application. The letter stated:

> The Minister will consider whether granting you permanent residence to Canada would be contrary to the National Interest to Canada. This will require an assessment of the detriment that you pose to the National Interest of Canada, as well as any humanitarian and compassionate circumstances pertinent to your situation.[94]

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[93] IP 10 guidelines, AR Vol. III, p. 427, 429, 432-433.
[94] Ahsan Affidavit, AR Vol. III, Exhibit "A", Tab 16, p. 287.

122. This letter explicitly promised the Appellant that the Minister would consider humanitarian and compassionate factors when determining his application for Ministerial relief. This letter was written before the transfer of responsibility for Ministerial relief from the Minister of Citizenship and Immigration to the Minister of Public Safety occurred, and before the latest version of the IP 10 guidelines was published. However, the current version of the guidelines continues to instruct applicants to address humanitarian and compassionate factors in their Ministerial relief submissions and the Applicant did not receive any further information from the Government indicating that these factors would not be considered.

123. The detailed procedure set out in the guidelines and the letter sent to the Appellant constitutes a clear promise regarding the process by which Ministerial relief applications will be handled. The guidelines instruct applicants to address humanitarian and compassionate factors, such as refugee protection, family and personal circumstances, and instruct officers to brief the Minister on these factors. The explicit language of the guidelines constitutes a clear and unambiguous promise that the Minister will consider these factors. The legitimate expectation is not a result of the authorship of the guidelines in question, but arises based on the fact that they are a published representation made by the government to the public regarding how Ministerial relief applications will be processed and assessed.

ii. The Guidelines Do Not Give Rise to Substantive Rights

124. The guidelines do not make any substantive promises, and do not give rise to a right to a specific result. They simply indicate the process that will be followed and the factors that will be taken into consideration by the Minister in his determination. As long as the Minister considers the relevant factors, it is open to the Minister to balance them as he sees fit, and to conclude that the evidence favourable to granting the exemption does not outweigh the basis for the admissibility.[95]

iii. The Guidelines Do Not Conflict with a Statutory Duty

125. This Court recently affirmed in *Canada v. Mavi* that the doctrine of legitimate expectation applies when a government official makes clear, unambiguous and unqualified

[95] *Chogolzadeh*, *supra* at para. 41.

representations, "provided the representations are procedural in nature and do not conflict with the decision maker's statutory duty".[96]

126. The Minister's duty under s. 34(2) of the IRPA is to render a decision on whether the person's admission would be detrimental to the national interest. The discretion given to the Minister under this provision is broad, and allows the Minister to take into account all of the factors set out in the guidelines. As a result, the guidelines do not conflict with a statutory duty.

127. The government has made a clear, unambiguous and unqualified representation regarding what evidence applicants need to present and what factors will be considered in Ministerial relief applications. These representations are procedural in nature, and do not conflict with the Minister's statutory duty. As such, the guidelines create a legitimate expectation that the process set out in them will be followed, and the Minister will balance the factors set out in the guidelines. It would be a breach of procedural fairness for the Minister to fail to consider the relevant factors.

128. If the government has made a decision that the guidelines are no longer relevant, the principles of fairness dictate that the public must be notified. Since no such notification has taken place, on this ground alone, the decision should be set aside.

<u>The Federal Court of Appeal Erred in Distinguishing *Baker*</u>

129. The dicta in *Baker* on legitimate expectations had been repeatedly applied in the Federal Court jurisprudence prior to the decision by the Court of Appeal.[97] This jurisprudence makes it clear that a broad range of factors must be balanced when evaluating what is in the national interest. It is not mandatory for the Minister in all cases to consider every question set out in the IP 10 guidelines, as "the basis of the claim for Ministerial discretion will frame the relevant questions to be asked". There may be cases where one or more of the questions are not relevant,

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[96] *Canada v. Mavi*, [2011] 2 S.C.R. 504, at para. 68.

