SCC File #23361

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IN THE SUPREME COURT OF CANADA
(Appeal From the Ontario Court of Appeal)

B E T W E E N:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA and
THE MINISTER OF EMPLOYMENT AND IMMIGRATION

Appellant

- and -

REZA

Respondent

FACTUM OF THE INTERVENOR
CANADIAN COUNCIL FOR REFUGEES

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I N D E X

Court File No. 23361

In the Supreme Court of Canada
(On Appeal from the Ontario Court of Appeal)

Between:

Her Majesty the Queen in Right of Canada and
The Minister of Employment and Immigration,

Appellants
(Respondents)

-and-

Reza

Respondent
(Appellant)

Intervenor's Factum

Part One - Statement of Facts

1. The Intervenor accepts the facts as stated in the Appellant's factum at paragraphs 2, 6, 8, 9, 11, 12 and 13. The Intervenor also accepts the facts as stated in the Respondent's factum at paragraphs 2 to 16.

Part Two - Points in Issue

2. The Intervenor wishes to address only two issues:

a) Is it proper for the courts to take into account considerations of juridical advantage?

b) Is the Respondent placed at a juridical disadvantage in the Federal Court?

Part Three - Argument

A. Is it proper for the Courts to take into account considerations of juridical advantage?

I. Relevance and Waiver

3. The Intervenor agrees with paragraphs 72 and 73 of the Respondent's Factum.

4. The Intervenor takes issue with the submission of the Appellants that the majority of the Ontario Court of Appeal were not entitled to invoke the doctrine of forum non conveniens to interfere with Ferrier J.'s discretion.

Appellants Factum, paragraph 56.

5. Ferrier J. used the doctrine of forum non conveniens as a factor in exercising his discretion.

Case on Appeal, Volume One, page 361.

6. The Ontario Court of Appeal was obliged to determine whether what the motions court judge had done was based on sound principle or not.

7. Madame Justice Abella, in dissent, does not criticize the motions court judge for invoking the doctrine of forum non conveniens. She, rather, endorses the position of Ferrier J. and finds, as did Ferrier J., that the Respondent would be at no juridical disadvantage in the Federal Court.

8. The Appellants, in taking the position that the courts below were not entitled to invoke the doctrine of forum non conveniens, is not just disagreeing with the majority in the Ontario Court of Appeal. In taking that position, the Appellants are disagreeing with all four judges in the courts below.

9. Even if the Appellants are right in their position that the doctrine of forum non conveniens is irrelevant to this case, the judgment of Ferrier J. would still have to be set aside. For if the doctrine is irrelevant to interfere with the decision of Ferrier J., it is also irrelevant to support the decision of Ferrier J. Yet, Ferrier J. relied on it.

10. The Court of Appeal had to decide whether or not Ferrier J.

exercised his discretion on the basis of sound legal principle. If the doctrine of forum non conveniens is irrelevant to the decision of Ferrier J., as the Appellants contend, yet Ferrier J. used that doctrine to support his decision, then his decision is not based on sound legal principle.

11. The Ontario Court of Appeal majority did not decide that Ferrier J. must exercise his discretion in favour of Respondent based on the doctrine of forum non conveniens. The majority only decided that Ferrier J. could not exercise his discretion against the Respondent if he was to base is decision on the doctrine of forum non conveniens. If the motions judge was to use the doctrine, which the majority in the Court of Appeal at no time held that he had to do, then it was wrong in law for him to use it in the way that he did.

12. The bulk of the submission of the Appellants on forum non conveniens is accordingly either irrelevant to the issue before the Court or undercuts the position that they wish to advance. The Intervenor submits that this Court should disregard paragraphs 47 to 54 and paragraph 56 of the Appellants Factum as not being responsive to the issues before this Court.

13. The Intervenor also points out that the reason that Ferrier J. relied on the doctrine of forum non conveniens was that the Appellants in the courts below argued it. The Appellants asked for a stay on the basis that it is not less advantageous to have the matter heard in the Federal Court.

