File Number: _____

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN

NELL TOUSSAINT

Applicant
Appellant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent
Respondent

APPLICATION FOR LEAVE TO APPEAL
FILED BY NELL TOUSSAINT, APPLICANT
based on sections 40(1) and 43(1) of the Act and rule 25(1) of the Rules

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Andrew C. Dekany
Barrister & Solicitor
1724 Queen Street West
Toronto, Ontario M6R 1B3
telephone: 416.888.8877
fax: 416.532.7777
e-mail: andrew@dekany.ca
solicitor for Nell Toussaint, applicant

Gowling Lafleur Henderson LLP
Barristers and Solicitors
2600 - 160 Elgin Street
Ottawa, Ontario K1P 1C3
telephone: 613.786.0212
fax: 613.563.9869
e-mail: Ed.VanBemmel@gowlings.com
agent for Nell Toussaint, applicant

Myles J. Kirvan
Deputy Attorney General of Canada
Per: Martin Anderson
Department of Justice
Ontario Regional Office
The Exchange Tower
130 King Street West
Suite 3400, Box 36
Toronto, Ontario M5X 1K6
telephone: 416.952.2856
fax: 416.954.8982
solicitor for Minister of Citizenship and Immigration, respondent

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IN THE SUPREME COURT OF CANADA
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BETWEEN

NELL TOUSSAINT

Applicant
Appellant

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MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent
Respondent

Notice of Application for Leave to Appeal

TAKE NOTICE that Nell Toussaint hereby applies for leave to appeal to the Court, pursuant to sections 40(1) and 43(1) of the *Supreme Court Act* and rule 25(1) of the Rules of the Supreme Court of Canada from the judgment of the Federal Court of Appeal in file numbered A-408-09 made on April 29, 2011, and for an order:

Setting aside paragraph 2(2) of the aforesaid judgment in which the Court answers "no" to the following questions:

> (2) Has the failure of the Governor in Council to enact regulations permitting the waiver of fees for foreign nationals living in poverty who wish to make an in-Canada application for permanent resident status pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act* infringed:
>
> (a) the rights of the appellants under section 7 or 15 of the *Canadian Charter of Rights and Freedoms*, or

(b) the rule of law or the common law constitutional right of access to the courts?

and in its place declaring that the absence of a provision in the *Immigration and Refugee Protection Act* or the Immigration and Refugee Protection Regulations entitling indigent foreign nationals living in poverty who wish to make an in-Canada application for permanent resident status pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, to a waiver of fees they cannot pay without undue hardship infringes

(a) the rule of law or constitutional right of access to justice, and

(b) the rights of the appellant under sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*,

or any further or other order that the Court may deem appropriate;

AND FURTHER TAKE NOTICE that this application for leave is made on the following grounds:

1. This application involves an important public question concerning the constitutional right of governments to effectively bar indigent members of the population from access to statutorily mandated exercises of discretion to which the balance of the population has access, through the means of establishing fees as a pre-condition of such access at levels that indigents cannot pay without undue hardship. Specifically, it involves the right of indigent foreign nationals living in Canada in poverty to apply to the Minister of Citizenship and Immigration for permanent residence on humanitarian and compassionate grounds even though they are unable to pay what for them are substantial application fees.

2. The constitutional issues were thoroughly argued before and dealt with by the Federal Court and by the Federal Court of Appeal, and ought to be decided by the Supreme Court.

3. The applicant is a public interest litigant who seeks to have these issues resolved as matters of consequence to the community as a whole.

4. There exists an appropriate record on which to determine these constitutional issues.

Dated at Toronto, Ontario this 26th day of June, 2011.

SIGNED BY

Andrew C. Dekany
Barrister and Solicitor
1724 Queen Street West
Toronto, Ontario M6R 1B3
telephone: 416.888.8877
fax: 416.532.7777
e-mail: andrew@dekany.ca
solicitor for Nell Toussaint, applicant

Gowling Lafleur Henderson LLP
Barristers and Solicitors
2600 - 160 Elgin Street
Ottawa, Ontario K1P 1C3
telephone: 613.786.0212
fax: 613.563.9869
e-mail: Ed.VanBemmel@gowlings.com
agent for Nell Toussaint, applicant

ORIGINAL TO: THE REGISTRAR

COPIES TO: Myles J. Kirvan
Deputy Attorney General of Canada
Per: Martin Anderson
Department of Justice
Ontario Regional Office
The Exchange Tower
130 King Street West
Suite 3400, Box 36
Toronto, Ontario M5X 1K6
telephone: 416.952.2856
fax: 416.954.8982

solicitor for Minister of Citizenship and Immigration, respondent

WeirFoulds LLP
Barristers and Solicitors
The Exchange Tower
130 King Street West
Suite 1600
Toronto, Ontario M5X 1J5
att.: Raj Anand
telephone: 416.947.5091
fax: 416.365.1876
e-mail: RANAND@weirfoulds.com

counsel for the intervener in the Federal Court of Appeal,
Charter Committee on Poverty Issues

NOTICE TO THE RESPONDENT: A respondent may serve and file a memorandum in response to this application for leave to appeal within 30 days after service of the application. If no response is filed within that time, the Registrar will submit this application for leave to appeal to the Court for consideration pursuant to section 43 of the *Supreme Court Act*.

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IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN

NELL TOUSSAINT

Applicant
Appellant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent
Respondent

I, Andrew C. Dekany, counsel for Nell Toussaint, the applicant, hereby certify that

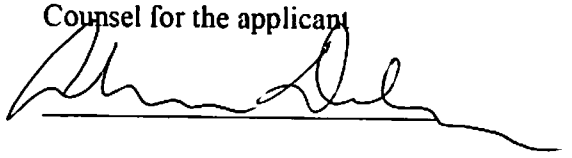
(a) there is no sealing or confidentiality order in effect in the file from a lower court or this Court and no document filed includes information that is subject to a sealing or confidentiality order or that is classified as confidential by legislation;

(b) there is not, pursuant to any order or legislation, a ban on the publication of evidence or the names or identity of a party or witness and no document filed includes information that is subject to any such ban; and

(c) there is not, pursuant to any legislation, information that is subject to limitations on public access and no document filed includes information that is subject to any such limitations;

Dated at Toronto, Ontario this 26th day of June, 2011.

Counsel for the applicant



ORIGINAL TO: THE REGISTRAR

COPY TO: Myles J. Kirvan
Deputy Attorney General of Canada
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Ontario Regional Office
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130 King Street West
Suite 3400, Box 36
Toronto, Ontario M5X 1K6
telephone: 416.952.2856
fax: 416.954.8982

solicitor for Minister of Citizenship
and Immigration, respondent

Federal Court Cour fédérale

Date: 20090904

Docket: IMM-326-09

Citation: 2009 FC 873

Ottawa, Ontario, September 4, 2009

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

NELL TOUSSAINT

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

and

LOW INCOME FAMILIES TOGETHER and CHARTER COMMITTEE ON POVERTY ISSUES

Interveners

FEDERAL COURT CANADA COUR FÉDÉRALE

REASONS FOR JUDGMENT AND JUDGMENT

I. Background

[1] The Applicant, Ms. Nell Toussaint, a citizen of Grenada, came to Canada in December 1999 as a visitor. Her visitor status expired within 6 months of entering Canada and she has been without status since that time. She does not want to return to Grenada. The Applicant would like to apply to the Minister of Citizenship and Immigration (the Minister or the Respondent), pursuant to s. 25(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (*IRPA*), for an exemption from certain requirements of *IRPA* on the basis of humanitarian and compassionate (H&C)

considerations. Specifically, she wants: (a) to be exempted from the requirement in s. 11 of *IRPA* that she must apply for permanent residence status before entering Canada; and, (b) to be granted permanent residence from within Canada on H&C grounds. The fee required to process her in-Canada H&C application is $550, which, the Applicant claims, she cannot afford.

[2] Under cover of letter dated September 12, 2008, a Certified Canadian Immigration Consultant, acting on behalf of the Applicant, forwarded an H&C application to the Minister. The cover letter contained the following request:

> On behalf of my client Ms. Nell Toussaint I am hereby making a request under section 25(1) of the Immigration and Refugee Protection Act for her to be exempted from the requirement under sections 307 and 10(1)(d) of the Immigration and Refugee Protection Regulations to pay the $550 fee for the processing of her application for permanent residency based on humanitarian and compassionate considerations (H&C) ...
>
> The basis of Ms. Toussaint's request for this fee exemption is set out in her affidavit, which is attached. As you can see, she is indigent and unable to afford to pay the fee.

[3] In a letter dated January 12, 2009, the Administrative Officer, Case Management Branch of Citizenship and Immigration Canada (CIC) returned the application without processing for the following reasons:

> Paragraph 10(1)(d) of the Immigration and Refugee Protection Regulations requires all applicants to include evidence of payment of the applicable fee. Your request for an exemption from the fees is contrary to this legislative requirement. If you wish to apply for permanent residence in Canada your application must be accompanied by the required fee.

[4] The Applicant seeks judicial review of this decision. In addition to a request that the decision of the Administrative Officer be quashed, the other key remedies sought may be stated as follows:

- An order that the Minister examine the Applicant's circumstances to determine whether an exemption from s. 11 of the *IRPA* is justified on H&C grounds, without the payment of any fee;

- A declaration that ss. 307, 10(1)(d) and 66 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (*IRP Regulations* or the *Regulations*), which require the payment of a fee as a condition of accessing the procedure under s.25(1) of *IRPA* is *ultra vires* in that it fetters the Minister's discretion under s. 25(1) of *IRPA*; and

- A declaration that ss. 307 and 10(1)(d) are inoperative or invalid as being contrary to s. 15(1) and s. 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (*Charter*), contrary to s. 1(b) of the *Canadian Bill of Rights* S.C. 1960, c. 44. (*Canadian Bill of Rights* or *Bill of Rights*), and contrary to the Rule of Law and the "constitutional norm of equality";

[5] By Order of Prothonotary Aalto, two organizations - the Charter Committee on Poverty Issues (CCPI) and Low Income Families Together (LIFT) – were granted intervener status in this application for judicial review.

II. Issues

[6] This application raises the following issues:

1. What is the applicable standard of review of the Minister's decision not to consider waiving the Applicant's in-Canada application fee?

2. On a proper statutory interpretation of the relevant provisions of *IRPA*, does s. 25 of *IRPA* require the Minister to consider a request to waive the fee for an in-Canada s. 25 application?

3. Are the provisions of *IRPA* or the *IRP Regulations* that purport to prevent foreign nationals, who are indigent or on social assistance, from seeking a waiver of fees for services under *IRPA*, invalid or inoperative on the basis of:

   a) s. 7 of the *Charter*; or

   b) s. 15 of the *Charter*.

4. Is the failure of the government to provide for the waiver of fees contrary to the rule of law and the common law constitutional right of access to the Courts.

[7] In her written submissions, the Applicant raised, as an issue, the possible application of certain provisions of the *Canadian Bill of Rights* to the facts. Since the Applicant did not address this argument during oral submissions, I have not considered the possible application of the *Bill of Rights*. Nevertheless, I would comment that the portion of the reasons and my conclusions relating to s. 7 of the *Charter* would also apply to any *Bill of Rights* argument advanced by the Applicant.

[8] Lastly, the Intervener LIFT focuses its issues specifically on the impact that a failure to waive fees has on the best interests of children directly affected. The Applicant has no children. Accordingly, the issue of the best interests of the child, as raised by LIFT, is not relevant to the consideration of this judicial review and any conclusions that I reach would not be determinative. This issue was, however, relevant to the situation facing two families whose applications for judicial review were heard together with this matter (*Krena v. Canada (Minister of Citizenship and Immigration)* (Court File No. IMM-2926-08) and *Gunther v. Canada (Minister of Citizenship and Immigration)* (Court File No. IMM-3045-08)). Because of the particular circumstances of each of these files, the matters were dismissed on the basis of mootness or lack of standing. Given the importance of having a proper factual foundation before the Court upon which to make important *Charter* determinations, I will not deal extensively with LIFT's arguments in these Reasons for Judgment.

III. Legislative Framework

[9] I begin by stating that: "The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country" (*Canada (Minister of Employment and Immigration) v. Chiarelli* [1992] 1 S.C.R. 711, 90 D.L.R. (4th) 289 at para. 24). Thus, Parliament has established a scheme for immigration in which all applications for permanent residence in Canada must be made from outside Canada (*IRPA*, s. 11(1)). However, s. 25(1) of *IRPA* gives the Minister the discretion to exempt persons from that requirement on the basis of H&C considerations. Section 66 of the *IRP Regulations* provides that such an application be made in writing accompanied by an application to remain in Canada as a permanent resident.

[10] Section 89 of the *IRPA* allows for the making of regulations that govern fees for services provided in the administration of *IRPA* and the cases in which fees may be waived by the Minister.

[11] Section 307 of the *IRP Regulations* sets out the fees payable for in-Canada H&C applications. A principal applicant pays $550, a spouse or an applicant 22 years of age or older also pays $550, and a family member who is less than 22 years of age pays $150.

[12] Section 10(1)(d) of the *IRP Regulations* states that an application may not be processed unless the applicable processing fee is paid.

[13] The full text of these relevant provisions is set out in Appendix A to these reasons.

IV. Issue #1: What is the applicable standard of review?

[14] Given the nature of the issues raised, the Minister's decision is reviewable on the standard of correctness. In other words, was the Minister correct in his conclusion that an exemption from the fees is contrary to s. 10(1)(d) of the *IRP Regulations*?

V. Issue #2: Does s. 25 of *IRPA* require the Minister to consider a request to waive the fee for an in-Canada s. 25 application?

A. *Position of the Applicant and Interveners*

[15] On the issue of the proper statutory interpretation of s. 25, the position of the Applicant and the Interveners is simple. They submit that s. 25 provides that the Minister "shall", upon request of a foreign national in Canada, examine the circumstances and may grant an exemption from "any obligation of this Act". They argue that, since the Applicant is a foreign national in Canada and since she has requested an exemption from the requirement to pay an application fee (an obligation under the Act), the Minister must consider the waiver request on H&C grounds. This broadly stated statutory obligation of the Minister cannot be fettered, they assert, by regulation. Accordingly, their position is that ss. 307, 10(1)(d) and 66 of the *IRP Regulations*, which require the payment of a fee as a condition of accessing the procedure under s.25(1) of *IRPA*, are *ultra vires*.

B. *Principles of Statutory Interpretation*

[16] Since the first issue before me is one of statutory interpretation, it is useful to begin with an overview of the principles related to such matters. On a number of occasions, the Supreme Court of Canada has given guidance on how to approach a problem of statutory interpretation. In *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at paragraph 21, Mr. Justice Iacobucci, speaking for the unanimous Court, endorsed the statement of Elmer Driedger in *Driedger on the Construction of Statutes*, 2nd ed. (Toronto: Butterworths Canada Ltd., 1983) that:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[17] Accordingly, the task of the Court in interpreting legislation cannot be restricted to analysing the plain meaning of the provision in question. Further, while the statutory words must be given a "fair, large and liberal construction and interpretation as best ensures the attainment of its objectives" (*Interpretation Act*, R.S.C. 1985, c. I-21, s. 12), attention must be directed to the scheme and objective of the statute, the intention of the legislature, and the context of the words in issue (*Rizzo*, above, at para. 23). Regardless of how clear and unambiguous the words of a provision may be, further analysis must be carried out. Indeed, a failure to determine the intention of the legislature in enacting a particular provision has been found to be an error (*Rizzo*, above, at paras. 23, 31). It follows that, where there are conflicting but not unreasonable interpretations available, the contextual framework of the legislation becomes even more important.

[18] In short, my task cannot be limited to interpreting the individual words or phrases used in s. 25; rather, I must have regard to the context in which the words are placed, the objects of *IRPA* and the intention of Parliament.

[19] In considering the context of *IRPA*, the nature or architecture of the statutory scheme is important. In *De Guzman v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436, [2006] 3 F.C.R. 655 at paragraph 23, the Court of Appeal described *IRPA* as "framework legislation":

> That is to say, the Act contains the core principles and policies of the statutory scheme and, in view of the complexity and breadth of the subject-matter, is relatively concise. The creation of secondary policies and principles, the implementation of core policy and principles, including exemptions, and the elaboration of crucial operational detail, are left to regulations, which can be amended comparatively quickly in response to new problems and other developments. Framework legislation thus contemplates broad delegations of legislative power.

[20] In *De Guzman* (at paragraph 26), the Court also commented that if there is a conflict between the express language of an enabling clause and a regulation purportedly made under it, the regulation may be found to be invalid. Otherwise, courts approach with great caution the review of regulations promulgated by the Governor (or Lieutenant-Governor) in Council.

C. *Analysis*

[21] I begin by acknowledging that a bare reading of the words of s. 25 without reference to any other provision of *IRPA* may support the interpretation preferred by the Applicant and the Interveners. The "grammatical and ordinary sense" of the words identified within s. 25 by the Applicant and Interveners could be interpreted to mandate the Minister to consider the Applicant's request for a fee waiver. However, as taught by the jurisprudence, the question before me cannot be answered without consideration of the words of s. 25 within the entire context of *IRPA*.

[22] In the case before me, the Applicant is in breach of the obligation of s. 11 of *IRPA* that she must have a visa before entering Canada. Thus, she clearly does not meet a requirement of *IRPA* and s. 25(1) is available to her. Pursuant to s. 25(1), upon request, the Minister must consider whether to exempt the Applicant from the s. 11 obligation. In other words, if the Applicant applies, the Minister is obliged to consider whether to exempt her from the requirement or inadmissibility criterion that prevents her from gaining permanent residence in Canada. The question before me is whether the Minister must also consider the Applicant's request that the application fee be waived.

[23] There is no question that "Section 25 itself is very broad and covers much more than requests for an exemption to apply for a permanent visa from within Canada" (*Monemi v. Canada (Solicitor General)*, 2004 FC 1648, 266 F.T.R. 31 at para. 37). I agree. Section 25(1) is available to foreign nationals in Canada and those who are outside Canada (albeit on slightly different terms). The Minister may, on his own initiative, examine the circumstances concerning a foreign national and exempt such person from obligations of *IRPA* or the *Regulations*. In addition to H&C

considerations, taking into account the best interests of a child directly affected, the Minister may take public policy considerations into account.

[24] A review of recent jurisprudence of this Court or the Court of Appeal shows that applications under s. 25(1) have been used to seek exemptions of the following:

- the obligation of ss. 117(9)(d) of the *IRP Regulations*, that dependents be declared by the foreign national at the time of a grant of a permanent resident visa (*Kisana v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189, [2009] F.C.J. No. 713 (QL));

- the application of s. 35(1)(a) of *IRPA* that makes a foreign national inadmissible on grounds of committing a crime against humanity (see, for example, *Varela v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 145, [2009] F.C.J. No. 549 (QL));

- medical inadmissibility (see, for example, *Kim v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1357, 51 Imm. L.R. (3d) 262);

- the criteria to be met for a permanent resident visa from outside Canada (see, for example, *Nalbandian v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1128, 309 F.T.R. 1); and

- inadmissibility due to criminality under s. 35 of *IRPA* (see, for example *Keymanash v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 641, [2007] 2 F.C.R. 206).

[25] However, a broad and liberal interpretation of s. 25 does not necessarily mean that this provision is available in respect of every type of obligation that arises under *IRPA* or the *Regulations*. Section 25(1) is available as a matter of right to any foreign national in Canada "who is inadmissible or who does not meet the requirements of this Act". From this phrase, we can see that the focus of s. 25(1) is on substantive obligations that fundamentally affect the ability of a foreign national to come to or remain in Canada. This focus is reflected in the various types of s. 25(1) decisions that have been considered by the Federal Court, as set out above.

[26] In general terms, the "exemption from any applicable criteria or obligation of this Act" logically refers to such criteria or obligations as cause the foreign national to be inadmissible or to not meet the requirements of *IRPA*. In my view, Parliament never intended s. 25(1) to create the possibility of exemption from administrative requirements whether established under *IRPA* or the *IRP Regulations*. To access the extraordinary benefits of s. 25(1), the foreign national must meet certain administrative requirements to make his or her "request", including: filing a written application; providing certain documents and information; and paying the fees set by the *IRP Regulations*.

[27] Consistent with this view of the intention of Parliament is the inclusion in *IRPA* of s. 89. As noted above, s. 89 permits the enactment of regulations that govern fees for services provided in the administration of *IRPA*. This provision also expressly provides for the ability of the government (through the Governor in Council), by regulation, to establish cases in which fees may be waived by the Minister. Under s. 89, the government has the exclusive mandate to establish and waive fees for services. It is clear that Parliament intended that the waiver of fees be done through regulations and not through the operation of s. 25(1). This is consistent with my assessment that s. 25(1) is available in respect of substantive criteria or obligations under *IRPA* and not to administrative requirements.

[28] When s. 25(1) and s. 89 are read together, in the context of the legislative scheme of IRPA, the two provisions can co-exist. Each has meaning.

[29] The Applicant and Interveners refer to past practices of the Minister where fees were waived by the Minister, apparently using s. 25(1) as authority. In December 2004, the Honourable Judy Sgro, then-Minister applied a temporary fee waiver for persons affected by the Tsunami and earthquake disaster of December 26, 2004. In the news release, it was stated that "the Minister has established the following temporary public policy under section 25 of the *Immigration and Refugee Protection Act*". In October 2005, a similar waiver was granted for persons affected by the Pakistani earthquake. Initially, in his Memorandum of Argument at the leave stage of this judicial review, the Minister stated that s. 25(1) gave the Minister authority to provide these general waivers of fees. In the further Memorandum of Argument, this statement was not made. The Applicant and the Interveners made much of this apparent change of positions. In my view, the Minister's past practices and his changed position on this judicial review is of no great moment. Whether the

general public policy waivers of 2004 and 2005 ought to have been done through regulation is not the question before me. I make no determination on whether the Minister's actions in those cases were *ultra vires*.

[30] Moreover, the interpretation of the legislative scheme that I have found also avoids absurd results. Part 19 of the *Regulations* establishes the fees payable for services provided under *IRPA*. Those fees are wide ranging. For example, fees are established for sponsorship applications ($75), for work permits ($150), for a permanent resident card ($50), for a study permit ($125) and for certification of an immigration document ($30). If I were to accept the interpretation submitted by the Applicant and Interveners, any of the fees could be the subject of an application for waiver under s. 25. Further, any such assessment would have to take into account all H&C considerations. I suspect that the Minister would be inundated with requests for waivers of any and all fees. In addition, applicants for any service under *IRPA* could also seek waiver of other non-fee requirements set out in s. 10 of the *IRP Regulations*. That would mean that applicants could ask the Minister to waive such requirements as making an application in writing (s. 10(1)(a)) or identifying accompanying partners (s. 10(1)(e)) or providing information of the names of all family members (s. 10(2)(a)). Surely, Parliament cannot have intended that s. 25 be used in this manner.

