Federal Court  Cour fédérale

Date: 20140530

Docket: T-929-12

Citation: 2014 FC 523

Ottawa, Ontario, May 30, 2014

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Plaintiff

and

NEDJO SAVIC

Defendant

JUDGMENT AND REASONS

[1] The Minister seeks a declaration pursuant to paragraph 18(1)(b) of the *Citizenship Act*, RSC 1985, c C-29 (the "*Act*") that Nedjo Savic (the "defendant") obtained his Canadian citizenship by false representation or fraud or by knowingly concealing material circumstances because he provided false answers and concealed information on his application for permanent residence which led to his permanent resident status and ultimately his citizenship.

[2] If the Minister is successful in the action, the Minister will be entitled to make a report to the Governor in Council pursuant to section 10 of the *Act*, which, if accepted, will result in the defendant ceasing to be a Canadian citizen. The defendant could then be subject to removal from Canada.

[3] The Minister makes this motion pursuant to section 213 of the *Federal Courts Rules*, SOR/98-106, asking the Court to grant summary judgment and issue the declaration. To be successful on the motion for summary judgment, the Minister must satisfy the Court that there is no genuine issue of fact or law for trial. The defendant submits that several issues are raised which require a trial; the most significant issue is whether the defendant's actions in providing false information (i.e. false representations, and/or knowingly concealing material circumstances) requires that the defendant had the intention to mislead the decision maker.

[4] For the reasons below, the Minister's motion for summary judgment is granted.

Citizenship revocation in general

[5] This Court does not revoke citizenship; rather, it makes a declaration which may lead to the Governor in Council deciding to do so. If such a declaration is made, the defendant will have the opportunity to make submissions to the Governor in Council before his citizenship is revoked. Where the Governor in Council is satisfied that any person has obtained, retained, renounced or resumed citizenship under the *Citizenship Act* by false representation or fraud or by knowingly concealing material circumstances, that person ceases to be a citizen. The defendant may seek judicial review of such a decision of the Governor in Council.

[6] In *Canada (Minister of Citizenship and Immigration) v Rogan*, 2011 FC 1007, [2011] FCJ No 1221 [*Rogan*], Justice Mactavish explained the nature of revocation proceedings, at paras 13 – 16:

> [13] A reference by the Minister under section 18(1)(b) of the *Citizenship Act*, R.S., 1985, c. C 29 (the "*Citizenship Act, 1985*") is not an action in the conventional sense of the word. Rather, it is "essentially an investigative proceeding used to collect evidence of facts surrounding the acquisition of citizenship, so as to determine whether it was obtained by fraudulent means": *Canada (Minister of Citizenship and Immigration) v. Obodzinsky*, 2002 FCA 518, [2002] F.C.J. No. 1800, at para. 15 [*Obodzinsky*, (FCA)].
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> [14] The task for the Court is to make factual findings as to whether Mr. Rogan obtained his Canadian citizenship by false representation or fraud or by knowingly concealing material circumstances. Findings made by this Court under section 18(1)(b) of the *Citizenship Act, 1985* are final, and cannot be appealed.
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> [15] Although these reasons follow a hearing at which a great deal of evidence was adduced, the Court's factual findings are not determinative of any legal rights. That is, this decision does not have the effect of revoking Mr. Rogan's Canadian citizenship: *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, [1997] S.C.J. No. 82, at para. 52, citing *Canada (Secretary of State) v. Luitjens*, [1992] F.C.J. No. 319, 142 N.R. 173 at 175 [*Luitjens*, (FCA)].
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> [16] These findings may, however, form the basis of a report by the Minister to the Governor in Council requesting the revocation of Mr. Rogan's citizenship. The ultimate decision with respect to the revocation of citizenship rests with the Governor in Council, which is the sole authority empowered to revoke citizenship. A decision by the Governor in Council to revoke an individual's citizenship may be judicially reviewed: *Canada (Minister of Citizenship and Immigration) v. Furman*, 2006 FC 993, [2006] F.C.J. No. 1248, at para. 15.

[7] Although the defendant in this case submits that the findings of the Court are invariably accepted by the Governor in Council and will lead to revocation, the defendant will have an opportunity to make submissions to the Governor in Council. The Governor in Council is not

precluded from considering the current circumstances of the defendant which may be relevant to the exercise of discretion whether to revoke his citizenship, but which do not change the facts as established by the plaintiff with respect to section 10 of the *Act*.

[8] As noted by Justice Kelen in *Canada (Minister of Citizenship and Immigration) v Dinaburgsky*, 2006 FC 1161, [2006] FCJ No 1460:

> 58 Canada does not allow persons convicted of serious criminal offences to become permanent residents. It is not the role of the Court to condone or forgive persons who misrepresent or conceal material facts about their past serious criminality. That is a decision for only the Minister of Citizenship and Immigration and the Governor in Council. Nor is it the Court's role to determine whether, as a matter of policy, it is appropriate to render stateless citizens of Canada who choose not to disclose criminal convictions pre-dating their admission to Canada. That is a decision left to Parliament acting through the Governor in Council.

[9] Justice Kelen's point is equally applicable in the present case; it is not the role of this Court to determine if the defendant, now elderly and in poor health, should suffer the consequences of revocation of his citizenship. That is the role of the Governor in Council. The Court's role is focused on determining whether the declaration pursuant to section 10 of the *Act* should be made.

Principles re summary judgment

[10] The legal principles with respect to summary judgments, both generally (see *Granville Shipping Co v Pegasus Lines Ltd SA*, [1996] 2 FC 853 at para 8 [*Granville Shipping*] and *MacNeil Estate v Canada (Indian and Northern Affairs Department)*, 2004 FCA 50), and in the specific context of proceedings undertaken to determine whether citizenship was obtained by

false representation or by fraud or by knowingly concealing material circumstances, are not in dispute.

[11] As recently noted by Justice de Montigny in *Canada (Minister of Citizenship and Immigration) v Campbell*, 2014 FC 40, [2014] FCJ No 30:

> [14] When a party brings a motion for summary judgment, the Court must determine whether there is a genuine issue for trial with respect to a claim or defence. The purpose of summary judgment is to allow the Court to summarily dispense with cases which ought not to proceed to trial because there is no genuine issue to be tried. The test is not whether a party cannot possibly succeed at trial; rather, it is whether the case is so doubtful that it does not deserve consideration by the trier of fact at a future trial. As such, summary judgment is not restricted to the clearest of cases. See: *ITV Technologies Inc v WIC Television Ltd*, 2001 FCA 11, at paras 4-6; *Premakumaran v Canada*, 2006 FCA 213, at paras 9-11; *Canada (MCI) v Schneeberger*, 2003 FC 970, at para 17.

