FEDERAL COURT

Court File No. IMM-326-09

Between:

NELL TOUSSAINT

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Court File No. IMM-2926-08

And Between:

CHANTAL BAVUNU KRENA

and

KETSIA KRENA

and

JODICK MOUDIANDAMBU

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Court File No. IMM-3045-08

And Between:

JANOS ROBERT GUNTHER

and

JANOSNE (MARIA) GUNTHER

and

ANITA GUNTHER

and

MELINDA GUNTHER

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

and

ATTORNEY GENERAL OF CANADA

Respondent

MEMORANDUM OF FACT AND LAW OF THE INTERVENER CHARTER COMMITTEE ON POVERTY ISSUES

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MEMORANDUM OF FACT AND LAW
OF THE INTERVENER CHARTER COMMITTEE ON POVERTY ISSUES

PART I - OVERVIEW

1. The Charter Committee on Poverty Issues (CCPI) has, for more than twenty years, promoted the human rights of poor people in Canada and participated in domestic and international fora to ensure that the rights of those living in poverty receive attention and consideration by courts, tribunals and international bodies. CCPI has intervened in a number of cases at the Supreme Court of Canada and before other courts and tribunals in Canada, as well as before UN human rights bodies.

2. CCPI was granted intervener status in the present case to address "issues arising from the requirement to pay fees to process Humanitarian and Compassionate (H & C) Applications for permanent residence pursuant to the IRPA and the impact of such fees on persons living in poverty." Prothonotary Aalto found that "this is one of those unique cases that raise issues of public policy, access to justice and discrimination and inequality" such that the Court will benefit from the participation of CCPI.

3. This case goes to the heart of the *Charter*'s guarantee of what was affirmed by the Supreme Court of Canada in *Andrews* as a "a positive right to equality in both the substance and the administration of the law" and what this guarantee means for those living in poverty.[1] The constitutional question before the Court is whether the government is permitted to impose a fee for H & C applications for permanent residence in Canada without addressing the unequal burden and/or exclusion which such fees impose on those who, because of poverty and/or reliance on social assistance, cannot afford to pay them. The interests at stake in access to H & C Review are determinative

[1] *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 171 citing *Reference re an Act to Amend the Education Act* (1986), 53 O.R. (2d) 513, at 554. [Hereinafter *Andrews*].

in many cases of whether families can remain together[2], of psychological and physical health[3], of the best interests of children[4], of access to work, housing[5] and a decent standard of living and of the protection of women from violence and sexual exploitation.[6]

4. This case comes to court at a critical moment in the evolution of equality jurisprudence under the *Canadian Charter*. In *R.* v. *Kapp*, the Supreme Court of Canada has eschewed the formalism of some recent applications of the approach to equality claims laid out in the *Law* decision, criticized for having narrowed equality analysis to "an artificial comparator analysis focused on treating likes alike."[7] The Court calls for a recommitment to the ideal of substantive equality as it was affirmed in *Andrews*:

> Substantive equality, as contrasted with formal equality, is grounded in the idea that: "The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration": *Andrews*, at p. 171, *per* McIntyre J., for the majority on the s. 15 issue. [8]

5. As Lindon, J. recently wrote, the message from the Court in *Kapp* is that we must "view the situation through the eyes of the claimant" and heed the words of Justice Frankfurter (then of the United States Supreme Court), who once cautioned "it was a wise man who said that there is no greater inequality than the equal treatment of unequals" (*Dennis v. United States*, 339 U.S. 162 (1950) at 184). [9]

6. The present case dramatically illustrates the inequality and injustice that may result from the imposition of a uniform requirement combined with a refusal to address its detrimental effects on disadvantaged groups. While a fee imposed on an

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[2] Dianne Patychuk and Ilene Hyman, *The Impact of Processing Fees for Humanitarian and Compassionate Claims on Non-Status Families with Children: A Social Research Report,* (April 22, 2009) filed by LIFT, at p. 15. [Hereinafter LIFT Report]
[3] *Ibid.,* at pp. 16, 18.
[4] *Ibid*., at pp. 12, 18.
[5] *Ibid.,* at p. 15.
[6] *Ibid.,* at pp. 16-18.
[7] *R. v*. *Kapp*, 2008 SCC 41 at para 22 [hereinafter, *Kapp*].
[8] *Ibid.,* at para 15.
[9] *Harris v. Canada (Minister of Human Resources and Skills Development)* [2009] F.C.J. No. 70, 2009 FCA 22 at para 27 per Lindon, J. (in dissent, but not on this point).

applicant for H & C Review who can afford to pay it may be experienced by that applicant as a reasonable price to pay to cover costs associated with the process, the experience of the same fee by someone living in poverty or relying on social assistance is entirely different. For the impecunious applicant, the fee prevents access to a critical process of humanitarian and compassionate consideration of her unique circumstances, risks or hardships and might permit her to seek permanent residency in Canada, secure employment, provide adequate care for children and find decent housing.

7. In CCPI's submission, this is precisely the kind of differential impact which the concept of substantive equality affirmed in *Andrews* and *Kapp* is meant to remedy. The Respondent, however, argues for a complete extrication of poverty from the analysis of substantive equality and the equality analysis in this case, such that no Charter or constitutional rights or principles are engaged by the decision not to waive fees for impecunious applicants. There are thus two very different versions of equality that are advanced within the new post-*Kapp* paradigm, one of which would bring about a new commitment to substantive equality for the most disadvantaged in society, and the other of which would further their marginalization.

PART II - ISSUES TO BE ADDRESSED

8. The Respondent's defence of the constitutionality of the decision not to waive fees for impecunious H & C applicants is premised on three arguments:

i) that decisions about waiving H & C fees are discretionary and go to the core of governmental decision-making;

ii) that poverty is not an analogous ground of discrimination under section 15; and

iii) that charging for the costs of the H & C procedure does not perpetuate prejudice and stigma.

CCPI will address these three arguments in turn, focusing particular attention on the question of whether poverty is an analogous ground of discrimination.

9. In addition, the Respondent asserts that the constitutional principle of the rule of law and the right to access to justice more generally, cannot be applied to a federal administrative process, such as an inland H & C application, for persons living in poverty. In CCPI's submission, the rule of law and principles of access to justice are equally applicable to administrative procedures in which fundamental rights are at stake, including the inland H & C application procedure.