[31] The Applicant and the Interveners submit that the relevant provisions of *IRPA* and the *Regulations* must be interpreted in a manner that is consistent with international instruments to which Canada is a signatory (*De Guzman*, above, at paras. 61-62). A complete response to this argument is reflected by the words of Chief Justice McLachlin, speaking for the Court in

Medovarski v. Canada (Minister of Citizenship and Immigration), 2005 SCC 51, [2005] 2 S.C.R. 539 at paragraph 48:

> Charter values only inform statutory interpretation where "genuine ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute": *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743, at para. 14. Both readings are not equally in accordance with the intention of the *IRPA*. Thus it is not necessary to consider Charter values in this case.

In my view, there is no ambiguity in s. 25(1) that requires resort to *Charter* value assessment.

[32] In sum on this issue, I conclude that s. 25(1) does not require that the Minister consider a request to exempt a foreign national from the payment of fees established pursuant to s. 89 of *IRPA* and the relevant *IRP Regulations*. Indeed, the Minister is without authority to do so. This interpretation is apparent when s. 25(1) is read harmoniously in its entire context and in its grammatical and ordinary sense, together with the scheme of *IRPA*, the object of *IRPA* and the intention of Parliament.

[33] This interpretation does not, however, complete my analysis. Regardless of the statutory interpretation, the relevant provisions could be invalid based on the other grounds advanced by the Applicant and the Interveners.

VI. Issue #3(a): Is the failure of the government to provide for fee waiver a breach of Section 7 of the *Charter*?

A. *Nature of the Issue*

[34] The Applicant submits that the refusal of the government to waive fees results in a situation where foreign nationals may be removed from Canada and separated from their children without consideration of the relevant H&C factors or the best interests of the children involved. This, she argues engages s. 7 *Charter* interests. She claims that, for persons who live in poverty and cannot afford to pay the application fee, removal without any review of their H&C grounds and the best interests of their children is inconsistent with the principles of natural justice.

[35] Section 7 of the *Charter* states that:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.	Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

B. *Deprivation of the right to life, liberty and security of the person*

[36] The first question to be asked is whether removal of the Applicant prior to consideration of her H&C factors deprives her of her right to life, liberty or security of the person.

[37] The Applicant is not a citizen of Canada. The situation faced by Ms. Medavarski, in *Medovarski*, above, was similar to that of the Applicant. Because of an earlier criminal conviction,

provisions of *IRPA* precluded Ms. Medovarski from having an assessment of H&C factors prior to her deportation. As do the Applicant and Interveners before this Court, Ms. Medovarski argued that her removal prior to an assessment of such considerations was contrary to s. 7 of the *Charter*. In dismissing this argument, the Supreme Court stated, at paragraph 46, "the deportation of a non-citizen in itself cannot implicate the liberty and security interests protected by s. 7 of the Canadian Charter of Rights and Freedoms". This statement appears to be a full answer to the s. 7 arguments of the Applicant and the Interveners.

[38] Moreover, there is no evidence before me that the Applicant is facing any risk to her life, liberty or security of person upon her deportation. If that had been the case, the Applicant could have sought to remain in Canada as a Convention refugee, or a protected person. Specifically, she could have brought a claim for protection under s. 96 (the refugee protection) or s. 97 (risk of torture or cruel and unusual treatment) of *IRPA*. She did not. She could have applied for a pre-removal risk assessment (PRRA). She did not. Either of these assessments could have been accessed at no cost to her. From this, I can conclude two things: (a) the Applicant does not fear for her safety should she return to Grenada; and (b) she has been afforded the right to two different proceedings that could have, to a large degree, considered whether her deportation to Grenada would have deprived her of life, liberty or security of her person.

[39] For other claimants pursuing permanent residence through s. 25, most have already have had the benefit of a refugee hearing or a PRRA, with negative results. In *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177, 17 D.L.R. (4th) 422, the Supreme Court concluded that a well-founded fear of persecution in Mr. Singh's country of origin was sufficient to

engage s. 7 of the *Charter*. For failed refugee claimants and those in receipt of a negative PRRA, a determination has been made that certain of the life, liberty and security interests are not at risk under Canada's international obligations (in particular, *United Nations Convention Relating to the Status of Refugees*, July 28, 1951, 189 U.N.T.S. 137, (the *Refugee Convention*) or the *Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment*, Dec. 10, 1984, UNGA Res. 39/46, 39 UN GAOR Supp. (No. 51) 197 (the *Convention Against Torture*)). To the extent, however, that the right to life, liberty and security of the person, as contemplated by s. 7 of the Charter, may extend beyond those rights assessed during a refugee hearing or a PRRA, I will continue my analysis.

C. *Fundamental Justice*

[40] I turn now to a consideration of the second aspect of s. 7. Is the Applicant being deprived of her rights without application of the principles of fundamental justice? In my view, there has been no breach of fundamental justice.

[41] The jurisprudence on s. 7 has established that a "principle of fundamental justice" must fulfil three criteria (see *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571 at para. 113):

1. It must be a legal principle (see *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 503).

2. The legal principle must be one that is "vital or fundamental to our societal notion of justice" (see *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at p. 590). Stated in different terms, the principle must be viewed by society as "essential to the administration of justice" (see *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76 at para. 8 (referred to as *Canadian Foundation*).

3. "The principle must be capable of being identified with precision and applied to situations in a manner that yields predictable results" (*Canadian Foundation*, above, at para. 8)

[42] The Applicant submits the addition of two alleged principles are engaged: consideration of H&C factors for a foreign national prior to removal, and consideration of the best interests of the child. Does either of these alleged "principles" rise to the level of principles of natural justice? In my view, they do not.

[43] The first alleged principle of fundamental justice is the right of a foreign national to an assessment of H&C factors. Unlike the "best interests of the child" (discussed below), I am not persuaded that an assessment of humanitarian and compassionate considerations is a legal principle.

[44] What is a legal principle? The words of Chief Justice McLachlin in *Canadian Foundation*, above, at paragraph 9 provide some guidance:

> A legal principle contrasts with what Lamer J. (as he then was) referred to as "the realm of general public policy" (*Re B.C. Motor Vehicle Act*, above, at p. 503), and Sopinka J. referred to as "broad" and "vague generalizations about what our society considers to be ethical or moral" (*Rodriguez*, above, at p. 591), the use of which would transform s. 7 into a vehicle for policy adjudication.

[45] The Applicant is, in effect, seeking an appeal of her deportation on the basis that H&C considerations would warrant her remaining in Canada. In general, a foreign national has no constitutional right to enter or remain in Canada (see *Singh*, above, at para. 13; *Chiarelli*, above, at para. 24 (SCC); *Medovarski*, above, at para. 46).

[46] Further, a foreign national has no right to come to or remain in Canada because of her personal H&C circumstances. The situation faced by the Applicant (and others in her situation) is similar to that considered by the Supreme Court in *Chiarelli*, above. In that case, Mr. Chiarelli was being deported because of serious criminal convictions. By operation of the *Immigration Act*, 1976, S.C. 1976-77, c. 52, he was not permitted to have all of the circumstances of his situation considered by the of the Immigration and Refugee Board, Immigration Appeal Division (IAD). In other words, the IAD was not able to hear an appeal from Mr. Chiarelli on H&C grounds that could have resulted in a stay of his deportation; Mr. Chiarelli was deprived of the ability to make such submissions. With respect to the right to appeal on H&C grounds, the Court commented that Mr. Chiarelli had no substantive right to an appeal on compassionate grounds. "It is entirely within the discretion of Parliament whether an appeal on this basis is provided" (*Chiarelli*, above, *at* para. 43). In *Chiarelli*,

the Court held that the removal of Mr. Chiarelli prior to review of compassionate factors did not amount to a breach of natural justice.

[47] If it is within the discretion of Parliament whether to provide for an H&C review prior to a deportation, it is certainly within Parliament's discretion to establish fees to access such an appeal process. I conclude that an H&C assessment prior to deportation is not a legal principle and, thus, cannot be a principle of fundamental justice to which s. 7 applies.

[48] The second alleged principle of fundamental justice is the "best interests of the child". This alleged principle does not apply to the Applicant; she is childless. However, the Intervener (in particular, LIFT) has intervened and provided extensive arguments on this point.

[49] In *Canadian Foundation*, above, the Canadian Foundation for Children, Youth and the Law (the Foundation) sought a declaration that the exemption from criminal sanction for parents or teachers who corporally punished children was unconstitutional. This was on the basis that the provision violated s. 7 of the *Charter*. The Foundation argued that the provision in the *Criminal Code*, R.S.C. 1985, c. C-46 failed to give procedural protections to children, did not further the best interests of the child, and was both overbroad and vague. In respect of the best interests of the child, Chief Justice McLachlin, writing for the majority of the Court, agreed that "the best interests of the child" was a "recognized legal principle" (*Canadian Foundation*, above, at para. 8). However, Chief

Justice McLachlin found that the "best interests of the child" was not a principle of natural justice (*Canadian Foundation*, above, at paras. 10-12).

> However, the "best interests of the child" fails to meet the second criterion for a principle of fundamental justice: consensus that the principle is vital or fundamental to our societal notion of justice. The "best interests of the child" is widely supported in legislation and social policy, and is an important factor for consideration in many contexts. It is not, however, a foundational requirement for the dispensation of justice. Article 3(1) of the *Convention on the Rights of the Child* describes it as "a primary consideration" rather than "the primary consideration" (emphasis added). Drawing on this wording, L'Heureux-Dubé J. noted in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 75:
>
> > [T]he decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. That is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying an H & C claim even when children's interests are given this consideration.
>
> It follows that the legal principle of the "best interests of the child" may be subordinated to other concerns in appropriate contexts. For example, a person convicted of a crime may be sentenced to prison even where it may not be in his or her child's best interests. Society does not always deem it essential [page95] that the "best interests of the child" trump all other concerns in the administration of justice. The "best interests of the child", while an important legal principle and a factor for consideration in many contexts, is not vital or fundamental to our societal notion of justice, and hence is not a principle of fundamental justice.
>
> The third requirement is that the alleged principle of fundamental justice be "capable of being identified with some precision" (*Rodriguez*, above, at p. 591) and provide a justiciable standard. Here, too, the "best interests of the child" falls short. It functions as a factor considered along with others. Its application is inevitably highly contextual and subject to dispute; reasonable people may well disagree about the result that its application will yield, particularly in areas of the law where it is one consideration among many, such as the criminal justice system. It does not function as a principle of fundamental justice setting out our minimum requirements for the dispensation of justice.

> To conclude, "the best interests of the child" is a legal principle that carries great power in many contexts. However, it is not a principle of fundamental justice.

[50] I agree and would conclude that, for the same reasons given by Justice McLachlin in *Canadian Foundation*, the "best interests of the child" is not a principle of fundamental justice.

D. *Conclusion on this issue*

[51] In conclusion on this issue, I find that the deportation of the Applicant prior to consideration of H&C factors does not engage the liberty and security issues protected by s. 7 of the *Charter*. In any event, since neither the assessment of H&C factors or of the best interests of the child are principles of fundamental justice to which s. 7 of the *Charter* applies, it follows that there is no breach of s. 7 of the *Charter*.

VII. Issue #3 (b): Does the failure of the government to provide for waiver of fees violate Section 15 of the *Charter*?

A. *Nature of the s. 15 Issue*

[52] The Applicant and Interveners (in particular CCPI) advance two different arguments under s. 15(1) of the *Charter*. First, they submit that persons living in poverty are protected under s. 15 of the *Charter;* thus, the Minister's failure to provide a fee waiver entails an improper failure to exercise the discretion available under s. 25 of *IRPA*. In the alternative, they assert that, by failing to

provide for a fee waiver pursuant to the regulation-making authority of s. 89 of *IRPA*, the government violates s. 15.

[53] Section 15(1) of the *Charter* provides as follows:

Equality before and under law and equal protection and benefit of law	Égalité devant la loi, égalité de bénéfice et protection égale de la loi
15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.	**15.** (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

[54] As I have already determined that the Minister has no discretion to waive fees under s. 25 of *IRPA*, the first argument fails. Thus, the question before me is directed at the failure of the government to enact, by regulation under s. 89 of *IRPA*, a waiver of fees for in-Canada H&C applications for persons who live in poverty. Does this failure deprive the Applicant from her right to equality under s. 15 of the *Charter*?

[55] The question before me is comparable to the situation before the courts in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 where the hospital system had failed to provide interpretative services for deaf patients to allow them to communicate with medical service providers. In *Eldridge*, as before me, there was a regulation-making authority, which had not been acted upon by the Government of British Columbia. The Supreme Court (at paragraph 77) stated that:

> The provision [s. 15] makes no distinction between laws that impose unequal burdens and those that deny equal benefits. If we accept the concept of adverse effect discrimination, it seems inevitable, at least at the s. 15(1) stage of analysis, that the government would be required to take special measures to ensure that disadvantaged groups are able to benefit equally from government services.

[56] Thus, I am faced with a question that could result in a determination that the government's failure to make a distinction on the basis of poverty produces discrimination within the meaning of s. 15 of the *Charter*.

[57] The Applicant bears the burden of establishing, on a balance of probabilities, the elements of s. 15 discrimination (see *Miron v. Trudel* [1995] 2 S.C.R. 418 at para. 36).

[58] I turn now to the s. 15 analysis.

B. *The s. 15 framework*

[59] *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 has long been considered to be the foundational jurisprudence for a s. 15 analysis. The Supreme Court of Canada called for "an analysis of the full context surrounding the claim and the claimant". In *Law v. Canada*, [1999] 1 S.C.R. 497, at paragraph 88, Justice Iacobucci (writing for a unanimous court) set out guidelines that reflected three broad inquiries:

1. Does the law, program or activity, based on a personal characteristic, impose differential treatment between the claimant and others with whom the claimant may fairly claim equality?

2. Is the differentiation based on one or more of the enumerated or analogous grounds?

3. Does the differentiation amount to a form of discrimination that has the effect of demeaning the claimant's human dignity?

[60] The *Law* framework was revisited In *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483. In *Kapp*, the Supreme Court reasserted *Andrews* as the seminal decision and focused on the "underlying identification of the perpetuation of disadvantage and stereotyping as the primary

indicators of discrimination" (*Kapp*, above, at para. 23). With respect to the multi-step analysis of *Law*, the Supreme Court stated the following:

> Viewed in this way, Law does not impose a new and distinctive test for discrimination, but rather affirms the approach to substantive equality under s. 15 set out in Andrews and developed in numerous subsequent decisions. The factors cited in Law should not be read literally as if they were legislative dispositions, but as a way of focussing on the central concern of s. 15 identified in Andrews - combatting discrimination, defined in terms of perpetuating disadvantage and stereotyping
>
> (*Kapp*, above, at para. 24).

[61] In the result, I am taught by the jurisprudence to employ the two-step analysis enunciated in *Kapp*, above, at paragraph 17:

1. Does the failure of the GIC to establish waiver for persons in poverty create a distinction based on an enumerated or analogous ground?

2. Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

[62] The first question requires that I address sub-issues. First, does the failure create a distinction based on a personal characteristic or fail to take into account the Applicant's already disadvantaged position in Canadian society, as compared to others? This involves identifying what is known as the comparator group. Secondly, is such a distinction based on an enumerated or analogous ground? Finally, only if there is a distinction based on an enumerated or analogous ground, do I need to turn to an examination of whether the distinction creates a disadvantage by perpetuating prejudice or stereotyping.

C. *Comparator group and distinction*

[63] I begin my analysis by first identifying the appropriate comparator group for the s. 15 analysis. The Supreme Court has emphasized that equality is a comparative concept and that an analysis under s. 15 requires that a comparison be made between a group with which the claimant identifies and some other group. In *Hodge v. Canada*, 2004 SCC 65, [2004] 3 S.C.R. 357, at paragraph 23, the SCC offered guidance on the section of the appropriate "comparator group":

> The appropriate comparator group is the one which mirrors the characteristics of the claimant (or claimant group) relevant to the benefit or advantage sought except that the statutory definition includes a personal characteristic that is offensive to the Charter or omits a personal characteristic in a way that is offensive to the Charter.

[64] The submission of the Interveners rests on the argument that s. 25 is discriminatory to the group of individuals who receive social assistance and who can be categorized as experiencing the social condition of poverty. The comparator group would therefore be foreign nationals who seek to make an in-Canada H&C Application and who are not impecunious nor in receipt of social assistance.

[65] Having identified the comparator group, the next question is whether s. 25 has created a distinction between the Applicants and those in the comparator group on the basis of an analogous ground.

[66] I am not convinced that application of the applicable statutory scheme results in a differential effect that effectively bars the H&C review for those foreign nationals living in poverty. There is no evidence to suggest that those foreign nationals who manage to file H&C applications, complete with the processing fee, are not impecunious and not in receipt of social assistance. Indeed, the evidence produced by the Minister suggests, by implication, that some persons living in poverty have paid the applicable fee (see the discussion below beginning at paragraph [95]). Further, the volume of applications for judicial review of H&C decisions brought to the Federal Court by those on social assistance suggests that impecunious and social assistance recipients have been able to access the procedure set out in s. 25 of *IRPA* (see, for example, *Veitch v. Canada (Minister Of Citizenship And Immigration)*, 2008 FC 1400; *Tharmalingam v. Canada (Minister Of Citizenship And Immigration)*, 2008 FC 463; *Palumbo v. Canada (Minister of Citizenship and Immigration*), 2009 FC 706).

[67] If I can find no distinction made on the basis of poverty that denies an equal benefit or imposes an unequal burden, it appears to me that the s. 15 argument must fail. In spite of my concerns, I will continue the analysis. Without deciding, I am prepared to accept, at this stage of the analysis, that persons living in such poverty that they cannot afford the processing fee face a distinction as compared to the comparator group.

D. *Enumerated or analogous ground*

[68] Having established a comparator group and assuming that there is discrimination, I move to a consideration of whether the government failure to establish a waiver of fees for persons in

poverty discriminates against that group on the basis of an enumerated or analogous ground. In other words, is poverty included in the protection offered by s. 15(1)?

[69] Section 15 of the *Charter* recognizes the right to equal protection and equal benefit of the law without discrimination for several specified or enumerated grounds. To prove discrimination, the claimant must show that the unequal treatment is based on one of the grounds expressly mentioned in s. 15(1) -- race, national or ethnic origin, colour, religion, sex, age or mental or physical disability -- or some analogous ground. Not all inequities are "worthy of constitutional protection" (see *Miron*, above, at para. 31).

[70] Poverty is not an enumerated ground. Thus, any protection provided under s. 15 may only be afforded to the Applicant on the basis that poverty is an analogous ground. The Applicant and Interveners argue that it does. I disagree.

[71] On the issue of whether a ground constitutes an analogous ground for the purposes of s. 15, the jurisprudence from the Supreme Court teaches that unacceptable forms of discrimination are those that focus on "personal characteristics", which are somehow inherently part of an individual's identity (*Corbière v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at para. 13):

> What then are the criteria by which we identify a ground of distinction as analogous? The obvious answer is that we look for grounds of distinction that are analogous or like the grounds enumerated in s. 15 -- race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability. It seems to us that what these grounds have in common is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable

> only at unacceptable cost to personal identity. This suggests that the thrust of identification of analogous grounds at the second stage of the Law analysis is to reveal grounds based on characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law. To put it another way, s. 15 targets the denial of equal treatment on grounds that are actually immutable, like race, or constructively immutable, like religion. Other factors identified in the cases as associated with the enumerated and analogous grounds, like the fact that the decision adversely impacts on a discrete and insular minority or a group that has been historically discriminated against, may be seen to flow from the central concept of immutable or constructively immutable personal characteristics, which too often have served as illegitimate and demeaning proxies for merit-based decision making.
>
> [Emphasis added]

[72] In short, the test is whether poverty is a personal characteristic that is either: (1) actually immutable; or (2) constructively immutable because it is changeable only at unacceptable cost to personal identity or, put differently, a characteristic that the government has no legitimate interest in expecting the individual to change.

[73] Can it be said, in the case before me, that the characteristic of being impecunious or in receipt of social assistance is a personal characteristic that is inherently part of an individual's identity or is one that the government does not have a legitimate interest to be changed?

[74] I begin by noting that the very notion of poverty as a social condition is somewhat problematic. The argument of the Applicant and CCPI is based on a conceptualization of poverty as a social condition, which refers not only to a person's economic status or income level but rather to a long-term condition that encompasses the social dimensions associated with inadequate income (such as stigma, stereotype and social exclusion).

[75] I am not sure that such a distinction can be made. Financial circumstances may change; individuals may come into and out of the state of poverty and experience the social consequences that follow. Further, even if I were to accept the concept of poverty as a social condition, there is no clear evidence which links durable poverty to any particular group of people. There are numerous factors that contribute to situations in which persons experience long periods of durable poverty. This would not be a social condition that occurs only to a particular demographic or a particular discrete or insular minority or group that historically has suffered discrimination.

[76] More importantly, for the purposes of s.15, it cannot be said that the state of being in the social condition of poverty or in receipt of social assistance is a personal characteristic that cannot be changed, such that certain people are inevitably poor or impoverished and will continue to be this way for a sustained period because that is an inherent part of who they are. As expressed by Justice Fichaud in *Boulter v. Nova Scotia Power Inc.*, 2009 NSCA 17, 275 N.S.R. (2d) 214 at paragraph 42: "Poverty is a clinging web, but financial circumstances may change, and individuals may enter and leave poverty or gain and lose resources. Economic status is not an indelible trait like race, national or ethnic origin, color, gender or age."

[77] I would also adopt Justice Fichaud's reasoning in finding that neither the social condition of poverty, nor the receipt of social assistance is a characteristic that the government does not have a legitimate interest to expect to be changed. On the contrary, "the government has a legitimate interest, not just to promote affirmative action that would ameliorate the circumstances attending an

immutable characteristic, but to eradicate that mutable characteristic of poverty itself" (*Boulter*, above, at para.42).

[78] The Applicant and CCPI rely on the decision of the Ontario Court of Appeal in *Falkiner v. Ontario (Ministry of Community and Social Services)* (2002), 59 O.R. (3d) 481 (C.A.).

[79] In *Falkiner*, the Court was called upon to determine whether the definition of "spouse" in s. 1(1)(d) of Regulation 366, R.R.O. 1990, as amended by O. Reg. 409/95, under the *Family Benefits Act*, R.S.O. 1990, c. F.2, infringed s. 15(1) of the *Charter*. Because of the impugned definition, persons adversely affected shared three relevant characteristics: "they are women, they are single mothers solely responsible for the support of their children and they are social assistance recipients" (*Falkiner*, at para. 70). As described by the Court of Appeal, the equality claim in *Falkiner* alleged "differential treatment on the basis of an interlocking set of personal characteristics" (*Falkiner*, above, at para. 72).