[97] See for example *Abdella, supra* at paras. 19 and 21; *Yamani, supra*, at para. 91; *Soe, supra* at para. 22; *Naeem, supra*, at para. 57; *Ramadan*, *supra* at paras. 18, 21; *Kablawi , supra* at para. 21; *Ismael, supra* at para. 15, *Afridi,supra* at para. 38.

or where the applicant does not submit evidence regarding one of the questions. In these circumstances, it may be reasonable for the Minister not to consider it.[98]

130. The Court of Appeal distinguishes the IP 10 guidelines from those that were at issue in *Baker* by indicating that the guidelines in *Baker* provided positive examples of circumstances where the granting of an H&C application was warranted, whereas the guidelines at issue in the case at bar only identify individuals who should *not* be granted ministerial relief. In the words of the Federal Court of Appeal: "In ministerial relief cases, the questions appear to be designed to identify foreign nationals whose presence in Canada would be detrimental to the national interest…"[99]

131. There are several problems with this analysis. First, this finding does not take into account the entire guidelines. Although the guidelines do contain the five questions cited by the Court below, the guidelines also instruct applicants to address a longer series of questions.[100] It is incorrect to assert, as the Court below did, that the guidelines are only directed towards indicating which persons are not worthy of relief. The guidelines instruct applicants to address the factors that they think apply to them, including: their family situation, education, community involvement, etc. These factors are clearly relevant to a determination as to whether or not a person's admission to Canada would or would not be detrimental to the national interest. In this respect the guidelines do not differ from those relied upon by this Court in *Baker*.

132. The guidelines also instruct the officers who handle Ministerial relief applications on the process to be followed, as set out above. In finding that *Baker* can be distinguished because the guidelines are only directed to determining which persons are not worthy of relief, the Court of Appeal failed to consider that the guidelines address the applicants' procedural fairness entitlements.

133. The Court of Appeal's analysis also misses the underlying rational outlined in *Baker* for putting weight on ministerial guidelines. As in *Baker*, the IP-10 guidelines are a public outline of

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[98] *Soe, supra* at para. 27.
[99] Federal Court of Appeal's Reasons for Decision, AR Vol. I, Tab 5 at para. 60
[100] IP 10 guidelines, *supra*, AR Vol. III, Tab 18, at p. 435.

what are considered to be relevant factors that a decision maker will take into consideration when making a decision for ministerial relief. Specifically, the guidelines give examples of things that should be considered when deciding whether an individual's presence in Canada is contrary to the national interest and they create legitimate expectations that certain factors will be considered. The Federal Court of Appeal's suggestion that the wording of the IP 10 guidelines undermines the public's right to rely on them pursuant to the doctrine of legitimate expectation fails to take into account the reasoning behind the doctrine and is not supported by the jurisprudence.

134. In sum, regardless of the guidelines' origin, the guidelines create legitimate expectations for applicants and indicate what evidence is relevant to the Minister's determination. The Court below consequently erred when it dismissed the relevance of the IP 10 guidelines.

C. The Court of Appeal Fettered the Minister's Discretion

135. By limiting the scope of the factors that can be taken into consideration by the Minister under section 34(2), the Court of Appeal unlawfully fettered the Minister's discretion and as such this Court should not uphold its decision.

136. The Court of Appeal found that "the aspect of national interest which is in issue" in Ministerial relief applications is "national security and public safety" (emphasis added).[101] The fact that the Court narrowed the definition of national interest to only one aspect of the national interest is a clear indication that the Court restricted the relevant factors that could be considered as part of the national interest, and in doing so, the Court unlawfully fettered the Minister's discretion.

137. As noted by the Court in *Yhap* the general position of Canadian courts on the structuring of discretion has been articulated in J.M. Evans' Judicial Review of Administrative Action, Fourth edition, where he states at p. 312:

> . . . a factor that may properly be taken into account in exercising a discretion may become an unlawful fetter upon discretion if it is elevated to the status of a general rule

[101] Federal Court of Appeal's Reasons for Judgment, AR Vol. I, Tab 5. at para. 61.

> that results in the pursuit of consistency at the expense of the merits of individual cases.[102]

138. In *Yhap*, the Court, emphasized the importance of flexibility in the adoption of policy or guidelines as a means of structuring discretion. Quoting from the Principles of Administrative Law, the Court stated "Anything, therefore, which requires a delegate to exercise his discretion in a particular way may illegally limit the ambit of his power."

