Federal Court  Cour fédérale

Date: 20120504

Docket: IMM-6316-11

Citation: 2012 FC 547

Ottawa, Ontario, May 4, 2012

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

ANDREA EUGENIA SABOGAL RIVEROS
ANGEL ANDRES VARGAS BUSTOS
EDILMA BUSTOS DE VARGAS

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 (Act) for judicial review of the decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board, dated 19 August 2011 (Decision), which refused the

Applicants' application to be deemed Convention refugees or persons in need of protection under sections 96 and 97 of the Act.

BACKGROUND

[2] The Principal Applicant is 32 years old and currently lives with her husband in Hamilton. The Secondary Applicants are her husband (Vargas) and mother-in-law (Bustos). All are citizens of Colombia who claimed protection because they are afraid of FARC guerrillas in that country.

[3] When the Principal Applicant lived in Colombia she worked as a commercial investments advisor for the Bank of Colombia (Bank). As such, she was responsible for serving the Bank's clients who had personal monthly incomes of more than 6 million pesos – approximately $3,000 – and corporations with investments worth more than 150 million pesos – approximately $80,000. The Bank restricted access to information about these clients to protect their confidentiality, but the Principal Applicant had access because of her duties.

[4] In March 2008, the Principal Applicant opened a business chequing account for Pabon Castro Barristers and Associates (Pabon). She was responsible for managing this account up to the time of her resignation from the bank in February 2009. In November 2008, the Principal Applicant learned that Pabon's legal representative, Margarita Pabon Castro (Castro), was connected to a money laundering operation involving a company called DMG.

[5] When the Bank learned that Pabon was connected to the money laundering operation, its legal department ordered that Pabon's account be cancelled. The Bank closed Pabon's account and issued a cheque to Castro for the outstanding balance – approximately 34 million pesos

(approximately $18,000) – on 12 December 2008. Castro was in detention at that time, so the Bank could not deliver the cheque to her. She was also Pabon's sole legal representative, so only she could access funds from the account.

[6] A man calling himself Jorge Tovar called the Principal Applicant at work and told her that his company, Tovar Legal Consulting (TLC), had been referred to conduct investments at the Bank. As she would later learn, "Jorge Tovar" was an alias of Commander Ruben of FARC's Urban Bloque (Ruben). The Principal Applicant arranged to meet Ruben at his office to determine if it was appropriate for the Bank to take on TLC as a client. On 29 December 2008, the Principal Applicant left her office to meet Ruben at the appointed time. While she was in the basement of her office building, Jorge Tovar approached her and asked what the outstanding balance was in Pabon's account. Although this man told the Principal Applicant he was going to be in charge of their relationship from that point on, she refused to give him confidential information about Pabon's account. The man left and the Principal Applicant notified the Bank's security about what had happened.

[7] After this event, the Applicant went on holiday to the United States of America (USA). She began her holiday on 30 December 2008 and intended to return to work on 2 February 2009. Bustos took a phone call from Ruben at the home the Applicants shared. Ruben told Bustos to look out the window, and when she did she saw a man standing at the street corner near the house holding a cellular phone. Ruben said that the best thing for the Principal Applicant to do was to cooperate and stop hiding or the she and Vargas would pay the consequences. He then hung up. The Applicants discussed this call and concluded that they were dealing with an upset client.

[8] Vargas took a second call at the Applicants' home on 30 January 2009. The caller asked for the Principal Applicant and identified himself as Jorge Tovar. Vargas told him the Principal Applicant was not at home, asked him to stop calling, and told him to contact the Bank if he needed anything. The caller shouted at Vargas, saying that the Principal Applicant should not hide anymore or he would be a widower. When she learned of this phone call, the Principal Applicant decided to inform her superiors at the Bank when she returned from her holiday on 2 February 2009.

[9] Ruben called the Principal Applicant at home on 1 February 2009. He identified himself as Commander Ruben and said she knew him as Jorge Tovar. He demanded that she tell him the balance in Pabon's account and send him the money. He reminded her that he was in charge and said that he would contact her again to tell her where to send the money. He also told her not to tell anyone or he would make it hard for her family. After this call, the Applicants disconnected their phone and concluded they were dealing with FARC rather than an upset client as they had earlier surmised.

