A-96-18

2019 FCA 169

Barinder Singh Sidhu (*Appellant*)

v.

The Minister of Citizenship and Immigration (*Respondent*)

INDEXED AS: SIDHU V. CANADA (CITIZENSHIP AND IMMIGRATION)

Federal Court of Appeal, Dawson, Woods and Rivoalen JJ.A.—Vancouver, April 11; Ottawa, June 7, 2019.

Citizenship and Immigration — Exclusion and Removal — Inadmissible Persons — Appeal, cross-appeal from Federal Court decision allowing respondent's application for judicial review of Immigration and Refugee Board, Appeal Division decision — Federal Court finding Appeal Division's decision unreasonable; providing obiter reasons on how to resolve duty of candour issue for further proceedings — Respondent cross-appealing, asking judgment be varied to strike out requirement redetermination be "in accordance with the reasons provided" — Appellant, permanent resident of Canada — Father convicted in India of various offences in relation to murder in India, sentenced to life imprisonment — Appellant's father then applying for permanent residence in Canada as member of family class — Appellant's father listing wife, appellant as accompanying dependants but failing to disclose his criminal history in India — Immigration report prepared indicating that appellant inadmissible pursuant to Immigration and Refugee Protection Act, s. 40(1)(a) — Federal Court stating that, but for his father's misrepresentation, appellant would not have been admitted to Canada; that appellant's permanent resident status predicated upon lie by father — Lie directly induced error in administration of Act — Principal issues whether Federal Court erring in finding unreasonable Appeal Division's finding that father's misrepresentation not attributable to appellant as "indirect" misrepresentation; whether Federal Court erring in treatment of "duty of candour question" — Appeal Division's reasons not withstanding scrutiny so as to provide justified, transparent, intelligible basis for Appeal Division's interpretation — Federal Court rightly determining that legislative scheme for finding permanent resident inadmissible on ground of misrepresentation not dependent upon issuance, service of Act, s. 44 report, completion of inadmissibility hearing against another party — In present case, appellant could be properly subject to finding of inadmissibility, notwithstanding that appellant's father out of Canada, not yet subject of s. 44 report — Concerning "duty of candour", in context of Act, s. 40(1)(a), Appeal Division's reasons not withstanding scrutiny; Appeal Division failing to consider all surrounding circumstances — Federal Court wrongly concluding that Appeal Division reasonably concluded that appellant bearing no duty to disclose information about father's conviction — Appeal Division had to consider issue separate from issue of attribution of father's misrepresentation — Finally, with respect to cross-appeal, Federal Court's remarks about appellant's disclosure obligation obiter; not incorporated into judgement, not binding Appeal division on redetermination — Therefore, no need to vary Federal Court's judgment — Appeal, cross-appeal dismissed.

This was an appeal and a cross-appeal from a Federal Court decision allowing the respondent's application for judicial review of the decision of the Appeal Division of the Immigration and Refugee Board. It remitted the issue of the appellant's admissibility to the Appeal Division "for redetermination

by a different member in accordance with the reasons provided". After finding the decision of the Appeal Division to be unreasonable, the Federal Court went on to provide its reasons for how it would resolve the duty of candour question for the benefit of any further proceedings. The respondent cross-appealed asking that the judgment of the Federal Court be varied to strike out the requirement that the redetermination be "in accordance with the reasons provided" by the Federal Court. The principal issue raised on this appeal was whether a misrepresentation of a material fact made by a principal applicant on an application for permanent residence can be attributed to an accompanying dependant as an "indirect" misrepresentation of a material fact within the meaning of paragraph 40(1)(a) of the Immigration and Refugee Protection Act rendering the accompanying dependant inadmissible.

The appellant is a permanent resident of Canada. His father was convicted in India of various offences under the Indian Penal Code in relation to the murder of an individual in India and was sentenced to life imprisonment. Afterwards, the appellant's father applied for permanent residence in Canada as a member of the family class. In his application for permanent residence, the appellant's father listed his wife and the appellant as accompanying dependants. Subsequently, while his father was on parole, the appellant and his parents were landed as permanent residents of Canada. On his application for permanent residence, and subsequently at the time of landing, the appellant's father failed to disclose that he had been arrested, charged and convicted of various offences in India. Later, a report was prepared in which an immigration officer expressed the opinion that the appellant was inadmissible pursuant to paragraph 40(1)(a) of the Act. The report was referred to the Immigration Division which found that the appellant was not inadmissible for misrepresentation. This decision was unsuccessfully appealed to the Appeal Division. The respondent then applied for judicial review of the Appeal Division's decision.

The Federal Court stated that, but for his father's misrepresentation, the appellant would not have been admitted to Canada so that his status as a permanent resident was predicated upon a lie, albeit a lie told by his father. This lie directly induced an error in the administration of the Act. The Federal Court concluded that the Appeal Division's interpretation of the legislative provision at issue appeared to be predicated on the assumption that the appellant could only be found inadmissible if his father was first subject to an inadmissibility hearing. This interpretation would, in the Federal Court's view, defeat the object of the legislation. The Federal Court also considered the Appeal Division's treatment of subsection 42(1) of the Act that it would lead to an absurd result if the appellant were found to be inadmissible when his father was not subject to an admissibility hearing; it rejected the Appeal Division's interpretation. The Federal Court then went on to provide obiter comments on the "duty of candour" finding that the circumstances did not "compel the conclusion" that the appellant was subject to a duty to disclose his father's criminal history on the application he signed or when they were examined at the port of entry. Only the principal applicant was required to disclose whether any of the dependant applicants had such a history. It was therefore within the range of defensible outcomes on the facts and the law for the Appeal Division to conclude that the appellant bore no duty of candour to inform on his father at the port of entry.

The principal issues were whether the Federal Court erred in finding that it was unreasonable for the Appeal Division to find that the father's misrepresentation was not attributable to the appellant as an "indirect" misrepresentation; and whether the Federal Court erred in its treatment of the "duty of candour question".

Held, the appeal and cross-appeal should be dismissed.