[80] For purpose of its s. 15 analysis, the Court recognized the receipt of social assistance as an analogous ground, summarizing its views in paragraph 92:

> The Divisional Court also recognized that social assistance recipients deserved s. 15 protection. The Divisional Court, however, defined the analogous ground more narrowly as sole support parents on social assistance or single mothers on social assistance. The intervener LEAF supported the Divisional Court's characterization. It seems to me, however, that recognizing the broader or more general category, receipt of social assistance, is preferable. It is more truly analogous to the enumerated grounds, which themselves are general; it conforms to the similar protection accorded to social assistance recipients in human rights legislation; it recognizes a group that is vulnerable to discrimination and that historically has been subjected to negative stereotyping; and it simplifies the equality analysis under

> s. 15. By contrast, recognizing as analogous a highly specific ground like sole support mothers on social assistance makes the s. 15 analysis, which is difficult enough, unnecessarily complex. Moreover, single mothers on social assistance already receive twofold s. 15(1) protection on the grounds of sex and marital status. What is novel about the respondents' position is that they seek recognition that their status as social assistance recipients is also relevant to the equality analysis. In my view, the most coherent way to achieve this is to recognize receipt of social assistance as an analogous ground.

[81] While the Court of Appeal accepted the receipt of social assistance as an analogous ground, the Court's analysis cannot be separated from the multi-faceted set of characteristics of the affected persons. The Court's conclusion (above, at paragraph 105) demonstrates that identification of the receipt of social assistance as an analogous ground is inseparable from the facts of the *Falkiner* case:

> I conclude that the 1995 definition of spouse in s. 1(1)(d)(iii) of Regulation 366 under the *Family Benefits Act* imposes differential treatment on the respondents on the combined grounds of sex, marital status and receipt of social assistance and that this differential treatment discriminates against them, contrary to s. 15 of the Charter.

[82] In other words, the Court in *Falkiner* did not determine that the affected persons suffered discrimination simply because they received social assistance.

[83] Five years later, in *R. v. Banks*, 2007 ONCA 19, 84 O.R. (3d) 1, leave to appeal denied [2007] SCCA No. 139, a different panel of the Ontario Court of Appeal held that anti-panhandling legislation did not violate s. 15(1). On the issue of analogous ground, Justice Juriansz (at paras. 104 and 105) stated as follows (albeit in *obiter*):

> It is worth noting that the appellants took care not to argue that "poverty" in and of itself is a ground of discrimination. While the "poor" undoubtedly suffer from disadvantage, without further categorization, the term signifies an amorphous group, which is not analogous to the grounds enumerated in s. 15. The "poor" are not a discrete and insular group defined by a common personal characteristic. While it is common to speak of the "poor" collectively, the group is, in actuality, the statistical aggregation of all individuals who are economically disadvantaged at the time for any reason. Within this unstructured collection, there may well be groups of persons defined by a shared personal characteristic that constitute an analogous ground of discrimination under s. 15.
>
> *Falkiner v. Ontario (Ministry of Community and Social Services)* (2002), 59 O.R. (3d) 481 (C.A.), on which the appellants rely, is distinguishable from the present case. The differential treatment in that case was based on three grounds: sex, marital status and "receipt of social assistance". Falkiner did not recognize poverty as a ground of discrimination.

[84] The very recent decision of the Nova Scotia Court of Appeal in *Boulter*, above, is almost directly on point. In that case, a number of persons were challenging a provision of the *Public Utilities Act*, R.S.N.S. 1989, c. 380 that did not permit the Nova Scotia Utility and Review Board (the Board) to set a lower rate for low income consumers than the rate chargeable to other consumers for the same electrical service. Nova Scotia Power Incorporated (NSPI), a virtual monopolist, provides electrical service. The Board must approve all rates charged by NSPI. Under s. 67(1) of the *Public Utilities Act* all rates must be charged equally to all persons. In *Boulter*, the claimants challenged the validity of s. 67(1). They submitted that poverty is an analogous ground under s. 15(1) of the *Charter* and that s. 67(1)'s exclusion of the option for an ameliorative program

to assist the poor discriminates contrary to s. 15(1). It is interesting to note that, in *Boulter*, Mr. Bruce Porter, who has also brought his opinions to this Court, appeared as an expert witness before the Board.

[85] The Court of Appeal analyzed the s. 15(1) *Charter* claim, in accordance with the Supreme Court of Canada guidance in *Law* and *Kapp* and concluded that "Poverty *per se* does not suit the legal pattern for an analogous ground under Corbière's formulation (*Boulter*, above, at para. 42).

[86] In short, the applicants in *Boulter* brought the same argument to the Board and, in appeal, to the Nova Scotia Court of Appeal as the Applicant and Interveners now bring to this Court. In *Boulter*, the Court did not find that poverty is an analogous ground under s. 15(1). I can see nothing to distinguish the case before the Nova Scotia Court of Appeal from the case before me. The only serious difference – which does not operate in favour of the Applicant – is that, unlike electricity service, persons seeking the Minister's discretion under s. 25 of *IRPA* are doing so by choice. Electrical service is as close to an essential service as one can find. In contrast, the processing of a claim for permanent residence from inside Canada is an exceptional and non-essential benefit. Persons who wish to apply for permanent residence in Canada may always do so from outside Canada even where it may be difficult for them to do so.

[87] Finally, I refer to the decision of *Guzman v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1134, [2007] 3 F.C.R. 411. In that case, Justice Simon Noël was asked by Ms. Guzman to strike down s. 133(1)(k) of *IRPA* on the basis that it violates section 15 of the *Charter*. Under s. 133(1)(k), Ms. Guzman, a permanent resident of Canada, was prevented from

sponsoring her husband, Mr. Cosma, as a "member of the family class" because she was in receipt of social assistance. Justice Noël declined to quash s. 133(1)(k), concluding that the receipt of social assistance by Ms. Guzman was not a "personal characteristic". Nor did he find that the receipt of social assistance was an analogous ground. Justice Noël distinguished *Falkiner* as follows (at para. 21):

> This situation is distinguishable from *Falkiner* as in that case the individuals concerned had a long history of receipt of social assistance combined with other factors, which contributed to them being discriminated against. The Court of Appeal for Ontario in *Falkiner* found that subparagraph 1(1)(d)(iii) of Regulation 366 of the *Family Benefits Act*, R.S.O. 1990, c. F-2, discriminated on the grounds of sex, marital status and the receipt of social assistance. In contrast to *Falkiner*, in the case at hand the only ground for discrimination alleged is that of receipt of social assistance, and there is no indication in the record that the applicant's receipt of social assistance is of any permanency.

[88] The Federal Court of Appeal dismissed the appeal of Ms. Guzman, on the basis of mootness; Mr. Cosma had left Canada after the Federal Court decision (*Guzman v. Canada (Minister of Citizenship and Immigration)* 2007 FCA 358; leave to SCC dismissed, [2008] S.C.C.A. No. 4).

[89] In sum, but for the *Falkiner* decision, there is no post-*Corbière* jurisprudence supporting the position of the Applicant and Interveners. Even the *Falkiner* decision can be readily distinguished. There is not one case where a Court has concluded that poverty – in and of itself – is an analogous ground. For the same reasons as expressed by Justice Fichaud in *Boulter*, Justice Juriansz in *Banks*, and Justice Noël in *Guzman*, I do not accept poverty as an analogous ground.

[90] In conclusion on this question, the Applicant has not persuaded me that the failure of the government to provide for fee waivers for persons living in poverty is based on an enumerated or analogous ground.

E. *Discrimination*

[91] Having determined that any distinction between the Applicant and those in the comparator group is not based on an enumerated or analogous ground, there is no need to proceed with the second part of the *Kapp* analysis. However, were I to do so, I would conclude that the Applicant and CCPI fail to persuade me that the distinction creates a disadvantage by perpetuating prejudice or stereotyping. My reasons follow.

[92] As taught by the jurisprudence, at this final stage of the analysis, a number of contextual factors are relevant. Those factors include:

1. Pre-existing disadvantage, stereotyping, prejudice or vulnerability;

2. Relationship or correspondence between the ground on which the claim is based and actual need, capacity or circumstances of the claimant;

3. Ameliorative purpose or effects of the law upon more disadvantaged persons or group; and

4. Nature and scope of the interest affected by the impugned law.

[93] The Applicant put forward the affidavit evidence of Mr. Porter to address the question of the disadvantages, stereotyping, prejudice and vulnerability of persons living in poverty. Mr. Porter is the Director of the Social Rights Advocacy Centre and describes himself as "a consultant and researcher in the area of discrimination, poverty and human rights". He is also a Coordinator of CCPI and, in that capacity, has played a role in interventions in a number of legal cases in Canada. In this case, he was retained to assess "the effect of the absence of a fee waiver for applications for Humanitarian and Compassionate consideration under section 25(1) of the Immigration and Refugee Protection Act on social assistance recipients". In his affidavit, Mr. Porter concludes that:

> [T]he absence of a fee waiver for those living in poverty seeking Humanitarian and Compassionate consideration perpetuates negative stereotypes and stigma attached to social assistance recipients and low income families, newcomers, persons with disabilities and racialized minorities and robs them of the sense of being valued as members of society worthy of equal dignity and respect.

[94] While I do not for a minute doubt Mr. Porter's sincerity and passion, I have serious difficulties with his evidence in this case. Compared to the evidence provided by the Respondent, Mr. Porter makes broad, generalized statements unsupported by empirical data or analysis. He appears to have no direct experience in the field of immigration. His comments and opinions with respect to immigration are apparently based on anecdotal and hearsay information. Further, in spite of the fact that he is not a lawyer, Mr. Porter purports to provide legal opinions (for example, on the interpretation of the *Charter* and on the "rights affirmed in the decision of the Supreme Court of Canada in *Baker*"). Quite simply, his opinion does not meet the basic threshold of either reliability or relevance (see *R. v. Mohan*, [1994] 2 S.C.R. 9).

[95] The Applicant faces further evidentiary problems with respect to the second and third factors listed above. The Applicant points to her own affidavit and other affidavit evidence showing that some foreign nationals are unable to pay and thus receive consideration of their in-Canada H&C applications. However, this evidence (other than from the Applicant) is purely anecdotal and hearsay.

[96] On the other hand, the Minister's evidence provides reliable evidence of the numbers of H&C applications and analysis of the data. It appears from the statistical data that large numbers of foreign nationals are able to file in-Canada H&C application, in spite of the fee. Highlights of those data, as presented in the affidavit evidence of Ms. Martha Justus, Acting Director, Strategic Research and Statistics Division, Research and Evaluation Branch, CIC, are as follows:

- In 2008, 2456 foreign nationals made in-Canada H&C applications (this counts every individual within an application). The number of applicants has diminished steadily and significantly from 2003 when 10439 foreign nationals sought in-Canada landing. Part of the decrease can be attributed to the 2005 policy that now permits claimants to apply from within Canada as members of the "spouse and common-law partner in Canada class".

- The Minister's evidence does not indicate that women are disadvantaged in making applications. Rather, women file a large number of H&C applications as the principal applicant in a group (794 female to 892 male, in 2008). Further, more than 50% of successful H&C applications for permanent resident status are women

(18,112 females to 15,249 males for the period 2003 to 2008). In 2003, principal claimants identified their marital status as married or in a common-law relationship in 674 cases and as divorced, single, separated or widowed in 1012 cases. If poverty affects single persons or women disproportionately, the H&C application statistics do not appear to be reflect this disproportionate effect.

- Level of education, which also correlates strongly to poverty, shows a wide variation in those foreign nationals who are ultimately accepted for permanent residence through the in-Canada application process. Or the period 2003 to 2008, about 33% of those admitted had less than nine years of education.

- Foreign nationals from over 30 nations commenced H&C applications in the period from 2003 to 2008.

[97] Given this evidence, it is reasonable to infer that foreign nationals living in poverty are filing in-Canada H&C applications. Based on my review of the statistical evidence, I am unable to conclude that poverty prevents any significant number of foreign nationals from filing in-Canada H&C applications. The need to waive the fees to allow persons who can be distinguished on the basis of poverty is simply not demonstrated. There is no evidence that shows that foreign nationals who are living in poverty suffer disproportionate hardship that can be attributed to the failure of the government to provide for fee waivers.

[98] The final factor asks the Court to examine the nature of the interest affected by the impugned law. An in-Canada H&C application provides foreign nationals with a discretionary and exceptional benefit – and not a right. As I noted earlier in these reasons, Canada's immigration laws require a foreign national to apply for residence in Canada from outside our country. Only in exceptional circumstances is this requirement waived. In some situations, the overarching commitment of Canada to international instruments (such as the *Refugee Convention* or the *Convention Against Torture*) allows a claimant to seek protection from within Canada's borders. For refugee claimants and persons who could return to the risk of torture, no fee is charged for a determination of their claims. Thus, Canada recognizes its obligations under these two important international conventions and the importance of allowing free access to government services in situations where a foreign national is impacted by such conventions.

[99] An H&C application does not fall into that category of claim. Access to the Minister's discretion is not a basic right as was considered, for example, in *Eldridge*, above. An H&C application is not meant to be another track equivalent to a claim for protection pursuant to s. 96 or s. 97 of *IRPA* or a pre-removal risk assessment.

[100] I make one additional observation. With the enactment of the *IRP Regulations*, Parliament has chosen to establish a set of criteria that must be met before an application for H&C relief can be assessed by the Minister. Section 10 of the *Regulations*, which imposes the processing fee, reflects Parliament's view on the issue of fee structure and cost recovery in the immigration and refugee protection context. While applications relating to possible risk and the need for international protection are assessed free of charge, those relating to immigration (and H&C applications for

waivers of the requirements for immigration) are assessed upon the payment of the required fee. In my view, this was a legitimate policy decision that may not lend itself to a review under s.15 of the *Charter*. In other words, the fee for processing in-Canada H&C applications "arises not from any demeaning stereotype but from a neutral and rationally defensible policy choice" (*Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] S.C.J. No. 37 (QL)). As noted by Justice Kroft of the Manitoba Court of Queen's Bench, in *Barker v. Manitoba (Registrar of Motor Vehicles)*, (1987) 47 D.L.R. (4th) 69:

> In a case of this kind, and when deciding whether so called economic discrimination could possibly be read into the ambit of s. 15(1), it is well to keep in mind that almost any law dealing with sales or income taxes, licence fees, tariffs or social benefits will have a different and more adverse impact on some groups of persons than others. If one were to accept that the policy decisions underlying these laws were subject to review by the court, then one would be led to the untenable conclusion that Parliament had by s. 15(1) intended to create an economically egalitarian society with judges as its supervisors.

[101] The Applicant also asserts that the fee requirement causes adverse effect discrimination on the basis of race, gender, disability and ethnic origin. This argument relies on the assertion that there are "recognized intersections" of poverty with other grounds of discrimination, such as sex, race, age and marital or family status. However, beyond a bare assertion of adverse effect discrimination, the Applicant has not shown how women, the disabled, single mothers and racial minorities have experienced discrimination as against the appropriate comparator groups for each of those alleged grounds.

[102] In order to succeed in making this argument, the Applicant and Interveners would need to show that the processing fee has an adverse effect on a disproportionate number of individuals who

are disabled, women, single mothers and racial minorities as compared to the relevant comparator group (i.e. able-bodied, men, families, non-minorities, respectively) (see *Eldridge*, above, and *Vriend v. Alberta*, [1998] 1 S.C.R. 493). They have failed to do so. There is no evidence, for example, that more women are barred from making an H&C application because of an inability to pay than men. The same goes for the other grounds of discrimination raised. Indeed, as reflected above, the evidence is that large numbers of foreign nationals that would fall within those identified groups have found no barriers to filing in-Canada H&C applications.

[103] I would therefore reject the submissions on adverse effect discrimination.

[104] Lastly, LIFT argues that the failure to waive the H&C fees constitutes substantively differential treatment of Canadian children born to foreign national parents. LIFT seems to be saying that the *IRPA* provisions are discriminatory because Canadian children born to foreign national parents are denied the benefit of making an H&C application, as compared to Canadian children born to Canadian parents. In my view, this argument is without merit. The *IRPA* provisions relating to H&C applications are applicable only to foreign nationals who are seeking permanent resident status in Canada. They do not apply to Canadian children born to Canadian parents. Therefore, it cannot be said that the Minister's refusal to consider H&C applications where the processing fee has not been paid effectively denies the claimants a benefit that Canadian nationals are receiving.

[105] I am also not satisfied that immigrant families have somehow been denied equal protection of the integrity of their family life and the best interests of the child under international law by virtue

of the *IRPA* provisions relating to H&C applications. LIFT does not provide any examples or explanations apart from a bare assertion of discrimination. They have therefore failed to show the alleged discriminatory activity.

[106] Taken altogether, the factors do not support a finding that the failure of the government to provide for a waiver of H&C processing fees discriminates against the Applicant and others living in poverty by imposing upon them burdens or obligations that are not imposed on others. Nor does the fee impact the Applicants in a way that perpetuates the pre-existing disadvantage and stereotyping experienced by them so as to constitute discrimination.

F. *Conclusion on this issue*

[107] In sum, even if I were to accept that persons living in a state of poverty, within which they cannot afford the s. 25 processing fee, face a distinction as compared to the comparator group, the s. 15(1) claim fails. This is because I have concluded that: poverty is not an analogous ground. Further, and even if poverty were accepted as an analogous ground, there is insufficient evidence to persuade me that any distinction caused by the failure of the Minister to implement a fee waiver for foreign nationals living in poverty perpetuates the prejudice or stereotyping of persons living in poverty.

[108] In conclusion on this issue, the Applicant and Interveners have failed to satisfy me that, on a balance of probabilities, the failure of the government to implement a fee waiver is contrary to s. 15(1) of the *Charter*.

VII. Issue #4: Is the failure of the government to provide for the waiver of fees contrary to the common law constitutional right of access to the Courts or to the rule of law?

[109] The Applicant and the Intervener, CCPI, submit that the failure of the government to provide for a waiver of fees for foreign nationals who are unable to afford the processing fee is contrary to the rule of law and the common law constitutional right of access to the Courts.

[110] The Applicant and CCPI rely on the case of *Polewsky v. Home Hardware Stores Ltd.* (2003), 66 O.R. (3d) 600 (Div. Ct.) in support of their position. The case of *Polewsky* involved fees charged for matters coming before the Ontario Small Claims Court when the court was given no discretion to waive such fees. The Ontario 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. They submit that the same principles should extend to the s. 25 in-Canada application on H&C grounds.

[111] With respect to the concept of *in forma pauperis*, the Court in *Polewsky* commented as follows (at para. 44):

> The purpose of allowing a claimant or a defendant to proceed *in forma pauperis* was to allow people who are indigent to access the courts. The concept has had a long-standing presence in the common law and has found its way into statute law. Its presence in some statutes, combined with what we find to be the common law right based upon the constitutional principle of access to the courts, buttresses our conclusion that the indigent should not be denied access to the Small Claims Court in cases where their claims or defences are meritorious and their inability to pay prescribed fees is proven on the balance of probabilities.

[112] On the issue of the common law right of access to the court, the Court (at para. 62) concluded as follows:

> . . . quite apart from the Charter, there is at common law a constitutional right of access to the courts. The fact that the provision to waive or reduce prescribed fees is omitted, deliberately or otherwise, does not make it correct in law. The result is that for persons with demonstrated inability to pay prescribed fees and with meritorious cases, there must be a statutory provision to which they can resort for relief from the requirement to pay fees.

[113] I acknowledge that the right of access to the courts is, under the rule of law, an essential element for the protection of the rights and freedoms of persons who might come before them. However, the fundamental flaw in the argument of the Applicant and CCPI is that access to the Minister under s. 25(1) cannot be equated to a right of access to the courts.

[114] Section 25(1) provides a discretionary benefit to foreign nationals. Parliament has no obligation to provide for foreign nationals to remain in Canada on H&C grounds (*Chiarelli*, above, at para. 43). Section 25 itself does not provide any right to make an in-Canada H&C application; rather, it provides an opportunity to apply for an exemption from provisions of *IRPA* or the *Regulations*. The Minister is only obliged to consider H&C factors "upon request". Immigration is not a right; nor is access to s. 25 of *IRPA*.

[115] In my view, the principles applied in *Polewsky* do not extend to discretionary administrative determinations. *Polewsky* and the jurisprudence relied on by the Applicant and CCPI (for example, *R. v. Lord Chancellor ex parte John Witham*, [1997] 2 All E.R. 779 (Q.B.); *R. v. Secretary of State for the Home Department and others, ex parte Saleem*, [2000] 4 All E.R. 814 (C.A.)) do not apply to the situation before me. In Canadian cases where the doctrine of *in forma pauperis* has been

accepted (*Polewski*, above; *Moss v. R.*, [1997] T.C.J. No. 712; *Pearson v. Canada* (2000), 195 F.T.R. 31) the context has always been access to a constitutional or statutory court.

[116] Furthermore, the provisions relating to the payment of the H&C application fee are not rendered invalid by virtue of the rule of law. The Supreme Court of Canada's statements, at paragraphs 58 and 59, in *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, on the precise content of the rule of law and its application to the constitutionality of legislation is informative:

> This Court has described the rule of law as embracing three principles. The first recognizes that "the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power": *Reference re Manitoba Language Rights*, at p. 748. The second "requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order": *Reference re Manitoba Language Rights*, at p. 749. The third requires that "the relationship between the state and the individual ... be regulated by law": *Reference re Secession of Quebec*, at para. 71.
>
> So understood, it is difficult to conceive of how the rule of law could be used as a basis for invalidating legislation such as the Act based on its content. That is because none of the principles that the rule of law embraces speak directly to the terms of legislation. The first principle requires that legislation be applied to all those, including government officials, to whom it, by its terms, applies. The second principle means that legislation must exist. And the third principle, which overlaps somewhat with the first and second, requires that state officials' actions be legally founded. See R. Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001), 80 Can. Bar Rev. 67, at pp. 114-15.

[117] The Supreme Court also cautioned, at paragraph 67: "The rule of law is not an invitation to trivialize or supplant the Constitution's written terms. Nor is it a tool by which to avoid legislative initiatives of which one is not in favour." Applying the Supreme Court's reasoning to the present situation, I find that the rule of law cannot be used to create a fee waiver in the context of H&C applications. This is not an appropriate application of the rule of law.

IX. Conclusion

[118] For the above reasons, I conclude that this application for judicial review will be dismissed.