[12] In *Canada (Minister of Citizenship and Immigration) v Schneeberger*, 2003 FC 970, [2003] FCJ No 1252, Justice Dawson (as she then was) noted:

> 25 The standard of proof to be applied in a reference under the Act is the civil standard of proof on a balance of probabilities. However, the evidence must be scrutinized with greater care because of the seriousness of the allegations and the severe consequences of revocation of citizenship (see *Canada (Minister of Citizenship and Immigration) v. Coomar* (1998), 159 F.T.R. 37 (T.D.) at paragraph 10).

[13] In *Canada (Minister of Citizenship and Immigration) v Laroche*, 2008 FC 528, [2008] FCJ No 676 [*Laroche*], Justice Mactavish granted summary judgment declaring that the defendant had obtained his citizenship by false representation or fraud or by knowingly

concealing material circumstances in contravention of subsection 10 of the *Act*, and provided an overview of the relevant principles from the jurisprudence:

> [6] As the Supreme Court of Canada recently observed in *Canada (Attorney General) v. Lameman*, 2008 SCC 14, at paragraph 10, the summary judgment process serves an important purpose in the civil litigation system, as it prevents claims or defences that have no chance of success from proceeding to trial. That said, while being able to weed out such cases at an early stage can save scarce judicial resources, justice requires that claims involving real issues be allowed to proceed to trial.
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> […]
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> [8] It has been suggested that there is some ambiguity between Rule 216(1), which states that matters should proceed to trial where there is a genuine issue to be decided, and Rule 216(3), which entitles a motions judge to decide that issue, if the necessary facts can be found.
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> [9] According to the Federal Court of Appeal, this apparent ambiguity should not result in motions for summary judgment becoming summary trials on the basis of affidavit evidence: see *Trojan Technologies Inc. v. Suntec Environmental Inc.* [2004] F.C.J. No. 636, 2004 FCA 140, at ¶19.
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> [10] A number of other principles can be gleaned from the jurisprudence. One such principle is that where there is an issue of credibility involved, the case should not be decided on summary judgment under Rule 216(3) but rather should go to trial because the parties should be cross-examined before the trial judge: *MacNeil Estate v. Canada (Indian and Northern Affairs Department)* [2004] F.C.J. No. 201, 2004 FCA 50, at ¶ 32.
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> [11] Judges hearing motions for summary judgment can only make findings of fact or law where the relevant evidence is available on the record, and does not involve a serious question of fact or law which turns on the drawing of inferences: see *Apotex Inc. v. Merck & Co.*, [2002] F.C.J. No. 811, 2002 FCA 210.
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> [12] Also relevant to this matter is Rule 215, which provides that:

215. A response to a motion for summary judgment shall not rest merely on allegations	**215.** La réponse à une requête en jugement sommaire ne peut être fondée uniquement sur les

or denials of the pleadings of the moving party, but must set out specific facts showing that there is a genuine issue for trial.	allégations ou les dénégations contenues dans les actes de procédure déposés par le requérant. Elle doit plutôt énoncer les faits précis démontrant l'existence d'une véritable question litigieuse.

[13] That is, a party responding to a motion for summary judgment cannot simply rely on allegations or denials in its pleadings. Instead, the responding party must provide evidence, through affidavits or by other means, of specific facts demonstrating that there is a genuine issue for trial: see *Kirkbi AG v. Ritvik Holdings Inc.* [1998] F.C.J. No. 912, at ¶18.

[14] According to the Federal Court of Appeal in the *MacNeil Estate* case previously cited, parties responding to a motion for summary judgment do not have the burden of proving *all* of the facts in their case; rather, they have only an evidentiary burden to put forward evidence showing that there is a genuine issue for trial: at ¶25.

[15] Although the burden lies with the moving party to establish that there is no genuine issue to be tried, Rule 215 does, however, require that the party responding to the motion for summary judgment "put his best foot forward". To do this, a responding party must set out facts that show that there is a genuine issue for trial: see *MacNeil Estate*, at ¶37.

[16] This requirement has also been described as necessitating that a responding party "lead trump or risk losing": see *Kirkbi AG*, above, at ¶18, quoting *Horton v. Tim Donut Ltd.* (1997), 75 C.P.R. (3d) 451 at 463 (Ont. Ct. (Gen.Div.)), aff'd (1997), 75 C.P.R. (3d) 467 (Ont. C.A.).

[17] Ultimately, the test is not whether a plaintiff cannot succeed at trial, but whether the case is so doubtful that it does not deserve consideration by the trier of fact at a future trial: see *Ulextra Inc. v. Pronto Luce Inc.* [2004] F.C.J. No. 722, 2004 FC 590.

[18] In making this determination, a motions judge must proceed with care, as the effect of the granting of summary judgment will be to preclude a party from presenting any evidence at trial with respect to the issue in dispute. In other words, the unsuccessful responding party will lose its "day in court": see

> *Apotex Inc. v. Merck & Co.*, 248 F.T.R. 82, at ¶12, aff'd 2004 FCA 298.

[14] The *Federal Courts Rules* regarding summary judgment were amended in 2009 and section 215, referred to above, is now section 214, with some minor changes to the wording, but the principles set out above continue to apply.

[15] The Supreme Court of Canada's recent decision in *Hryniak v Mauldin*, 2014 SCC 7, [2014] SCJ No 7, which interpreted Ontario's recently amended summary judgment rules, appears to encourage resort to summary judgment in appropriate cases to facilitate access to justice and to resolve the litigation. However, the consequences of citizenship revocations require the Court to carefully scrutinize the evidence and I continue to be guided by the principles set out above.

[16] With all of these principles in mind, the merits of the motion have been considered.

The Defendant's Immigration History

[17] On September 28, 1995, the defendant shot his neighbour in Bosnia and Herzegovina with a firearm. The defendant maintains that he shot in self-defence in the context of a property dispute. He was arrested, charged with attempted homicide, detained in custody for two and a half months and then released pending trial. He was tried and convicted in 2000. His conviction was set aside on appeal in 2002 and a new trial was ordered. That trial has not taken place as the defendant is not present in Bosnia and Herzegovina, however, the defendant remains subject to an international arrest warrant.

