Chan v. Canada (Minister of Citizenship and Immigration)
(C.A.)

San Tong Chan (Appellant)
v.
The Minister of Citizenship and Immigration (Respondent)

[2000] 4 F.C. 390
[2000] F.C.J. No. 1180
Court File No. A-294-99

Federal Court of Canada - Court of Appeal
Isaac, Robertson and Sharlow JJ.A.

Heard: Vancouver, June 15, 2000.
Judgment: Ottawa, July 24, 2000.

Citizenship and Immigration — Exclusion and removal — Inadmissible persons — Appellant denied refugee status by virtue of Convention, Art. 1F(b) — Convention, Art. 1F(b) not applicable to refugee claimant who has been convicted of crime committed outside Canada and has served sentence prior to coming here — Persons such as appellant entitled to have refugee claim heard unless declared danger to Canadian public.

In 1992, while he was illegally in the United States, the appellant was convicted of the offence of illegal use of a communication device, an offence defined in connection with offences related to drug trafficking. He was sentenced to 14 months imprisonment, with credit for time served, and a probationary period of 3 years. He was deported to China, his country of origin. In 1996, he came to Canada and claimed refugee status. The CRDD denied his claim by virtue of Article 1F(b) of the United Nations Convention Relating to the Status of Refugees on the basis that he had committed a serious non-political crime outside the country of refuge. This was an appeal from the Motions Judge's decision upholding that decision.

Held, the appeal should be allowed.

Article 1F(b) is not applicable to a refugee claimant who has been convicted of a crime committed outside Canada and has served his sentence prior to coming here.

In obiter comments in Pushpanathan v. Canada (Minister of Citizenship and Immigration), Bastarache J., writing for the majority, stated that Article 1F(b) of the Convention was generally meant to prevent ordinary criminals extraditable by treaty from

seeking refugee status. Professor Hathaway [page391] in The Law of Refugee Status and La Forest J. in Canada (Attorney General) v. Ward, were of the same opinion.

Any other interpretation is in conflict with the statutory scheme set out in the Immigration Act (sections 19, 46 and 53 already provide an avenue for dealing with persons, such as the appellant, who have been convicted of a serious offence prior to coming to Canada). Specifically, to construe Article 1F(b) so that it captures a person in the appellant's situation creates a direct conflict with subparagraph 46.01(1)(e)(i) of the Act by eliminating the need for the Minister to issue a danger opinion. A person such as the appellant is entitled to have his refugee claim heard unless the Minister declares him to be a danger to the Canadian public. Moreover, even those who have obtained refugee status without disclosing a prior conviction are entitled to remain in Canada until such time as the Minister issues a danger opinion.

The broad interpretation that the Minister seeks to place on Article 1F(b) has the effect of removing this safeguard which is premised on the reality that a person may have a valid refugee claim even though having a criminal record in another jurisdiction. If one were to accept the Minister's interpretation of Article 1 F(b), a prior conviction for a serious non-political offence would operate to automatically deny that person's right to a refugee hearing, regardless of his attempts at rehabilitation and whether or not he constitutes a danger to the Canadian public. It would have been preferable if the CRDD had dealt with the merits of the appellant's refugee claim on an alternative basis: Moreno v. Canada (Minister of Employment and Immigration).

Statutes and Regulations Judicially Considered

Food and Drugs Act, 21 U.S.C. s. 843(b) (1988).
Immigration Act, R.S.C., 1985, c. I-2, ss. 2 (as am. by R.S.C., 1985 (4th Supp.), c. 28, s. 1), 19 (as am. by R.S.C., 1985 (3rd Supp.), c. 30, s. 3; S.C. 1992, c. 49, s. 11; 1995, c. 15, s. 2; 1996, c. 19, s. 83), 46 (as am. by S.C. 1992, c. 49, s. 35), 46.01(1)(e)(i) (as am. idem, s. 36; 1995, c. 15, s. 9), 53 (as am. by R.S.C., 1985 (4th Supp.), c. 28, s. 17; S.C. 1992, c. 49, s. 43; 1995, c. 15, s. 12).
United Nations Convention Relating to the Status of Refugees, July 28, 1951, [1969] Can. T.S. No. 6, Art. 1F(b),(c).

