CITATION: VARELA *v.* CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), 2009 FCA 145, [2010] 1 F.C.R. 129 A-210-08

Jaime Carrasco Varela (*Appellant*)

v.

The Minister of Citizenship and Immigration (*Respondent*)

INDEXED AS: VARELA V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) (F.C.A.)

Federal Court of Appeal, Noël, Nadon and Pelletier JJ.A.—Toronto, January 28; Ottawa, May 6, 2009.

Citizenship and Immigration — Immigration Practice — Appeal from Federal Court decision dismissing judicial review of Immigration and Refugee Board decision appellant inadmissible to Canada — Decision of Federal Court on judicial review of Board decision final except where Judge certifying serious question of general importance, states that question — Issue herein whether Judge properly exercising discretion to certify question — Scheme of Immigration and Refugee Protection Act designed to ensure that claimant's right of appeal not invoked lightly, Court's intervention timely —Serious question of general importance one that is dispositive of appeal, must arise from issues in case, not judge's reasons — Here, none of questions certified by application Judge dispositive of appeal — Absence of serious question of general importance meaning pre-condition to right of appeal not met — Appeal dismissed.

This was an appeal from the Federal Court decision dismissing an application for judicial review of the Immigration and Refugee Board's (IRB) decision that the appellant was inadmissible to Canada pursuant to paragraph 35(1)(*a*) of the *Immigration and Refugee Protection Act* (Act). After circulating a draft of his reasons to give counsel the opportunity to suggest questions for certification, the application Judge certified five questions for appeal, four of which were suggested by counsel for the appellant, and one which was raised by the Judge himself. The dominant issue was the appropriateness of the questions certified and the consequences of inappropriate certified questions on the appellant's right of appeal.

Held, the appeal should be dismissed.

A decision of the Federal Court on judicial review of a decision of the IRB is intended to be final, with no right of appeal except where the judge certifies that a serious question of general importance is involved and states the question, as set out by paragraph 74(*d*) of the Act. This provision fits within a larger scheme designed to ensure that a claimant's right to seek the intervention of the courts is not invoked lightly, and that such intervention, when justified, is timely. An integral part of this scheme is the presence of two "gatekeeper" provisions providing that (1) leave must be obtained to commence an application for judicial review, and (2) there is no right of appeal unless a judge of the Federal Court certifies that a question of general importance is raised by the application for judicial review. These provisions are designed to ensure that applications with no merit are dealt with in a timely manner. A serious question of general importance is one that is dispositive of the appeal and, while it is possible that a single case might raise more than one question of general importance, this would be the exception rather than the rule. Furthermore, such a question arises from the issues in the case, and not from the judge's reasons. In the present case, none of the questions certified by the application Judge were dispositive of the appeal.

Although the Supreme Court of Canada stated in *Baker v. Canada (Minister of Citizenship and Immigration)* that once a question has been certified, all issues raised by the appeal may be considered by the Court, it is a mistake to reason that any question that could be raised on appeal may be certified. The statutory requirement remains as stated in paragraph 74(*d*) of the Act. The absence of a serious question of general importance in the case at bar meant that the pre-condition to the right of appeal was not met, and therefore the appeal had to be dismissed.

STATUTES AND REGULATIONS CITED

Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24, ss. 4, 5, 6, 7.

Immigration Act, R.S.C., 1985, c. I-2, s. 19(1)(*j*) (as am. by R.S.C., 1985 (3rd Supp.), c. 30, s. 3; S.C. 2000, c. 24, s. 55).

Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 35(1)(*a*), 36 (as am. by S.C. 2008, c. 3, s. 3), 72 (as am. by S.C. 2002, c. 8, s. 194), 74.

Immigration and Refugee Protection Regulations, SOR/2002-227, s. 231.

TREATIES AND OTHER INSTRUMENTS CITED

Rome Statute of the International Criminal Court, 17 July 1998, 2187 U.N.T.S. 90.

United Nations Convention Relating to the Status of Refugees, July 28, 1951, [1969] Can. T.S. No. 6, Art. 1F(a).