[18] After the shooting incident and while awaiting his trial, on March 8, 1998, the defendant applied for permanent residence ["PR"] in Canada. His wife's great nephew assisted him with the application form, which required him to answer several questions. The defendant answered "no" to Question 20 which asked whether he had "committed a criminal offence in any country". He also answered questions on a supplementary form indicating that he had no problems with the police and that he had not had any contact with any state security service. The defendant attested to the truthfulness, completeness and accuracy of his answers to the questions on the supplementary form. He declared that he asked for and obtained an explanation for every point on the form that was not clear to him. He also declared that he fully accepted responsibility for the statements made on his PR application.

[19] Between 1998 and 2000, the defendant traveled to and from Canada to Bosnia and Herzegovina without incident at least twice and was able to renew his passport in 1998.

[20] The defendant obtained permanent resident status in Canada on January 19, 1999, after the required police and security clearances administered by Citizenship and Immigration Canada [CIC] were completed.

[21] The defendant applied for citizenship on March 10, 2003. On his application, he attested that he understood the contents of the application and that false declarations could result in the loss of Canadian citizenship or a charge under the *Act*.

The revocation proceedings against the defendant

[22] On February 24, 2012, the Minister of Citizenship and Immigration (the "Minister"), issued a Notice in Respect of Revocation of Citizenship which informed the defendant that a report would be made to the Governor in Council under section 10 of the *Act*. On March 21, 2012, the defendant requested that the case be referred to this Court, pursuant to section 18 of the *Act*. On May 11, 2012, the Minister commenced proceedings in this Court and issued a Statement of Claim which alleges that the defendant obtained Canadian citizenship by false representation or by fraud or by knowingly concealing material circumstances concerning his criminal history. After cross-examinations by the parties, the Minister brought this motion for summary judgment pursuant to Rule 215(1) of the *Federal Courts Rules*.

[23] I note that by Order dated November 6, 2012, the defendant's son, Blagoje Savic, was appointed as litigation guardian for the defendant because the defendant now suffers from Parkinson's disease and dementia. The litigation guardian gathered information from his father, the great-nephew who assisted his father complete his application, and from other family members. The litigation guardian participated in the cross examinations and provided evidence.

Relevant statutory provisions

[24] Sections 10 and 18 of the *Citizenship Act* are set out in Annex A.

Issues

[25] As noted above, the key issue is whether summary judgment should be granted.

[26] The plaintiff now submits that the facts are undisputed and support the order for summary judgment: the defendant was charged with attempted murder and was detained by police in 1995; he declared on his application for permanent residence that he had never committed a crime, that he never had any contact with state security services, and that he never had problems with the police; and based on this information he became a permanent resident in 1999 and a Canadian citizen in 2003. The plaintiff also relies on admissions made at discovery including that the defendant knew he was facing charges for attempted homicide at the time of his application and should not have answered the questions as he did.

[27] The defendant submits that there is insufficient evidence to establish the necessary facts and raises nine issues that he submits are genuine issues requiring that a trial be held; the most significant issue being whether an intention to mislead the decision maker is required to establish that the defendant obtained his Canadian citizenship by false representation or by fraud or by knowingly concealing material circumstances and whether the defendant had such an intention.

Is intent to mislead the decision maker required pursuant to section 10 of the Citizenship Act?

The plaintiff's position

[28] The Minister submits that he has established, on a balance of probabilities, that the defendant obtained his Canadian citizenship by false misrepresentations or by fraud or by knowingly concealing material circumstances on his permanent resident application and/or citizenship application.

[29] The Minister submits that a misrepresentation of a material fact includes an untruth, the withholding of truthful information or a misleading answer that has the effect of foreclosing or averting further inquiries (*Minister of Manpower and Immigration v Brooks*, [1974] SCR 850 at 873 [*Brooks*]; *Canada (Minister of Citizenship and Immigration) v Odynsky*, 2001 FCT 138 at paras 156-159, 177, [2001] FCJ No 286 [*Odynsky*]) and that the defendant's answers to the relevant questions had that effect.

[30] The Minister further submits that the conduct of making "false representations" included in subsection 10 (2) does not require an intention to mislead the decision-maker as established by the Supreme Court of Canada in *Brooks* at paras 138-140. The Minister submits that *Brooks* has been relied on in citizenship proceedings, although *Brooks* was not a citizenship proceeding.

[31] The Minister argues that, in any event, the wording of section 10 is clear; a declaration can be issued where it is found that a person obtained his permanent resident status by false representation or by fraud or by knowingly concealing material circumstances and the defendant's conduct includes both false representation and knowingly concealing material circumstances.

[32] The Minister further clarifies his position; the defendant knowingly concealed material circumstances either intentionally or through wilful blindness. In addition, the Minister submits that the defendant made false representations, which does not require an intention to mislead the decision maker. However, if such an intention is required, it has been established.

Post hearing submissions of the plaintiff

[33] At the hearing, the Minister advanced a new argument to support his position that no intention to mislead is required under section 10 with respect to false representation. The Minister noted that the jurisprudence regarding section 40 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ["IRPA"] which addresses the consequences of misrepresentation for permanent residents may be instructive.

[34] I asked the plaintiff to provide more clarity regarding this new line of argument in brief post hearing submissions. The defendant was also provided with an opportunity to respond in writing to the plaintiff's submissions regarding section 40. The defendant did so and, in addition, reiterated many of the arguments made at the hearing and in the previous memos. The defendant also elaborated on the Governor in Council process regarding revocation of citizenship.

[35] My consideration of the post hearing submissions has been limited to the alternative argument regarding section 40 of IRPA.

[36] These submissions are summarized below and have been carefully considered.

[37] The Minister submits that while there is no need to go beyond the clear wording of section 10 of the *Act* and the relevant jurisprudence to conclude that an intention to mislead is not required to establish that a person made a false representation, the jurisprudence regarding section 40 of IRPA bolsters this position.

[38] The Minister reiterates that his argument that intention is not required if a person makes a false representation is an alternative argument. The Minister's primary position is that the defendant knowingly concealed material circumstances – either intentionally or by willful blindness, which is amply supported by the evidence. The Minister also submits that false representations were made and, if an intention to mislead is required, such an intention is apparent.

