Federal Court  Cour fédérale

Date: 20210120

Docket: IMM-939-19

Citation: 2021 FC 59

Ottawa, Ontario, January 20, 2021

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

ADINA HARMS-BARBOUR

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant, Adina Harms-Barbour, seeks judicial review of three (3) related decisions that have resulted in her being found inadmissible to Canada on grounds of serious criminality and in the issuance of a deportation order.

[2] For the reasons that follow, the applications for judicial review are dismissed.

II. Background

[3] The Applicant is a citizen of Germany, who came to Canada as a permanent resident in 1975. She was seven (7) years old at the time.

[4] On December 4, 2015, the Applicant was convicted of fraud over $5,000 under paragraph 380(1)(*a*) of the *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*]. The nature of the offence was mortgage fraud. On August 19, 2016, she received a five-year penitentiary sentence and was ordered to pay $7,500 in restitution.

[5] On June 2, 2017, the Applicant was convicted of two (2) forged document offences contrary to paragraphs 368(1)(*a*) and (*b*) of the *Criminal Code*. She was sentenced to twelve (12) months in prison to be served concurrently with her prior five-year sentence.

[6] On August 2, 2017, a Canada Border Services Agency [CBSA] officer wrote to the Applicant to advise her that a report under subsection 44(1) of the *Immigration Refugee Protection Act*, SC 2001, c 27 [IRPA] had been or may be prepared alleging that she may be inadmissible to Canada under paragraph 36(1)(*a*) of the IRPA, because of her criminal conviction under paragraph 380(1)(*a*) of the *Criminal Code* [Procedural Fairness Letter]. The Procedural Fairness Letter invited the Applicant to make written submissions as to why a removal order should not be made against her and enumerated the types of relevant details she should provide. It also indicated that she would find attached the documentation upon which the CBSA intended to rely.

[7] The Applicant submitted a written response to the Procedural Fairness Letter on August 21, 2017, wherein she spoke of her establishment in Canada, including her close bond with her family and daughter and her employment history. The Applicant also provided information on her health and her pending court dates regarding her custody proceedings and her criminal convictions.

[8] On January 2, 2018, a different CBSA officer conducted an analysis of the Applicant's submissions and prepared a report under subsection 44(1) of the IRPA and a supporting narrative [subsection 44(1) report]. The CBSA officer indicated he was of the opinion that there were reasonable grounds to believe the Applicant was inadmissible to Canada under paragraph 36(1)(*a*) of the IRPA for serious criminality and recommended that she be sent to an admissibility hearing.

[9] A Minister's delegate reviewed the subsection 44(1) report and concluded on May 3, 2018, that the overall gravity of the offences committed, the damage to society and the Applicant's lack of remorse were such that the Applicant should be referred to an admissibility hearing before the Immigration Division [ID] pursuant to subsection 44(2) of the IRPA [referral decision].

[10] The admissibility hearing was initially scheduled for September 25, 2018, but was adjourned to December 17, 2018, so that the Applicant could retain and instruct counsel. The December hearing was subsequently adjourned to allow newly retained counsel to discuss with the Respondent's counsel the possibility of resolving the matter with the issuance of a warning

letter in accordance with the Operational Manual ENF 6 entitled “Review of Reports under Subsection A44(1)” [ENF 6]. The Applicant instructed her counsel to provide submissions to the Respondent’s counsel in response to the subsection 44(1) report narrative and the Minister’s delegate’s review disclosed to her after the December 17, 2018 admissibility hearing. The exhibits attached to the submissions included an interim custody and access order dated January 25, 2018 and transcripts from three (3) proceedings: (1) an excerpt from the December 4, 2015 reasons for judgment relating to the Applicant’s fraud conviction; (2) the August 19, 2016 fraud conviction sentencing hearing; and (3) the June 2, 2017 sentencing hearing relating to the two (2) forged document offences under paragraphs 368(1)(*a*) and (*b*) of the *Criminal Code*.

[11] The admissibility hearing proceeded on January 28, 2019, despite the Applicant’s attempts to resolve the matter with a warning letter. The Applicant submitted no documentation to the ID.