PART III - LAW AND ARGUMENT

A. The Application of the Charter to the Decision Not to Waive Fees

i. The Authority to Waive Fees

10. There is no debate as to the Respondent's statutory authority to waive fees for H & C Applications. Section 89 of the *IRPA* states that "regulations may govern fees for services provided in the administration of this Act, and cases in which fees may be waived by the Minister or otherwise." Section 10(1)(d) of the *Regulations* promulgated under the IRPA specify that applications (for H & C consideration) "*shall*…be accompanied by evidence of payment of the applicable fee" (emphasis added). No provision was made for fee waiver in the regulations despite the statutory authority to do so.[10]

11. The Respondent initially argued that in the absence of a regulation providing for fee waiver, the Minister has no discretion to waive fees.[11] If that were indeed the case, then the executive decision to adopt regulations requiring the payment of a fee but neglecting to provide for fee waiver for impecunious applicants would be the focus of *Charter* review in this case.[12]

12. However, it is now agreed that the Minister has in the past waived fees for victims of the 2004 Tsunami and the 2005 Pakistan earthquake. The Respondent now takes the position that s. 25 of the IRPA, which authorizes the Minister to grant a foreign national "an exemption from any applicable criteria or obligation of this Act" provides the

[10] *Immigration and Refugee Protection Regulations*, SOR/2002-227.
[11] Amended Statement of Defence dated February 19, 2007, paras 25-28, Gunther Record, at 66.
[12] "Section 32 of the *Charter* specifies the actors to whom the *Charter* will apply. They are the legislative, executive and administrative branches of government". *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 at para 34.

authority to waive fees for H & C applications. "Just as the Government occasionally decides to allow for temporary, discrete fee waivers, it has also made the decision not to allow a general and permanent waiver for impecunious people."[13] The Respondent argues that it is "open" to the government to make these types of discretionary decisions and that this "goes to the heart of government decision-making."[14]

13. The exercise of discretionary authority conferred by s. 25, however, must also be consistent with the *Charter*. If the Respondent is correct in locating a discretion to waive fees in the authority conferred on the Minister by s. 25, then the issue of *Charter* compliance in this case is analogous to that in *Eldridge*. There the Supreme Court found that the applicable statutes provided discretionary authority to accommodate the needs of the deaf in the provision of healthcare services. LaForest J. relied on the principle affirmed in *Slaight Communications* that legislation conferring discretion must, where possible, be interpreted as not allowing *Charter* rights to be infringed. Finding that the failure to provide sign language interpreters violated s. 15(1), LaForest, J. concluded that it was the exercise of discretion by a delegated authority, rather than the statute itself, which had violated the *Charter* by not providing sign language interpretation.[15]

14. By analogy, in the present case, CCPI submits that the IRPA must be interpreted as including a fee waiver for impecunious applicants to accompany any imposition of fees. The Ministerial discretion accorded in s. 25 must be exercised consistently with this constitutional requirement.

ii. The *Charter* Applies to Both Governmental Action and Failure to Act

15. Whether the decision not to waive fees in this case is conceived of as governmental action (imposing a fee on impecunious applicants for H & C) or as governmental inaction (failing to provide for fee waiver for impecunious applicants) the decision is equally subject to *Charter* review and remedy. The Supreme Court of Canada has emphasized that the distinction between government action and inaction is

[13] Respondent's Memorandum of Argument, October 22, 2008, para 25.
[14] *Ibid.*
[15] *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at para 29 [hereinafter *Eldridge*]

"very problematic" precisely because of the difficulty of categorization in cases such as this.[16] Further, s. 32 of the *Charter* is worded broadly so that the *Charter* will be engaged even if the government or legislature refuses to exercise its authority. "The application of the *Charter* is not restricted to situations where the government actively encroaches on rights."[17]

16. Nor does the fact that there may be resource implications to a requirement of a fee waiver affect the application of section 15 of the *Charter.* LaForest, J. addressed this issue for a unanimous court in *Eldridge*, responding to arguments from governments in that case that section 15 does not oblige governments to allocate resources to address disadvantage that exists independently of the impugned legislation or program.

> To argue that governments should be entitled to provide benefits to the general population without ensuring that disadvantaged members of society have the resources to take full advantage of those benefits bespeaks a thin and impoverished vision of s. 15(1). It is belied, more importantly, by the thrust of this Court's equality jurisprudence.
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> Section 15(1) makes no distinction between laws that impose unequal burdens and those that deny equal benefits. The government will be required (at least at the s. 15(1) stage of analysis) to take special measures to ensure that disadvantaged groups are able to benefit equally from government services. If there are policy reasons in favour of limiting the government's responsibility to ameliorate disadvantage in the provision of benefits and services, those policies are more appropriately considered in determining whether any violation of s. 15(1) is saved by s. 1 of the *Charter*.[18]

B. The Decision not to Waive Fees for Impecunious Applicants Violates s. 15

17. Under the two step framework for assessing s. 15 claims described by the Supreme Court in *Kapp*, the first stage of the inquiry is to ask whether the decision not to waive fees for impecunious applicants creates a distinction and if so, whether the

[16] *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para 53 [hereinafter *Vriend*]
[17] *Ibid.,* at para 60.
[18] *Eldridge, supra* n. 15 at para 87.

distinction is based on an enumerated or analogous ground. The second stage of the process is to ask whether the distinction is discriminatory.

i. Policy Creates a Distinction

a. Differential Effect and Appropriate Comparator

18. Central to the Court's approach in *Andrews* was the importance of addressing and eliminating inequality resulting, not from differential treatment found within a law or policy itself, but rather from the differential effect of law and policy because of circumstances of disadvantage:

> In simple terms, then, it may be said that a law which treats all identically and which provides equality of treatment between "A" and "B" might well cause inequality for "C", depending on differences in personal characteristics and situations. To approach the ideal of full equality before and under the law -- and in human affairs an approach is all that can be expected -- the main consideration must be the impact of the law on the individual or the group concerned.[19]

19. The important distinction in the present case is one of differential impact. The fee requirement which may be a reasonable expense for those who can afford it acts as a bar to H & C review for impecunious applicants, or forces them to sacrifice basic necessities to pay the fee.

20. The choice of comparator group in this case is analogous to other cases in which "same treatment" resulted in a differential effect. In *Eldridge*, the failure to provide interpreter services was found to create a distinction between those who needed interpreter services to communicate, the deaf, and those who did not, the hearing population.[20] In the N.A.P.E case, dealing with a decision not to honour a pay equity award, the Court held that the appropriate comparison was between women who required pay equity measures to achieve equal pay, and men who did not.[21] Similarly, the comparison in the present case is between those in poverty who need a fee waiver

[19] *Andrews, supra* n. 1 at para 26.
[20] *Eldridge*, *supra* n. 15 at para 80.
[21] *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 S.C.R. 381 at para 42 [hereinafter N.A.P.E.]

in order to have access to H & C Review, and those who are not in poverty who do not have the same need for a waiver.

21. The Respondent mischaracterizes the comparison that is the basis of the Applicants' section 15 claim: "The Applicants seem to be arguing that because humanitarian relief is, in limited situations and limited timeframes, extended to disaster victims and in relation to international crises, it must also be extended on a permanent basis to all impecunious foreign nationals who wish to become permanent residents of Canada through inland H&C applications."