Cases Judicially Considered

Applied:
Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982; (1998), 160 D.L.R. (4th) 193; 11 Admin. L.R. (3d) 1; 43 Imm. L.R. (2d) 117; 226 N.R. 201; amended reasons [1998] 1 S.C.R. 1222; (1998), 11 Admin. L.R. (3d) 130.
Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689; (1993), 103 D.L.R. (4th) 1; 20 Imm. L.R. (2d) 85; 153 N.R. 321.

Referred to:
Moreno v. Canada (Minister of Employment and Immigration), [1994] 1 F.C. 298; (1993), 107 D.L.R. (4th) 424; 21 Imm. L.R. (2d) 221; 159 N.R. 210 (C.A.).

Authors Cited

Hathaway, James C. The Law of Refugee Status. Toronto:

Butterworths, 1991.

APPEAL from a Trial Division decision (Chan v. Canada (Minister of Citizenship and Immigration) (1999), 166 F.T.R. 271; 49 Imm. L.R. (2d) 11) upholding the Convention Refugee Determination Division decision finding the appellant not to be a Convention refugee by virtue of Article 1F(b) of the United Nations Convention Relating to the Status of Refugees. Appeal allowed.

Appearances:

Alexandar Stojicevic, for the appellant.
Helen C. H. Park, for the respondent.

Solicitors of Record:

McCrea & Associates, Vancouver, for the appellant.
Deputy Attorney General of Canada, for the respondent.

The following are the reasons for judgment rendered in English by

1 **ROBERTSON J.A.**:— The appellant was illegally residing in the United States when arrested in San Francisco following a "sting" operation in which a [page393] substantial quantity of heroin was sold to undercover agents. Pursuant to a plea bargain, the appellant pleaded guilty and was convicted in 1992 of the offence of illegal use of a communication device (a pager), contrary to the Food and Drugs Act, 21 U.S.C. section 843(b) (1988) an offence defined in connection with offences related to drug trafficking. Under the terms of the plea bargain, the appellant was sentenced to 14 months imprisonment, with credit for time served, and a probationary period of three years. The appellant also agreed to deportation to his country of origin, China, following his release. The appellant was deported to China. In 1996, he arrived in Canada and claimed refugee status. It is that claim that gives rise to these proceedings.

2 On May 27, 1998, the Convention Refugee Determination Division of the Immigration and Refugee Board (the Board) found the appellant not to be a Convention

refugee by virtue of Article 1F(b) of the United Nations Convention Relating to the Status of Refugees [July 28, 1951, [1969] Can. T.S. No. 6]. That Article has been adopted as part of our domestic law under section 2 of the Immigration Act [R.S.C., 1985, c. I-2 (as am. by R.S.C., 1985 (4th Supp.), c. 28, s. 1)] which excludes from the definition of refugee those who fall within Article 1F(b). The latter states that the provisions of the Convention do not apply to a person who "has committed a serious non-political crime outside the country of refuge":

> Article 1
>
> Definition of the Term "Refugee"
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> [...]
>
> F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
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> ...
>
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

3 Having regard to the circumstances surrounding the appellant's conviction in the United States, the Board invoked the exclusion clause, thereby denying him the right to have his refugee claim determined on its merits. In short, the Board rejected the appellant's argument that in assessing the seriousness of a non-political crime regard must be had to the offence for which the refugee claimant was convicted and not that with which he could have been charged and convicted. The Board's decision was upheld by the Motions Judge [(1999), 166 F.T.R. 271 (F.C.T.D.)] who also rejected the appellant's alternative argument that Article 1F(b) does not apply in cases where the refugee claimant had been convicted of an offence committed outside the country of refuge and served his or her sentence prior to coming to Canada. The appellant argued that the purpose of that Article is limited to preventing ordinary criminals, who would otherwise be subject to extradition, from seeking refugee status in order to subvert that judicial process. It necessarily follows that persons who have been convicted of an offence and served their sentence have no need to subvert the extradition process. For this reason, the appellant argued, albeit unsuccessfully, that Article 1F(b) could not be invoked as a ground for refusing to hear the appellant's refugee claim.

