Federal Court  Cour fédérale

Date: 20180731

Docket: IMM-2261-17

Citation: 2018 FC 804

Ottawa, Ontario, July 31, 2018

PRESENT: The Honourable Mr. Justice Norris

BETWEEN:

BHARTIBEN GANDABHAI PATEL

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] The applicant, Bhartiben Gandabhai Patel, is a citizen of India. She became a permanent resident of Canada in July 2004 after being sponsored by her then husband, Kuntal Pathak. In June 2013, the Canada Border Services Agency [CBSA] issued a report alleging that the applicant is inadmissible to Canada due to misrepresentation. Specifically, the CBSA alleged that the applicant's marriage to Mr. Pathak was one of convenience entered into solely to obtain

permanent resident status in Canada, a material fact the applicant had failed to disclose in her application for permanent residence.

[2] The CBSA recommended referring the matter to an admissibility hearing. That hearing took place over several days in 2015. For reasons given orally on July 8, 2015, the Immigration Division [ID] concluded that the allegation had been established and that the applicant is inadmissible to Canada due to misrepresentation. A removal order was signed the same day.

[3] The applicant appealed this decision to the Immigration Appeal Division [IAD]. The appeal was heard on March 27, 2017. The IAD dismissed the appeal for written reasons dated April 26, 2017.

[4] The applicant now seeks judicial review of the decision of the IAD under section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. She contends that the hearing before the IAD was unfair because of deficiencies in the interpretation of her testimony. She also contends that there has been a breach of the principles of natural justice because defects in the recording of the IAD hearing leave her unable to challenge the IAD's negative credibility findings on judicial review.

[5] For the reasons that follow, this application for judicial review must be allowed. The IAD made pointed negative findings about the applicant's credibility and these findings necessarily figured in the rejection of her appeal. Most of the hearing before the IAD was not

recorded, including a substantial part of the applicant's testimony. This leaves me unable to determine whether the IAD's credibility findings are reasonable or not. The incompleteness of the recording thus deprives the applicant of a ground of review which is central to her case and this, in turn, means that the rules of natural justice are violated. Since this is sufficient to require a new hearing, it is not necessary for me to consider the adequacy of the interpretation at the IAD hearing.

II. BACKGROUND

[6] The applicant was born in India in 1975. She married her first husband, Kanaiyalal Patel, in June 1995. They had two children. The applicant's first husband passed away in November 2002.

[7] The applicant and Kuntal Pathak were married in Gandhinagar, India, on January 4, 2004, while the latter was visiting there from Canada. Mr. Pathak, who was a permanent resident of Canada, returned to Canada a short time later and began the sponsorship process for the applicant and her children. The applicant and her children landed in Canada on July 15, 2004. They have resided here ever since.

[8] Around early 2013, the CBSA began an investigation into the genuineness of the applicant's marriage to Mr. Pathak. As a result of this investigation, it came to light that Mr. Pathak had been married to another woman, Venus Pathak, before he married the applicant. Kuntal and Venus Pathak had apparently separated in July 2002. They divorced in October 2003. At the time of their divorce they had a six-month old child.

[9] In late December 2003, Kuntal and Venus Pathak and their child traveled to India together. Shortly after arriving, Mr. Pathak married the applicant. Apparently, the two had known each other since childhood, although they had last seen one another in 1992 or 1993. Meanwhile, Ms. Pathak married Bhavik Patel on January 19, 2004. (The CBSA suspected but could not establish that the applicant and Bhavik Patel are related.) Reportedly, the weddings took place in the same town, the two couples honeymooned in the same destination and both exchanged identical wedding gifts. A short time later, Kuntal and Venus Pathak and their child returned to Canada together.

[10] Mr. Pathak sponsored the applicant for permanent residence while Ms. Pathak, who was also a permanent resident of Canada, sponsored Mr. Patel. However, government records suggest that Mr. and Ms. Pathak continued to reside together in Canada during the sponsorship period, even purchasing a home together.

[11] The sponsorship application for the applicant and her children was successful and they arrived in Canada in July 2004. However, government records suggest that the applicant and Mr. Pathak never lived together here.