139. The discretion afforded the Minister under s. 34(2) of the Act is wide. The officer is asked to consider, with respect to the possible inadmissibility to Canada of a given applicant, whether they have satisfied the Minister that their presence in Canada would not be detrimental to the "national interest". To confine the meaning of s. 34(2) to only one "aspect of" the national interest, that is, national security and public safety, defeats the plain meaning of the language used by the Legislature and the meaning of this term as derived from the principles of statutory interpretation outlined above.[103]

140. The Legislature chose to use the broad term "national interest" when delineating the scope of the Minister's discretion. The ruling of the Federal Court of Appeal unlawfully narrows this provision. In contrast, the IP 10 guidelines are general enough that they are an appropriate and lawful structuring of the discretion conferred by section 34(2). As such, it is appropriate that these guidelines play an important role when evaluating a Minister's exercise of his discretion pursuant to this section.

<u>The Federal Court of Appeal Erred by Concluding H&C Considerations Could Only be Advanced in s .25 Application</u>

141. The Court of Appeal concluded that the IP 10 guidelines specifically, and humanitarian and compassionate factors generally, are not relevant to the Minister's exercise of discretion under s. 34(2) and that it would constitute a reviewable error for the Minister to consider irrelevant factors when exercising his discretion.[104] The Court held that such factors should only

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[102] *Yhap v. Canada (M.E.I.)*, [1990] 1 F.C. 722.
[103] See paras. 78-112 in Part III, above.
[104] Federal Court of Appeal's Reasons for Judgment, AR Vol. I, Tab 5 at paras. 45, 61, 67. *Maple Lodge Farms v. Canada*, [1982] 2 S.C.R. 2 at p. 7-8.

be considered in an application for relief made pursuant to s. 25 of the IRPA. Therefore, the Court of Appeal's decision fetters the Minister's discretion, by limiting the factors that the Minister of Public Safety may consider.

142. Recent jurisprudence from the Federal Court confirms that the Minister of Public Safety can no longer consider H&C factors when exercising his discretion under s. 34(2). In *Khalil*, Justice O'Reilly found that "the CBSA's analysis of Ms. Haj Khalil's application included factors Justice Pelletier regarded as irrelevant, namely considerations that would normally form part of an application for humanitarian and compassionate relief and matters relating to Canada's international relations".[105] In that case, Justice O'Reilly concluded the decision was consequently not in accordance with the approach set out in the Federal Court of Appeal's decision.[106]

143. The Court of Appeal erred in finding that the only forum to advance H&C considerations was an application under s. 25 of the IRPA.[107] This conclusion demonstrates a failure to understand the nature and rational underlying both s. 25 and s. 34(2) applications and would unnecessarily complicate and diminish the effectiveness of the s. 34(2) process.

144. Ministerial relief applications under s. 34(2) and H&C applications under s. 25 of the IRPA both involve a broad grant of discretion, and a balancing of various overlapping factors. However, they are each directed at different purposes. According to the IP 5 guidelines, which address the processing of H&C applications:

> The purpose of H&C discretion is to allow flexibility to approve deserving cases not covered by the legislation. This discretionary tool is intended to uphold Canada's humanitarian tradition.[108]

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[105] *Khalil*, *supra* at para. 58.
[106] *Khalil*, *supra* at para. 58. Justice O'Reilly also quashed the decision because it did not explicitly address national security or public safety.
[107] Federal Court of Appeal's Reasons for Decision, AR Vol. I, Tab 5 FCA decision at para. 45.
[108] Citizenship and Immigration Canada, *IP 5: Immigration Applications in Canada Made on Humanitarian and Compassionate Grounds*, online: <http://www.cic.gc.ca/english/resources/manuals/ip/ip05-eng.pdf>, section 2, p. 7 (IP 5 guidelines).

145. In contrast, the purpose of s. 34(2) Ministerial relief applications is much more specific. As set out in the facts, Ministerial relief applications are meant to rectify any unjust consequences that may flow from the broadly worded provisions in s. 34(1).[109]

146. Although s. 34(2) and s. 25 are directed at different purposes, there are many factors that could be relevant to both types of applications. For example, national interest considerations may be relevant to the determination of an H&C application. In *Legault v. Canada (MCI)*, the Federal Court of Appeal found that the Minister of Citizenship and Immigration can refuse an H&C application where "public interest reasons supersede humanitarian and compassionate ones".[110] These public interest considerations may include the public's interest in the integrity of the immigration system.[111] In the same way, the IP 5 guidelines, which address the processing of humanitarian and compassionate applications under s. 25 of the IRPA, state that inadmissible persons may submit an H&C application to overcome their inadmissibility, "[h]owever, exemptions to inadmissibility must be weighed against the objectives as expressed in the IRPA which indicate an intent to prioritize security".[112]

