League for Human Rights of B'nai Brith Canada (*Applicant*)

v.

Her Majesty the Queen, the Attorney General of Canada and **Wasyl Odynsky** (*Respondents*)

INDEXED AS: LEAGUE FOR HUMAN RIGHTS OF B'NAI BRITH CANADA V. CANADA (F.C.)

Federal Court, Barnes J.—Toronto, March 16 and 17; Ottawa, June 19, 2009.

Citizenship and Immigration — Status in Canada — Citizens — Judicial review of Governor in Council's (GIC) decision declining to exercise power conferred thereupon by Citizenship Act, s. 10 to revoke Canadian citizenship of respondent Mr. Odynsky — Minister giving Mr. Odynsky notice of intention to seek revocation of citizenship after learning latter not disclosing, when immigrating to Canada, having worked as guard under German SS during World War II — In reference, Federal Court finding Mr. Odynsky obtaining citizenship by false representation or by knowingly concealing material circumstances — Whether GIC erred in exercising authority under Act, s. 10 — Express mention of material misrepresentation in Act, s. 10 not intended to remove from GIC's discretion consideration of other factors before issuing order to revoke citizenship — While material misrepresentation only prerequisite to revocation decision, all other factors not necessarily excluded from Minister, GIC's consideration — GIC's discretion under Act, s. 10 extending beyond consideration of existence of material misrepresentation — Also no basis for concluding GIC's decision unreasonable, made in breach of Canadian Charter of Rights and Freedoms — Application dismissed.

Construction of Statutes — Citizenship Act, s. 10 conferring discretion on Governor in Council (GIC) to revoke Canadian citizenship in cases of fraud — Although Act, s. 10 not conferring legislative discretion in direct way, creating automatic revocation of citizenship to take effect as of such date as may be fixed by GIC — This language suggesting scope of GIC's discretion enlarged beyond consideration of material misrepresentation — Parliament's permissive language indicating intent to confer broad discretion on GIC in exercising revocation authority.

Administrative Law — Judicial Review — Grounds of Review — Duty of fairness not owed to public at large, third-party not directly involved in decision-making process — To extent fairness requiring decision maker to provide reasons, obligation owed only to parties directly affected — Scope of duty of fairness varying based on impact of decision on those affected.

Practice — Parties — Standing — Applicant seeking judicial review of Governor in Council's decision not to exercise power to revoke respondent Odynsky's citizenship — Although applicant having no direct interest, not directly affected by decision, meeting requirements for public interest standing — Raising serious issue of statutory construction; having genuine interest in outcome of case; proceeding representing only realistic means for applicant to seek declaratory relief.

This was an application for judicial review of the Governor in Council's (GIC) decision declining to exercise the power conferred upon it by section 10 of the *Citizenship Act* to revoke the Canadian citizenship of the respondent Mr. Odynsky. The applicant claimed that the GIC exceeded its authority by considering matters that were outside the scope of section 10 and, in particular, evidence concerning the personal circumstances of Mr. Odynsky. It also challenged the decision under section 7 of the *Canadian Charter of Rights and Freedoms* and for an alleged breach of the duty of fairness.

The Minister of Citizenship and Immigration became aware that during World War II, Mr. Odynsky had worked as a guard in a forced labour camp in the Ukraine under the German SS. The Minister was concerned that Mr. Odynsky had not disclosed this fact when he sought entry to Canada as a landed immigrant in 1949. In

accordance with section 18 of the Act, Mr. Odynsky was given notice that the Minister intended to seek the revocation of his Canadian citizenship, at which point Mr. Odynsky requested that his case be referred to the Federal Court. The Federal Court found that Mr. Odynsky had obtained his Canadian citizenship by false representation or by knowingly concealing material circumstances. The Minister then recommended to the GIC that Mr. Odynsky's citizenship be revoked.

The issues were whether the applicant had standing in this case and, if so, whether the GIC erred in exercising its authority under section 10 of the Act by considering matters other than whether Mr. Odynsky had obtained his Canadian citizenship based on a material misrepresentation or omission; whether the GIC owed a duty of fairness to the applicant; whether the GIC's decision was reasonable; and whether section 7 of the Charter applied.

Held, the application should be dismissed.

The applicant had no "direct interest" or was not "directly affected" by the GIC's decision concerning Mr. Odynsky. However, it did have public interest standing for the following reasons. The applicant unquestionably raised a serious issue of statutory construction. It also had a genuine interest in the outcome of the case given its longstanding involvement in the advancement of human rights and in war crimes issues. Furthermore, no other outside party would have a greater interest in the outcome of a case such as this one than the applicant. Finally, this proceeding represented the only realistic means for the applicant to seek a declaration regarding the point of statutory interpretation it asserted, in particular since citizenship was not revoked in this case and the GIC's decision would never be judicially reviewed except where a third party would seek to do so.

The express mention of a material misrepresentation in section 10 of the Act was not intended to remove from the GIC the discretion to consider other factors before issuing an order for revocation of citizenship. While a material misrepresentation is the only prerequisite to a revocation decision and that such a finding underpins the entire process of revocation, it does not necessarily follow that all other factors are thereby excluded from consideration either by the Minister or by the GIC. The legislative context supports the position that the GIC's authority under section 10 is more than a mere formality and that it enjoys a broad discretion to consider matters beyond the issue of material misrepresentation. Although section 10 does not confer legislative discretion in a direct way by using the word "may", it creates an automatic revocation of citizenship to take effect as of such date as may be fixed by order of the GIC. This language seems to suggest an enlargement to the scope of the GIC's discretion beyond consideration of the single issue of material misrepresentation. Within the complete context of section 10, Parliament's permissive language is indicative of an intent to confer a broad discretion upon the GIC in exercising its revocation authority. The requirement for a finding of material misrepresentation in section 10 was not intended by Parliament to remove other matters from consideration in the exercise of the GIC's discretion. That issue was highlighted to ensure that citizenship could not be revoked except where that prerequisite had been established.