[12] On October 18, 2004, the applicant filed for a divorce from Mr. Pathak on grounds of adultery. The divorce was finalized on July 5, 2005.

[13] Meanwhile, Bhavik Patel became a permanent resident of Canada in September 2004. He and Ms. Pathak claim to have separated in January 2005. They divorced in August 2005.

[14] After they had divorced their respective second spouses, Kuntal and Venus Pathak reconciled and had a second child together.

[15] Several witnesses testified at the admissibility hearing on the applicant's behalf, including the applicant herself and Mr. Pathak. The ID found that the applicant is inadmissible to Canada due to misrepresentation primarily on the basis of three considerations which suggested that her marriage to Mr. Pathak was not genuine:

a) The respective address histories of the applicant and Mr. Pathak, which suggest that the two never lived together in Canada;
b) The haste with which their marriage was conducted in India and how short-lived it was once the applicant arrived in Canada; and
c) The ongoing relationship between Kuntal and Venus Pathak throughout the period when Mr. Pathak was married to the applicant.

[16] The ID made negative credibility findings with respect to both the applicant and Mr. Pathak on these and other key issues. While noting that witnesses had testified that they had seen the applicant and Mr. Pathak together and that other witnesses testified that they had been contacted by the couple, ostensibly in an effort to resolve problems in their relationship, the ID concluded that this evidence was insufficient to overcome the inference, supported by the three circumstances set out above, that the applicant's marriage to Mr. Pathak was not genuine. As a result, the ID found on a balance of probabilities that the applicant is inadmissible to Canada due to misrepresentation under section 40(1)(a) of the *IRPA*.

III. DECISION UNDER REVIEW

[17] The applicant appealed the determination that she is inadmissible to the IAD under section 63(3) of the *IRPA*.

[18] The IAD member identified the issues on appeal as "the legal validity of the Removal Order and whether there are sufficient humanitarian and compassionate grounds under section 67(1)(c) of the *IRPA* to allow the appeal." The IAD member decided both issues against the applicant.

[19] On this application for judicial review, the applicant has not challenged the conclusion that there were not sufficient humanitarian and compassionate grounds to allow the appeal.

[20] With respect to the validity of the removal order, the IAD member states that the ID member relied on three factors in rendering her decision: "The first of these was the address history of the appellant and her sponsor, which was found to establish that the couple never lived together. The second of these was the haste with which the marriage was carried out. The third was the short-lived marriage."

[21] While the ID member did indeed rely on these factors in deciding against the applicant, they are not exactly the three key circumstances she cited, as set out above. Be that as it may, the factors identified by the IAD member are relevant to the central issue of whether the

marriage between the applicant and Mr. Pathak was genuine or not. With respect to each of them and others, the IAD member concluded contrary to the applicant's position.

[22] With respect to the address histories suggesting that the applicant and Mr. Pathak had never resided together in Canada, the IAD member stated:

> The appellant's evidence does not overcome the respondent's thorough investigation and the documentary evidence pertaining to travel and places of residence, which establish that, on a balance of probabilities, the appellant did not reside with her sponsor as claimed. I agree with the finding of the ID, that the Minister's evidence in this regard is compelling and indicative of a marriage of convenience.

[23] As well, the IAD member found that a "genuine couple residing together would have generated bills and other documentation establishing their joint residence. It is not reasonable that the appellant, having had the opportunity to prepare for both the ID appeal [*sic*] (where the sponsor testified and could have provided documentary evidence as well) and for the IAD appeal, would not have one single document to sustain this claim."

[24] With respect to the circumstances of the marriage itself, the IAD member found that the marriage had been "entered into hastily and with little forethought." The applicant's actions confirmed that "she did not marry the man, but rather, she married the access to Canada that this man could provide to her and her children."

[25] The IAD member also found that, even once she was in Canada, the applicant's family life was never integrated into Mr. Pathak's. For example, the applicant never met Mr. Pathak's daughter from his first marriage, nor did the applicant's children meet their new stepsister.

Mr. Pathak's life with Venus Pathak continued on as if the applicant and her children did not exist.