147. Similarly, a comprehensive analysis of the national interest in a Ministerial relief case may require consideration of factors that are also relevant to an H&C application. For example, national interest is concerned with the economic stability of Canada, among other things.[113] An assessment of how a Ministerial relief application may affect Canada's economic interest could require considering an applicant's economic establishment in Canada, including whether they own a business that employs Canadians. These factors are also relevant to an H&C assessment.[114]

148. There is nothing in the IRPA that precludes consideration of humanitarian and compassionate factors in both H&C applications and Ministerial relief applications. Indeed, in order for the decision maker to be able to properly understand and analyze all of the factors that

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[109] See paras. 15-20 in Part I, above.
[110] *Legault v. Canada (MCI)*, 2002 FCA 125 at paras. 17, 28 ["*Legault*"].
[111] *Legault*, *supra* at paras. 18-19.
[112] IP 5 guidelines, *supra* at section 5.25, p. 26.
[113] *Charkaoui (Re)*, 2009 FC 342 at para. 58.
[114] IP 5 guidelines, *supra* at section 11.5.

are relevant to a particular individual's application, many of the same factors must be taken into consideration in both H&C and Ministerial relief applications. Therefore, although H&C and Ministerial relief applications have different purposes, and require a unique analysis, H&C factors can be relevant to both types of applications. It must be left up to the decision maker in each case to weigh the factors as appropriate in a Ministerial relief determination. It is not the Court's role to preclude relevant factors from being taken into consideration by the decision maker—by doing so, the Court fetters the discretion of that decision maker.

149. The Federal Court of Appeal's preclusion of the use of H&C factors in Ministerial Relief applications means that relevant factors can no longer be taken into consideration when s. 34(2) applications are determined. This may result in costly inefficiencies in the immigration system as an individual who is inadmissible under s. 34(2) must make an additional application to the Minister of Citizenship and Immigration in order to have relevant humanitarian and compassionate circumstances considered. As such, the Federal Court of Appeal's decision is in error, and warrants the intervention of this Court.

PART IV – COSTS

150. The Appellant requests its costs of the appeal, calculated in accordance with established jurisprudence permitting costs to *pro bono* counsel.

PART V – ORDER SOUGHT

151. The Appellant requests an order allowing the appeal, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto, this 28th day of March, 2012.

_____	_____
Lorne Waldman	Gordon Cameron
_____	_____
Jacqueline Swaisland	Clare Crummey

Counsel for the Appellant

PART VI – TABLE OF AUTHORITIES

Tab	Case	Paragraph
1	*Abdella v. Canada (M.P.S.E.P.)*, 2009 FC 1199	38, 129
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13	*Hilewitz v. Canada (M.C.I.)*, [2005] 2 S.C.R. 706	75
14	*Housen v. Nikolaisen*, [2002] 2 S.C.R. 235	69
15	*Ismael v. Canada (M.P.S.E.P.)*, 2008 FC 1366	38, 129
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19	*Maleki v. Canada (M.C.I.)*, 2012 FC 131	146
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21	*Miller v. Canada (S.G.)* 2006 FC 912	55, 81

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44	*Canadian Oxford Dictionary*, (Don Mills, Ontario: Oxford University Press Canada, 1998).	79
45	Citizenship and Immigration Canada, *Memorandum of Understanding between the Department of Citizenship and Immigration, the Canada Border Services Agency and the Immigration and Refugee Board of Canada*, online: <http://www.cic.gc.ca/english/department/laws-policy/mou/mou-cbsa.asp>.	26
46	Citizenship and Immigration Canada, *ENF 3: Admissibility, Hearings, and Detention Review Proceedings*, online: <http://www.cic.gc.ca/english/resources/manuals/enf/enf03-eng.pdf>.	35
47	Citizenship and Immigration Canada, *IP 5: Immigration Applications in Canada Made on Humanitarian and Compassionate Grounds*, online: <http://www.cic.gc.ca/english/resources/manuals/ip/ip05-eng.pdf>.	144, 146
48	Citizenship and Immigration Canada, "Operational Manuals", online: <http://www.cic.gc.ca/english/resources/manuals/index.asp>.	34
49	House of Commons, Subcommittee on Public Safety and National Security of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, *Evidence*, No. 3 (1 February 2005)	26
50	*Le Micro Robert*, (Paris: Dictionnaires Le Robert, 2006)	79
51	Sullivan, Ruth. *Statutory Interpretation*, 2d ed. (Toronto: Irwin Law, 2007)	96