There is no recognized duty of fairness owed to the public at large. To the extent that fairness may require a decision maker to provide reasons, it is an obligation owed only to the parties directly affected and no further. The scope of the duty of fairness, including the obligation to give reasons for a decision, will vary according to the importance or impact of the decision to the lives of those affected by it. It therefore cannot be said that a decision maker owes any duty of fairness to a third party which claims to represent the public interest but which is not directly involved in the decision-making process at first instance.

Finally, there was also no basis for concluding that the GIC's decision to reject the Minister's recommendation was unreasonable or was made in breach of the Charter.

STATUTES AND REGULATIONS CITED

Canada Labour Code, R.S.C., 1985, c. L-2.

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], s. 7.

Citizenship Act, R.S.C., 1985, c. C-29, ss. 10, 18.

Federal Courts Rules, SOR/98-106, r. 1 (as am. by SOR/2004-283, s. 2), Tariff B, column III.

Revised Statutes of Canada, 1985 Act, R.S.C., 1985 (3rd Supp.), c. 40, s. 4.

CASES CITED

APPLIED:

League for Human Rights of B'nai Brith Canada v. Canada, 2008 FC 732, 334 F.T.R. 63, revg 2008 FC 146, 79 Admin. L.R. (4th) 161, 323 F.T.R. 174; *Oberlander v. Canada (Attorney General)*, 2004 FCA 213, [2005] 1 F.C.R. 3, 241 D.L.R. (4th) 146, 320 N.R. 366.

CONSIDERED:

Canada (Minister of Citizenship and Immigration) v. Odynsky, 2001 FCT 138, 196 F.T.R. 1, 14 Imm. L.R. (3d) 3; *Oberlander v. Canada (Attorney General)*, 2003 FC 944, 238 F.T.R. 35; *Oberlander v. Canada (Attorney General)*, 2008 FC 1200, [2009] 3 F.C.R. 358, 336 F.T.R. 179, 75 Imm. L.R. (3d) 114; *Canada (Minister of Citizenship and Immigration) v. Bogutin* (1997), 144 F.T.R. 1, 42 Imm. L.R. (2d) 248 (F.C.T.D.); *Canada (Minister of Citizenship and Immigration) v. Copeland*, [1998] 2 F.C. 493, (1997), 51 C.R.R. (2d) 65, 140 F.T.R. 183 (T.D.); *Normandin v. Canada (Attorney General)*, 2005 FCA 345, [2006] 2 F.C.R. 112, 343 N.R. 246; *Luitjens v. Canada (Secretary of State)* (1992), 9 C.R.R. (2d) 149, 142 N.R. 173 (F.C.A.); *Beothuk Data Systems Ltd., Seawatch Division v. Dean*, [1998] 1 F.C. 433, (1997), 218 N.R. 321 (C.A.); *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, (1992), 95 Nfld. & P.E.I.R. 271, 4 Admin. L.R. (2d) 121; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, (1999), 174 D.L.R. (4th) 193, 14 Admin. L.R. (3d) 173.

REFERRED TO:

Minister of Justice of Canada et al. v. Borowski, [1981] 2 S.C.R. 575, (1981), 130 D.L.R. (3d) 588, [1982] 1 W.W.R. 97; *Sierra Club of Canada v. Canada (Minister of Finance)*, [1999] 2 F.C. 211, (1998), 13 Admin. L.R. (3d) 280, 157 F.T.R. 123 (T.D.); *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, (1992), 88 D.L.R. (4th) 193, 2 Admin. L.R. (2d) 229; *Harris v. Canada*, [2000] 4 F.C. 37, (2000), 187 D.L.R. (4th) 419, [2000] 3 C.T.C. 220 (C.A.); *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, 329 N.B.R. (2d) 1, 291 D.L.R. (4th) 577; *Martineau et al. v. Matsqui Institution Inmate Disciplinary Board*, [1978] 1 S.C.R. 118, (1977), 74 D.L.R. (3d) 1, 33 C.C.C. (2d) 366; *Her Majesty in right of the Province of Alberta v. Canadian Transport Commission*, [1978] 1 S.C.R. 61, (1977), 2 A.R. 539, 75 D.L.R. (3d) 257.

AUTHORS CITED

Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 5th ed. Markham, Ont.: LexisNexis Canada, 2008.

APPLICATION for judicial review of the Governor in Council's decision (Order in Council P.C. 2007-804) declining to exercise the power conferred upon it by section 10 of the *Citizenship Act* to revoke the Canadian citizenship of the respondent Mr. Odynsky. Application dismissed.

APPEARANCES

David Matas for applicant.

David Gates for respondents Her Majesty the Queen, Attorney General of Canada.

Barbara L. Jackman for respondent Wasyl Odynsky.

SOLICITORS OF RECORD

David Matas, Winnipeg, for applicant.

Deputy Attorney General of Canada for respondents Her Majesty the Queen, Attorney General of Canada.

Jackman & Associates, Toronto, for respondent Wasyl Odynsky.