[119] In general, decisions of the Federal Court in matters arising under *IRPA* are final. However, pursuant to s. 74(d) of *IRPA*, an appeal to the Federal Court of Appeal may be made "only if, in rendering judgment, the judge certifies that a serious question of general importance is involved and states the question". In the recent decision of *Varela*, above , the Court of Appeal emphasized that any question certified must meet certain criteria:

- The question must be a serious question of general importance.
- The question must arise from the issues in the case and not the judge's reasons.
- A serious question is one that is dispositive of the appeal.

- The reference in s. 74(d) to "a serious question" means that a single case will raise more than one question only as an exception to the rule that only "a" question may be certified

[120] In this case, there was more than one issue raised. Had I found in favour of the Applicant on any one of the issues, I would have allowed the application for judicial review. Accordingly, each of the issues raises a question that could be dispositive of an appeal. Further, given the number of in-Canada H&C applications that are made each year and the far-reaching impacts of a decision in favour of the Applicant on any of the issues, each of the issues is a "serious question of general importance".

[121] All of the parties have proposed questions for certification that were similar in substance. Having reviewed the proposed questions, the following are the questions that I will certify:

1. On a proper statutory interpretation of s. 25(1) of *IRPA*, is the Minister obliged to consider a request to grant an exemption from the requirement to pay the H&C processing fee, otherwise required under s. 307 of the *IRP Regulations*?

2. Does the failure of the government (through the GIC) to enact regulations permitting the waiver of fees for foreign nationals living in poverty who wish to make an in-Canada application for permanent resident status pursuant to s. 25(1) of *IRPA* infringe the Applicant's rights under s. 7 or s.15 of the *Charter*?

3. Is the failure of the government (through the GIC) to enact regulations permitting the waiver of fees for foreign nationals living in poverty who wish to make an in-Canada application for permanent resident status pursuant to s. 25(1) of *IRPA* contrary to either the rule of law or the common law constitutional right of access to the Courts?

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The Application for judicial review is dismissed; and

2. The following questions are certified:

   a) On a proper statutory interpretation of s. 25(1) of *IRPA*, is the Minister obliged to consider a request to grant an exemption from the requirement to pay the H&C processing fee, otherwise required under s. 307 of the *IRP Regulations*?

   b) Does the failure of the government (through the GIC) to enact regulations permitting the waiver of fees for foreign nationals living in poverty who wish to make an in-Canada application for permanent resident status pursuant to s. 25(1) of *IRPA* infringe the Applicant's rights under s. 7 or s.15 of the *Charter*?

   c) Is the failure of the government (through the GIC) to enact regulations permitting the waiver of fees for foreign nationals living in poverty who wish to make an in-Canada application for permanent resident status

pursuant to s. 25(1) of *IRPA* contrary to either the rule of law or the common law constitutional right of access to the Courts?

"Judith A. Snider"
Judge

APPENDIX "A"

Immigration and Refugee Protection Act, S.C. 2001, c, 27

Application before entering Canada

11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.

Humanitarian and compassionate considerations

25. (1) The Minister shall, upon request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative or on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.

Fees

Regulations

89. The 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, individually or by class.

Loi sur l'immigration et la protection des réfugiés, L.C. 2001, c. 27

Visa et documents

11. (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.

Séjour pour motif d'ordre humanitaire

25. (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative ou sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.

Frais

Règlement

89. Les règlements peuvent prévoir les frais pour les services offerts dans la mise en oeuvre de la présente loi, ainsi que les cas de dispense, individuellement ou par catégorie, de paiement de ces frais.

Immigration and Refugee Protection Regulations, SOR/2002-227

Form and content of application

10. (1) Subject to paragraphs 28(*b*) to (*d*), an application under these Regulations shall

. . .

(*d*) be accompanied by evidence of payment of the applicable fee, if any, set out in these Regulations;

Division 5

Humanitarian and Compassionate Considerations

Request

66. A request made by a foreign national under subsection 25(1) of the Act must be made as an application in writing accompanied by an application to remain in Canada as a permanent resident or, in the case of a foreign national outside Canada, an application for a permanent resident visa.

Application under Section 25 of the Act

Fees

307. The following fees are payable for processing an application made in accordance with section 66 if no fees are payable in respect of the same applicant for processing an application to remain in Canada as a permanent resident or an application for a permanent resident visa:

(*a*) in the case of a principal applicant, $550;

Règlement sur l'immigration et la protection des réfugiés, DORS/2002-227

Forme et contenu de la demande

10. (1) Sous réserve des alinéas 28*b*) à *d*), toute demande au titre du présent règlement :

. . .

d) est accompagnée d'un récépissé de paiement des droits applicables prévus par le présent règlement;

Section 5

Circonstances d'ordre humanitaire

Demande

66. La demande faite par un étranger en vertu du paragraphe 25(1) de la Loi doit être faite par écrit et accompagnée d'une demande de séjour à titre de résident permanent ou, dans le cas de l'étranger qui se trouve hors du Canada, d'une demande de visa de résident permanent.

Demande en vertu de l'article 25 de la Loi

Frais

307. Les frais ci-après sont à payer pour l'examen de la demande faite aux termes de l'article 66 si aucuns frais ne sont par ailleurs à payer à l'égard du même demandeur pour l'examen d'une demande de séjour au Canada à titre de résident permanent ou d'une demande de visa de résident permanent :

a) dans le cas du demandeur principal, 550 $;

(*b*) in the case of a family member of the principal applicant who is 22 years of age or older or is less than 22 years of age and is a spouse or common-law partner, $550; and

b) dans le cas d'un membre de la famille du demandeur principal qui est âgé de vingt-deux ans ou plus ou qui, s'il est âgé de moins de vingt-deux ans, est un époux ou conjoint de fait, 550 $;

(*c*) in the case of a family member of the principal applicant who is less than 22 years of age and is not a spouse or common-law partner, $150.

c) dans le cas d'un membre de la famille du demandeur principal qui est âgé de moins de vingt-deux ans et n'est pas un époux ou conjoint de fait, 150 $.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-326-09
STYLE OF CAUSE:	TOUSSAINT v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	June 23, 2009
REASONS FOR JUDGMENT AND JUDGMENT:	Snider J.
DATED:	September 4, 2009

APPEARANCES:

Mr. Andrew C. Dekany Mr. Angus Grant	FOR THE APPLICANT
Mr. Martin Anderson Ms. Kristina Dragaitis Mr. Ned Djordevic	FOR THE RESPONDENT
Ms. Amina Sherazee Mr. Rocco Galati	FOR THE INTERVENER LIFT
Mr. Raj Anand	FOR THE INTERVENER CCPI

SOLICITORS OF RECORD:

Andrew C. Dekany Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENTS
Amina Sherazee Barrister and Solicitor	FOR THE INTERVENER LIFT
Weir Foulds LLP Barristers and Solicitors Toronto, Ontario	FOR THE INTERVENER CCPI

I HEREBY CERTIFY that the above document is a true copy of the original issued out of / filed in the Court on the 4th day of September A.D. 2009
Dated this 8th day of September 2009

L. ROCHON
REGISTRY ASSISTANT
ADJOINTE DU GREFFE

Federal Court of Appeal | Cour d'appel fédérale

CANADA

Date: 20110429

Dockets: A-408-09
A-501-09

Citation: 2011 FCA 146

CORAM: **SHARLOW J.A.**
DAWSON J.A.
LAYDEN-STEVENSON J.A.

Docket: A-408-09

BETWEEN:

NELL TOUSSAINT

Appellant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

and

CHARTER COMMITTEE ON POVERTY ISSUES

Intervener

Docket: A-501-09

BETWEEN:

BEN NDUNGU

Appellant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Heard at Toronto, Ontario, on January 19, 2011.

Judgment delivered at Ottawa, Ontario, on April 29, 2011.

REASONS FOR JUDGMENT BY: SHARLOW J.A.

CONCURRED IN BY: DAWSON J.A.
LAYDEN-STEVENSON J.A.

Federal Court of Appeal Cour d'appel fédérale

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Docket: A-501-09

BETWEEN:

BEN NDUNGU

Appellant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT

SHARLOW J.A.

[1] These are appeals of two judgments of Justice Snider, reported as *Toussaint* v. *Canada (Minister of Citizenship and Immigration)*, 2009 FC 873, [2010] 3 F.C.R. 452, and *Ndungu* v. *Canada (Minister of Citizenship and Immigration)*, 2009 FC 1269. The appeals were heard together

based on serious questions of general importance certified by Justice Snider pursuant to paragraph 74(*d*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "*IRPA*"). Those questions, which I have reworded slightly, are as follows:

> (1) On a proper interpretation of subsection 25(1) of the *IRPA*, is the Minister of Citizenship and Immigration (the "Minister") obliged to consider a request for an exemption from the requirement in paragraph 10(1)(*d*) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the "*Regulations*"), to pay a fee for processing an application under subsection 25(1)?
>
> (2) If not, then has the failure of the Governor in Council to enact regulations permitting the waiver of fees for foreign nationals living in poverty who wish to make an in-Canada application for permanent resident status pursuant to subsection 25(1) of the *IRPA* infringed:
>
> (a) the rights of the appellants under section 7 or 15 of the *Canadian Charter of Rights and Freedoms*, or
>
> (b) the rule of law or the common law constitutional right of access to the courts?

[2] Justice Snider concluded that the answer to all of these questions is no, and on that basis dismissed the judicial review applications. I agree with Justice Snider on the second question. However, I respectfully disagree with her on the first question, and for that reason I would allow these appeals.

A. Background

[3] The description of the background to these appeals is divided into three parts: *(1) Subsection 25(1) of the IRPA*; *(2) Provisions of the IRPA and the Regulations relating to fees*; and *(3) Relevant facts and litigation history.*

1. Subsection 25(1) of the IRPA

[4] A foreign national may be granted the status of "permanent resident" under the *IRPA*. "Foreign national" is defined as follows in subsection 2(1) of the *IRPA*:

"foreign national" means a person who is not a Canadian citizen or a permanent resident, and includes a stateless person.	« étranger » Personne autre qu'un citoyen canadien ou un résident permanent; la présente définition vise également les apatrides.

[5] The status of permanent resident brings with it a number of important legal rights, including the right to enter and remain in Canada, and essentially the same rights as a citizen to work in Canada, and to receive social benefits, including health care.

[6] The normal procedure by which a foreign national becomes a permanent resident begins with an application submitted while the foreign national is outside Canada. However, subsection 25(1) of the *IRPA* permits a person to submit an "in-Canada" or "inland" application for permanent resident status with a request that the Minister exercise the discretion to grant specified relief. Subsection 25(1) read as follows at the time relevant to these appeals:

25. (1) The Minister shall, upon request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative or on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is	25. (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative ou sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger —

justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.	compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.

(Section 25 was amended by subsection 4(1) of the *Balanced Refugee Reform Act*, S.C. 2010, c. 7, effective June 29, 2010. However, no one has argued that the amendments apply to the subsection 25(1) applications that are the subject of these appeals, which were made before the amendments came into force. For that reason, I have not taken the amendments into consideration.)

[7] A foreign national in Canada is eligible to submit a subsection 25(1) application only if he or she is inadmissible or does not meet the requirements of the *IRPA*. A foreign national may be inadmissible on any of the grounds stipulated in sections 34 to 42 of the *IRPA*. It is not necessary to summarize all of those provisions but I will note some examples.

[8] Under section 34, a foreign national is inadmissible on security grounds for, among other things, engaging in any of the listed acts of espionage, subversion, terrorism, or for being a danger to the security of Canada, unless the Minister is satisfied that the presence of the foreign national in Canada would not be detrimental to the national interest. Under section 35, a foreign national is inadmissible on the ground of violating human or international rights in one of the listed ways, again subject to a Ministerial exception. Under section 38, a foreign national is inadmissible on health grounds if, among other things, their health condition might reasonably be expected to cause excessive demand on health or social services.

[9] The categories of admissibility that are most relevant to the statutory context for these appeals are set out in section 39 (financial reasons) and section 41 (non-compliance with the *IRPA*). Those provisions read as follows:

39. A foreign national is inadmissible for financial reasons if they are or will be unable or unwilling to support themself or any other person who is dependent on them, and have not satisfied an officer that adequate arrangements for care and support, other than those that involve social assistance, have been made.	39. Emporte interdiction de territoire pour motifs financiers l'incapacité de l'étranger ou son absence de volonté de subvenir, tant actuellement que pour l'avenir, à ses propres besoins et à ceux des personnes à sa charge, ainsi que son défaut de convaincre l'agent que les dispositions nécessaires — autres que le recours à l'aide sociale — ont été prises pour couvrir leurs besoins et les siens.
...	[...]
41. A person is inadmissible for failing to comply with this Act (*a*) in the case of a foreign national, through an act or omission which contravenes, directly or indirectly, a provision of this Act; and (*b*) in the case of a permanent resident, through failing to comply with subsection 27(2) or section 28.	41. S'agissant de l'étranger, emportent interdiction de territoire pour manquement à la présente loi tout fait — acte ou omission — commis directement ou indirectement en contravention avec la présente loi et, s'agissant du résident permanent, le manquement à l'obligation de résidence et aux conditions imposées.

[10] Subsection 25(1) on its face imposes a legal obligation on the Minister to do certain things upon the request of a foreign national in Canada who is inadmissible or who does not meet the requirements of the *IRPA*. (It also permits the Minister to do those same things on his own initiative, or upon the request of a foreign national outside Canada, but those elements of subsection 25(1) are not in play in these appeals).

[11] As I read subsection 25(1), the Minister's statutory obligation generally is as follows: (1) to examine the circumstances of the applicant; (2) to identify any humanitarian and compassionate considerations relating to the applicant (taking into account the best interests of a child directly affected), and any relevant public policy considerations; and (3) to form an opinion as to whether the humanitarian and compassionate considerations, or the public policy considerations, justify granting the applicant permanent resident status or an exemption from any applicable criteria or obligation of the *IRPA*.

2. Provisions of the IRPA and the Regulations relating to fees

[12] The *IRPA* does not stipulate the procedural requirements for a subsection 25(1) application. The procedural requirements are established by regulations enacted by the Governor in Council pursuant to subsection 5(1) of the *IRPA*, which reads as follows:

5. (1) Except as otherwise provided, the Governor in Council may make any regulation that is referred to in this Act or that prescribes any matter whose prescription is referred to in this Act.	5. (1) Le gouverneur en conseil peut, sous réserve des autres dispositions de la présente loi, prendre les règlements d'application de la présente loi et toute autre mesure d'ordre réglementaire qu'elle prévoit.

Pursuant to subsection 5(2) of the *IRPA*, regulations proposed to be made under certain provisions of the *IRPA* must be tabled in Parliament and referred to a Parliamentary Committee before they can be enacted by the Governor in Council. No such Parliamentary reference was required for any regulations that are relevant to the issues in these appeals.

[13] Section 26 of the *IRPA* authorizes the making of regulations relating to subsection 25(1), the provision in issue in this case. Section 26 read as follows at the relevant time (my emphasis):

26. The regulations may provide for any matter relating to the application of sections 18 to 25, and may include provisions respecting	26. Les règlements régissent l'application des articles 18 à 25 et portent notamment sur :
(*a*) entering, remaining in and re-entering Canada;	*a*) l'entrée, la faculté de rentrer et le séjour;
(*b*) permanent resident status or temporary resident status, including acquisition of that status;	*b*) le statut de résident permanent ou temporaire, et notamment l'acquisition du statut;
(*c*) the circumstances in which all or part of the considerations referred to in section 24 may be taken into account;	*c*) les cas dans lesquels il peut être tenu compte de tout ou partie des circonstances visées à l'article 24;
(*d*) conditions that may or must be imposed, varied or cancelled, individually or by class, on permanent residents and foreign nationals; and	*d*) les conditions qui peuvent ou doivent être, quant aux résidents permanents et aux étrangers, imposées, modifiées ou levées, individuellement ou par catégorie;
(*e*) deposits or guarantees of the performance of obligations under this Act that are to be given to the Minister.	*e*) les garanties à fournir au ministre pour l'exécution de la présente loi.

[14] Paragraph 26(*b*) of the *IRPA* permits regulations to be made regarding "permanent resident status", including "the acquisition of that status". That would include regulations stipulating the procedural requirements for a subsection 25(1) application.

[15] The procedural regulations in play in this case are subsection 10(1) and section 66 of the *Regulations*. Subsection 10(1) states the general procedural requirements for all applications under

the *IRPA*. Section 66 stipulates how a subsection 25(1) application is to be made. Those provisions read as follows (my emphasis):

10. (1) Subject to paragraphs 28(*b*) to (*d*), an application under these Regulations shall	10. (1) Sous réserve des alinéas 28*b*) à *d*), toute demande au titre du présent règlement :
(*a*) be made in writing using the form provided by the Department, if any;	*a*) est faite par écrit sur le formulaire fourni par le ministère, le cas échéant;
(*b*) be signed by the applicant;	*b*) est signée par le demandeur;
(*c*) include all information and documents required by these Regulations, as well as any other evidence required by the Act;	*c*) comporte les renseignements et documents exigés par le présent règlement et est accompagnée des autres pièces justificatives exigées par la Loi;
(*d*) be accompanied by evidence of payment of the applicable fee, if any, set out in these Regulations; and	*d*) est accompagnée d'un récépissé de paiement des droits applicables prévus par le présent règlement;
(*e*) if there is an accompanying spouse or common-law partner, identify who is the principal applicant and who is the accompanying spouse or common-law partner.	*e*) dans le cas où le demandeur est accompagné d'un époux ou d'un conjoint de fait, indique celui d'entre eux qui agit à titre de demandeur principal et celui qui agit à titre d'époux ou de conjoint de fait accompagnant le demandeur principal.
...	[...]
66. A request made by a foreign national under subsection 25(1) of the Act must be made as an application in writing accompanied by an application to remain in Canada as a permanent resident or, in the case of a foreign national outside Canada, an application for a permanent resident visa.	66. La demande faite par un étranger en vertu du paragraphe 25(1) de la Loi doit être faite par écrit et accompagnée d'une demande de séjour à titre de résident permanent ou, dans le cas de l'étranger qui se trouve hors du Canada, d'une demande de visa de résident permanent.

[16] The *IRPA*, as it read in 2008, mentions fees only in sections 89, 148 and 150. It is undisputed in these appeals that section 89 of the *IRPA* is the provision that authorized the enactment of section 307 of the *Regulations*, the provision that stipulates the fee in issue in these appeals. Sections 148 and 150 of the *IRPA* (found in Part 3, "Enforcement") relate to the obligations of operators of vehicles or transportation facilities bringing persons into Canada. Those provisions shed no light on the issues in these appeals. Section 89 reads as follows:

89. The 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, individually or by class.	89. Les règlements peuvent prévoir les frais pour les services offerts dans la mise en oeuvre de la présente loi, ainsi que les cas de dispense, individuellement ou par catégorie, de paiement de ces frais.

[17] No regulation has been enacted governing the waiver of fees by the Minister or otherwise.

[18] Fees are dealt with in Part 19 of the *Regulations* (sections 294-315), which consists of five divisions: Division 1 (interpretation), Division 2 (fees for applications for visas and permits, including work permits and study permits), Division 3 (fees for applications to remain in Canada as a permanent resident), Division 4 (right of permanent residence) and Division 5 (fees for other applications and services). Within each division, fees are imposed in numerous categories, each with its own scheme that in some cases includes exceptions and remissions.

[19] The fee in issue in this case is the fee stipulated by section 307 of the *Regulations*, which is found in Division 5 (fees for other applications and services) and reads in relevant part as follows:

307. The following fees are payable for processing an application made in accordance with section 66 if no fees are payable in respect of the same applicant for processing an application to remain in Canada as a permanent resident or an application for a permanent resident visa:	307. Les frais ci-après sont à payer pour l'examen de la demande faite aux termes de l'article 66 si aucuns frais ne sont par ailleurs à payer à l'égard du même demandeur pour l'examen d'une demande de séjour au Canada à titre de résident permanent ou d'une demande de visa de résident permanent :
(*a*) in the case of a principal applicant, $550	*a*) dans le cas du demandeur principal, 550 $ [....]

(The reference to section 66 is a reference to section 66 of the *Regulations*, which is quoted above.)

3. Relevant facts and litigation history

[20] The facts relating to Ms. Toussaint and Mr. Ndungu are similar insofar as they are relevant to these appeals. Ms. Toussaint and Mr. Ndungu are foreign nationals. In 2008 they were living in Canada without permanent resident status and without a visa entitling them to remain in Canada. They had no legal right to remain in Canada and were liable to be removed. If they were to leave Canada, they would have no legal right to return to Canada without obtaining either a visa or the status of permanent resident.

[21] Ms. Toussaint and Mr. Ndungu both wish to become permanent residents. Each submitted a subsection 25(1) application in 2008. The Minister does not dispute that they were eligible to do so, and for the purposes of these appeals it is not necessary to identify precisely why they were eligible.

[22] Paragraph 10(1)(*d*) of the *Regulations* required Ms. Toussaint and Mr. Ndungu to include with their subsection 25(1) applications proof that they had paid the $550 fee stipulated by section

307 of the *Regulations*. Ms. Toussaint and Mr. Ndungu did not comply with that requirement. They both claim that the payment of the $550 fee would be an undue financial hardship for them. When they submitted their subsection 25(1) applications, they did not include proof of payment of the fee. Instead, they submitted evidence of their poverty and a request that the fee be waived.

[23] For the purpose of these appeals, I have assumed that the claims of financial hardship asserted by Ms. Toussaint and Mr. Ndungu are such that the Minister could reasonably conclude that the fee should be waived on humanitarian and compassionate grounds. I do not suggest that this would have been the only decision reasonably open to the Minister.

[24] Ms. Toussaint and Mr. Ndungu each received a letter stating that their subsection 25(1) applications would not be considered until the $550 fee was paid. Ms. Toussaint's letter is dated January 12, 2009, and Mr. Ndungu's letter is dated February 10, 2009. The explanations are identical and read as follows:

> Paragraph 10(1)(*d*) of the *Immigration and Refugee Protection Regulations* requires all applicants to include evidence of payment of the applicable fee. Your request for an exemption for the fee is contrary to this legislative requirement. If you wish to apply for permanent residence in Canada your application must be accompanied by the required fee.

This explanation reflects the interpretation of subsection 25(1) of the *IRPA* and the applicable *Regulations* asserted by the Minister in the Federal Court and in this Court.

[25] Both Ms. Toussaint and Mr. Ndungu sought and obtained leave to bring an application in the Federal Court for judicial review of the Minister's decision to refuse to consider their subsection 25(1) applications. Justice Snider heard Ms. Toussaint's application for judicial review first, dismissing it and certifying the questions referred to above. Justice Snider later heard Mr. Ndungu's application, with the same result.