[10] Ruben called the Principal Applicant on her cellular phone on 8 February 2009. He again demanded the money from the Pabon account. The Principal Applicant told him that the account was closed and only Pabon's legal representative or an authorized person could receive the balance. He told her he would show he was authorized, and he also demanded further information on the Bank's other clients. Ruben said the Principal Applicant would suffer the consequences if she did not give him the information he required.

[11] The Principal Applicant believed she could not tell her superiors at the Bank what was happening. Two men attacked her on her way home from work on the evening of 13 February 2009. These men did not identify themselves; they blocked her way with motorcycles and one of them

grabbed her arm and pushed her into a nearby fence. This man asked if she understood how they authorized things and demanded the balance from Pabon's account. She begged him not to kill her and told him the balance was 34 million pesos.

[12] When he heard that the balance was 34 million pesos, the man told the Principal Applicant that she was lying. He said the account should have more than 300 million pesos in it and the money belonged to FARC. He also said that she had until 22 February 2009 to give up the money or she would be killed.

[13] The Principal Applicant told Vargas about this incident. The Applicants also contacted their friend, Abdelmur – a lieutenant in the Colombian Army – for help. Abdelmur told them that the authorities could not help everyone threatened by FARC because they focussed on protecting high-profile people. He also told the Applicants that he doubted if FARC would stop harassing them even if the Principal Applicant resigned from the Bank. Abdelmur said it would be better for them to move and find a new place to live.

[14] The Principal Applicant resigned from the Bank on 11 February 2009 and the Applicants moved to a friend's house on 21 February 2009. They stayed there until they fled Colombia on 28 February 2009. The Applicants first went to the USA, from where they contacted the Prinicpal Applicant's sister in Canada. The sister advised them to claim protection in Canada, so they came here and claimed protection on 13 March 2009.

[15] The RPD joined the Applicants' claims under subsection 49(1) of the *Refugee Protection Division Rules* SOR/2002-227 and heard their claims on 31 March 2011. The RPD made its Decision on 19 August 2011 and notified the Applicants on 24 August 2011.

DECISION UNDER REVIEW

[16] The RPD reviewed the events which led the Applicants to claim protection in Canada. It found that they had established their identities through certified copies of their Colombian passports. It then went on to examine the merits of their claims.

Not Convention Refugees

[17] The RPD found that the Principal Applicant had refused to break the law and commit a purely criminal act. Although she had asserted at the hearing that her refusal to do what FARC demanded could be seen as an imputed political opinion, the RPD rejected this assertion. It said that she had expressed no political opinion and that she said several times she was only allowed to release funds to Pabon's authorized representative. The RPD concluded that the Applicants had not established a nexus to a Convention ground, so their claim for protection as Convention refugees under section 96 of the Act failed.

Internal Flight Alternative

[18] Having found that they were not Convention refugees, the RPD turned to the question of whether they were persons in need of protection under section 97 of the Act. The RPD concluded they were not persons in need of protection because an internal flight alternative (IFA) was available to them in Medellin, Colombia. Under subparagraph 97(1)(*b*)(ii) of the Act, the existence of an IFA was determinative of their claim.

[19] The RPD instructed itself on the test for an IFA; it noted that *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1991] FCJ 1256 (FCA) (QL) establishes a two

pronged test. First, the RPD must be satisfied, on a balance of probabilities, that a claimant is not at risk in the area of the country where an IFA is situated. Second, the RPD must be satisfied that it would not be unreasonable for the claimant to seek refuge in the IFA.

Risk in all Columbia

[20] In relation to the first prong of the test, the RPD found that FARC targeted the Principal Applicant only because she worked at the Bank. She could only access the money FARC wanted while she worked there. After she resigned from the Bank on 16 February 2009, FARC would no longer be interested in her. The RPD inferred from Ruben's knowledge of the Bank's operations that he had an inside contact who would be able to tell him who became responsible for Pabon's account after the Principal Applicant left. Through this contact Ruben would be able to access information which would show the Principal Applicant had not taken the money. The RPD concluded that any information the Principal Applicant had about the money would be stale. As she has not worked at the bank for 2 ½ years, she would not face a risk on this basis.

[21] The RPD agreed with the Applicants' assertion that FARC is still able to carry out violence in Colombia. However, the RPD found that the Principal Applicant was not a whistle-blower or human rights defender – two groups that face a heightened risk in Colombia. When she handled the Pabon account, the Principal Applicant was simply doing her job and she would have been replaced after she left. She did not report the threats to anyone and, since FARC likely had someone inside the Bank, that person would know the Principal Applicant had not reported the threats and had left the country when pressed.