[39] The relevant provision of IRPA is paragraph 40(1)(a):

40. (1) A permanent resident or a foreign national is inadmissible for misrepresentation	**40.** (1) Emportent interdiction de territoire pour fausses déclarations les faits suivants :
(*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;	a) directement ou indirectement, faire une présentation erronée sur un fait important quant à un objet pertinent, ou une réticence sur ce fait, ce qui entraîne ou risque d'entraîner une erreur dans l'application de la présente loi;

[40] The Minister submits that the jurisprudence regarding section 40 has established that a willfulness or intention to misrepresent or to withhold material facts is not required. However, there may be an exception for honest and reasonable mistakes which would only apply in "truly exceptional circumstances" (*Goudarzi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 425, [2012] FCJ No 474).

[41] The Minister submits that importing an element of intention to mislead for false representation under subsection 10 (2) of the *Act* is absurd as this suggests that the law should

treat people differently depending on when their false representation is discovered. If the person is a permanent resident, intention to mislead would not be required, but if the person has already acquired citizenship, the *Act* would apply and an intention to mislead by making the false representation would have to be established.

[42] The rare exception of honest and reasonable mistake which may be available under subsection 40 (1) of IRPA is not available under subsection 10 (2) of the *Act*. However, the Minister submits that citizens involved in revocation proceedings could make submissions on an issue of innocent mistake at the subsequent Governor in Council process.

[43] The Minister further submits that even if an exception for honest and reasonable mistake were available under subsection 10(2), it would not assist the defendant. If he honestly believed that he did not commit a criminal offence, did not have contact with a state security agency or did not have a problem with the police, despite shooting his neighbour, being arrested, charged with attempted murder and detained for two months, his belief could not be reasonable.

The defendant's position

[44] The defendant submits that in order to find that he knowingly concealed material circumstances, it must be found, based on the evidence presented, that he intentionally and consciously misled the decision-maker (*Odynsky*, above at para 159; *Rogan*, above, at para 31. The defendant submits that there was no such intent and that his answers to the questions on his permanent resident form and the supplemental form were justified.

[45] The defendant argues that none of the jurisprudence supports the position that the Minister is not required to demonstrate a fraudulent intent or intent to mislead the decision maker where false representations are made. The defendant argues that the Minister is asking the Court to give a novel and illogical reading to section 10 (2) of the *Act* since the other conduct - fraud and knowingly concealing - does require such intent.

[46] The defendant submits that the Minister's reliance on *Brooks* to argue that making false representations does not require an intention to mislead is misplaced. The case law regarding citizenship revocation that has relied on *Brooks* has focused on the issue of materiality, not intent.

[47] The defendant further submits that citizenship has not previously been revoked on the exclusive basis of a false representation.

The defendant's Post hearing Submissions

[48] The defendant rejects the submission that the jurisprudence under section 40 of IRPA regarding misrepresentation is instructive. The defendant notes that the provisions differ and that procedural safeguards are more robust for permanent residents; for example, permanent residents found inadmissible may appeal to the Immigration Appeal Division and make oral submissions. However, no appeal is available for a decision made pursuant to section 10 of the *Citizenship Act*. The possibility that the defendant would be able to raise an honest mistake at the later stage in submissions to the Governor in Council is not an alternative to an appeal or to an inability to raise an honest mistake before the Court.

[49] In addition, the defendant disputes the Minister's argument that subsection 10 (1) does not permit a person to raise an honest mistake and submits that the jurisprudence has recognized that people should not be punished for events outside of their knowledge and control. The defendant referred to *Schneeberger*, above where Justice Dawson noted:

> [26] More must be established than a technical transgression of the Act. Innocent misrepresentations are not to result in the revocation of citizenship. See: *Canada (Minister of Multiculturalism and Citizenship) v. Minhas* (1993), 66 F.T.R. 155 (T.D.).

An Intention to mislead is an element of section 10

[50] It is important to bear in mind that section 10 does not create a criminal offence and does not engage a criminal standard of proof. The conduct set out in section 10 that is relied on to establish that the "person has obtained, retained, renounced or resumed citizenship under this *Act* by false representation or fraud or by knowingly concealing material circumstances" must be established on a balance of probabilities, not on the standard of proof beyond a reasonable doubt.

[51] The purpose of the provision is to ensure that applicants do not benefit by obtaining permanent resident status and citizenship as a result of failing to provide essential information or from providing false information. The information provided is relied on by the decision maker. Applicants have a duty to provide the information requested and to be truthful and ought to know that the information will be relied upon and may foreclose further lines of inquiry.

[52] The plaintiff relies on *Brooks* to support his position that intention is not an element of making a false representation. I am not persuaded that *Brooks* has established this proposition for the *Citizenship Act*.

[53] In *Brooks* at 864-65, the Supreme Court of Canada considered section 19 of the *Immigration Act*, RSC 1952, c 325 regarding whether the defendant should be deported. That provision, in a different statute and differently worded, did not specify an element of intention.

[54] Justice Laskin (as he then was), speaking for the Court, noted at page 865:

> An answer may be both false and misleading but the statute does not demand this combination. It may be the one or the other and still fall within the prohibition. Again, since criminal punishment is not the object of the enforcement of immigration and deportation policies by means of special inquiries, I cannot be persuaded that intentional or wilful deception should be read in as a prerequisite. It was noted by counsel, as well as by the Board, that mens rea is made a condition of culpability under s. 50(b) and (f) which sets out criminal offences, and hence is of a different order than what is prescribed by ss. 19 and 26.
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> [emphasis added]

[55] The Court found that providing false or misleading information does not require *mens rea* or an intention to mislead to be caught by the *Immigration Act* (as it provided at that time).

[56] Although subsequent jurisprudence has cited *Brooks* in the context of citizenship revocation, I have not been referred to any jurisprudence that specifically relied on *Brooks* with respect to the element of intention required pursuant to section 10 of the *Citizenship Act*.

[57] The jurisprudence regarding citizenship revocation has established that inadvertent omission of information that is not material will not be caught by section 10, but also that wilful blindness to the requirement to disclose information will not be condoned.