4 In my respectful view, the appeal must be allowed. Assuming without deciding that the appellant's conviction qualifies as a serious non-political crime, it is clear to me that Article 1F(b) cannot be invoked in cases where a refugee claimant has been convicted of a crime and served his or her sentence outside Canada prior to his or her arrival in this country. I rest this conclusion on two grounds. First, obiter comments of Justice

Bastarache in Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982 (writing for the majority) and Justice La Forest in Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689, fully support this interpretation of Article 1F(b), as do the writings of academic commentators. Second, any other interpretation is in conflict with the statutory scheme set [page395] out in the Immigration Act. What the Minister fails to recognize is that sections 19 [as am. by R.S.C., 1985 (3rd Supp.), c. 30, s. 3; S.C. 1992, c. 49, s. 11; 1995, c. 15, s. 2; 1996, c. 19, s. 83], 46 [as am. by S.C. 1992, c. 49, s. 35] and 53 [as am. by R.S.C., 1985 (4th Supp.), c. 28, s. 17; S.C. 1992, c. 49, s. 43; 1995, c. 15, s. 12] of the Act already provide an avenue for dealing with persons, such as the appellant, who have been convicted of a serious offence prior to coming to Canada. Specifically, to construe Article 1F(b) so that it captures a person in the appellant's situation creates a direct conflict with subparagraph 46.01(1)(e)(i) [as am. by S.C. 1992, c. 49, s. 36; 1995, c. 15, s. 9] of the Act. As will be explained, persons such as the appellant are entitled to have their refugee claim heard unless the Minister declares them to be a danger to the Canadian public. Moreover, even those who have obtained refugee status without disclosing the prior conviction are entitled to remain in Canada until such time as the Minister is prepared to issue such a danger opinion. My formal analysis begins with the persuasive obiter found in Pushpanathan, supra, a case decided after the Board rendered its decision.

5 The issue in Pushpanathan, supra, was whether a person who had pleaded guilty to drug trafficking while in Canada is precluded from claiming refugee status because of Article 1F(c) of the Convention. That Article precludes from refugee status persons who are "guilty of acts contrary to the purposes and principles of the United Nations". As a matter of interpretation and historical fact, the Supreme Court concluded that it was not the intention of the signatories to the Convention to classify drug trafficking as falling within Article 1F(c). In part, Justice Bastarache reasoned that as Article 1F(b) deals with serious non-political crimes, such as drug trafficking, these same crimes were not meant to be included in the general [page396] unqualified language of Article 1F(c). In effect, he categorizes drug trafficking as a serious non-political crime. During the course of his analysis, Justice Bastarache refers to the purpose of Article 1F(b) and, at paragraph 73 [pages 1033-1034], he observed:

> It is also necessary to take account of the possible overlap of Article 1F(c) and F(b) with regard to drug trafficking. It is quite clear that Article 1F(b) is generally meant to prevent ordinary criminals extraditable by treaty from seeking refugee status, but that this exclusion is limited to serious crimes committed before entry in the state of asylum. Goodwin-Gill, supra, at p. 107, says:
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> > With a view to promoting consistent decisions, UNHCR proposed that, in the absence of any political factors, a presumption of serious crime might be considered as raised by evidence of commission of any of the following offences: homicide, rape, child molesting, wounding, arson, drugs trafficking, and armed robbery.