The Appeal Division's reasons did not withstand scrutiny so as to provide a justified, transparent and intelligible basis for the Appeal Division's interpretation. The Federal Court rightly determined that "the legislative scheme for finding a permanent resident inadmissible on the ground of misrepresentation is not dependent upon the issuance and service of a section 44 report and

completion of an inadmissibility hearing against another party. In the present case, this meant that the appellant could be properly subject to a finding of inadmissibility, notwithstanding that his father was out of Canada and had not yet been the subject of a section 44 report. The Federal Court also rightly found that the Appeal Division's interpretation would result in the situation where family members would not be subject to removal proceedings when, after landing, the principal applicant leaves Canada and remains outside of Canada in order to avoid an admissibility hearing. This result would undermine the integrity of the immigration process and would be an absurd result.

As for the application of the implied exclusion rule, the Appeal Division relied on the Immigration Division's reasoning that because paragraph 40(1)(b) of the Act specifies that a permanent resident or foreign national is inadmissible "for being or having been sponsored by a person who is determined to be inadmissible for misrepresentation", and paragraph 40(1)(a) does not contain similar language, Parliament evidenced its intent that it did not intend to attach the inadmissibility of a principal applicant for misrepresentation to all landed dependants. The difficulty with this reasoning was that it was based upon the assumption that, correctly interpreted, paragraph 40(1)(a) does not attribute a principal applicant's misrepresentation to an accompanying dependant as an "indirect" misrepresentation of a material fact – the very question of statutory interpretation the Appeal Division had to answer. In this circumstance, the implied exclusion rule of statutory interpretation had no application—in effect the Appeal Division assumed a meaning of paragraph 40(1)(a) and then relied upon paragraph 40(1)(b) to confirm its assumption.

With respect to the question certified by the Federal Court, the reasons of the Appeal Division did not permit the certified question to be answered by the Court conducting a reasonableness review. In the circumstances of this case, if the Court were to conduct the required textual, contextual and purposive analysis in order to answer the certified question, the Court would wholly excise and supplant the reasons of the Appeal Division. This would be a correctness review in circumstances where Parliament entrusted to the Appeal Division, not this Court, responsibility for interpreting the Act.

Concerning the Federal Court's treatment of the "duty of candour question", in the context of paragraph 40(1)(a) of the Act, the requirement of candour is invoked to assess the "withholding" aspect of the provision. The Appeal Division found the circumstances did not rise to the level of withholding a material fact that induced or could have induced an error in the administration of the Act. The reasons given by the Appeal Division again did not withstand scrutiny to provide a justified, transparent and intelligible basis for its conclusion and moreover failed to consider all of the surrounding circumstances. The Federal Court wrongly concluded that the Appeal Division reasonably concluded that the appellant bore no duty to disclose information about his father's conviction. It remained an issue for the Appeal Division to consider separate from the issue of attribution of the father's misrepresentation.

Finally, as to the cross-appeal, the Federal Court's remarks about the disclosure obligation of the appellant were obiter and were not incorporated into the judgment. They will not bind the Appeal Division on the redetermination. Therefore, there was no need to vary the judgment of the Federal Court.

STATUTES AND REGULATIONS CITED

Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 11(1), 16(1), 40, 41, 42.

Immigration and Refugee Protection Regulations, SOR/2002-227, ss. 10, 51, 98(6), 117.

Penal Code (India).

CASES CITED

CONSIDERED:

McLean v. British Columbia (Securities Commission), 2013 SCC 67, [2013] 3 S.C.R. 895; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559; *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, [2018] 1 S.C.R. 83; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, (1998), 36 O.R. (3d) 418; *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708; *Bonnybrook Park Industrial Development Co. Ltd. v. Canada (National Revenue)*, 2018 FCA 136, 44 Admin. L.R. (6th) 71; *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, [2018] 1 S.C.R. 6; *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 S.C.R. 909; *Canada (Citizenship and Immigration) v. Yansane*, 2017 FCA 48, 26 Admin. L.R. (6th) 267.

REFERRED TO:

Merck Frosst Canada Ltd. v. Canada (Health), 2012 SCC 3, [2012] 1 S.C.R. 23; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Bodine v. Canada (Citizenship and Immigration)*, 2008 FC 848, 331 F.T.R. 200; *Baro v. Canada (Citizenship and Immigration)*, 2007 FC 1299, [2007] F.C.J. No. 1667 (QL).

APPEAL and CROSS-APPEAL from a Federal Court decision (2018 FC 306, [2018] 4 F.C.R. 267) allowing the respondent's application for judicial review of the decision of the Appeal Division of the Immigration and Refugee Board (2017 CanLII 64209) involving the appellant's inadmissibility to Canada. Appeal and cross-appeal dismissed.

APPEARANCES

Aleksander Stojicevic and *Mojan Farshchi* for appellant.

Cheryl D. Mitchell for respondent.

SOLICITORS OF RECORD

Maynard Kischer Stojicevic, Vancouver, for appellant.

Deputy Attorney General of Canada for respondent.

The following are the reasons for judgment rendered in English by

DAWSON J.A.:

[1] Paragraph 40(1)(a) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 renders a permanent resident or a foreign national inadmissible to Canada on the ground of misrepresentation when the permanent resident or foreign national "directly or indirectly" misrepresents or withholds "material facts relating to a relevant matter that induces or could induce an error in the administration of" the Act. The principal issue raised on this appeal is whether a misrepresentation of a material fact made by a principal applicant on an application for permanent residence can be attributed to an accompanying dependant as an "indirect" misrepresentation of a material fact within the meaning of paragraph 40(1)(a) of the Act rendering the accompanying dependant inadmissible. The issue arises in the following circumstances.

1. Factual background

[2] The appellant is not a Canadian citizen; he is a permanent resident of Canada.

[3] On October 21, 2005, the appellant's father was convicted in India of various offences under the Indian *Penal Code* in relation to the murder of Jaswinder Kaur Sidhu in India. The appellant's father was sentenced to life imprisonment.

