# WHY JUDGES NEED ACADEMICS

## The Honourable Karen Sharlow[1]

*Academics love to be cited by judges. It makes them feel warm, fuzzy and relevant. However, in the common law tradition this has not always been the case. Lord Tomlin in Donoghue v. Stevenson famously remarked that "the work of living authors, however deservedly eminent, cannot be used as authority". Justice Sharlow explains why this view may indeed be outmoded.*

*- Dr. Emir Crowne, Co-Founder of the Canadian Law Student Conference and Desirée D'Souza, Chair of the 2012 Canadian Law Student Conference*

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I am delighted to be here, and I thank Professor Crowne for his kind introduction, and for inviting me to speak to you today.

I was provided a while ago with a list of the papers being presented at this conference. I read that list carefully. It is a most impressive list – it gives the impression of a collection of papers, some deep, some broad, all imaginative. It is that list that inspired the subject of my talk today.

Or perhaps I should say that the inspiration is you – you who are so engaged in the cutting edge of legal thinking on so many difficult and complex topics. It is so long since I was in law school I can no longer claim to be on the cutting edge, if I ever was. And so I was relieved to find that I could at least discern the subject of most of the papers, although I admit to being baffled by some of the titles.

I am looking forward to reading the published version of all of your papers to try and get myself up to speed. That is really want I want to talk to you about – getting up to speed. In particular, I want to talk about how judges get up to speed. How do judges learn the law, with all its twists, turns and changes? How do judges keep themselves current? How do they keep themselves – and the jurisprudence that they are building bit by bit every day – on a sensible track?

We have some tools. You know about most of them. One critical tool is the assistance of the lawyers who argue cases before us. Those of you with a little

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[1] The Honourable Karen Sharlow is a Judge on the Federal Court of Appeal. The following is an excerpt from Justice Sharlow's keynote address at the 5th Annual Law Student Conference delivered in Windsor, Ontario on March 16th, 2012.

exposure to the judicial process – or to moot courts – will know that every litigant's case in an appeal is summarized in a factum.

A well-written factum is a treasure trove of legal knowledge and analysis. It is one of the tools by which judges learn the law. It is also one of the tools by which judges learn about the law, which is just as important.

What do I mean by learning about the law? It is this. A good factum tells the court what the law is and how it applies to the facts of the case. But where necessary, a good factum will also tell the court how the law got that way. And where necessary, a good factum will tell the court how the law needs to change. Judges learn about the law when they learn about the path the law has taken, and where it is headed.

And in a good factum all of that is said – and this is very important – in a few short paragraphs. A factum can never be more than a summary – a concise summary. Perhaps more importantly, a factum is a summary of the theory of one party's case. And, because a factum is an instrument of advocacy as well as an instrument of teaching, it cannot be entirely objective. So, as a tool of learning, a factum – even the best possible factum – has its limitations.

Judges also have access to many continuing legal education programs. Some of these are devised by the courts themselves, through judges' education committees. There are also organizations that have judicial education within their mandate – the National Judicial Institute, the Canadian Institute for the Administration of Justice, to name two of the most prominent. These organizations work with the Canadian Judicial Council to develop the education programs needed by judges. Some of these programs have to do with the law itself – there are annual conferences on the law of evidence for example, and the *Canadian Charter of Rights and Freedoms*.[2] There are also many conferences dealing with judicial skills and best practices – judgment writing, the preparation of oral judgments, judicial ethics, to name only a few examples.

These educational opportunities are valuable to judges. Many of us take those opportunities when we can. But they too have their limitations. At the risk of oversimplifying and being a little inaccurate, judicial seminars mostly focus on the practical side of things, rather than legal theory or legal policy. For example, a judicial conference on expert evidence typically begins with a brief talk on the law of evidence as it relates to expert opinion. But that is background. It is not the focus of the seminar. The seminar generally will be intended to address the practical problems judges face when expert evidence is presented to them at a

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[2] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

trial. That is useful and necessary, but it is not everything that a judge needs to know.