> The parties sought to ensure that common criminals should not be able to avoid extradition and prosecution by claiming refugee status. Given the precisely drawn scope of Article 1F(b), limited as it is to "serious" "non-political crimes" committed outside the country of refuge, the unavoidable inference is that serious non-political crimes are not included in the general, unqualified language of Article 1F(c). Article 1F(b) identifies non-political crimes committed outside the country of refuge, while Article 33(2) addresses non-political crimes committed within the country of refuge. Article 1F(b) contains a balancing mechanism in so far as the specific adjectives "serious" and "non-political" must be satisfied, while Article 33(2) as implemented in the Act by ss. 53 and 19 provides for weighing of the seriousness of the danger posed to Canadian society against the danger of persecution upon refoulement. This approach reflects the intention of the signatory states to create a humanitarian balance between the individual in fear of persecution on the one hand, and the legitimate concern of states to sanction criminal activity on the other. The presence of Article 1F(b) suggests that even a serious non-political crime such as drug trafficking should not be included in Article 1F(c). This is consistent with the expression of opinion of the delegates in the Collected Travaux Préparatoires of the 1951 Geneva Convention Relating to the Status of Refugees (1989), vol. III, at p. 89.

6 In addition to the commentators referred to by Justice Bastarache, the appellant cites Professor Hathaway for the proposition that the limited purpose underlying Article 1F(b) is to thwart criminals attempting to evade extradition by making a refugee claim. At pages 221-222 Professor Hathaway writes (The Law of Refugee Status):

> The common law criminality exclusion [Article 1F(b)] disallows the claims of persons who are liable to sanctions in another state for having committed a genuine, serious crime, and who seek to escape legitimate criminal liability by claiming refugee status. This exclusion clause is not a means of bypassing ordinary criminal due process for acts committed in a state of refuge, nor a pretext for ignoring the protection needs of those whose transgressions abroad are of a comparatively minor nature. Rather, it is simply a means of bringing refugee law into line with the basic principles of extradition law, by ensuring that important fugitives from justice are not able to avoid the jurisdiction of a state in which they may lawfully face punishment ... .
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> Second, the extradition-based rationale for the exclusion clause requires that the criminal offence be justiciable in the country in which it was committed. Insofar as the claimant has served her sentence, been acquitted of the charges, benefited from an amnesty or otherwise met her obligations under the criminal law, she would be at no risk of extradition, and should

not be excluded from refugee status... .

7 I pause here to note that in Ward, supra, Justice La Forest endorses the views of Professor Hathaway at page 743, albeit by way of obiter:

> The articulation of this exclusion for the "commission" of a crime can be contrasted with those of s. 19 of the Act which refers to "convictions" for crimes. Hathaway, supra, at p. 221, interprets this exclusion to embrace "persons who are liable to sanctions in another state for having committed a genuine, serious crime, and who seek to escape legitimate criminal liability by claiming refugee status". In other words, Hathaway would appear to confine paragraph (b) [page398] to accused persons who are fugitives from prosecution. The interpretation of this amendment was not argued before us. I note, however, that Professor Hathaway's interpretation seems to be consistent with the views expressed in the Travaux préparatoires, regarding the need for congruence between the Convention and extradition law; see statement of United States delegate Henkin, U.N. Doc. E/AC.32/SR.5 (January 30, 1950), at p. 5. As such, Ward would still not be excluded on this basis, having already been convicted of his crimes and having already served his sentence.

8 One cannot deny that the weight of judicial and academic authority supports the proposition that Article 1F(b) does not apply to those who have already been convicted and served their sentence for crimes committed outside Canada prior to making a refugee claim. That being said, I accept that the wording of Article 1F(b) is extremely broad. It expressly refers to persons who have committed a serious non-political crime outside Canada, which logically includes those who have already been convicted and served their sentence. As a matter of statutory interpretation, one must ask why it is that a clause which is so broadly drafted should be narrowly construed. The answer lies in the fact that the broad interpretation being advanced by the Minister is in conflict with the general scheme of the Act as it relates to refugee claimants who have been convicted of a serious offence prior to their arrival in Canada.