22. A comparison between the claimant group in this case with those for whom fees have been waived would be analogous to what the Court identified in *Vriend* as a "formal" differential treatment comparison. In that case the formal comparison was between groups denied protection from discrimination (gays and lesbians) and groups such as racial minorities who were provided with protection from the discrimination under the Act. However, the Court found that the "substantive" comparison - "the more fundamental one"[22] – was between those who needed the benefit of the protection (gays and lesbians) and those who because of relative advantage did not need the protection - ie. heterosexuals. Similarly, in the present case, the "fundamental" comparison identifies the differential treatment between those who need a fee waiver because of poverty and those who do not need the waiver because they are more advantaged. .

b. Distinction Based on Enumerated or Analogous Grounds: Social Condition of Poverty and Receipt of Public Assistance

i. Factors for Finding Analogous Grounds

23. The analogous grounds inquiry must be undertaken in a purposive and contextual manner.[23] The "nature and situation of the individual or group at issue, and the social, political, and legal history of Canadian society's treatment of that group" must be considered; specifically, whether persons with the characteristics at issue are lacking

[22] *Vriend*, *supra* n. 16 at para 82.

[23] *Law* v. *Canada* (*Minister of Employment and Immigration*), [1999] 1 S.C.R. 497 at para 6 [hereinafter *Law*]; *Andrews, supra* n. 1 at 152.

in political power, disadvantaged, or vulnerable to becoming disadvantaged or having their interests overlooked.[24] As stated by Wilson J. in *Andrews*:

> this is a determination which is not to be made only in the context of the law which is subject to challenge but rather in the context of the place of the group in the entire social, political and legal fabric of our society. While legislatures must inevitably draw distinctions among the governed, such distinctions should not bring about or reinforce the disadvantage of certain groups and individuals by denying them the rights freely accorded to others. .... It can be anticipated that the discrete and insular minorities of tomorrow will include groups not recognized as such today. It is consistent with the constitutional status of s. 15 that it be interpreted with sufficient flexibility to ensure the "unremitting protection" of equality rights in the years to come".[25]

24. In *Andrews* the Court stated that equality principles developed in the interpretation of s. 15 would build on the body of legislation and jurisprudence from the human rights field.[26] Thus, recognition of a ground as analogous will be informed by whether that ground, or a similar ground, has been included in human rights legislation.[27]

25. Courts have developed a number of factors that may be considered in determining analogous grounds including "historical social, political and economic disadvantage", whether a proposed ground is a 'personal characteristic', whether the ground is similar to one of the enumerated grounds; whether legislatures and the courts have recognized that distinctions based on the ground under consideration are discriminatory, whether the group constitutes a discrete and insular minority, whether it has served as 'the basis of stereotypical attributes' and a proposed ground's 'similarity to other prohibited grounds of discrimination in human rights codes'.[28] An additional consideration is whether the personal characteristic at issue is 'immutable' or 'constructively immutable' – the latter meaning changeable only at unacceptable cost to

[24] *Law*, *supra* n. 23 at paras 519, 525, 554.
[25] *Andrews*, *supra* n. 1 at para 152.
[26] This principle was affirmed in *Eldridge, supra* n. 15 at para 63.
[27] *Andrews, supra* n.1, at para 38; *Egan* v. *Canada*, [1995] 2 S.C.R. 513 at para 176 [hereinafter *Egan*]; *Miron v. Trudel*, [1995] 2 S.C.R. 418 [Hereinafter *Miron*], at paras 148-9.
[28] *Miron, Ibid*., at para 149.

personal identity or, put differently, the government has no legitimate interest in expecting the individual to change.[29]

26. The Court has also noted that "embedded" analogous grounds such as pregnancy as a ground embedded in sex discrimination may be necessary to permit meaningful consideration of intra-group discrimination."[30] While any of these factors may signal an analogous ground, "the converse proposition – that any or all of them must be present to find an analogous ground – is invalid".[31] All factors must be considered in light of the primary question of whether recognizing a particular ground or characteristic as analogous would further the purpose of s. 15[32] namely, protection of substantive equality.[33]

ii. Judicial Consideration

27. The Supreme Court of Canada has not yet considered whether poverty or receipt of public assistance is an analogous ground of discrimination. However, it has certainly recognized that the poor are "one of the most disadvantaged groups in society"[34] and that when it comes to poverty-related barriers to the equal enjoyment of *Charter* rights, the poor, in the words of the Chief Justice, ought not to be treated as "constitutional castaways".[35]

28. The jurisprudence from lower courts is mixed on the question of poverty as an analogous ground. In CCPI's submission, the prevalent confusion can be resolved by distinguishing between low income or economic disadvantage *per se*, which some courts have rejected as analogous, and the "social condition" of poverty and reliance on public assistance, which is recognized, in various forms, in all provincial and territorial human rights legislation and has been recognized by courts, international

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[29] *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 [hereinafter *Corbiere*], at para 58.
[30] *Ibid*., para 15.
[31] *Miron v. Trudel*, [1995] 2 S.C.R. 418 [Hereinafter "*Miron*"], at para 149.
[32] Corbiere, *supra* n. 29 at 250; *Law*, *supra* n. 23 at 554; *Egan, supra* n. 27 at 599.
[33] *Kapp, supra* n. 7 at paras 14-16.
[34] *R.* v. *Prosper*, [1994] 3 S.C.R. 236 at p. 288, para. 71, per L'Heureux-Dubé J. (Dissenting but not on this point).
[35] *Ibid,* at 302, para 102 per McLachlin J. (as she then was).

human rights bodies, experts and legislators as an analogous ground of discrimination. The "social condition of poverty", as discussed below, captures the social dimension of stigma, stereotype and social exclusion linked to living in poverty or relying on public assistance, and includes the social relations that make poverty something that is not easily left behind. It is in this sense that courts have held that the state of being a poor person or being in receipt of social assistance constitutes an analogous ground for the purpose of s.15 of the *Charter* and have historically suffered disadvantage.[36]

29. The Nova Scotia Court of Appeal (*en banco*) found poverty to be an analogous ground of discrimination in the context of a s. 15 challenge to residential tenancies legislation that excluded tenants of public housing. Hallett J.A., writing for the Court, stated: "I find that the impugned provisions amount to discrimination on the basis of race, sex and income".[37] The Court went on to hold that the legislation was discriminatory on the basis of 'public housing tenancy', citing the fact that all the tenants had a low income "verging on or below poverty".[38] *Sparks* was subsequently applied by the Nova Scotia Supreme Court in *R*. v *Rehberg .* Considering the constitutionality of the "spouse in the house rule", Kelly J. stated: "I find in these circumstances, as was found in *Sparks*, that poverty is likely a personal characteristic of this group, and in this instance poverty is analogous to the listed grounds in s. 15."[39]

30. In 2002, the Ontario Court of Appeal drew upon both *Sparks* and *Rehberg* to conclude in *Falkiner* that "receipt of social assistance" is an analogous ground of discrimination.[40] In one of the most complete analyses to date of receipt of social assistance as an analogous ground, Laskin J.A. found that there was significant

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[36] *Federated Anti-Poverty Groups of B.C.* v. *British Columbia*, [1991] B.C.J. No. 3047 (B.C.S.C.) [hereinafter *Federated Anti-Poverty Groups of B.C.*]; *Falkiner* v. *Ontario (Ministry of Community and Social Services)*, (1996), 140 D.L.R. (4th) 115 (Ont. Div. Ct.) per Rosenberg J. (dissenting) at 130-139, 153; *Falkiner* v. *Ontario (Ministry of Community and Social Services),* (2000), 188 D.L.R. (4th) 52 (Div. Ct.); *Falkiner v. Ontario (Ministry of Community & Social Services)* (2002), 59 O.R. (3d) 481 (C.A.) [hereinafter *Falkiner*] *Schaff* v. *Canada*, [1993] T.C.J. No. 389 at para. 52; *Dartmouth/Halifax County Regional Housing Authority* v. *Sparks* (1993), 101 D.L.R. (4th) 224 (N.S.C.A.) [hereinafter *Sparks*]; *R.* v. *Rehberg* (1993), 111 D.L.R. (4th) 336 (N.S.S.C.) [hereinafter *Rehberg*].