[26] Both judicial review applications challenged the Minister's interpretation of subsection 25(1) of the *IRPA*, and raised a number of constitutional challenges in the event the Minister's interpretation was found to be correct.

[27] On the question of statutory interpretation, Justice Snider acknowledged that the interpretation of subsection 25(1) proposed by Ms. Toussaint and Mr. Ndungu reflects a valid literal interpretation of subsection 25(1), but she accepted the Minister's interpretation because, as she explained in paragraphs 23 to 32 of her reasons in *Toussaint*, she considered the Minister's interpretation to be more consistent with the object and purpose of the statutory scheme that includes subsection 25(1).

[28] Justice Snider rejected the constitutional arguments of Ms. Toussaint and Mr. Ndungu, concluding that there is no constitutional principle that compels the Governor in Council to enact regulations governing the waiver of fees payable under the *IRPA*.

B. Standard of Review

[29] This case has been argued throughout on the basis that the Minister is owed no deference on the question of statutory interpretation or the constitutional issues raised in these appeals. I agree, and have applied the standard of correctness.

C. Principles of statutory interpretation

[30] As the main issue in these appeals requires a resolution of a debate about the interpretation of subsection 25(1) of the *IRPA*, the principles of statutory interpretation must be considered. Justice Snider summarized the relevant principles in paragraphs 16 to 20 of her reasons in *Toussaint*. I agree with her summary and repeat it here:

> [16] Since the first issue before me is one of statutory interpretation, it is useful to begin with an overview of the principles related to such matters. On a number of occasions, the Supreme Court of Canada has given guidance on how to approach a problem of statutory interpretation. In *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at paragraph 21, Mr. Justice Iacobucci, speaking for the unanimous Court, endorsed the statement of Elmer Driedger in *Driedger on the Construction of Statutes*, 2nd ed. (Toronto: Butterworths Canada Ltd., 1983) that:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> [17] Accordingly, the task of the Court in interpreting legislation cannot be restricted to analysing the plain meaning of the provision in question. Further, while the statutory words must be given a "fair, large and liberal construction and interpretation as best ensures the attainment of its objectives" (*Interpretation Act*, R.S.C. 1985, c. I-21, s. 12), attention must be directed to the scheme and objective of the statute, the intention of the legislature, and the context of the words in issue (*Rizzo*, above, at para. 23). Regardless of how clear and unambiguous the words of a provision may be, further analysis must be carried out. Indeed, a failure to determine the intention of the legislature in enacting a particular provision has been found to be an error (*Rizzo*, above, at paras. 23, 31).

> It follows that, where there are conflicting but not unreasonable interpretations available, the contextual framework of the legislation becomes even more important.
>
> [18] In short, my task cannot be limited to interpreting the individual words or phrases used in s. 25; rather, I must have regard to the context in which the words are placed, the objects of *IRPA* and the intention of Parliament.
>
> [19] In considering the context of *IRPA*, the nature or architecture of the statutory scheme is important. In *De Guzman v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436, [2006] 3 F.C.R. 655 at paragraph 23, the Court of Appeal described *IRPA* as "framework legislation": That is to say, the Act contains the core principles and policies of the statutory scheme and, in view of the complexity and breadth of the subject-matter, is relatively concise. The creation of secondary policies and principles, the implementation of core policy and principles, including exemptions, and the elaboration of crucial operational detail, are left to regulations, which can be amended comparatively quickly in response to new problems and other developments. Framework legislation thus contemplates broad delegations of legislative power.
>
> [20] In *De Guzman* (at paragraph 26), the Court also commented that if there is a conflict between the express language of an enabling clause and a regulation purportedly made under it, the regulation may be found to be invalid. Otherwise, courts approach with great caution the review of regulations promulgated by the Governor (or Lieutenant-Governor) in Council.

D. Interpretation of subsection 25(1)

1. Introduction

[31] The question of statutory interpretation raised in these appeals is this: Does subsection 25(1) of the *IRPA* give the Minister the authority to grant a request made by a foreign national in Canada to waive the requirement in paragraph 10(1)(*d*) of the *Regulations* to pay the fee stipulated by section 307 of the *Regulations* for a subsection 25(1) application? In my view, the answer is yes, for the reasons explained below. It follows that the Minister erred in law when he rejected the

subsection 25(1) applications of Ms. Toussaint and Mr. Ndungu on the basis that subsection 25(1) did not give him the authority to waive the fee.

[32] For ease of reference, subsection 25(1) is reproduced here (my emphasis):

25. (1) The Minister shall, upon request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative or on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from <u>any applicable criteria or obligation of this Act</u> if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.	25. (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative ou sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever <u>tout ou partie des critères et obligations applicables</u>, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.

[33] I summarize the Minister's argument as follows. The phrase "any applicable criteria or obligation of this Act" in subsection 25(1) of the *IRPA* refers only to the grounds of inadmissibility for permanent residence set out in sections 34 to 42 of the *IRPA*, and the various obligations under the *Regulations* to provide specified information and official documents. In contrast, the requirement under paragraph 10(1)(*d*) of the *Regulations* to pay the $550 fee is a precondition to the making of a valid subsection 25(1) application. Until that fee is paid, there is no subsection 25(1) application, and therefore there is no subsection 25(1) request for the Minister to consider. It follows

that the phrase "applicable criteria or obligation of this Act" cannot be interpreted to include the authority to waive the fee.

[34] Ms. Toussaint and Mr. Ndungu propose an entirely different interpretation. I summarize their argument as follows. Under subsection 25(1) of the *IRPA*, the Minister is given the statutory authority to grant a foreign national in Canada an exemption from "any applicable criteria or obligation of this Act". Paragraph 10(1)(*d*) imposes on every subsection 25(1) applicant the obligation to pay the fee stipulated in section 307 of the *Regulations*. By virtue of subsection 2(2) of the *IRPA*, the obligation to pay that fee is an obligation "of this Act", and therefore it is an obligation that the Minister may waive pursuant to subsection 25(1). Subsection 2(2) of the *IRPA* reads as follows:

2. (2) Unless otherwise indicated, references in this Act to "this Act" include regulations made under it.	2. (2) Sauf disposition contraire de la présente loi, toute mention de celle-ci vaut également mention des règlements pris sous son régime.

2. Analysis of subsection 25(1)

[35] I agree with Justice Snider (at paragraph 21 of her reasons in *Toussaint*) that the interpretation of subsection 25(1) of the *IRPA* proposed by Ms. Toussaint and Mr. Ndungu is consistent with its language, read literally in its ordinary and grammatical sense. That conclusion accords with the broad language used to describe what the Minister may waive – "any applicable criteria or obligation of this Act" – and the correspondingly broad basis for such a waiver – humanitarian and compassionate considerations and public policy considerations.

[36] I also agree with Justice Snider that this does not necessarily mean that the literal interpretation of subsection 25(1) is correct. If the language of subsection 25(1) can reasonably bear another meaning that accords better with the context and objectives of the statutory scheme, then that other meaning should be accepted. Therefore, it is necessary to consider the elements of the statutory scheme relating to applications for permanent residence and the related fees, and the place of those elements within the *IRPA*.

[37] Based on the submissions of the parties, I have concluded that the following contextual factors should be considered in interpreting subsection 25(1): (a) the general principle that immigration is a privilege, not a right; (b) the statutory objectives of the *IRPA* as stated in section 3; (c) whether the existence of section 89 of the *IRPA* implies that the question of fee waivers was intended to be solely a matter for regulation by the Governor in Council; (d) the fact that the criteria used to assess a subsection 25(1) application include financial self sufficiency in Canada; and (e) whether requiring fee waivers to be considered with a subsection 25(1) application is absurd because it would be unduly cumbersome. I will discuss each of these in turn below.

(a) Immigration as a privilege

[38] The Minister argues that subsection 25(1) requires the Minister to consider a subsection 25(1) application upon request, but does not require the Minister to enable that request by waiving the fee. This argument, according to the Minister, is consistent with the fundamental principle of Canadian immigration law that immigration is a privilege (see, for example, *Canada (Minister of Citizenship and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711 at paragraph 24).

[39] In my view, the principle that immigration is a privilege means that a subsection 25(1) applicant has no legal right to a favourable decision by the Minister on any request for an exemption. However, that principle says nothing about the scope of the Minister's discretion under subsection 25(1), or more specifically, whether it should be interpreted narrowly as the Minister contends, or broadly as contended by Ms. Toussaint and Mr. Ndungu.

(b) The statutory objectives of the IRPA as stated in section 3

[40] It is often the case that the resolution of a debate on the interpretation of a statute requires consideration of the objectives of the statute. In this case, the objectives of the *IRPA* are set out in section 3 of the *IRPA*. Subsection 3(1) refers to immigration, subsection 3(2) refers to refugees, and subsection 3(3) refers to interpretation and application.

[41] The Minister cites paragraphs 3(1)(*a*), (*c*) and (*e*) in support of his interpretation of subsection 25(1). Those provisions read as follows:

3. (1) The objectives of this Act with respect to immigration are	3. (1) En matière d'immigration, la présente loi a pour objet :
(*a*) to permit Canada to pursue the maximum social, cultural and economic benefits of immigration;	*a*) de permettre au Canada de retirer de l'immigration le maximum d'avantages sociaux, culturels et économiques;
...	[...]
(*c*) to support the development of a strong and prosperous Canadian economy, in which the benefits of immigration are shared across all regions of Canada;	*c*) de favoriser le développement économique et la prospérité du Canada et de faire en sorte que toutes les régions puissent bénéficier des avantages économiques découlant de l'immigration;

...	[...]
(*e*) to promote the successful integration of permanent residents into Canada, while recognizing that integration involves mutual obligations for new immigrants and Canadian society;	*e*) de promouvoir l'intégration des résidents permanents au Canada, compte tenu du fait que cette intégration suppose des obligations pour les nouveaux arrivants et pour la société canadienne;

[42] The Minister argues that interpreting subsection 25(1) to permit a discretionary waiver of fees would be inconsistent with the *IRPA* provisions of pursuing maximum economic benefits of immigration, supporting the development of a strong and prosperous economy, and promoting the goal of the successful integration of permanent residents to Canada. I see nothing in any of these provisions that is inconsistent with a statutory provision that permits the Minister to waive the fee for a subsection 25(1) application. On the contrary, it may well be more consistent with these objectives to give the Minister the authority to facilitate a process that might lead to a foreign national being granted the status of a permanent resident. A foreign national in Canada who does not have the status of permanent resident does not have an unqualified right to work to achieve self-sufficiency. If such a person has a potentially meritorious claim for a discretionary grant of permanent residence under subsection 25(1), there is no obvious policy objection to a process that could facilitate his subsection 25(1) application by a fee waiver.

[43] I do not read anything in subsection 3(1) as referring directly or indirectly to fees. Such fees are imposed primarily as a cost recovery device, to improve the efficiency of the government department charged with the administration of the *IRPA*. Administrative efficiency is undoubtedly important in all government endeavours, but I am unable to read section 3 of the *IRPA* as including

administrative efficiency as one of the core statutory objectives of immigration. In my view, the stated objectives of the *IRPA* are not liable to be harmed by adopting the interpretation of subsection 25(1) proposed by Ms. Toussaint and Mr. Ndungu.

[44] One argument for Mr. Ndungu was based in part on paragraphs 3(3)(*d*) and (*f*) of the *IRPA*, which read as follows:

3. (3) This Act is to be construed and applied in a manner that	3. (3) L'interprétation et la mise en oeuvre de la présente loi doivent avoir pour effet :
...	[...]
(*d*) ensures that decisions taken under this Act are consistent with the *Canadian Charter of Rights and Freedoms*, including its principles of equality and freedom from discrimination and of the equality of English and French as the official languages of Canada;	*d*) d'assurer que les décisions prises en vertu de la présente loi sont conformes à la *Charte canadienne des droits et libertés*, notamment en ce qui touche les principes, d'une part, d'égalité et de protection contre la discrimination et, d'autre part, d'égalité du français et de l'anglais à titre de langues officielles du Canada;
...	[...]
(*f*) complies with international human rights instruments to which Canada is signatory.	*f*) de se conformer aux instruments internationaux portant sur les droits de l'homme dont le Canada est signataire.

[45] The argument, in summary, is that to interpret paragraph 25(1) in a way that precludes the Minister from waiving the fee would be inconsistent with paragraph 3(3)(*d*) or (*f*) of the *IRPA*, especially where the best interests of a child are at stake. This presumes that the fee imposed on a subsection 25(1) applicant for permanent residence engages the rights of the applicant under the

Charter and certain international agreements to which Canada is a signatory (relating to the interests of children). The same presumption underlies the argument for Mr. Ndungu on the second certified question and in that context was correctly rejected by Justice Snider. In my view, it bears no greater weight in the context of statutory interpretation.

(c) Role of section 89 of the IRPA

[46] The Minister cites section 89 of the *IPRA* in support of his interpretation of subsection 25(1). Section 89 is quoted above and is repeated here for ease of reference:

89. The 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, individually or by class.	89. Les règlements peuvent prévoir les frais pour les services offerts dans la mise en oeuvre de la présente loi, ainsi que les cas de dispense, individuellement ou par catégorie, de paiement de ces frais.

As indicated above, the Governor in Council has enacted no regulations dealing with discretionary fee waivers by the Minister.

[47] The Minister argues that the existence of section 89 is an indication that Parliament intended the Minister to have no discretion to waive fees except as permitted by a regulation enacted by the Governor in Council. According to the Minister, to find a fee waiving authority within subsection 25(1) would suggest that Parliament has provided for competing authorities. I see no reason to read that much into section 89. In my view, section 89 and subsection 25(1) are capable of standing together no matter which interpretation of subsection 25(1) is adopted.

[48] I see no reason in principle why Parliament would not see fit to authorize the Minister to waive the fee for a subsection 25(1) application on humanitarian and compassionate grounds or public policy grounds, necessarily on a case by case basis, while at the same time authorizing the Governor in Council to enact regulations governing when a fee may be waived "by the Minister or otherwise, individually or by class." The scope of the regulation making authority in section 89 is plenary – it permits regulations to be made for the waiver of any of the dozens of fees imposed in Part 19 of the *Regulations*, most of which have nothing to do with subsection 25(1). In my view, there is ample scope for the enactment of regulations relating to fee waivers without encroaching on the authority given to the Minister under subsection 25(1).

(d) Statutory requirement of financial stability and independence

[49] The Minister argues that waiving the fee payable by a subsection 25(1) applicant who is not financially self sufficient and is not capable of attaining that status would be inconsistent with the financial admissibility criteria in section 39 of the *IRPA*. That provision is quoted above and is repeated here for ease of reference:

39. A foreign national is inadmissible for financial reasons if they are or will be unable or unwilling to support themself or any other person who is dependent on them, and have not satisfied an officer that adequate arrangements for care and support, other than those that involve social assistance, have been made.	39. Emporte interdiction de territoire pour motifs financiers l'incapacité de l'étranger ou son absence de volonté de subvenir, tant actuellement que pour l'avenir, à ses propres besoins et à ceux des personnes à sa charge, ainsi que son défaut de convaincre l'agent que les dispositions nécessaires — autres que le recours à l'aide sociale — ont été prises pour couvrir leurs besoins et les siens.

[50] I do not accept the Minister's argument on this point. The result of the Minister's interpretation is this. It is possible as a matter of law for a person with no financial resources to be granted permanent resident status if the Minister is of the opinion that such a decision is warranted by humanitarian and compassionate considerations or public policy considerations. However, because that same person does not have $550, the Minister cannot permit the opening of the door that would engage the Minister's statutory authority to assess those considerations. In my view, that state of affairs makes no sense. It would be more consistent with the objectives of the *IRPA* to interpret subsection 25(1) in a way that allows the Minister to waive that fee, than to interpret it in a way that bars any such relief.

(e) Administrative considerations

[51] The Minister suggests that it would be unduly cumbersome for the Minister to have to deal with a fee waiver (which necessarily would deal with many of the same considerations as a request for an exemption from section 39 – financial inadmissibility) in the case of an application based on an entirely unrelated ground of admissibility – for example, inadmissibility on health grounds. The Minister asserts that this would entail "enormous resource implications", such that it is unreasonable to conclude that Parliament intended such a result.

[52] It is difficult, if not impossible, to assess the merits of the allegation of increased costs because the Minister has offered no evidence to support it. However, drawing what inferences I can from the common general knowledge of administrative matters, it seems to me that dealing with fee waivers might prove to be relatively simple compared, for example, to assessing claims for

exemptions from inadmissibility provisions. There is no obvious reason why the Minister could not consider a subsection 25(1) application on its merits before considering any request for a fee waiver. The question of the fee waiver would then have to be considered only if the principal request for an exemption is successful.

[53] Even if I were to assume that interpreting subsection 25(1) as proposed by Ms. Toussaint and Mr. Ndungu would entail more work on the part of the Minister (and Ministerial delegates) than is now the case, so that the cost of administering subsection 25(1) would increase, I am not persuaded on balance that an increased administration burden, in and by itself, is a sound reason for adopting the Minister's interpretation of that provision, particularly in the absence of any evidence on the point.

[54] Justice Snider in her reasons raises a concern that if subsection 25(1) is interpreted as proposed by Ms. Toussaint and Mr. Ndungu, the Minister would be inundated with requests for fee waivers for any and all fees imposed by the *Regulations*. In my view, the record discloses no foundation for that concern. Indeed, it does not form any part of the submissions of the Minister in these appeals.

3. Conclusion on statutory interpretation

[55] In my view, there is nothing in the scheme of the *IRPA* or the statutory context to compel the conclusion that the obligation under paragraph 10(1)(*d*) of the *Regulations* to pay a fee for a subsection 25(1) application is not within the scope of the phrase "any applicable criteria or

obligation of this Act" in subsection 25(1) of the *IRPA*. I conclude that on a proper interpretation of subsection 25(1) of the *IRPA*, the Minister is obliged to consider a request for an exemption from the requirement in section 307 of the *Regulations* to pay a fee for processing an application under subsection 25(1), and I would answer the first certified question accordingly.

E. The constitutional questions

[56] My answer to the first certified question is a sufficient basis for allowing this appeal, and rendering the second question moot. I have nevertheless considered the second question and the constitutional issues to which they relate because they were dealt with thoroughly by Justice Snider, and were the subject of full argument in these appeals.

[57] As indicated above, I agree with the conclusions of Justice Snider on the constitutional issues that are the subject of the second certified question, as summarized below. Because I agree substantially with her analysis as set out in paragraphs 34 to 117 of her reasons, I do not consider it necessary to repeat it.

[58] Section 7 of the *Charter*. The rights of Ms. Toussaint and Mr. Ndungu under section 7 of the *Charter* are not engaged by the failure of the Minister to consider their requests for a fee waiver. That is so for two reasons. First, their removal from Canada prior to consideration of the humanitarian and compassionate grounds raised in their subsection 25(1) applications does not deprive them of their right to life, liberty or security of the person. Second, they have not been deprived of any rights without the application of the principles of fundamental justice.

[59] Subsection 15(1) of the *Charter*. If there were no provision in the *IRPA* or the *Regulations* for the waiver of the fee for a subsection 25(1) application by a foreign national living in poverty in Canada, that would not constitute discrimination against Ms. Toussaint or Mr. Ndungu contrary to subsection 15(1) of the *Charter* on the ground of "poverty" or "being a person in receipt of social assistance". That is so for several reasons.

(1) The subsection 15(1) claim fails on the facts. There is no evidence that foreign nationals living in poverty in Canada suffer disproportionate hardship that can be attributed to the absence of a provision for a fee waiver

(2) The absence of a provision for a fee waiver does not affect access to a process for claiming a legal right. It affects only access to a process for requesting a discretionary and exceptional benefit.

(3) "Poverty" or "being in need of social assistance" are not analogous grounds for purposes of subsection 15(1). A person's financial condition is not an immutable personal characteristic. People who are poor or who are in need of social assistance are not a discrete and insular group defined by a common or shared personal characteristic. The absence of a provision for a fee waiver does not create a disadvantage by perpetuating prejudice or stereotyping.

[60] Access to the courts and the rule of law. The absence of a provision for the waiver of fees is not contrary to the common law constitutional right of access to the courts or to the rule of law. Access to the Minister under subsection 25(1) of the *IRPA* is not the same as, or analogous to,

access to the courts because the Minister's authority under subsection 25(1) is limited to providing an exceptional discretionary benefit. In the context of the immigration provisions of the *IRPA*, the rule of law cannot be used to create a fee waiver where none exists in the legislation.

F. Conclusion

[61] I would allow both appeals, set aside the judgments of the Federal Court, allow both applications for judicial review, and refer both matters back to the Minister for consideration of the requests of the appellants for a waiver of the fees payable in respect of their subsection 25(1) applications. I would answer the certified questions as follows:

1. On a proper interpretation of subsection 25(1) of the *IRPA*, is the Minister obliged to consider a request for an exemption from the requirement in paragraph 10(1)(*d*) of the *Regulations* to pay a fee for processing an application under subsection 25(1)?

   Answer: Yes.

2. Has the failure of the Governor in Council to enact regulations permitting the waiver of fees for foreign nationals living in poverty who wish to make an in-Canada application for permanent resident status pursuant to subsection 25(1) of the *IRPA* infringed:

   i. the rights of the appellants under section 7 or 15 of the *Charter*, or
   ii. the rule of law or the common law constitutional right of access to the courts?

   Answer: No.

"K. Sharlow"

J.A.

"I agree
Eleanor R. Dawson J.A."

"I agree
Carolyn Layden-Stevenson J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-408-09
(APPEAL FROM AN ORDER OF THE HONOURABLE JUSTCE SNIDER DATED SEPTEMBER 4, 2009, DOCKET NO. IMM-326-09, IMM-2926-08 AND IMM-3045-08)	
STYLE OF CAUSE:	NELL TOUSSAINT v. MINISTER OF CITIZENSHIP AND IMMIGRATION AND CHARTER COMMITTEE ON POVERTY ISSUES (Intervener)
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	January 19, 2011
REASONS FOR JUDGMENT BY:	**SHARLOW J.A.**
CONCURRED IN BY:	**DAWSON J.A.** **LAYDEN-STEVENSON J.A.**
DATED:	April 29, 2011

APPEARANCES:

Andrew C. Dekany Angus Grant	FOR THE APPELLANT
Martin Anderson Kristina Dragaitis Mahan Kermati	FOR THE RESPONDENT
Raj Anand	FOR THE INTERVENER

SOLICITORS OF RECORD:

Andrew C. Dekany Barrister and Solicitor	FOR THE APPELLANT
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-501-09
(APPEAL FROM AN ORDER OF JUSTICE SNIDER DATED DECEMBER 11, 2009, DOCKET NO. IMM-1088-09)	
STYLE OF CAUSE:	BEN NDUNGU v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	January 19, 2011
REASONS FOR JUDGMENT BY:	**SHARLOW J.A.**
CONCURRED IN BY:	**DAWSON J.A.** **LAYDEN-STEVENSON J.A.**
DATED:	April 29, 2011

APPEARANCES:

Rocco Galati	FOR THE APPELLANT
Martin Anderson Kristina Dragaitis Mahan Kermati	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Rocco Galati Firm Professional Corporation	FOR THE APPELLANT
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT

Federal Court of Appeal | Cour d'appel fédérale

CANADA

Date: 20110429

Docket: A-408-09

Ottawa, Ontario, April 29, 2011

CORAM: **SHARLOW J.A.**
DAWSON J.A.
LAYDEN-STEVENSON J.A.