[12] After noting the concession made by the Applicant’s counsel that all the elements of paragraph 36(1)(*a*) of the IRPA were met, the ID found there were reasonable grounds to believe the Applicant was inadmissible to Canada and issued a deportation order against her.

[13] On February 11, 2019, the Applicant sought judicial review of the subsection 44(1) report, the referral decision and the deportation order.

[14] On September 12, 2019, Madam Justice Elizabeth Heneghan granted leave with respect to the deportation order only.

[15] The Respondent subsequently brought a motion seeking an order prohibiting the Applicant from proceeding with the judicial review of the subsection 44(1) report and the referral decision on the basis that section 302 of the *Federal Courts Rules*, SOR/98-106, provides that an application for judicial review shall be limited to a single order in respect of which relief is sought.

[16] On November 28, 2019, Madam Justice Sandra J. Simpson granted the Applicant leave to seek judicial review of the subsection 44(1) report and the referral decision since both were closely linked to the deportation order.

[17] While framed differently in her memorandum of argument, the Applicant submits that the decision to refer her to an admissibility hearing is unreasonable and that her rights to procedural fairness were breached by the CBSA officer and the Minister's delegate.

III. Analysis

A. *Standard of Review*

[18] The parties agree that the standard of review applicable to a decision to refer a permanent resident to an admissibility hearing is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 16-17 [*Vavilov*]; *Yavari v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 469 at paras 23-25 [*Yavari*]; *Kyere v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 120 at para 18 [*Kyere*]; *McAlpin v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 422 at para 51 [*McAlpin*]).

[19] Where the standard of reasonableness applies, the Court shall examine "the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome" (*Vavilov* at para 83). It must ask itself "whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99). The burden is on the party challenging the decision to show that it is unreasonable (*Vavilov* at para 100).

[20] With respect to the issue of procedural fairness, the Federal Court of Appeal clarified in *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [*Canadian Pacific*] that issues of procedural fairness do not necessarily lend themselves to a standard of review analysis. Rather, the role of this Court is to determine whether the proceedings were fair in all the circumstances. In other words, "whether the applicant knew the case to meet and had a full and fair chance to respond" (*Canadian Pacific* at paras 54-56; *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35).

B. *The Decision to Refer the Applicant to an Admissibility Hearing is Reasonable*

[21] The Applicant's argument focuses on the subsection 44(1) report and the referral decision. She argues that they are unreasonable because they rest on overlooked and inaccurate evidence.

[22] First, the Applicant argues that the CBSA officer who prepared the subsection 44(1) report and narrative overlooked the substantive role played by the Applicant's ex-husband in the

mortgage fraud offence and his external motivations to portray the Applicant as the sole actor. These facts should have raised concerns with the CBSA officer and triggered an interview with the Applicant regarding the circumstances of the offence. The failure to identify the substantive role played by her ex-husband is a significant omission as it relates directly to factors outlined in ENF 6.

[23] Second, the Applicant argues that the Minister's delegate overemphasizes the impact of the fraud conviction on the community by highlighting the $470,000 cost to the taxpayers. Reliance on this figure is misleading given that the criminal court rejected the amount of restitution sought by the Canada Mortgage and Housing Corporation [CMHC] as not easily ascertainable.

[24] Third, the Applicant submits that there was no evidence supporting the opinion of the Minister's delegate that the Applicant received proceeds of crime arising from the fraud conviction or that she used such proceeds to support her family.

[25] Fourth, the Applicant contends that the Minister's delegate was incorrect in his assessment that she had not shown any remorse and acted out of personal greed. In her view, a review of the transcript from the sentencing hearing of the 2017 forgery conviction proves that she is in fact remorseful.

[26] Finally, the Applicant argues that the CBSA officer and the Minister's delegate failed to consider the strong and nurturing relationship she enjoys with her daughter and therefore, unreasonably assessed the impact a deportation order would have on her daughter.

[27] In my opinion, the Applicant's concerns do not justify this Court's intervention.