11 O.R. (3d) at page 69

14. It is submitted that the Appellants cannot argue before the motions court judge the doctrine of forum non conveniens and win, argue before the Court of Appeal the doctrine of forum non conveniens and lose, and then before this Court argue that the courts below erred in law by even considering the doctrine. The

Appellants must be taken to have waived any right they had to object to consideration of the doctrine by the manner in which they argued the case in the courts below.

II. Disadvantage and the Charter

15. If it is open to the Appellants to argue that the doctrine of forum non conveniens cannot be applied in this case, then the Intervenor argues that the doctrine can and should be applied.

16. The Intervenor submits that, at a minimum, the doctrine of forum non conveniens can and should be applied, as a guide, where the claim of juridical disadvantage comes from a member of a disadvantaged group within the sense of Section 15 of the Canadian Charter of Rights and Freedoms.

17. The argument of the Appellants, that the doctrine of forum non conveniens cannot be applied in this case, is an argument that the Ontario Court of Appeal was wrong to interfere with the exercise of discretion of the motions court judge even though the motions court judge may himself have been wrong in applying the doctrine of forum non conveniens. In other words, for the Appellants, juridical disadvantage does not matter, even if it exists.

18. If this Court assumes or finds that there is a juridical disadvantage, the Intervenor submits that it offends the protection intended to be offered by the Canadian Charter of Rights and Freedoms to allow a juridical disadvantage to persist for a member of a group disadvantaged within the sense of Section 15 of the Charter.

19. A group is disadvantaged within the sense of Section 15 of the Charter where it is a group lacking political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated.

Andrews v. Law Society of B.C. (1989) 1 S.C.R. 143 at page 152

per Wilson J.

20. The Intervenor submits that whether juridical disadvantage is a relevant consideration for other persons or not, it must be a relevant, and, indeed, obligatory consideration for those who are members of disadvantaged groups. Juridical disadvantage compounds the pre-existing disadvantage, something the courts should not permit.

21. The difference in treatment at the Ontario and Federal courts and its relation to Section 15 of the Charter is a matter raised on the merits by the Respondent.

Respondent's Factum, paragraph 15(b);
Reasons of the Ontario Court of Appeal.

22. The Intervenor submits that Section 15 Charter considerations are also relevant at this preliminary level in order to determine whether it is proper for the courts to look at juridical disadvantage. If the difference in treatment in the two levels of courts does violate section 15 of the Charter, then it is both permissible and obligatory to look at juridical disadvantage.

23. If Section 15 of the Charter is applied at this preliminary level, that does not dispose of the matter on the merits. Should this Court accept the Section 15 argument here presented, all that would be decided is that denial of access to the Ontario courts to raise constitutional issues violates section 15 of the Charter. The larger issue, whether the leave provisions of the Immigration Act violate Section 15 of the Charter, even when non constitutional issues are raised, is left open.

24. Refugee claimants fall into an analogous category to those specifically mentioned in Section 15.

25. Refugee claimant status, in so far as it based on a well

founded fear of persecution cannot be readily be altered by claimants, except on the basis of unacceptable cost, i.e., by returning to persecution. In that sense, their refugee claimant status is an immutable characteristic.

See LaForest J. in Andrews, supra at page 195.

26. Refugee claimants are a group lacking political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated.

See Andrews supra at page 152 per Wilson J.

27. Refugee claimants form the kind of discrete and insular minority to which the Supreme Court of the U.S. referred in U.S. v. Caroline Products Co.

See Andrews supra at page 183, per McIntyre J.

28. In determining whether there is discrimination on grounds relating to personal characteristics it is important to look not only at what has created the discrimination but also to the larger social, political and legal context. It is only by examining the larger context that a court can determine whether differential treatment results in inequality. A finding that there is discrimination will in most cases necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged.

Turpin v The Queen (1989) 1 S.C.R. 1296, at 1331-1332, per Wilson J.

29. In the case of Andrews, this Court found that non citizens fall into an analogous category to those specifically enumerated in Section 15.

Andrews, supra per Mr. Justice Laforest at page 195.