9 This part of my analysis begins with the presumption that the appellant's conviction in the United States constitutes a serious non-political crime within the meaning of Article 1F(b). While this presumption is contrary to the appellant's interests, it is consistent with the position articulated by the Board and adopted by the Motions Judge. In this regard, the Motions Judge held that the Board did not err in concluding that the appellant's conviction arose out of an offence involving drug trafficking and that such conduct amounted to a serious non-political crime. This was so despite the fact that the appellant was convicted not for drug trafficking per se but for the unlawful use of a communication device, an offence unknown to [page399] Canadian law. Moreover, I am going to presume that, had the appellant engaged in similar conduct in Canada, he would have been convicted of an offence such as drug trafficking for which a maximum prison term of ten years or more could have been imposed. In other words, for present purposes

I will presume, without deciding, that a serious non-political crime is to be equated with one in which a maximum sentence of ten years or more could have been imposed had the crime been committed in Canada. As will become evident, these presumptions assist me in demonstrating the inconsistency in the Minister's interpretation of Article 1F(b) when contrasted with other relevant provisions of the Act.

10 Section 19 of the Immigration Act forms the basis for understanding how the legislation deals with persons convicted of a crime committed in another country prior to coming to Canada. That section sets out the classes of persons deemed "inadmissible". It must be noted that section 19 is a general provision and not specifically directed at refugee claimants. Of critical relevance to this appeal is subparagraph 19(1)(c.1)(i) which declares inadmissible those persons who have been convicted of an offence outside of Canada that, if committed here, would constitute an offence punishable by a maximum term of imprisonment of ten years or more (e.g. drug trafficking):

> 19. (1) No person shall be granted admission who is a member of any of the following classes:
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> ...
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> (c.1) persons who there are reasonable grounds to believe
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> (i) have been convicted outside Canada of an offence that, if committed in Canada, would constitute an offence that may be punishable under any Act of Parliament by a maximum term of imprisonment of ten years or more,
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> ...
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> except persons who have satisfied the Minister that they have rehabilitated themselves and that at least five years have elapsed since the expiration of any sentence imposed for the offence or since the commission of the act or omission, as the case may be;

11 As noted earlier, for purposes of deciding this appeal, that provision is presumed to equate with the notion of a serious non-political crime as referred to in Article 1F(b). At the same time, subparagraph 19(1)(c.1)(i) provides for an exception. A person who has been convicted of an offence falling within that provision is admissible if at least five years have elapsed since the expiration of their sentence and he or she is able to persuade the Minister that they have rehabilitated themselves. For our purposes, what is relevant is that subparagraph 19(1)(c.1)(i) recognizes that a person is not automatically excluded from admission to Canada simply because they have served time for a serious offence prior to seeking admission to Canada. By comparison, the interpretation being advanced by the Minister with respect to Article 1F(b) would operate to automatically exclude such a person from ever asserting a refugee claim even though that person might have a valid

refugee claim or that person is able to satisfy the Minister that he or she has been rehabilitated. That interpretation also runs contrary to obiter comments made by Justice La Forest in Ward, supra, where at pages 741-742 he observed:

> A claimant for refugee status in Canada who has established his or her inclusion in the definition of "Convention refugee" must still overcome the hurdle of s. 19 before entry into this country will be permitted. These exclusions on the basis of criminality have been carefully drafted to avoid the admission of claimants who may pose a threat to the Canadian government or to the lives or property of the residents of Canada. The provisions specifically give the Minister of Employment and Immigration enough flexibility, however, to reassess the desirability of permitting entry to a claimant with a past criminal record, where the Minister is convinced that rehabilitation has occurred. In this way, Parliament opted not to treat a criminal past as a reason to be estopped from obtaining refugee status.

12 Putting aside subparagraph 19(1)(c.1)(i) for the moment, it is necessary to recognize that the [page401] Immigration Act deals specifically with refugee claimants who have been convicted of a serious crime outside Canada, as well as those who have obtained refugee status but failed to disclose a prior conviction at the time of their refugee hearing. I shall deal with each of these scenarios in turn.