Judges need something more. Luckily, there is "something more". The evidence is right here, in this very room. The "something more" is the intellect, energy and skill of legal scholars like you, who produce scholarly books and articles on every imaginable legal subject: scholarly works that, like the papers being presented at this conference, are deep, broad, imaginative; scholarly works that offer fresh insight into the law, legal theory, legal policy, the judicial process and judicial decision making; scholarly works that are critical of decided cases or what the decided cases say about the direction of the law. Scholarly works can be all of those things. And all of them, in their own way, are helpful to judges.

Perhaps you doubt that the work of academics can be helpful to judges. I am here to tell you that you should have no such doubt.

I hear you thinking that have you read all of the Canadian cases – every single one – and you rarely see an academic article cited. Well, you are right about that. But in the world of jurisprudence, unlike the world of the academy, the value of an academic article is not measured by counting citations. It may not be measurable at all, in any objective way.

Judges have access to articles and other learned works. They are referred to in factums. They fill our libraries. They are circulated to us by knowledgeable and diligent librarians. Some judges even buy their own legal books. One way or another, learned works are made available to judges. And when they are made available, they are read. They are read with interest and respect. And they have their influence.

When I was planning this talk, I was going to give you a list of the academic articles that I have found particularly instructive during my time as a judge. But the list became long and unwieldy, and it would have been too hard and taken too much time to give a sensible account of the value of each one.

So I have picked two, one from a long time ago and one fairly recent, that I think exemplify the academic article as a tool for teaching judges. Well, I should say, as a tool for teaching me – I cannot speak for all judges. But I do not think I am unique.

The first article – the one from a long time ago – is about statutory interpretation. It is a famous article. If you have not heard of it, I would encourage you to read it. You can find it online. It was written by the great law teacher, Professor John Willis of Dalhousie Law School, and published in the 1938

volume of the Canadian Bar Review. Its title is "Statute Interpretation in a Nutshell".[3]

In about 26 pages, Professor Willis said just about everything you need to know about statutory interpretation. Nothing much has changed since 1938. All of the arguments he describes are still being made today.

In saying this, I mean to take nothing away from the recent great works on statutory interpretation, for example by Elmer Driedger, Pierre Andrè Côté, Ruth Sullivan, and more recently Stéphane Beaulac – you probably know these well. These works are substantial and valuable, perhaps even indispensable, to legal scholars and judges.

But I think there is something special to be learned from Professor Willis, something that I try to remember when I struggle almost every day with problems of statutory interpretation. The message I take from Professor Willis begins with a particular perception of his that I express this way: If you take all of the rules of statutory interpretation and lay them end to end, they would point in all different directions. In other words, for every rule of statutory interpretation that would lead to a particular conclusion, there is one that would lead to a different conclusion.

So, Professor Willis explains that ultimately the magic is in the judge's choice of the approach to be taken to the particular problem presented by the case. And he explains how judges make that choice. He says this at page 16 of his paper, "A court invokes whichever of the rules produces a result that satisfies its sense of justice in the case before it."[4]

There is truth in this statement. And it is not a statement about the law. It is a statement about how people reason. A judge who adopts a particular interpretation and explains that choice by citing a particular rule of interpretation is, at some level, justifying a result. How does that govern how I decide a case? Well, it doesn't.

But it reminds me when I am writing reasons for a decision that although reasons are supposed to be the product of a rational, objective process, my chosen result may be driven, at least in part and perhaps subconsciously, by something else. Something instinctive. Something that is personal. My own biases and my own values.

Judging is after all a human process. I would not want that human dimension to be removed, even if it could be. So, what I try to do (not in every case – there are only so many hours in the day after all) is to explain my reasoning

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[3] John Willis, "Statute Interpretation in a Nutshell" (1938) 16 Can Bar Rev 1.
[4] *Ibid* at 16.

in a way that makes it apparent to the reader why I have concluded that the result I have chosen is the one that achieves justice in the particular case. From that, a careful reader might discern something about me, my own instincts and predilections. But that is okay. That goes with the territory. And that is what I learned from Professor Willis.