[58] The defendant relied on *Canada (Minister of Multiculturalism and Citizenship) v Minhas*, [1993] FCJ No 712, 21 Imm LR (2d) 31 [*Minhas*] and *Schneeberger*, above, to assert that section 10 does not preclude the defendant raising an honest mistake.

[59] In *Minhas* at paras 8-10, Justice Jerome considered subsection 10(1) of the *Act* regarding false representations and concluded that *some* evidence of an intention to mislead is required:

> 8 In order to succeed, the Minister must do more than merely demonstrate that the respondent has committed a technical transgression of the Act. The words used in subsection 10(1) do not impute an offence requiring the full criminal standard of proof "beyond a reasonable doubt", but rather have the effect of saving innocent misrepresentations from the severe penalty of revocation of citizenship. An innocent statement or representation, although false and misleading, is not sufficient to invoke or justify such a penalty. There is a further element of proof required, relating to the respondent's state of mind, and the onus of that proof rests with the Minister. What is required, therefore, is some evidence that the respondent misrepresented pertinent facts with the intention to deceive and to obtain his citizenship on the basis of those false representations.
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> [my emphasis]

[60] In that case Justice Jerome was not satisfied that Minhas had the intention to make a false representation or to knowingly conceal material circumstances in order to obtain his citizenship.

[61] In *Schneeberger*, Justice Dawson noted:

> [26] More must be established than a technical transgression of the Act. Innocent misrepresentations are not to result in the revocation of citizenship. See: *Canada (Minister of Multiculturalism and Citizenship) v. Minhas* (1993), 66 F.T.R. 155 (T.D.).

[62] In that case, Justice Dawson (as she then was) found that the conduct constituted both a false representation and knowing concealment and was clearly intentional:

> 48 For these reasons, I am satisfied, on a balance of probabilities, that the defendant provided a false blood sample to the R.C.M.P. This constituted the making of a false representation to, and the knowing concealment of a material circumstance from, the R.C.M.P. The false representation was that the blood sample was that of the defendant. The defendant knowingly concealed the material circumstance that it was someone else's blood contained in a rubber tube inserted in his arm under his skin. Through the making of this false representation and/or the knowing concealment of a material circumstance, the defendant circumvented any further police inquiry which would likely have led to criminal charges. This, in turn, would have rendered him ineligible for citizenship. Through the making of the false representation and/or the knowing concealment he was able to tell the Citizenship Judge that he had not been charged with an offence.

[63] In *Canada (Minister of Citizenship and Immigration) v Phan*, 2003 FC 1194, 240 FTR 239 [*Phan*], Justice Gibson referred to *Schneeberger* and other jurisprudence that had referred to *Minhas* and expressed the need for caution regarding “innocent” misrepresentations:

> [33] I agree with the foregoing concern about the application of *Minhas*. I am concerned that the principle drawn from that decision by Justice Dawson that "innocent representations are not to result in the revocation of citizenship" is overly broad. I am satisfied that misrepresentations put forward as "innocent" must be carefully examined. "Willfull blindness", when practised by an applicant for

> Canadian citizenship in the pursuit of his or her application, is not to be condoned. The applicant is seeking a significant privilege. In those circumstances, he or she, when faced with a situation of doubt, should invariably err on the side of full disclosure to a citizenship judge or citizenship official.

[64] In *Odynsky*, above at para 159, Justice MacKay addressed the meaning of "knowingly conceal" noting that the person need not know that the information concealed is material to the decision, but the act of concealing the information must be done with the intent to mislead.

[65] In *Rogan*, above Justice Mactavish addressed the requirements of section 10 of the *Act* and summarized the jurisprudence:

> [32] In order to find that someone "knowingly conceal[ed] material circumstances" within the meaning of section 10 of the *Citizenship Act, 1985*, "the Court must find on evidence, and/or reasonable inference from the evidence, that the person concerned concealed circumstances material to the decision, whether he knew or did not know that they were material, with the intent of misleading the decision-maker": *Odynsky*, above, at para. 159. See also *Schneeberger*, above, at para. 20.
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> [33] "A misrepresentation of a material fact includes an untruth, the withholding of truthful information, or a misleading answer which has the effect of foreclosing or averting further inquiries": *Schneeberger*, at para. 22, citing *Brooks*. This is so even if the answer to those inquiries might not turn up any independent ground of deportation: *Brooks*, above, at 873.
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> [34] In assessing the materiality of the information concealed, regard must be had to the significance of the undisclosed information to the decision in question: *Schneeberger*, at para. 21. However, "more must be established than a technical transgression of the Act. Innocent misrepresentations are not to result in the revocation of citizenship": *Schneeberger*, at para. 26, citing *Canada (Minister of Multiculturalism and Citizenship) v. Minhas* (1993), 66 F.T.R. 155, [1993] F.C.J. No. 712 (F.C.T.D.).
>
> [35] That said, misrepresentations claimed to be "innocent" must be carefully examined, and willful blindness will not be

> condoned. If faced with a situation of doubt, an applicant should invariably err on the side of full disclosure: *Canada (Minister of Citizenship and Immigration) v. Phan*, 2003 FC 1194, 240 F.T.R. 239 at para. 33.

[66] The plaintiff's primary argument is that the defendant acted intentionally in concealing material circumstances and in making false representations.

[67] The plaintiff's alternative argument is that some conduct that falls under section 10, namely false representations, need not be intentional. Success on this argument would avoid the need to provide some evidence to establish on a balance of probabilities that there was an intention to mislead the decision maker.

[68] The overall goal of section 10 is to ensure that persons who have obtained permanent resident status and citizenship by providing false information or by withholding information that is material to the decision will not continue to benefit from that status. In my view, intent to mislead the decision maker is required for all conduct referred to in section 10. That intention must be established on a balance of probabilities; the plaintiff must provide some evidence of intention or some evidence from which a reasonable inference of intention to mislead can be drawn.

[69] Section 10 refers to three types of conduct (false representation or fraud or by knowingly concealing material circumstances) and it is possible that the same conduct could satisfy all three, but that is not required.

[70] Fraud arises in both criminal law and in other contexts including tort and contract. Fraud is generally defined as intentional or reckless misrepresentation of fact by words or by conduct that deceives another person and which results in a detriment to that other person (see *Bruno Appliance and Furniture, Inc v Hryniak*, 2014 SCC 8). The conduct which amounts to fraud can also be an omission or silence in situations where there is an obligation to disclose information.