[4] In January 2007, the appellant's father applied for permanent residence in Canada as a member of the family class and was sponsored by his daughter, the appellant's sister. In his application for permanent residence, the appellant's father listed his wife and the appellant as accompanying dependants. On May 4, 2008, while his father was on parole, the appellant and his parents were landed as permanent residents of Canada at the Vancouver International Airport. At the time of landing the appellant was 25 years old.

[5] On his application for permanent residence, and subsequently at the time of landing, the appellant's father failed to disclose that he had been arrested, charged and convicted of various offences under the Indian *Penal Code*. Specifically, in his Schedule 1 Background / Declaration form, the appellant's father was asked "Have you, or, if you are the principal applicant, any of your family members listed in your application for permanent residence in Canada, ever: been convicted of, or are you currently charged with, on trial for, or party to a crime or offence, or subject of any criminal proceedings in any country?" The father answered "No." This answer was untrue.

[6] It is admitted that the facts of the father's charge and conviction were material facts related to a relevant matter—admissibility to Canada—and that the father's untrue answer induced an error in the administration of the Act.

[7] There is no evidence that the appellant made any direct misrepresentation of a material fact in his own Schedule 1 Background / Declaration form, or at the time of landing.

[8] On February 5, 2015, an immigration officer prepared a report to the Minister under subsection 44(1) of the Act in which the officer expressed the opinion that the appellant was inadmissible pursuant to paragraph 40(1)(a) of the Act for "directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act." The report was based on the following information:

The appellant:

- is not a Canadian citizen;
- became a permanent resident of Canada at Vancouver International Airport in May 2008;
- was an accompanying dependant of his father;

- the appellant's father is inadmissible to Canada because he "failed to disclose to the visa officer that he had been convicted of conspiracy to commit murder and kidnapping in India prior to his visa issuance"; and,

- the appellant "did not disclose and / or withheld information concerning his father's conviction, thereby inducing an error in the administration of the Immigration and Refugee Protection Act."

[9] A delegate of the Minister referred the report to the Immigration Division of the Immigration and Refugee Board of Canada. The Immigration Division found the appellant was not inadmissible for misrepresentation (File Number B5-01024).

[10] The Minister of Public Safety and Emergency Preparedness appealed the decision of the Immigration Division. The Immigration Appeal Division of the Immigration and Refugee Board of Canada dismissed the appeal (File Number VB6-02129 [*Sidhu v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2017 CanLII 64209 (I.R.B.)]).

[11] The Minister applied to the Federal Court for judicial review of the decision of the Appeal Division. For reasons indexed as [*Canada (Citizenship and Immigration) v. Sidhu*] 2018 FC 306, [2018] 4 F.C.R. 267, the application was granted and the Federal Court remitted the matter to the Immigration Appeal Division for redetermination on the terms explained below. In its reasons, after finding the decision of the Appeal Division to be unreasonable, the Court went on to provide its "reasons for how I would resolve the duty of candour question for the benefit of any further proceedings" (reasons, at paragraph 51).

[12] The judgment of the Federal Court allowed the Minister's application for judicial review of the decision of the Appeal Division and remitted the issue of the appellant's admissibility to the Appeal Division "for redetermination by a different member in accordance with the reasons provided". The Court certified the following question:

> Under paragraph 40(1)(a) of the *Immigration and Refugee Protection Act*, which reads: 'A permanent resident or a foreign national is inadmissible for

> misrepresentation **(a)** for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act' … is a permanent resident inadmissible for indirectly misrepresenting a material fact if they are landed as a dependent of a principal applicant who misrepresented material facts on his application for landing.

[13] This is an appeal from the judgment of the Federal Court. As well, the Minister cross-appeals, asking that the judgment of the Federal Court be varied to strike out the requirement that the redetermination be "in accordance with the reasons provided" by the Federal Court.

2. Standard of review

[14] It is well-settled law that on this appeal this Court is required to consider whether the Federal Court chose the correct standard of review and applied it properly to the decision of the Appeal Division.

[15] The Federal Court correctly selected the reasonableness standard of review. In order to apply this standard properly to the decision of the Appeal Division, the Federal Court was required to focus on whether the Appeal Division's interpretation of paragraph 40(1)(a) was an interpretation that the language of the Act "can reasonably bear." (*McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895, at paragraph 40). On this appeal, this Court is to "step into the shoes" of the Federal Court and focus on the decision of the Appeal Division (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, citing *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23, at paragraph 247).

[16] Before turning to the decision of the Appeal Division it is helpful to review the applicable legislative framework.

3. Legislative framework

[17] Before a foreign national enters Canada, the foreign national must apply to an officer for a visa or for any other document required by the regulations made under the

Act. The requested visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of the Act (subsection 11(1)). A person who makes an application under the Act "must answer truthfully all questions put to them for the purpose of the examination" (subsection 16(1)). This requirement of candour is an overriding principle of the Act and a principle that aids in the interpretation of various provisions of the Act.

[18] The duty of candour is highlighted in section 51 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227. When a foreign national seeks to become a permanent resident section 51 of the Regulations requires:

> **Examination — permanent residents**
>
> **51** A foreign national who holds a permanent resident visa and is seeking to become a permanent resident must, at the time of their examination,
>
> (a) inform the officer if
>
> (i) the foreign national has become a spouse or common-law partner or has ceased to be a spouse, common-law partner or conjugal partner after the visa was issued, or
>
> (ii) material facts relevant to the issuance of the visa have changed since the visa was issued or were not divulged when it was issued; and
>
> (b) establish that they and their family members, whether accompanying or not, meet the requirements of the Act and these Regulations. [Underlining added.]

[19] The requirement of candour also underlies paragraph 40(1)(a) of the Act which renders a permanent resident or a foreign national inadmissible for misrepresentation. More specifically, paragraph 40(1)(a) provides:

> **Misrepresentation**
>
> **40 (1)** A permanent resident or a foreign national <u>is inadmissible for misrepresentation</u>
>
> **(a)** <u>for directly or indirectly misrepresenting or withholding material facts</u> relating to a relevant matter that induces or could induce an error in the administration of this Act. [Underlining added.]