[37] *Sparks,* Ibid, at pp 232-34, paras 26 & 27.

[38] *Ibid*., at para. 31

[39] *Rehberg, supra* n. 36 at p 361, para 83.

[40] *Falkiner, supra* n. 36 at paras 84-93. It is to be noted that the Court in *Falkiner* refused to follow an earlier Ontario ruling: *Masse* v. *Ontario* (*Ministry of Community and Social Services*), [1996] O.J. No. 363, at para 375.

evidence of historical disadvantage and continuing prejudice against social assistance recipients and that "recognizing receipt of social assistance as an analogous ground of discrimination under s. 15(1) would further the protection of human dignity."[41] Laskin J.A. also found that economic disadvantage is only one feature of the disadvantage experienced by those in receipt of social assistance[42], that it is not an easily mutable condition[43], that it is a protected ground in most provincial human rights statutes[44], and that intersecting disadvantage linked to receipt of public assistance and other grounds does not invalidate receipt of public assistance as an independent analogous ground.[45]

31. In *R. v. Clarke*,[46] Ferrier J. considered whether, in the context of jury selection, poverty and homelessness ought to be recognized as a potential ground of discriminatory attitudes among prospective jurors. Noting the findings of the Ontario Court of Appeal in *Falkiner*, and relying on the evidence of one of the expert affiants in the present case, Ferrier J. concluded:

> I have no difficulty on the evidence in concluding that there is widespread prejudice against the poor and the homeless in the widely applied characterization that the poor and homeless are dishonest and irresponsible and that they are responsible for their own plight. ... The evidence of Mr. Porter, which is not challenged, is that the prejudice against the poor and homeless is similar to racial prejudice.[47]

32. The Respondent relies on a number of cases in which courts have stated that poverty and economic disadvantage *on their own* are not analogous[48]; income, poverty, "begging", and economic status are not personal characteristics[49] that attach to the individual[50]; and that poverty is not an immutable condition.[51] However, none of

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[41] *Falkiner*, supra n. 36 at para 89.
[42] *Ibid.,* at para 90.
[43] *Ibid.,* at para 91.
[44] *Ibid.,* at para 92.
[45] *Ibid.,* at para 93.
[46] *R. v. Clarke*, [2003] O.J. No. 3883.
[47] *Ibid.,* at par 18.
[48] *Federated Anti-Poverty Groups of B.C. supra* n. 36 at paras 275-6; Also, obiter comments in *Falkiner*, supra n. 36.
[49] *R.* v. *Banks,* 2007 ONCA 19 at para 104, leave denied [2007] S.C.C.A. No. 139 [hereinafter *Banks*].
[50] *Thibaudeau* v. *Canada,* [1995] 2 S.C.R. 627 [Hereinafter *Thibaudeau*]; *Banks*, *Ibid,* at para 104; *Donovan v. Canada*, [2006] 1 C.T.C. 2041 (T.C.C.), at para 18 (the amount of a child support payment is a question of economic status which is not an immutable personal characteristic); *Dunmore* v. *Ontario (Attorney General)* (1997), 37 O.R. (3d) 287 (Gen. Div.); affd (1999), 182 D.L.R. (4th) 471 (Ont. C.A.);

these authorities provides a basis for rejecting a finding that the social condition of poverty and receipt of public assistance are analogous grounds.

33. In *R. v. Banks* the Court noted that "the appellants took care not to argue that "poverty" in and of itself is a ground of discrimination"[52]. Instead, they argued that 'poor beggars' define an analogous ground. Justice Juriansz's comments in *Banks* upon which the Respondents rely, were thus made in *obiter*. Similarly, Justice Laskin's comments in *Falkiner* distinguishing economic disadvantage or income level *per se* from what is protected under human rights legislation as "social condition" or "receipt of public assistance" does not contradict the Applicants' contention in this case that the social condition of poverty and receipt of public assistance are analogous grounds.

34. In *Federated Anti-Poverty Groups of B.C.* v. *Vancouver (City)*, upon which the Respondents also rely, "the issue ... [was] not poverty, rather it [was] whether the proscribed manner of conducting panhandling discriminates against those who do so."[53] The Court held that there was no analogous ground in this case on the basis that panhandling is a freely chosen activity, not an immutable personal characteristic. The ground put forward in the present case is not tied to any one specific activity.

35. In *Guzman* the Court was asked to find receipt of social assistance as an analogous ground under s. 15. Noel J. determined that it could not be considered an analogous ground based on the particular circumstances of the appellant, which he distinguished from the applicants in *Falkiner*.[54] Unlike the applicants in *Falkiner*, Ms. Guzman was not a single mother, and had been in receipt of social assistance for a short duration.

36. The applicants in the present case share the more "durable" characteristics of the social condition of poverty and reliance on public assistance as

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revd [2001] 3 S.C.R. 1016 (reversed on other grounds) (working in a particular economic sector, namely as an agricultural worker, is not a personal characteristic); *Bailey v. Canada* (2005), 248 D.L.R. (4th) 401 (F.C.A.), at para 12 (income level is not to be considered a personal characteristic).

[51] *Boulter v. Nova Scotia Power Inc.,* [2009] N.S.J. No. 64, at para 42; and *Guzman v. Canada (Minister of Citizenship and Immigration) (F.C.),* [2007] 3 F.C.R. 411 [Hereinafter *Guzman*], at para 19.

[52] *Banks*, *supra* n. 49 at para 104.

[53] *Federated Anti-Poverty Groups of B.C. supra* n. 36 at para 289.