CASES CITED

CONSIDERED:

Canada (Minister of Citizenship and Immigration) v. Varela, [2007] I.D.D. No. 32 (QL); *Mugesara v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100, 254 D.L.R. (4th) 200, 28 Admin. L.R. (4th) 161; *Baker v. Canada (Minister of Citizenship and Immigration*), [1999] 2 S.C.R. 817, (1999), 174 D.L.R. (4th) 193, 14 Admin. L.R. (3d) 173.

REFERRED TO:

Varela v. Canada (Minister of Citizenship and Immigration), 2001 FCT 483, [2001] 4 F.C. 42, 205 F.T.R. 1; 15 Imm. L.R. (3d) 9, *Zazai v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89, 36 Imm. L.R. (3d) 167, 318 N.R. 365; *Ramirez v. Canada (Minister of Employment and Immigration)*, [1992] 2 F.C. 306, (1992), 89 D.L.R. (4th) 173, 135 N.R. 390.

APPEAL from the decision of the Federal Court (2008 FC 436, [2009] 1 F.C.R. 605, 72 Imm. L.R. (3d) 236) dismissing an application for judicial review of the Immigration and Refugee Board's decision that the appellant was inadmissible to Canada pursuant to paragraph 35(1)(*a*) of the *Immigration and Refugee Protection Act*. Appeal dismissed.

APPEARANCES

Micheal T. Crane for appellant.

Jamie R. D. Todd and *David B. Cranton* for respondent.

SOLICITORS OF RECORD

Micheal T. Crane, Toronto, for appellant.

Deputy Attorney General of Canada for respondent.

The following are the reasons for judgment rendered in English by

PELLETIER J.A.:

INTRODUCTION

[1] This is an appeal from the decision of Mr. Justice Harrington (the application Judge), reported as 2008 FC 436, [2009] 1 F.C.R. 605, in which he dismissed an application for judicial review of the decision of the Immigration and Refugee Board (IRB) that the appellant, Mr. Jaime Carrasco Varela, was inadmissible to Canada pursuant to paragraph 35(1)(*a*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. Although a number of grounds of appeal were raised, the dominant issue on appeal was the appropriateness of the questions certified by the application Judge, and the consequences of inappropriate certified questions on Mr. Carrasco Varela's right of appeal.

THE FACTS

[2] Mr. Carrasco Varela entered Canada as a refugee claimant on August 1, 1991. His claim for Convention refugee status was heard in December 1991. The Convention Refugee Determination Division rejected his claim in March 1992 on the basis that he was excluded from refugee protection by Article 1F(a) of the *United Nations Convention Relating to the Status of Refugees*, 28 July 1951, [1969] Can. T.S. No. 6 (entered into force 22 April 1954), because there were serious reasons to consider that he had committed a crime against humanity. Mr. Carrasco Varela's application for leave to appeal from that decision was dismissed.

[3] Notwithstanding this decision, Mr. Carrasco Varela remained in Canada on a Minister's permit and, in due course, filed an inland application for permanent resident status on humanitarian and compassionate (H&C) grounds. In the course of the processing of that application, a senior immigration officer determined that Mr. Carrasco Varela was inadmissible to Canada under paragraph 19(1)(*j*) [as am. by R.S.C., 1985 (3rd Supp.), c. 30, s. 3; S.C. 2000, c. 24, s. 55] of the *Immigration Act*, R.S.C., 1985, c. I-2.

[4] Mr. Carrasco Varela brought an application for judicial review of the senior immigration officer's decision on grounds of procedural fairness. That application was heard by Madam Justice Dawson who allowed it on the basis that the senior immigration officer did not take into account the defences of obedience to superior orders and compulsion: see *Varela v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 483, [2001] 4 F.C. 42, at paragraphs 27–33. As a result, Mr. Carrasco Varela made a fresh H&C application, which remains outstanding to this date.