[20] A further inadmissibility provision is found in section 41 of the Act, which renders a foreign national inadmissible for contravening any provision of the Act. Permanent

residents only become inadmissible under this provision if they fail to meet the physical presence requirements, or fail to comply with any prescribed conditions:

> **Non-compliance with Act**
>
> **41** A person is inadmissible for failing to comply with this Act
>
> **(a)** in the case of a foreign national, through an act or omission which contravenes, directly or indirectly, a provision of this Act; and
>
> **(b)** in the case of a permanent resident, through failing to comply with subsection 27(2) or section 28. [Underlining added.]

[21] Section 42 of the Act deals with the treatment of foreign national family groups. Generally, if a foreign national is an accompanying family member of an inadmissible person, that foreign national is inadmissible on the grounds of an inadmissible family member. An exception exists for foreign nationals seeking temporary resident status:

> **Inadmissible family member**
>
> **42 (1)** A foreign national, other than a protected person, is inadmissible on grounds of an inadmissible family member if
>
> **(a)** their accompanying family member or, in prescribed circumstances, their non-accompanying family member is inadmissible; or
>
> **(b)** they are an accompanying family member of an inadmissible person.
>
> **Exception**
>
> **(2)** In the case of a foreign national referred to in subsection (1) who is a temporary resident or who has made an application for temporary resident status or an application to remain in Canada as a temporary resident,
>
> **(a)** the matters referred to in paragraph (1)(a) constitute inadmissibility only if the family member is inadmissible under section 34, 35 or 37; and
>
> **(b)** the matters referred to in paragraph (1)(b) constitute inadmissibility only if the foreign national is an accompanying family member of a person who is inadmissible under section 34, 35 or 37. [Underlining added.]

[22] Because the appellant's family applied for permanent residence as members of the family class sponsored by the appellant's sister, it is relevant to note that section 117 of the Regulations defines the circumstances in which a foreign national is a member of the family class. For the purpose of this appeal only subsection 117(1) is relevant:

Family class

117 (1) A foreign national is a member of the family class if, with respect to a sponsor, the foreign national is

(a) the sponsor's spouse, common-law partner or conjugal partner;

(b) a dependent child of the sponsor;

(c) the sponsor's mother or father;

(d) the mother or father of the sponsor's mother or father;

(e) [Repealed, SOR/2005-61, s. 3]

(f) a person whose parents are deceased, who is under 18 years of age, who is not a spouse or common-law partner and who is

(i) a child of the sponsor's mother or father,

(ii) a child of a child of the sponsor's mother or father, or

(iii) a child of the sponsor's child;

(g) a person under 18 years of age whom the sponsor intends to adopt in Canada if

(i) the adoption is not being entered into primarily for the purpose of acquiring any status or privilege under the Act,

(ii) where the adoption is an international adoption and the country in which the person resides and their province of intended destination are parties to the Hague Convention on Adoption, the competent authority of the country and of the province have approved the adoption in writing as conforming to that Convention, and

(iii) where the adoption is an international adoption and either the country in which the person resides or the person's province of intended destination is not a party to the Hague Convention on Adoption

(A) the person has been placed for adoption in the country in which they reside or is otherwise legally available in that country for adoption and there is no evidence that the intended adoption is for the purpose of child trafficking or undue gain within the meaning of the Hague Convention on Adoption, and

(B) the competent authority of the person's province of intended destination has stated in writing that it does not object to the adoption; or

(h) a relative of the sponsor, regardless of age, if the sponsor does not have a spouse, a common-law partner, a conjugal partner, a child, a mother or father, a relative who is a child of that mother or father, a relative who is a child of a child of that mother or father, a mother or father of that mother or father or a relative who is a child of the mother or father of that mother or father

(i) who is a Canadian citizen, Indian or permanent resident, or

> **(ii)** whose application to enter and remain in Canada as a permanent resident the sponsor may otherwise sponsor.

[23] The appellant could not be sponsored for permanent residence by his sister because he did not meet the definition of a member of the family class. His eligibility was dependent on his father's application and the appellant's ability to accompany his father as a dependant.

[24] Finally, section 10 of the Regulations deals with the form and content of applications. Of relevance is subsection 10(3):

> **10 …**
>
> **Application of family members**
>
> **(3)** The application is considered to be an application made for the principal applicant and their accompanying family members.

[25] Having briefly reviewed the legislative framework, I now turn to the decision of the Appeal Division. As the Appeal Division directed itself to the issue of whether the Immigration Division had committed an error by finding the appellant was not a person described by paragraph 40(1)(a) of the Act, it is helpful to begin with the lengthier reasons of the Immigration Division.

4. The decisions of the Immigration Division and the Immigration Appeal Division

A. The decision of the Immigration Division

[26] The question posed by the Immigration Division was whether the appellant was "responsible for misrepresentations made by his father". The Immigration Division answered that question in the negative, finding that the appellant was responsible only for the representations made in his own Schedule 1 Background / Declaration form.

[27] The Immigration Division began its analysis by rejecting the Minister's submission that since the appellant was dependent on his father's application, the information contained in his father's application was equally relied upon by the appellant for the processing of his application for permanent residence. The Immigration Division found that none of the case law relied upon by the Minister went so far as to hold that a

permanent resident is responsible for misrepresentations made by another family member that do not relate to the permanent resident's own admissibility. The Immigration Division also rejected the Minister's reliance on paragraph 42(1)(b) of the Act. The Minister had argued that this provision evidenced Parliament's intent that family units remain intact and that inadmissibility of a principal applicant or inadmissibility of an accompanying dependant would result in the inadmissibility of everyone in the family group. In the view of the Immigration Division, section 42 shows Parliament's intent "that family units should remain intact if any inadmissibility of one family member is discovered before any of the family members are landed". (reasons, at paragraph 14).