Now I will fast forward to my second example, written in 2002 by one of today's leading legal scholars, Professor Martha O'Brien of the University of Victoria Law School.[5] (Here I must tell you that I have known and liked Martha for years. Would that have unduly influenced my impression of her work? Perhaps, but that should not detract from what I am about to tell you.)

I can hear you say that a 2002 paper is not exactly new, it is already a decade old. But in the world of judges, ten years is a snap of the fingers. It takes at least ten years for any academic work to have a discernible impact on the jurisprudential radar screen.

To put Professor O'Brien's paper in perspective, I have to give you a little legal history. To those who already know this, I apologize. Please bear with me.

You will all have heard of a federal statute called the *Indian Act*.[6] It was first enacted sometime in the 19th century. It has been amended from time to time but in many ways it remains, as its name indicates, an anachronism. And yet it still governs most First Nations, and it must be understood, interpreted and applied. There is one provision in particular that has generated much litigation. It is section 87. It says, and I paraphrase, that the personal property of an Indian situated on a reserve is exempt from taxation.[7]

Sounds like it should be simple, and perhaps it was when it was enacted in the 19th century. At that time, taxation was basically excise tax – which in its broadest sense refers to a direct tax on goods. So, section 87 would have assured First Nations people that rifles and other imported goods that they kept in their homes on reserves would not be subject to tax.

But life became more complicated in the 20th century, and many other taxation statutes were enacted. One of them was the *Income Tax Act*,[8] enacted in 1917. It was only a few short pages then. It has since grown monstrously long and complicated. But for First Nations people, what is important is that the *ITA* imposed a tax on income. That was important because, at some point in the 20th

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[5] Martha O'Brien, "Income Tax, Investment Income, and the *Indian Act*: Getting Back on Track" (2002) 50 Can Tax J 1570.
[6] RSC 1985, c I-5.
[7] *Ibid*, s 87.
[8] RSC 1985, c 1 (5th Supp).

century, First Nations people started to become employees of commercial and administrative organizations located on reserves.

Take Mr. Nowegijick for example. In 1975, he was an Indian employed on a reserve. His salary was taxed under the *ITA*. He objected, based on the exemption in section 87 of the *Indian Act*. He lost the first two rounds but his case went to the Supreme Court of Canada, where in 1983 he finally won.[9] The Court decided that his salary should be exempt from income tax.[10]

To get to that result, the Court had to conclude that income earned on a reserve was personal property situated on a reserve. I will not try to explain how they did that, but I think Professor Willis would have understood.

About 10 years later, the Supreme Court of Canada went a little further in another case involving section 87. They decided that employment insurance benefits received by Mr. Williams, who was an Indian, were exempt from income tax because the wages that were the basis of his entitlement to benefits were earned on a reserve.[11] You will appreciate that to reach that result, the court had to conclude that Mr. Williams' employment insurance benefits were situated on a reserve. And the court had to acknowledge that the situs of employment insurance benefits is, to say the least, not obvious. An employment insurance benefit is not a thing that can actually *be* anywhere. So they developed what is now called the "connecting factors test".[12]

To give you a flavour of that test, I will read a short excerpt from the headnote of the case:

> The proper approach to determining the situs of intangible personal property is for a court to evaluate the various connecting factors which tie the property to one location or another. In the context of the exemption from taxation in the *Indian Act*, the connecting factors which are potentially relevant should be weighed in light of three important considerations: the purpose of the exemption; the type of property in question; and the incidence of taxation upon that property. Given the purpose of the exemption, the ultimate question is to what extent each connecting factor is relevant in determining whether taxing the particular kind of property in a particular manner would erode the

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[9] *Nowegijick v The Queen*, [1983] 1 SCR 29, 144 DLR (3d) 193.
[10] *Ibid.*
[11] *Williams v Canada*, [1992] 1 SCR 877 at 899-900, 90 DLR (4th) 129 [*Williams* cited to SCR].
[12] *Ibid* at paras 892-93.