30. Refugee claimants are a group of non citizens. All refugee claimants are non citizens.

31. Andrews and Kinersly, the plaintiffs in the Andrews case, were permanent residents. It is submitted that if permanent residents are considered to fall within the protection of Section 15 of the Charter, then refugee claimants fall within the protection of Section 15 of the Charter a fortiori. Refugee claimants have fewer rights and more liabilities than permanent residents do . Refugee claimants are more powerless than landed immigrants are. Refugee claimants are more vulnerable to having their interests overlooked and their rights to equal concern and respect violated than permanent residents are.

32. In order for discrimination to exist it is not necessary for those more favourably treated to consist only of citizens. The relevant test is whether those less favourably treated consist only of non citizens. Where those less favourably treated consist only of non citizens then there is discrimination in violation of the Charter.

Brooks v. Canada Safeway Ltd. (1989) 1 S.C.R. 1219 at 1247-1249.

33. For Section 15 to be violated, it is not necessary for discrimination to be universal, to affect every member of the group. It is sufficient if it is partial, affecting only part of an identifiable group.

Brooks, v. Canada Safeway Ltd., supra.

III. International Law

34. On the assumption or finding that there is a juridical disadvantage in the Federal Court, the doctrine of forum non conveniens should be applied as a guide, because to ignore the juridical disadvantage would be to violate international law.

35. The Refugee Convention provides that a refugee shall have free access to the courts of law on the territory of all contracting states.

Article 16(1)

36. A person is a refugee either at the time the person leaves the country of nationality or subsequently due to circumstances arising since departure.

United Nations High Commission for Refugees "Handbook on Procedures and Criteria for Determining Refugee Status", paragraphs 94, 95.

37. Refugee recognition is declaratory, not constitutive. Refugee recognition does not make a person a refugee. Refugee determination that leads to acceptance of a person as a refugee recognizes that the person was already a refugee either from the time the person left the home country for fear of being persecuted or from the time circumstances arose since departure that made the person a refugee sur place.

Atle Grahl Madsen :"The Status of Refugees in International Law" volume one, pages 157-160, 340, 341.

38. The enjoyment of certain benefits to be accorded under the Convention must be available to prima facie refugees pending determination of their bona fide character. These provisions would easily be rendered meaningless if they could only be invoked upon the formal recognition of the person concerned as a refugee.

Grahl Madsen, op. cit., volume 2, page 224.

39. It is submitted that Article 16 of the Convention is one of these provisions. This provision was meant to protect the person entitled to invoke it throughout his/her time as a refugee and not just from the moment of recognition.

40. It is further submitted that, if claimants are at a juridical disadvantage in the Federal Court, then this disadvantage violates the Convention commitment to free access. If refugee claimants were forced to go to the Federal Court alone on constitutional

matters, they would not have free access to the courts within the meaning of Section 16 of the Refugee Convention.

41. There exists a presumption that domestic law will not be interpreted, where possible, as violating international obligations imposed by a treaty signed and ratified by the Government.

A.G. v. B.C. (1980) 3 W.L.R. 109 (H.L.)

42. This presumption has been applied by a judge of this Court, in dissent, but not on this point, in relation to the Refugee Convention, in the case of Ernewein.

Ernewein v. M.E.I. (1980) 103 D.L.R. (3d) 1 at page 17 per Pigeon J.

43. The common law principle of forum non conveniens must be applied and interpreted in this case, in so far as it is possible, so as not to violate the guarantee given to refugee claimants in the Refugee Convention to free access to Canadian courts.

44. The judgment of the majority of the Court of Appeal brings Canada more closely into compliance with Article 16 of the Refugee Convention than the judgment of the minority does. The judgment of the majority, for that reason, is to be preferred.

45. The Refugee Convention also provides for equality of treatment in court access between refugees who are habitual residents and nationals, one the one hand, and refugees who are habitual residents elsewhere and nationals of the country of habitual residence on the other hand.

Articles 16(2) and (3).

46. The Convention contemplates the possibility of inequality of treatment between residents and non-residents. It does not contemplate an inequality of treatment based on subject matter.

47. The Immigration Act contemplates an inequality of treatment based on subject matter. Any person, resident or non-resident, who comes with the scheme of the Immigration Act, is subject to its leave provisions. Refugee claimants are treated differently depending on whether they seek access to the court to deal with Immigration Act matters or other matters.