13 Subparagraph 46.01(1)(e)(i) of the Act dictates that a person is ineligible to have his or her refugee claim determined if an adjudicator determines that that person falls within subparagraph 19(1)(c.1)(i) and the Minister is of the opinion that he or she constitutes a danger to the public in Canada. Thus, the issuance of a danger opinion acts to deny a person the right to a refugee hearing in circumstances where the claimant has been convicted of serious crime as defined in subparagraph 19(1)(c.1)(i). Subparagraph 46.01(1)(e)(i) reads as follows:

> 46.01 (1) A person who claims to be a Convention refugee is not eligible to have the claim determined by the Refugee Division if the person
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> ...
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> (e) has been determined by an adjudicator to be
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> (i) a person described in paragraph 19(1)(c) or subparagraph 19(1)(c.1)(i) and the Minister is of the opinion that the person constitutes a danger to the public in Canada,

14 Moreover, the Act goes on to deal with those situations in which immigration officials only learn of a person's prior conviction for an offence committed outside Canada after that person has been granted refugee status. Paragraph 53(1)(a) provides

that no person who has been determined to be a Convention refugee is to be removed to a country in which their life is threatened unless that person is inadmissible under subparagraph 19(1)(c.1)(i) and the Minister is of the opinion that the person constitutes a danger to the public in Canada. Paragraph 53(1)(a) reads as follows:

> 53. (1) Notwithstanding subsections 52(2) and (3), no person who is determined under this Act or the regulations to be a Convention refugee, nor any person who has been [page402] determined to be not eligible to have a claim to be a Convention refugee determined by the Refugee Division on the basis that the person is a person described in paragraph 46.01(1)(a), shall be removed from Canada to a country where the person's life or freedom would be threatened for reasons of race, religion, nationality, membership in a particular social group or political opinion unless
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> (a) the person is a member of an inadmissible class described in paragraph 19(1)(c) or subparagraph 19(1)(c.1)(i) and the Minister is of the opinion that the person constitutes a danger to the public in Canada;

15 In summary, it is clear that the broad interpretation which the Minister wishes to place on Article 1F(b) is in conflict with the purpose of that provision as articulated in Pushpanathan, supra, and as confirmed by academic commentators. Moreover, that interpretation fails to recognize that the Immigration Act has already in place a statutory scheme for dealing with persons who have been convicted of serious crimes committed outside Canada. The one thread that runs throughout the relevant provisions is that no one who seeks or has obtained refugee status can be removed from Canada simply because they have been convicted of a serious crime in another country. In both instances, the Minister must issue a danger opinion before any steps can be taken to remove the person from Canada. By contrast, the broad interpretation that the Minister seeks to place on Article 1F(b) has the effect of removing this safeguard which is premised on the reality that a person may have a valid refugee claim even though they have garnered a criminal record in another jurisdiction. If one were to accept the Minister's interpretation of Article 1F(b), a prior conviction for a serious non-political offence would operate to automatically deny that person's right to a refugee hearing, regardless of the person's attempts at rehabilitation and whether or not they constitute a danger to the Canadian public. Bluntly stated, the interpretation being advanced by the Minister has the effect of virtually abrogating subparagraph 46.01(1)(e)(i) of the Immigration Act by eliminating the need for the Minister to issue a danger opinion. As a matter of statutory interpretation, the only way in which the apparent conflict can be resolved is to construe Article 1F(b) in a manner consistent with its known purpose.

16 I would allow the appeal; set aside the order of the Motions Judge dated April 23, 1999; allow the application for judicial review; set aside the Board's decision dated May 27, 1998; and remit the matter to the Board for reconsideration on the basis that Article

1F(b) is not applicable to refugee claimants who have been convicted of a crime committed outside Canada and who have served their sentence prior to coming to Canada. The appellant is entitled to costs in this Court and in the Motions Court. In closing, I should like to add that it would have been preferable if the Board had dealt with the merits of the appellant's refugee claim on an alternative basis. This is a matter I dealt with extensively in Moreno v. Canada (Minister of Employment and Immigration), [1994] 1 F.C. 298 (C.A.), at pages 326-327. The Board may find my remarks in that case instructive.

ISAAC J.A.:— I agree.
SHARLOW J.A.:- I agree.