> entitlement of an Indian *qua* Indian to personal property on the reserve.[13]

Sounds simple enough, does it not? Again, I will not try to explain the reasoning behind the connecting factors test. But you will not be surprised to learn that it spawned a lot of new cases. One group of cases related to investment income earned by First Nations people. Why was that? By the late 20th century, there were some prosperous reserves. Some of them actually had modern amenities, like branches of banks and credit unions. And of course First Nations people would deposit money in those branches. And inevitably, some of them started to think that they should not have to pay tax on their interest income. And so they began to litigate the point.

The early cases were not successful for the First Nations appellants. The first case to reach the Federal Court of Appeal, *Recalma*, was decided in 1998 against the appellant, and the Supreme Court of Canada denied leave to appeal.[14] *Recalma* was followed by a number of Tax Court decisions,[15] more losses for the First Nations people.

And this is where Martha O'Brien comes in. She wrote a paper criticizing *Recalma* and the Tax Court cases that followed it. The paper is called "Income Tax, Investment Income, and the Indian Act: Getting Back on Track", published in the 2002 Canadian Tax Journal.[16] The paper, in my estimation, is an excellent one. What makes it excellent? I think there are three things: 1. The analysis is scholarly, objective, and sound; 2. The conclusions make sense; 3. The criticisms are focused on the decisions, not on the judges or the Court, which means that they are respectful in content and tone.

This paper came to my attention in 2003 while I was working on an appeal from *Sero*, one of the Tax Court decisions that followed *Recalma* and that was criticized in Professor O'Brien's paper. I was impressed by the paper. However, I have to say that despite the criticisms of *Recalma*, which I thought were valid, I

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[13] *Ibid* at para 878.

[14] *Recalma v Canada*, [1998] 2 CTC 403, 158 DLR (4th) 59 (FCA), leave to appeal to SCC refused, [1998] 3 SCR vii [*Recalma*].

[15] See e.g. *Sero v Canada*, [2001] TCJ No 345, aff'd 2004 FCA 6, [2005] 2 CTC 248, leave to appeal to SCC refused, 30206 (March 12, 2004) [*Sero*]; *Lewin v Canada*, [2001] TCJ No 242, aff'd 2002 FCA 461, [2003] 3 CTC 151, leave to appeal to SCC refused, 29562 (January 20, 2003).

[16] O'Brien, *supra* note 5.

was unable to distinguish *Recalma* or say that it was clearly wrong. And so I followed *Recalma*, joined by two colleagues, and dismissed the *Sero* appeal.[17]

Professor O'Brien wrote another excellent criticism entitled "Investment Income and Indian Reserves: The Disconnecting Factors", published in 2004 by the Canadian Tax Journal.[18] That article did not, however, influence the Supreme Court of Canada to grant leave to appeal to *Sero*.

But of course, the issue did not go away. Two cases out of Quebec, *Bastien*[19] and *Dubé*,[20] involved the same issue and failed in the Tax Court and in the Federal Court of Appeal. But they were granted leave to appeal. And, in 2011, their appeals succeeded. Now, it seems to be established that the interest income of an Indian that is earned on a deposit in a bank or credit union branch situated on a reserve is exempt from tax.

But of course, that is what Professor O'Brien thought all along. And guess what – Professor O'Brien's 2002 article (among others, I have to say) was cited with approval by the Supreme Court of Canada, in three places in *Bastien*.[21] I think that Professor O'Brien's 2002 article was a significant influence on the Supreme Court of Canada in *Bastien* and *Dubé*. And I think that sends an important message to you – today's legal scholars. The message is this: Professor O'Brien taught the judges of the Supreme Court of Canada something. They learned something from her. And her teaching became their teaching. And their teaching will now govern all like cases in the Tax Court and the Federal Court of Appeal.

That means that you, each one of you, can teach judges something that will eventually become part of the fabric of our law. You, through your scholarship and your writing, can make a difference in our law. And there is no limit to what you can teach us – no limit at all. Anything that can potentially touch a justiciable issue is fair game – anything.