48. It is submitted that this sort of inequality is not within the contemplation of the Refugee Convention and, accordingly, violates the Convention. The doctrine of forum non conveniens should be applied and interpreted if at all possible to avoid this situation.

IV. Foreign Law

49. One of the sources of international law is the general principles of law recognized by the community of nations.

Statute of the International Court of Justice, Article 38(1)(c).

50. The "general principles of law" refers to the general principles of domestic law.

In re Section 55 of the Supreme Court Act (1984) 1 S.C.R. 86 at 114.

51. The form of access that refugee claimants have to the courts of other countries signatory to the Refugee Convention is a source of law in determining what free access to the courts in Article 16 of the Refugee Convention means.

52. Refugee claimants in other countries signatory to the Refugee Convention are not subject to the access restrictions to which they are subject in Canada. In other countries, there is no juridical difference between the access refugee claimants have to courts and the access nationals have to courts.

53. There is general principle of law recognized by those states

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53. There is general principle of law recognized by those states

signatory to the Refugee Convention not to put refugee claimants at a juridical disadvantage in the courts.

54. The law and practice of other countries signatory to the Refugee Convention shows that "free access" in the Refugee Convention means not putting refugee claimants at a juridical disadvantage, in comparison with nationals, in access to the courts when pursuing legal remedies in relation to their refugee claims.

a. France

55. In France, refugee determination is done by the French Office for Protection of Refugees and the Stateless (OFPRA).

Loi No. 52-803 du 25 Juillet, 1952.

56. Refugee determinations by OFPRA are subject to review as of right by a Review Commission .

Article 5.

57. The Council of State (Conseil d'Etat) serves as a court of judicial review from decisions of the Review Commission.

Paya Monzo, Conseil d'Etat, 29 March 1957.

58. In terms of access to the Conseil d'Etat, there is nothing to distinguish rejected refugee claimants from others seeking access to the Conseil d'Etat. Requests for judicial review from decisions of the Review Commission are treated like requests for judicial review from the decisions of any other administrative tribunal.

b. United Kingdom

59. In the U.K., all applicants for judicial review are made by way of leave.

1971 Supreme Court Practice, Order 53, rule 3(1).

60. There must be a hearing on the application for leave where it is requested in the notice of application.

Order 53, rule 3(3).

61. Where leave is refused without a hearing, because no hearing was requested, the application for leave may be renewed by applying to a single judge in open court.

Order 53, rule 3(4)(b).

62. Where leave is refused after a hearing, the application for leave can be renewed before the Court of Appeal.

Order 53, rule 14(3).

63. Where leave is granted and the substantive application for judicial review is heard and decided, any party has an appeal of right to the Court of Appeal.

1981 Supreme Court Act, section 16.

64. The ordinary rules of judicial review apply in refugee cases. There is no special regime for such cases.

R. v. Home Secretary, ex parte, Bugdaycay (1986) 1 W.L.R. 155(C.A.); (1986) 2 W.L.R. 606 (H.L.).

65. In Bugdaycay, the Court of Appeal suggested the "court has no role to play" in judicial review of refugee determination. The House of Lords disapproved of this suggestion and held, on the contrary, that "where the result of a flawed decision may imperil life or liberty, a special responsibility lies on the court in the examination of the decision making process."

At page 163, per Neill L.J., (C.A.); at page 625, per Lord Templeman (H.L.).

c. United States

66. In the U.S., an alien may apply to an immigration judge during deportation or exclusion proceedings both for asylum and withholding of deportation. The tests for each are closely related. A person will be granted asylum if he/she meets the

refugee definition. Deportation is withheld, if otherwise the non-refoulement provision of the Refugee Convention would be violated.

Immigration and Nationality Act (INA) Section 208(a), 243 (b)(1).

67. The decision of the immigration judge can be appealed to the Board of Immigration Appeals (BIA). The deportation decision of the BIA is subject to judicial review in the Federal Court of Appeals.

INA Section 106.

68. The procedure prescribed generally for judicial review of federal agencies is the sole and exclusive procedure for judicial review of all final orders of deportation, including withholding of deportation. There are technical differences between the procedure for judicial review of deportation orders and judicial review of other administrative orders, but these differences in procedure do not lead to a difference in access.