[28] The Immigration Division acknowledged that there was case law to support the proposition that in some circumstances a person is obliged by paragraph 40(1)(a) of the Act to spontaneously disclose unsolicited information during an examination. However, the Immigration Division found nothing in the surrounding circumstances of the appellant's landing that created a duty on him to spontaneously disclose to the examining officer that his father had a criminal conviction in India.

[29] Finally, the Immigration Division applied the tool of statutory interpretation known as the implied exclusion rule. This rule was said to apply "whenever the legislature sets out some but not all parts of a category or class, or mentions some things but fails to mention others that are comparable. A partial enumeration of like things is meant to be exhaustive, and anything left off the list is by implication meant to be excluded." (reasons, at paragraph 53). The Immigration Division reasoned that because paragraph 40(1)(b) of the Act provides that a permanent resident or foreign national is inadmissible for misrepresentation "for being or having been sponsored by a person who is determined to be inadmissible for misrepresentation", and similar language is not found in paragraph 40(1)(a), Parliament did not intend to attach the inadmissibility of a principal applicant for misrepresentation to all landed dependants.

[30] Further examples were said to be found in section 42 of the Act which is said to attach the inadmissibility of one family member to all others in the case of foreign

nationals, and in subsection 98(6) of the Regulations “which attaches the admissibility of landed family members to the admissibility of the principal applicant in the entrepreneur class.” (reasons, at paragraph 57).

B. The decision of the Appeal Division

[31] On the appeal from the decision of the Immigration Division the Appeal Division directed itself to the question of whether the Immigration Division had erred by finding that the appellant is not a person described by paragraph 40(1)(a) of the Act.

[32] After setting out the provision, the Appeal Division noted that a foreign national or permanent resident can be found to be inadmissible for misrepresentation even in the absence of an intent to mislead or misrepresent, and that a misrepresentation takes place if it averts a line of inquiry into inadmissibility. This said, in the view of the Appeal Division the determinative issue was whether the appellant had an obligation to disclose information about his father’s criminality. The Appeal Division found that “it would lead to an absurd result if the appellant w[as] found inadmissible when the principal applicant who had an obligation to disclose information about his credibility is not subject to an admissibility hearing. In such circumstances, even s. 42(1)(b) of the Act would not apply to the appellant as a foreign national because his father has not been found inadmissible” (reasons, at paragraph 16, footnote omitted).

[33] The Appeal Division rejected the submission that the inclusion of the word “indirect” in paragraph 40(1)(a) “applies to a situation such as this one where the [appellant] did not provide anything factually untrue or misleading in his application or examination for landing” (reasons, at paragraph 17).

[34] The Appeal Division went on to find the Immigration Division’s analysis of the legislative intent of paragraph 40(1)(a), based on the implied exclusion rule, to be persuasive.

[35] Finally, the Appeal Division found that the duty of candour did not extend so far as to apply in the circumstances of the appellant. While evidence of some sort of tacit agreement or conspiracy among family members to withhold information in order to

avoid a finding of inadmissibility would “likely compel the [appellant] to disclose his father’s criminality”, the appellant testified he did not know the information in his father’s form, he was not present when his father was interviewed in Vancouver “and there is no evidence to support the notion that [the appellant] knew or should have known that [his father’s criminality] was material” (reasons, at paragraph 18).

[36] In the view of the Appeal Division, there was no basis on which to conclude that the appellant knew or ought to have known that he had a personal duty to provide information about his father’s criminality in the process of becoming a permanent resident. Nor could the Appeal Division conclude that the appellant had any intention to withhold such information.

5. The decision of the Federal Court

[37] After briefly describing some of the arguments made by the parties, the Federal Court noted that the goal of paragraph 40(1)(a) “is to ensure that applications provide ‘complete, honest and truthful information…’ and that ‘full disclosure is fundamental to the proper and fair administration of the immigration scheme’”. The objective of the legislation is to deter misrepresentations and maintain integrity of the immigration process (reasons, at paragraph 33). The Court noted that the provision had been interpreted as being broad in scope, and that it did not draw a distinction between innocent and deliberate misrepresentations.

[38] The Federal Court stated that but for his father’s misrepresentation, the appellant would not have been admitted to Canada so that his status as a permanent resident was predicated upon a lie, albeit a lie told by his father (reasons, at paragraph 35). This lie directly induced an error in the administration of the Act because the father’s murder conviction was a material fact that would have led to the family being denied landing (reasons, at paragraphs 35 and 37).

[39] The Federal Court concluded that the Appeal Division’s interpretation of the legislative provision at issue appeared to be predicated on the assumption that the appellant could only be found inadmissible if his father was first subject to an

inadmissibility hearing. This interpretation would, in the view of the Federal Court, defeat the object of the legislation. The “legislative scheme for finding a permanent resident inadmissible on the ground of misrepresentation is not dependent upon the issuance and service of a section 44 report and completion of an inadmissibility hearing against another party.” (reasons, at paragraph 39).

[40] In the view of the Federal Court, the interpretation adopted by the Appeal Division would undermine one of the objectives of the Act and “allow individuals who have benefitted from the misrepresentation of a material fact, albeit by another party, to remain in Canada.” The Federal Court concluded this would be an absurd result (reasons, at paragraph 41). Thus, the fact that the principal applicant, the appellant’s father, was not in Canada did not preclude a finding that the appellant was inadmissible on the basis of the misrepresentation of the principal applicant (reasons, at paragraph 43).

[41] The Federal Court then turned to consider the Appeal Division’s treatment of subsection 42(1) of the Act. The Appeal Division had found that it would lead to an absurd result if the appellant was found to be inadmissible when his father was not subject to an admissibility hearing. In this circumstance the Appeal Division had concluded that “even s. 42(1)(b) of the Act would not apply to the appellant as a foreign national because his father has not been found inadmissible” (reasons, at paragraph 16, footnote omitted). The Federal Court rejected this interpretation because a finding of inadmissibility under paragraph 42(1)(b) is “not dependent upon the issuance and service of a section 44 report and inadmissibility determination against the father.” (reasons, at paragraph 47).