The following are the reasons for judgment and judgment rendered in English by

[1] BARNES J.: This is an application by the League for Human Rights of B'nai Brith Canada (B'nai Brith) challenging the lawfulness of Order in Council P.C. 2007-804 rendered by the Governor in Council (GIC) on May 17, 2007. In that decision, and notwithstanding the recommendation of the Minister of Citizenship and Immigration (Minister), the GIC declined to exercise the power conferred upon it by section 10 of the *Citizenship Act*, R.S.C., 1985, c. C-29 (Act) to revoke the Canadian citizenship of the respondent, Wasyl Odynsky. This decision is challenged by B'nai Brith on the basis that the GIC exceeded its authority by taking into consideration matters which were outside the scope of section 10 of the Act and, in particular, evidence concerning the personal circumstances of Mr. Odynsky. B'nai Brith contends that the only matter that the GIC could lawfully consider was whether Mr. Odynsky obtained his Canadian citizenship on the strength of a material misrepresentation. This argument is based on the language of section 10 which states that a person ceases to be a citizen where the GIC, on a report from the Minister, is satisfied that citizenship was obtained by false representation or fraud or by knowingly concealing material circumstances. Since the Federal Court had conclusively made a finding of material misrepresentation against Mr. Odynsky in a reference proceeding brought under section 18 of the Act, B'nai Brith says that the GIC had no option but to issue an order for revocation of his citizenship. In addition, B'nai Brith challenges the GIC decision under section 7 of the Charter [*Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]] and for an alleged breach of the duty of fairness.

I. Background

[2] At some point the Minister became aware that during World War II Mr. Odynsky had worked as a guard in the Poniatowa forced labour camp in the Ukraine under the direction of the German SS. In that camp in November 1943, thousands of Jewish prisoners were massacred by killing squads commanded by the SS. The Minister was concerned that Mr. Odynsky had not disclosed this history when he sought entry to Canada as a landed immigrant in 1949.

[3] On September 24, 1997 the Minister indicated an intention to seek the revocation of Mr. Odynsky's Canadian citizenship by giving notice to him in accordance with section 18 of the Act. Mr. Odynsky then exercised his right under section 18 for a referral of his case to the Federal Court. That reference was perfected by the Minister on December 11, 1997.

[4] The Federal Court reference was heard by Justice Andrew MacKay in late 1998 and continued into August of 1999 (see *Canada (Minister of Citizenship and Immigration) v. Odynsky*, 2001 FCT 138, 196 F.T.R. 1). Justice MacKay heard evidence from witnesses in the Ukraine and in Toronto and found, on a balance of probabilities, that Mr. Odynsky had obtained a visa for entry to Canada by lying to Canadian authorities when asked about his wartime experiences. On the strength of this conclusion Justice MacKay made a declaration pursuant to section 18 of the Act that Mr. Odynsky obtained his Canadian citizenship by false representation or by knowingly concealing material circumstances. His decision included these additional findings, at paragraphs 225–226:

> In considering any report to the Governor General in Council concerning Mr. Odynsky pursuant to s-s. 10(1) of the Act, the Minister may wish to consider that
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> 1) on the evidence before me I find that Mr. Odynsky did not voluntarily join the SS auxiliary forces, or voluntarily serve with them at Trawniki or Poniatawa, or later with the Battalion Streibel;
>
> 2) there was no evidence of any incident in which he was involved that could be considered as directed wrongfully at any other individual, whether a forced labourer-prisoner, or any other person;

3) no evidence was presented of any wrongdoing by Mr. Odynsky since he came to Canada, now more than 50 years ago;

4) evidence as to his character from some of those who have known him in Canada, uncontested at trial, commended his good character and reflected his standing within his church and within the Ukrainian community in Toronto.

While those factors may be relevant to any discretion the Minister or the Governor in Council may exercise, they are not relevant in this proceeding.

[5] Before submitting a report under section 10 of the Act to the GIC, the Minister invited further submissions from Mr. Odynsky. He responded with extensive material attesting to his good character and setting out a number of other mitigating factors.

[6] Notwithstanding Mr. Odynsky's entreaties, the Minister proceeded with a report to the GIC recommending that his citizenship be revoked. The basis for that recommendation was as follows:

Before deciding to recommend revocation, I have also balanced the personal interests of Mr. Odynsky against the public interest. In doing so, I have considered the personal interest issues raised on Mr. Odynsky's behalf by his counsel and his family in appendices C, D, F, H and J attached to this report, and in letters of support from other Canadian individuals and organizations, including the letters which form part of those appendices. I have concluded, for the following reasons, that the public interest in holding him accountable for the seriousness of his deceit regarding his wartime activities outweighs Mr. Odynsky's personal interests:

1. Mr. Odynsky's citizenship was obtained through deceit. The length of time he has been in Canada should not be conclusive in deciding whether that citizenship should be revoked, at least in a situation such as the instant case where the deceit foreclosed inquiries relating to reprehensible acts committed in wartime. Otherwise, the effect would be to allow Mr. Odynsky to benefit now from his deception on entry about such grave matters.

2. Notwithstanding the evidence regarding Mr. Odynsky's good character since he came to Canada, the fact remains that Mr. Odynsky would not have enjoyed any life in Canada as a Canadian citizen if he had told the truth when he applied to come to this country.

3. Mr. Odynsky's personal interest in staying in Canada does not outweigh the public interest in ensuring Canada will not be a safe haven for persons complicit in wartime crimes or atrocities and in ensuring the integrity of the Canadian citizenship process. Moreover, it is inappropriate to put a great deal of emphasis on Mr. Odynsky's personal interest in maintaining citizenship in order to maintain family ties. Revocation of citizenship does not automatically lead to deportation. Removal proceedings do not ensue unless I choose to refer an inadmissibility report by an immigration officer to the Immigration Division of the Immigration and Refugee Board for an admissibility hearing.

4. The considerations of state sponsored health care and protection of the elderly do not outweigh the serious misrepresentation made by Mr. Odynsky. As a result of his deceit in entering Canada, Mr. Odynsky gained the status that entitled him to enjoy 50 years of state sponsored health care. His interest in maintaining the benefits of that status are outweighed by the public interest described above.