[71] The requirement for intention with respect to conduct that amounts to fraud in section 10 does not need to be spelled out because intention, which can include recklessness regarding the statement or omission and the other person's likely reliance on that statement, is part of the definition of fraud.

[72] The element of "knowingly" with respect to concealing material circumstances makes it clear that inadvertent omissions will not be caught. The jurisprudence has further clarified that an intention to mislead the decision maker is required (see *Odynsky* and *Rogan*, above).

[73] However, as noted in *Phan*, given the privilege of permanent resident status or citizenship being sought by an applicant, when there is doubt, the applicant should err on the side of full disclosure.

[74] This leaves for consideration the conduct contemplated by false representations, which the plaintiff alternatively submits does not require an intention to mislead. As noted above, I do not agree. Simply making a false statement (i.e., a false representation) in error or inadvertently

should not result in a declaration under section 10. Some intention to mislead is required. This intention must be established on a balance of probabilities.

[75] However, it is difficult to conceive of a situation where a false representation that is not inadvertent would not also be covered by the conduct described as fraud, given that in the context of permanent resident applications, the representation would be relied on by the decision maker and the applicant would benefit from making the false representation.

[76] Similarly, situations where an applicant would "knowingly conceal material circumstances" may also constitute a "false representation" and/or fraud.

[77] I note the recent case of *Canada (Minister of Citizenship and Immigration) v Thiara*, 2014 FC 220, 2014 FCJ No 288 [*Thiara*], which the defendant brought to the Court's attention after the hearing and before my reasons were released.

[78] In that case, Justice Roy concluded, as I have, that an intent to deceive is required.

> [49] Obtaining citizenship by false representation implies an action made with the intent to deceive. That to my way of thinking implies the knowledge that something is false and the conscience that a statement is made. *Black's Law Dictionary*, 7th ed., West Group, defines a representation as "a presentation of fact – either by words or by conduct – made to induce someone to act". In this case, the burden of proving that the defendant was conscious he was making a representation, i.e. that it was made to induce action, has not been discharged. On a balance of probabilities, the defendant's behaviour must be found to be innocent.

[79] The facts in *Thiara* were quite different and no intention was found.

[80] As elaborated upon below, in the present case, the defendant's actions in providing false answers and concealing that he had been charged with a criminal offence and was awaiting trial at the time of his application can not be characterized as innocent misrepresentations, nor are they technical transgressions. The defendant withheld truthful information and provided untruthful answers which had the effect of foreclosing further inquiries. CIC relied on the untruthful answers and the concealment of significant, material and pertinent information.

[81] I would also note that I have not been persuaded by the plaintiff's submissions that the jurisprudence regarding section 40 of IRPA is instructive and bolsters the view that false representations within the meaning of section 10 of the *Citizenship Act* do not include an element of intention to mislead. It may appear incongruous that an unintentional or inadvertent "misrepresentation" or an honest mistake in an application for permanent resident status would result in inadmissibility if caught at the time the person is a permanent resident, but would not result in a revocation of citizenship if caught once the person has become a citizen. However, the two relevant provisions are different in several respects. These provisions must be considered and interpreted within the context of the respective statutes; in addition, they are differently worded, engage different procedures and result in different consequences. Also, as noted above, an honest and reasonable mistake can be raised, albeit only in exceptional circumstances, with respect to misrepresentation in an application for permanent residency. This could avoid the consequences that result in inadmissibility pursuant to section 40 of IRPA.

Should summary judgment be granted?

The Plaintiff's position

[82] The Minister submits that summary judgment should be granted and there is no genuine issue for trial. The defendant has admitted the essential facts: he shot his neighbour on September 28, 1995; the police arrested and detained him from September 1995 to December 1995; and, he was charged with attempted murder. Moreover, the defendant's litigation guardian admitted at discovery that he knew he was facing criminal charges at the time he filled out his application and that he should have disclosed this information.

[83] The defendant's answers foreclosed further inquiries into his potential inadmissibility, therefore, on a balance of probabilities, the defendant gained his permanent resident status and citizenship by false representation or by fraud or by concealing material circumstances.

[84] The Minister submits that the defendant's answers on the supplementary form alone are sufficient to support a finding of false representation and knowing concealment of material circumstances. He falsely answered "no" to question 4, which asked whether he had problems with the police. He also falsely answered "no" in response to question 1, which asked whether he had any contact with any state security service.

[85] The Minister argues the defendant's answer to question 20 on the permanent resident application, stating that he had not committed a criminal offence in any country, also supports a finding of false representation *and* knowing concealment of material circumstances. If the

defendant was uncertain whether he had committed a criminal offence, he should have provided details on a separate sheet, as instructed on the application.

[86] Additionally, the defendant provided false answers to clearly worded questions; the only reasonable conclusion is that he did so with intent to mislead the decision-maker. The Minister submits that if an intention to mislead is required, it has been established on a balance of probabilities.

[87] The Minister further submits that none of the other issues the defendant has raised are genuine issues for trial.

[88] All the evidence that will be available at trial exists now; nothing more will be available if there is a trial. The defendant's litigation guardian gathered information from family members and from his father and provided evidence at the examinations for discovery.

[89] A trial is not needed to determine whether intention to mislead is an element of section 10 as this is a question of law that has been fully argued on this motion for summary judgment; a trial will not enhance the Court's ability to determine this issue.

[90] With respect to the defendant's submission that the Minister is bound by its Notice of Revocation which referred to willful conduct by the defendant, the Minister submits that the Notice also referred to false representations. Moreover, the jurisprudence has established that the Notice only provides a brief summary of the basis of the Minister's position and the details are

provided in the Statement of Claim (*Odynsky*, above at para 97). The Statement of Claim provided sufficient details and the defendant responded to the issues raised. The defendant can not assert that he was prejudiced in any way by the words of the Notice.

Defendant's Position

[91] The defendant submits that the Minister has not met its onus of establishing the necessary facts, therefore, summary judgment should not be granted.

[92] The defendant argues that there is a lack of clear evidence with respect to the criminal proceedings in Bosnia and Herzegovina, including: contradictory evidence regarding the specific offence he was charged with and when; the delay between 1995-2000; no information about how CIC processed his police and security clearances; and no information about how he was able to obtain and renew his passport and travel to and from Bosnia and Herzegovina. The defendant submits that examinations for discovery of a representative of CIC produced no satisfactory explanations.