BETWEEN:

NELL TOUSSAINT

Appellant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

and

CHARTER COMMITTEE ON POVERTY ISSUES

Intervener

JUDGMENT

1. The appeal is allowed and the judgment of the Federal Court is set aside. The application for judicial review is allowed and this matter is referred back to the Minister of Citizenship and Immigration for consideration of the appellant's request for a waiver of the fees payable in respect of her application under subsection 25(1) of the *Immigration and Refugee Protection Act*.

2. The certified questions are answered as follows:

(1) On a proper interpretation of subsection 25(1) of the *Immigration and Refugee Protection Act*, is the Minister of Citizenship and Immigration obliged to consider a request for an exemption from the requirement in paragraph 10(1)(*d*) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the "*Regulations*"), to pay a fee for processing an application under subsection 25(1)?

Answer: Yes

(2) Has the failure of the Governor in Council to enact regulations permitting the waiver of fees for foreign nationals living in poverty who wish to make an in-Canada application for permanent resident status pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act* infringed:

(a) the rights of the appellants under section 7 or 15 of the *Canadian Charter of Rights and Freedoms*, or

(b) the rule of law or the common law constitutional right of access to the courts?

Answer: No.

I HEREBY CERTIFY that the above document is a true copy of the original issued out of / filed in the Court on the 29 day of April A.D. 20 17

Dated this 3 day of May 20 17

E. RABOUIN
REGISTRY ASSISTANT
ADJOINTE AU GREFFE

"K. Sharlow"
J.A.

File Number: _____

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN

NELL TOUSSAINT

Applicant

Appellant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Respondent

Applicant's Memorandum Of Argument

Part I – Statement of Facts

Overview of applicant's position with respect to issues of public importance, mootness and standing

1. This application involves the right of indigent foreign nationals living in Canada in poverty to apply to the Minister of Citizenship and Immigration for permanent residence on humanitarian and compassionate ("H & C") grounds, even though they are unable to pay what for them are substantial application fees.

2. The Federal Court of Appeal declared that under section 25(1) of the *Immigration and Refugee Protection Act* ("*IRPA*") the Minister, on humanitarian and compassionate grounds, could exempt indigent persons such as the applicant from paying the fee for an H & C application.[1]

3. Although successful on this ground the applicant seeks leave because the Federal Court of Appeal went on in effect to declare that there was no constitutional right

[1] See paragraph 2(1) of the Court's judgment, application for leave to appeal, p. 96

under sections 7 or 15 of the *Canadian Charter of Rights and Freedoms* ("*Charter*"), the Rule of Law, or the common law constitutional right of access to justice to have the government provide for a fee waiver where a waiver is necessary for those in poverty to access the Minister's humanitarian and compassionate review[2]. In this part of its judgment the Federal Court of Appeal clearly intended to provide guidance[3] and undoubtedly the judgment will be taken as authoritative and followed by the bar[4] and the Federal Court[5] as well as by officials exercising conferred discretion under the Act. The Federal Court of Appeal's analysis of these constitutional issues substantially agreed with the analysis of the court of first instance.[6]

4. After the appeal was filed in the Federal Court of Appeal but prior to the appeal being heard Parliament amended section 25 of the *IRPA* effective June 29, 2010 by enacting the *Balanced Refugee Reform Act* (*BRRA)*, S.C. 2010, c. 7, subsection 4(1) of which added section 25(1.1) to provide that:

> "The Minister is seized of a request referred to in subsection (1) only if the applicable fees in respect of that request have been paid."

5. As of June 29, 2010 it therefore appears the Minister is not obliged to consider an H & C application for permanent residence by an indigent foreign national living in Canada without payment of the fee since the Minister would not be seized of such a request.[7]

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[2] *ibid*., paragraph 2(2) of judgment

[3] See paragraph 56 of the reasons for judgment of the Federal Court of Appeal, application for leave to appeal, p. 90

[4] See paragraph 10 of the affidavit of Geraldine Sadoway sworn June 24, 2011, application for leave to appeal, p. 216

[5] See *Sellars* v. *The Queen*, 1980 CanLII 166, [1980] 1 S.C.R. 527, and *R.* V. *Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609 and subsequent jurisprudence in lower courts which extended the principles in those cases to *obiter dicta* in judgements of provincial appellate courts (*Western Aerial Applications Ltd.* v. *Turbomeca USA Inc.*, 2009 BCSC 123 (CanLII), at paras 21 and 22, and see *R.* v. *Riggs*, 2007 CanLII 43484 (NL PC) at paras. 17 to 19

[6] See paragraphs 57 to 60 of the Federal Court of Appeal's reasons for judgment, application for leave to appeal, pp. 90 to 92

[7] Although another amendment under the *BRRA*, s. 25.1(2), gives the Minister authority to exempt a foreign national from the payment of fees, that is only in a case where the Minister under s. 25.1, *on the*

6. The Federal Court of Appeal referred to the amendments under the *BRRA* but did not consider their effect on the applicant's fee waiver request because her request was made before June 29, 2010. However, the determination of the constitutional issues by that court's judgment has immediate and significant effect on the way in which those issues are dealt with under the current version of the Act.

7. A spokesperson on behalf of the Minister was recently quoted in the National Post daily newspaper as stating:

> "CIC is considering what impact, if any, [the Federal Court of Appeal's] decision has on the assessment of pending humanitarian and compassionate applications . . . However, with the recent refugee reform, we do not believe at this time that this should be an issue."[8]

It appears the spokesperson was referring to the *BRRA*, in particular the addition of section 25(1.1), and implying that as a result indigent foreign nationals in Canada no longer have access to a waiver of the fee for making humanitarian and compassionate applications for permanent residence.

8. The applicant, in the public interest, applies to this Court for leave to appeal the Federal Court of Appeal's judgment respecting the constitutional validity of the original legislation as it had been interpreted by the court of first instance. The Federal Court of Appeal was prepared to determine the constitutional issues even though it held that they were moot as a result of its interpretation of section 25(1)[9]. In light of the amendment in section 25(1.1) those issues are no longer moot. In any event, the amended legislation presents the identical constitutional issues and, by providing that the Minister is not seized of an application without the payment of a fee, even heightens the importance of having them determined by this Court. Should this Court choose not to grant this leave application and deal with those issues, they will stand, determined in default by the judgment of

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Minister's own initiative, examines the person's circumstances for H & C grounds, not where the foreign national himself or herself requests the Minister to do so. See application for leave to appeal, p. 121

[8] Affidavit of Bonnie Morton sworn June 24, 2011, exhibit A, application for leave to appeal, p. 210

[9] Reasons for judgment of the Federal Court of Appeal, para. 56, application for leave to appeal, p. 90

the Federal Court of Appeal – a judgment that in this respect the applicant respectfully submits was in error.

9. Apart from an appeal to this Court from the Federal Court of Appeal's decision in the case at bar, further appellate review of the constitutional issues by the courts below is unlikely. There is a requirement for leave to apply to the Federal Court for judicial review in immigration matters[10], and a further requirement for the court of first instance, the Federal Court, to certify a serious question of general importance before an issue can be dealt with by the Federal Court of Appeal[11]. The authoritative judgment of the Federal Court of Appeal on the constitutional issues renders it extremely unlikely that leave would be granted or questions would be certified by the Federal Court with respect to those issues.

10. Moreover, the cost of mounting such a challenge again is likely to be prohibitive, especially considering that funding for new cases under the Court Challenges Program was cancelled by the federal government on September 25, 2006.[12]

11. The unstable situations of poor foreign nationals living in Canada and the length of time for cases to proceed through the courts also make these constitutional issues evasive of review. For example, two other sets of applicants whose applications for judicial review at first instance were consolidated with that of the within applicant's[13] were held to have become moot and therefore dismissed by the court of first instance and their appeals to the Federal Court of Appeal were quashed.[14]

12. As immigration law is a federal concern, and as indigent persons seeking to make applications for permanent residence on humanitarian and compassionate grounds

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[10] *Immigration and Refugee Protection Act*, s. 72
[11] *Immigration and Refugee Protection Act*, s. 74(d)
[12] Affidavit of Bonnie Morton, paras. 20 and 22, application for leave to appeal, pp. 205 and 206
[13] Order of the Federal Court (prothonotary) dated February 27, 2009, application for leave to appeal, p. 192
[14] Affidavit of Bonnie Morton, para. 21, application for leave to appeal, p. 206

but unable to pay the fees may be located in any part of Canada, this case raises a matter of national importance.

13. More generally, if allowed to stand the Federal Court of Appeal's judgment on the constitutional issues will have a significantly detrimental effect on the rights of persons living in poverty in Canada.[15] The Court's holding that the rule of law and access to justice does not apply to accessing discretionary administrative decision-making procedures, such as H & C consideration under the *Immigration and Refugee Protection Act*, sends direction to governments across Canada and to officials exercising decision-making authority under a wide range of statutes as to their constitutional obligations. It tells them that they need not exercise discretion or administer justice in a manner consistent with the goal of ensuring access to administrative justice for persons living in poverty and renders *Charter* rights illusory in many of the areas poor people rely on most for their protection.[16]

14. The applicant is a public-interest litigant. She initiated her judicial review proceeding and pursued it to this point because her plight, effectively being barred from access to the Minister's consideration of her plea for an exemption on humanitarian and compassionate grounds by a fee she cannot pay, is reflective of a whole class of similarly situated, in-country foreign nationals. Pursuant to the Federal Court of Appeal's judgment, Citizenship and Immigration Canada invited the applicant to submit her application for permanent residence based on humanitarian and compassionate grounds and to make submissions on her request for a fee waiver.[17] However, other foreign nationals similarly situated to her continue to face the fee barrier.[18]

15. The applicant found the support she needed to pursue her rights only because her case was an appropriate vehicle for testing the legality of the absence of a waiver

[15] Affidavit of Bonnie Morton, paras. 9 and following, application for leave to appeal, pp. 199 to 202
[16] Affidavit of Bonnie Morton, para. 10, application for leave to appeal, pp. 199 and 200
[17] Applicant's affidavit, para. 3, application for leave to appeal, pp. 217 and 218
[18] Two such cases are identified in the affidavit of Geraldine Sadoway sworn June 24, 2011, para. 9, application for leave to appeal, p. 216

for these access-barring fees.[19] This applicant is the epitome of the "ordinary citizen" who seeks "to resolve matters of consequence to the community as a whole" to quote this Court's characterization of a public interest litigant in *British Columbia (Minister of Forests) v. Okanagan Indian Band*[20]. In her circumstances she is not, of course, a "citizen" *per se*; nevertheless, she is, like the citizens referred to in *Okanagan Indian Band*, a person whose interest in the proceedings legitimately and reasonably transcends her own.[21]

16. The applicant therefore seeks leave to appeal to have this Court review the judgments of the courts below and finally determine whether indigent persons unable to pay the fees can nevertheless have access to what this Court in *Baker* v. *Canada (Minister of Citizenship and Immigration)*, which also involved an application for permanent residence on humanitarian and compassionate grounds, characterized as "a decision that in practice has exceptional importance to the lives of those with an interest in its result."[22]

Social Science Facts

17. The expert evidence relating to the social condition of poverty and receipt of public assistance as a basis of prejudice, discrimination, stigma and stereotyping is uncontested by the respondent's evidence, which relates solely to statistical definitions of low income. Professor john powell, a prominent expert on race, ethnicity, poverty and the law, states that poverty should be understood as more than income level, as a condition linked to "deprivation of capabilities" and leading to social exclusion. Being temporarily cash poor should not be equated with being in the condition of poverty. Social exclusion and "capability-deprivation" makes poverty "durable", particularly where it intersects with other grounds of discrimination, in which case it can be expected to be "cumulative, enduring and essentially immutable."[23]

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[19] Applicant's affidavit, paras. 1 and 2, application for leave to appeal, p. 217
[20] *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371, at para. 27
[21] Applicant's affidavit, para. 4, application for leave to appeal, p. 218
[22] *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, para. 31
[23] Affidavit of john powell, application for leave to appeal, pp. 137 to 143, especially at 142. The powell affidavit, and the Porter, Lightman, Sadoway, Watson, Goldman, and Grey affidavits referred to below,

18. Bruce Porter has worked on issues of discrimination and prejudice against poor people for over twenty years. His evidence has been relied on by numerous courts and tribunals, including the Ontario courts in *Falkiner* v. *Ontario*[24], and *R.* v. *Clarke*[25]. Porter's evidence relates to the broader social and historical context of poverty and receipt of social assistance, establishing that poor people and social assistance recipients lack political influence, are subject to widespread negative stereotypes, stigmas and prejudice, and are considered lazy, morally inferior and financially irresponsible. Negative prejudices extend to notions of genetic inferiority and to the idea that poor people should not have children. It is incorrectly assumed that poor people will bring higher crime rates, lower property values and inferior schooling to neighbourhoods.[26]

19. The evidence demonstrates that the exclusionary effect of H & C fees extends to many foreign nationals living in poverty. Richard Goldman, an immigration lawyer, is "on a regular basis confronted with persons who appear to have compelling humanitarian factors to present in an H & C application but who are unable to afford the government fees."[27] Carolyn Watson, a settlement counsellor, "routinely" sees clients who want to apply for permanent residence under H & C considerations but who cannot afford to the pay the fees on their own.[28] Geraldine Sadoway, an immigration lawyer with Parkdale Community Legal Services in Toronto, is "often unable to proceed with H & C files because the clients are unable to pay this fee."[29]

20. Professor Ernie Lightman documents the gross inadequacy of social assistance entitlements in comparison to expenditures on basic necessities. The social assistance

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bear the style of cause of one of the other applications for judicial review, *Krena et al* v. *Minister of Citizenship and Immigration*, which were consolidated with that of the applicant by the Federal Court's February 27, 2009 order (application for leave to appeal, p. 192) and therefore form part of the record in this case.

[24] *Falkiner* v. *Ontario (Ministry of Community and Social Services)*,[2002] 59 O.R. (3d) 481[*Falkiner*]

[25] *R.* v. *Clarke*, [2003] O.J. No. 3883

[26] Affidavit of J. Bruce Porter, especially at paras. 20 to 23 and 26 to 39, application for leave to appeal, pp. 172 to174 and 176 to 184

[27] Affidavit of Richard Goldman, application for leave to appeal, p. 134

[28] Affidavit of Carolyn Watson, application for leave to appeal, p. 131

[29] Affidavit of Geraldine Sadoway, application for leave to appeal, p. 125

rate for single persons such as the applicant is half of the estimated cost of basic necessities. Social assistance rates "are typically too low to allow for discretionary expenditures."[30] The applicant's previous reliance on low wage, part-time and temporary employment and her experience of severe poverty is representative of a widespread pattern among newcomers to Canada.[31]

21. Josephine Grey, the Executive Director of Low Income Families Together, states that many foreign nationals have no choice but to deprive themselves and family members of basic necessities in order to scrape together the money necessary to pay the H & C application fee. Trying to secure or borrow the fee causes stress and anxiety and can result in exploitation.[32] Parkdale Community Legal Services provides potential applicants with a "begging letter" to take to charitable organizations requesting a loan or gift to pay the fee.[33]

22. The learned judge of first instance, whose analysis was substantially agreed with by the Federal Court of Appeal, mischaracterized this expert evidence as "anecdotal and hearsay" and relied instead on evidence from the respondent, showing that between approximately 2,500 and 10,500 H & C applications were filed each year between 2002 and 2009 "in spite of the fee". The respondent provides no evidence as to the source or level of income of the applicants who paid the fee, nor any information as to the differential hardship which may have resulted from those in poverty paying the fee. Nevertheless, the judge of first instance concluded that "there is no evidence that shows that foreign nationals who are living in poverty suffer disproportionate hardship that can be attributed to the failure of the government to provide for fee waivers." The Federal Court of Appeal agreed with this conclusion in rejecting the section 15(1) *Charter* argument.

Legislative Facts

[30] Affidavit of Ernie Lightman, application for leave to appeal, p. 150
[31] *ibid.*, especially at pp. 154 and 155
[32] Affidavit of Josephine Grey, application for leave to appeal, p. 145
[33] Affidavit of Geraldine Sadoway, *sup.*, application for leave to appeal, p. 128

23. The courts below held that neither poverty nor receipt of or eligibility for social assistance are analogous grounds of discrimination under section 15(1) of the *Charter*. Yet all Canadian jurisdictions but the federal jurisdiction have provisions prohibiting discrimination on the grounds of either "social condition" (Northwest Territories, Quebec, and New Brunswick), "source of income" (Alberta, British Columbia, Manitoba, Newfoundland and Labrador, Nova Scotia, Nunavut, Prince Edward Island, and Yukon Territory) or "receipt of public assistance" (Ontario with respect to the occupancy of accommodation, and Saskatchewan).[34]

24. The New Brunswick *Human Rights Act* defines "social condition" as meaning, in respect of an individual,

> "the condition of inclusion of the individual in a socially identifiable group that suffers from social or economic disadvantage on the basis of his or her source of income, occupation or level of education".
>
> « condition sociale » désigne la condition d'un individu résultant de son inclusion au sein d'un groupe social identifiable et socialement ou économiquement défavorisé fondée sur sa source de revenu, sa profession ou son niveau d'instruction[35]

25. The Northwest Territories *Human Rights Act* defines "social condition" as follows:

> "social condition", in respect of an individual, means the condition of inclusion of the individual, other than on a temporary basis, in a socially identifiable group that suffers from social or economic disadvantage resulting from poverty, source of income, illiteracy, level of education or any other similar circumstance.
>
> condition sociale» Condition d'un individu résultant de son inclusion, autrement que de façon temporaire, au sein d'un groupe social identifiable et socialement ou économiquement défavorisé pour des causes liées à la pauvreté, à la source de revenu, à l'analphabétisme, au niveau d'instruction ou à d'autres circonstances similaires.[36]

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[34] Zinn, Russel W. *The Law of Human Rights in Canada: Practice and Procedure*, looseleaf (Aurora, Ont.: Canada Law Book, 1996, chapter 13, "Social Condition".
[35] *Human Rights Act*, RSNB 1973, c H-11, section 2
[36] *Human Rights* Act, SNWT 2002, c 18, section 1(1)

26. The Canadian Human Rights Review Panel, chaired by Justice Gérard LaForest found "ample evidence of widespread discrimination based on characteristics related to social conditions, such as poverty, low education, homelessness and illiteracy" and recommended the inclusion of "social condition" as a prohibited ground of discrimination in the *Canadian Human Rights Act.*[37]

27. In *Falkiner, supra,* the Court of Appeal for Ontario recognized "receipt of social assistance" as an analogous ground of discrimination under section 15(1) of the *Charter*.[38]

Part II – Statement Of The Questions In Issue

28. Whether the absence of a provision in the *Immigration and Refugee Protection Act* or the Immigration and Refugee Protection Regulations entitling indigent foreign nationals living in poverty who wish to make an in-Canada application for permanent resident status pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, to a waiver of fees they cannot pay without undue hardship infringes
    (a) the rule of law or constitutional right of access to justice, and
    (b) the rights of the appellant under sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*?

Part III – Statement Of Argument

The Rule of Law and constitutional right of access to justice

29. In *Polewsky* v. *Home Hardware Stores Ltd.*[39] the Ontario 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 latter, the court

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[37] Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (Ottawa: Department of Justice, 2000), at pp. 106 to 110
[38] *Supra*, paras. 86 to 94.
[39] *Polewsky* v. *Home Hardware Stores Ltd* ., (2003), 229 D.L.R. (4th) 308

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? . . . The *Charter* protections would become merely illusory, the entire *Charter* undermined."[40]

30. The judge of first instance accepted that access to the courts is a component of the rule of law but restricted the application of the rule to "constitutional and statutory courts", finding that it does not extend to "discretionary administrative determinations"[41] or in the words of the court below, "an exceptional discretionary benefit".[42]

31. This finding is at odds with this Court's recognition of the important role played by administrative bodies in protecting *Charter* rights, either as courts of competent jurisdiction or as decision-makers obliged to exercise discretion consistently with the Charter.[43] As Lady Justice Hale of the Court of Appeal in England held: "In this day and age a right of access to a tribunal or other adjudicative mechanism established by the state is just as important and fundamental as a right of access to the ordinary courts."[44]

32. The application of the rule of law to a broad range of discretionary decision-making has become a critical component of constitutional protections for the most vulnerable in society. David Dyzenhaus finds this principle to be implicit in the decision of this Court in *Baker*.

> It is very significant that in *Baker* the person who received the protection of the rule of law was a highly vulnerable "overstayer" in Canada, someone whose continued residence in Canada depended entirely on whether an official would decide to make an exception for her on "humanitarian and

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[40] *B.C.G.E.U.* v. *British Columbia (Attorney General)*, [1988] 2 S.C.R. 214 at para 24.
[41] Reasons for judgment, Federal Court, para. 115, application for leave to appeal, p. 53
[42] Reasons for judgment, Federal Court of Appeal, para. 60, application for leave to appeal, pp. 91 and 92
[43] *R.* v. *Conway*, 2010 SCC 22 at paras. 20 to 23, in particular at para. 21
[44] *Saleem* v. *Secretary of State for Home Department*, [2000] EWCA Civ 186; see also Lorne Sossin, "Access to Administrative Justice and Other Worries" in Sossin, Lorne and Flood, Colleen, eds. *Administrative Law in Context* (Toronto: Emond Montgomery Press, 2008), ch. 15

> compassionate grounds". In order for her to obtain the protection of the rule of law, the court had to consider her not as someone in a virtually lawless void – at the mercy of the state – but as an individual entitled to treatment in accordance with the values that Canadians regard as constitutional – as constitutive of public order. This shows that the common law Constitution provides protections even when there is no explicit or positive source for such protection, at the same time as our understanding of its content is influenced by positive sources, most notably the *Charter.*[45]

33. The applicant respectfully submits that the same principles applied to access to Small Claims Courts in *Polewsky* apply, *a fortiori,* to access to so important a procedure for the most vulnerable members of society.