[28] The CBSA officer's failure to identify in the narrative of the subsection 44(1) report the role played by the Applicant's ex-husband in the mortgage fraud scheme or the factors that could have motivated him to cooperate with the Crown does not render his recommendation that the Applicant be sent to an admissibility hearing unreasonable.

[29] In his narrative, the CBSA officer described the circumstances of the offence as follows:

> Through forged documents and cheques, the subject used friends and family members to take out mortgages in their names without their knowledge totally (sic) 9 mortgages worth collectively over 2 million dollars. Those named on the deeds had no idea they held mortgages on these properties until contacted by other parties. The subject would never take possession of the homes, instead she would sell it to the victims without their knowledge. The homes would then be rented to unsuspecting renters who would then pay the subject a rent payment each month. In the sentencing hearing, the judge found that there was "overwhelming evidence" that the subject was involved in creating a giving (sic) false statements, documents, and information to get mortgages approved.

[30] He found that the offences for which the Applicant was being reported were serious in nature and that her crimes had created a severe negative impact on eight (8) individuals and their families, two (2) corporations as well as a $470,000 burden on taxpayers. He also noted that the

hardship the Applicant had left on her victims included severe financial losses, diminished credit ratings, stress, anxiety, loss of trust and embarrassment in their communities.

[31] The Applicant submits that the CBSA officer's characterization of the circumstances of the fraud conviction is inaccurate because it fails to account for her ex-husband's criminal participation in the commission of the offence and his external motivation to portray her as the sole actor, including the resolution deal he struck with the Crown and his intention to initiate custody proceedings following the criminal trial. According to the Applicant, ENF 6 enumerates a number of factors to consider in determining whether to recommend a referral to the ID when reviewing reports under subsection 44(1) of the IRPA concerning permanent residents. They include whether others influenced the permanent resident in the commission of the crime and the potential for rehabilitation. She argues that the failure to identify the substantive role played by her ex-husband unfairly skewed the weighing of these factors, identified in ENF 6, against the Applicant. The Applicant also submits that the CBSA officer's findings are unsupported by the evidence. The sentencing decision constituted the most reliable document to describe the circumstances of the offence and it makes no mention of the victims' anxiety, for instance.

[32] While helpful in determining the reasonableness of the approach taken by the CBSA officer in the exercise of his limited discretion, ENF 6 is not binding on this Court (*Sharma v Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 319 at paras 27, 46 [*Sharma*]; *McAlpin* at paras 66, 69).

[33] Prior to the issuance of the subsection 44(1) report, the CBSA requested and obtained a significant number of documents regarding the Applicant's fraud conviction. Documents in the Certified Tribunal Record [CTR] include requests for criminal information, conviction certificates, a transcript of the judge's sentencing remarks, the Applicant's correctional plan, criminal factors assessment and dynamic factors assessment from Correctional Service Canada, JOIN reports and a 54-page case report from the investigating police service. This case report sets out the circumstances surrounding the mortgage fraud offence. It provides background information and describes the investigation in relation to the various mortgaged properties. It summarizes the supporting evidence, including the interviews conducted, one of which was with the Applicant's ex-husband. The CBSA officer was clearly aware of the Applicant's ex-husband's role, which is described in detail in the case report.

[34] However, the Applicant did not make any specific submissions in relation to her ex-husband's involvement in the mortgage fraud as a mitigating factor in responding to the Procedural Fairness Letter. Instead, she states only that her ex-husband was initially charged with fraud but became a witness for the Crown and the charges were dropped. She does not allege coercion or undue influence.

[35] It is trite law that a decision maker is presumed to have weighed and considered all the evidence presented to it (*Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (FCA) at para 1). It is also well established that a decision maker is not expected to "respond to every argument or line of possible analysis" or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (*Vavilov* at para 128;

Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board), 2011 SCC 62 at paras 16, 25).

[36] In the absence of a more articulate argument from the Applicant, it was not unreasonable for the CBSA officer, or the Minister's delegate for that matter, not to discuss her ex-husband's participation in the mortgage fraud.