[26] Finally, the IAD member noted that the applicant's marriage to Mr. Pathak was short-lived, with the divorce application being filed with the court on October 18, 2004. This was only a few months after the applicant and her children arrived in Canada.

[27] The applicant testified at the IAD appeal hearing. In addition to the findings supporting the validity of the removal order set out above, the IAD member made strongly worded negative findings about the applicant's credibility. The IAD member found that the applicant's testimony at the appeal "was evasive, circuitous and lacked credibility." The applicant "often failed to answer questions, providing tangential answers." In fact, the problems in her testimony were so pronounced that "it had to be confirmed that the quality of interpretation and cognitive capacity were not issues." For the IAD member, the applicant's inconsistent testimony on material points combined with her "persistently ambiguous responses or outright failure to respond to questions (which were posed to her in different ways, repeatedly, up to 5-6 times in certain instances), establish that, on a balance of probabilities, the [applicant] provided her testimony in this manner not due to any particular handicap, but rather, with the aim to conceal and confound." Unsurprisingly, the IAD member found that the applicant had "failed to meet her onus of resolving the concerns put forward by the ID and failed to establish that, on a balance of probabilities, she entered into a genuine relationship with the sponsor."

IV. ISSUE

[28] As stated above, the question of whether the rules of natural justice are violated because of the failure to record the IAD hearing completely is determinative of this application.

V. ANALYSIS

[29] To explain why I have concluded that a new hearing is required, I will address three questions:

a) What must the applicant show to establish a violation of the rules of natural justice?
b) What evidence may the court consider in determining whether there has been a violation of the rules of natural justice?
c) Has there been a violation of the rules of natural justice in this case?

A. *What must the applicant show to establish a violation of the rules of natural justice?*

[30] As will be discussed in detail below, only a small part of the IAD hearing on March 27, 2017, was recorded. As a result, the record before this court of what happened during that hearing is incomplete.

[31] The IAD is a court of record (*IRPA*, section 174) but it is not required by statute to record its proceedings (although it is standard practice for it to do so). In cases where there is no statutory right to a recording, "courts must determine whether the record before it allows it to properly dispose of the application for appeal or review. If so, the absence of a transcript will

not violate the rules of natural justice" (*Canadian Union of Public Employees, Local 301 v Montréal (City)*, [1997] 1 SCR 793 at para 81). On the other hand, if the court cannot dispose of an application before it because of the absence of a transcript, this will violate the rules of natural justice.

[32] The test for assessing the significance of gaps in the record of a proceeding under review was summarized succinctly by Justice Strickland in *Nweke v Canada (Citizenship and Immigration)*, 2017 FC 242 at para 34 [*Nweke*]: "the applicant must raise an issue that affects the outcome of the case that can only be determined on the basis of a record of what was said at the hearing such that the absence of a transcript prevents the Court from addressing the issue properly" (citing *Agbon v Canada (Minister of Citizenship and Immigration)*, 2004 FC 356 at para 3 [*Agbon*]; *Huszar v Canada (Citizenship and Immigration*, 2016 FC 284 at para 19 [*Huszar*]; and *Vergunov v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 584 (FCTD)). No question arises as to what standard of review applies because, by its very nature, this test is engaged for the first time before this court.

[33] The jurisprudence shows that the lack of a complete record of a witness's testimony in a case where that witness's credibility is important is of particular concern (see, for example, *Agbon* at para 4; *Ortiz v Canada (Citizenship and Immigration)*, 2005 FC 346 at paras 4-5; *Canada (Citizenship and Immigration) v Liang*, 2009 FC 955 at paras 24-25; *Bhuiyan v Canada (Citizenship and Immigration)*, 2010 FC 144 at paras 7-14; and *Nweke* at paras 45-47). On the other hand, where the decision being reviewed turns on the decision-maker's assessment of a more "objective" factor, it may be possible to address the issue properly on the available record

(see, for example, *Cletus v Canada (Citizenship and Immigration)*, 2008 FC 1378 at para 25 and *Huszar* at para 27) or to rectify a defect in the record with other evidence or information relating to that factor without distorting the judicial review process or being unfair to either side (see, for example, *Huszar* at paras 29-40).

