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Romans v. Canada: A Case Comment on the Jurisdiction of the Immigration Appeal Division of the Immigration and Refugee Board to Consider Charter Challenges attacking the validity of a removal order[FN*][FN**]

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Introduction

The recent decision of the Immigration Appeal Division ("IAD") of the Immigration and Refugee Board ("IRB") in *Romans v. Canada (Minister of Citizenship & Immigration)*[FN1] represents a need to deconstruct and reconstruct the test for re-opening an appeal pursuant to subsection 70(1)(b) of the *Immigration Act*.[FN2] It represents a need to change certain aspects of the test on re-opening so as to ensure that panels has the jurisdiction to consider constitutional challenges attacking the validity of a removal order.

In *Romans* the constitutional interest of the appellant involved rights to life, liberty, and security of the person, and fundamental justice under section 7 of the *Charter of Rights and Freedoms*.[FN3] The scope of this paper, however, is to look at whether jurisdiction exist at the IAD in re-opened appeals to consider the constitutional validity of a removal order.

There is no doubt that the IAD must exercise its discretionary jurisdiction in accordance with the constitutionally protected principles of fundamental justice, where the life, liberty or security interest of an appellant is engaged.[FN4]

The Federal Court of Appeal in *Romans*[FN5] ruled "We have accepted, for the sake of the discussion, that section 7 of the *Charter* is engaged by the deportation of a permanent resident pursuant to paragraph 27(1)(d) of the *Immigration Act*."[FN6] The court ultimately held that "the circumstances of this case, was in accordance with the principles of fundamental justice." [FN7]

Counsel for the appellant filed a motion for the appeal before the IAD to be re-opened[FN8] on the basis of *Chieu v. Canada (Minister of Citizenship & Immigration)*[FN9] In addition, Counsel for the appellant also filed a Notice of Constitutional Question challenging the constitutional validity of certain sections of IRPA. Since this was a matter considered under the *Immigration Act*, Rule 27.1(1) and 2 of the *Immigration Appeal Division Rules*[FN10] applies. [FN11]

The IAD dismissed the motion to re-open the appeal on the basis that it lacked jurisdiction to consider the constitutional validity of the removal order. In effect, the IAD said to the appellant that the appropriate forum for such a challenge is at the Federal Court of Canada.

I will demonstrate in developing this paper the advantages of the IAD taking jurisdiction over such a challenge at a re-opened appeal. Such advantages include the court having a full record on the constitutional issues together with the reasoned decision of the tribunal.

The Discretionary Jurisdiction of the IAD to Re-open (Reconsider) its Decisions

Pursuant to subsection 70(1)(b) of the *Immigration Act*, the IAD has the discretionary jurisdiction to re-open or reconsider any decision made by it and to vary or revoke such decision if it considers it advisable to do so. In making this determination the IAD must ultimately determine, having regard to all the circumstances of the case, that the appellant should not be removed from Canada.[FN12] In making this determination the IAD must consider the non-exhaustive factors set out in *Ribic*[FN13] and confirmed by the Supreme Court of Canada in *Chieu*.[FN14]

(1) the seriousness of the offence leading to the deportation order;

(2) the possibility of rehabilitation;

(3) the length of time spent in Canada and the degree to which the appellant is established here;

(4) the family in Canada and the dislocation to the family that deportation would cause;

(5) the support available to the appellant, not only within the family but also within the community;

(6) the degree of hardship that would be caused to the appellant by his return to his country of nationality.

The IAD may re-open or reconsider where:

A. a party proposes to adduce new evidence which could not have been previously obtained by reasonable diligence and the new evidence is such that, if adduced, it would be practically conclusive;[FN15]

B. the Board is clearly wrong in law;[FN16]

C. a party wishes to make representations or objections not already considered by the Board that it had no opportunity to raise previously.

To do justice to the Appellant sometimes require re-opening and reconsidering a decision where a party proposes to adduce new evidence which could not have been previously obtained by reasonable diligence and the new evidence is such that, if adduced, it would be practically conclusive

In *Barone v. Canada (Minister of Citizenship & Immigration)*[FN17] the IAD held that:

> the scope of the Appeal Division's jurisdiction to reopen does not extend to revisiting determinations on legal issues - it is limited to revisiting de terminations made in the exercise of the Appeal Division's statutory discretion in light of new evidence.