Violation of s. 7 of the Charter

34. Section 7 of the *Charter* protects interests fundamentally related to human life, liberty, personal security, physical and psychological integrity, dignity and autonomy. These interests are protected because they are "intrinsically concerned with the well-being of the living person ... based upon respect for the intrinsic value of human life and on the inherent dignity of every human being."[46] Section 7 may impose positive obligations on governments.[47]

35. Section 7 involves two stages of analysis. The first addresses the values at stake with respect to the individual and whether these engage interests protected by the rights to life, liberty and security of the person. The second is concerned with possible limitations of those values when considered in conformity with fundamental justice.[48]

i. Protected Interests

36. The s.7 claim advanced by the applicant in this case does not require the court to find a freestanding constitutional "right" to H & C or that foreign nationals have "an unqualified right to remain in Canada." As noted in *Singh,* the distinction between "privilege" and

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[45] Dyzenhaus, D., "Constituting the Rule of Law: Fundamental Values in Administrative law" (2001-2002) 27 Queen's L.J. 445, at 503 and 504
[46] *Rodriguez* v. *British Columbia (Attorney General),* [1993] 3 S.C.R. 519, at para. 14
[47] *New Brunswick (Minister of Health and Community Services)* v. *G. (J.),* [1999] 3 S.C.R. 46, at para. 107
[48] *Rodriguez, supra*, at para. 12

"right", which tainted jurisprudence under the *Canadian Bill of Rights*, is not acceptable under the *Charter*[49]. Whether H & C consideration is considered a privilege or a right does not determine whether it must conform to the *Charter*.

37. The s. 7 issue here is analogous to the issue in *Chaoulli*, where McLachlin, C.J. held that the *Charter* does not confer a freestanding constitutional right to health care, but "where the government puts in place a scheme to provide health care, that scheme must comply with the *Charter*."[50] In that case the question was whether, if a provision prevents access to timely healthcare for some patients, it engages interests protected by the rights to life and security of the person, and this Court was unanimous in concluding that it does.

38. In the case at bar, access to H & C consideration provides applicants with the opportunity to explain, and the right to have the Minister exam their circumstances and consider, why deportation poses significant risk, among other things, their physical and psychological health and well-being. As was noted by this Court in *Singh* and more recently *Chaoulli*, it is enough to engage security of the person if it is likely that one's health would be impaired.[51] These s. 7 interests would be considered in an H & C review and the outcome of the review would impact the well-being and health of an applicant. Denying access to H & C because of an inability to pay the fee also creates additional state-imposed anxiety, stress and stigma.[52]

39. Instead of assessing this evidence of s.7 protected interests at stake, the judge of first instance, with whose analysis the court below substantially agreed, relied on the decision of this Court in *Medovarski* to foreclose any possibility that s. 7 interests *may* be engaged.[53] This Court observed in the context of that case that "deportation of a non-

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[49] *Singh* v. *Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, at para. 50
[50] *Chaoulli* v. *Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791, at para. 104
[51] *Singh*, *supra*, at para. 48
[52] *Chaoulli*, *supra*, at para. 116
[53] *Medovarski* v. *Canada (Minister of Citizenship and Immigration)*; *Esteban v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 539, 2005 SCC 51, at para. 46

citizen *in itself* cannot implicate the liberty and security interests protected by s. 7." The judge of first instance held that this statement "appears to be a full answer to the s.7 arguments of the Applicant and the Interveners." [54]

40. In the applicant's respectful submission, *Medovarski* has no application to the present case. Deportation as a consequence of a sentence to prison, when the liberty interest has already been engaged in a criminal trial, involves a qualitatively different application of the s.7 interests in *Singh* than a prohibition against access to H & C considerations because of poverty. As noted in *G. (J.),* "The effects of the state interference must be assessed objectively, with a view to their impact on the psychological integrity of a person of reasonable sensibility."[55] Moreover, this Court affirms in *Medovarski* the direct correspondence between the considerations that will be engaged in H & C review and the interests engaged by s.7 of the *Charter*. In response to Medovarski's claim that her right to liberty and security of the person was infringed, this Court noted that where such interests are engaged, they are dealt with under s. 25(1) of the *IRPA*.[56]

ii. Fundamental Justice

41. In her analysis of whether the denial of a fee waiver for H & C is contrary to principles of fundamental justice the judge of first instance, with whom the court below substantially agreed, focused on whether H & C review is a legal principle. Finding that it is provided "at the discretion of parliament", she concluded that "H & C assessment prior to deportation is not a legal principle and, thus, cannot be a principle of fundamental justice to which s.7 applies."[57]

42. The legal principle at issue in this case, however, is not H & C assessment prior to deportation but rather the principle of fairness in relation to accessing this assessment - a step in a legal process created by parliament. Is it consistent with fundamental justice to

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[54] Reasons for judgment of Federal Court., para. 37, application for leave to appeal, p. 23
[55] *G. (J.),* at para. 60. This Court distinguishes, in that case, between separation from a child resulting from a sentence to jail and separation as a result of child custody proceedings. The former does not engage the parent's right to security of the person while the latter does. (See para. 63.)
[56] *Medovarski*, *supra*, at paras. 45 and 47
[57] Reasons for judgment of the Federal Court, para. 47, application for leave, p. 27

bar access to H & C review for those unable to afford the fee because of poverty? The question is analogous to the issue in *G. (J.)* where this Court considered whether failing to provide legal aid to impecunious parents engaged in complex custody hearings conformed with fundamental justice. In that case, this Court found that while there is no generalized right to state funded counsel, the state is obliged to ensure that impecunious parents have access to a fair hearing by providing legal aid where necessary.[58] The applicant respectfully submits that the same principle applies in the present case with respect to fee waiver, without which indigent applicants have no access to H & C - a procedure which, even if it is enacted at the discretion of parliament, must still be fair.

43. The central consideration in relation to the principle of fundamental justice in the present case is that the deprivation or limit at issue should not be arbitrary, that is, should not be inconsistent with the objectives of H & C review.[59] Barring the poorest applicants from humanitarian and compassionate exceptions under the *IRPA*, when precisely these persons may be deserving of such consideration because of their disadvantages or hardship linked to poverty, would bear no relation to the objective of H & C review. It is all the more arbitrary considering that fees can be exempted by the Minister under s. 25.1(2) of the *IRPA* when the H & C review is conducted at the invitation of the Minister.

Violation of s. 15(1) of the *Charter*

44. Under the two step framework for assessing s. 15 claims described by this Court in *Kapp*[60], the first stage of the inquiry is to ask whether a decision not to waive fees for indigent applicants creates a distinction and if so, whether the distinction is based on an enumerated or analogous ground. The second stage of the process is to ask whether the distinction is discriminatory.[61]

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[58] *G. (J.)*, *supra*, at para. 91
[59] *Chaoulli*, *supra*, at paras. 129 and 130
[60] *R.* v. *Kapp*, [2008] 2 S.C.R. 483, 2008 SCC 41[*Kapp*]
[61] *Kapp*, *supra*, at para. 17

i. Policy Creates a Distinction: Differential Effect and Appropriate Comparator

45. As the court of first instance found, this case is comparable to the situation that was before the courts in *Eldridge* in which this Court stated that: "at least at the s. 15(1) stage of analysis...the government will be required to take special measures to ensure that disadvantaged groups are able to benefit equally from government services."[62]

46. In *Eldridge,* as in the present case, the issue was whether positive measures were constitutionally required to ensure equal access to benefits conferred by statute, not whether the statutory benefits themselves were constitutional rights. This Court found that the applicable legislation authorized the provision of interpreter services and hence it was the decision not to provide such services, rather than the legislation, which violated s. 15. 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). The learned judge of first instance was therefore correct in identifying the distinction in the present case as being between foreign nationals who seek to make an in-Canada H & C application and who require a fee waiver because they are living in poverty and those who do not require a fee waiver because they are not living in poverty.

ii. Enumerated or Analogous Grounds: Social Condition of Poverty and Receipt of Public Assistance

47. Critical to a consideration of whether poverty and receipt of public assistance are analogous grounds is the distinction between poverty as low income, or social assistance as a mere source of income, and the broader social dimension of these grounds. Provincial human rights legislation has attempted to capture this distinction by referring to poverty as a "social condition".[63] Provisions prohibiting discrimination on the grounds of "receipt of public assistance" and "source of income" have been interpreted to engage this broader concept of "social condition".[64] The applicant

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[62] *Eldridge* v. *British Columbia (Attorney General),* [1997] 3 S.C.R. 624 [*Eldridge*], at para. 77
[63] Zinn, *supra*.
[64] *ibid.*

submits that it is the "social condition" of poverty and receipt of public assistance that should be recognized as analogous grounds under s. 15 of the *Charter*.

48. "Social condition" captures the social reality of stigma, stereotype and social exclusion linked to poverty or reliance on public assistance. It includes the social relations that make poverty something that is not easily left behind, and significantly less "mutable" than income level.[65]

49. In her consideration of whether poverty is an analogous ground, the applications judge, with whose analysis the Federal Court of Appeal substantially agreed, failed to consider the ways in which poverty is used to make "suspect distinctions"[66] outside of the context of immigration law, and she failed to reference any of the evidence that supports this claim. Instead, she relied on *Corbiere* to focus on the issue of immutability narrowly conceived in relation to income level, considering whether individuals "come into or out of the state of poverty" defined by her as "financial circumstances"[67] and characterized by the Federal Court of Appeal as “financial condition”[68]. In *Corbiere,* however, this Court was not concerned with statistics as to the frequency of Aboriginals moving between being "on-reserve" and "off-reserve" or changes to place of residence *per se.* Rather this Court analysed the extent to which residency status fundamentally informed social and political relationships. The fundamental issue in *Corbiere,* as in other analogous grounds cases, was the way in which society and governments respond to the group or characteristic, the way in which these responses inform identity and whether they are linked to stereotypes and discrimination. These questions must be considered in the broader social and political context. A ground that is found analogous is analogous in all circumstances - what varies in different contexts is whether particular circumstances or decision-making amount to discrimination.

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[65] Affidavit of john powell, *supra*, especially at p. 138 and following
[66] In *Corbiere* v. *Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 [*Corbiere*] this Court explained that if a ground is to be deemed analogous for the purposes of s. 15, it must "stand as a constant marker of potential legislative discrimination", serving as a jurisprudential marker for "suspect distinctions."
[67] Reasons for judgment of the Federal Court, para. 75,application for leave to appeal, p. 38
[68] Reasons for judgment of the Federal Court of Appeal, para 59, application for leave to appeal, p. 91

50. Evidence of the stigma, prejudices, and stereotypes that attach to being poor and/or in receipt of public assistance was most thoroughly considered in the *Falkiner* case, *supra*, by the Court of Appeal for Ontario, which held receipt of social assistance to be an analogous ground.

51. The judge of first instance, with whose analysis the Federal Court of Appeal substantially agreed, relied on *Guzman*[69], *Boulter*[70], and *Banks*[71] to conclude that poverty and receipt of public assistance are not analogous grounds under s. 15 of the *Charter*. None of those decisions, however, refers to the social construction of poverty or receipt of public assistance, or considers evidence of stigma or stereotype. Each only considers income level or economic disadvantage *per se*.

52. The judge of first instance, with whose analysis the Federal Court of Appeal substantially agreed, distinguished *Falkiner* from the present case on the basis that receipt of social assistance was not found to be an *independent* ground of discrimination. With respect, this is a misreading of the decision.[72]

53. The judge of first instance, with whose analysis the Federal Court of Appeal substantially agreed, failed to consider the importance of what is now widespread recognition of grounds related to social condition or receipt of public assistance in provincial and territorial human rights statutes. As the Court of Appeal for Ontario noted in *Falkiner*[73], such recognition was accepted by this Court in *Miron*[74] as an important indicator of analogous grounds, and in relation to this ground the evidence is "compelling".

iii. The Distinction is Discriminatory

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[69] *Guzman* v. *Canada (Minister of Citizenship and Immigration)*, [2007] 3 F.C.R. 411
[70] *Boulter* v. *Nova Scotia Power Inc.*, [2009] N.S.J. No. 64 (N.S.C.A.); leave denied, 2009 CanLII 47476 (SCC)
[71] *R.* v. *Banks*, 2007 ONCA 19, at para. 104; leave denied, 2007 CanLII 37182 (SCC)
[72] See *Falkiner*, *supra*, para. 94
[73] *Supra*, at para. 92
[74] *Miron* v. *Trudel*, [1995] 2 S.C.R. 418, at 496

54. In her consideration of whether imposing a fee for H & C review without allowing fee waiver in cases of poverty is discriminatory, the judge of first instance suggests that because some social assistance recipients have managed to pay the H & C fee, the policy cannot be discriminatory on this ground. In other words, the policy can only be understood as discriminatory if it prevents *all* poor people from accessing the H & C review procedure.

55. However, it has been well established since *Brooks* v. *Canada Safeway Ltd.*[75] that not all members of a group need to be adversely affected for a provision to be found to discriminate on the ground in question. The fact that not all women are pregnant does not prevent the court from finding that discrimination affecting pregnant women constitutes sex discrimination. Similarly, the fact that an absence of a fee waiver would not prevent all indigent applicants from accessing H & C review, does not mean there is no discrimination on the ground of receipt of social assistance or otherwise living in the social condition of poverty.

56. The judge of first instance, with whose analysis the Federal Court of Appeal substantially agreed, further found that other than the evidence of the applicant herself, there is "no evidence" of any exclusionary effect of a failure to provide for fee waiver, and the court below found no evidence of any disproportionate hardship. As noted above, there is in fact an abundance of evidence on the record showing exclusion and disproportionate hardship on other foreign nationals who are unable to pay the fee. Moreover, even without such evidence, the fact that a person in the applicant's condition and circumstances would lose her right to request a fee exemption and therefore be unable to apply for H & C review ought to be enough to establish discrimination on this ground. In *Eldridge*, *supra*, this Court did not require evidence of the numbers of deaf people affected by the failure to provide interpreter services for the deaf. It was obvious that deaf people would be the group adversely affected. Similarly, it is unreasonable for the judge of first instance, with whose analysis the Federal Court of Appeal substantially

[75] *Brooks* v. *Canada Safeway Ltd* ., [1989] 1 S.C.R. 1219

agreed, to have concluded that without data on the exact numbers of poor people unable to file applications for H & C review, there is "no evidence" of a disproportionate effect on indigent applicants of a failure to provide for fee waiver.

Not Saved by Section 1

57. The respondent provided no evidence that the financial implications of a fee waiver for indigent applicants for H & C review would constitute an unreasonable or disproportionate expenditure.[76]

Part IV – Submissions In Support Of Order Sought Concerning Costs

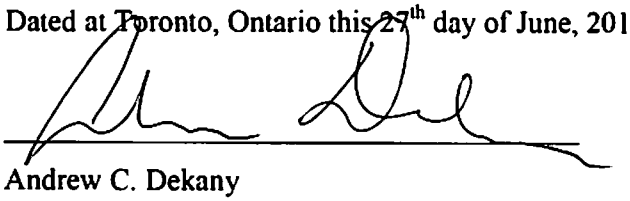
58. This application for leave to appeal is: a) brought by a disabled applicant who is reliant on social assistance and against whom a costs order would impose even greater hardship, and b) is public interest litigation advanced on behalf of all indigent persons in Canada. For these reasons the applicant requests that costs be awarded to her, in any event of the cause.

Part V – Order Or Orders Sought

59. That leave to appeal be granted with costs, in any event of the cause.

All of which is respectfully submitted.

Dated at Toronto, Ontario this 27th day of June, 2011



Andrew C. Dekany

of counsel for the applicant, Nell Toussaint

[76] *Nova Scotia (Workers' Compensation Board)* v. *Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54, at para. 109; *Newfoundland (Treasury Board)* v. *N.A.P.E.*, [2004] 3 S.C.R. 381, 2004 SCC 66, at para. 72

TABLE OF AUTHORITIES

Paragraph no.

Legislative enactments

Case law

Articles

Texts

Immigration and Refugee Protection Act 2001, c. 27 Past version: in force between June 18, 2008 and June 28, 2010	Loi sur l'immigration et la protection des réfugiés 2001, ch. 27 Version antérieure : en vigueur entre le 18 juin 2008 et le 28 juin 2010

Humanitarian and compassionate considerations **25.** (1) The Minister shall, upon request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative or on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations. Provincial criteria (2) The Minister may not grant permanent resident status to a foreign national referred to in subsection 9(1) if the foreign national does not meet the province's selection criteria applicable to that foreign national. 2001, c. 27, s. 25; 2008, c. 28, s. 117.	Séjour pour motif d'ordre humanitaire **25.** (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative ou sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient. Critères provinciaux (2) Le statut ne peut toutefois être octroyé à l'étranger visé au paragraphe 9(1) qui ne répond pas aux critères de sélection de la province en cause qui lui sont applicables. 2001, ch. 27, art. 25; 2008, ch. 28, art. 117.

Immigration and Refugee Protection Act 2001, c. 27 Current version: in force since June 29, 2010	Immigration et la protection des réfugiés, Loi sur l' 2001, ch. 27 Version courante : en vigueur depuis le 29 juin 2010

Humanitarian and compassionate considerations — request of foreign national	Séjour pour motif d'ordre humanitaire à la demande de l'étranger
25. (1) The Minister must, on request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	**25.** (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.
Payment of fees	Paiement des frais
(1.1) The Minister is seized of a request referred to in subsection (1) only if the applicable fees in respect of that request have been paid.	(1.1) Le ministre n'est saisi de la demande que si les frais afférents ont été payés au préalable.
Exceptions	Exceptions
(1.2) The Minister may not examine the request if the foreign national has already made such a request and the request is pending.	(1.2) Le ministre ne peut étudier la demande de l'étranger si celui-ci a déjà présenté une telle demande et celle-ci est toujours pendante.
Non-application of certain factors	Non-application de certains facteurs
(1.3) In examining the request of a foreign national in Canada, the Minister may not consider the factors that are taken into account in the determination of whether a person is a Convention refugee under section 96 or a person in need of protection under subsection 97(1) but must consider elements related to the hardships that affect the foreign national.	(1.3) Le ministre, dans l'étude de la demande d'un étranger se trouvant au Canada, ne tient compte d'aucun des facteurs servant à établir la qualité de réfugié — au sens de la Convention — aux termes de l'article 96 ou de personne à protéger au titre du paragraphe 97(1); il tient compte, toutefois, des difficultés auxquelles l'étranger fait face.
	Critères provinciaux

Provincial criteria (2) The Minister may not grant permanent resident status to a foreign national referred to in subsection 9(1) if the foreign national does not meet the province's selection criteria applicable to that foreign national. 2001, c. 27, s. 25; 2008, c. 28, s. 117; 2010, c. 8, s. 4.	(2) Le statut de résident permanent ne peut toutefois être octroyé à l'étranger visé au paragraphe 9(1) qui ne répond pas aux critères de sélection de la province en cause qui lui sont applicables. 2001, ch. 27, art. 25; 2008, ch. 28, art. 117; 2010, ch. 8, art. 4.
Humanitarian and compassionate considerations — Minister's own initiative **25.1** (1) The Minister may, on the Minister's own initiative, examine the circumstances concerning a foreign national who is inadmissible or who does not meet the requirements of this Act and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected. Exemption (2) The Minister may exempt the foreign national from the payment of any applicable fees in respect of the examination of their circumstances under subsection (1).	Séjour pour motif d'ordre humanitaire à l'initiative du ministre **25.1** (1) Le ministre peut, de sa propre initiative, étudier le cas de l'étranger qui est interdit de territoire ou qui ne se conforme pas à la présente loi; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché. Dispense (2) Il peut dispenser l'étranger du paiement des frais afférents à l'étude de son cas au titre du paragraphe (1).
Provincial criteria (3) The Minister may not grant permanent resident status to a foreign national referred to in subsection 9(1) if the foreign national does not meet the province's selection criteria applicable to that foreign national. 2010, c. 8, s. 5.	Critères provinciaux (3) Le statut de résident permanent ne peut toutefois être octroyé à l'étranger visé au paragraphe 9(1) qui ne répond pas aux critères de sélection de la province en cause qui lui sont applicables. 2010, ch. 8, art. 5.
Public policy considerations **25.2** (1) The Minister may, in examining the circumstances concerning a foreign national who is inadmissible or who does not meet the requirements of this Act, grant that person permanent resident status or an exemption	Séjour dans l'intérêt public **25.2** (1) Le ministre peut étudier le cas de l'étranger qui est interdit de territoire ou qui ne se conforme pas à la présente loi et lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que l'intérêt public le justifie. Dispense (2) Il peut dispenser l'étranger du paiement

from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by public policy considerations. Exemption (2) The Minister may exempt the foreign national from the payment of any applicable fees in respect of the examination of their circumstances under subsection (1). Provincial criteria (3) The Minister may not grant permanent resident status to a foreign national referred to in subsection 9(1) if the foreign national does not meet the province's selection criteria applicable to that foreign national. 2010, c. 8, s. 5.	des frais afférents à l'étude de son cas au titre du paragraphe (1). Critères provinciaux (3) Le statut de résident permanent ne peut toutefois être octroyé à l'étranger visé au paragraphe 9(1) qui ne répond pas aux critères de sélection de la province en cause qui lui sont applicables. 2010, ch. 8, art. 5.

"PROPOSED CLASS PROCEEDING"

Court File No. IMM-2926-08

FEDERAL COURT

BETWEEN:

CHANTAL BAVUNU KRENA

and

KETSIA KRENA

and

JODICK MOUDIANDAMBU

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

AFFIDAVIT OF GERALDINE SADOWAY

I, Geraldine Sadoway, Barrister and Solicitor, of the City of Toronto in the Province of Ontario, MAKE OATH AND SAY AS FOLLOWS:

1. My work address is Parkdale Community Legal Services, 1266 Queen Street West, Toronto, Ontario, M6K 1L3. I am the staff lawyer for the Immigration and Refugee Division at Parkdale Community Legal Services (PCLS), a community legal aid clinic funded through Legal Aid Ontario and Osgoode Hall Law School. I have held this position since May of 1997. My work at PCLS involves representing clients who meet the criteria for PCLS services in many

different immigration and refugee law matters before administrative tribunals and the Federal Court. As PCLS is a teaching clinic, my work also involves teaching, training and supervising the case work of law students who are selected to participate in the intensive poverty law program offered by Osgoode Hall Law School. Prior to my employment at PCLS I was in private practice doing primarily immigration and refugee law work from my year of call in 1983 until 1997. I have also taught immigration and refugee law periodically for the Queen's University Faculty of Law from 1995 until 2000 and in the fall of 2005. In addition to my LL.B. degree I have been awarded the LL.M. degree by the University of Cambridge in 2003 in the area of international human rights law. Attached hereto and marked as Exhibit "A" is a detailed resume of my professional qualifications.

