Federal Court of Appeal  Cour d'appel fédérale

Date: 20190716

Docket: A-104-18

Citation: 2019 FCA 206

CORAM: **WEBB J.A.**
NEAR J.A.
LASKIN J.A.

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant

and

ANDREW JAMES FISHER-TENNANT BY HIS GUARDIAN AT LAW, JONATHAN TENNANT

Respondent

and

CANADIAN ASSOCIATION OF REFUGEE LAWYERS

Intervener

Heard at Toronto, Ontario, on February 13, 2019.

Judgment delivered at Ottawa, Ontario, on July 16, 2019.

REASONS FOR JUDGMENT BY: LASKIN J.A.

CONCURRED IN BY: WEBB J.A.
DISSENTING REASONS BY: NEAR J.A.

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REASONS FOR JUDGMENT

LASKIN J.A.

I. Overview

[1] In granting an application for judicial review of a decision made under the *Citizenship Act*, R.S.C. 1985, c. C-29, a judge of the Federal Court declared that Andrew James Fisher-Tennant is a citizen of Canada: *Fisher-Tennant v. Canada (Citizenship and Immigration)*, 2018

FC 151 (Ahmed J.). The application judge declined to certify in his judgment a question of general importance. By paragraph 22.2(*d*) of the *Citizenship Act*, no appeal lies to this Court from a judgment of the Federal Court on judicial review with respect to any matter under the Act, absent a certified question.

[2] Despite this preclusive clause, the Minister of Citizenship and Immigration appeals from the application judge's decision. He relies on the jurisprudence of this Court holding that paragraph 22.2(*d*) and other preclusive clauses in the *Citizenship Act* and the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (*IRPA*), will not, in certain circumstances, bar an appeal from a decision in respect of which no question has been certified. The Minister argues that the application judge committed two "jurisdictional" errors that permit the appeal to proceed. These errors, the Minister argues, were in impermissibly granting a declaration of fact and in "usurping" the decision-making role of the Minister under the *Citizenship Act*, and they resulted in the application judge awarding relief not available on judicial review under the *Federal Courts Act*, R.S.C. 1985, c. F-7.

[3] The respondent, Andrew, is three years old. He is represented in this proceeding by his biological father, Jonathan Tennant, who submits that the application judge committed no error that would permit an appeal to this Court in the absence of a certified question.

[4] For the reasons that follow, I agree with Mr. Tennant. I would therefore quash the Minister's appeal on the basis that it is barred by paragraph 22.2(*d*) of the *Citizenship Act*.

II. Background

A. *Citizenship by descent*

[5] Part I of the *Citizenship Act* bears the heading "The Right to Citizenship." By paragraph 3(1)(*b*) of the Act, which is included in Part I under the subheading "Persons who are citizens," and subject to the Act's other provisions, a person "is" a citizen by descent if the person was born outside Canada after February 14, 1977, and if, at the time of the person's birth, one of the person's parents, other than an adoptive parent, was a Canadian citizen.

[6] Since 2009, citizenship by descent under paragraph 3(1)(*b*) has been limited by paragraph 3(3)(*b*) to the first generation born outside Canada to a Canadian parent: *An Act to amend the Citizenship Act*, S.C. 2008, c. 14, s. 2(2).

[7] However, the first generation limit in paragraph 3(3)(*b*) is subject to, among other things, the Crown servant exception set out in paragraph 3(5)(*b*). Under this exception, the first generation limit does not apply to a person "born to a parent one or both of whose parents, at the time of that parent's birth, were employed outside Canada in or with the Canadian Armed Forces, the federal public administration or the public service of a province, otherwise than as a locally engaged person."

[8] In this case, Andrew was born in November 2015 in the United States. Mr. Tennant, a Canadian citizen, is his biological father, and Marc Fisher, an American citizen by birth, his adoptive father. But Andrew was not the first generation to be born outside Canada: his

biological father, Mr. Tennant, was born in 1971 in Malaysia, to Dr. Paul Tennant and Susan Carey, Canadian citizens by birth, while Dr. Tennant was working in that country. At birth, Mr. Tennant was a Canadian citizen under paragraph 5(1)(*b*) of the former *Canadian Citizenship Act*, R.S.C. 1970, c. C-19, which provided that a person born outside of Canada was a Canadian citizen if his or her father was a citizen.

[9] It follows that unless the Crown servant exception applies – unless Andrew's grandfather, Dr. Tennant, was employed in Malaysia "in or with […] the federal public administration or the public service of a province" at the time that Andrew's biological father, Mr. Tennant, was born – the first generation limit in paragraph 3(3)(*b*) applies to Andrew, who is then not a citizen by descent. Conversely, if the Crown servant exception applies, Andrew is a citizen by descent under paragraph 3(1)(*b*).

[10] By contrast to section 3, under which certain persons have the status of citizen at birth, section 5 of the Act, under the subheading "Grant of citizenship," provides for the acquisition of citizenship by certain categories of persons through a grant of citizenship by the Minister, on application. Sections 5.1 and 11 also provide for citizenship on application and by grant. The Supreme Court recognized and discussed the distinction between citizenship at birth and citizenship by grant in *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358 at paras. 2-4, 143 D.L.R. (4th) 577. I will return to this distinction later in these reasons.

B. *Application for certificate of citizenship*

[11] Mr. Tennant applied for a certificate of Canadian citizenship on Andrew's behalf under subsection 12(1) of the *Citizenship Act*. That provision states that the Minister must, on application, determine if a person is a citizen, and, if they are, must (subject to any applicable regulations) issue a certificate of citizenship or provide them with some other means to establish their citizenship.

[12] Mr. Tennant set out in the application that he had been born in Malaysia in 1971, at a time when his father, Dr. Tennant, was employed there as a Crown servant. In the space provided in which to include "[d]etails on Crown service," Mr. Tennant indicated that his father had been a "University professor retained by the Government of Canada under a scheme established between Canada and Malaysia for technical co-operation."

[13] Mr. Tennant included a copy of his father's passport, issued April 1, 1971, in support of Andrew's application. The passport contained a temporary employment visa, "[f]or employment as Lecturer with The University of Penang under Colombo Plan," as well as an inscription, reading

> THE BEARER IS PROCEEDING TO MALAYSIA AS A UNIVERSITY PROFESSOR RETAINED BY THE GOVERNMENT OF CANADA UNDER THE SCHEME ESTABLISHED BETWEEN CANADA AND MALAYSIA FOR TECHNICAL CO-OPERATION.

[14] Mr. Tennant also included a letter from the University of British Columbia, indicating that Dr. Tennant taught at the University of Penang from 1971 to 1973, and that the University of

British Columbia paid his salary and benefits during this period, for which it was then reimbursed by the Canadian International Development Agency of the Government of Canada. Finally, he provided a copy of Dr. Tennant's application for registration of Mr. Tennant's birth abroad, which stated that Dr. Tennant was "SERVING ON A CIDA PROJECT" at the time of Mr. Tennant's birth.

[15] The application was considered by a citizenship officer of Citizenship and Immigration Canada. She wrote to Citizenship and Passport Program Guidance, with the subject line "Verification of crown servant employment," asking whether the documentation provided by Mr. Tennant was "acceptable in order to apply [the] crown servant grandparent exception […]." A senior program advisor responded several months later. He stated that "employment with the University of British Columbia […] would not qualify for the grandparent Crown servant exception," because employment abroad with the University of British Columbia "[did] not fall under either the 'federal public administration' or 'public service of a province' categories of Crown service." He also stated that, if Mr. Tennant had documentation demonstrating that Dr. Tennant was employed abroad by the Canadian government during the relevant period, "we would take it into consideration."

[16] The officer prepared a memorandum concerning Andrew's application, setting out her conclusion that the Crown servant exception was not applicable, "[a]s per information received and through verification with [Citizenship and Passport Program Guidance] […]." The officer wrote to Mr. Tennant advising of her decision, stating that Andrew did not meet the legislative requirements for citizenship.

C. *Application for judicial review*

[17] Mr. Tennant applied on Andrew's behalf for leave to judicially review the officer's decision under subsection 22.1(1) and section 22.2 of the *Citizenship Act*. In his application for leave and for judicial review, he sought a declaration that Andrew is "a Canadian citizen by virtue of meeting the requirements for Canadian citizenship pursuant to the [*Citizenship Act*]," and an order in the nature of *mandamus* "compelling the Minister, within 30 days of the date of the order, to issue [Andrew] a Certificate of Citizenship […]." One of the grounds asserted for relief was that Andrew "[met] the statutory requirements for Canadian citizenship by virtue of ss. 3(1)(b) of the *Citizenship Act* and [was] entitled to a Certificate of Citizenship […]." Mr. Tennant asked in the alternative that the officer's decision be set aside and the matter sent back for redetermination. Mr. Tennant submitted an affidavit in support of the application, as well as an affidavit sworn by Dr. Tennant.

[18] The Minister opposed the granting of leave. Mr. Tennant then raised in his reply memorandum the argument that the officer had fettered her discretion by treating the view of Citizenship and Passport Program Guidance as dispositive. Leave was granted, and the Minister then brought a motion in writing for judgment, conceding the issue of fettered discretion and seeking to have the officer's decision set aside and the matter remitted for reconsideration. Mr. Tennant opposed the motion on the basis that he wished to make oral submissions on Andrew's entitlement to declaratory relief.

[19] The Minister's motion and the application for judicial review were heard together by the Federal Court. In his reasons, the application judge referred (at para. 14) to the parties'

agreement that the officer had fettered her discretion, stating that "[t]he only dispute remaining between the parties is with respect to the issues of remedy and costs."

[20] The application judge then addressed, under the heading "Availability of the Directed Verdict," Mr. Tennant's request for declaratory relief. He first found (at paras. 18-20) that this was not a case where "the decision-maker must be left to complete its work," as the "relevant factual finding was made" by the officer, "albeit not in the manner required by law," and that there was nothing further required to complete the record. As a result, he concluded, concerns over "wading into the decision-making process on the basis of an incomplete factual record" and "weigh[ing] evidence in place of the decision-maker" did not arise.

[21] The application judge went on to consider the Minister's argument that the Federal Court is unable to make declarations pertaining solely to findings of fact. He agreed with that proposition, but disagreed that it applied, finding (at para. 21) that the declaration sought by Mr. Tennant – that Andrew is a Canadian citizen under section 3 of the *Citizenship Act* – was one not of fact but of law, and within the authority of the Federal Court to grant.

[22] Under the heading "Appropriateness of a Directed Verdict," the application judge then outlined the evidence before the officer. He found (at para. 28) that "the only logical conclusion [was] that Dr. Tennant was in the employment of CIDA and thereby he was a Crown servant," and stated that it would be futile to return the matter to the officer in the face of such clear evidence. He also noted (at para. 31) that the officer's "approach demonstrate[d] a lack of diligence," and that this "militate[d] in favour of a remedy that [was] commensurate with the

seriousness of the consequences flowing from the [o]fficer's conduct." Finally, he noted that the language of section 3 of the *Citizenship Act* is itself declaratory, stating (at para. 33) that "once the requirements under [section] 3 are met, the person is a citizen, irrespective of Ministerial action" (emphasis in original), and that a "directed verdict" would therefore not impinge on any exercise of the Minister's discretion.

[23] For these reasons, the application judge concluded (at paras. 23, 34-36) that the case warranted what he described as "the exceptional remedy of a directed verdict." He expressly declined to return the matter for redetermination, writing that "any decision that fails to affirm or delay [sic] the recognition of [Andrew's] citizenship would be unjust." He reasoned that, because he had "affirmed that Dr. Tennant was serving abroad as a Crown servant" at the relevant time, Andrew was a Canadian citizen "as a matter of law."

[24] The Minister asked that the application judge certify the following question:

> Does the Federal Court have the jurisdiction to issue a directed verdict or a declaration that an applicant is a Canadian citizen under the Citizenship Act, when a decision-maker has not made a factual determination that the applicant is a Canadian citizen as per the provisions of the Citizenship Act?

[25] The application judge found (at para. 41) that this question did not merit certification. He stated that "the question as to whether the Federal Court has the jurisdiction to issue directed verdicts is already well established," both generally and in the citizenship context.

[26] In disposing of the proceeding, the application judge issued the following judgment:

THIS COURT'S JUDGMENT is that:

1. I hereby declare, Andrew James Fisher-Tennant is a citizen of Canada.

2. No costs are awarded.

3. There is no question for certification.

D. *Appeal to this Court*

[27] The Minister presented a notice of appeal to the Registry of this Court for filing. The notice stated that the application judge's decision fell within the "narrow exception" to the certified question requirement, because the application judge had made two "jurisdictional" errors – issuing a declaration on a question of fact and arrogating to himself the Minister's power under subsection 12(1) of the *Citizenship Act* to determine whether Andrew is a citizen. In accordance with rule 72 of the *Federal Courts Rules*, SOR/98-106, the Registry forwarded the notice of appeal to a judge of this Court, who directed the Registry to file it.

[28] Mr. Tennant then brought a motion under rule 74 of the *Federal Courts Rules*, which provides that the Court may "at any time, order that a document that is not filed in accordance with [the Rules] be removed from the Court file." He argued that the Minister had not established a "sufficiently arguable case" that the appeal fell within the exceptions to the certified question requirement. The Minister opposed the motion, in large part on the basis that the direction under rule 72 had determined that the appeal should proceed, and that the motion was an improper attempt to appeal from that decision. This Court dismissed the motion: *Canada (Citizenship and Immigration) v. Tennant*, 2018 FCA 132 (Stratas J.A., sitting alone). I will

discuss the reasons of my colleague Justice Stratas on the motion when I refer to the case law regarding the scope and limits of paragraph 22.2(*d*) and similar provisions.

[29] Following the dismissal of Mr. Tennant's motion, the Canadian Association of Refugee Lawyers (CARL) was granted leave to intervene in the appeal with respect to the proper interpretation of preclusive clauses and the remedial powers of the Federal Court.

III. Issue and standard of review

[30] The threshold issue is whether the Minister's appeal is barred by paragraph 22.2(*d*) of the *Citizenship Act*. In resolving this issue the Court may consider both whether the errors alleged by the Minister are of a kind that will justify hearing an appeal in the face of a preclusive clause, and whether the application judge actually committed the errors alleged.

[31] To the extent that the Court determines whether the alleged errors on the part of the application judge are of a kind that can justify hearing the appeal despite the preclusive clause, the Court makes this determination at first instance. No standard of review therefore applies.

[32] To the extent that the Court determines whether the application judge actually committed the alleged errors, the administrative law standard of review in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 45-47, [2013] 2 S.C.R. 559, applies to the application judge's review of the Minister's decision, while the appellate standard of review set out in *Housen v. Nikolaison*, 2002 SCC 33, [2002] 2 S.C.R. 235, applies to the application

judge's determination of the appropriate remedy: *Sturgeon Lake Cree Nation v. Hamelin*, 2018 FCA 131 at para. 51, 424 D.L.R. (4th) 366.

IV. Hearing an appeal despite a preclusive clause

A. *The preclusive clauses*

[33] By paragraphs 27(1)(*a*) and (*c*) of the *Federal Courts Act*, an appeal lies to this Court from a final or interlocutory judgment of the Federal Court. However, the appeal rights set out in the *Federal Courts Act* may be overridden by other statutes: *Tennina v. Canada (National Revenue)*, 2010 FCA 25 at para. 11, 402 N.R. 1.

[34] Both the *Citizenship Act* and the *IRPA* permit judicial review applications only with leave of the Federal Court, preclude appeals to this Court from interlocutory and leave decisions, and preclude appeals to this Court from judgments issued in applications for judicial review in the absence of a certified question. Section 22.4 of the *Citizenship Act* and subsection 75(2) of the *IRPA* state, respectively, that the provisions of those statutes prevail in the event of any inconsistency with those of the *Federal Courts Act*.

[35] The relevant provision in this case is paragraph 22.2(*d*) of the *Citizenship Act*, which governs judicial review applications under the Act; it states that "an appeal to the Federal Court of Appeal may be made only if, in rendering judgment, the judge certifies that a serious question of general importance is involved and states the question." Its counterpart in the *IRPA* is paragraph 74(*d*). This Court has described this provision as "a second filter" – the first, the

requirement to obtain leave, applying to applications for judicial review to the Federal Court, and the second, the certified question requirement, applying to appeals to this Court from decisions of the Federal Court: *Mudrak v. Canada (Citizenship and Immigration)*, 2016 FCA 178 at para. 11, 485 N.R. 186. The Court has explained further that the second requirement is "intended to filter significant questions of law from questions of fact," and has also stated that "[a]s a certified question is a precondition to this Court's jurisdiction, it is a requirement that must not be taken lightly": *Mudrak* at paras. 12, 19. These observations apply equally to paragraph 22.2(*d*) of the *Citizenship Act*.

[36] As set out above, the application judge did not certify a question when issuing his judgment. In bringing this appeal nonetheless, the Minister asserts that the application judge made errors of a kind that have been recognized as permitting this Court to hear an appeal despite paragraph 22.2(*d*) of the *Citizenship Act* and similar preclusive clauses.

B. *Judicial treatment of the preclusive clauses*

[37] The case law establishes that certain types of errors will justify hearing an appeal in the face of a preclusive clause. These include, for example, bias or a reasonable apprehension of bias on the part of the judge at first instance, and refusal to exercise jurisdiction: *Canada (Minister of Citizenship and Immigration) v. Katriuk*, 235 N.R. 305 at para. 12, 1999 CarswellNat 157 (WL) (F.C.A.); *Canada (Solicitor General) v. Subhaschandran*, 2005 FCA 27 at para. 15, [2005] 3 F.C.R. 255; *Es-Sayyid v. Canada (Public Safety and Emergency Preparedness)*, 2012 FCA 59 at para. 28, 432 N.R. 261, leave to appeal to S.C.C. refused, 440 N.R. 398. A further category comprises errors in the course of a "separate, divisible judicial act" – a decision in the exercise of

a power that arises not under the *Citizenship Act* (or the *IRPA*) but from some other source: *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391 at paras. 65-66, 151 D.L.R. (4th) 119.

[38] This Court has also used the term "jurisdictional errors" to describe errors that will permit an appeal to be heard despite a preclusive clause: *Sellathurai v. Canada (Public Safety and Emergency Preparedness)*, 2011 FCA 223 at paras. 15-16, [2012] 2 F.C.R. 243. But it has also expressed reluctance to use that language, given the uncertainties surrounding the term "jurisdiction" in other contexts, preferring instead to use the language of "fundamental matters" striking "right at the rule of law": *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 144 at paras. 19-21.

[39] I agree with the view expressed by my colleague Justice Stratas in his reasons dismissing the rule 74 motion in this proceeding (at para. 16) that the case law has not defined the exceptions to preclusive clauses particularly well. He saw the motion as an opportunity to provide a "better explanation" for the exceptions. He described (at para. 19) an exception centred on "jurisdictional" errors as unhelpful, because it would ultimately capture issues of statutory interpretation that were, at best, mere errors of law. He proposed (at para. 17) that, instead of focussing on "jurisdictional" errors, the Court should not give effect to a preclusive clause where the Federal Court's judgment gives rise to rule of law concerns. The appeal bar would then not apply where

- it is alleged that there is a fundamental flaw going to the very root of the Federal Court's judgment or striking at the Federal Court's very ability to decide the case—examples include a blatant exceedance of authority obvious from the face of the judgment or an infringement of the rule against actual or apparent bias supported by substantial particularity in the notice of appeal; and

- the flaw raises serious concerns about the Federal Court's compliance with the rule of law

[40] Justice Stratas went on to state (at paras. 17-18) that the exception should not apply to "contentious debates over issues of statutory interpretation, errors of law, exercises of judicial discretion, and the weight that should be accorded to evidence and its assessment," but only to "fundamental" flaws that strike at "the very root" of the judgment or the Federal Court's "very ability" to hear the case, and in any event only where "serious concerns" regarding the rule of law are raised. "This high threshold," he stated, "allows Parliament's preference for an absolute bar to prevail in all cases except for those most rare cases where concerns based on the constitutional principle of the rule of law are the most pronounced."

[41] Consistent with Justice Stratas's comments, the exceptions that have been identified to the preclusive clauses, no matter how they are expressed, do not include "mere errors of law": *Mahjoub* at para. 21. There are many statements to this effect. For example, in *Huntley v. Canada (Citizenship and Immigration*), 2011 FCA 273 at para. 8, [2012] 3 F.C.R. 118, leave to appeal to S.C.C. refused, 435 N.R. 391, this Court held that "failing to apply the appropriate standard of review is a run-of-the-mill error of law, and not a usurpation of jurisdiction […]." In *Canada (Minister of Citizenship and Immigration) v. Katriuk*, 252 N.R. 68 at para. 8, 1999 CarswellNat 2531 (WL) (F.C.A.), leave to appeal refused, [2000] 1 S.C.R. xiii., this Court held

that “an erroneous finding of fact based on a misapprehension of what is in evidence” did not result in a loss of jurisdiction, but at most amounted to an error of law in the exercise of jurisdiction.

[42] In a similar vein, this Court has rejected the argument that the fact that an order was made “outside the statutory jurisdiction of the Federal Court” is sufficient to defeat the *IRPA*’s preclusive clause, holding that “[t]o accept that argument could deprive [the preclusive clause] of all meaning”: *Canada (Minister of Citizenship and Immigration) v. Edwards*, 2005 FCA 176 at para. 12, 335 N.R. 181; see also *Canada (Minister of Citizenship and Immigration) v. Lazareva*, 2005 FCA 181 at paras. 8-9, 335 N.R. 21. In both of these cases, the appeals held subject to the statutory bar were based on the ground (similar to one of the grounds advanced in this case) that in granting relief the Federal Court had “usurped” authority granted to the Minister. The Minister’s position here, based on counsel’s response when the Court raised these decisions in oral argument, appears to be that these two decisions do not reflect the current law.

C. *Position of the parties and intervener on the nature and scope of the exceptions*

[43] The Minister argues that, in enacting the preclusive clause, “Parliament cannot have intended to immunize alleged errors from appellate scrutiny which, if not subject to review, would undermine the rule of law and public confidence in the due administration of justice”: Minister’s memorandum at para. 33. He submits that a preclusive clause will not apply where the application judge committed a “jurisdictional error,” whether by exceeding the judge’s jurisdiction or failing to exercise it. The Minister also quotes with apparent approval Justice Stratas’s description of the threshold as requiring a “fundamental flaw,” and a decision “raising

serious concerns about […] compliance with the rule of law": Minister's memorandum at para. 35.

[44] In his submissions, Mr. Tennant appears to invoke the administrative law concept of "true question of jurisdiction": Mr. Tennant's memorandum at paras. 13-14. He submits that to be entitled to proceed with his appeal, the Minister must "demonstrate that the issues raised are those of 'true jurisdiction' for which no [deference] ought to be shown." However, he also cites (at para. 15) Justice Stratas's articulation of the test. Mr. Tennant submits (at para. 16) that "[i]t is a rare case that an appellant can establish a lack or loss of jurisdiction of the court."

[45] CARL submits that the preclusive clauses in the *IRPA* and the *Citizenship Act* should be construed applying the same principles applied to privative clauses restricting access to judicial review. It states that privative clauses have always been narrowly interpreted, citing *Crevier v. A. G. (Québec) et al.*, [1981] 2 S.C.R. 220 at 237, 127 D.L.R. (3d) 1, and *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, [1992] 2 S.C.R. 394 at 405, 92 D.L.R. (4th) 609.

[46] CARL argues that this Court should not accept Justice Stratas's articulation of the test, which it sees as both departing from existing jurisprudence and raising the applicable threshold. CARL submits that in suggesting that errors must be "fundamental," "serious," and "substantial" to give rise to appeal, Justice Stratas used "qualitative" and "undefined" language that will promote too broad a reading of the preclusive clauses. It argues that a broad interpretation should be rejected because it will unduly limit access to justice by vulnerable non-citizens.

[47] CARL also disagrees with Justice Stratas's reluctance to describe the relevant test in "jurisdictional" terms. It draws a distinction between "simple" jurisdictional errors and "true" jurisdictional errors, as those terms are understood for the purposes of judicial review. It cites *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31 at para. 31, [2018] 2 S.C.R. 230, in which the Supreme Court stated that "'true' questions of jurisdiction involve a far narrower meaning of 'jurisdiction' than the one ordinarily employed." CARL accordingly urges this Court to adopt a test turning on "simple" jurisdictional errors, arguing that "the debate on jurisdiction" that has plagued judicial review jurisprudence "does not need to spread into other areas of law": CARL's memorandum at para. 22.

[48] In reply, the Minister disagrees that Justice Stratas's approach changed the "jurisdictional exception" test, or that he could have done so as a judge sitting alone. The Minister argues that Justice Stratas's description of the threshold is consistent with that adopted by panels of this Court in *Mahjoub* and *Huntley*. He says that the concern that applying Justice Stratas's description would lead to less access to this Court is unfounded.

D. *No need in this case to revisit the nature and scope of the exceptions*

[49] I appreciate and respect the efforts of my colleague Justice Stratas to provide a "better explanation" of the circumstances in which it will be appropriate to entertain an appeal despite a preclusive clause. There is much in his reasons with which I agree.

[50] At the same time, there may be some merit to CARL's concern about describing the exceptions in qualitative terms. Redefining the exception in language such as "fundamental

flaw," "blatant exceedance of authority," striking "at the very root" of the judgment, and raising "serious concerns" about the rule of law could present its own set of interpretive difficulties. The rule of law is itself a concept that defies easy definition. In addition, the reasons why a "blatant" or "obvious" exceedance of authority should justify hearing an appeal despite the bar, when an insidious or subtle exceedance would not, may deserve further consideration. Another potential concern is with putting the scope of the appeal bar on a constitutional footing when there is no constitutional right to an appeal: *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9 at para. 136, [2007] 1 S.C.R. 350. Nor does the "rule of law" category appear to capture the "separate, divisible judicial act" cases, some of which turn on the specific statutory language of the preclusive clause in issue. We did not receive extensive (or in some cases any) submissions on these areas of potential concern.

[51] The Minister is correct in his submission that unless and until adopted by a panel of this Court, the views expressed by a member of the Court sitting alone as a motions judge do not change the law as established by the decisions of a panel: *Sport Maska Inc. v. Bauer Hockey Corp.*, 2016 FCA 44 at paras. 37-38, [2016] 4 F.C.R. 3. In the end, I do not find it necessary to decide in this case whether to adopt my colleague's formulation or some variation of it. That is because I conclude, for reasons that I will now discuss, that the errors that the application judge is alleged to have made either were not errors at all or were ordinary errors, of a kind that does not displace the preclusive clause in paragraph 22.2(*d*) of the *Citizenship Act*, regardless of how the currently recognized exceptions to the preclusive clauses are expressed.

V. The errors alleged

[52] The Minister submits that the application judge made two "jurisdictional" errors that resulted in his granting relief not available on judicial review under the *Federal Courts Act*, and that these errors permit this Court to hear and decide the Minister's appeal.

[53] First, he argues that the application judge exceeded his jurisdiction by issuing what is in substance a declaration of fact – that Dr. Tennant was a Crown servant – when the Federal Court has no jurisdiction to make declarations on findings of fact. Second, he submits that the application judge exceeded his jurisdiction by "arrogating to himself a power that Parliament gave to the Minister" – the exclusive authority to determine applications for evidence of citizenship. I will address these two grounds in turn.

A. *Did the application judge impermissibly grant a declaration of fact?*

[54] As set out above, the substantive relief granted by the application judge was a declaration that "Andrew James Fisher-Tennant is a citizen of Canada." The parties agree that the Federal Court has authority to issue declaratory relief in deciding an application for judicial review. Its power to do so is found in paragraph 18(1)(*a*) of the *Federal Courts Act*, by which it may grant declaratory relief against any federal board, commission or other tribunal:

Extraordinary remedies, federal tribunals	**Recours extraordinaires : offices fédéraux**
18 (1) Subject to section 28, the Federal Court has exclusive original jurisdiction	18 (1) Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour :
(*a*) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and	*a*) décerner une injonction, un bref de *certiorari*, de *mandamus*, de prohibition ou de *quo warranto*, ou pour rendre un jugement déclaratoire contre tout office fédéral;
(*b*) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (*a*), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.	*b*) connaître de toute demande de réparation de la nature visée par l'alinéa a), et notamment de toute procédure engagée contre le procureur général du Canada afin d'obtenir réparation de la part d'un office fédéral.

[55] By subsection 18(3), the remedies in subsection 18(1) may be obtained only on an application for judicial review made under section 18.1. Subsection 18.1(3) then sets out the Federal Court's powers on an application for judicial review, which again include a power to grant declaratory relief:

Powers of Federal Court	**Pouvoirs de la Cour fédérale**
(3) On an application for judicial review, the Federal Court may	(3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :
(*a*) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or	*a*) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;
(*b*) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance	*b*) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle

with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.	estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

[56] In addition, rule 64 of the *Federal Courts Rules* provides that the Federal Court may make "a binding declaration of right in a proceeding," whether or not any consequential relief is or can be claimed.

[57] However, the Minister argues that the application judge exceeded his powers to grant declaratory relief under subsections 18(1) and 18.1(3) by issuing a declaration of fact. On this point, the Minister relies on this Court's statement in *Makara v. Canada (Attorney General)*, 2017 FCA 189 at para. 16, that the Federal Court "does not have jurisdiction to make declarations pertaining solely to findings of fact." The Minister submits that the application judge's declaration is "at heart" a declaration of fact, because in order to make it, the judge first had to make a factual determination that Dr. Tennant was a Crown servant in 1971: Minister's memorandum at para. 57.

[58] The prohibition against the Federal Court granting declarations of fact, to which the Minister refers, has its roots in *Gill (J.S.) v. Minister of Employment and Immigration*, 49 F.T.R. 285 at para. 13, 1991 CarswellNat 291 (WL) (T.D.). In that case the plaintiff – whose application for permanent residency had been denied on the basis that he had been untruthful about his marital status – sought a declaration that he had never been married and that he had answered questions truthfully on his permanent residency application. Relying on this Court's statement in *LeBar v. Canada* (1988), [1989] 1 F.C. 603 at 610, 90 N.R. 5 (C.A.), that declaratory relief

"declares what the law is," the Federal Court concluded that the relief sought was a "declaration of fact" beyond its jurisdiction to grant, and struck out the statement of claim. The Nova Scotia Court of Appeal followed similar reasoning in *Shore Disposal Ltd. v. Ed DeWolfe Trucking Ltd.* (1976), 72 D.L.R. (3d) 219 at 222, 16 N.S.R. (2d) 538 (C.A.).

[59] In my view, the analyses in *Gill* and similar cases merely give effect to the well-established principle that declaratory relief must resolve a real legal issue in which both parties have a genuine interest. The Supreme Court recently reiterated the requirements for granting declaratory relief in *S.A. Metro Vancouver Housing Corp*., 2019 SCC 4 at para. 60:

> [d]eclaratory relief is granted by the courts on a discretionary basis, and may be appropriate where (a) the court has jurisdiction to hear the issue, (b) the dispute is real and not theoretical, (c) the party raising the issue has a genuine interest in its resolution, and (d) the responding party has an interest in opposing the declaration being sought […].

[60] These factors, all of which are present here, have long governed the granting of declaratory relief. It has also long been clear that granting declaratory relief may entail determining whether the facts give rise to a legal right. As stated by Paul Martin in "The Declaratory Judgment" (1931) 9:8 C.B.R. 540 at 547, cited with approval in *Telecommunication Employees Association of Manitoba Inc. et al. v. Manitoba Telecom Services Inc. et al*., 2007 MBCA 85 at para. 62, 214 Man. R. (2d) 284, "the essence of the declaratory judgment is the determination of rights."

[61] The use of declarations to determine questions of status is also well known to Canadian law: see "The Declaratory Judgment" at 546.

[62] For example, in *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 S.C.R. 99, the Supreme Court granted a declaration that non-status Indians and Métis are "Indians" under subsection 91(24) of the *Constitution Act, 1867*, 30 & 31 Vict., c. 3 (U.K.). In doing so, it relied (at para. 4) on "a number of key factual findings" made by the trial judge. In *Glynos v. Canada (C.A.)*, [1992] 3 F.C. 691, 1992 CanLII 8572 (C.A.), a case on which Mr. Tennant particularly relies, this Court, having formed a clear view of Mr. Glynos's entitlement to citizenship under a provision that, unlike section 3 of the current *Citizenship Act*, required that citizenship be granted, issued a declaration that he was "eligible for a grant of citizenship." The application judge's declaration in this case is also similar in effect to the declaration by the Court of Appeal for Ontario in *Gehl v. Canada (Attorney General)*, 2017 ONCA 319 at para. 89, 138 O.R. (3d) 52. While the Court's declaration in that case that the appellant was entitled to registration as an Indian was based on its view of the limited range of reasonable outcomes available on the record underlying the appellant's application for registration, this did not transform the declaration into one of fact.

[63] In my view, status as a citizen of Canada by descent may be the subject of a declaration. As Mr. Tennant correctly observes, this Court has held that Canadian citizenship is "a creature of federal statute" with "no meaning apart from statute": *Canada (Citizenship and Immigration v. Taylor)*, 2007 FCA 349 at para. 50, 286 D.L.R. (4th) 385.

[64] And as discussed above, it is the Act itself – in this case paragraph 3(1)(*b*) – that confers citizenship by descent. It is not granted by the Minister, but rather is acquired by birth: see *Assal v. Canada (Citizenship and Immigration)*, 2016 FC 505 at paras. 68-70. This is reflected in the

procedure for obtaining evidence of citizenship, as now set out in section 14 of the *Citizenship Regulations, No. 2*, SOR/2015-124. That provision requires the filing of "evidence that establishes that the applicant is a citizen" (emphasis added). A certificate of citizenship issued under subsection 12(1) is therefore only evidence of citizenship, and does not itself confer that status. As stated in one tribunal decision, "[i]t is not the 'certificate of citizenship' that provides the citizenship, but rather it is being born as a citizen which entitles you to a piece of paper showing such citizenship": *Schlesinger v. Canada (Citizenship and Immigration)*, 2015 CanLII 92532 at para. 17, 2015 CarswellNat 8549 (WL) (Immigration Appeal Division). Or as put in *Assal* (at para. 68), "[f]or a citizen at birth, the certificate of citizenship only constitutes the recognition or evidence of this citizenship."

[65] Contrary to the Minister's submission, a declaration of citizenship is thus, at a minimum, not "solely" a declaration of fact. The nature of the application judge's declaration is therefore not a basis to conclude that the preclusive clause does not apply.

B. *Did the application judge usurp the role of the Minister?*

[66] The Minister argues that the application judge's declaratory judgment effectively renders a decision on the merits of the application under subsection 12(1) of the *Citizenship Act*, which he submits is beyond the Federal Court's statutory authority. The Minister submits that Parliament has given him the exclusive authority to determine applications made under subsection 12(1). He says that nothing in the *Federal Courts Act* empowers the Federal Court to render a decision on the merits or to substitute its decision for that of the Minister, and to determine itself whether the requirements of subsection 12(1) are met. The Minister invokes the

distinction between the role of the Court on appeal, in which substitution of the Court's views is permissible, and its role on judicial review, in which, he submits, it is not.

[67] One of the principal authorities on which the Minister relies is this Court's decision in *Canada (Minister of Human Resources Development) v. Rafuse*, 2002 FCA 31 at paras. 8-9, 286 N.R. 385, in which this Court approved the Federal Court's statement in *Xie v. Minister of Employment and Immigration*, 75 F.T.R. 125 at para. 17, 1994 CarswellNat 484 (WL) (T.D.), that it does not, on judicial review, have the power to "substitute its opinion for that of the tribunal whose decision is under judicial review, and make the decision that the tribunal should have made." He also relies on the comment of Justice Stratas in his decision on the rule 74 motion (at para. 25) that "the clear language of the *Citizenship Act* gives [the] power [to grant citizenship] only to the Minister."

[68] Contrary to the Minister's submission, the law of judicial review recognizes a power on the part of a reviewing court to substitute its view for that of the administrative decision-maker, provided that certain conditions are met. The application judge therefore did not err in holding that this remedy was available to him if these conditions were satisfied.

[69] There are two relevant statements in *Rafuse*. One is the statement on which the Minister relies. The second, also citing *Xie*, is the following (at para. 14):

> While the directions that the Court may issue when setting aside a tribunal's decision include directions in the nature of a directed verdict, this is an exceptional power that should be exercised only in the clearest of circumstances […].

[70] The first proposition set out in *Rafuse* – that substitution of the decision of the Court for that of the administrative decision-maker is not permitted on judicial review under the *Federal Courts Act* – has been repeated by this Court in several other cases. In *Jada Fishing Co. Ltd. v. Canada (Minister of Fisheries and Oceans)*, 2002 FCA 103 at para. 10, 288 N.R. 237, leave to appeal refused, [2002] 4 S.C.R. vi, this Court held that it was "without jurisdiction" to substitute its decision for that of a tribunal, because it could "only dismiss the appeal or give the judgment that the Trial Division should have given, and the Trial Division could not have substituted its decision for that of the [tribunal] in an application for judicial review." See also *Canada (Human Resources Development and Social Development) v. Layden*, 2009 FCA 14 at paras. 10-12; *Adamson v. Canada (Human Rights Commission)*, 2015 FCA 153 at para. 62, 474 N.R. 136, leave to appeal refused, [2016] 1 S.C.R. v; *Canada (Attorney General) v. Burnham*, 2008 FCA 380 at para. 11, 384 N.R. 149.

[71] But despite the first proposition set out in *Rafuse*, it is clear that, at a minimum, substitution of the Court's views for those of the administrative decision-maker can be achieved indirectly, or in effect, through remedies that the *Federal Courts Act* sets out. *Rafuse* itself recognized this possibility in the second statement quoted above. A reviewing court can achieve indirect substitution in a number of ways.

[72] The most obvious is to quash the tribunal's decision and give directions requiring the decision-maker to reach a particular result. It is now well-established that this form of relief, a combination of *certiorari* and *mandamus*, is available where on the facts and the law there is only one lawful response, or one reasonable conclusion, open to the administrative decision-

maker, so that no useful purpose would be served if the decision-maker were to redetermine the matter: see *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31 at paras. 41-44, [2001]1 S.C.R. 772; *Canada (Public Safety and Emergency Preparedness) v. LeBon*, 2013 FCA 55 at paras. 13-14, 444 N.R. 93; *D'Errico v. Canada (Attorney General)*, 2014 FCA 95 at paras. 14-16, 459 N.R. 167; *Sharif v. Canada (Attorney General)*, 2018 FCA 205 at paras. 54, 59.

[73] This Court has observed that, when granting relief of this nature, "the reviewing court acts in a practical sense as the merits-decider": *'Namgis First Nation v. Canada (Fisheries and Oceans)*, 2019 FCA 149 at para. 6; see also *Layden* at para. 10. As put by the Federal Court, "this Court [can] accomplish indirectly what it is not authorized to do directly. It [can] compel the Board to reach a specific conclusion thereby, in effect, substituting its decision for that made by the Board": *Turanskaya v. Canada (Minister of Citizenship and Immigration)*, 111 F.T.R. 314 at para. 6, 1995 CarswellNat 1163 (WL) (T.D.), affirmed 145 D.L.R. (4th) 259, 210 N.R. 235 (F.C.A).

[74] As indicated above, this type of *certiorari* and *mandamus* relief (as well as other relief amounting to indirect substitution, discussed below) is sometimes referred to as a "directed verdict," terminology employed by the application judge here. Strictly speaking, this terminology is incorrect; to avoid confusion, it would be better not to use it. "Directed verdict" is a criminal law, not an administrative law, concept: see *R. v. Rowbotham; R. v. Roblin*, [1994] 2 S.C.R. 463 at 467, 168 N.R. 220. However, the phrase can be understood to capture, among other things, a remedy of indirect substitution granted because there is only one reasonable outcome.

[75] A reviewing court may also achieve substitution indirectly through a declaration recognizing the parties' rights. This type of indirect substitution also appears to be available when there is only one reasonable determination of the issue as to which a declaration is granted.

[76] The Supreme Court recognized that a declaration may have the effect of substitution in *Kelso v. The Queen*, [1981] 1 S.C.R. 199, 120 D.L.R. (3d) 1, where the issue was whether Mr. Kelso was entitled to be reinstated to his former position in the public service. In response to the argument that only the Public Service Commission, and not the Court, had authority to make appointments, the Court observed (at 210) that while it was "quite correct to state that the Court cannot actually appoint Mr. Kelso to the Public Service," and "[t]he administrative act of appointment must be performed by the Commission," the Court was "entitled to 'declare' the respective legal rights of the appellant and the respondent." The Court granted a declaration that "the appellant [was] entitled to remain in, or be reinstated to, [his] position […]." *Glynos v. Canada*, discussed above, is another example.

[77] While *Kelso* and *Glynos* involved actions for a declaration, declarations amounting to substitution are also granted in the context of applications for judicial review: see for example, *Giguère v. Chambre des notaires du Québec*, 2004 SCC 1, [2004] 1. S.C.R. 3, in which the Court granted a declaration of entitlement to compensation that the Chambre had refused, and *Gehl v. Canada (Attorney General)*, referred to above.

[78] It is also possible that, in certain administrative proceedings, setting aside the decision under review without further relief will, in effect, restore the parties to their positions prior to the decision. In these cases, merely setting aside the administrative decision may indirectly substitute the reviewing court's view: see *Stetler v. The Ontario Flue-Cured Tobacco Growers' Marketing Board*, 2009 ONCA 234 at para. 49, 311 D.L.R. (4th) 109; *Retail, Wholesale Department Store Union v. Yorkton Cooperative Association*, 2017 SKCA 107 at para. 48; *Telus Communications Inc. v Telecommunications Workers Union*, 2014 ABCA 199 at paras. 35-36, 575 A.R. 325; *Association des policiers provinciaux du Québec c. Sûreté du Québec*, 2010 QCCA 2053 at paras. 6, 73, leave to appeal refused, [2011] 2 S.C.R. v.

[79] Indirect substitution is thus a recognized, albeit exceptional, power under the law of judicial review. But that law also recognizes a power even of direct substitution, in which the court itself grants the relief sought from the administrative decision-maker – again, in exceptional circumstances: see, for example, *Renaud v. Quebec (Commission des affaires sociales)*, [1999] 3 S.C.R. 855 at para. 3, 184 D.L.R. (4th) 441; and *Bessette v. British Columbia (Attorney General)*, 2019 SCC 31 at para. 94.

[80] In her dissenting reasons in *Giguère*, Justice Deschamps set out as follows the circumstances in which a reviewing court may substitute its view for that of the administrative decision-maker (at para. 66, citations omitted and emphasis added):

> A court of law may not substitute its decision for that of an administrative decision-maker lightly or arbitrarily. It must have serious grounds for doing so. A court of law may render a decision on the merits if returning the case to the administrative tribunal would be pointless […]. Such is also the case when, once an illegality has been corrected, the administrative decision-maker's jurisdiction has no foundation in law: […]. The courts may also intervene in cases where, in light of the circumstances and the evidence in the record, only one interpretation or solution is possible, that is, where any other interpretation or solution would be unreasonable: […]. It is also accepted that a case may not be sent back to the competent authority if it is no longer fit to act, such as in cases where there is a reasonable apprehension of bias […].

[81] The premise of this statement appears to be that substitution in the limited circumstances that Justice Deschamps sets out does not intrude on the separation of powers between the judiciary and the executive, and does not undermine the reasons why decision-making authority is vested in administrative decision-makers: see also *Giguère* at paras. 67-69.

[82] Though in dissent, Justice Deschamps's statement as to the availability of substitution in cases in which the court concludes that there is only one reasonable outcome, so that returning the matter to the administrative decision-maker would be pointless, has since been accepted and relied on in a number of cases, involving both direct and indirect substitution. Her statement has also now been approved and applied by a majority of the Supreme Court, though in a statutory appeal in which the court appealed to had a legislated power of direct substitution: *Groia v. Law Society of Upper Canada*, 2018 SCC 27 at para. 161, [2018] 1 S.C.R. 772.

[83] This Court has in at least two cases engaged in direct substitution in reliance on Justice Deschamps's reasons in *Giguère – Canada v. Williams Lake Indian Band*, 2016 FCA 63, 396 D.L.R. (4th) 164, reversed on other grounds, 2018 SCC 4, [2018] 1 S.C.R. 83, and *Canada*

(Attorney General) v. Bétournay, 2018 FCA 230. These decisions appear to treat the first proposition in *Rafuse* and the statement in *Jada Fishing* as having been overtaken.

[84] *Williams Lake* was an application for judicial review of a decision of the Specific Claims Tribunal under the *Specific Claims Tribunal Act*, S.C. 2008, c. 22, and section 28 of the *Federal Courts Act*. The Court concluded that only one result was possible, and therefore (at para. 119) "dismiss[ed] the specific claim brought pursuant to paragraphs 14(1)(*b*) and 14(1)(*c*) of the *Specific Claims Tribunal Act*." In *Bétournay*, also an application for judicial review under section 28 of the *Federal Courts Act*, this Court held (at para. 69) that although it is not generally appropriate for a reviewing court to substitute its decision for that of a tribunal, an exception to this principle exists where only one reasonable conclusion is available. It then proceeded (at para. 70) to allow the application for judicial review, and "[m]aking the decision that the Board should have made, [to dismiss] the grievance [and] set aside the order to reimburse the wages and benefits for the suspension period […]."

[85] Other appellate courts have also applied Justice Deschamps's statement in the judicial review context: see, for example, *Canadian Centre for Bio-Ethical Reform v. South Coast British Columbia Transportation Authority*, 2018 BCCA 344 at para. 60, 426 D.L.R. (4th) 333; and *Stetler v. The Ontario Flue-Cured Tobacco Growers' Marketing Board* at paras. 42, 49, referred to above as an example of indirect substitution through the portion of its order setting aside the administrative decision. In *Stetler* the Ontario Court of Appeal, after invoking *Giguère*, also granted "for greater clarity" a declaration reinstating the quota that the Board had denied.

[86] In this case, the application to the Minister was for a certificate of Canadian citizenship under subsection 12(1) of the *Citizenship Act*. The application judge did not grant that relief. What he granted, having found that there was only one reasonable conclusion on the question whether Andrew is a citizen, was a declaration that will as a practical matter require that the Minister issue a certificate. As noted above, this type of substitution remedy may follow in the exceptional cases in which a court determines that substitution is warranted.

[87] As already noted, the application judge discussed at some length in his reasons the availability and appropriateness of a "directed verdict," a term which he used to describe a remedy amounting to substitution. He concluded that, although it is an exceptional remedy, it was a remedy available to him. In coming to this conclusion he found (at para. 28) that there was only one reasonable outcome – that "[t]he only logical conclusion on the evidence is that Dr. Tennant was in the employment of CIDA and thereby he was a Crown servant" – and that returning the matter to the Minister for redetermination would be futile. This finding brings this case into the class of exceptional cases in which relief amounting to substitution has been recognized as appropriate.

[88] The application judge may have erred in his appreciation of the record in making this finding and coming to his conclusion that the prerequisites for granting a substitution remedy were met. The application judge may in addition have failed to show sufficient deference to the Minister's decision; he did not even refer to the standard of review. Nor did he discuss at any length the legal criteria for determining status as an employee. And the application judge may also have erred, as the Minister submits, in relying in part on evidence, in the affidavits of Mr.

Tennant and Dr. Tennant, that was not before the Minister when the decision under review was rendered and did not come within the exceptions for additional evidence on judicial review: see *Sharma v. Canada (Attorney General)*, 2018 FCA 48 at paras. 7-9.

[89] But assuming that the application judge did err in these respects, his errors in my view would constitute "mere" or "everyday" errors, of a kind that this Court regularly corrects in the absence of a preclusive clause: see, for a recent example, *Canada (Attorney General) v. Allard*, 2018 FCA 85 at paras. 44-46. They do not reach a level that would bring this case into any of the categories of cases in which this Court would be justified in disregarding the preclusive clause that Parliament has enacted in paragraph 22.2(*d*).

[90] Since the preclusive clause applies, it is not this Court's place ultimately to decide whether the application judge committed these errors in substituting his view for that of the Minister. It follows that this Court should not be taken either to endorse or to disapprove of the application judge's approach. However, these reasons should not be read as an invitation to judges conducting judicial reviews under statutes containing preclusive clauses to disregard the requirements of that process, including the requirement to show deference to administrative decision-makers. Remedies amounting to substitution of the court's view for that of the administrative decision-maker remain appropriate only in exceptional cases.

VI. Proposed disposition

[91] For the reasons I have set out, I conclude that paragraph 22.2(*d*) of the *Citizenship Act* bars this appeal by the Minister. In the exercise of this Court's power under paragraph 52(*a*) of

the *Federal Courts Act*, I would therefore quash the appeal. Mr. Tennant does not seek costs, and I would not award them.

"J.B. Laskin"

J.A.

"I agree.
Wyman W. Webb J.A."

NEAR J.A. (Dissenting Reasons)

[92] I have read the reasons of the majority and am unfortunately unable to agree with the conclusions reached. There is no need to repeat the factual and procedural background to this matter as it is set out in a comprehensive manner in the majority reasons.

[93] It is common ground that the Federal Court has the authority to issue declaratory relief in deciding an application for judicial review. In this case there was an application for judicial review but the Federal Court did not engage in conducting a judicial review. Rather, the Federal Court simply made a declaration of fact based on newly admitted evidence that was not before the Minister when the Minister made his original decision pursuant to the authority granted to him by Parliament under section12 of the *Citizenship Act*.

[94] The Federal Court concluded that Dr. Tennant was a Crown servant in 1971 based on this newly admitted evidence which led directly to it declaring that the respondent is a Canadian citizen. It drew this conclusion despite not having conducted a judicial review or possibly entertaining a *mandamus* application as a remedy (rather than a "directed verdict", a concept unknown in administrative law), as it could have done if so inclined based on the record that had been originally considered by the Minister. Instead, the Federal Court declared what it found to be the facts based on new evidence not originally considered by the Minister. This Court in *Makara* (at para. 16) found that the Federal Court "does not have jurisdiction to make declarations pertaining solely to findings of fact." I agree, and in my view, the nature of the application judge's declaration, despite carrying legal implications in relation to the respondent's citizenship rights, pertained solely to the Federal Court's findings of fact and not those of the

Minister: that Dr. Tennant was working abroad as a Crown servant when Mr. Tennant was born, and as a consequence, that the respondent is a Canadian citizen. Accordingly, the Federal Court's declaration in these circumstances amounted to an error sufficient to conclude that the preclusive clause does not apply in this case.

[95] This finding is sufficient to dispose of the matter and to allow the appeal. However, in my view, the Federal Court also usurped the role of the Minister and rendered a decision on the merits despite the fact that Parliament has given the Minister exclusive authority to determine applications made under subsection 12(1) of the *Citizenship Act*. The Federal Court clearly substituted its decision for that of the Minister. It is uncontested that generally upon judicial review the Court does not have the power to substitute its opinion for that of the administrative decision-maker whose decision is under judicial review, and, make the decision that the administrative decision-maker should have made (*Bétournay* at para. 69; *Rafuse* at para. 9; *Xie* at para. 17). The majority reasons correctly set out that there are exceptions in extraordinary circumstances whereby using a combination of *certiorari* and *mandamus*, the Court may achieve such a result indirectly. But such extraordinary circumstances do not arise on the facts of this case. Indeed, the Federal Court conducted no judicial review and showed no deference to the Minister as the original decision-maker.

[96] The majority correctly refer to the *Giguère* line of cases based on Justice Deschamps's reasoning that in extraordinary cases a Court may substitute its finding where it concludes "in light of the circumstances and the evidence on the record, only one interpretation or solution is possible, that is, where any other interpretation or solution would be unreasonable […]"

(*Giguère* at para. 66). It is common ground that such a substitution is an exceptional power under the law of judicial review and is to be exercised with caution. This is not such a case. The litany of possible errors referred to in the majority reasons (at para. 88) illustrate that the decision was far from self-evident. In my view, given that the Federal Court failed to conduct a judicial review and relied upon evidence not placed before the Minister and that is contested, it is not at all clear that the Federal Court's factual declaration that the respondent is a Canadian citizen was the only reasonable determination of the matter. Nor is this an exceptional situation calling out for the Court to substitute its decision for that of the Minister, rather than, as is the normal case, send the matter back for redetermination based on a complete review of the facts conducted by the Minister as mandated by Parliament.

[97] Contrary to the majority reasons, failure to return the matter to the Minister in these circumstances will, in my view, act as an "invitation to judges conducting judicial reviews under statutes containing preclusive clauses to disregard the requirements of that process, including the requirement to show deference to administrative decision makers". It will be an invitation for a reviewing Court to make declarations of fact based on evidence that may not have even been before the original decision maker, refuse to certify a question, and then rely upon the preclusive clause to shield any review in situations which are clearly not exceptional or extraordinary.

[98] For these reasons, I would allow the appeal, quash the decision of the Federal Court, and remit the matter to a different citizenship officer for redetermination without costs.

"D. G. Near"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

(APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE AHMED OF THE FEDERAL COURT OF CANADA DATED FEBRUARY 13, 2018, DOCKET NUMBER T-1027-17)

DOCKET:	A-104-18
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION v. ANDREW JAMES FISHER TENNANT BY HIS GUARDIAN AT LAW, JONATHAN TENNANT AND CANADIAN ASSOCIATION OF REFUGEE LAWYERS
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 13, 2019
REASONS FOR JUDGMENT BY:	LASKIN J.A.
CONCURRED IN BY:	WEBB J.A.
DISSENTING REASONS BY:	NEAR J.A.
DATED:	JULY 16, 2019

APPEARANCES:

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