[42] The Court then concluded its analysis on misrepresentation as follows [at paragraphs 48–52]:

> In the present matter, an inadmissibility report under subsection 44(1) was issued against the respondent for committing a material misrepresentation pursuant to paragraph 40(1)(a). It stated that the respondent’s father was “inadmissible to Canada as he failed to disclose to the visa officer that he had been convicted of conspiracy to commit murder and kidnapping in India.”

> Paragraph 42(1)(b) provides that a foreign national is inadmissible on the grounds of an inadmissible family member if they are an accompanying family member of an inadmissible person. There is no requirement that an inadmissibility report be prepared pursuant to subsection 44(1) of the IRPA in order to find someone inadmissible pursuant to paragraph 42(1)(b) of the IRPA. If the principal applicant is inadmissible, the dependant is inadmissible.
>
> The IAD's finding to the effect that the respondent could only be found to be inadmissible if the father was subject to an inadmissibility hearing pursuant to subsection 44(2) of the IRPA, after the preparation of an inadmissibility report under subsection 44(1) of the IRPA, is unreasonable. The IAD's finding that the father's misrepresentation was not attributable to the respondent as an "indirect" misrepresentation was also unreasonable.
>
> While these conclusions are sufficient to dispose of the application, I think it may be helpful to provide my reasons for how I would resolve the duty of candour question for the benefit of any further proceedings.

[43] The Federal Court then went on to provide *obiter* comments on the "duty of candour". The issue appears to have arisen because the Minister argued that the appellant was obliged by a duty of candour to disclose his father's criminal history. This duty was said to arise because the appellant relied on the information provided by his father as the principal applicant in the permanent residence application and because the appellant was a dependant as an accompanying person on his father's application for permanent residence.

[44] The Federal Court framed the issue to be decided as "the extent to which the duty of candour compels an applicant to voluntarily share information as a dependant of the principal applicant when he is not directly asked to provide that information" (reasons, at paragraph 66). The parties agreed before the Federal Court that one must have regard to all of the surrounding circumstances to decide whether an applicant has failed to comply with the duty of candour.

[45] The Federal Court described the surrounding circumstances in this case to include:

- The appellant was an adult when the applications for visas were completed (age 23) and at the time of entry (age 25).

- The appellant was aware of his father's conviction and jail sentence, and that at the time of entry his father was on parole from a sentence of life imprisonment.

- The appellant believed his father to be innocent and that he would ultimately be absolved.

- The appellant did not know what was in the Schedule 1 Background / Declaration form he completed in India. While he signed the form, it was prepared by travel agents and was in English. He signed it on his father's instruction.

- At the Vancouver Airport he was given a form with questions in the Punjabi language to be answered by ticking off "yes" or "no". He answered these questions to the best of his knowledge. One question asked whether he had committed any criminal activity in India, or had been arrested, and he answered this question truthfully. He did not know how his father had answered the question, as they were examined separately, and he did not ask his father. He was not asked by an immigration officer whether his father had been charged, convicted or imprisoned for any criminal offences (reasons, at paragraphs 67 to 69).

[46] The Federal Court found that the circumstances did not "compel the conclusion" that the appellant was subject to a duty to disclose his father's criminal history on the application he signed or when they were examined at the port of entry (reasons, at paragraph 72). Only the principal applicant was required to disclose whether any of the dependant applicants had such a history (reasons, at paragraph 74). It was therefore within the range of defensible outcomes on the facts and the law for the Appeal Division to conclude that the appellant bore no duty of candour to inform on his father at the port of entry. However, the Federal Court did reject the Appeal Division's conclusion that in order for a duty of candour to arise there needed to be some evidence establishing there was "a tacit agreement or conspiracy by the [appellant] and his father." (reasons, at paragraph 75).

6. The issues to be decided

[47] In my view, three issues are raised on this appeal:

1. Did the Federal Court err in finding that it was unreasonable for the Appeal Division to find that the father's misrepresentation was not attributable to the appellant as an "indirect" misrepresentation?

2. Did the Federal Court err in its treatment of the "duty of candour question"?

3. What is the appropriate remedy?

7. Did the Federal Court err in finding that it was unreasonable for the Appeal Division to find that the father's misrepresentation was not attributable to the appellant as an "indirect" misrepresentation?

A. Relevant legal principles

[48] The Appeal Division was required to decide whether the Immigration Division erred in finding that the appellant was not a person described by paragraph 40(1)(a) of the Act. At the heart of this exercise was the Appeal Division's interpretation of its home statute—an exercise in which, under reasonableness review, the Appeal Division is entitled to deference.

[49] To accord this deference, "a reviewing court must 'stay close to the reasons given by the [T]ribunal' and pay them 'respectful attention'". The Tribunal's reasons "provide the basis for determining why it reached the decision it did and whether that decision is within the range of outcomes 'defensible in respect of the facts and law'" (*Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, [2018] 1 S.C.R. 83, at paragraph 36).

[50] The question for a reviewing court "is whether the tools of statutory interpretation—including the text, context and purpose of the provision—can reasonably support the Tribunal's conclusion." If faced with competing reasonable interpretations,

“a reviewing court should refrain from interfering where the Tribunal, with the benefit of its expertise, has ‘resolve[d] a statutory uncertainty by adopting any interpretation that the statutory language can reasonably bear’” (*Williams Lake*, at paragraph 108).

[51] As for the tools of statutory interpretation, it is well settled that “[t]oday there is only one principle or approach [to statutory interpretation], namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament” (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at paragraph 21).

[52] This principle has been often restated by the Supreme Court, including in the following terms in *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at paragraph 10:

> It has been long established as a matter of statutory interpretation 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”: see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole. [Underlining added.]