B. *What evidence may the court consider in determining whether there has been a violation of the rules of natural justice?*

[34] It is evident from the test set out above that the record before the reviewing court is of crucial importance. A contention that the incompleteness of the record of the proceeding under review violates the rules of natural justice will succeed only if the record before the reviewing court is insufficient to permit it to dispose of a potential ground of review properly.

[35] The general rule is that the evidentiary record on an application for judicial review of an administrative decision is restricted to the record that was before the decision-maker (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at par 19 [*Access Copyright*]; *Canada (Citizenship and Immigration) v Sohail*, 2017 FC 995 at para 17 [*Sohail*]). The rationale for this rule is grounded in the respective roles of the administrative decision-maker and the reviewing court (*Access Copyright* at paras 17-18; *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at paras 17-18). The decision-maker decides the case on its merits. The reviewing court can only review the overall legality of what the decision-maker has done. This rationale also grounds the concerns that can arise when the record before the reviewing court does not contain all the evidence that was before the administrative decision-maker.

[36] The general rule admits of exceptions. One is that new evidence will be admissible on judicial review when it is necessary to demonstrate procedural defects that cannot be found in the evidentiary record of the administrative decision-maker (*Access Copyright* at para 20).

[37] Another exception to the general rule is that it may be permissible to file new evidence to rectify gaps in the record of the original proceeding (see, for example, *Huszar* at paras 22-28). I would suggest, however, that this exception ought to be permitted very sparingly, if at all, when the result of the proceeding under review turns on general credibility assessments. Generally speaking, in such circumstances, it is not realistic or fair to expect either party to be able to reproduce exactly what a witness said in the absence of a verbatim transcript. Even with respect to discrete credibility findings on specific issues, a record reconstructed after-the-fact for the purpose of advancing or responding to a judicial review application will, almost inevitably, be self-serving to some degree and the reviewing court will generally not be in a position to resolve disputes about the record. Further, counsel's notes of the hearing under review will generally not be helpful on matters of substance, either (cf. *Sohail* at paras 15-23).

[38] The parties filed the following affidavits on this application for judicial review:

a) The affidavit of the applicant sworn on December 11, 2017, describing problems the applicant states she had with the interpretation of her evidence at the IAD hearing;
b) The further affidavit of the applicant sworn on April 25, 2018, addressing inconsistencies in her evidence that the IAD member had commented upon in her reasons;
c) The affidavit of Gabriella Utreras Sandoval, student-at-law, sworn December 11, 2017, describing the applicant's counsel's efforts to obtain the recording of the IAD hearing and

what Ms. Utreras Sandoval heard when she listened to the recording once it was available. This affidavit includes as an exhibit the annotations produced by VIQ Player, the media program provided with the CDs of the hearing. These show the times the recording was started and stopped;

d) The further affidavit of Gabriella Utreras Sandoval sworn April 25, 2018, describing comparisons she made between the recording of the IAD hearing and the transcript of that hearing produced in the Certified Tribunal Record; and

e) The affidavit of Pat Bono sworn May 2, 2018. Mr. Bono was the CBSA Hearings Officer who appeared on behalf of the Minister of Public Safety and Emergency Preparedness at the IAD hearing. Attached as exhibits to his affidavit are a copy of the handwritten point-form notes Mr. Bono took during the testimony of the applicant and other witnesses as well as a typewritten version of these notes.

[39] There is little dispute between the parties about the admissibility of these affidavits so my conclusions on this point can be stated briefly. The two affidavits from Ms. Utreras Sandoval are admissible as evidence capable of demonstrating the defects in the recording of the IAD hearing. The affidavit of Mr. Bono is also admissible for this limited purpose since it could help to demonstrate the scope of what is omitted from the recording of the IAD hearing. However, it is not admissible as a substitute or proxy for the unrecorded testimony at that hearing. The further affidavit of the applicant sworn on April 25, 2018, is admissible for the limited purpose of demonstrating the scope of what was omitted from the recording of the IAD hearing but it is not admissible as a substitute or proxy for the applicant's testimony at that hearing. Finally, since I will not be addressing the alleged inadequacies of the interpretation at the IAD hearing, it is not

necessary to determine the admissibility of the applicant's affidavit sworn on December 11, 2017.