[5] Concurrently with the refusal of the application for permanent resident status, the Minister also instituted proceedings leading to an inquiry (now called an admissibility hearing) as to whether Mr. Carrasco Varela was inadmissible to Canada under paragraph 19(1)(*j*) of the *Immigration Act.* Despite the fact that the inquiry began on January 19, 2000, a decision was not rendered until January 2007, by which time the *Immigration Act* had been replaced by the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act). The IRB held that Mr. Carrasco Varela was inadmissible to Canada under paragraph 35(1)(*a*) of the Act, the successor to paragraph 19(1)(*j*) of the *Immigration Act*. That decision was the subject of the judicial review in the Federal Court.

[6] The IRB's decision was based on findings of fact in relation to three time periods. The first is Mr. Carrasco Varela's period of service as a guard at El Chipote prison near Managua, Nicaragua. The IRB found that Mr. Carrasco Varela took part in atrocities and participated in the inhumane treatment of prisoners. The atrocities were committed against "a civilian population, nationals of Nicaragua who were in opposition to the official party of this country": see *Canada (Minister of Citizenship and Immigration) v. Varela*, [2007] I.D.D. No. 32 (QL), at paragraphs 60, 67 (*Varela*). In a statement given to immigration officials, Mr. Carrasco Varela reportedly said that El Chipote prison was "a detention centre used solely to detain political prisoners": see *Varela*, at paragraph 63.

[7] The second is the period during which Mr. Carrasco Varela was transferred from El Chipote prison to serve in a rural garrison. The IRB found that he was involved in killing peasants in the course of anti-insurgency operations against the Contras. The IRB specifically discounted

Mr. Carrasco Varela's evidence that he was able to avoid active military service while in the countryside by obtaining a false medical certificate indicating that he had a heart condition.

[8] The third is the period following his return from the countryside to El Chipote prison. Four individuals who had kidnapped a Soviet military attaché to Nicaragua were taken from the prison and summarily executed. Although Mr. Carrasco Varela was a member of the execution squad, he claimed that he had refused to take part in the shooting and was beaten by his commander as a result. The IRB did not believe his evidence and concluded that he participated in the murder of the four men.

[9] On the basis of these conclusions, the IRB found that there were reasonable grounds to believe that Mr. Carrasco Varela was inadmissible to Canada on the basis that he was a foreign national who had committed acts outside Canada that constitute an offence referred to in sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24.

THE DECISION UNDER REVIEW

[10] The application Judge began his analysis by identifying the elements of a crime against humanity, as defined by the Supreme Court in *Mugesara v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100, at paragraph 119 (*Mugesara*), as follows:

> As we shall see, based on the provisions of the *Criminal Code* and the principles of international law, a criminal act rises to the level of a crime against humanity when four elements are made out:
>
> 1. An enumerated proscribed act was committed (this involves showing that the accused committed the criminal act and had the requisite guilty state of mind for the underlying act);
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> 2. The act was committed as part of a widespread or systematic attack;
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> 3. The attack was directed against any civilian population or any identifiable group of persons; and
>
> 4. The person committing the proscribed act knew of the attack and knew or took the risk that his or her act comprised a part of that attack.

[11] The application Judge then examined the evidence supporting the finding that Mr. Carrasco Varela was inadmissible to Canada. He concluded that he should not disturb the IRB's conclusion that the latter had committed atrocities against prisoners at El Chipote prison. On the other hand, he found "no clear and compelling information which would give reasonable grounds to believe he deliberately killed innocent peasants": see reasons, at paragraph 20. As for the execution of the kidnappers, the application Judge found that the IRB's conclusion should not be disturbed. In short, the application Judge concluded that the first part of the test set out in *Mugesara* had been satisfied.

[12] As for the other elements of the test, the application Judge considered that, in the case of the kidnappers, it was clear that they were treated as enemies of the state. He was of the view that, since paragraph 35(1)(*a*) covered both crimes against humanity and war crimes, it did not matter whether the kidnappers were considered to be combatants (or prisoners of war) or civilians. In either case, Mr. Carrasco Varela was a person described in paragraph 35(1)(*a*).

[13] Similarly, the application Judge found that the inmates of El Chipote prison were either Contras or civilians. "It matters not whether Mr. Carrasco's involvement could be characterized as ill-treatment of prisoners of war or inhumane acts committed against a civilian population": see reasons, at paragraph 31.