Now, I want to disabuse you of any thought you may have that so many articles have been written already, that there must be nothing left. I will use just a few minutes to bring to light one subject that in my view badly needs some teaching from you. It involves the vexed question of the judge who, rightly or

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[17] *Sero*, *supra* note 15.
[18] Martha O'Brien, "Investment Income and Indian Reserves: The Disconnecting Factor" (2004) 52:2 Can Tax J 543.
[19] *Bastien Estate v Canada*, 2011 SCC 38, [2011] 2 SCR 710, rev'g 2009 FCA 108, 400 NR 349 [*Bastien*].
[20] *Dubé v Canada*, 2011 SCC 39, [2011] 2 SCR 764, rev'g 2009 FCA 109, 315 DLR (4th) 372 [*Dubé*].
[21] *Bastien*, *supra* note 19 at paras 28, 42, 60.

wrongly, has gained a reputation of having a fixed view on the determination of an important legal question.

Let me explain this point by telling you about an example – a case in the Federal Court of Appeal decided less than a month ago by three of my colleagues.[22] I encourage you all to read it – it can be found on the website of the Federal Court of Appeal. An application for leave to appeal has already been filed – Supreme Court File 34712.[23] This is an immigration case, but you will see that the issues raised in the case potentially have much wider application.

The applicant in the case is Al-Munzir Es-Sayyid. He is a 23-year old Egyptian national. He came to Canada when he was 7 years old with his family, who were given refugee status. Mr. Es-Sayyid attained a serious criminal record – armed robbery and the like – which in due course led immigration officials to issue a deportation order. He was entitled to ask for a determination that he could not be removed to Egypt because of the risks he would face there. He did ask, but he did not get the answer he hoped for. The decision was that there was no risk or no risk that was sufficiently serious to stop the deportation.

Mr. Es-Sayyid then did the only thing he could do – he commenced legal proceedings in the Federal Court. He filed an application for leave to apply for judicial review of the decision denying the risk. That application was still pending when removal arrangements were made in accordance with what I assume is the normal deportation process. Mr. Es-Sayyid applied to the Federal Court, as was his right, for a stay of the execution of his removal order. The stay was denied. Naturally, Mr. Es-Sayyid was motivated to appeal the denial of the stay of execution.

But he faced a very difficult hurdle. For technical reasons that I will not go into now, his grounds of appeal were limited. Of the possible grounds, one was an allegation of a reasonable apprehension of bias on the part of the judge who denied the stay. But how is that to be proved?

His lawyer tried to answer with statistical evidence – evidence that this particular judge had a 98% rate of not granting non-citizens the relief sought

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[22] *Es-Sayyid v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FCA 59, leave to appeal to SCC requested [*Es-Sayyid*].

[23] The *Es-Sayyid* leave application raises issues relating to the statistical evidence submitted in support of an allegation of reasonable apprehension of bias on the part of the judge. It also raises an issue that is now before the Supreme Court of Canada in another case – the appeal of *Cojocaru v British Columbia Women's Hospital and Health Centre*, 2011 BCCA 192 [*Cojocaru*]. According to the case summary provided by the Supreme Court of Canada on its website, the issue in *Cojocaru* is this: when and under what circumstances can a trial judge adopt and incorporate in a judgment, without attribution, the submissions of a party?

where criminality was in issue. This statistical evidence was buttressed by a report from a professor who, based on a preliminary study of the decisions of the judge, opined that the judge did not have an open mind in cases involving non-citizen applications where criminality was in issue. The appeal was filed in part on the basis of these documents. But the appeal was dismissed.[24]

The Federal Court of Appeal gave a number of reasons for dismissing the appeal, and I will not recount them all. For today, it is enough to say that the Court concluded that the opinion evidence was inadmissible, and in any event was fatally flawed by a lack of objectivity and independence on the part of the professor expressing the opinion.[25] The Court also criticized, rather scathingly in my view, the statistical analysis underlying the opinion.[26] I will not go into details about these criticisms – they may or may not be considered by the Supreme Court of Canada in due course.