[37] The Applicant included excerpts of transcripts from her trial in December 2015 to demonstrate that the trial judge found that the Applicant's ex-husband had an integral role to play in the commission of the offence. These excerpts were not, however, before the CBSA officer or the Minister's delegate when they made the decision to refer the Applicant to an admissibility hearing, nor were they part of the record before the ID.

[38] The Applicant's argument that her ex-husband's involvement in the offence and motivation in assisting the Crown should have triggered a personal interview is equally without merit. The jurisprudence is clear that there is no duty to interview the person affected provided that person is given an opportunity to make submissions and to know the case against him or her (*Kyere* at para 29). The Applicant was given such opportunity when she received the Procedural Fairness Letter. There was also no obligation to disclose the subsection 44(1) report narrative prior to the Minister's delegate review under subsection 44(2) of the IRPA and allow the Applicant a further opportunity to respond (*Kyere* at para 29).

[39] Regarding the Applicant's second argument, I find that the Minister's delegate was fully entitled to consider the impact of the Applicant's crime on the community, including the cost to taxpayers.

[40] In assessing the gravity of the offence, the Minister's delegate was informed by the findings of the sentencing judge and used various numbers to quantify the cost of the Applicant's mortgage fraud. He noted that the Applicant had fraudulently mortgaged nine (9) homes collectively worth more than two (2) million dollars and that she was believed to have fraudulently mortgaged six (6) other homes but the victims would not cooperate with the investigation. He also noted that her crimes had negatively impacted eight (8) families, members of her own family, close friends and two (2) corporations. In the same context, the Minister's delegate added that the Applicant's actions had cost Canadian taxpayers $470,000 and that her actions had a negative impact on the housing investment market.

[41] While CMHC was not granted restitution in the amount claimed, it was not unreasonable for the Minister's delegate to note CMHC's loss in assessing the gravity of the offence, which the sentencing judge described in the following terms: "CMHC, who insured these transactions, claims financial losses of nearly $470,000, whose losses – at the end of the day – are shouldered by taxpayers". The sentencing judge refused to order restitution because of the Applicant's inability to pay the amount claimed and the difficulty in assessing the exact amount of the loss. The sentencing judge explained that the analysis required consideration of the foreclosure process, the foreclosure outcome, the loss sustained by the bank in the first instance, the amount of costs incurred by the bank, the claims process from the bank to CMHC and the consequent

determination of the amount of the payout. The sentencing judge was not prepared to grant an order for restitution in the amount claimed based on a victim impact statement only.

[42] The Applicant also takes issue with the opinion of the Minister's delegate that she either received proceeds of crime arising from the fraud conviction or used any such proceeds to support her family. She argues that this opinion is unsupported by the evidence.

[43] I disagree.

[44] In describing the circumstances of the allegations against the Applicant, the CBSA officer noted that the Applicant received rent from unsuspecting renters each month through the mortgage fraud scheme in place. Given this information, which was in the case report before both the CBSA officer and the Minister's delegate, it was not unreasonable for the Minister's delegate to find that she received proceeds of crime and that she used such proceeds to support her family.

[45] Even if one conceded that the opinion of the Minister's delegate was speculative and unsupported by the evidence, I am not persuaded that it would constitute a determinative error given there was little evidence demonstrating how she supported her daughter and family.

[46] The Applicant's issue with the Minister's delegate's statement that members of her family refused to cooperate with the investigation is also without merit. Paragraph f) of the

background section of the case report explicitly mentions that "[s]ome of the witnesses were not cooperative as they were family members or close friends of [the Applicant]".

[47] The Applicant also disagrees with the Minister's delegate's statement that she has shown no remorse. She argues that a review of the June 2, 2017 transcript from the sentencing hearing of the forgery convictions under section 368 of the *Criminal Code* proves that she was in fact remorseful and deposes in her affidavit that she has made amends with all her victims and has received forgiveness.