[14] On that basis, the application Judge considered that the criteria in *Mugesara* had been met.

[15] The application Judge dismissed Mr. Carrasco Varela's arguments with respect to the defences of superior orders and duress. He then dealt at some length with the effect of a general amnesty that was declared as part of the agreement which brought the Nicaraguan civil war to an end. He concluded that the IRB's failure to deal with this defence raised by Mr. Carrasco Varela was not determinative because, on his interpretation of the law, the amnesty would not apply to a determination made pursuant to paragraph 35(1)(*a*) of the Act.

[16] The application Judge then went on to deal with the possibility of an abuse of process arising from the fact that by proceeding against Mr. Carrasco Varela solely on the basis that he was inadmissible pursuant to paragraph 35(1)(*a*), the Minister apparently left himself room to commence fresh proceedings for Mr. Carrasco Varela's removal on the basis of serious criminality (section 36 [as am. by S.C. 2008, c. 3, s. 2]) if the present proceedings were not successful.

[17] Finally, the application Judge dealt with the issue of certifying a question for appeal. He noted that it had been agreed during the hearing that a draft of his reasons would be circulated so as to give counsel the opportunity to suggest questions. As a result, counsel for Mr. Carrasco Varela suggested four questions, which the application Judge articulated as follows (reasons, at paragraph 55):

a. Are all prisoners necessarily "civilians" for the purpose of defining a crime against humanity as *per Mugesara v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100?

b. May the execution of criminals constitute a crime against humanity as being part of a widespread and systemic attack on civilians?

c. Were the acts committed by the Sandinistas against the Contras in military or civil war activities part of a "widespread and systemic attack on civilians"?

d. It is an error in law to rely on the Rome Statute in consideration of whether the mistreatment of prisoners constitutes a crime against humanity (in relation to the applicant's service as a prison guard at El Chipote prison)?

[18] The application Judge then set out the objections of counsel for the Minister to the proposed questions, as well as his response to those objections (at paragraphs 56–58):

Counsel for the Minister submits that none of the proposed questions transcends the interests of the immediate parties, or contemplates issues of broad significance, or has not already been answered. More particularly, it was suggested that in *Sumaida v. Canada (Minister of Citizenship and Immigration)*, [2000] 3 F.C. 66, the Federal Court of Appeal dealt with the first three questions. I do not share that reading of the *Sumaida* case. In speaking for the Court, Mr. Justice Létourneau noted that some of those targeted were civilians, and could not be considered terrorists. The question as certified need not have been and was not answered. Furthermore, in *Gonzalez*, above, the Court of Appeal characterized encounters between the Sandinistas and Contras as incidents of war. Although there has been reference in the case law to the distinction between war crimes and crimes against humanity based on the characteristics of the targeted group, it may well be time to revisit that distinction, in the light of recent international developments.

As to the fourth question, the Minister submits, at least in so far as it relates to Mr. Carrasco's situation, that the Rome Statute is simply a restatement of existing law. That is indeed my opinion. However, this is an important issue, and that opinion might not be shared.

These questions are interrelated, and at the risk of being somewhat overcautious, I am prepared to certify all of them.

[19] The application Judge then raised a question which had not been raised by counsel for Mr. Carrasco Varela (at paragraph 59):

Although the general amnesty in Nicaragua was the subject of considerable discussion in both written and oral submissions, no question was proposed by Mr. Carrasco in that regard. However, as other questions will be

certified, given the distinction between sections 35 and 36 of the IRPA, and the UNHCR Handbook, I propose certifying the following question myself:

> Should a pardon or general amnesty be taken into account in considering whether a person is inadmissible on grounds of violating human or international rights within the meaning of section 35 of the *Immigration and Refugee Protection Act?*

THE ISSUE

[20] Predictably, the parties' memoranda dealt with the questions certified by the application Judge. However, the discussion between the Court and counsel at the hearing of this appeal focused on whether the certified questions satisfied the statutory criteria for certified questions, as qualified by the jurisprudence of this Court.

[21] In my view, the only question that arises on this appeal is whether the application Judge properly exercised his discretion to certify a question. In my opinion, he did not. As a result, the pre-condition to Mr. Carrasco Varela's right of appeal has not been met and this appeal must accordingly be dismissed.