But speaking for myself only, I am left with many unanswered questions about the opinion evidence. Can statistics about the decisions of a judge support (or refute) an allegation that the judge does not have an open mind on some particular issue? Can statistics about the decisions of a judge predict – with some degree of confidence – what a judge will do in a particular case or a particular class of case? And if those things are possible, then what methodology should be employed to obtain and analyze the relevant statistics? And if appropriate methodologies can be devised, and an expert opines on the basis of a statistical analysis that the judge has or does not have an open mind in a particular case or class of cases, then how should a judge assess the weight of that opinion when it is presented as evidence in support of (or against) an allegation of a reasonable apprehension of bias?

Some Canadian scholars have delved into these waters to some degree – some references are listed below (the list was quickly assembled is by no means comprehensive). But my impression – my uninformed impression I must quickly add – is that although this is an area of study that is potentially important to the integrity of the courts, it has a very long way to go before it can be helpful to judges.

But the people in this room can do something about that. And I hope that some of you will do so.

It is time for me to conclude. Here are the two main points that I hope that you will take away.

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[24] *Es-Sayyid*, *supra* note 22.
[25] *Ibid* at paras 36-44.
[26] *Ibid* at para 45.

First: The work of legal scholars – work that is serious, objective, scholarly, and insightful – is essential to the development of the law because it teaches judges, sometimes in subtle and unacknowledged ways, what they need to know.

Second: The entire judicial system could benefit from sound scholarly work on the use of statistics to shed light on judicial decision-making.

Let me conclude by saying that I hope most sincerely that some of you will pursue a career in legal scholarship, for the benefit of all of us. Many of you are already well on your way.

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## I. STATISTICS AND JUDICIAL DECISIONS

A series of articles by Don Butler were published in the Ottawa Citizen in late 2011 discussing the question of inconsistencies in immigration refugee decisions and outlining new research by Sean Rehaag on leave rates. These can be accessed at http://www.ottawacitizen.com/news/court/index.html.

Ian Greene & Paul Shaffer, "Leave to Appeal and Leave to Commence Judicial Review in Canada's Refugee-Determination System: Is the Process Fair?" (1992) 4:1 Int'l J Refugee L 71.

Jay Ramji-Nogales, Andrew I Schoenholtz & Phillip G Schrag, "Refugee Roulette: Disparities in Asylum Adjudication" (2007) 60 Stan L Rev 295.

Jon B Gould, Colleen Sheppard & Johannes Wheeldon, "A Refugee from Justice? Disparate Treatment in the Federal Court of Canada" (2010) 32:4 Law & Pol'y 454.

Moin A Yahya & James Stribopoulus, "Does a Judge's Party of Appointment or Gender Matter to Case Outcomes? An Empirical Study of the Court of Appeal for Ontario" (2007) 45 Osgoode Hall LJ 315.

Sean Rehaag, "Do Women Refugee Judges Really Make a Difference: An Empirical Analysis of Gender and Outcomes in Canadian Refugee Determination" (2011) 23 CJWL 627.

Sean Rehaag, "Troubling Patterns in Canadian Refugee Adjudication" (2008) 39 Ottawa L Rev 335.

Thaddeus Hwong, "A Review of Quantitative Studies of Decision Making in the Supreme Court of Canada" (2003-2004) 30 Man LJ 353.

Thaddeus Hwong, *A Quantitative Exploration of Judicial Decision Making in Canadian Income Tax Cases*, (PhD Thesis, Graduate Program in Law, Osgoode Hall Law School, 2006).

## II. SOME CASES IN WHICH STATISTICS WERE SUBMITTED AS EVIDENCE

*Cervenakova v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1281.

*Cina v Canada (Minister of Citizenship and Immigration)*, 2011 FC 635.

*Dunova v Canada (Minister of Citizenship and Immigration)*, 2010 FC 438.

*Gabor v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1162.

*Geza v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 124.

*McCleskey v Kemp*, 481 US 279 (1987).

*Sittampalam v Canada (Attorney General)*, 2010 ONSC 3205.

*Sivak v Canada (Minister of Citizenship and Immigration)*, 2011 FC 402.

*Zrig v Canada (Minister of Citizenship and Immigration)*, [2002] 1 FC 559, aff'd 2003 FCA 178.

*Zupko v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1319.