[48] As noted earlier, the CBSA officer and the Minister's delegate did not have a copy of the June 2, 2017 sentencing hearing transcript when they decided to refer the Applicant to an admissibility hearing. They had a copy of the transcript of the August 2016 mortgage fraud sentencing hearing, wherein the judge stated that no "evidence was offered and, hence, no account can be taken of other personally mitigating factors such as remorse or an explanation for this conduct beyond personal greed". They also had a copy of reports obtained from the Correctional Service of Canada, which also reflected the Applicant's lack of remorse. The Minister's delegate's finding is further supported by the fact that in her response to the Procedural Fairness Letter, the Applicant fails to take responsibility for her actions.

[49] Finally, the Applicant submits that the CBSA officer and the Minister's delegate improperly considered the humanitarian and compassionate factor of the best interest of the child. Specifically, she takes issue with their failure to mention in their reports the joint custody

and access order, which supported the strong and nurturing relationship she enjoys with her daughter.

[50] The joint custody and access order was not before the CBSA officer or the Minister's delegate.

[51] Moreover, I am satisfied that the emotional hardship to the Applicant's daughter was considered by both the CBSA officer and the Minister's delegate, within the scope of their limited discretion to do so. Their decisions clearly reflect that they were aware of the facts put forward by the Applicant in her response to the Procedural Fairness Letter and they provide a clear rationale for their conclusions (*Yavari* at para 55; *McAlpin* at para 70).

[52] To conclude, the Applicant has failed to persuade me that the decision to refer her to an admissibility hearing and resulting deportation order rest on overlooked and inaccurate evidence and are therefore unreasonable. The Applicant is putting too much emphasis on particular words used by the decision makers and is engaging in a "line-by-line treasure hunt for error" (*Vavilov* at para 102). In my view, the Applicant is essentially asking this Court to reweigh the evidence to reach a different conclusion. That is not the role of this Court on judicial review (*Vavilov* at para 125).

C. *No Breach of Procedural Fairness*

[53] The Applicant first submits that her rights to procedural fairness were breached because she did not receive the documents, which, according to the Procedural Fairness Letter, should

have been attached. The Respondent filed an affidavit from the CBSA officer who prepared the Procedural Fairness Letter confirming that there were no attachments to the letter and that the August 2, 2017 letter was a standard form letter.

[54] Moreover, I am satisfied that the duty of procedural fairness was met in this case. The Procedural Fairness Letter was sent to the Applicant prior to the completion of the subsection 44(1) report (*Kyere* at para 29). It outlined the allegations made against her, namely, her possible inadmissibility to Canada on account of her fraud conviction under paragraph 380(1)(*a*) of the *Criminal Code* in accordance with paragraph 36(1)(*a*) of the IRPA. The letter also informed the Applicant as to the administrative workflow regarding the inadmissibility issue, and provided her an opportunity to make submissions. I am satisfied that the omission of documents did not compromise the Applicant's ability to address the case against her prior to the referral decision being made.

[55] The Applicant's second allegation of a breach of procedural fairness relates to the failure of the decision maker to follow the recommendation in ENF 6 to review the relevant transcripts. The Applicant relies on ENF 6 which states that the "best documentation is a transcript of the trial judge's remarks on conviction or sentencing, commonly known as the *Judge's Reasons for Sentence*". She argues that it is apparent the CBSA officer did not follow that recommendation as he failed to check the appropriate box labelled "Judge's Reasons for Sentence" found in section 10 of the subsection 44(1) narrative. In her view, the failure to review the transcripts meant that the inaccuracies regarding the existence of another perpetrator, the amount of restitution and the Applicant's remorse, resulted in a fatally flawed process underpinning the referral decision.

[56] The Applicant's argument is without merit. The transcript of the Judge's Reasons for Sentence in relation to the offence which led to the report under subsection 44(1) of the IRPA is in the CTR and the supporting narrative clearly demonstrates the CBSA officer reviewed and considered the Judge's Reasons for Sentence.

[57] During the hearing, the Applicant attempted to demonstrate several inaccuracies in the decisions of the CBSA officer and the Minister's delegate. She contends that she was never given the opportunity to respond to statements, which she considers inflammatory.