[93] The defendant raised other issues, including whether the wording of the questions in the 1998 form required that he disclose the shooting incident, and, why the form and the questions were later revised.

[94] The defendant contends that the Minister's Notice in Respect of Revocation alleges that the defendant "*willfully* made false representations by knowingly concealing material circumstances namely a criminal charge that would have made you inadmissible to Canada" and

alleges that he obtained citizenship and permanent residence "by *knowingly* concealing material circumstances". Therefore, the Minister cannot argue that intention is not required.

[95] The defendant maintains that the issue of whether an intent to mislead is required under section 10 is a live issue requiring a trial, as is the issue of whether the defendant had an intent to mislead.

[96] The defendant submits that he did not conceal material circumstances or make false representations, because he had an honest belief that he had not committed a criminal offence. At the time of preparing his application for permanent residence, he had not been found to have committed a criminal offence. He notes that the criminal proceedings in Bosnia and Herzegovina occurred in 2000, five years after the shooting incident and two years after he applied for permanent residence.

[97] He also notes that question 20 asked whether he had "committed a criminal offence in any country" and did not ask whether he was charged with or involved in criminal proceedings. The defendant argues that, his answer, "no", was an accurate answer because at that time, there had been no determination of his guilt.

[98] The defendant adds that he passed police and security clearance. This, combined with his belief that he shot his neighbour out of self-defence and in the post-civil war environment of his home country, led him to believe that he had not committed a criminal offence at the time he completed his application.

[99] The defendant argues that all these circumstances must be considered as they provide the objective basis for his subjective belief.

[100] The defendant also submits that there are credibility issues with respect to the evidence, the determination of which require a trial.

Summary Judgment is granted

[101] As noted in the jurisprudence referred to above, summary judgment permits the Court to summarily dispense with cases which should not proceed to trial because there is no genuine issue to be tried.

[102] The Court must consider whether the case "is so doubtful that it does not deserve consideration by the trier of fact at a future trial" while ensuring that "claims involving real issues be allowed to proceed to trial" (*Laroche*, above).

[103] The defendant has not met the evidentiary burden required to establish that there is a genuine issue for trial. The facts do not support the defendant's position that the issues raised should be the subject of a trial.

[104] The majority of the issues the defendant proposed as genuine issues for trial are speculative questions that are posed to support the argument that the defendant had some objective basis for his subjective belief that he had not committed an offence and that his answers were not false.

[105] The defendant was (and still is) facing a charge of attempted homicide; contrary to his submission, there was no ambiguity about the charge he was facing at the time he provided his answers. The reason why the forms were revised has no bearing on the fact that the defendant was obliged to answer the questions on the forms, as they existed in 1998, truthfully and completely. His ability to travel twice to Canada and return to Bosnia and Herzegovina with a passport does not change the fact that he knew he was facing a criminal charge of attempted homicide. This is particularly true since one of his trips was to attend his trial. While the defendant submits that he passed the security clearances for permanent resident status and this informed his belief that he had not committed a criminal offence, I note that he filled in the forms concealing his criminal proceedings and falsely answering the questions *before* the security clearances. In my view, his responses foreclosed other inquiries that could have resulted in a different outcome regarding those clearances.

[106] The only possible issue for a trial would be whether an intention to mislead the decision maker is a necessary requirement pursuant to section 10 and whether the defendant had such intent.

[107] The legal issues regarding the intent required pursuant to section 10 have been fully argued by the parties on this motion and the relevant evidence to determine whether the defendant had the requisite intent is on the record. A trial will not enhance the Court's ability to resolve these issues.

[108] As noted above, I have found that an intention to mislead the decision maker is an element of section 10. Intention must be established on a balance of probabilities.

[109] The defendant's argument is basically that he answered the questions truthfully based on his subjective belief and based on his own interpretation of the questions on the permanent resident application and supplemental form.

[110] I acknowledge that the questions were worded in a broad manner, opening the door to the defendant's argument that his responses were accurate. However, there can be no doubt about the nature of the information sought and the purpose of the application. For example, the question which asked "did you have problems with the police" is a broad question which might capture many situations that would include and go beyond altercations with the police, arrests, or possible abuse of authority by the police, but it certainly would include the very serious problems the defendant had with the police.

[111] The defendant's explanation that he answered "no" to that question because his problems were not with the police but rather with his neighbour and that the police were just doing their job in arresting him and detaining him for two months is not a reasonable explanation. This answer avoids the question and is another example of being wilfully blind to the purpose of the question and the need to disclose pertinent information in the context of an application for permanent residence.

[112] The applicant had been arrested, detained and charged with attempted homicide. He could not hold a reasonable belief that he had no problems with the police. Similarly he could not hold a reasonable belief that he had no contact with any state security agency, given his arrest and detention.

[113] The defendant's view that he had not committed a criminal offence, because he had not been tried and convicted at that time can not be condoned. The defendant argues that a person has not committed a criminal offence unless they have been convicted by a court. He notes that the question did not ask if he had been *charged with an offence or convicted of an offence*, but only if he had *committed an offence* – and his subjective belief was that he had not.

[114] I do not accept the argument that a person can truthfully say they have not committed an offence unless they are tried and convicted. This suggests that a person could commit an offence, flee and avoid detection and still be able to attest that they had not committed an offence.

[115] In this case, the defendant had been charged with attempted homicide. Even if he believes that his actions were in self defence, he could not reasonably conceal the information regarding the charges he faced. The permanent resident application form directed applicants to be truthful. He attested that he understood the questions and that his answers were truthful. The form also directed applicants to provide additional details or explanations. The defendant should have done so to elaborate as he saw fit on his subjective view that he had not committed an offence.

[116] Moreover, his answers to the other questions which indicated he had no problems with the police and no contact with any state security agencies were clearly false. These statements can only be regarded as being made with the intention to mislead the decision maker.