5. Mr. Odynsky's personal interest in remaining in Canada does not outweigh the public interest in ensuring:

   a. that Canada will not be a safe haven for persons who have committed or been complicit in war crimes, crimes against humanity or other reprehensible acts regardless of when or where they were committed; and

   b. the integrity of the Canadian citizenship process.

Furthermore, I have concluded that Mr. Odynsky's case is still placed within the policy of Canada's War Crimes Program regarding World War II cases although it was concluded by Mr. Justice MacKay that Mr. Odynsky's service with the Germans was not voluntary. As indicated by Justice Counsel in her submissions of November 22, 2001: "(…) membership alone was not the basis for commencement of proceedings, Mr. Odynsky served as a paid, armed guard at a Forced Labour Camp primarily populated by Jewish prisoners, both before and after those prisoners were massacred as part of the 'Final Solution'". The nature of Mr. Odynsky's service, whether voluntary or not, had no bearing on his admissibility to Canada in 1949. The fact that his service was found to be involuntary does not change the fact that he did not reveal anything about that service when he applied to come to Canada. [Emphasis added.]

[7] After considering the Minister's report the GIC issued an Order in Council stating:

Her Excellency the Governor General in Council, having considered the report of the Minister of Citizenship and Immigration made under section 10 of the *Citizenship Act* in relation to the person named in the annexed schedule, hereby declines to exercise the power conferred by section 10 of the *Citizenship Act* with respect to that person.

It is from this decision that B'nai Brith seeks declaratory and other prerogative relief.

II. Issues

[8] (a) Does the applicant have standing and, if so, did the GIC err in the exercise of its authority under section 10 of the Act by taking into account matters other than whether Mr. Odynsky had obtained his Canadian citizenship on the basis of a material misrepresentation or omission?

(b) Did the GIC owe a duty of fairness to B'nai Brith?

(c) Was the GIC's decision reasonable?

(d) Does section 7 of the Charter apply?

III. Analysis

Standing

[9] There is no basis for B'nai Brith's contention that it has a "direct interest" or is "directly affected" by the GIC's decision concerning Mr. Odynsky. This issue was conclusively determined by Justice Eleanor Dawson in the earlier appeal from the Prothonotary's summary dismissal order [2008 FC 146, 79 Admin. L.R. (4th) 161] in this proceeding (see: *League for Human Rights of B'nai Brith Canada v. Canada*, 2008 FC 732, 334 F.T.R. 63). It cannot be reargued now.

[10] Justice Dawson left open the question of whether B'nai Brith should be granted public interest standing but her decision, nevertheless, contains a thorough and very helpful analysis of the relevant evidence and authorities on that issue.

[11] There is no disagreement among the parties that an applicant for public interest standing must satisfy a conjunctive three-part test. It is required that:

i. There is a serious question raised;

ii. The applicant has a genuine or direct interest in the outcome of the litigation; and

iii. There is no other reasonable or effective way to bring the issue before the Court.

See *Minister of Justice of Canada et al. v. Borowski*, [1981] 2 S.C.R. 575; *Sierra Club of Canada v. Canada (Minister of Finance)*, [1999] 2 F.C. 211 (T.D.); and *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236.

[12] There is no question that B'nai Brith has raised a serious issue of statutory construction in this proceeding and the Attorney General did not strenuously argue otherwise. Justice Dawson also felt this was a serious issue worthy of further consideration, and I can find no basis for taking issue with her finding.

[13] The question of whether B'nai Brith has a genuine or direct interest in the GIC's decision is somewhat more vexing. Because of its longstanding involvement in the advancement of human rights and in war crimes issues, B'nai Brith claims to have sufficient expertise and interest to challenge what it contends was an unlawful interpretation of section 10 of the Act.

[14] Having reviewed the authorities including *Sierra Club*, above, *Canadian Council of Churches*, above, and *Harris v. Canada*, [2000] 4 F.C. 37 (C.A.) and considering the affidavit of Alan Yusim, Director, MidWest Region for B'nai Brith, I am satisfied that B'nai Brith has met the genuine interest requirement necessary for public interest standing in this case. Indeed, I cannot think of any other outside party which would have a greater interest in the outcome of a case like this one than B'nai Brith.

[15] Ordinarily it is the third requirement for public interest standing that will be a stumbling block for a party like B'nai Brith (see *Sierra Club*, above, and *Canadian Council of Churches*, above). That is so because in most cases involving a dispute between the Crown and a private interest litigant, one party will be aggrieved by the outcome and will almost always be better placed than a public interest party to challenge it. That is not the case here. The history of the few reported cases involving citizenship revocation indicates that both the Crown and the affected person have consistently maintained that the GIC has a broad discretion under section 10 of the Act. In cases like *Oberlander v. Canada (Attorney General),* 2003 FC 944, 238 F.T.R. 35 (*Oberlander* (2003)) where the person affected seeks judicial review of a negative decision by the GIC, the option of intervening will not be attractive for the reasons already expressed by Justice Dawson in the earlier proceeding in this case, at paragraph 64:

> However, there is jurisprudence to the effect that an intervener takes the pleadings and the record as it finds them, and that an intervener may not litigate new issues. See, for example, *Maurice v. Canada (Minister of Indian Affairs and Northern Development)* (2000), 183 F.T.R. 45 (T.D.). In the *Oberlander* case, both the Attorney General and Mr. Oberlander proceeded on the basis that the Governor in Council could engage in a balancing of the individual's personal interests. A similar position has been adopted by the Attorney General in this case.