INA Section 106(a).

69. In exclusion cases, judicial review is available to review the legality of custody by way of habeas corpus.

INA Section 106(b).

70. Access to the Federal Courts in the U.S. for judicial review of BIA decisions is not restricted by a leave requirement.

d. Australia

71. In Australia, the Commonwealth Administrative Decisions (Judicial Review) Act 1977 provides that a person who is aggrieved by a decision to which the Act applies may apply to the Federal Court of Australia for an order of review in respect of the decision.

Section 5(1).

72. A decision to which the Act applies is any decision of an administrative character made under a Commonwealth Act other than certain listed decisions.

Section 3(1).

73. Refugee determination is done by the Minister for Immigration and Ethnic Affairs.

Migration Act 1958, section 6A(1)(c).

74. Refugee determination by the Minister is not one of the exceptions listed in the Administrative Decisions (Judicial Review) Act. It is subject to the general regime of judicial review.

75. In the case of Mayer, the Minister argued that his power to determine refugee status should be immune from judicial review on the ground that the Migration Act does not empower the Minister to make the decision, but merely referred to the objective fact that there happened to be such a power in the Minister to decide. The High Court of Australia rejected that argument and held that the decisions of the Minister on refugee determination were subject to judicial review.

M.I.E.A. v. Mayer (1985) 157 C.L.R. 290.

See also Chan v. M.I.E.A. (1989) 169 C.L.R. 379.

B. Is the Respondent placed at a juridical disadvantage in the Federal Court?

I. Leave

76. A study done by Ian Greene and Paul Shaffer has shown that there is a statistically significant association between individual judges and the outcome of applications for leave in the Federal Court under the Immigration Act.

"Leave to Appeal" (1992) 4 International Journal of Refugee Law 71 at page 78.

77. The authors of the study noted that a level of associations as

high as those found in the study are "very rarely encountered in social science research."

78. The study noted that the degree of difference discovered in the study amongst different judge is rare. For instance, a leave application decided by Madame Justice Desjardins was 5.4 more times likely to succeed than a leave application decided by Mr. Justice Pratte.

At page 82.

79. In a sample of 611 cases out of approximately 2000 cases, reasons were given in 11.1% of the cases, or in 14% of the cases for which leave was denied. None of the decisions, whether reasons were granted or not, involved an oral hearing.

At pages 75, 76.

80. The authors of the study were not able to identify any factor other than the judges predispositions to explain the association between individual judges and the outcome of leave applications.

81. The Appellants argue that the leave requirement in the Federal Court does not put the Respondent at a juridical disadvantage, and rely on Peiroo. The Court in Peiroo had difficulty accepting that an applicant who is in a position to show reasonable and probable ground for complaint regarding the decision in respect of which he seeks review would fail to be accorded the requisite leave.

Peiroo v. Canada (1990) 69 O.R. (2d) 253 at 259.

82. The Greene and Shaffer study show that reliance on the reasoning in Peiroo is formalistic. What, for one judge, is arguable and justifies the granting of leave, is, for another judge, not arguable and does not justify the granting of leave.

83. Justice means like cases are decided in like fashion. Because, in the present Federal Court leave system, like cases are decided

in markedly unlike fashion, the Federal Court leave system is not just. Because it is not just, applicants are put at a juridical disadvantage in being required to apply for leave in the Federal Court, in comparison with initiating a proceeding in the Ontario courts, where no leave is required.

84. The juridical disadvantage in applying for leave in the Federal Court cannot now be removed by the Federal Court itself in a constitutional challenge to the leave requirement. For the Federal Court has already held that the leave requirement in its court is constitutional. Accordingly, if this argument were to be raised now in a Federal Court leave application, leave would likely not be granted. For the Federal Court, the matter has ceased to be arguable. The issue, on the other hand, remains very much arguable in the Ontario Courts.

Bains v. M.E.I. (1990) N.R. 239.