Tab	International Materials	Paragraph
52	*Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* GA res. 39/46, annex, 39 UN GAOR Supp. (No. 51) at 197, UN Doc. A/39/51 (1984); 1465 UNTS 85	102
53	*Convention on the Rights of the Child* GA res. 44/25, annex, 44 UN GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989); 1577 UNTS 3; 28 ILM 1456 (1989)	102, 105

PART VII – STATUTORY PROVISIONS

***Immigration Act*, S.C. 1985 c. I-2 [repealed]**

19(1) No person shall be granted admission who is a member of any of the following classes: […] (f) persons who there are reasonable grounds to believe […] (iii) are or were members of an organization that there are reasonable grounds to believe is or was engaged in […] (B) Terrorism Except persons who have satisfied the Minister that their admission would not be detrimental to the national interest;	19(1) Les personnes suivantes appartiennent à une catégorie non admissible: […] (f) celles dont il y a des motifs raisonnables de croire qu'elles: […] (iii) soit sont ou ont été membres d'une organisation dont il y a des motifs raisonnables de croire qu'elle se livre ou s'est livrée: […] (B) soit à des actes de terrorisme, la présent alinéa ne visant toutefois pas les personnes qui convainquent le ministre que leur admission ne serait nullement préjudiciable à l'intérêt national;

***Immigration and Refugee Protection Act*, S.C. 2001, c. 27**

Objectives — immigration **3.** (1) The objectives of this Act with respect to immigration are (*a*) to permit Canada to pursue the maximum social, cultural and economic benefits of immigration; (*b*) to enrich and strengthen the social and cultural fabric of Canadian society, while respecting the federal, bilingual and multicultural character of Canada; (*b.1*) to support and assist the development of minority official languages communities	Objet en matière d'immigration **3.** (1) En matière d'immigration, la présente loi a pour objet : *a*) de permettre au Canada de retirer de l'immigration le maximum d'avantages sociaux, culturels et économiques; *b*) d'enrichir et de renforcer le tissu social et culturel du Canada dans le respect de son caractère fédéral, bilingue et multiculturel; *b.1*) de favoriser le développement des collectivités de langues officielles minoritaires au Canada;

in Canada; (*c*) to support the development of a strong and prosperous Canadian economy, in which the benefits of immigration are shared across all regions of Canada; (*d*) to see that families are reunited in Canada; (*e*) to promote the successful integration of permanent residents into Canada, while recognizing that integration involves mutual obligations for new immigrants and Canadian society; (*f*) to support, by means of consistent standards and prompt processing, the attainment of immigration goals established by the Government of Canada in consultation with the provinces; (*g*) to facilitate the entry of visitors, students and temporary workers for purposes such as trade, commerce, tourism, international understanding and cultural, educational and scientific activities; (*h*) to protect the health and safety of Canadians and to maintain the security of Canadian society; (*i*) to promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks; and (*j*) to work in cooperation with the provinces to secure better recognition of the foreign credentials of permanent residents and their more rapid integration into society. Objectives — refugees (2) The objectives of this Act with respect to refugees are (*a*) to recognize that the refugee program is	*c*) de favoriser le développement économique et la prospérité du Canada et de faire en sorte que toutes les régions puissent bénéficier des avantages économiques découlant de l'immigration; *d*) de veiller à la réunification des familles au Canada; *e*) de promouvoir l'intégration des résidents permanents au Canada, compte tenu du fait que cette intégration suppose des obligations pour les nouveaux arrivants et pour la société canadienne; *f*) d'atteindre, par la prise de normes uniformes et l'application d'un traitement efficace, les objectifs fixés pour l'immigration par le gouvernement fédéral après consultation des provinces; *g*) de faciliter l'entrée des visiteurs, étudiants et travailleurs temporaires qui viennent au Canada dans le cadre d'activités commerciales, touristiques, culturelles, éducatives, scientifiques ou autres, ou pour favoriser la bonne entente à l'échelle internationale; *h*) de protéger la santé des Canadiens et de garantir leur sécurité; *i*) de promouvoir, à l'échelle internationale, la justice et la sécurité par le respect des droits de la personne et l'interdiction de territoire aux personnes qui sont des criminels ou constituent un danger pour la sécurité; *j*) de veiller, de concert avec les provinces, à aider les résidents permanents à mieux faire reconnaître leurs titres de compétence et à s'intégrer plus rapidement à la société. Objet relatif aux réfugiés (2) S'agissant des réfugiés, la présente loi a pour objet : *a*) de reconnaître que le programme pour