In *Almonte v. Canada (Minister of Citizenship & Immigration)*[FN18] the IAD confirmed the nature of its discretionary jurisdiction to re-open an appeal:

> The rationale underlying the differing nature of the dispositions available to the Appeal Division on a deportation appeal is clear and was outlined in Howard. A determination by the Appeal Division of an appeal brought pursuant to paragraph 70(1)(a) is final in nature. The fact that judicial review of an Appeal Division decision by the Federal Court is available ensures both that there is finality at the level of the Appeal Division, and that there is a mechanism for reviewing errors of the Appeal Division. This in turn ensures that one panel of the Appeal Division does not sit in review of another panel of the Appeal Division on a question of law. To permit one panel of the Appeal Division to review the decision of another panel of the Appeal Division on the grounds enumerated in paragraph 70(1)(a) would undermine the principle of finality in decision-making and would seriously threaten consistency of decision-making within this tribunal.

In *Grant v. Canada (Minister of Citizenship & Immigration)*[FN19] the IAD sets out its discretionary jurisdiction as follows:

> The purpose of Parliament in granting the Appeal Division a discretionary jurisdiction in removal order appeals was to permit the granting of relief from the harsh results brought about by the operation of the *Immigration Act* (the "*Act*") in certain circumstances. In other words, whereas the removal provisions of the *Act* are of general application, the Appeal Division's discretionary jurisdiction allows for justice to be done in individual cases.[FN20]

In *Chhai v. Canada (Minister of Citizenship & Immigration)*[FN21] Member MacPherson interprets s. 70(1)(b) as follows:

> "all the circumstances" contemplates not only the appellant's circumstances but also the good of society as expressed as an overarching objective of the *Immigration Act*.

The jurisprudence on a broad level suggests the need to balance finality of decision-making, with the ability to reconsider its

decisions in light of new evidence that has become available. *Grant*[FN22] and, *Chhai*,[FN23] suggest that, a panel can still exercise its discretionary jurisdiction to re-open a case, where it would cause more harm or prejudice to the public interest in good administration and to the rights of an individual to refuse to re-open.

The IAD Discretionary Jurisdiction must be exercised in accordance with the *Charter*

Section 24(1) of the *Charter* provides that:

> Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Section 52(1) of the *Constitution Act* provides that:

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Because of its statutory origins, the IAD must ensure that their powers are exercised, and its proceedings conducted, in a way that complies with the *Charter*:[FN24]

> [. . .] the Appeal Board had a duty to apply the *Immigration Act* in accordance with *Charter* values. This is an indirect way of stating that which is directly articulated in section 52 of the Constitution Act, 1982, namely that the Constitution of Canada (which includes the Canadian *Charter* of Rights and Freedoms) is the supreme law of the land. It follows from this that all government actors, including administrative tribunals, must apply the law in a manner which is not inconsistent with the *Charter*.

The jurisprudence appear to support the view that regardless of whether the constitutional challenge is attacking the validity of the impugned order or the enabling legislation, a tribunal can consider the *Charter* challenge.[FN25]

To do justice to the Appellant sometimes require re-opening and reconsidering a decision where the IAD is clearly wrong in law

The Jurisprudence of the IAD suggest that to re-open a hearing attacking the constitutional validity of a removal order is an impermissible collateral attack on the original member's decision akin to "one member of the Appeal Division . . . sit[ting] in judgement of another member."[FN26]

With respect to what the issue of one panel member of the Immigration Appeal Division sitting in review of another panel of the Appeal Division on a question of law, Member MacPherson has dealt with that issue persuasively in *Y. (P.V.), Re*[FN27]

> there should be some recognition that in some cases the circumstances are such that it would be inappropriate to await the outcome of the Federal Court proceedings. These cases would be, by definition, relatively rare and would be cases where the motions materials are so strong that there is a patently obvious denial of natural justice. As noted by Justice Evans and Professor Brown, two scholarly experts in the field of administrative law:
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> > . . . where a tribunal recognizes that it has made a mistake that has deprived it of jurisdiction, and thus rendered its decision null and void, it need not wait until a party has obtained an order from the court formally quashing the decision before it rehears the matter and decides it again. [FN28]

In constitutional matters the court has jurisdiction to consider such matter on judicial review.[FN29] However, the Supreme Court of Canada has also clearly held that *Charter* cases must not be decided in a factual vacuum. In order to advance a *Charter* violation, an applicant must provide a sufficient factual foundation.[FN30] Recently, in *Public School Boards' Assn. (Alberta) v. Alberta (Attorney General)*,[FN31] Binnie J. held that the strict test in admitting new evidence at the appellate level "reflect a broader judicial policy to achieve finality on the factual record at the trial level, with very limited exceptions." The jurisprudence, therefore, suggest that in proceedings before the IAD,[FN32] it is preferable that all of the issues be disposed of prior to any application for leave to commence judicial review by any party to the proceedings.[FN33]

On judicial review, the record before the court is generally restricted to the evidence that was before the decision-maker

whose decision is being challenged. New evidence is not generally admissible on such applications.