II. Appeal

85. A person who is denied leave in the Federal Court under the Immigration Act has no appeal from the denial of leave.

Immigration Act section 82.2

86. A person who is granted leave to apply for judicial review under the Immigration Act in the Federal Court Trial Division and loses cannot appeal the decision to the Federal Court of Appeal unless the Trial Division Judge certifies that a serious question of general importance is involved.

Immigration Act section 83(1).

87. In the Ontario courts, since there is no leave requirement, there is accordingly no prohibition of appeal based on denial of leave.

88. In the Ontario courts, there is no requirement that the trial judge certify a serious question of general importance before the

case can go to the Ontario Court of Appeal.

89. This certification requirement means that the doctrine of forum non conveniens applies to the Federal Court a fortiori, because the Respondent would be at an even greater juridical disadvantage now, being subject to the certification requirement, than he was before the certification requirement became law.

90. The law of certification came into effect on February 1, 1993. It was not in effect at the time of the judgment of the motions court judge or of the Ontario Court of Appeal.

91. It is submitted that this Court can look at the change in the law in assessing whether or not there is a juridical disadvantage. If the Respondent were to lose at this Court and be left to his remedies in the Federal Court system, he must take the Federal Court as he finds it now. He is not entitled to take advantage of procedures as they existed in the Federal Court at the time he began these proceedings in the Ontario courts. The Respondent now would be subject to the certification procedure if he applied today to the Federal Court, was granted leave, and then lost.

92. The Intervenor submits further that, if this Court accepts that juridical disadvantage is relevant but does not address the claimed juridical disadvantage that arises from the coming into force of the certification procedure on February 1, 1993, then the judgment this Court would give against the Respondent would be moot. It would be open to the Respondent to relitigate the case on the basis of the intervening juridical disadvantage caused by the certification procedure.

93. The Intervenor submits that the Respondent had a juridical disadvantage before February 1, 1993, and that that juridical disadvantage increased because of the change of law on February 1, 1993.

94. The Intervenor submits, in the alternative, that, if the Respondent had no juridical disadvantage before February 1, 1993, he now has a juridical disadvantage, by reason of the change of law of February 1, 1993.

95. Given the wide variations in the rate of granting of leave in the Federal Court, depending on the individual judge, it is safe to assume that this certification procedure would be subject to similar variation, and, for that reason would be equally unjust.

96. As well, the certification procedure requires the certifying judge to call into question his own judgement. It is inherently unjust to leave a decision on whether an appeal can be launched only to the judge who decides the case.

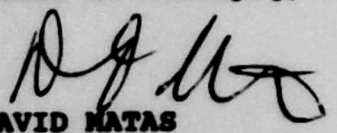
97. Thirdly, a judgment may raise no serious question of general importance and still be wrong. A person who has an appeal as of right in one court and an appeal in another court only subject to certification that the case poses a serious question of general importance is at a juridical disadvantage in the second court. For, if the trial judge in the first court is wrong, but not on a serious question of general importance, the judgment can be corrected on appeal. If the trial judge is wrong in the second court, correction of the judgment is impossible.

98. As mentioned previously, the Federal Court of Appeal has already held that the leave requirement in that court is constitutional. Even if the Federal Court Trial Division were now to grant leave on that issue, it is highly unlikely that the question would be certified for the Federal Court of Appeal, since that Court has already decided the issue. The Respondent could, on the other hand, put that issue before the Ontario Court of Appeal as of right, provided he succeeded in this Court.

Part Four - Order Sought

99. The Intervenor submits that the appeal should be dismissed

ALL OF WHICH IS RESPECTFULLY SUBMITTED.
Dated at Winnipeg, this seventh day of February, 1994.



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TO: The Registrar of this Court

AND TO: John C. Tait Q.C.
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Part Five - Table of Authorities

Appendix - Legislation

Immigration Act, Section 83(1)

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

Service hereof admitted this
7th day of Feb 1994
Ottawa Agents for
~~Applicant~~ Respondent
per D James

SERVICE OF A TRUE COPY HEREOF
SIGNIFICATION DE COPIE CONFORME

Admitted this 7 day
Acceptée le jour
of February 19 94
de

4h30

Julie H Joliat
for
pour John C. Tait, Q.C.
Deputy Attorney General of Canada
Sous-procureur général du Canada