B. Application of the relevant legal principles to the decision of the Appeal Division

[53] The Appeal Division put forward two reasons for its interpretation of paragraph 40(1)(a): first, it would lead to an absurd result if the appellant was found to be inadmissible when the principal applicant was not subject to an admissibility hearing; and, second, the Immigration Division’s analysis, based on the implied exclusion rule of statutory interpretation, was persuasive. The Appeal Division gave no reasons for its bare conclusion that the use of the word “indirect” did not render the section applicable when the appellant did not provide anything factually untrue or misleading in his application or examination for landing (reasons, at paragraph 17).

[54] In my view, the Appeal Division's reasons do not withstand scrutiny so as to provide a justified, transparent and intelligible basis for the Appeal Division's interpretation. I reach this conclusion for the following reasons.

[55] First, I agree with the Federal Court that "the legislative scheme for finding a permanent resident inadmissible on the ground of misrepresentation is not dependent upon the issuance and service of a section 44 report and completion of an inadmissibility hearing against another party" (reasons, at paragraph 39). This requirement cannot be read into the legislation.

[56] In the present case, this means that the appellant may be properly subject to a finding of inadmissibility, notwithstanding that his father is out of Canada and has not yet been the subject of a section 44 report.

[57] I further agree with the Federal Court that the Appeal Division's interpretation would result in the situation where family members would not be subject to removal proceedings when, after landing, the principal applicant leaves Canada and remains outside of Canada in order to avoid an admissibility hearing. This result would undermine the integrity of the immigration process and would be an absurd result.

[58] As for the application of the implied exclusion rule, the Appeal Division relied on the Immigration Division's reasoning that because paragraph 40(1)(b) of the Act specifies that a permanent resident or foreign national is inadmissible "for being or having been sponsored by a person who is determined to be inadmissible for misrepresentation", and paragraph 40(1)(a) does not contain similar language, Parliament evidenced its intent that it did not intend to attach the inadmissibility of a principal applicant for misrepresentation to all landed dependants. The Immigration Division referred to two other provisions to buttress this argument.

[59] The difficulty with this reasoning is that it is based upon the assumption that, correctly interpreted, paragraph 40(1)(a) does not attribute a principal applicant's misrepresentation to an accompanying dependant as an "indirect" misrepresentation of a material fact. This is the very question of statutory interpretation that the Appeal

Division was required to answer. In this circumstance, the implied exclusion rule of statutory interpretation had no application—in effect the Appeal Division assumed a meaning of paragraph 40(1)(a) and then relied upon paragraph 40(1)(b) to confirm its assumption.

[60] Thus, the reasons given by the Appeal Division for its interpretation do not withstand scrutiny. It follows that the decision of the Appeal Division fails to meet the indicia of reasonableness enumerated in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190.

C. The certified question

[61] What then is the proper course for this Court to pursue, particularly in response to the question certified by the Federal Court?

[62] The Supreme Court has at times instructed reviewing courts that deference to administrative decision makers requires "a respectful attention to the reasons offered or which could be offered in support of a decision" (emphasis added). Thus, a "court must first seek to supplement [reasons] before it seeks to subvert them" (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at paragraph 12 (emphasis in the original)).

[63] However, as my colleague Justice Stratas wrote (in dissent), "[a] reviewing court is to *review* the work of an administrator, not *do* the work of an administrator" (*Bonnybrook Park Industrial Development Co. Ltd. v. Canada (National Revenue)*, 2018 FCA 136, 44 Admin. L.R. (6th) 71, at paragraph 83 (emphasis in the original)).

[64] Justice Stratas' comment follows the admonition of the majority of the Supreme Court in *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, [2018] 1 S.C.R. 6, at paragraph 24, that the "requirement that respectful attention be paid to the reasons offered, or the reasons that could be offered, does not empower a reviewing court to ignore the reasons altogether and substitute its own". The Supreme Court went on to adopt and then reformulate the following passage:

> The direction that courts are to give respectful attention to the reasons "which could be offered in support of a decision" is not a "carte blanche to reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result" …. [para. 54, quoting *Petro-Canada v. Workers' Compensation Board (B.C.)*, 2009 BCCA 396, 276 B.C.A.C. 135, at paras. 53 and 56]

> In other words, while a reviewing court may supplement the reasons given in support of an administrative decision, it cannot ignore or replace the reasons actually provided. Additional reasons must supplement and not supplant the analysis of the administrative body. [Underlining added.]

[65] In the circumstances of this case, if this Court were to conduct the required textual, contextual and purposive analysis in order to answer the certified question, the Court would wholly excise and supplant the reasons of the Appeal Division. This would be a correctness review of the decision of the Appeal Division, in circumstances where Parliament has entrusted to the Appeal Division, not this Court, responsibility for interpreting the Act. In *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 S.C.R. 909, at paragraph 44, the Supreme Court confirmed that, despite the existence of a certified question, the appropriate standard of review remains reasonableness. Doing the analysis the Appeal Division failed to do would not be reasonableness review.

[66] Put another way, the reasons of the Appeal Division do not permit the certified question to be answered by this Court conducting a reasonableness review.

[67] It follows that I would remit the issue of misrepresentation to a differently constituted panel of the Appeal Division so that the Appeal Division may consider how paragraph 40(1)(a) is to be interpreted, and specifically whether a misrepresentation of a material fact by a principal applicant can be attributed to an accompanying dependant as an "indirect" misrepresentation. The Appeal Division will be assisted in this exercise if it chooses to consider the text, context and purpose of paragraph 40(1)(a).

[68] As the arguments before us reflect, the text of paragraph 40(1)(a) appears to be ambiguous. Must the permanent resident or foreign national personally make a misrepresentation, or may a misrepresentation committed by a principal applicant be attributed to an accompanying foreign national or permanent resident? The answer to

this question will require the Appeal Division to pay careful attention to the legislative context and purpose, a context that includes the legislative history and the scheme of the legislation as set out in these reasons, and a purpose that includes deterring misrepresentations and maintaining the integrity of the immigration process.

[69] I now turn to the next issue.

8. Did the Federal Court err in its treatment of the "duty of candour question"?

[70] As previously stated, the requirement of candour is an overriding principle of the Act.