in the first instance about saving lives and offering protection to the displaced and persecuted;	les réfugiés vise avant tout à sauver des vies et à protéger les personnes de la persécution;
(*b*) to fulfil Canada's international legal obligations with respect to refugees and affirm Canada's commitment to international efforts to provide assistance to those in need of resettlement;	*b*) de remplir les obligations en droit international du Canada relatives aux réfugiés et aux personnes déplacées et d'affirmer la volonté du Canada de participer aux efforts de la communauté internationale pour venir en aide aux personnes qui doivent se réinstaller;
(*c*) to grant, as a fundamental expression of Canada's humanitarian ideals, fair consideration to those who come to Canada claiming persecution;	*c*) de faire bénéficier ceux qui fuient la persécution d'une procédure équitable reflétant les idéaux humanitaires du Canada;
(*d*) to offer safe haven to persons with a well-founded fear of persecution based on race, religion, nationality, political opinion or membership in a particular social group, as well as those at risk of torture or cruel and unusual treatment or punishment;	*d*) d'offrir l'asile à ceux qui craignent avec raison d'être persécutés du fait de leur race, leur religion, leur nationalité, leurs opinions politiques, leur appartenance à un groupe social en particulier, ainsi qu'à ceux qui risquent la torture ou des traitements ou peines cruels et inusités;
(*e*) to establish fair and efficient procedures that will maintain the integrity of the Canadian refugee protection system, while upholding Canada's respect for the human rights and fundamental freedoms of all human beings;	*e*) de mettre en place une procédure équitable et efficace qui soit respectueuse, d'une part, de l'intégrité du processus canadien d'asile et, d'autre part, des droits et des libertés fondamentales reconnus à tout être humain;
(*f*) to support the self-sufficiency and the social and economic well-being of refugees by facilitating reunification with their family members in Canada;	*f*) d'encourager l'autonomie et le bien-être socioéconomique des réfugiés en facilitant la réunification de leurs familles au Canada;
(*g*) to protect the health and safety of Canadians and to maintain the security of Canadian society; and	*g*) de protéger la santé des Canadiens et de garantir leur sécurité;
(*h*) to promote international justice and security by denying access to Canadian territory to persons, including refugee claimants, who are security risks or serious criminals.	*h*) de promouvoir, à l'échelle internationale, la sécurité et la justice par l'interdiction du territoire aux personnes et demandeurs d'asile qui sont de grands criminels ou constituent un danger pour la sécurité.
Application	Interprétation et mise en oeuvre
(3) This Act is to be construed and applied in a manner that	
(*a*) furthers the domestic and international	