[16] In a case like this one where citizenship is not revoked, the GIC's decision will never be judicially reviewed except where a third party seeks to do so.

[17] I do not accept the argument advanced by Mr. Odynsky's counsel that a party like B'nai Brith can never be permitted to directly challenge the outcome of an administrative process between private litigants. The suggested option of bringing a wholly independent application for declaratory relief ignores the problem that such a proceeding would have to be advanced hypothetically without an evidentiary record or a reviewable decision. To my thinking this proceeding represents the only realistic means for B'nai Brith to seek a declaration with respect to the point of statutory interpretation it asserts.

Standard of Review

[18] Before addressing the statutory interpretation issue raised on this application it is necessary to identify the appropriate standard of review. This was an issue thoroughly canvassed by the Federal Court of Appeal in *Oberlander v. Canada (Attorney General)*, 2004 FCA 213, [2005] 1 F.C.R. 3 (*Oberlander* (F.C.A.)) and later by Justice Michael Phelan in *Oberlander v. Canada (Attorney General)*, 2008 FC 1200, [2009] 3 F.C.R. 358 (*Oberlander* (2008)) and I need not repeat that analysis here. It is sufficient for present purposes to conclude that the scope of section 10 of the Act is a matter of law to be resolved on the standard of correctness. With respect to the review of the GIC decision on the merits and subject, of course, to the modifications established more recently in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, I would adopt the following statement of Justice Robert Décary in *Oberlander* (F.C.A.), at paragraphs 55 and 56:

> The case at bar resembles *Suresh* to the extent that the Governor in Council is dealing with a self-imposed government policy, but it cannot be said here that there is a negligible legal dimension in determining whether a person falls within the ambit of the war criminals policy. A Canadian citizen ought not, in my view, be declared stateless and be stigmatized as a suspected war criminal by a decision which would be reviewed on a standard affording greater deference than on the standard of reasonableness *simpliciter*.
>
> Application of the standard of review
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> I agree with the reviewing Judge that there was no obligation on the Governor in Council to mention all the elements it considered before reaching its decision and that the fact that peripheral elements are not mentioned is no proof that they were not considered or that they were arbitrarily discarded. I also agree that a reviewing court should not enter into a re-weighing of the evidence and the factors submitted by the parties.

Previous Authorities

[19] Counsel for the Attorney General argued before me that the scope of the GIC's discretion under section 10 was settled by the Federal Court of Appeal decision in *Oberlander* (F.C.A.), above, and by other authorities which have at least implicitly recognized a broad discretion at that stage of the citizenship revocation process. There is no question that the Attorney General took the position in the proceedings involving Mr. Oberlander that the GIC's authority included a delicate balancing of policy, personal interests and the public interest, but I do not agree that the Court unreservedly accepted that position. Rather, the Court found it unnecessary to resolve the point and simply assumed that the Attorney General's position was well founded (see *Oberlander* (F.C.A.), at paragraph 42). On this point, I am in complete agreement with the views of my colleague Justice Dawson who, in dealing with the interlocutory appeal in this proceeding, interpreted the decision in *Oberlander* (F.C.A.) as follows, at paragraphs 42–44:

> I read this to be a clear reservation that the Court of Appeal accepted, for the purpose of the appeal, the Attorney General's acknowledgment of the need to balance interests, but that such acceptance was not intended to foreclose future argument on the issue.
>
> In the circumstance where the Court of Appeal's decision was expressly stated to be based upon the Minister's acknowledgment, I do not find that the applicant's argument is bereft of any possibility of success because of the *Oberlander* decision.
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> This view is consistent with the observation of Justice Pratte in *Canada (Minister of Employment and Immigration) v. Taggar*, [1989] 3 F.C. 576 (C.A.), at page 582, that the authority of a prior decision "is very limited since, rightly or wrongly, it was partly based on the concession made by counsel for the Minister."

[20] Other relevant authorities have only lightly touched on the issue of the scope of the GIC's authority under section 10. This is not entirely surprising because both the Minister's and the GIC's past working assumption seems to have been based on the existence of a broad statutory discretion. At the same time it would not have been of any interest to the person affected to argue for a more limited authority based solely on the determination of the question of material misrepresentation. That was the situation in the underlying reference hearing in this case, where Justice MacKay found that Mr. Odynsky had obtained his citizenship on the strength of false representations or by knowing concealment of material circumstances about his wartime activities (see paragraph 221). Nevertheless, Justice MacKay went on to make a number of additional findings concerning the degree of Mr. Odynsky's complicity and his good character. These matters, he said [at paragraph 226], were not relevant to the issue he had to decide but "may be relevant to any discretion the Minister or the Governor in Council may exercise".

[21] In *Oberlander* (2003) Justice Luc Martineau held that the GIC's authority under section 10 was to be exercised independently from the Federal Court reference finding. He also identified no legal error arising from the GIC's consideration of the Government's "no safe haven" policy. Those findings, though, were made in the context of argument from both parties that the GIC had a broad discretion under section 10.

[22] When the Oberlander case was recently redetermined, Justice Michael Phelan came to the same conclusion but, again, in the context of common ground between the parties as to the scope of the GIC's section 10 authority: see *Oberlander* (2008), above.

[23] In an earlier decision of this Court in *Canada (Minister of Citizenship and Immigration) v. Bogutin* (1997), 144 F.T.R. 1 (F.C.T.D.), Justice William McKeown observed that under paragraph 10(1)(*a*) of the Act there is an automatic cessation of citizenship where the GIC is satisfied that citizenship was obtained by material misrepresentation. To the same effect is the decision by Justice Donna McGillis in *Canada (Minister of Citizenship and Immigration) v. Copeland*, [1998] 2 F.C. 493 (T.D.). Notwithstanding those comments, in both decisions there is a recognition that the Federal Court reference decision is merely one step in a process which may or may not result in the revocation of citizenship. Neither of those decisions undertook a detailed analysis of the scope of the GIC's mandate. Indeed, the passages relied upon appear to me to be first-impression and inconclusive *obiter*.