[22] Based on the documentary evidence before it, the RPD concluded that FARC's ability to pursue the Principal Applicant was limited and that FARC would not pursue her to Medellin if she fled there.

Reasonable Relocation

[23] The RPD found that it was reasonable in all the circumstances for the Principal Applicant and her family to relocate to Medellin. She and Vargas both had excellent work and education histories so they would be employable in Medellin. It would not be unduly harsh for them to relocate there.

[24] The RPD concluded that the Applicants' claim under section 97 failed because they had an IFA available to them.

ISSUES

[25] The Applicants raise the following issues in this case:

a. Whether the RPD's conclusion that they did not have a nexus to a Convention ground was reasonable;

b. Whether the RPD's conclusion they had an IFA was reasonable.

STANDARD OF REVIEW

[26] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is well-settled by past jurisprudence, the

reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[27] The standard of review applicable to the first issue in this case is reasonableness. In *D.F.R. v Canada (Minister of Citizenship and Immigration)* 2011 FC 772, Justice Donald Rennie held at paragraph 8 that the existence of a nexus to a Convention ground is a question of fact. As the Supreme Court of Canada held in *Dunsmuir*, above, at paragraph 51, questions of fact generally attract the reasonableness standard of review.

[28] The standard of review applicable to the second issue in this case is also reasonableness. In *Martinez v Canada (Minister of Citizenship and Immigration)* 2012 FC 5, Justice Yvon Pinard held at paragraph 8 that the standard of review applicable to the RPD's analysis of an IFA is reasonableness. Justice Richard Mosley made a similar finding in *Ponce v Canada (Minister of Citizenship and Immigration)* 2011 FC 1360, at paragraph 13, as did Justice Luc Martineau in *Zavala v Canada (Minister of Citizenship and Immigration)* 2009 FC 370 at paragraph 5.

[29] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

STATUTORY PROVSIONS

[30] The following provisions of the Act are applicable in this proceeding:

Convention refugee	**Définition de « réfugié »**
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	**96.** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	*a*) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
[…]	[…]
Person in Need of Protection	**Personne à protéger**
97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	**97.** (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	*a*) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;
(*b*) to a risk to their life or to a	*b*) soit à une menace à sa vie

risk of cruel and unusual treatment or punishment if	ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,	(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,	(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
[…]	[…]

ARGUMENT

The Applicants

Nexus to a Convention Ground

[31] The Applicants argue that the RPD's finding that they did not have a nexus to a Convention ground was unreasonable because it was not based on the evidence. They point to *Ward v Canada (Attorney General)*, [1993] 2 SCR 689 for the proposition that political opinion can arise from an

imputed political opinion, regardless of a claimant's actual beliefs. The evidence before the RPD showed that FARC is a political organization and that when people refuse to help FARC they are treated as enemies. The Applicants say that nothing in the record shows that FARC would not see the Principal Applicant's refusal to help them as a political act. Although the RPD mentioned their submissions on this point, the RPD did not say why it rejected their evidence. It also did not find the Applicant was not credible, so the RPD must have taken their evidence as true.

Internal Flight Alternative

[32] The RPD's conclusion on the IFA available to the Applicants was based on a plausibility finding and *Valtchev v Canada (Minister of Citizenship and Immigration)* 2001 FCT 776 establishes that the RPD should only make such findings in the clearest of cases. This was not such a case. The Decision must be returned for reconsideration.

[33] The Applicants also say that the RPD's conclusion that an IFA is available to them is contradicted by the evidence. The Principal Applicant testified at the hearing and in her Personal Information Form (PIF) that Abdelmur told her that resigning from the Bank would not end her problems with FARC. Abdelmur had first-hand knowledge about FARC's operations because he fought against them with the Colombian Army. The RPD ignored this relevant and reliable evidence.