[58] Referrals to the ID under subsections 44(1) and (2) of the IRPA attract minimal participatory rights to procedural fairness (*Kyere* at para 27).

[59] As noted above, the Applicant received a Procedural Fairness Letter that informed her that a report under subsection 44(1) of the IRPA had been or could be prepared alleging that she may be inadmissible to Canada due to her criminal conviction under paragraph 380(1)(*a*) of the *Criminal Code*. The letter also notified her that she faced removal from Canada and invited her to make submissions on why a removal order should not be made against her. The letter enumerated the types of details she should include in her submissions, which included among other things, her criminal history and current attitude. The CBSA also informed her that it could rely on other sources, including reports prepared by other enforcement agencies and that she may wish to address her history with other agencies in her submissions.

[60] The Applicant was required to put her best foot forward in her written submissions. Neither the CBSA officer nor the Minister's delegate had an obligation to return to her to validate their findings or to point out the deficiencies in her submissions or supporting evidence. There was also no duty to provide the subsection 44(1) report to the Applicant prior to the referral decision under subsection 44(2) of the IRPA (*Sharma* at para 30; *Kyere* at para 29).

[61] Finally, the Applicant argued that the Minister's delegate fettered his discretion by refusing to reconsider his decision when she provided additional submissions and documents which included excerpts from the December 4, 2015 reasons for judgment relating to the Applicant's fraud conviction and the transcript of the sentencing hearing in 2017 relating to the forgery offences prior to the admissibility hearing before the ID. The Respondent objected to the Applicant raising this argument at the hearing on the basis that it was not raised in the applications for leave and judicial review. The Applicant disagreed and claimed that this was not a new argument, referring to a few paragraphs in her memorandum of argument to support her position.

[62] While the Applicant does indeed refer to a request for reconsideration in her memorandum of argument, I agree with the Respondent that the Applicant did not raise the argument that the Minister's delegate fettered his discretion by refusing to reconsider his referral decision.

[63] I also note that there is no record of a reconsideration decision before the Court.

[64] If a reconsideration decision was indeed made, the jurisprudence is clear that it constitutes a separate decision, which must be challenged through a separate application for judicial review (*McAlpin* at para 49; *Kosolapova v Canada (Citizenship and Immigration)*, 2014 FC 458 at para 8). The Applicant did not bring such application for judicial review and leave of this Court was granted only with respect to the January 2, 2018 subsection 44(1) report, the May 3, 2018 referral decision and the January 28, 2019 deportation order.

[65] Consequently, the Applicant's argument must fail.

IV. Conclusion

[66] To conclude, when read holistically and contextually, I am satisfied that the CBSA officer's subsection 44(1) report, the Minister's delegate's referral decision and the resulting deportation order meet the reasonableness standards set out in *Vavilov*. The decisions are based on internally coherent reasons, and they are justified in light of the relevant facts and the law. The reasons are also transparent and intelligible. I am equally satisfied that there was no breach of the Applicant's procedural fairness rights.

[67] Accordingly, the applications for judicial review are dismissed.

[68] The Applicant requested that the Court certify the following question:

> In cases involving paragraph 36(1)(*a*) of the IRPA, does a Minister's delegate have the jurisdiction or the ability to recall or claw back a referral made under subsection 44(2) of the IRPA prior to the issuance of a removal order by the Immigration Division?

[69] Given that I have decided the applications for judicial review on a different basis and considering my comments above regarding the absence of a reconsideration order, the issue raised by the proposed certified question would not be dispositive of this matter (*Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 at paras 3, 46).

[70] Accordingly, no question will be certified.

JUDGMENT in IMM-939-19

THIS COURT'S JUDGMENT is that:

1. The applications for judicial review are dismissed; and

2. No serious question of general importance is certified.

"Sylvie E. Roussel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Raj Sharma	FOR THE APPLICANT
Maria Green	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Stewart Sharma Harsanyi LLP Calgary, Alberta	FOR THE APPLICANT
Attorney General of Canada Edmonton, Alberta	FOR THE RESPONDENT