In *Farhadi v. Canada (Minister of Citizenship & Immigration)*[FN34] Gibson J. held that:

> It is trite law that a reviewing court is bound by the record filed before the federal board, commission or other tribunal the decision of which is under appeal. Reviewing court jurisprudence has followed this rule, noting that if evidence not before the initial tribunal is introduced on judicial review, the review application would effectively be transformed into an appeal or a trial de novo. While I am satisfied that a jurisdictional exception exists to the rule that new evidence is not admissible on judicial review, I am also satisfied that an issue as to jurisdictional error of the tribunals does not arise here. The issues before me pertain to the *Charter* and the adequacy of the procedural safeguards in any risk assessment process conducted in this case.

In *Gitxsan Treaty Society v. H.E.U.*[FN35] the Federal Court of Appeal held that:

> The essential purpose of judicial review is the review of decisions, not the determination, by trial de novo, of questions that were not adequately canvassed in evidence at the tribunal or trial court. The latter is what the applicant is inappropriately proposing for this judicial review. This is not the necessity to which Lord Sumner was referring in *Nat Bell Liquors*, *supra*. The Court will not entertain new evidence in these circumstances.

While it is a generally accepted principle in judicial review proceedings that new evidence will not be entertained, the *Federal Court Rules, 1998*, do allow for the applicant to file a record which will include affidavits and documentary evidence.[FN36]

However, and in any event, the impact of the IAD declining jurisdiction to consider a constitutional challenge means that the court is deprived of a record on judicial review that is the result of thorough examination of the constitutional issues at the IAD. As the Supreme Court recently observed in *Al Sagban*,[FN37]

> It is the I.A.D., not this Court, that has the expertise to balance domestic and foreign concerns properly. More importantly, it is the I.A.D. that should make the decision regarding the appropriate remedy if the appeal is allowed. The I.A.D. has the expertise to decide whether the removal order should be quashed or whether a stay would be preferable, as well as to determine what the terms and conditions of a stay would be.

To do justice to the Appellant sometimes require re-opening and reconsidering a decision where a party wishes to make representations or objections not already considered by the Board that it had no opportunity to raise previously

The Court has also generally held that arguments not presented before the original tribunal cannot be raised upon judicial review.

In *Toussaint v. Canada (Labour Relations Board)*[FN38] the Federal Court of Appeal held that:

> it has been clearly established that in the context of an application for judicial review this Court cannot decide a question which was not raised before the administrative tribunal . . .

Further, in *Singh v. Canada (Minister of Citizenship & Immigration)*[FN39] the court endorsed the reasoning in *Toussaint*:

> [. . .] the court is not entitled to " . . . pronounce itself" on a question not faced by the administrative authority, I conclude that this principle applies equally when the vires of regulations passed pursuant to the enabling statute is in issue. While the jurisprudence cited herein was decided in the context of section 28 of the former *Federal Court Act*, I think it applies equally in the context of subsection 18.1(3) which provides for the remedies in respect of federal boards, Commissions or other tribunals with respect to their decisions, orders, acts or proceedings.

More recently, in *Society of Composers, Authors & Music Publishers of Canada v. Canadian Assn. of Internet Providers*[FN40]

> Moreover, as these arguments were not raised in the proceeding before the Board, they cannot be raised at the section 28 application stage . . .

The Supreme Court of Canada has held in *Chieu* that "appeals under s. 70(1)(b) . . . require the resolution of an issue in which an individual's rights are at stake." This certainly means that IAD has the jurisdiction to re- open its appeal process whether a *Charter* challenge is to the validity of section 70 of the *Immigration Act* or a challenge to the validity of a removal order. As the Supreme Court further observed in *Chieu*:

> [para46] Parliament has structured the I.A.D. to provide robust procedural guarantees to individuals who come before it and to provide a significant degree of administrative flexibility to I.A.D. board members and staff. The I.A.D. is a court of record (s. 69.4(1)) with broad powers to summons and examine witnesses, order the production of documents, and enforce its orders (s. 69.4(3)). A removal order appeal is essentially a hearing de novo, as evidence can be received that was not available at the time the removal order was made. The I.A.D. has liberal rules of evidence, and may "receive such additional evidence as it may consider credible or trustworthy and necessary for dealing with the subject-matter before it" (s. 69.4(3)(c)). Written reasons must be provided for the disposition of an appeal under ss. 70 or 71 when such reasons are requested by either of the parties to the appeal (s. 69.4(5)). As with the statutory stay, Parliament has not provided similar procedural guarantees for decisions by the Minister.
>
> [para47] Furthermore, the remedial powers of the I.A.D. are very flexible. Pursuant to s. 73(1) of the Act, the I.A.D. can dispose of an appeal made pursuant to s. 70 in three ways: by allowing it; by dismissing it; or, if exercising its equitable jurisdiction under ss. 70(1)(b) or 70(3)(b), by directing that execution of the order be stayed. When a removal order is quashed, the I.A.D. has the power to make any other removal order or conditional removal order that should have been made (s. 74(1)). When a removal order is stayed, the I.A.D. may impose any terms and conditions it deems appropriate, and review the case from time to time as it considers necessary (s. 74(2)). Stays may be cancelled or amended by the I.A.D. at any time (s. 74(3)). When a stay is cancelled, the appeal must be either dismissed or allowed, although the I.A.D. retains its powers under s. 74(1) to substitute a different removal order.
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> [para48] The I.A.D. can also reopen an appeal prior to execution of the removal order and, if appropriate, exercise its discretion in another way. As a result, this Court has stated that the I.A.D.'s discretionary jurisdiction is ongoing . . .
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> [para67] [. . .] One of the objects of the Act is to streamline immigration proceedings in Canada, while providing full protection for *Charter* and common law rights.

The Immigration and Refugee Board's own procedural manual entitled "Removal Order Appeals"[FN41] indicates that "(f)ollowing the decision in *Chieu*, the appellant will be more likely to make constitutional arguments before the Appeal Division."

Test as applied in *Romans*

In *Romans*,[FN42] the motion to re-open was based on the Supreme Court of Canada decision in *Chieu*,[FN43] where the court held that the Immigration Appeal Division have jurisdiction to consider the country condition at a potential destination to which a person may be removed under the *Ribic*[FN44] test. It was also based on new medical evidence with respect to the appellant's treatment and future prognosis. Further, it was based on section 7 of the *Charter*.[FN45]

In *Romans* the appellant, a permanent resident, was attempting to argue that removal to his country of birth would infringe upon his section 7 *Charter* rights. In other words, the appellant's constitutional argument under section 7 of the *Charter appears to be founded* on the fact that "the harsh results brought about by the operation of the *Immigration Act*" allows for the deportation of a mentally ill person, who has lived almost all of his 37 years in Canada,[FN46] to his country of birth, Jamaica, where he has no familial or other support system.[FN47] This is a question that the IAD had not previously decided. The panel sought and received written submissions from the parties on the question of whether rehearing the appeal at the IAD is the proper forum for counsel for the appellant to attack the constitutional validity of the deportation order.

In *Romans*,[FN48] the panel dismissed a constitutional challenge to the validity of the *Immigration and Refugee Protection Act* on the basis that it lacks jurisdiction,[FN49]

> The discretionary jurisdiction of the IAD is of a continuing nature in removal cases under the *Immigration Act*. The IAD has jurisdiction to re-open an appeal from a removal order on discretionary grounds only. Counsel for the appellant filed a notice of constitutional question prior to the hearing challenging the validity of section 36(1)(a), 44(1) and 48(1) of the current *Immigration and Refugee Protection Act*. This appeal is governed by the *Immigration Act*. Nevertheless, on a

re-opening, the appellant cannot attack the constitutional validity of the removal order.[FN50]

A persuasive view is that of Ontario Divisional Court in *Pieters v. Toronto Board of Education*[FN51] In *Pieters v. Toronto Board of Education* [FN52] a panel of the Ontario Labour Relations Board hearing a reconsideration application that included a constitutional challenge that was not raised on the original appeal, took jurisdiction of the matter:

> [para54] Although it is probably the case that there is no appropriate basis for reconsideration of this issue having regard to the Board's jurisprudence, it has not been argued before, was argued fully at the reconsideration hearing and will in all likelihood be raised again if it remains unaddressed. For that reason, I will deal with it now.

The Divisional Court on an application for judicial review in *Pieters v. Toronto Board of Education*[FN53] upheld the finding of the Board that it had the jurisdiction to consider the *Charter* arguments on reconsideration:

> [para12] No *Charter* argument was advanced before the Board at the time of the original hearing; it was raised only at the time of the reconsideration hearing. The applicant cannot, however, in our view, be precluded from raising the *Charter* now and at the time of the reconsideration hearing simply because it wasn't raised at the original hearing.
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> [para13] The applicant's position, simply stated, is that he expected the Board would exercise its discretion in a manner that is consistent with the *Charter*. It was only when he received the Board's decision and its reasons that he realized it had not done so. There is logic to his argument.