[24] My review of the relevant authorities indicates that the issue before me has not been previously analysed in the context of thorough or competing argument and, in the result, there has yet to be a considered decision on point. It is therefore necessary to consider the scope of the GIC's authority under section 10 of the Act.

The Scope of the GIC's Authority Under Section 10 of the Act

[25] The process for revoking Canadian citizenship under the Act is clear enough.[1] Under section 18, where the Minister has formed a preliminary view that a person may have obtained Canadian citizenship by false representation, fraud or knowing concealment of material circumstances, the Minister cannot pursue revocation without first giving notice of an intention to do so. The affected person is then entitled to request that the Minister refer the case for adjudication in the Federal Court. Where the Federal Court determines that Canadian citizenship was obtained by false representation, fraud or knowing concealment of material circumstances, it will issue a declaration to that effect. The Minister may then submit a report to the GIC recommending an order for revocation of citizenship. Upon the GIC being "satisfied" that the person obtained citizenship by false representation, fraud or knowing concealment of material circumstances, the person ceases to be a citizen "as of such date as may be fixed by order of the Governor in Council".

[26] The determination of whether Canadian citizenship was obtained through a material and willful misrepresentation or omission is a threshold issue that is carried forward through the revocation process. The Minister cannot consider a revocation without forming a preliminary view on the point. Upon the request of the person affected, the Federal Court must resolve that issue on a balance of probabilities and, where so determined, issue a declaration.

[27] On a report from the Minister the GIC must then be "satisfied" that citizenship was fraudulently obtained before it can make the final order for revocation.

[28] There is a practical necessity for resolving the material misrepresentation question in a judicial hearing. This is a question of fundamental importance to the rights of the affected person requiring a careful assessment of considerable evidence such that a process of independent adjudication is essential to its proper determination.[2] It is not a matter that either the Minister or the GIC is appropriately placed to resolve. Accordingly there is a clear purpose served by segregating that part of the process from what follows under section 10.

[29] The question that remains, though, is whether the express mention of a material misrepresentation in section 10 was intended to remove all other matters from consideration in the exercise of the GIC's discretion, or whether it was intended only to identify or highlight that issue as an essential precondition to the GIC's revocation order.

[30] The principle of statutory interpretation that underlies B'nai Brith's argument is that Parliament's expression of the single consideration of material misrepresentation by the GIC necessarily excludes all other considerations from the exercise of its section 10 discretion. This, it argues, reflects the principle of implied exclusion: that the legislative expression of one thing excludes another. This principle and its limitations were discussed at length by the Federal Court of Appeal in *Normandin v. Canada (Attorney General)*, 2005 FCA 345, [2006] 2 F.C.R. 112, at paragraphs 26–28 and 31–32:

> The appellant's argument in relation to the implied exclusion rule is attractive, but it gives this rule of construction an absolutism that the cases and authorities quite uniformly do not grant it.
>
> First, this rule of statutory interpretation, also known as the "*a contrario* argument" (see Pierre-André Côté, *The Interpretation of Legislation in Canada*, 3rd ed. (Scarborough: Carswell, 2000), at page 336), operates in the following way, according to Professor Sullivan in *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002), at pages 186-187:
>
> > An implied exclusion argument lies whenever there is reason to believe that if the legislature had meant to include a particular thing within its legislation, it would have referred to that thing expressly. Because of this expectation, the legislature's failure to mention the thing becomes grounds for inferring that it was deliberately excluded. Although there is no express exclusion, exclusion is implied. The force of the implication depends on the strength and legitimacy of the expectation of express reference. The better the reason for anticipating express reference to a thing, the more telling the silence of the legislature. [Emphasis added.]
>
> But important and useful as it may be, this rule of construction is very far from being a general rule of application or interpretation: see *Congrégation des Frères de l'Instruction Chrétienne v. Commissaires d'écoles Grand'Mère*, [1977] 1 S.C.R. 429, at page 435; *Murray Bay Motor Co. Ltd. v. Belair Insurance Co.*, [1975] 1 S.C.R. 68, at page 74. In fact, in *Alimport (Empresa Cubana Importadora de Alimentos) v. Victoria Transport Ltd.*, [1977] 2 S.C.R. 858, at page 862, Mr. Justice Pigeon, discussing the rule and speaking for the Court, writes:
>
> > The principle that the mention of a particular case excludes application of other cases not mentioned is far from being recognized as a general rule of interpretation. On the contrary, an affirmative provision of limited scope does not ordinarily exclude the application of a general rule otherwise established. [Emphasis added.]
>
> …

Second, this rule of statutory interpretation relied on by the appellant must be used with the utmost caution: see P.-A. Côté, *The Interpretation of Legislation*, at page 337. Lacking absolute intrinsic value, the rule must be set aside when other statutory provisions relevant to the issue under review suggest that its consequences would go against the statute's purpose (see P.-A. Côté in his work, at page 339; *Ternette v. Solicitor General of Canada*, [1984] 2 F.C. 486 (T.D.)), are manifestly absurd (*Congrégation des Frères de l'Instruction Chrétienne*, at page 436) or lead to incoherence and injustice (*Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311, at pages 321-322).