ANALYSIS

[22] As the application Judge recognized in his reasons, a decision of the Federal Court on judicial review of a decision of the IRB is intended to be final, with no right of appeal except in one circumstance, namely, where the judge certifies that a serious question of general importance is involved and the judge states that question. This is simply a statement of paragraph 74(*d*) of the Act:

> **74.** Judicial review is subject to the following provisions:
>
> …
>
> (*d*) 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.

[23] This provision fits within a larger scheme designed to ensure that a claimant's right to seek the intervention of the courts is not invoked lightly, and that such intervention, when justified, is timely.

[24] It is worth remembering that there is no right to judicial review of "any matter—a decision, determination or order made, a measure taken or a question raised—under [the] Act" unless leave is first granted by the Federal Court. The application for leave must be served and filed within 15 days (in the case of a matter arising in Canada) of the applicant being notified of the decision or matter. The Act directs the judge hearing the application for leave to deal with it without delay, and without personal appearance. There is no appeal from the decision to dismiss an application for leave: see section 72 [as am. by S.C. 2002, c. 8, s. 194] of the Act.

[25] The Act goes on to stipulate that the application for judicial review shall be heard no sooner than 30 days nor more than 90 days after leave is granted, and that it is to be disposed of without delay and in a summary way: see paragraph 74(*b*) of the Act.

[26] These measures must be read together with section 231 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, which provides for a stay of any removal order pending the disposition of judicial proceedings. The result is that, on the one hand, persons whose status in Canada is in question are allowed to remain in Canada pending the final disposition of their recourse to the courts; on the other hand, the law requires that such recourse be disposed of without delay and in a summary fashion.

[27] An integral part of this scheme is the presence of two "gatekeeper" provisions. The first is the requirement that leave be obtained to commence an application for judicial review. The second is the absence of a right of appeal unless a judge of the Federal Court certifies that a serious question of general importance is raised by the application for judicial review. Given the statutory stay that flows automatically from access to the courts, these provisions are designed to ensure that applications that have no merit are dealt with in a timely manner.

[28] In the same way, it is worth noting that section 74 speaks of "a" serious question of general importance, not of "one or more" serious questions of general importance. While I would not preclude the possibility that a single case might raise more than one question of general importance, this would be the exception rather than the rule. A serious question is one that is dispositive of the appeal: see *Zazai v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89, 318 N.R. 365 (*Zazai*), and the cases cited therein at paragraph 11. There are a limited number of such questions in any appeal.

[29] Additionally, a serious question of general importance arises from the issues in the case and not from the judge's reasons. The judge, who has heard the case and has had the benefit of the best arguments of counsel on behalf of both parties, should be in a position to identify whether such a question arises on the facts of the case, without circulating draft reasons to counsel. Such a practice lends itself, as it did in this case, to a "laundry list" of questions, which may or may not meet the statutory test. In this case, none of them did.

[30] Turning then to the questions that the application Judge certified, the first is [at paragraph 55]:

a. Are all prisoners necessarily "civilians" for the purpose of defining a crime against humanity as *per Mugesara v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100?

[31] At paragraphs 30 and 31 of his reasons, the application Judge wrote:

> Regardless how the matter is considered, Mr. Carrasco was rightly ordered deported. The order states: "[t]he Immigration Division determines that you are a person described in 35(1)(a) of the Act." Both crimes against humanity and war crimes are covered.
>
> By the same token, the prisoners in El Chipote prison were either Contras or ordinary political dissidents. It matters not whether Mr. Carrasco's involvement could be characterized as ill-treatment of prisoners of war or inhumane acts against a civilian population.

[32] Clearly, this question is not dispositive of the appeal. Nor is it a question that the application Judge himself felt it necessary to decide. Referring once again to *Zazai*, at paragraph 12:

> The corollary of the fact that a question must be dispositive of the appeal is that it must be a question which has been raised and dealt with in the decision below. Otherwise, the certified question is nothing more than a reference of a question to the Court of Appeal. If a question arises on the facts of a case before an applications judge, it is the judge's duty to deal with it. If it does not arise, or if the judge decides that it need not be dealt with, it is not an appropriate question for certification.