[71] In the context of paragraph 40(1)(a) of the Act, the requirement of candour is invoked to assess the "withholding" aspect of the provision. This is a recognition that in certain circumstances there may be an obligation to disclose information in order to avoid a finding that a permanent resident or foreign national withheld material facts relating to a relevant matter that induces or could induce an error in the administration of the Act. It is necessary to consider the surrounding circumstances in order to determine if, in a particular case, the withholding of information is sufficient to render a permanent resident or foreign national inadmissible for misrepresentation (*Bodine v. Canada (Citizenship and Immigration)*, 2008 FC 848, 331 F.T.R. 200, at paragraph 42; *Baro v. Canada (Citizenship and Immigration)*, 2007 FC 1299, [2007] F.C.J. No. 1667 (QL), at paragraphs 15 and 17).

[72] The Appeal Division found the circumstances did not rise to the level of withholding a material fact that induced or could have induced an error in the administration of the Act because:

- There was no evidence of a tacit agreement or conspiracy to withhold information.
- There was "no evidence to support the notion" that the appellant should have known that his father's conviction was material.

- There was “no basis to conclude that the appellant knew or ought to have known that he had a personal duty to provide information”.

[73] In my view, the reasons given by the Appeal Division again do not withstand scrutiny to provide a justified, transparent and intelligible basis for its conclusion that the appellant was not obliged to provide information about his father’s criminal conviction because the Appeal Division failed to consider all of the surrounding circumstances. I reach this conclusion for the following reasons.

[74] First, I agree with the Federal Court that it was not necessary for there to be evidence of a tacit agreement or conspiracy in order to find that the appellant withheld a material fact. Circumstances that fall short of evidencing an agreement or conspiracy may, nonetheless, give rise to a requirement to disclose material facts.

[75] Second, in my view the Appeal Division erred by concluding there was “no evidence to support the notion” that the appellant should have known that his father’s criminal conviction was relevant. The appellant had signed a Schedule 1 Background / Declaration form in India that asked if he had been convicted of an offence. While he says that he did not understand the form because it was written for him in English, the same question was put to the appellant in the Punjabi language at the time of landing. This was evidence that, if considered by the Appeal Division, could have led it to conclude that the appellant knew or ought to have known that his father’s conviction, or criminal convictions generally, were a material fact. The Appeal Division erred by failing to consider this evidence.

[76] Next, the Appeal Division found that there was no basis to conclude that the appellant knew or ought to have known that he had a personal obligation to provide information. Again, the Appeal Division gave no reasons for this conclusion. A permanent resident or foreign national applying under the Act is obliged to comply with requirements of the Act even if not knowledgeable of the full extent of the legislative requirements.

[77] Finally, and importantly, nowhere in its reasons does the Appeal Division consider that the appellant was dependent on the information contained in his father's application for permanent residence. As set out in subsection 10(3) of the Regulations, the father's application was made for the appellant as an accompanying family member. Before the Appeal Division the Minister of Public Safety and Emergency Preparedness argued that the appellant had no "stand-alone right to immigrate to Canada" (reasons, at paragraph 12). This was a relevant circumstance that ought to have been considered by the Appeal Division.

[78] It follows from these reasons that I disagree with the conclusion of the Federal Court that the Appeal Division reasonably concluded that the appellant bore no duty to disclose information about his father's conviction. It remains an issue for the Appeal Division to consider separate from the issue of attribution of the father's misrepresentation.

[79] This is not to say that the Appeal Division must reach any particular conclusion about the appellant's duty to disclose information. However, in reaching its conclusion the Appeal Division must consider the entirety of the surrounding circumstances, which it failed to do in this case. The surrounding circumstances include the appellant's reliance on his father's application, the appellant's age, the fact that the appellant was questioned about his criminal record and the appellant's knowledge of his father's conviction. This is a somewhat unusual case. This is not a case where, unknown to the dependants, a principal applicant exaggerated a qualification or other fact in his or her application for permanent residence. The appellant knew of his father's conviction and that criminal convictions were of interest to the Canadian immigration officials.

9. The cross-appeal

[80] As explained earlier in these reasons, in addition to the appellant's appeal from the judgment of the Federal Court, the Minister cross-appeals, asking that the judgment be varied by striking out the requirement that the redetermination be "in accordance with the reasons provided".

[81] For the following reasons, the Minister's concern about the phrase "in accordance with the reasons provided" is not well founded.

[82] In *Canada (Citizenship and Immigration) v. Yansane*, 2017 FCA 48, 26 Admin. L.R. (6th) 267, this Court considered the effect of *obiter* findings on a redetermination hearing, and the effect of a court directing that reconsideration take place in accordance with its reasons.

[83] On the first point, this Court concluded that only directions or instructions explicitly stated in a judgment bind a subsequent decision maker. Comments or recommendations made by a court in its reasons need not be followed by a decision maker, although the decision maker would be well advised to consider such comments or recommendations (*Yansane*, at paragraph 19). On the second point, the Court found "it matters little whether the judgment allowing an application for judicial review contains such a statement" (*Yansane*, at paragraph 25).

[84] In the present case, the Federal Court's remarks about the disclosure obligation of the appellant were *obiter* and were not incorporated into the judgment. They will not bind the Appeal Division on the redetermination. There is, therefore, no need to vary the judgment of the Federal Court.

10. Conclusion

[85] It follows that I would:

i. dismiss the appellant's appeal from the judgment of the Federal Court;

ii. dismiss the cross-appeal; and

iii. not answer the certified question on the ground that the reasons of the Appeal Division do not permit the question to be answered on judicial review; rather, this Court would be required to excise and supplant the reasons of the Appeal Division in order to answer the question.

[86] For clarity, as a result of dismissing the appeal and the cross-appeal from the judgment of the Federal Court, the issue of the appellant's inadmissibility paragraph 40(1)(*a*) is remitted to the Appeal Division for redetermination by a different member.

WOODS J.A.: I agree.

RIVOALEN J.A.: I agree.