The principle in *Pieters* is sound in administrative law and is a principle that may assist the IAD in structuring its jurisdiction when faced with constitutional challenges to the validity of a removal order.

In declining jurisdiction, the IAD denies appellant the benefit of its re- opening (reconsideration) process which:

> • is relatively much "less formal, less costly, and speedier (process) than the (Federal Court of Canada)"[FN54] and "can represent a cost saving both in terms of money and resources. If the motion is granted and the applicant obtains the relief he is seeking, expensive federal court proceedings" would not be necessary;[FN55]
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> • gives the appellant direct access to the tribunal unlike the Federal Court process where leave from the Federal Court Trial Division to commence an application for judicial review of the IAD decision pursuant to section 82.1 of the *Immigration Act* is a condition precedent to commencing such a review of a member's decision;

As seen above, the authorities from the various levels of the court suggest that tribunals such as the IAD being the body primarily charged with the administration of the Act should rule upon important issues going to its jurisdiction. In so doing, the court can benefit from the Board decision rendered after full litigation of the case.

Conclusion

I should say in conclusion that the jurisprudence cited in this paper indicates that the IAD does have the jurisdiction to consider constitutional challenges in re-opened proceedings. If, for example, a *Charter* challenge is to the constitutional validity of section 70 of the *Immigration Act*, or the appeal process, then the appellant would not just be trying to attack the validity of the deportation order, but attacking the whole process set out by section 70. [FN56] The IAD may properly consider such a challenge on re-opening. [FN57] However, as seen in *Romans*, the IAD may decline jurisdiction if it suspects that the *Charter* challenge is merely a second kick at the can or a collateral attack[FN58] on the legal validity of the removal order when the appellant only has a right to argue on the discretionary jurisdiction. In other words, the IAD declined jurisdiction on the basis that it is not the proper forum for the appellant to make such a challenge.

The declining of jurisdiction on a motion for the IAD to re-open its appeal, however, disadvantages the appellant, the court and the proper administration of justice, proceedings, particularly where there is a constitutional challenge. As John M. Evans[FN59] wrote,

> [. . .] the Supreme Court acknowledged the practical advantages of having *Charter* challenges decided by the tribunal, subject, of course, to judicial review for correctness. For example, it would normally be more efficient for all of the issues to be decided in one forum; the tribunal may well be better equipped than the court to make findings of fact, and

> to provide the regulatory context that will give the reviewing court an invaluable perspective from which to decide the question of constitutional law; and it may be less costly for the individual if the record is compiled by the tribunal than the court. I think that Strayer J. got it right when he said, "it should not be lightly concluded that a tribunal has no authority to decide questions of law and constitutionality."[FN60]

As well, in cases where there is a clear denial of natural justice and/or an error in law it would be more appropriate in terms of judicial economy for the IAD to re-open the proceedings to do justice to the parties. In light of the jurisprudence that generally restrict the evidence to that which was before the tribunal and, the court's routine exercise of its discretion to decline to hear arguments not presented before the tribunal, the grounds for re-opening a removal appeal, as suggests in this paper, should be expanded as a natural evolution of the IAD jurisprudence. In any event, the grounds of appeal as suggested in this paper are all within the parameters of the test set out in the *Grillas*[FN61] and *Chandler*[FN62] from which most of the IAD's decisions on re-opening derive.

FN*. Paper prepared for the "Intensive Program in Immigration and Refugee Law" (Osgoode Hall Law School, York University, January 21, 2003).

FN**. An application for leave to file an application for judicial review has been made.

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FN1. (January 03, 2003), Doc. IAD T99-06694 (Imm. & Ref. Bd. (App. Div.)), Member Waters

FN2. R.S.C. 1985, c. I-2. Now replaced by the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

FN3. Section 7 provides that "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." To make out a violation of this section of the *Charter* involves a two-step analysis: (1) Is there an infringement upon one of the three (3) protected interests, that is to say a deprivation of life, liberty or security of the person? (2) Is such deprivation in accordance with the principles of fundamental justice?

FN4. *New Brunswick (Minister of Health & Community Services) v. G. (J.)* , [1999] 3 S.C.R. 46 (S.C.C.) *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44 (S.C.C.) *Gosselin c. Québec (Procureur général)*, 2002 SCC 84 (S.C.C.) *Romans v. Canada (Minister of Citizenship & Immigration)* (2001), 203 F.T.R. 108, 14 Imm. L.R. (3d) 215 (Fed. T.D.); affirmed [2001] F.C.J. No. 1416, 2001 FCA 272, 2001 CarswellNat 2045, 17 Imm. L.R. (3d) 34 (Fed. C.A.)