[34] The RPD also ignored the expert report of Dr. Mark Chernick – an associate professor of Government and Latin American Studies at Georgetown University – called *Country Conditions in Colombia Relating to Asylum Claims in Canada*. This report says that victims of FARC cannot know if threats against them will be carried out. Once targeted, FARC's victims can only comply

with FARC's demands or leave Colombia. Dr. Chernick is a highly qualified expert; he is at least as qualified as Dr. Judith Hellman. In *Villicana v Canada (Minister of Citizenship and Immigration)* 2009 FC 1205, I held that it was an error for the RPD to discount expert evidence on Mexico from Dr. Hellman. Because Dr. Chernick is as qualified as Dr. Hellman and Dr. Chernick's report was prepared under similar circumstances to Dr. Hellman's, it was an error for the RPD not to consider this report. Further, a report from the United Nations High Commission for Refugees on Colombian asylum seekers corroborates Dr. Chernick's report. This means the RPD's conclusion was unreasonable.

[35] The Applicants also say that the RPD's finding on IFA was speculative. When it found that FARC would likely leave the Principal Applicant alone because she has resigned from the Bank, the RPD unreasonably assumed FARC would follow the RPD's own logic.

The Respondent

[36] The Respondent argues that, based on the evidence before it, the RPD's finding on nexus was reasonable. This finding was consistent with the Principal Applicant's testimony that, because she had resigned nearly two years ago, her knowledge about the Bank's clients would be dated. The Respondent notes that the question of nexus is within the RPD's jurisdiction and says that the Court should defer to the RPD's finding of fact on this issue.

[37] The Applicants bore the onus of establishing a nexus and, where there no evidence on the record to establish a particular Convention ground, the RPD is under no obligation to consider or specifically address that ground (see *Casteneda v Canada (Minister of Citizenship and Immigration)* 2011 FC 1012 at paragraph 19). There was no evidence before the RPD that FARC imputed any

political views to the Principal Applicant. She did not express any political opinion; all she told FARC was that she could only release funds to an authorized representative of Pabon. The RPD's conclusion that the Applicants had no nexus to any of the Convention grounds was reasonable.

[38] Although the Applicants object to the RPD's IFA finding, this is not a reason for the Court to find that it was unreasonable. As with the finding on nexus, this is a factual finding to which the Court should defer. The Respondent points to *Rasaratnam*, above, for the proposition that once IFA becomes an issue, the onus is on the claimant to show that it is not available. In this case, the Applicants did not discharge the onus on them. On the contrary, several facts on the record support the RPD's conclusion:

a. The Principal Applicant can no longer assist FARC and Ruben would know this through his contact at the Bank,;
b. The Principal Applicant is not a member of the groups FARC typically targets for reprisal;
c. Because of Ruben's contact at the Bank, FARC would know that the Principal Applicant had not informed on them;
d. Recent documentary evidence indicated that FARC's ability to carry out acts of violence has been compromised by the Colombian Government's actions;
e. There is no evidence to show why FARC would still be interested in the Principal Applicant. They would likely be interested only in her successor at the Bank;
f. Given their work histories and education, the Applicants can reasonably relocate to Medellin;
g. The Principal Applicant testified that she could relocate to Medellin.

[39] The Respondent notes that the Court has upheld similar analyses of IFA by the RPD in recent cases. See *Velasquez v Canada (Minister of Citizenship and Immigration)* 2011 FC 804, *Ramirez v Canada (Minister of Citizenship and Immigration)* 2011 FC 227, and *Ramos v Canada (Minister of Citizenship and Immigration)* 2011 FC 15.

The Applicants' Reply

[40] The Applicants say that, to ground a nexus finding, a political opinion only has to be perceived by the persecutors and does not have to be expressed. In *Ward*, above, the Supreme Court of Canada found that a political opinion imputed from activities or behaviour may be based on an opinion incorrectly imputed to an individual.

[41] The Applicants also say that it was an error for the RPD to require proof that persecution would occur, rather than proof of a risk of persecution.

ANALYSIS

[42] The nexus issue does not need to be addressed because the RPD's principal finding on IFA is unreasonable and the Decision must be returned on this ground alone.

[43] Following *Rasaratnam*, above, the RPD found that the first prong of the test for an IFA was satisfied in this case because:

a. The Principal Applicant was targeted solely because of her job at the Bank;

b. The Principal Applicant had the ability to release funds only while she worked at the Bank;

c. The Principal Applicant has now left the Bank and so no longer has the ability to release funds or provide usable information;

d. FARC would now focus upon whoever it is that can provide them with what they wanted when they approached and threatened the Principal Applicant;

e. Because FARC seems to have a source inside the Bank who gave them the information they required, they are likely not interested in the Principal Applicant;

f. With the reduced circumstances that FARC now finds itself in, and the passage of time, it is unlikely that they would be searching for the Principal Applicant nationally or that they would send someone to harm her.