[33] The second question accepted by the application Judge was [at paragraph 55]:

b. May the execution of criminals constitute a crime against humanity as being part of a widespread and systematic attack on civilians?

[34] If the thrust of this question is to determine whether any execution of criminals can constitute a crime against humanity, then it is a question that cannot be answered on this record. If the thrust of the question is to determine whether the execution of the kidnappers in this case is a crime against humanity, then it is a question that the application Judge did not feel it necessary to address in his reasons. At paragraph 29 of his reasons, the application Judge wrote:

The evidence is clear and compelling that the kidnappers were treated as enemies of the state. Mr. Carrasco claims the President of Nicaragua personally attended El Chipote Prison. As Mr. Justice MacGuigan said in *Ramirez*, it does not really matter whether the crime is a war crime or a crime against humanity. It was a crime committed during the course of what was either a civil war or civil insurrection. He simply employed the term "international crime."

[35] If the application Judge, following the decision of this Court in *Ramirez v. Canada (Minister of Employment and Immigration)*, [1992] 2 F.C. 306, found [at paragraph 29] that "it [did] not really matter whether the crime is a war crime or a crime against humanity", as he apparently did, then it can hardly be a question for certification.

[36] The third question was [at paragraph 55]:

c. Were the acts committed by the Sandinistas against the Contras in military or civil war activities part of a "widespread and systematic attack on civilians"?

[37] Once again, this question was not considered by the application Judge. Furthermore, it is difficult to see how such a question could be answered in any meaningful way. Which acts, committed in the course of hostilities lasting several years, are in issue? How is the answer to that question relevant to the disposition of this case?

[38] The fourth question accepted by the Judge was [at paragraph 55]:

d. Is it an error in law to rely on the Rome Statute in consideration of whether the mistreatment of prisoners constitutes a crime against humanity (in relation to the applicant's service as a prison guard at El Chipote prison)?

[39] The IRB referred to certain articles of the Rome Statute [*Rome Statute of the International Criminal Court*, 17 July 1998, 2187 U.N.T.S. 90] in its decision, but it is not clear whether it relied upon those articles in coming to the conclusion it did. In his decision, the application Judge wrote at paragraph 46 that:

Mr. Carrrasco submits that the Board fell into error in referring to the Rome Statute. In my opinion, it is not necessary to consider that submission as the Statute says nothing new as far as Mr. Carrasco's activities are concerned, as *per Gonzalez*, above.

[40] If the Judge did not think it necessary to deal with the question proposed by counsel, it is difficult to see how it could be a serious question of general importance.

[41] The last question was proposed by the application Judge himself. It is [at paragraph 59]:

Should a pardon or general amnesty be taken into account in considering whether a person is inadmissible on grounds of violating human or international rights within the meaning of section 35 of the *Immigration and Refugee Protection Act?*

[42] It would be difficult to say that a relevant factor—surely a general amnesty is a relevant factor—should not to be taken into account in determining admissibility under the Act. This does not rise to the level of a serious question of general importance.

[43] Having found that no serious question of general importance is stated in the certified questions, what is the status of the appeal? As noted earlier in these reasons, the requirement that the application Judge certify that a serious question of general importance is involved and that he or she states the question is a gatekeeper function. Some confusion has arisen with respect to the thrust of that function by the decision of the Supreme Court in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, to the effect that, once a question had been certified, all issues raised by the appeal could be considered by the Court: see paragraph 12. It is a mistake to reason that

because all issues on appeal may be considered once a question is certified, therefore any question that could be raised on appeal may be certified. The statutory requirement remains as stated in paragraph 74(*d*): there must be a serious question of general importance. The absence of such a question means that the pre-condition to the right of appeal has not been met, and therefore the appeal must be dismissed. To hold otherwise would be to allow the Federal Court of Appeal to create a right of appeal where the Act has not provided one.

[44] As a result, I would dismiss the appeal.

NOËL J.A.: I agree.

NADON J.A.: I agree.