In short, the *expressio unius est exclusio alterius* rule cannot be used to thwart the intention of Parliament and make it inoperative. "Like all arguments based on these presumptions", writes Professor Sullivan, at page 193 of her work, referring to the rule, "its weight depends on a range of contextual factors and the weight of competing considerations. Even if an implied exclusion argument is not rebutted, it may be outweighed by other indicators of legislative intent."

[31] In my view, the isolation of the material misrepresentation issue in section 10 was not intended to remove from the GIC the discretion to consider other factors before issuing an order for revocation of citizenship. It is true that a material misrepresentation is the only prerequisite to a revocation decision and that such a finding underpins the entire process of revocation. But it does not necessarily follow that all other factors are thereby excluded from consideration either by the Minister or by the GIC. The reason why the implied exclusion does not apply in this situation is explained in the following passage from Professor Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, Ont.: LexisNexis Canada, 2008), at page 250:

There are several ways to rebut an implied exclusion argument. One is to offer an alternative explanation of why the legislature expressly mentioned some things and was silent with respect to others. The legislature may have wished, for example, to emphasize the importance of the matters mentioned or, out of excessive caution (*ex abundanti cautela*), to ensure that the mentioned matters were not overlooked. Express reference to something may be necessary or appropriate in one context but unnecessary or inappropriate in another. [Footnotes omitted.]

Also see *Martineau et al. v. Matsqui Institution Inmate Disciplinary Board*, [1978] 1 S.C.R. 118, at page 130 and *Her Majesty in right of the Province of Alberta v. Canadian Transport Commission*, [1978] 1 S.C.R. 61, at page 68.

[32] Here the legislative context supports the respondents' position that the GIC's authority under section 10 is more than a mere formality and that it enjoys a broad discretion to consider matters beyond the issue of material misrepresentation.

[33] The usual way to confer a legislative discretion upon a decision maker is to couple the authority to decide a matter with the word "may". Section 10 does not use that convention in a direct way but, instead, creates an automatic revocation of citizenship to take effect as of such date as may be fixed by order of the GIC. While this is an atypical approach to the conferral of a discretion, this language seems to me to suggest an enlargement to the scope of the GIC's discretion beyond consideration of the single issue of material misrepresentation. If it was otherwise intended, Parliament could easily have used the mandatory words "as of such date as shall be fixed by order of the GIC", thereby excluding the possibility that the GIC might choose not to fix any date for the revocation of a person's citizenship based on its own consideration of relevant factors. Within the complete context of section 10, Parliament's permissive language is indicative of an intent to confer a broad discretion upon the GIC in the exercise of its revocation authority.

[34] Moreover, while the Federal Court of Appeal decision in *Oberlander* (F.C.A.) does not conclusively resolve the scope of the GIC's discretion under section 10, it does offer some insight into other aspects of the decision-making process which helps to understand the GIC's mandate. Of particular significance is the observation at paragraph 40 of the decision that the Minister's report to the GIC is not a means by which the Federal Court finding of material misrepresentation can be challenged. That misrepresentation finding is said to be final, non-reviewable and binding as an "indisputable fact" upon the GIC. This is, of course, consistent with the clear stipulation in paragraph 18(1)(*b*) of the Act that the Federal Court "decides" whether or not there has been a material misrepresentation. Then, at paragraph 36 of the *Oberlander* (F.C.A.) decision, the Court characterized the role of the Minister in preparing a report as follows:

> Section 10 of the *Citizenship Act* requires the Minister to prepare "a report". In the absence of any mandatory formula which the Minister should adopt, a wide latitude should be given to her. The prosecutor's brief in *Suresh*—the content of which is not described in the reasons for judgment—should not be taken out of its statutory and factual context, even more so since the principal reason why it was not accepted was that it was not articulate nor rational. The reviewing Judge was correct in finding that the report of the Minister was part of the reasons of the Governor in Council. [Emphasis added.]

[35] It is difficult to think of a purpose that would be served by a ministerial report to the GIC if the only relevant fact that the GIC can consider has already been indisputably decided on a reference to the Federal Court. I would add to this that in its earlier decision in *Luitiens v. Canada (Secretary of State)* (1992), 9 C.R.R. (2d) 149 the Federal Court of Appeal described the Trial Division finding of material misrepresentation [at page 152] as "merely one stage of a proceeding which may or may not result in a final revocation of citizenship". This statement is difficult to reconcile with the proposition that the sole determinative issue for revoking citizenship is one already conclusively determined by the Federal Court. B'nai Brith attempted to answer this point by saying that the Minister has a plenary discretion to decide whether to refer a case for revocation to the GIC notwithstanding a finding of material misrepresentation by the Federal Court. Presumably this broader discretion would permit the Minister to consider the personal circumstances of the affected person along with relevant government policies dealing with revocation of citizenship in like situations. However, as noted above, the Federal Court of Appeal in *Oberlander* (F.C.A.) observed that while there is no legislative expression to support a broad ministerial discretion, the Minister was said to have a "wide latitude" in reporting to the GIC. It appears doubtful to me that Parliament intended that only the Minister should have a plenary discretion to refer a matter to the GIC but that the GIC has no discretion to look behind the Minister's decision. The idea that the GIC is fulfilling merely a symbolic role in this process and is bound to accept the Minister's recommendation to revoke citizenship is not a proposition that appeals to me and it is not consistent with the Court's view of the significance of the Minister's reporting function as described in *Oberlander* (F.C.A.).

[36] While the Minister may well enjoy a discretion not to proceed at all with the process of revocation, once that process is initiated there is no basis in the language of section 10 to support the argument that the scope of the Minister's discretion is any broader than that of the GIC. Once the Federal Court has found that citizenship has been conferred on the basis of a misrepresentation, the Act makes no distinction between the Minister's authority and that of the GIC. The GIC's authority to make an order is directly tied to a "a report from the Minister". If the Minister is entitled to report broadly to the GIC it is implicit that the GIC has a corresponding discretion to take into account any relevant factors before issuing a revocation order.