[44] In other words, the basis of the finding is that the Principal Applicant has now left the Bank and is not likely to be of any further interest to FARC. Hence, on a balance of probabilities, the Applicants can go to Medellin where they will not face a danger of torture or a risk of cruel and unusual treatment or punishment. However, it seems to me if FARC has now lost interest in the Principal Applicant for these reasons, there would be no need for the Applicants to move to Medellin. If they are not at risk, they have no need to flee. The RPD's reliance upon IFA means that it must believe the Applicants are at risk in Bogota and so need to move to the IFA.

[45] The RPD agrees with the Applicants that

> FARC still possesses the ability to carry out violence against targets in Colombia if they are motivated to do so.

[46] If the Applicants need to take advantage of an IFA, then they must be under threat from FARC which, as the RPD found, possess the ability to carry out violence against its targets.

[47] The only way to make sense of this finding is to assume that the Applicants are still under threat in Bogota but, because FARC is now operating under reduced circumstances, it is not likely that FARC will go to the trouble of hunting for the Applicants nationally.

[48] As the Applicants point out, this is basically a plausibility finding based upon very little except the RPD's own speculation about what FARC is likely to do in the circumstances. This finding is contradicted by highly material evidence that was before the RPD, which it appears to disregard. This evidence includes:

a. The advice the Principal Applicant received from Abdelmur – a lieutenant in the Colombian army who has fought guerrillas – that her resignation from the bank will increase the risk she faces. He said she would be killed for disobeying FARC;

b. The objective country evidence from Dr. Chernick and, in particular, that

> When the victim receives a death threat, he or she cannot know if it will be carried out. They can only live in fear. This is the objective. This is how the terrorism works.
>
> […] the modus operandi of Columbia's illegal armed actors is to assert authority through violence and intimidation. All the illegal and rogue actors have detailed computerized records of their enemies. In Colombia, memories are long. Thought [*sic*] long and tragic history of this conflict, reprisals have regularly taken place months and years after the events. This has not been changed. At this time, there is no credible evidence, data analysis that would suggest that the risk to threatened individuals has lessened, or these individuals would be able to avoid continued threats and harm were they return or returned.
>
> Could an asylum seeker who had been threatened years earlier move return [*sic*] to Colombia but move to another region of the country. [*sic*] The answer is no. The FARC guerrillas and the paramilitaries still operate in all areas of the country. [...] All illegal groups, especially the FARC, have sophisticated computer technology and have repeatedly tracked down those viewed as enemies to other regions. They have an estimated 8,000-11,000 rural combatants and thousands of urban militias connected into a highly sophisticated

> national network. There is virtually no city or town where a person who has been once targeted would not be looking over his shoulder, wondering if the FARC or another group might find him or her, wondering if their name had been entered into the type of national, computerized database that the FARC has so carefully developed.

c. The fact that FARC had no problem locating the Applicants in Bogota;

d. General Information in the National Documentation Package that an IFA or relocation alternative is generally not available in Colombia.

[49] The RPD's speculative conclusions on this point are simply not supported by the evidence. This renders the Decision unreasonable and it is my view that it must be returned for reconsideration. See *Hassan v Canada (Minister of Citizenship and Immigration)* [1999] FCJ No 250 at paragraphs 7 and 8 and *Smith v Canada (Minister of Citizenship and Immigration)* 2009 FC 1194 at paragraph 49.

[50] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is allowed. The decision is quashed and the matter is returned for reconsideration by a differently constituted RPD.

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-6316-11
STYLE OF CAUSE:	**ANDREA EUGENIA SABOGAL RIVEROS; ANGEL ANDRES VARGAS BUSTOS; EDILMA BUSTOS DE VARGAS** - and - **THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	March 8, 2012
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DATED:	May 4, 2012

APPEARANCES:

Alla Kikinova	**APPLICANTS**
Suran Bhattacharyya	**RESPONDENT**

SOLICITORS OF RECORD:

MICHAEL LOEBACH Barrister & Solicitor London, Ontario	**APPLICANTS**
Myles J. Kirvan, Q.C. Deputy Attorney General of Canada	**RESPONDENT**