interests of Canada; (*b*) promotes accountability and transparency by enhancing public awareness of immigration and refugee programs; (*c*) facilitates cooperation between the Government of Canada, provincial governments, foreign states, international organizations and non-governmental organizations; (*d*) ensures that decisions taken under this Act are consistent with the *Canadian Charter of Rights and Freedoms*, including its principles of equality and freedom from discrimination and of the equality of English and French as the official languages of Canada; (*e*) supports the commitment of the Government of Canada to enhance the vitality of the English and French linguistic minority communities in Canada; and (*f*) complies with international human rights instruments to which Canada is signatory.	(3) L'interprétation et la mise en oeuvre de la présente loi doivent avoir pour effet : *a*) de promouvoir les intérêts du Canada sur les plans intérieur et international; *b*) d'encourager la responsabilisation et la transparence par une meilleure connaissance des programmes d'immigration et de ceux pour les réfugiés; *c*) de faciliter la coopération entre le gouvernement fédéral, les gouvernements provinciaux, les États étrangers, les organisations internationales et les organismes non gouvernementaux; *d*) d'assurer que les décisions prises en vertu de la présente loi sont conformes à la *Charte canadienne des droits et libertés*, notamment en ce qui touche les principes, d'une part, d'égalité et de protection contre la discrimination et, d'autre part, d'égalité du français et de l'anglais à titre de langues officielles du Canada; *e*) de soutenir l'engagement du gouvernement du Canada à favoriser l'épanouissement des minorités francophones et anglophones du Canada; *f*) de se conformer aux instruments internationaux portant sur les droits de l'homme dont le Canada est signataire.
Minister of Citizenship and Immigration **4.** (1) Except as otherwise provided in this section, the Minister of Citizenship and Immigration is responsible for the administration of this Act. […] Minister of Public Safety and Emergency Preparedness (2) The Minister of Public Safety and Emergency Preparedness is responsible for the	Compétence générale du ministre de la Citoyenneté et de l'Immigration **4.** (1) Sauf disposition contraire du présent article, le ministre de la Citoyenneté et de l'Immigration est chargé de l'application de la présente loi. […] Compétence du ministre de la Sécurité publique et de la Protection civile (2) Le ministre de la Sécurité publique et de la

administration of this Act as it relates to (*a*) examinations at ports of entry; (*b*) the enforcement of this Act, including arrest, detention and removal; (*c*) the establishment of policies respecting the enforcement of this Act and inadmissibility on grounds of security, organized criminality or violating human or international rights; or (*d*) determinations under any of subsections 34(2), 35(2) and 37(2).	Protection civile est chargé de l'application de la présente loi relativement : *a*) au contrôle des personnes aux points d'entrée; *b*) aux mesures d'exécution de la présente loi, notamment en matière d'arrestation, de détention et de renvoi; *c*) à l'établissement des orientations en matière d'exécution de la présente loi et d'interdiction de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou pour activités de criminalité organisée; *d*) à la prise des décisions au titre des paragraphes 34(2), 35(2) ou 37(2). Précisions du gouverneur en conseil (3) Sous réserve des paragraphes (1) à (2), le gouverneur en conseil peut, par décret : *a*) préciser lequel des ministres mentionnés à ces paragraphes est visé par telle des dispositions de la présente loi; *b*) préciser que plusieurs de ces ministres sont visés par telle de ces dispositions, chacun dans les circonstances qu'il prévoit.
Security **34.** (1) A permanent resident or a foreign national is inadmissible on security grounds for (*a*) engaging in an act of espionage or an act of subversion against a democratic government, institution or process as they are understood in Canada; (*b*) engaging in or instigating the subversion by force of any government; (*c*) engaging in terrorism; (*d*) being a danger to the security of	Sécurité **34.** (1) Emportent interdiction de territoire pour raison de sécurité les faits suivants : *a*) être l'auteur d'actes d'espionnage ou se livrer à la subversion contre toute institution démocratique, au sens où cette expression s'entend au Canada; *b*) être l'instigateur ou l'auteur d'actes visant au renversement d'un gouvernement par la force; *c*) se livrer au terrorisme; *d*) constituer un danger pour la sécurité du

Canada; (*e*) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or (*f*) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (*a*), (*b*) or (*c*). Exception (2) The matters referred to in subsection (1) do not constitute inadmissibility in respect of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest.	Canada; *e*) être l'auteur de tout acte de violence susceptible de mettre en danger la vie ou la sécurité d'autrui au Canada; *f*) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle est, a été ou sera l'auteur d'un acte visé aux alinéas *a*), *b*) ou *c*). Exception (2) Ces faits n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui convainc le ministre que sa présence au Canada ne serait nullement préjudiciable à l'intérêt national.
Consideration of application **113.** Consideration of an application for protection shall be as follows: (*a*) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection; (*b*) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required; (*c*) in the case of an applicant not described in subsection 112(3), consideration shall be on the basis of sections 96 to 98; (*d*) in the case of an applicant described in subsection 112(3), consideration shall be on the basis of the factors set out in section 97 and (i) in the case of an applicant for protection who is inadmissible on	Examen de la demande **113.** Il est disposé de la demande comme il suit: *a*) le demandeur d'asile débouté ne peut présenter que des éléments de preuve survenus depuis le rejet ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'il n'était pas raisonnable, dans les circonstances, de s'attendre à ce qu'il les ait présentés au moment du rejet; *b*) une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires; *c*) s'agissant du demandeur non visé au paragraphe 112(3), sur la base des articles 96 à 98; *d*) s'agissant du demandeur visé au paragraphe 112(3), sur la base des éléments mentionnés à l'article 97 et, d'autre part : (i) soit du fait que le demandeur interdit de territoire pour grande criminalité constitue un danger pour le public au