[54] *Guzman, supra* n. 51, at para 21.

those in *Falkiner*. Due to a serious physical injury, the Gunthers' sole source of income for three years while in Canada was Ontario Disability Support (ODSP), which they received from 2003 until 2006, when they were deported.[55] Ms. Toussaint is a racialized woman with a disability and has subsisted in Canada since 1999 by undertaking a series of very low paying jobs, using food banks, and living with friends at no charge. She survived in dire poverty until she was able, with the assistance of a legal-aid lawyer, to receive social assistance. Ms. Krena is a racialized single mother. The primary source of income for several years for her and her children has been social assistance or earned income with a social assistance top-up. [56]

37. The Respondent additionally relies on a comment from the Supreme Court of Canada in *Thibaudeau* that in the context of the provisions of the *Income Tax Act* at issue in that case, income level could not attach to individuals.[57] In that case the Appellants argued that the status of 'separated or divorced custodial parent' is an analogous ground under s. 15. The Court did not consider whether receipt of public assistance or the social condition of poverty constitute analogous grounds.[58]

iii. The Social Condition of Poverty Satisfies Factors for Analogous Ground

38. In considering whether poverty ought to be recognized as an analogous ground of discrimination it is important to distinguish two different meanings of "poverty". The term may refer solely to a person's economic status or income level measured in quantitative terms against measures of adequacy or "poverty lines". However, poverty may also refer more broadly to the social relations and attitudes associated with inadequate income and resources in particular social contexts – to the social conditions that are inherent in being poor. It is poverty understood in this broader sense which is the subject of expert evidence in the present case, and is alleged as a ground of discrimination by the Applicants. The 'social condition of poverty' is recognized in

[55] Statement of Claim of Janos Robert Gunther et al. of July 28, 2005, at para 15.
[56] Affidavit of Chantal Krena sworn on September 6, 2008, at para 7.
[57] *Thibaudeau, supra* n. 50 at para 122.
[58] The fact that the social condition of poverty and the receipt of public assistance may be associated with households or family units does not, in CCPI's submission, act as a bar to its recognition as an analogous ground of discrimination. Courts have recognized the household and familial dimensions of other prohibited grounds of discrimination. See: *Benner v. Canada (Secretary of State),* [1997] 1 S.C.R. 358.

international law, in human rights legislation and in *Charter* jurisprudence as a ground of discrimination that is analogous to those enumerated under s.15.

International Human Rights Law

39. Under international human rights law poverty is understood broadly in both its social and economic dimensions. The Programme of Action of the World Summit for Social Development (1995) defined poverty as including not only lack of income and productive resources but also "social discrimination and exclusion" and "characterized by a lack of participation in decision-making and in civil, social and cultural life."[59]

40. The United Nations Committee on Economic, Social and Cultural Rights has defined poverty as a human condition characterized by sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights.[60] In a recent General Comment on non-discrimination the Committee lists a number of grounds of discrimination which are comparable to enumerated grounds. Along with grounds such as disability and sexual orientation the Committee lists "economic and social situation" noting that: "[a] person's social and economic situation when living in poverty or being homeless may result in pervasive discrimination, stigmatisation and negative stereotyping..." [61]

Domestic Human Rights Provisions

41. Currently, all provincial and territorial human rights statutes provide protection from discrimination because of either source of income (Alberta, British Columbia, Manitoba, Nova Scotia, Nunavut, and Prince Edward Island), receipt of public assistance (Ontario and Saskatchewan), social condition (New Brunswick, Northwest Territories, Quebec), or social origin (Newfoundland). These human rights provisions have been interpreted broadly to provide protection against discrimination on the basis

[59] Division for Social Policy and Development, *World Summit for Social Development Copenhagen 1995,* UN DESAOR, 1995, Chapter II, "Eradication of poverty", at para 19.
[60] U.N. Committee on Economic, Social and Cultural Rights, *Poverty and the International Covenant on Economic, Social and Cultural Rights,* U.N. Doc. E/C.12/2001/10, at para 8.
[61] U.N. Committee on Economic, Social and Cultural Rights, General Comment 20 "Non-Discrimination in Economic, Social and Cultural Rights" E/C.12/GC/20 (25 May 2009) at para 35.

of poverty or low level of income, even where the ground is identified as "source of income".[62]

42. The term "social condition" has been understood broadly under human rights law. In Quebec, the human rights tribunal has found that social condition includes objective and subjective elements. [63] "The objective component relates to a person's standing in society as determined by factors such as his or her occupation, income or education level, or family background. The subjective component is associated with perceptions, biases and stereotypes related to such characteristics."[64]

Prejudice, Stigma and Historical Disadvantage

43. The Record in the present case provides extensive evidence of widespread prejudice, stereotyping, scapegoating and exclusion of people living in poverty and/or relying on social assistance. This evidence has not been contested by the Respondent.

44. Subjective perceptions of persons living in poverty referred to in the case law are based largely on characteristics that are imputed to the members of the group with little or no evidence.[65] Prevalent stereotypes and prejudices include assumptions that poor people and people on social assistance are:

> Able-bodied men; whereas in fact the majority are women, children and persons with disabilities; Dishonest or irresponsible with money; whereas in fact recipients must budget strictly in order to survive on minimal incomes More apt to default on their rent payments; whereas in fact studies show no difference in default rates; Procreate at a higher than

[62] See, for example *Shelter Corporation et al. v. Ontario Human Rights Commission et al* (2001), 143 O.A.C. 54 [Hereinafter *Kearney*]; *Québec (Comm. des droits de la personne) v. Whittom* (1993), 20 C.H.R.R. D/349 (Qué. Trib), affirmed in (1997), 29 C.H.R.R. D/1 (Qué. C.A.)

[63] *Quebec (Commission des droits de la personne) v. Gauthier*, (1993), 19 C.H.R.R. D/312 (Que. Trib.) cited in Russel W. Zinn, *The Law of Human Rights in Canada: Practice and Procedure*, looseleaf (Aurora, Ont.: Canada Law Book, 1996) at 13:30, at pp 13-4.

[64] Hon. Justice Lynn Smith & William Black, "The Equality Rights" in Gerald-A. Beaudoin & Errol Mendes, eds., *Canadian Charter of Rights and Freedoms*, 4th ed. (Toronto: Butterworths, 2005) at 1010-1011.

[65] Affidavit of Bruce Porter, Record, 1192 -1230 at p 1207, para 26 [hereinafter, Bruce Porter Affidavit]; Sheilagh Turkington, "A Proposal to Amend the Ontario Human Rights Code: Recognizing Povertyism" (1993) 9 J.L. & Soc. Pol'y 134 at 141 [hereinafter S. Turkington].

> normal rate; Poor parents, lacking skills; Responsible for their own fate; Immigrants not "paying their own way".[66]

45. In *Falkiner*, the Ontario Court of Appeal found "significant evidence of historical disadvantage of and continuing prejudice against social assistance recipients, particularly sole-support mothers". The Court found that social assistance recipients face resentment and anger from others in society, who see them as freeloading and lazy, and that they are therefore subject to stigma leading to social exclusion."[67]

46. In 2000 the *Canadian Human Rights Act* was reviewed by a special panel chaired by former Supreme Court Justice Gérard Laforest at the request of the Minister of Justice. The panel was requested to consider, among other things, whether the ground "social condition" should be added to the *Act*. During the consultations, the panel "heard more about poverty than about any other single issue."[68] The research papers and submissions received provided "ample evidence of widespread discrimination based on characteristics related to social conditions, such as poverty, low education, homelessness and illiteracy.[69]

47. The Panel recommended the inclusion of "social condition" as a prohibited ground of discrimination in all areas covered by the *Act* in order to address widespread discrimination and prejudice against those living in poverty.