FN5. (2001), 17 Imm. L.R. (3d) 34 (Fed. C.A.).

FN6. *Romans*, *supra* note 5, at paragraph 1.

FN7. *Supra* note 5, at paragraph 4.

FN8. History of the case: *Romans v. Canada (Minister of Citizenship & Immigration)* (November 18, 1999), Doc. IAD T99-06694, [1999] I.A.D.D. No. 2816 (Imm. & Ref. Bd. (App. Div.)) *Romans v. Canada (Minister of Citizenship & Immigration)* (2001), 14 Imm. L.R. (3d) 215 (Fed. T.D.); affirmed (2001), 17 Imm. L.R. (3d) 34 (Fed. C.A.) leave to appeal denied [2001] S.C.C.A. No. 471, 2001 CarswellNat 2732 (S.C.C.)

FN9. 2002 SCC 3, 18 Imm. L.R. (3d) 93 (S.C.C.) In this case the Supreme Court of Canada held that the IAD have jurisdiction to consider the country conditions at a potential destination to which a person may be removed.

FN10. SOR/93-46.

FN11. Section 27 of the Rules provides that:

> 27. (1) Every application that is not provided for in these Rules shall be made by a party to the Appeal Division by motion, unless, where the application is made during a hearing, the members decide that, in the interests of justice, the

application should be dealt with in some other manner.

(2) The motion shall consist of

(a) a notice specifying the grounds on which the motion is made;

(b) an affidavit setting out the facts on which the motion is based; and

(c) a concise statement of the law and of the arguments that are relied on by the applicant.

(3) The motion shall be

(a) served on the other party to the proceeding; and

(b) filed, together with proof of service, at the registry within five days after the date of service.

(4) Evidence on the merits of a motion shall be introduced by affidavit, unless the Appeal Division decides that, in the interests of justice, the evidence should be introduced in some other manner.

(5) The other party may, within seven days after being served with a motion, file at the registry a reply stating concisely the law and arguments relied on by the party, accompanied by an affidavit setting out the facts on which the reply is based.

(6) The applicant may, within seven days after being served with a reply, file a response thereto at the registry.

(7) A copy of the reply and affidavit filed pursuant to subrule (5) and of the response filed pursuant to subrule (6) shall be served on the other party within seven days after the date of service of the motion or reply, as the case may be.

(8) The Appeal Division may dispose of a motion without a hearing where no injustice is likely to be caused.

FN12. *Canada (Minister of Citizenship & Immigration) v. Ledwich* (June 16, 1998), Doc. W89-00477, [1998] I.A.D.D. No. 831 (Imm. & Ref. Bd. (App. Div.))

FN13. *Ribic v. Canada (Minister of Employment & Immigration)* (August 20, 1985), Doc. I.A.B. T84-9623 (Imm. App. Bd.), D. Davey, Benedetti, Petryshyn

FN14. *Chieu v. Canada (Minister of Citizenship & Immigration)*, 2002 SCC 3, 18 Imm. L.R. (3d) 93 (S.C.C.)

FN15. *Melo v. Canada (Minister of Citizenship & Immigration)*, [2000] F.C.J. No. 1136, 2000 CarswellNat 1475 (Fed. T.D.) at para. 2; *Grant v. Canada (Minister of Citizenship & Immigration)*, [2002] I.A.D.D. No. 161, 2002 CarswellNat 1491, 21 Imm. L.R. (3d) 75 (Imm. & Ref. Bd. (App. Div.)) at paragraphs 10-11.

FN16. Based on the jurisprudence from the Federal Court of Canada and Supreme Court of Canada, the time has come to expand the discretionary jurisdiction of the IAD to consider constitutional questions attacking the validity of a removal order. As the Supreme Court has stated in *Chandler v. Assn. of Architects (Alberta)*, 62 D.L.R. (4th) 577 (S.C.C.) "Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal".

FN17. [1996] I.A.D.D. No. 1352, 1996 CarswellNat 2521, 38 Imm. L.R. (2d) 93 (Imm. & Ref. Bd. (App. Div.))

FN18. *Almonte v. Canada (Minister of Citizenship & Immigration)* (September 29, 1995), Doc. T-89-00826, [1995] I.A.D.D. No. 1254 (Imm. & Ref. Bd. (App. Div.))

FN19. (June 21, 2001), Doc. T93-00071 (Imm. & Ref. Bd. (App. Div.)), Member D'Ignazio

FN20. *Supra* note 18, at page 11.

FN21. (September 24, 2002), Doc. IAD TA1-03486 (Imm. & Ref. Bd. (App. Div.)), Member MacPherson

FN22. *Supra*, note 18.

FN23. *Chhai*, *supra* note 19.

FN24. See, *Barone*, *supra* note 17, at paragraph 12.

FN25. *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 (S.C.C.) *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570 (S.C.C.) *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5 (S.C.C.) *Tétreault-Gadoury v. Canada (Employment & Immigration Commission)*, [1991] 2 S.C.R. 22 (S.C.C.) *R. v. Mills*, [1986] 1 S.C.R. 863 (S.C.C.) See also, J. Evans, "Administrative Tribunals and Charter Challenges: Jurisdiction, Discretion and Relief" (1997), 10 Can. J. Admin. Law and Practice 355.

FN26. *Barone*, *supra* note 17, at paragraph 18.

FN27. *Y. (P.V.), Re* (March 30, 2000), Doc. T98-03551, [2000] C.R.D.D. No. 71 (Can. Imm. & Ref. Bd. (Ref. Div.)) MacPherson, at para. 7-12.

FN28. Donald Brown and John Evans, *Judicial Review of Administrative Actions in Canada* (Toronto Canvasback Publishing, 1998) at 12-72.

FN29. *Gwala v. Canada (Minister of Citizenship & Immigration)*, [1999] 3 F.C. 404, 3 Imm. L.R. (3d) 26 (Fed. C.A.) *Moktari v. Canada (Minister of Citizenship & Immigration)* (2001), 200 F.T.R. 25, 12 Imm. L.R. (3d) 268 (Fed. T.D.) These decisions established that on an application for judicial review of an administrative decision *Charter* issues can be raised for the first time.

FN30. *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086 (S.C.C.) at 1099 *MacKay v. Manitoba*, [1989] 2 S.C.R. 357 (S.C.C.) at 361-363 In *MacKay*, the Court held, in part, that:

> *Charter* decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill- considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of *Charter* issues.

FN31. *Public School Boards' Assn. (Alberta) v. Alberta (Attorney General)* , [2000] 1 S.C.R. 44, 2000 CarswellAlta 678, 2000 CarswellAlta 679 (S.C.C.)

FN32. Sections 69.4(1) and (2) of the *Immigration Act* read as follows:

> 69.4 (1) The Appeal Division is a court of record and shall have an official seal, which shall be judicially noticed.
>
> (2) The Appeal Division has, in respect of appeals made pursuant to sections 70, 71 and 77, sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction, that may arise in relation to the making of a removal order or the refusal to approve an application for landing made by a member of the family class.

FN33. It should be noted that applications for leave and for judicial review are brought pursuant to subsection 82.1(1) of the *Immigration Act* and may be commenced *only* with leave of a judge of the Trial Division. See 82.1(2) of the *Immigration Act*.

FN34. [1998] 3 F.C. 315 (Fed. T.D.) at 329; reversed 2000 CarswellNat 925, 6 Imm. L.R. (3d) 80 (Fed. C.A.)

FN35. (1999), [2000] 1 F.C. 135 (Fed. C.A.) at 144-145.

FN36. Rule 306 provides that "Within 30 days after issuance of a notice of application, an applicant shall serve and file its supporting affidavits and documentary exhibits." In addition, where leave is granted a judge of the Trial Division makes an order setting out the various steps to be followed by the parties including the Applicant's record and affidavits.

FN37. *Al Sagban v. Canada (Minister of Citizenship & Immigration)*, 2002 CarswellNat 1, 2002 CarswellNat 2, 18 Imm. L.R. (3d) 163 (S.C.C.)

FN38. (1993), 160 N.R. 396 (Fed. C.A.) at 399.

FN39. (1995), 98 F.T.R. 58, 30 Imm. L.R. (2d) 211 (Fed. T.D.) at 62 [F.T.R.].

FN40. (2001), 267 N.R. 82 (Fed. C.A.) at 86.

FN41. Immigration and Refugee Board, "Removal Order Appeals" (Legal Services, February 1, 2002), at 11-6.

FN42. *Romans*, *supra* note 1.

FN43. *Chieu*, *supra* note 9.

FN44. *Ribic*, *supra* note 13.

FN45. This was not a ground stated in the Notice of Motion to Re-open the hearing. However, a Notice of Constitutional Question was filed pursuant to section 57 of the *Federal Court Act*.

FN46. Mr. Romans was born in June 1965 and was landed in Canada on October 7, 1967. See, T99-06694, Waters, January 03, 2003 (I.A.D.), paragraph 11.

FN47. Member Wales found on the one hand "The appellant has a loving and supportive family who are always willing to take him back, no matter what the circumstances," page 3. On the other hand, she also found that "He has never been employed, and the Designated Representative indicated that there was no realistic possibility of this happening in the future. He exists on social assistance administered through the Public Trustee's office. He has no friends, no spouse and no children," page 6. She then found that "His life is held hostage to his mental illness, even when he receives regular medication as he did prior to attending the hearing." In any event the panel found that "there would be great emotional hardship to the appellant's family, and particularly to his mother, if he were to be deported from Canada." However, it is difficult to assess the impact upon the appellant.

FN48. *Romans*, *supra* note 1, at pages 7-8.

FN49. In *Romans*, *supra* note 1, at page 8, the panel relied upon three IAD decisions to decline jurisdiction: *Barone v. Canada (Minister of Citizenship & Immigration)*, [1996] I.A.D.D. No. 1352, 1996 CarswellNat 2521, 38 Imm. L.R. (2d) 93 (Imm. & Ref. Bd. (App. Div.)) *Almonte v. Canada (Minister of Citizenship & Immigration)* (September 29, 1995), Doc. T-89-00826, [1995] I.A.D.D. No. 1254 (Imm. & Ref. Bd. (App. Div.)) *Canada (Minister of Citizenship & Immigration) v. Ledwich* (June 16, 1998), Doc. W89-00477, [1998] I.A.D.D. No. 831 (Imm. & Ref. Bd. (App. Div.)) The IAD considers that these decisions should be regarded as persuasive because they clearly and succinctly address basic principles to be applied by members in considering re-opened removal appeals made pursuant to s. 70 of the *Immigration Act*. As will be seen below, it appears that following the principle set out by the Supreme Court of Canada in *MacKay v. Manitoba*, [1989] 2 S.C.R. 357 (S.C.C.) an appellant would not be able to cross the threshold of establishing a breach of the Charter unless he/she demonstrate that the legislation actually has the effect complained of. In other words, the applicant could not argue that there is a breach of the Charter until it was first decided that his appeal was dismissed both at the appeal and re-opening (reconsideration) stages of the process. See, *MacKay*, *supra*.

FN50. *Romans*, *supra* note 1, at paragraph 17. In the event the applicant is able to surmount the first hurdle of obtaining leave to appeal the decision of the IAD, the factual base -- which is the full factual record before the IAD -- may be used to argue that the impugned decision and/or legislation is not in accordance with the *Charter*.

FN51. (2000), 139 O.A.C. 321 (Ont. Div. Ct.)

FN52. [1998] O.L.R.B. Rep. 104 (Ont. L.R.B.)

FN53. (2000), 139 O.A.C. 321 (Ont. Div. Ct.)

FN54. *Y. (P.V.), Re*, *supra* note 27, at paragraph 8.

FN55. *F. (M.F.), Re* (June 9, 1999), Doc. T97-04544, [1999] C.R.D.D. No. 154 (Imm. & Ref. Bd. (Ref. Div.))

FN56. Section 70(1) of the *Immigration Act*

> Subject to subsections (4) and (5), where a removal order or conditional removal order is made against a permanent resident or against a person lawfully in possession of a valid returning resident permit issued to that person pursuant to the regulations, that person may appeal to the Appeal Division on either or both of the following grounds, namely,
>
> (a) on any ground of appeal that involves a question of law or fact, or mixed law and fact; and
>
> (b) on the ground that, having regard to all the circumstances of the case, the person should not be removed from Canada.

FN57. J. Evans stated in "Administrative Tribunals and *Charter* Challenges: Jurisdiction, Discretion and Relief", *supra* note 24.

FN58. See, *Howard v. Canada (Minister of Citizenship & Immigration)*, 105 F.T.R. 260 (Fed. T.D.) at paragraphs 6-8. *Romans* is distinguished, however, because it challenges that deleterious effect of the IAD removal order on the appellant's section 7 *Charter* rights.

FN59. Justice in the Federal Court of Appeal.

FN60. J. Evans stated in "Administrative Tribunals and *Charter* Challenges: Jurisdiction, Discretion and Relief", supra note 24 at page 361.

FN61. *Grillas v. Canada (Minister of Manpower & Immigration)* (1971), [1972] S.C.R. 577, 23 D.L.R. (3d) 1, 1971 CarswellNat 389, 1971 CarswellNat 389F (S.C.C.)

FN62. *Chandler*, supra note 16.

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