grounds of serious criminality, whether they are a danger to the public in Canada, or (ii) in the case of any other applicant, whether the application should be refused because of the nature and severity of acts committed by the applicant or because of the danger that the applicant constitutes to the security of Canada.	Canada, (ii) soit, dans le cas de tout autre demandeur, du fait que la demande devrait être rejetée en raison de la nature et de la gravité de ses actes passés ou du danger qu'il constitue pour la sécurité du Canada.

***Canada Border Services Agency Act*, S.C. 2005, c. 38**

Agency established **3.** (1) The Canada Border Services Agency is established as a body corporate. […] Mandate of Agency **5.** (1) The Agency is responsible for providing integrated border services that support national security and public safety priorities and facilitate the free flow of persons and goods, including animals and plants, that meet all requirements under the program legislation, by (*a*) supporting the administration or enforcement, or both, as the case may be, of the program legislation; (*b*) implementing agreements between the Government of Canada or the Agency and a foreign state or a public body performing a function of government in a foreign state to carry out an activity, provide a service or administer a tax or program; (*c*) implementing agreements between the Government of Canada or the Agency and the government of a province or other public body performing a function of the Government in Canada to carry out an	Constitution de l'Agence **3.** (1) Est constituée l'Agence des services frontaliers du Canada, dotée de la personnalité morale. […] Mission de l'Agence **5.** (1) L'Agence est chargée de fournir des services frontaliers intégrés contribuant à la mise en oeuvre des priorités en matière de sécurité nationale et de sécurité publique et facilitant le libre mouvement des personnes et des biens — notamment les animaux et les végétaux — qui respectent toutes les exigences imposées sous le régime de la législation frontalière. À cette fin, elle : *a*) fournit l'appui nécessaire à l'application ou au contrôle d'application, ou aux deux, de la législation frontalière; *b*) met en oeuvre tout accord conclu entre elle ou le gouvernement fédéral et un État étranger ou un organisme public remplissant des fonctions gouvernementales dans un État étranger et portant sur l'exercice d'une activité, la prestation d'un service, l'administration d'une taxe ou l'application d'un

activity, provide a service or administer a tax or program; (*d*) implementing agreements or arrangements between the Agency and departments or agencies of the Government of Canada to carry out an activity, provide a service or administer a program; and (*e*) providing cooperation and support, including advice and information, to other departments and agencies of the Government of Canada to assist them in developing, evaluating and implementing policies and decisions in relation to program legislation for which they have responsibility. Support (2) The Agency may provide support, through the provision of services, to departments and agencies for which the Minister is responsible, in accordance with agreements or arrangements entered into with those departments and agencies.	programme; *c*) met en oeuvre tout accord conclu entre elle ou le gouvernement fédéral et le gouvernement d'une province ou un organisme public remplissant des fonctions gouvernementales au Canada et portant sur l'exercice d'une activité, la prestation d'un service, l'administration d'une taxe ou l'application d'un programme; *d*) met en oeuvre tout accord ou entente conclu entre elle et un ministère ou organisme fédéral et portant sur l'exercice d'une activité, la prestation d'un service ou l'application d'un programme; *e*) fournit aux autres ministères ou organismes fédéraux l'appui et la collaboration nécessaires, notamment par la prestation d'avis ou de renseignements, pour les aider dans l'élaboration, l'examen et la mise en oeuvre des orientations et des décisions relatives à la législation frontalière qui relève d'eux. Assistance (2) Elle peut en outre appuyer, par la prestation de services, les ministères ou organismes relevant du ministre, conformément à tout accord ou entente conclu avec eux.