> Though "social condition" does not mean the same thing as poverty, for the purpose of our examination, we will take it to refer to identifiable classes of individuals in disadvantaged social and economic situations. This identification rests on the social and economic indicators of disadvantage these individuals share (the objective component), as well as the way they are perceived by others (the subjective component). The idea that a group can suffer because of the perceptions of others and can be defined by those perceptions is contrary to the concept of equality. This is how stereotypes work. [70]

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[66] Bruce Porter Affidavit, *Ibid,* 1192 at pp 1207, 1208, 1210 and 1211.
[67] *Falkiner, supra* n. 36 at para 86.
[68] Canadian Human Rights Act Review Panel, *Promoting Equality*: *A New Vision* (Ottawa: Department of Justice, 2000), at p 106.
[69] *Ibid*., at 107.
[70] *Ibid.,* at 110. Importantly, the Review Panel urged a definition of 'social condition' that would limit its scope to "disadvantaged groups".

Immutability

48. As Laskin, J.A. noted in *Falkiner*, "...immutability in the sense of a characteristic that cannot be changed – race is an example – is not a requirement for recognizing an analogous ground." Nevertheless, poverty understood in its social as well as economic dimension, should be understood as immutable. The *Canadian Human Rights Act* Review Panel, found:

> Research done for the Panel shows that poverty is immutable in the sense that it is beyond the control of most poor [people], at least over considerable periods of their lives. There is evidence that poverty is inherited because individuals whose parents were poor are more likely to live in poverty….Our research also shows that while people may move from social assistance to a low-paying job to employment insurance, few actually move into income levels high enough to escape their condition of poverty.[71]

49. Where grounds of discrimination intersect, or where there are multiple constraints both personal as well as structural, on an individual's capacities, poverty is likely to be more "durable." For instance, the combination of migration, race and sex will create conditions for more long term deprivations leading to immutability.[72] As noted by the Nova Scotia Court of Appeal in *Sparks,* the intersectionality of poverty with other grounds of discrimination, particularly for racialized single mothers, makes poverty a personal characteristic entirely analogous to other prohibited grounds of discrimination.

> Single mothers are now known to be the group in society most likely to experience poverty in the extreme. It is by virtue of being a single mother that this poverty is likely to affect the members of this group. This is no less a personal characteristic of such individuals than non-citizenship was in *Andrews*. To find otherwise would strain the interpretation of "personal characteristic" unduly.[73]

50. In CCPI's submission, poverty, understood broadly as a social and economic characteristic, ought to be recognized as an analogous ground of discrimination in this case. As Bill Black and Lynn Smith have summarized:

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[71] *Ibid*, at para 8.
[72] Affidavit of John Powell, Krena Record, pp 346-352 [hereinafter John Powell Affidavit].
[73] *Sparks, supra* n. 36 at p 10.

> Poverty would seem to meet most of the criteria for determining analogous grounds, and the additional factors incorporated within the ground of social condition strengthen this argument. By definition, poverty is associated with economic disadvantage, which in turn leads to social disadvantage. People living in poverty are subject to prejudice and stereotypes. For most, poverty is beyond the unilateral control of the individual and is at least as difficult to change as religion, citizenship or marital status. It is related statistically to enumerated grounds such as race and sex. While it almost never represents a fundamental choice in a person's life, it certainly is an important part of a person's life. In terms of residential and employment segregation and lack of educational opportunity, it has similarities to the conditions that gave rise to the phrase "discrete and insular minority." It is "inherited" in the sense that one's economic status and education level are statistically related to those of one's parents. Persons living in poverty lack their fair share of political influence, and programs related to poverty may be undervalued in the political process as compared with universal programs such as health.[74]

ii. The Distinction is Discriminatory

a. On the Grounds of the Social Condition of Poverty and Receipt of Public Assistance

51. In the second stage of the equality analysis, the Supreme Court has emphasized that the analysis should focus on the substantive equality purposes of section 15 and on whether the impugned distinction perpetuates disadvantage and stereotype. As Rothstein J. recently emphasized in *Ermineskin*, the analysis of whether a distinction is discriminatory must address "the broader context of a distinction in a substantive equality analysis."[75] Under s. 15(1), the focus is on *preventing* governments from making distinctions based on the enumerated or analogous grounds that have the effect of perpetuating group disadvantage and prejudice or imposing disadvantage on the basis of stereotyping.*."*[76] The four contextual factors identified in *Law* are to be applied as important indicators of discrimination rather than as a "legislative disposition."

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[74] Hon. Justice Lynn Smith & William Black, *supra,* at 1010-1011. See also: M. Jackman, "Constitutional Contact with the Disparities in the World: Poverty as a Prohibited Ground of Discrimination Under the Canadian Charter and Human Rights Law" (1994) 2 Review of Constitutional Studies 76 at 121. See also, S. Turkington, *supra* n. 65.

[75] *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9. at para 194

[76] *Kapp*, *supra* n. 7 at paras 23 - 25.

52. As the Supreme Court noted in *Andrews*, equality is "a comparative concept, the condition of which may only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises."[77] The analysis must consider not only the "particular legal distinction being challenged" but also look to "disadvantage that exists apart from and independent of [it]"[78] and to those characteristics of the group which "act as headwinds to the enjoyment of society's benefits."[79]

53. The Respondent argues that the requirement to pay fees cannot discriminate because "asking people to pay for part of the cost of the administrative services that they use, does not perpetuate prejudice or stereotyping." The assumption seems to be that because the fee requirement does not target the poor for adverse treatment based on stereotype, it must be found to be non-discriminatory under the new *Kapp* directive. This would be a perverse outcome of the Court's new direction in *Kapp*, however. It would essentially rule out a finding of discrimination in any cases of differential effect, forcing the narrowing of section 15 to direct facially discriminatory provisions based on stereotype and differential treatment. This is precisely the type of impoverished vision of equality which the Supreme Court seeks to reverse by returning to a substantive equality focus.

54. In the present case, the fee requirement has an exclusionary effect on a protected group because of pre-existing disadvantage and particular needs associated with the group. In cases like this, the consideration of whether the requirement perpetuates disadvantage and prejudice cannot be reduced to the question of whether the requirement itself is based on stereotype or prejudice. Rather, the policy must be considered in the broader social and historical context of the disadvantage and prejudice experienced by the group. The second contextual factor identified in *Law* is an important indicator of a violation of substantive equality: that is, whether the impugned provision or policy "takes into account the actual needs, capacity, or

[77] *Andrews*, *supra* n. 1 at 164; *Law*, *supra* n. 23 at paras 24, 56; *R. v. Turpin*, [1989] 1 S.C.R. 1296 at 1331-32.
[78] *R. v. Turpin*, *Ibid*.
[79] *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 at para 67, *per* Sopinka J.

circumstances of the claimant and others with similar traits in a manner that respects their value as human beings and members of Canadian society."[80]

55. The principle enunciated in *Andrews* and reaffirmed in *Law* remains critical to maintaining a focus on the substantive equality purposes of section 15 in the present case: "It will be easier to establish discrimination to the extent that impugned legislation fails to take into account a claimant's actual situation, and more difficult to establish discrimination to the extent that legislation properly accommodates the claimant's needs, capacities, and circumstances."[81] It is the failure of the Respondent's fee waiver policy to accommodate the needs, capacities and circumstances of impoverished applicants which grounds a finding of discrimination in the present case.