C. *Has there been a violation of the rules of natural justice in this case?*

[40] This question is the crux of this application for judicial review. To answer it, I will first explain what I find is missing from the record of the proceeding before the IAD. I will then explain why I find that the deficiencies of the record prevent me from addressing properly an important potential issue on judicial review.

(1) What is missing from the record?

[41] Ms. Utreras Sandoval states in her affidavit sworn on December 11, 2017, that the recording of the IAD hearing on March 27, 2017, released to counsel is approximately 18 hours long. She had the unenviable task of listening to the entire recording. Ms. Utreras Sandoval found that the majority of the recording seemed to be audio from an empty room with occasional noises in the background. Only the first three hours of the recording contain the applicant's hearing, and even then only parts of the hearing were recorded.

[42] Reading the transcript of the parts of the hearing that were recorded together with the affidavits from Mr. Utreras Sandoval and Mr. Bono, I find that what happened is the following.

[43] The hearing began shortly before 9:00 a.m. After some preliminary discussion, the applicant began her evidence-in-chief. This continued until approximately 10:15 a.m., when the

member stated that there would be a fifteen minute break. The proceeding was recorded up to this point. The recording device was turned off at 10:15:50 a.m., presumably when the break began.

[44] The hearing resumed at approximately 10:30 a.m. The applicant continued her evidence-in-chief for some time and then Mr. Bono began his cross-examination. None of this was recorded.

[45] The recording device was turned on between 11:33:32 a.m. and 11:36:56 a.m. It is difficult to tell but it appears that this is when what was meant to be an off-the-record exchange with the applicant's son, who was observing the hearing, took place. The proceeding had been interrupted to ask him about the trouble the applicant seemed to be having understanding the questions she was being asked. This exchange was recorded and transcribed. It appears to end when the member states "let me just put us on the record." This must have been when the member actually turned the recording device off rather than on at 11:36:56 a.m.

[46] Mr. Bono continued his cross-examination. This was not recorded. The hearing was adjourned for lunch at approximately 12:11 p.m. The recording device was turned on at 12:11:54 p.m. The transcript reflects the IAD member stating: "and we will return at 1:11 p.m." Minister's counsel replies: "1:11, okay. Thank you." It appears that the member actually turned the recording device on at this point when she meant to turn it off.

[47] The recording device continued to run over the lunch break. It was turned off at 1:16:49 p.m., when the hearing must have resumed. Mr. Bono completed his cross-examination of the applicant. This was not recorded. It is not possible to tell whether the IAD member asked the applicant any questions or not. Mr. Bono's notes reflect that counsel for the applicant asked some questions in re-direct examination. None of this testimony was recorded. Two additional witnesses – the applicant's daughter and a friend of the applicant's – also testified. None of their evidence was recorded.

[48] The recording device was turned on between 2:59:12 p.m. and 3:12:00 p.m., likely during a short break. The recording device was turned on again at 4:19:36 p.m., presumably when the proceeding ended. It stayed on overnight. The device finally stopped recording at 8:08:01 a.m. the next day. The oral submissions of the parties, if any, were not recorded. There is no indication in the record before me that the parties filed written submissions after the hearing.

[49] In short, nothing of substance was recorded after the break at 10:15 a.m. The only evidence recorded was the first part of the applicant's evidence-in-chief. We know from Mr. Bono's notes that there was more to the applicant's evidence-in-chief than was recorded. We also know from Mr. Bono's notes that the applicant was cross-examined at some length and was re-examined briefly. None of this was recorded, either.

[50] Ms. Utreras Sandoval estimated that only about one-eighth of the full-day hearing on March 27, 2017, was recorded. Taking into account that the hearing began shortly before

9:00 a.m. and concluded shortly before 4:30 p.m., and also taking breaks in the proceeding into account, I find that slightly less than one-quarter of the hearing was recorded.