[37] B'nai Brith countered by arguing that the reason the GIC is tasked with being "satisfied" that citizenship has been fraudulently obtained is to account for situations where the person affected does not request a Federal Court reference. There the GIC must make its own misrepresentation finding. While this argument has some superficial appeal, I think it likely that if Parliament had such a specific intent it would have stated that case explicitly. Instead, Parliament adopted language in section 10 which does not distinguish between the two situations. This failure to make a distinction where one would otherwise be expected implies that the GIC's discretion was not intended to be limited but, rather, was considered plenary.

[38] Ultimately on this issue I am of the view that the requirement for a finding of material misrepresentation in section 10 of the Act was not intended by Parliament to remove other matters from consideration in the exercise of the GIC's discretion. Instead, that issue was highlighted to ensure that citizenship could not be revoked except where that prerequisite had been established.

[39] As one final point on the interpretation of section 10, I must comment on the respondents' reliance upon the use of the word "peut" that appears in the French text of the Act. This language, they say, further indicates that a broad discretion is conferred upon the GIC. I do not, however, believe that I can rely upon that reference in the French text.

[40] The word "peut" was first introduced into the French version of the Act in the 1985 statutory revisions. By virtue of section 4 of the *Revised Statutes of Canada, 1985 Act*, R.S.C., 1985 (3rd Supp.), c. 40 any such change does not operate as new law but is to be construed as a consolidation of the law as it was previously enacted. It is noteworthy that the English text was not changed through the 1985 statutory revision thereby creating a variance between the French and English that did not previously exist. This same problem was of concern to the Court of Appeal in *Beothuk Data Systems Ltd., Seawatch Division v. Dean*, [1998] 1 F.C. 433, where a substantive change to the French version of the *Canada Labour Code* in the 1985 statutory revision [R.S.C., 1985, c. L-2] was held to have been made without authority and could not inform the search for Parliament's original intent (see paragraphs 43–44). It would only be in a situation where the same change was effected in both languages that one could infer that the revision was made for clarification and to bring the text into closer conformity with the original Parliamentary intent.

Duty of Fairness

[41] B'nai Brith argues that the GIC owed it a duty of fairness, at least to the extent of providing reasons for its decision. This duty, it says, would arise at the point in time that B'nai Brith's interests as a public interest litigant were known or could be ascertained.

[42] This argument is without merit. There is no recognized duty of fairness owed to the public at large. To the extent that fairness may require a decision maker to provide reasons it is an obligation owed only to the parties directly affected and no further. This has been made clear in decisions like *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, at page 636 where the administrative decision maker's duty of fairness was expressly limited "to the regulated parties whose interest they must determine."

[43] It is also clear in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 that the scope of the duty of fairness, including the obligation to give reasons for a decision, will vary according to the importance or impact of the decision to the lives of those affected by it. At the centre of the fairness analysis was said to be a consideration of whether [at paragraph 30] "those whose interests were affected had a meaningful opportunity to present their case fully and fairly." In light of these principles, it cannot be said that a decision maker owes any duty of fairness to a third party which claims to represent the public interest but which is not directly involved in the decision-making process at first instance.

Reasonableness

[44] B'nai Brith broadly asserted in its written argument that the GIC decision not to revoke Mr. Odynsky's citizenship is indefensible and not within the range of reasonable and acceptable outcomes. The record discloses, however, that the GIC had before it a considerable body of mitigating evidence supporting leniency, including Justice MacKay's findings that Mr. Odynsky was not a volunteer and had not been shown to have acted wrongfully towards any other person in the camps where he served. In addition, Justice MacKay noted Mr. Odynsky's favourable record since arriving in Canada in 1949. It was reasonably open to the GIC on this record to have rejected the Minister's recommendation for revocation of citizenship and B'nai Brith has not made a convincing case to the contrary.

The Application of the Charter

[45] Lastly, B'nai Brith contends that the GIC's decision not to revoke Mr. Odynsky's citizenship constitutes a breach of section 7 of the Charter and renders Canada complicit as an accessory after the fact to war crimes and crimes against humanity. This submission was not further advanced in oral argument and it is devoid of merit. I need only say that B'nai Brith has not explained how its corporate interests could be engaged under section 7 and its argument is otherwise hypothetical on this record.

IV. Conclusion

[46] On the basis of the foregoing, I am satisfied that the Governor in Council's discretion under section 10 of the *Citizenship Act* extends beyond a consideration of the existence of a material misrepresentation and may include other factors such as the personal circumstances of the affected person. In the result, I am satisfied that the decision under review was made in conformity with the authority conferred upon the GIC by section 10 of the Act. In addition, the GIC owes no duty of fairness to third parties in the exercise of its section 10 authority and has no obligation to provide reasons to anyone other than the person affected. There is also no basis for concluding that the GIC's decision was unreasonable or was made in breach of the Charter.

Costs

[47] Neither B'nai Brith nor the Crown sought costs against the other and, as between them, no costs are awarded. Mr. Odynsky is entitled to his costs payable by B'nai Brith under column III [of Tariff B of the *Federal Courts Rules*, SOR/98-106, r. 1 (as am. by SOR/2004-283, s. 2)].

JUDGMENT

THIS COURT ADJUDGES that this application for judicial review is dismissed with costs payable to Mr. Odynsky by B'nai Brith under column III.

APPENDIX

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,

(*a*) the person ceases to be a citizen, or

(*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.

(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.

…

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

(*a*) that person does not, within thirty 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.