56. The evidence of prevalent prejudice and stereotypes experienced by poor people and those relying on social assistance in this case establishes that the refusal to waive fees for applicants living in poverty and relying on social assistance does, in fact, perpetuate and exacerbate patterns of historical disadvantage, prejudice and stereotype applied to these groups.

> To understand discriminatory attitudes toward the poor, it is necessary to put aside any of the traditional considerations linked with invidious motives and to consider the pattern of thinking that is involved..... One can only imagine that a minimum income requirement for an apartment which excludes anyone on social assistance or the charging of a fee which social assistance recipients and other poor people are unable to pay is "neutral" if one pretends that poor people do not exist. It is not that the effect of the policy on poor people is unknown or unpredictable. It is simply seen as somehow acceptable to exclude such applicants from housing. This idea of what is "acceptable" is itself based on a devaluing of poor people.[82]

57. It is also clear in the evidence that the refusal to waive fees for impoverished H & C applicants has many practical consequences which exacerbate pre-existing disadvantage and prejudice. Applicants living in poverty often have to sacrifice necessities such as adequate food, clothing and housing, to save the money necessary to pay the H & C fee, resulting in further marginalization. Others have to beg

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[80] *Law, supra* n. 23 at para 70
[81] *Ibid.*
[82] Affidavit of Bruce Porter, *supra* n. 65 at pp 1205, 1214.

for or borrow the necessary money to pay the fee, increasing the negative prejudices associated with the inability to "pay one's own way". The fee contributes to the social cycle of poverty. Those who cannot make an H & C application lack immigration status and are precluded from accessing social assistance and municipal assisted housing. These fundamental exclusions from the life of the community exacerbate stigma and discrimination.[83]

58. In addition, the interest at stake in accessing H & C review is also critical to a consideration of the discriminatory impact of this exclusion. One can hardly imagine a denial or deprivation of the benefit of law which so directly impacts "a basic aspect of full membership in Canadian society" and being valued as an equal member of society, than a refusal of access to humanitarian and compassionate consideration of one's particular plight, of the best interests of children, of personal and economic security and of the application of fundamental human rights and Charter values to particular circumstances.[84]

59. H & C review often functions as a remedy of last resort for those in the most desperate circumstances. In *Guzman*, where the Court found that a disqualification of those relying on social assistance for sponsorship was not discriminatory, the Court relied on the fact that social assistance recipients may have the sponsorship bar waived for humanitarian and compassionate reasons where it creates particular hardship.[85]

b. Discriminatory on the Basis of Sex, Disability, Race and Marital/Family Status

60. It is well known, and amply demonstrated in the Record, that there is a strong statistical correlation between poverty/receipt of public assistance with other prohibited grounds of discrimination, including, in this case, race, sex, marital/family

[83] *Ibid.,* at pp 1192-1230; Affidavit of Josephine Grey, Record, pp 1110-1116 [hereinafter Affidavit of Josephine Grey]; Affidavit of Ernie Lightman, Record, pp 1138-1191 [hereinafter Affidavit of Ernie Lightman]; Affidavit of John Powell, *supra* n. 72 . Affidavit of Geraldine Sadoway, Record, pp 1081-1095; LIFT Report, *supra* n. 2 at p 2.
[84] *Law*, supra n. 23 at para 74; *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras 67 - 70.
[85] *Guzman*, *supra* n. 51, at paras 40, 45.

status and disability. There are also critical intersections between negative stereotypes of poor people and negative stereotypes about these and other groups which are over-represented among the poor.[86]

61. Racialized groups, for example, face a higher incidence of poverty and greater stigmatization related to their poverty; they are also likely to experience a greater depth and duration of poverty.[87] These same patterns hold true of people with disabilities, single mothers and women. All of these groups are more likely to be excluded from H & C application fees, suffer more severe consequences from being denied access to the procedure, and face greater hardship paying the fees.[88]

62. Because of these well recognized intersections of poverty with other grounds of discrimination, policies which exclude or impose burdens on low income people have been found under human rights legislation to constitute adverse effects discrimination on grounds such as sex, race, age and marital/family status.[89] The same result may obtain in the present case, under s. 15.

63. Adverse effects discrimination, first recognized by the Supreme Court of Canada in the context of human rights legislation, has been incorporated into the court's substantive equality approach under s. 15.[90] As Laskin, J.A. noted in *Falkiner,* a facially neutral provision may still give rise to differential treatment on the basis of sex if the provision has a disproportionate adverse or negative effect on women. A disproportionate adverse effect is itself a form of differential treatment. [91]

64. While CCPI believes that it is important in the context of the present case to recognize the social condition of poverty and receipt of public assistance as

[86] Affidavit of Bruce Porter, *supra* n.65; Affidavit of John Powell, *supra* n. 72.
[87] Affidavit of John Powell, *supra* n. 72; Affidavit of Ernie Lightman, *supra* n. 83; Affidavit of Bruce Porter, *supra* n. 65.
[88] See: Affidavit of Bruce Porter, *supra* n.65; John Powell, *supra* n. 72; Josephine Grey, *supra* n. 83; and Geraldine Sadoway, *supra* n. 87. See also LIFT report, *supra* n. 2.
[89] *Québec (Comm. des droits de la personne) v. Whittom* (1993), 20 C.H.R.R. D/349 (Qué. Trib), affirmed in (1997), 29 C.H.R.R. D/1 (Qué. C.A.); *Shelter Corporation et al. v. Ontario Human Rights Commission et al* (2001), 143 O.A.C. 54; *Sinclair v. Morris A. Hunter Investments Ltd.* (2001), 41 C.H.R.R. D/98 (Ont. Bd.Inq.); *Ahmed v. 177061 Canada Ltd.* (2002), 43 C.H.R.R. D/379 (Ont. Bd.Inq.).
[90] Andrews, *supra* n. 1.
[91] *Falkiner*, *supra* n.36 at para 77.

analogous grounds and to find discrimination on these two grounds, it is also important to recognize, as human rights tribunals and courts have done, the intersectionality of poverty with race, disability, sex and marital/family status.[92] CCPI therefore submits that the failure to waive fees for H & C Applications for impecunious applicants constitutes adverse effect discrimination against the applicants on the basis, where applicable, of, race, sex, disability and marital status.

C. Not Saved By Section One

65. The Respondent has offered no evidence or argument to justify the failure to waive fees for H & C review under section one of the *Charter*. The cost of a fee waiver for impecunious applicants has not been calculated or even estimated. Budgetary considerations in and of themselves cannot normally be invoked as a free-standing pressing and substantial objective for the purposes of s. 1 of the *Charter*".[93]

66. Under human rights legislation, accommodating circumstances of persons in receipt of public assistance is subject to a rigorous standard of "undue hardship". This standard has been generally incorporated into section one in section 15 claims.[94] The Respondent has provided no evidence that the financial implications of a fee waiver for impecunious applicants for H & C Review would approach the standard of undue hardship.

D. The Decision not to Waive Fees for Impecunious Applicants is Inconsistent with the Rule of Law

67. The Rule of Law is an unwritten constitutional principle that reflects Canada's "commitment to an orderly and civil society in which all are bound by the enduring rules, principles, and values of our Constitution as the supreme source of law and authority."[95] It has three essential elements: the law is supreme over government officials as well as private individuals; the relationship between the state and the

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[92] *Kearney*, *supra* n. 62.
[93] *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54 at (para. 109; N.A.P.E., supra, at para. 72.
[94] *Eldridge*, *supra*, at para 94.
[95] *Lalonde v. Ontario (Commission de restructuration des services de santé)* 2001 (ON C.A.), (2001), 56 O.R. (3d) 505 (C.A.) at 547.

individual is governed by law; and the "creation and maintenance of a positive legal order is the normative basis for civil society"[96].

68. Unwritten constitutional principles have normative force. They give rise to legal rights which may impose substantive obligations on government and provide a basis to invalidate legislation. Even where the express written text of the Constitution does not itself create an enforceable right, these unwritten constitutional values must be considered in determining the legality of government action. [97]

69. In *Polewsky v. Home Hardware*[98] the Divisional Court found that the failure to waive Small Claims Court fees for indigent individuals violated both the common law right of access to courts *in forma pauperis* and the constitutional principle of the rule of law. In support of applying the constitutional principle of the rule of law, the Court cited Dickson, C.J. on the centrality of access to courts in relation to the integrity of the *Charter*.

> Of what value are the rights and freedoms guaranteed by the Charter if a person is denied or delayed access to a court of competent jurisdiction in order to vindicate them? How can the courts independently maintain the rule of law and effectively discharge the duties imposed by the Charter if court access is hindered, impeded or denied? The Charter protections would become merely illusory, the entire Charter undermined.[99]

In an era where Charter rights are increasingly considered in administrative procedures, it makes no sense to exclude administrative processes and tribunals from the application of the rule of law. These actors are entrusted with adjudicating fundamental rights and with complying with the Charter. As noted by Lorne Sossin:

> The rule of law is no less significant in an administrative hearing room or decision-making process than a courtroom, and arguably, as I discuss below, it may be more so. For the community at large generally and for vulnerable communities specifically, it is far more likely that a person's

[96] *Ibid.*
[97] Secession, supra at 249 , Lalonde, supra at 549-551, 563.
[98] *Polewsky v. Home Hardware Stores Ltd*. (2003), 229 D.L.R. (4th) 308.
[99] B.C.G.E.U., Re, [1988] 2 S.C.R. 214 (S.C.C.) at 228.

> rights and important interests will be at stake in an administrative proceeding than a judicial one.
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> …. Access to justice is no less imperative in tribunals than courts. Unlike judicial independence, which is an unwritten constitutional principle applying uniquely to courts, access to justice likely has broader application to all adjudicative proceeding in which rights and interests are at stake, and especially to those with jurisdiction over the *Charter*.[100]

70. The right to effective remedies is also a principle of international human rights law, and a component of the international rule of law. The Universal Declaration of Human Rights affirms that "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." [101]

71. The Canadian government has consistently argued before international human rights bodies that petitioners must, where applicable, apply for H & C Review in order to fulfill the requirement of exhaustion of domestic remedies.[102] Under international law, an effective administrative remedy domestically must be accessible to disadvantaged groups, including the poor.[103]

PART IV - ORDER SOUGHT

72. CCPI requests that the order sought by the Applicants be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: June 1, 2009

Raj Anand
Counsel for the Intervener,
Charter Committee on Poverty Issues

[100] Lorne Sossin, "Access to Administrative Justice and Other Worries," in Sossin, Lorne and Flood, Colleen, eds. *Administrative Law in Context* (Toronto: Edmond Montgomery Press, 2008), Chapter 15.
[101] Universal Declaration of Human Rights, GA Res. 217 (III), UN GAOR, 3d. Sess. Supp. No. 13, UN Doc. A/810 (1948) 71, Art. 2, 8
[102] See, for example, UN Committee Against Torture, Communication, B.S. v. Canada, CAT/C/27/D/166/2000, UN Committee Against Torture (CAT), 14 November 2001, at para 4.1 available at: http://www.unhcr.org/refworld/docid/3f588ec60.html; and UN Committee Against Torture, Communication No. 273/2005: Canada. 22/05/2006, T.A. v. Canada, UN Doc. CAT/C/36/D/273/2005 at para 4.4
[103] See for example, UN Committee on Economic, Social and Cultural Rights *General Comment No. 9 : The domestic application of the Covenant*. E/C.12/1998/24 at para 9.

PART V - AUTHORITIES

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2. *Andrews v. Law Society of B.C.*, [1989] 1 S.C.R. 143
3. *B.C.G.E.U., Re.*, [1988] 2 S.C.R. 214 (S.C.C.)
4. *Bailey v. Canada* (2005), 248 D.L.R. (4th) 401 (F.C.A.)
5. *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817
6. *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358
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9. *Dartmouth/Halifax County Regional Housing Authority v. Sparks* (1993), 101 D.L.R. (4th) 224 (N.S.C.A.)
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11. *Dunmore v. Ontario (Attorney General)* (1997), 37 O.R. (3d) 287 (Gen. Div.) (affd. (1999), 182 D.L.R. (4th) 471 (Ont. C.A.)) (revd [2001] 3 S.C.R. 1016)
12. *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241
13. *Egan v. Canada*, [1995] 2 S.C.R. 513
14. *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624
15. *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9
16. *Falkiner v. Ontario (Ministry of Community and Social Services)* (1996), 140 D.L.R. (4th) 115 (Ont. Div. Ct.) (Rosenberg, J.)
17. *Falkiner v. Ontario (Ministry of Community and Social Services)* (2000), 188 D.L.R. (4th) 52 (Div. Ct.)
18. *Falkiner v. Ontario (Ministry of Community and Social Services)* (2002), 59 O.R. (3d) 481 (C.A.)
19. *Federated Anti-Poverty Groups of B.C. v. British Columbia*, [1991] B.C.J. No. 3047 (B.C.S.C.)

20. *Guzman v. Canada (Minister of Citizenship and Immigration) (F.C.)*, [2007] 3 F.C.R. 411

21. *Harris v. Canada (Minister of Human Resources and Skills Development)* [2009] F.C.J. No. 70

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