(2) The implications for the applicant's ability to seek judicial review

[51] The Minister presented a compelling circumstantial case that the applicant's marriage to Kuntal Pathak was not genuine and that the applicant had entered into it solely for the purpose of securing status in Canada. Left unanswered, the Minister's evidence could very well support a finding on a balance of probabilities that the applicant is inadmissible due to misrepresentation. The evidence was not left unanswered, however. The applicant attempted to answer it twice: at the admissibility hearing before the ID and at the appeal before the IAD. She failed both times, in large part because of negative credibility findings. While the documentary evidence compiled by the Minister strongly suggests that the applicant's marriage to Kuntal Pathak was not genuine, the genuineness of a marriage is a highly personal matter. As this case demonstrates, credibility findings can be determinative of this issue.

[52] In dismissing the appeal, the IAD member made particularly strong negative findings about the applicant's credibility. Section 72(1) of the *IRPA* grants the applicant the right to seek leave to judicially review the IAD's decision. Leave having been granted, the applicant is entitled to ask me to determine whether the IAD member's credibility findings are reasonable. While that determination would be made on the deferential reasonableness standard, credibility findings are not meant to be immune from judicial review. However, I cannot tell on the record before me whether the IAD's credibility findings are reasonable or not. The portion of the applicant's evidence-in-chief that is available is not free of problems but those problems are not

so significant as to warrant on their own the IAD member's harsh assessment of the applicant's evidence. In any event, even if they were, the reasonableness of the IAD member's conclusions must be assessed against the whole of the applicant's evidence. I do not know what that evidence is because the recording is largely incomplete.

[53] The respondent urges me to presume that the applicant's evidence before the IAD was not materially different from her evidence before the ID, of which we have a complete transcript. If there were no material differences, the evidence before the ID would support the IAD's negative credibility findings. If there were material differences between the two, this would only provide more support for the IAD's findings. Either way, the transcript of the prior hearing gives me a sufficient basis to review the IAD member's conclusions (which, it goes without saying, the respondent contends are entirely reasonable).

[54] I cannot agree with this approach. The applicant testified in support of her appeal to the IAD. This was the testimony the IAD member had to evaluate. To substitute other testimony as the basis for a finding that the IAD member's conclusions are reasonable would undermine one of the primary rationales for the deference this court must show to the IAD's credibility findings – the original decision-maker's singular advantage of hearing the witness's evidence directly and being able to assess the witness's demeanor and other testimonial factors (*Imran v Canada (Citizenship and Immigration)*, 2016 FC 916 at para 21).

[55] Credibility was a central issue in this case. The record before this court does not permit me to determine whether the IAD member's findings are reasonable on the evidence before her

or not. The result is that I am prevented from dealing with an important issue arising in the application for judicial review. This is a violation of the rules of natural justice.

VI. CONCLUSION

[56] For these reasons, a new hearing before the IAD is required.

[57] The parties agreed that I could limit that hearing solely to the issue of inadmissibility due to misrepresentation under section 40(1)(a) of the *IRPA*. In my view, given that the applicant did not challenge the dismissal of the IAD appeal as it related to section 67(1)(c) of the *IRPA* (i.e. humanitarian and compassionate considerations), it would not be appropriate for her to have another opportunity to argue that ground of appeal unless she can demonstrate a material change in circumstances. Otherwise, the new hearing before the IAD shall be limited to the issue of inadmissibility due to misrepresentation.

[58] That there must be a new hearing is regrettable for many reasons. The time, effort and resources expended in the first IAD appeal have been thrown away. Further delay will prolong the uncertainty concerning the applicant's status in Canada. The result of the new hearing may very well be the same as before. However, the rules of natural justice require nothing less.

[59] The parties did not suggest any questions for certification. I agree that none arise.

JUDGMENT IN IMM-2261-17

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed.
2. The decision of the Immigration Appeal Division dated April 26, 2017, is set aside and the matter is remitted for reconsideration by a differently constituted panel.
3. Unless the applicant can demonstrate a material change in circumstances relating to section 67(1)(c) of the *Immigration and Refugee Protection Act*, the new hearing shall be limited solely to the issue of the applicant's inadmissibility due to misrepresentation under section 40(1)(a) of that Act.
4. No question of general importance is stated.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Aris Daghighian	FOR THE APPLICANT
Judy Michaely	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Green and Spiegel, LLP Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT