Comment on *Singh* v. *Minister of Employment and Immigration*

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The author examines the impact of the Supreme Court decision in *Singh* v. *Minister of Employment and Immigration* in three areas: immigration, constitutional and administrative law. This decision heralds a more humane approach in Canadian inmigration law and highlights the potential influence of the *Charter*. The Court also clarifies the role of judicial review and the distinction between "rights" and "privileges" in administrative law.

L'auteur évalue l'impact de la décision de la Cour suprême dans l'affaire *Singh* c. *Ministre de l'Emploi et de l'Immigration* sur les plans du droit constitutionnel, administratif et du droit de l'immigration. Cette décision annonce une nouvelle approche plus humaine au droit de l'immigration canadien, et l'influence potentielle de la *Charte*. De plus, la Cour clarifie le rôle du contentieux administratif ct la distinction entre "droit" et "privilège" en droit administratif.

Introduction

Singh v. *Minister of Employment and Immigration*[1] is significant in three distinct ways. It is of great importance in rendering more humane Canadian immigration law. It is a major step forward in the application of the *Canadian Charter of Rights and Freedoms*[2] and other human rights documents. Finally, it reinforces the growing bonds between the "new constitutional law", as best exemplified by the *Charter*, and administrative law. Each of these deserves separate discussion.

Before discussing the manner in which *Singh* affected three inportant areas of law, it is useful to comment on the facts. Mr Singh was brought before an inquiry held under the *Immigration Act, 1976*[3] for the purpose of determining whether he could remain in Canada. He made a claim to refugee status as defined under the *Act*. He submitted a sworn statement under section 45 of the *Act* and, in due course, the Minister rejected his claim. He then applied for redetermination of his claim to the Immigration

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[1](1985), [1985] 1 S.C.R. 177, (*sub nom. Re Singh and Minister of Employment and Immigration*) 17 D.L.R. (4th) 422, 58 N.R. 1 [hereinafter *Singh* cited to S.C.R.].

[2]Part 1 of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter the *Charter*].

[3]S.C. 1976-77, c. 52.

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Appeal Board. The Board exercised its power under section 71 and summarily dismissed the application with no hearing and with only the sworn statement and another affidavit signed by Mr Singh before it.

These facts are the basis of the argument before the Supreme Court. The details of Mr Singh's case and the justification of his refugee application are utterly insignificant. The essential issue is that at no time was he able to put his arguments directly to those who had to decide, to meet them, and to try to sway them.

A. Immigration Law

It is logical to begin with immigration law, because the issue decided by the case is most easily explained in that light.

Since the hardening of views on immigration in the early 1970s, a claim to refugee status has been the only way for a person already inside Canada to become a landed immigrant. All persons without such a claim had to leave the country and apply from outside. It is true that this was a rule more honoured in the breach than in the observance. Orders in Council were routinely used for "hard cases" or cases which, for one reason or another, the Department of Employment and Immigration wanted to assist. However, most applicants were simply told that, except for refugee status, no avenue was open inside the country.

In part as a result of this and in part because of political problems in many parts of the world, there was an extremely high incidence of refugee applications. It is impossible to know how many persons thought themselves genuine refugees and how many wanted to live and work in Canada for awhile.[4] The Department was at most times willing to assume the worst motives on the part of applicants.[5] Although the truth is clearly different from the official version and the abuse of the refugee process is caused as much by the undue harshness of our law as by improper exploitation of the system by applicants, there is little doubt that the number of applications

[4]There was also another group of persons married to Canadians who made refugee applications in order to avoid separation from their families during the processing of their claims. This problem has been eliminated by an administrative (but not legislative) change in 1985. Spouses are now permitted to remain until their landing is granted or refused. Clearly, the blame for the abuse of the refugee process in these cases lay with the Department, not the persons making the claim. It is fortunate that the problem is solved.

[5]See the statement on illegal immigrants by Lloyd Axworthy, Minister of Employment and Immigration: Canada, House of Commons, Standing Committee on Labour, Manpower and Immigration, *Minutes of Proceedings and Evidence of the Standing Committee on Labour, Manpower and Immigration*, No. 47 at 47-4ff. (29 June 1983). See also Report to the Minister of Employment and Immigration, *Illegal Migrants in Canada* by W.G. Robinson (Hull, Que.: Supply & Services Canada, June 1983).

strained the Department's resources, that it produced unacceptable delays and that at least some flagrant abuses of the system did occur.[6]

It is not surprising that the legislator looked for ways of accelerating the application process and of weeding out manifestly unfounded cases. The solution adopted was to allow everyone to make an application[7] but to attempt to limit the redetermination process before the Immigration Appeal Board to worthy cases.[8] The means chosen to achieve this end was subsection 71(1) of the *Immigration Act, 1976* which reads as follows:

> Where the Board receives an application referred to in subsection 70(2), it shall forthwith consider the application and if, on the basis of such consideration, it is of the opinion that there are reasonable grounds to believe that a claim could, upon the hearing of the application, be established, it shall allow the application to proceed, and in any other case it shall refuse to allow the application to proceed and shall thereupon determine that the person is not a Convention refugee.[9]

It was perhaps possible to view this subsection as allowing the elimination only of cases utterly unlikely to succeed. This seemed to be the tenor of *Minister of Manpower and Immigration* v. *Fuentes*.[10] However, the Federal Court on the whole inclined towards the harder view that an applicant must, at the outset, demonstrate the *probability* of his victory in order to obtain a hearing.[11] This view was ultimately approved by the Supreme

[6]See J.H. Grey, *Immigration Law in Canada* (Toronto: Butterworths, 1984) at 122-23 and 160-63, where this writer has already expressed his views on these matters. See also C.J. Wydrzynski, *Canadian Immigration Law and Procedure* (Aurora, Ont.: Canada Law Book, 1983).

[7]See *Brannson* v. *Minister of Employment and Immigration* (1980), [1981] 2 F.C. 226, 36 N.R. 317 (A.D.); *Mensah* v. *Minister of Employment and Immigration* (1981), [1982] 1 F.C. 70, 36 N.R. 332 (A.D.); *Duran* v. *Minister of Employment and Immigration* (1980), [1981] 2 F.C. 188, 42 N.R. 342 (A.D.).

[8]"Redetermination" is similar to an appeal but is obviously a *de novo* process.

[9]The French version of subsection 71(1) reads:

> La Commission, saisie d'une demande visée au paragraphe 70(2), doit l'examiner sans délai. A la suite de cet examen, la demande suivra son cours au cas où la Commission estime que le demandeur pourra vraisemblablement en établir le bien-fondé à l'audition; dans le cas contraire, aucune suite n'y est donnée et la Commission doit décider que le demandeur n'est pas un réfugié au sens de la Convention.

This is extremely important since the French text became the basis of the Supreme Court decision in *Kwiatkowsky* v. *Minister of Employment and Immigration* (1982), [1982] 2 S.C.R. 856, (*sub nom. Re Kwiatkowsky and Minister of Manpower & Immigration*) 142 D.L.R. (3d) 385, (*sub nom. Kwiatkowsky* v. *Minister of Manpower and Immigration*) 45 N.R. 116 [hereinafter *Kwiatkowsky* cited to S.C.R.]. The French text seems more onerous for the applicant because of its use of the future tense.

[10](1974), [1974] 2 F.C. 331 (A.D.). This case dealt with basically identical legislation in force prior to the *Immigration Act, 1976*.

[11]*Lugano* v. *Minister of Manpower and Immigration* (1976), [1976] 2 F.C. 438, 13 N.R. 322 (A.D.).

Court,[12] because of the drafting of the text. However, misgivings about the result were present at all levels.[13] This is not surprising, because the jurisprudence left the possibility of injustice open at all times. If people with a one-third chance of winning are to be denied a hearing and removed, it is mathematically likely that one in three of them will be a genuine refugee. Since refugee status is, along with extradition, one of the last areas of law where matters of life and death routinely arise, it is particularly invidious that this area should be dealt with in such a summary and indeed random manner. Moreover, the brazen removal of Convention refugees could not be regarded otherwise than as a violation of Canada's international obligations. *Kwiatkowsky*[14] seemed to settle the law;[15] in fact it satisfied no one and renewed calls for reform.[16] The events in *Kwiatkowsky* though not the Supreme Court hearing, took place before the *Charter*; as soon as it had been proclaimed part of the Constitution, it was inevitable that another attempt would be made to bring down section 71.

The Federal Court, never given to liberalism in administrative law, especially immigration law, was not receptive. In *Singh*[17] and *Vincent* v. *Minister of Employment and Immigration*[18] it excluded refugee status from even potential interest under section 7 of the *Charter* because the threat to life, liberty or security of the person existed outside Canada. The *Charter* would thus apply to prevent arbitrary action inside the country, but not to stop our collaboration with such action abroad even in the event that it became flagrant. Fortunately, the Supreme Court in *Singh* reversed and held invalid the power to refuse to entertain an application for redetermination

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[12]See *Kwiatkowsky, supra*, note 9 at 863-64.

[13]See especially the remarks of Le Dain J. in the Federal Court of Appeal in *Kwiatkowski* v. *Immigration Appeal Board* (1980), 34 N.R. 237. See also, at the Supreme Court level, the care taken by Wilson J. to make certain that no more stringent test was adopted: *Kwiatkowsky, supra*, note 9.

[14]*Ibid.*

[15]Especially since the Department has shown great reluctance to legislate where an injustice against the applicant exists. It is ever vigilant to correct perceived injustice against itself.

[16]That is in part why a mandate was given to Rabbi G. Plaut to study the question of refugees. He produced a masterly Report which points out the imperative of an oral hearing at least once for every applicant: Report to the Minister of Employment and Immigration, *Refugee Determination in Canada* by W.G. Plaut (Hull, Que.: Supply & Services Canada, 17 April 1985). It is doubtful, however, that without *Singh* the Department would have planned the swift reform which it is now about to promulgate.

[17]Reported from the Federal Court of Appeal as *Singh* v. *Minister of Employment and Immigration* (1983), [1983] 2 F.C. 347, 144 D.L.R. (3d) 766, 47 N.R. 189.

[18](1983), 148 D.L.R. (3d) 385, 48 N.R. 214 (F.C.A.D.).

given to the Immigration Appeal Board by the legislation. The two judgments in the Supreme Court found very different grounds[19] for their conclusions, but the result was not in doubt. Henceforth, every applicant for refugee status was going to get at least one oral hearing, compatible with the importance of the refugee issue.[20]

There is no doubt that, at least initially, the Department was left with an unbearable backlog and administrative chaos. All present applicants, most of whom would have been eliminated, will have to be heard. Some cases already settled by exclusion orders have been revived by the Federal Court and added to the list to be heard.[21] However, the inconvenience can never outweigh the previous danger of error. If the Department devises a new hearing scheme, as it has promised to do, it will have to respect the *Singh* requirement of one full oral hearing.[22]

The backlog will inevitably be alleviated by another judicial reform of immigration law, *Jiminez-Perez* v. *Minister of Employment and Immigration*,[23] in which subsection 115(2) of the *Immigration Act, 1976* was invoked to give every person the right to apply for exemption from the rule that immigrant status could only be sought outside Canada. No one obtained a right to exemption, but there was at least a right to be considered.[24] Refugee status will thus cease to be the straw to be clutched by desperate people with good grounds for remaining here other than those covered by the definition of "refugee". The relaxation of the irrational rule which in the past had ordained the temporary but often protracted separation of spouses

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[19]See the discussion of the *Charter* and the *Canadian Bill of Rights*, *infra*, note 31 and accompanying text.

[20]See the decision of Beetz J. in *Singh*, *supra*, note 1 at 231:

> Again, I express no views as to the applicability of the *Charter of Rights and Freedoms*, but I otherwise agree with these submissions: threats to life or liberty by a foreign power are relevant, not with respect to the applicability of the *Canadian Bill of Rights*, but with respect to the type of hearing which is warranted in the circumstances. In my opinion, nothing will pass muster short of at least one full oral hearing before adjudication on the merits.

[21]*Nsilulu* v. *Minister of Employment and Immigration* (23 July 1985) A-639-85 (F.C.A.D.). The essence of this case is that the order had not been executed and the matter was not moot. The Federal Court allowed Nsilulu to make a s. 28 application outside the delays.

[22]At present, the final application under s. 45 of the *Immigration Act, 1976* fails the test because the applicant never meets his judges and has no direct contact with them. Until *Singh* the redetermination process was tainted by the screening under s. 71.

[23](1982), [1983] 1 F.C. 163, 45 N.R. 149 (A.D.), aff'd [1984] 2 S.C.R. 565, 14 D.L.R. (4th) 609.

[24] But not, it seems, the right to a delay to get a reply prior to removal: *Green* v. *Minister of Employment and Immigration* (1983), [1984] 1 F.C. 441, 49 N.R. 225 (A.D.). One could have hoped for a different result after *Ramawad* v. *Minister of Manpower and Immigration* (1977), [1978] 2 S.C.R. 375, 81 D.L.R. (3d) 687 and it is possible that the Supreme Court will be asked to consider this issue in the future.

is also certain to reduce the bogus claims. Those that are not pure fabrication, whether or not they are likely to succeed, merit careful study.

It would probably be incorrect to suggest that no way of dealing with purely frivolous appeals was possible in Canada's constitutional context. It is quite conceivable that if *Kwiatkowsky* had imposed less stringent requirements for a hearing,[25] *Singh* would have been differently decided. It certainly would have been a far less urgent matter. Many courts, whether first instance or appellate, have provisions for dismissing dilatory, frivolous or abusive cases.[26] Even where life, liberty or security of the person is concerned, such provisions are not necessarily unconstitutional so long as they are limited to things manifestly untenable. It was the breadth of section 71 which made it dangerous and which led to its undoing.[27]

One hopes that this will lead to a new respect for common sense in immigration law.[28] Too often, decisions affecting people's lives have been made on a purely technical basis. There was thus little correlation between cases which succeeded before the courts and cases which, in equity, merited victory. The trend in administrative law has been away from technicalities.[29] The *Charter* provides an opportunity for this trend to be extended to areas where a tradition of strict statutory construction has developed. Immigration law is such an area.[30] *Singh* shows us that, in the future, the questions which

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[25]*i.e.* "a reasonably arguable case".

[26]See, *e.g.*, the Quebec *Code of Civil Procedure*, R.S.Q. c. C-25, arts 50 and 75.1; and the Ontario *Judicature Act*, R.S.O. 1980, c. 223, s. 32.

[27]The lesson is that the Department was too greedy — even more than it had to be — and an analogy arises with respect to the misuse of privative clauses by the Quebec government in the 1960s which led to their constitutional limitation by the courts: *A.G. Quebec* v. *Farrah* (1978), [1978] 2 S.C.R. 638, 86 D.L.R. (3d) 161, 21 N.R. 595; and especially *Crevier* v. *A.G. Quebec* (1981), [1981] 2 S.C.R. 220, 127 D.L.R. (3d) 1, 38 N.R. 541 [hereinafter *Crevier*].

[28]The common sense approach is evident in another decision, *Howard* v. *Presiding Officer of the Inmate Disciplinary Court of Stony Mountain Institution* (1985), [1984] 2 F.C. 642 at 663, (*sub nom. Re Howard and Presiding Officer of the Inmate Disciplinary Court of Stony Mountain Institute*) 19 D.L.R. (4th) 502, (*sub nom. Howard* v. *Stony Mountain Institution Inmate Disciplinary Court (Presiding Officer)*) 57 N.R. 280 (A.D.), where Thurlow C.J. said:

> [I]t appears to me that whether or not the person has a right to representation by counsel will depend on the circumstances of the particular case, its nature, its gravity, its complexity, the capacity of the inmate himself to understand the case and present his defence.

[29]See *Minister of National Revenue* v. *Coopers and Lybrand* (1978), [1979] 1 S.C.R. 495, 92 D.L.R. (3d) 1 [hereinafter *Coopers and Lybrand*]; *Wiseman* v. *Borneman* (1969), [1971] A.C. 297, [1969] 3 All E.R. 275 (H.L.) [hereinafter *Wiseman*].

[30]In fact, both in Canada and the U.K., immigration is an area where, generally, government policy has tended to win out over individual rights. See, for instance, the result in *Minister of Manpower and Immigration* v. *Hardayal* (1977), [1978] 1 S.C.R. 470, 76 D.L.R. (3d) 465 and even that in *Re H.K.* (1966), [1967] 2 Q.B. 617, [1967] 2 W.L.R. 962. Both cases are often quoted for their liberal *dicta*, but this did not help the applicants.

will be asked will pertain not only to the wording of the act, but also to the nature and importance of the individual rights involved and the consequences for the individual.

B. The *Charter*

At first blush it seems strange to consider *Singh* a significant development in *Charter* law. Three of the six judges chose to anchor their judgment in the old *Canadian Bill of Rights*. Only three invoked the *Charter*.[31] In view of this uncertainty, one could well discount the technical side of the judgment as too uncertain to be followed.

However, this attitude is too facile. It must be remembered that the two judgments are not contradictory. Both the *Charter* and the *Bill of Rights* can have the same effect. Neither Judge disapproves of the other's approach, they only choose different ones. It follows, surely, that except before the Supreme Court, both judgments must stand as authority[32] and should be applied.

Secondly, the *Charter* has had, as one of its effects, the revival of interest in other human rights documents, such as the *Bill of Rights* and provincial (unentrenched) Charters. In *Ford* v. *A.G. Quebec*,[33] for example, Boudreault J. applied the same standards of freedom of expression under Quebec law as would obtain under the *Charter*. In other provinces, too, there has been much activity under provincial Charters.[34] Similarly, the old and once moribund[35] *Bill of Rights* has acquired new vigour.[36] If it was not argued

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[31]Beetz J., with whom Estey and McIntyre JJ. concurred, wrote the judgment based on the *Canadian Bill of Rights*, Part I of *An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms*, S.C. 1960, c. 44, reprinted in R.S.C. 1970, App. III [hereinafter the *Bill of Rights*]; Wilson J., with whom Dickson C.J.C. and Lamer J. concurred, applied the *Charter*.

[32]It is disturbing that, in daily discussions, the Department seems intent on considering only Beetz J.'s opinion as authoritative and treats the other almost as a minority view. Both opinions are of great value and they should be considered together and not pitted against each other.

[33](1984), [1985] C.S. 147.

[34]See, *e.g.*, the use of the Manitoba *Human Rights Act*, S.M. 1974, c. 65, in *Winnipeg School Division No. 1* v. *Craton* (1985), [1985] 2 S.C.R. 150, 61 N.R. 241, and the use of the Alberta *Individual's Rights Protection Act*, R.S.A. 1980, c. I-2, in *Cormier* v. *Alberta Human Rights Comm'n* (1984), 33 Alta L.R. (2d) 359 (Q.B.).

[35]See *Bliss* v. *A.G. Canada* (1978), [1979] 1 S.C.R. 183, 92 D.L.R. (3d) 417; *A.G. Canada* v. *Lavell* (1973), [1974] S.C.R. 1349, 38 D.L.R. (3d) 481.

[36]See P. Calamai, "Right that Saved Former MP from Tribunal's Fine Lost to Woman who 'Fiddled away Precious Time'" *National* (November 1985) 18, where the author wrote:

> In *Singh*, Mr Justice Jean Beetz, writing for himself and judges Willard Estey and William McIntyre, elevated the Bill of Rights from a mere instrument of interpretation into a quasi-constitutional document, an achievement that had eluded the late Chief Justice Bora Laskin.

in *Kwiatkowsky*, it was because it appeared to be a hopeless argument at that time. In *Singh* it was also not initially raised, but the Court brought it up *proprio motu*. Whether or not one can reconcile Beetz J.'s judgment with the previous jurisprudence under the *Bill of Rights*, almost all of it opposed to judicial activism, it is virtually certain that the *Bill of Rights* argument would not have succeeded in 1982 and definitely not before 1980. Thus Beetz J. raises serious doubts as to the continued correctness of the old cases; he in no way weakens the *Charter*, or its effect by his failure to raise it. Indeed, if a problem can be solved without recourse to the Constitution, it is established and not necessarily bad practice to solve it that way.[37] Thus, the only conclusion one can draw is that, in many cases, the *Bill of Rights* will have the same effect as the *Charter* and the *Charter* arguments may not have to be argued as such. Although this was clearly not intended, a more "liberal" result can be reached through Beetz J.'s judgment than through Wilson J.'s, since paragraph 2(e) of the *Bill of Rights* is not, unlike section 7 of the *Charter*, limited to threats to "life, liberty and security of the person" but applies to all determinations of "rights" and "obligations". All the debates about "single right" or "several rights" under section 7[38] become utterly unnecessary.

Wilson J.'s judgment is a direct application of the *Charter*. It is significant for its support of a broad interpretation of the words "security of the person".[39] However, its most compelling feature is its treatment of section 1 and the argument that administrative convenience can outweigh the rights guaranteed under the *Charter*:

> Certainly the guarantees of the *Charter* would be illusory if they could be ignored because it was administratively convenient to do so. No doubt considerable time and money can be saved by adopting administrative procedures which ignore the principles of fundamental justice but such an argument, in my view, misses the point of the exercise under section 1. The principles of natural justice and procedural fairness which have long been espoused by our courts, and the constitutional entrenchment of the principles of fundamental justice in section 7, implicitly recognize that a balance of administrative convenience does not override the need to adhere to these principles.[40]

If administrative convenience were sufficient, the government could override *Charter* rights at will and could almost always find a convincing explanation for its policies in terms of administrative considerations. *Singh*

[37]See *Glassco* v. *Cumming* (1978), [1978] 2 S.C.R. 605, 22 N.R. 271. Nevertheless this writer will state at the outset that he prefers the *Charter* as the basis for the invalidity of s. 71.

[38]See the judgment of Wilson J. in *Singh, supra,* note 1 at 202ff. See also *Collin* v. *Lussier* (1983), [1983] 1 F.C. 218 (T.D.), a decision much maligned prior to *Singh* but justly vindicated in it for a commendable approach towards s. 7.

[39]See *Singh, ibid.* at 206-7. In the end, the matter is not finally decided.

[40]*Ibid.* at 218-19.

is thus the strongest of a series of cases demonstrating that once a breach of the *Charter* is proved, it is not easy to persuade the courts that it is justified under section 1.[41]

C. Administrative Law

Like so many *Charter* cases,[42] *Singh* has an application in general administrative law.

Administrative law was separated from constitutional law in the early years of this century; now it is becoming increasingly constitutional. In *Crevier*[43] judicial review was recognized as a constitutional right under section 96 of the *Constitution Act, 1867*.[44] Now section 7 of the *Charter* and paragraph 2(e) of the *Bill of Rights* are adding to the constitutional nature by entrenching a concept of "fundamental justice". Fundamental justice has been compared to natural justice.[45] The similarity is enhanced by Beetz J.'s description of it, so redolent of the continuum of *Coopers and Lybrand*:[46]

> The most important factors in determining the procedural content of fundamental justice in a given case are the nature of the legal rights at issue and the severity of the consequences to the individuals concerned.[47]

The conclusion is that, at least for matters having serious consequences, judicial review is not only a matter of custom and not a mere presumption, but is a right not to be taken away save by the clearest language and presumably for compelling cause.

A second major issue of administrative law in *Singh* is the troublesome distinction between "rights" and "privileges". In *Martineau* v. *Matsqui Institution Disciplinary Board* Dickson J. wrote:

> There has been an unfortunate tendency to treat "rights" in the narrow sense of rights to which correlative legal duties attach. In this sense, "rights" are frequently contrasted with "privileges", in the mistaken belief that only the former can ground judicial review of the decision-maker's actions. One should,

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[41]See *Quebec Association of Protestant School Boards* v. *A.G. Quebec* (1982), [1982] C.S. 673, 140 D.L.R. (3d) 33, aff'd (1983), [1983] C.A. 77, aff'd (1984), [1984] 2 S.C.R. 66, 10 D.L.R. (4th) 321; *R.* v. *Therens* (1985), [1985] 1 S.C.R. 613, 18 D.L.R. (4th) 655; *Plantation Indoor Plants Ltd* v. *A.G. Alberta* (1985), [1985] 1 S.C.R. 366, 58 N.R. 255.

[42]See especially *Operation Dismantle Inc.* v. *R.* (1985), [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481. See also D.P. Jones & A.S. de Villars, *Principles of Administrative Law* (Toronto: Carswell, 1985) at 191.

[43]*Supra*, note 27.

[44](U.K.), 30 & 31 Vict., c. 3 (formerly *British North America Act, 1867*).

[45]See *Jamieson* v. *R.* (1982), 142 D.L.R. (3d) 54, 70 C.C.C. (2d) 430 (Que. Sup. Ct), Durand J.

[46]*Supra*, note 29.

[47]*Supra*, note 1 at 229.

I suggest, begin with the premise that any public body exercising power over subjects may be amenable to judicial supervision ... .[48]

Nevertheless, some judges have continued to invoke the distinction between rights and privileges, derived from *R.* v. *Electricity Comm'rs*,[49] as a reason for refusing judicial review for all matters characterized as mere privileges.[50] Such a distinction rests in the fallacy that "mere privileges" exist in public law. We learned in *Roncarelli* v. *Duplessis*[51] that no untrammelled discretion is ever found. If this is so, every "privilege" necessarily implies a *right* to be considered. Therefore decisions about reviewability cannot depend on a distinction between "rights" and "privileges" but rather on the importance of the rights involved.[52]

Wilson J. raised this problem:

It must be recognized that the appellants are not at this stage entitled to assert rights as convention refugees; their claim is that they are entitled to fundamental justice in the determination of whether they are convention refugees or not.[53]

She went on to say:

The creation of a dichotomy between privileges and rights played a significant role in narrowing the scope of the application of the *Canadian Bill of Rights*[54] ... I do not think this kind of analysis is acceptable in relation to the *Charter*. ... Given the potential consequences for the appellants of a denial of that status if they are in fact persons with a "well-founded fear of persecution", it seems to me unthinkable that the *Charter* would not apply to entitle them to fundamental justice in the adjudication of their status.[55]

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[48] (1979), [1980] 1 S.C.R. 602 at 618-19, (*sub nom. Martineau* v. *Matsqui Institution Disciplinary Board No. 2*) 106 D.L.R. (3d) 385 [hereinafter *Martineau*]. This position was also expressed in *R.* v. *Board of Visitors of Hull Prison* (1978), [1979] 2 W.L.R. 42, [1979] 1 All E.R. 701 (C.A.). See also *R.* v. *Criminal Injuries Compensation Board ex parte Lain* (1967), [1967] 2 Q.B. 864, [1967] 1 All E.R. 770.

[49](1923), [1924] 1 K.B. 171, [1923] All E.R. 150 (C.A.). It is unlikely that this decision was intended to make judicial review as difficult as its subsequent use made it. See comments on it in *Ridge* v. *Baldwin* (1963), [1964] A.C. 40, [1963] 2 All E.R. 66 (H.L.).

[50]See, *e.g.*, *Siclait* v. *Minister of Manpower and Immigration* (24 September 1979) T-5569-78 (F.C.T.D.); *Charlebois* v. *Barreau du Québec* (1982), [1983] C.S. 177.

[51](1959), [1959] S.C.R. 121, 16 D.L.R. 689, Rand J.

[52]See *Wiseman*, *supra*, note 29. After this case, *Martineau*, *supra*, note 48 and *A.G. Quebec* v. *A.G. Canada* (1978), [1979] 1 S.C.R. 218, 24 N.R. 1, it is difficult to justify the continued use of the distinction.

[53]*Singh*, *supra*, note 1 at 208. It is to be noted that although Beetz J. at times uses the conservative rights/privileges dichotomy, this statement clearly applies to his judgment as well. His "rights" cannot mean more than rights to be considered for certain rights which accrue to Convention refugees.

[54]But this may be changed after the judgment of Beetz J. in *Singh*.

[55]*Singh*, *supra*, note 1 at 209-10.

In other words, the new, common sense approach towards administrative law in which old distinctions and procedural refinements are to give way to considering the merits and the consequences[56] has been emphatically reaffirmed at least for cases involving basic rights.

Only in one way does *Singh* preserve a certain degree of proceduralism — in its treatment of section 24 of the *Charter*. Wilson J. expressed the following opinion:

> Section 24(1) of the *Charter* provides remedial powers to "a court of competent jurisdiction". As I understand this phrase, it premises the existence of jurisdiction from a source external to the *Charter* itself.[57]

In previous pages, she used the words "broad, remedial powers" to describe section 24. It follows that once a court has jurisdiction from a source outside the *Charter* it is not bound by other procedural limitations contained in that source.[58]

It has not been decided whether the principle of *Canada Labour Relations Board* v. *Paul L'Anglais Inc.*[59] applies to *Charter* matters, so that the provincial superior court *would always* have jurisdiction. They would go a long way in eliminating the remaining procedural limitations.

Conclusion

Singh is a major step forward in immigration law, human rights law and administrative law. However, it is an early decision under the *Charter* and necessarily leaves many unanswered questions. The split in the Court is not significant because both judgments can stand together. The future will show whether the promise of a system in which all important issues are dealt with in accordance with fundamental justice and in which common

[56]*Coopers and Lybrand* and *Wiseman*, *supra*, note 29; *Furnell* v. *Whangarei High Schools Board* (1972), [1973] A.C. 660, [1973] 1 All E.R. 400 (P.C.); *Vachon* v. *A.G. Quebec* (1978), [1979] 1 S.C.R. 555, 25 N.R. 399.

[57]*Singh*, *supra*, note 1 at 222. See also *Law* v. *Solicitor General of Canada* (1984), 11 D.L.R. (4th) 608, 57 N.R. 45 (F.C.A.D.), where the Immigration Appeal Board was held to be such a court.

[58]For instance, a provincial superior court exercising *habeas corpus* powers against a federal body would no longer have to worry about its lack of power to issue *certiorari* in aid, if the *Charter* were in issue. It would do everything required under s. 24 provided it had initial jurisdiction.

[59](1983), [1983] 1 S.C.R. 147, 146 D.L.R. (3d) 202. See also J.H. Grey, "Section 96 to 100: A Defence" (1985) 1 Admin. L.J. 3. The principle in question is that the provincial superior courts always have jurisdiction to decide questions of constitutional validity. There is no reason why the *Charter* would not be included among constitutional issues. *Charter* matters were deemed constitutional for purposes of *locus standi*: *Minister of Justice of Canada* v. *Borowski* (1981), [1981] 2 S.C.R. 575, 130 D.L.R. (3d) 588, following *Thorson* v. *A.G. Canada* (1974), [1975] 1 S.C.R. 138, 43 D.L.R. (3d) 1.

sense and justice prevail over technicalities and procedural niceties will be fulfilled.