[117] As Justice Gibson noted in *Phan*, above:

> [36] On the evidence before me, I am satisfied that the Defendant was likely an innocent participant in drug trafficking when he undertook to help out his "friend" in October of 1993. I am satisfied that that was his belief. That being said, it was not for him to conclude that his participation in drug trafficking was "innocent" or "minor" and that the charges against him, whatever they were, and he apparently chose not to find out what they were, were "minor" or would be "dropped" or that he would be found innocent on the charges. Rather, it was for him to acquaint himself with the kind of trouble he was in and to disclose that trouble to citizenship officials or judges in a manner that would allow them to determine whether they were precluded by law, for the time being at least, from conferring citizenship on him.
>
> [37] However justified, from the Defendant's point of view, might have been his motivation in suppressing information so that he could get his citizenship and a passport so that he could visit his dying mother, it did not justify the suppression of information in the context of a very significant process where warnings were provided to him at every turn. If he had made full disclosure and explained the urgency that confronted him, that would have constituted the kind of full disclosure that would have allowed a citizenship judge or citizenship official to carry out his or her obligation. By taking it unto himself to decide that he did not need to disclose his difficulties, no matter how he characterized those difficulties in his own mind, and in circumstances where he either knew or certainly should have known that there might be an impediment to his obtaining citizenship, was completely unjustified. I am satisfied that it amounted both to the making of a false representation and to a knowing concealment of material circumstances on his part.
>
> [My emphasis.]

[118] Similarly in the present case, the defendant's subjective belief, given the purpose of the permanent resident application, of which he was aware, was not objectively justified.

[119] The plaintiff has established on a balance of probabilities that the defendant had the intent to mislead the decision maker when he knowingly concealed material circumstances and made false representations. He knew the purpose of the application form, he gave evasive and false answers and he concealed very significant information regarding the charges of attempted homicide that he faced. His intention to mislead the decision maker can be reasonably inferred from his conduct. If he did not intend to mislead, he was wilfully blind to the fact that the answers provided would mislead or deceive the decision maker – and as a result of this deception, he obtained permanent resident status.

[120] This case does raise circumstances that require the Court to carefully heed the guidance from the jurisprudence to proceed with caution in considering a summary judgment as it precludes the defendant his "day in court." I am aware of the significant consequences of revocation of citizenship for this elderly defendant who has been in Canada for 15 years and is now in poor health. However, these circumstances do not overcome the facts as established by the plaintiff.

[121] As noted at the outset, it may be that such circumstances will be considered in the submissions to the Governor in Council.

Conclusion

[122] For all of the foregoing reasons, the Minister's motion is granted, and a declaration will issue pursuant to subsection 10(1) and paragraph 18(1)(b) of the *Citizenship Act* that the Defendant obtained Canadian citizenship by false representation or fraud or by knowingly concealing material circumstances. After considering the circumstances of the defendant, I decline to order costs.

JUDGMENT

THIS COURT'S JUDGMENT is that the Minister's motion for summary judgment is granted, without costs. The Court declares that Nedjo Savic obtained Canadian citizenship by false representation or fraud or by knowingly concealing material circumstances.

"Catherine M. Kane"
Judge

ANNEX A

***Citizenship Act*, RSC, 1985, c C-29**

10. (1) Subject to section 18 but notwithstanding any other section of this Act, where the Governor in Council, on a report from the Minister, is satisfied that any person has obtained, retained, renounced or resumed citizenship under this Act by false representation or fraud or by knowingly concealing material circumstances,	**10.** (1) Sous réserve du seul article 18, le gouverneur en conseil peut, lorsqu'il est convaincu, sur rapport du ministre, que l'acquisition, la conservation ou la répudiation de la citoyenneté, ou la réintégration dans celle-ci, est intervenue sous le régime de la présente loi par fraude ou au moyen d'une fausse déclaration ou de la dissimulation intentionnelle de faits essentiels, prendre un décret aux termes duquel l'intéressé, à compter de la date qui y est fixée :
(*a*) the person ceases to be a citizen, or	*a*) soit perd sa citoyenneté;
(*b*) the renunciation of citizenship by the person shall be deemed to have had no effect, as of such date as may be fixed by order of the Governor in Council with respect thereto.	*b*) soit est réputé ne pas avoir répudié sa citoyenneté.
(2) A person shall be deemed to have obtained citizenship by false representation or fraud or by knowingly concealing material circumstances if the person was lawfully admitted to Canada for permanent residence by false representation or fraud or by knowingly concealing material circumstances and, because of that admission, the person subsequently obtained citizenship.	(2) Est réputée avoir acquis la citoyenneté par fraude, fausse déclaration ou dissimulation intentionnelle de faits essentiels la personne qui l'a acquise à raison d'une admission légale au Canada à titre de résident permanent obtenue par l'un de ces trois moyens.
[…]	[…]
18. (1) The Minister shall not make a report under section 10 unless the Minister has given notice of his intention to do so to the person in respect of whom the report is to be made and	**18.** (1) Le ministre ne peut procéder à l'établissement du rapport mentionné à l'article 10 sans avoir auparavant avisé l'intéressé de son intention en ce sens et sans que l'une ou l'autre des conditions suivantes ne se soit réalisée :
(*a*) that person does not, within thirty	*a*) l'intéressé n'a pas, dans les trente

days after the day on which the notice is sent, request that the Minister refer the case to the Court; or

(*b*) that person does so request and the Court decides that the person has obtained, retained, renounced or resumed citizenship by false representation or fraud or by knowingly concealing material circumstances.

(2) The notice referred to in subsection (1) shall state that the person in respect of whom the report is to be made may, within thirty days after the day on which the notice is sent to him, request that the Minister refer the case to the Court, and such notice is sufficient if it is sent by registered mail to the person at his latest known address.

(3) A decision of the Court made under subsection (1) is final and, notwithstanding any other Act of Parliament, no appeal lies therefrom.

jours suivant la date d'expédition de l'avis, demandé le renvoi de l'affaire devant la Cour;

b) la Cour, saisie de l'affaire, a décidé qu'il y avait eu fraude, fausse déclaration ou dissimulation intentionnelle de faits essentiels.

(2) L'avis prévu au paragraphe (1) doit spécifier la faculté qu'a l'intéressé, dans les trente jours suivant sa date d'expédition, de demander au ministre le renvoi de l'affaire devant la Cour. La communication de l'avis peut se faire par courrier recommandé envoyé à la dernière adresse connue de l'intéressé.

(3) La décision de la Cour visée au paragraphe (1) est définitive et, par dérogation à toute autre loi fédérale, non susceptible d'appel.

FEDERAL COURT

SOLICITORS OF RECORD

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