2. The substance of my proposed testimony in this proceeding includes the following. I propose to describe the circumstances facing the typical Humanitarian and Compassionate ("H & C") applicants who approach my clinic for legal assistance. Secondly, I propose to offer my opinion based on my experience working with these applicants.

3. PCLS is open for intake for new clients four days per week all year round excepting a brief period between Christmas and New Year. In the immigration and refugee group, we see an average of 7 to 10 new clients seeking legal advice on immigration matters each day that we are open for intake. At least twice a week, or about 100 times a year, we provide clients with information about making an application for permanent residence on "humanitarian and compassionate" (H & C) grounds pursuant to section 25(1) of the *Immigration and Refugee Protection Act.* We typically provide the clients with a copy of the H & C application form and explain the process and the requirement for the $550 fee to commence the application.

4. Many clients who contact our office about this application describe circumstances that would clearly warrant an H & C application. A significant number of cases involve parents of

children born in Canada who are therefore Canadian citizens. A significant number of cases involve women who have been in relationships with Canadian citizens or permanent residents, and who have not been sponsored by their Canadian partner, or have had to separate from their partner due to domestic violence. These two groups of clients are often the least likely to be able to afford the government's H & C application fee. We often are unable to proceed with H & C files because the clients are unable to pay this fee. In these cases we urge the client to find the money as soon as possible in order to avoid delays in processing because the application cannot go into the system until the fee is paid. Sometimes we provide these clients with a letter to take to charitable organizations, explaining the fee requirement and requesting a loan or gift in the amount required so that the client can file the H & C application. We call this our "begging letter". Attached hereto and marked as Exhibit "B" is a copy of a typical "begging letter" provided to one such client.

5. Notwithstanding the use of "begging letters" and the use of other stratagems to raise funds, we have seen a number of clients who have delayed filing the H & C application for months and even years because they cannot raise the fee required to start the application. All of the clients we assist at PCLS meet our income criteria in order to qualify for our services so our clients are all persons living on very low income, including persons receiving social assistance. Three groups of clients have a particularly difficult time raising the H & C application fee: impecunious refugees, single parents of young children, and disabled persons.

6. With respect to impecunious refugees, it must be noted that successful refugee claimants are obliged to pay a $550 fee to apply to become permanent residents within six months of being accepted as refugees in Canada. If they have a spouse and children, the fee is greater: $550 per adult and $150 per child. Successful refugees who have been in Canada for about a year during the determination of their refugee claim may not yet have been able to find employment, especially if they have language barriers to overcome. If they do not raise the necessary fee

within the six months after their positive refugee decision, then they must apply to be landed through the H & C application process.

7. Single parents, usually mothers, with young children are simply unable to work because of the necessity of caring for their children and the unavailability of child care facilities. Yet these are clients who often have very compelling H & C cases. The only factor preventing them from filing the application with the free legal assistance of a community legal clinic such as PCLS is the H & C fee. Sometimes they are able to borrow the fee from friends, or charitable organizations assist with the payment of the fee. This invariably results in a delay of six months to a year while the client is trying to obtain the fee. In some cases we send the H & C application with the fee for just one person, even though the family might include three children. We send the application in to get into the two-to-three year queue for the H & C files, hoping that the client will be able to obtain the additional funds later so that the entire family can be processed together. I have no doubt that a certain number of otherwise meritorious H & C applications by mothers with young children do not go forward at all, simply because the mother cannot pay or borrow the fee.

8. Disabled persons, or persons with a significant health impairment which could result in a positive H & C decision, are usually living on disability benefits which cover only their most basic needs of food and shelter. They are not in a position to pay the H & C fee to file an application on H & C grounds and must borrow the money to file their application. If they have relatives in Canada, they are usually able to do this, but if they have no relatives in Canada, it is necessary to seek assistance from charitable organizations, which often is not forthcoming. In every case we have dealt with, as far as I can remember, involving a person with a disability, where the person was able to pay the fee the money to pay the fee had to be borrowed. Further, I have no doubt that other meritorious applications have not been filed due to the inability of the applicants to pay or borrow the fee.

9. In my opinion, racial and ethnic minorities are also disproportionately affected. Certainly in our experience at PCLS the majority of the clients negatively affected by the H & C fee were members of ethnic or racial minorities and several of them also have language barriers.

10. In my opinion, the H & C fee is highly problematic for our clients and constitutes a significant - in some cases absolute - barrier to obtain access to the H & C process. Broadly speaking, our clients face similar barriers due to poverty to a wide array of federal and provincial services. The H & C fee is representative of the systemic barriers they face. To elaborate the point further, poverty and fee barriers in the federal and provincial domain are intermingled. For example, the inability to apply for H & C creates a lack of immigration status, which in turn creates an ineligibility for provincial social assistance, which in turn creates a bar to municipal assisted housing.

SWORN BEFORE ME)
at the City of Toronto, in the)
Province of Ontario)
this 19th day of August, 2008

Geraldine Sadoway

Andrew C. Dekany
Commissioner for Taking Affidavits

Parkdale
Community Legal Services Inc.

1266 Queen Street West
Toronto, Ontario M6K 1L3
Telephone 416 531-2411
Fax 416 531-0885

September 19, 2006

To Whom It May Concern:

Re: Request for loan assistance for Ms. M.

We are writing to ask your assistance for the above named individual. Ms. M came to Canada from X in 1999. Currently she is filing a humanitarian and compassionate immigration application for herself and two dependent children. There is a non-refundable cost recovery fee of $850.00 that must be submitted with the application. (Please see the immigration fee schedule attached hereto.) However, Ms. M is a full-time mother of three children, including her Canadian daughter, and does not have $850.00. As a result of her parenting responsibilities and lack of employment, it is impossible for Ms. M to save the money for the processing fee.

While raising her young children, Ms. M has been volunteering her time at the Holy Family Catholic Church, as well as the St. Francis Table where she assisted in serving food to the homeless, and the Baycrest Hospital where she helps senior citizens.

If your organization for any reason has a fund that could assist Ms. M with a loan or donation towards the $850 processing fee, we request your assistance on her behalf.

We at Parkdale Community Legal Services have been involved in a campaign requesting the Minister of Citizenship and Immigration to allow for a waiver of this processing fee in deserving cases, when there is financial need. If you agree with the objectives of our campaign, we would also appreciate your support in signing our petition postcard, enclosed herewith, asking for the elimination of the cost recovery fee for humanitarian applications involving women who have left a relationship due to domestic violence and who, for that reason, do not have a sponsor for their immigration application. In fact, Ms. M. is a person in this situation as she had to separate from her Canadian partner due to his abuse.

We thank you in advance for any assistance you can give. Should you have any questions, please contact RP at extension 260.

Yours truly,
PARKDALE LEGAL SERVICES INC.

Geraldine Sadoway
Staff Lawyer
REPLY TO: RP, Law Student, extension 260
Encl.

This is Exhibit "B" referred to in the affidavit of Geraldine Sadoway sworn before me, this 19th day of August 2008 19

A COMMISSIONER FOR TAKING AFFIDAVITS
Andrea C. DeKany

"PROPOSED CLASS PROCEEDING"

Court File No. IMM-2926-08

FEDERAL COURT

BETWEEN:

CHANTAL BAVUNU KRENA

and

KETSIA KRENA

and

JODICK MOUDIANDAMBU

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Affidavit of Carolyn Watson

I, Carolyn Watson, of the City of Toronto, Province of Ontario, Settlement Counsellor, make oath and say as follows:

1. I have worked as a settlement counselor for almost two years and have advised refugee claimants and non-status immigrants. I have filled out Personal Information Forms, Pre-Removal Risk Assessments, and Humanitarian and Compassionate applications on behalf of dozens of clients and have advised over three hundred clients a year in their attempts to become permanent residents of Canada. I chaired an internal committee called the Newcomer and Non-Status Action Committee, which is dedicated to research, education, advocacy, and developing partnerships on behalf of immigrants to Canada. I have also sat on two external committees dedicated to improving access to services for newcomers and non-status immigrants.

2. I have an Honours Bachelor of Arts degree in History and Ibero-American Studies from the University of Toronto, graduating in 1999. I also obtained a Master of Arts degree in History from the University of Toronto in 2001 and am completing a doctoral degree at the University of New Mexico in Latin American History, expected graduation fall 2009.

3. From November 2006 to January 2007 I was the interim settlement counselor at Davenport-Perth Neighbourhood Centre in Toronto where I gained experience in the settlement sector. I wrote a background paper on Trokosi slavery in Ghana for a client who was making an H&C application and I have written dozens of letters in support of

H&C applications. From February 2007 to May 2007 I was a settlement counselor at Brampton Neighbourhood Resource Centre where I established the Spanish/Portuguese settlement position. From May 2007 to September 2008 I was the settlement counselor at Davenport-Perth Neighbourhood Centre. I worked with large numbers of failed refugee claimants and non-status immigrants to resolve their immigration issues. I put together three complete Humanitarian and Compassionate applications and contributed to dozens more by writing letters and submitting supporting documentation.

4. I have routinely seen clients who want to apply for permanent residence under humanitarian and compassionate considerations but who cannot afford to pay the government fees on their own. I set out some examples below.

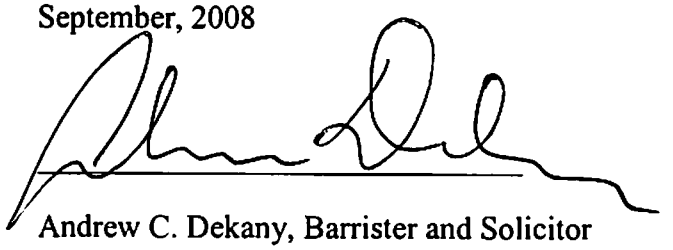
5. A settlement client of mine in her mid twenties came from Grenada in 2003 and applied for permanent residence under humanitarian and compassionate considerations in the spring of 2008. She was living in a women's shelter at that time and the shelter gave her the application fee. Without the gift from the shelter she would have been unable to apply. She had an infant under the age of two at the time she applied and was not able to work but was receiving Ontario Works.

6. A sixty-six year old settlement client of mine from Jamaica who came to Canada in 1989 developed a nerve disorder in 2005 and could no longer work. He had been working as a general labourer previously and is illiterate. I began counselling him in November 2006

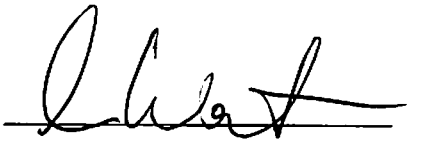
to prepare a humanitarian and compassionate application for permanent residence. He never submitted the application because he could not pay the application fee.

7. A thirty-two year old settlement client of mine from St. Vincent and the Grenadines who was physically and sexually abused throughout her childhood and early adult life in St. Vincent has been in Canada for four years. She has two daughters, ages nine and fourteen, one of whom was also physically abused and the other sexually abused, who do not have any immigration status in Canada either. The mother works in a bakery to pay basic necessities, such as food and rent, but cannot afford to pay the humanitarian and compassionate application fee for herself or her two children.

Sworn before me at the City of Toronto,
Province of Ontario, this 11th day of
September, 2008



Andrew C. Dekany, Barrister and Solicitor
A Commissioner for taking oaths



Carolyn Watson

"PROPOSED CLASS PROCEEDING"

Court File No. IMM-2926-08

FEDERAL COURT

BETWEEN:

CHANTAL BAVUNU KRENA

and

KETSIA KRENA

and

JODICK MOUDIANDAMBU

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

AFFIDAVIT OF RICHARD GOLDMAN

I the undersigned, Richard Goldman, domiciled and residing at 3511 Hutchison, apt. 1, Montréal, Québec, having been duly sworn, do hereby declare:

1. I am a lawyer and member in good standing of the Barreau du Québec since 1987;

2. I have specialized in immigration matters for more than eight years. I also currently serve on the Barreau du Québec's Consultative Committee on Citizenship and Immigration;
3. Since August 2003, I have been employed as the Coordinator of the church-funded Committee to Aid Refugees, a non-profit organization offering assistance to refugee claimants at every stage of the refugee claims process;
4. In that capacity, I receive many calls and visits from refused refugee claimants who would like information about recourses that are available to them, following a negative decision of the Immigration and Refugee Board;
5. In presenting the available recourses, I explain the possibility of filing an application for permanent residence on humanitarian and compassionate grounds (H & C application);
6. On a regular basis, I am confronted with persons who appear to have compelling humanitarian factors to present in an H & C application, but who are unable to afford the government fees of $550 per adult and $150 per dependent child under 22 years of age;
7. This has a particular impact on persons struggling with mental or physical health problems who have difficulty working steadily, or at all;
8. I estimate that I deal, on average, with one such case per month;
9. By way of examples of such cases, I am currently dealing with the cases of two refused refugee claimants who have been unable to raise the aforesaid fees, due to health problems that have prevented them from working steadily. One is a Pakistani man, who is facing removal later this month. The other is a single

mother from Ghana who is not yet facing removal, but has no prospect of being able to raise the said fees for an H & C application and will likely enter removal proceedings in the next few months;

10. I have read the above Affidavit and all the facts are true to my personal knowledge.

AND I HAVE SIGNED,

R. Goldman

RICHARD GOLDMAN

Sworn to before me at MONTREAL
this 12th day of September, 2008

Marie-Eve Couture

Commissioner of Oaths for the
Judicial District of Montreal

Commissaire à l'assermentation
MARIE-EVE COUTURE
171920
Le District Judiciaire de Montréal

"PROPOSED CLASS PROCEEDING"

Court File No. IMM-2926-08

FEDERAL COURT

BETWEEN:

CHANTAL BAVUNU KRENA
and
KETSIA KRENA
and
JODICK MOUDIANDAMBU

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Affidavit of john powell

I, john powell, of the city of Columbus, state of Ohio, United States of America, professor, make oath and say as follows:

1. I am a professor of law at the Ohio State University's Moritz College of Law, the executive director of the Kirwan Institute for the Study of Race and Ethnicity at the Ohio State University, and hold the Williams Chair in Civil Rights and Civil Liberties at the University's Moritz College of Law. I am recognized as an expert on issues relating to race, ethnicity, poverty and the law.
2. Attached hereto and marked as exhibit "A" is my report dated September 17, 2008, which I believe to be true and accurate.
3. Attached hereto and marked as exhibit "B" is my curriculum vitae.

Sworn before me at the city of)
Columbus , state of Ohio,)
United States of America on)
September 17, 2008)

.....
john powell

.....
A commissioner for oaths

Jennifer M. Pursell
Notary Public, State of Ohio
My Commission Expires 6/28/09

Exhibit A

Report of john a. powell
September 17, 2008

I. Statement of Qualifications

I am a Professor of Law at the Ohio State University's Moritz College of Law the Executive Director of the Kirwan Institute for the Study of Race and Ethnicity at the Ohio State University, and hold the Williams Chair in Civil Rights and Civil Liberties at the University's Moritz College of Law. I graduated from Stanford University with a B.A in Psychology and a Philosophy minor in 1969. I went on to receive my Juris Doctor from Boalt Hall at the University of California at Berkeley in 1973. From 1978 to 1980, I was a Post-Graduate Human Rights Fellow at the University of Minnesota.

I am the founder and past Director of the Institute on Race and Poverty at the University of Minnesota, and have served as National Legal Director of the American Civil Liberties Union (ACLU) and Director of Legal Services for the City of Miami, Florida. I have taught at Columbia University, Harvard Law School, American University, The University of San Francisco School of Law and the Law School at the University of Minnesota.

In addition, I have lived and worked in India, South America, Europe and Africa where I served as a consultant to the governments of Mozambique and South Africa. I served as part of a research team looking at comparative poverty in South Africa, Brazil and the United States. I have an ongoing working relationship with the Ford Foundation to develop strategies to ensure that opportunities and resources made available in the aftermath of hurricane Katrina actually reach the people who need them the most. I recently advised the United Nations' Durban conference to track race and poverty, and this recommendation was part of the official recommendations in the final report.

I am recognized as an expert on issues relating to race, ethnicity, poverty and the law. Over the past 10 years, I have overseen over sixty funded research projects. Many of these projects focused on expanding our understanding of racial disparities and the structures from which they arise. These projects have been international, national, and local in scope. I am a prolific writer with four books, 15 book chapters and more than 50 invited journal articles, essays and position papers listed on my curriculum vitae. I have worked in Canada frequently on issues of race and poverty, and recently gave the keynote address at the Provincial Forum on Racialization of Poverty in Toronto.

II. Redefining Poverty as the Deprivation of Basic Capabilities

The standard definition of poverty is that of a lack or insufficiency of material goods, particularly money. In everyday speech, we refer to a poor person as someone without a job, someone who needs money, perhaps someone without a home or with insufficient

income to meet everyday needs. The standard definition of poverty as a lack of or insufficiency of material goods or lowness of income is underspecified and imprecise.

Poverty is a condition. This condition can only be measured indirectly. Lowness of income is one imperfect means of measuring that condition and should not be confused for the condition itself. Rather than the definition of poverty, lowness of income is better understood as a *cause* and *consequence* of poverty. Moreover, poverty is a multivariate condition. Although 'insufficient income' can be devastating enough, poverty means more than lack of income. Poverty also means lack of wealth, which enables us to withstand intermittent job loss, pay for emergencies, and help our children with college tuition or a down payment on a first home.

Poverty can also be caused by racial and economic segregation, and confinement to areas of crime and disinvestment. Illiteracy, inadequate education, social isolation, illness, and disability can all contribute to a condition of poverty. Inadequate or insufficient formal education can put individuals on a low-wage track in a high-skill economy. Illiteracy, low-level reading ability, and poor arithmetic skills can render individuals more susceptible to fraudulent scams or unfair terms by dishonest individuals in car sales, mortgage contracts, and investment plans, let alone make it more difficult to manage everyday affairs. Conversely, better education, safe shelter, child care, and health care increase a person's ability to earn income and rise out of poverty.

In my opinion, the definition of poverty as a deprivation of basic capabilities advanced by Nobel Laureate Economist Amartya Sen captures the multivariate reality of the condition of poverty. [1] This definition is consistent with the standard definition of poverty since a lack of income can be a principle reason for an individual's capability deprivation. However, this definition draws attention to the other forces aside from lowness of income that contribute to the condition of being impoverished. The United Nations has already moved away from an income proxy to a "Human Development Index" that takes into account the ability of people to live healthily and safely, to build knowledge, and to access resources.[2]

III. A Structural Model for Achieved Socio-Economic Status

The definition of poverty as a deprivation of basic capabilities illustrates the fact that the relationship between income and capabilities is variable across space and time, depending on the different types of contingencies and institutional relationships. For some individuals in certain communities, the same level of real income can produce very different capability levels depending on the resources in those communities and the needs of those individuals. The same level of income or material goods in an environment with a high level of susceptibility to disease such as malaria or environmental disaster such as hurricane would not result in the same level of capabilities as someone with the same income level and access to material goods, but residing in an environment safe from those contagions or weather-related risks. Disadvantages can also impact not only an

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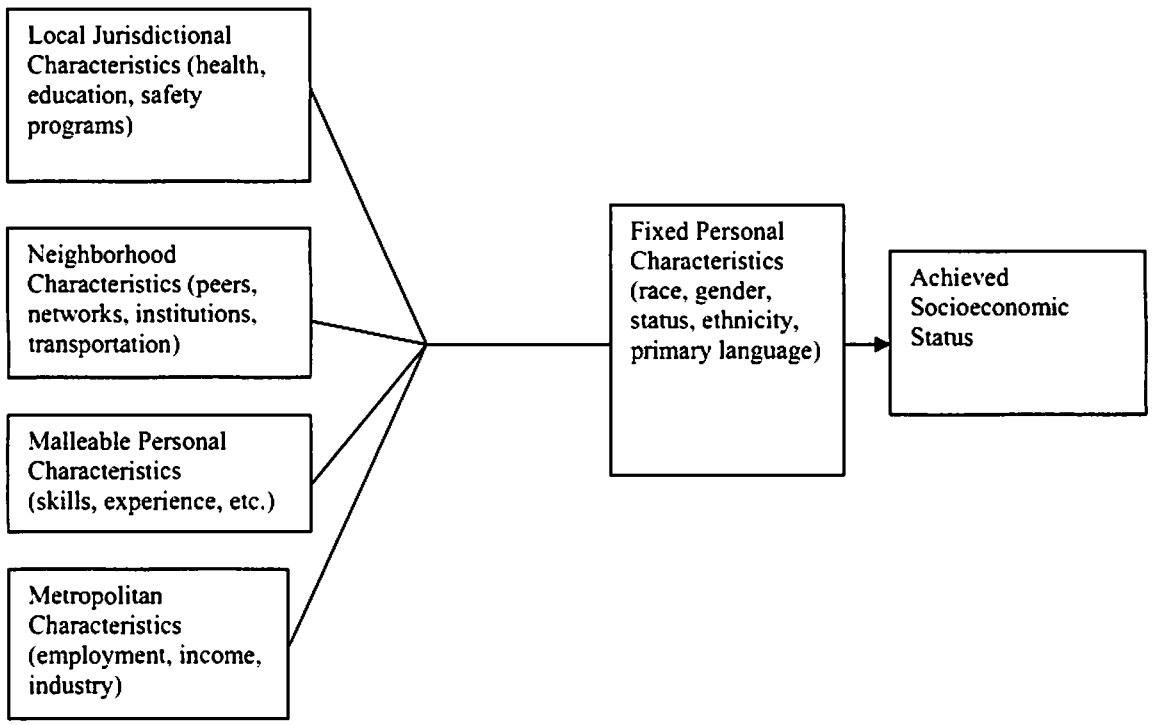
[1] Amartya Sen, *Development as Freedom* 87 (New York: Alfred A. Knopf, 1999).
[2] The index measures life expectancy, literacy, and GDP per capita.

individual's capabilities, but also affect their ability to translate income into capabilities. For example, a person with a physical disability may not only have greater capability disadvantages, but have greater difficulty converting income into the same level of capabilities as an able-bodied person.

In order to better understand how opportunity is structured and how capabilities may be achieved, we have to look at the interaction of the many conditions and attributes located in a particular place, such as poor schools, crime, low fiscal base and a weak job market. But looking at any one of these alone is inadequate. These and other factors *interact* and either reinforce or help mitigate each other. A person living in an impoverished environment must overcome cumulative factors that expose them to mutually reinforcing constraints.



Poverty is an outcome of structural contingencies – of the interaction of institutions that function effectively to close the doors of opportunity to huge swaths of people. For example, the amount and composition of income a person earns in early life will depend on his or her decisions about family structure, education, and labor force participation, which in turn are determined by the opportunity structure of the neighborhood where he or she lives. The neighborhood will influence one's choice of peers, the social and economic networks available to that person; available and accessible (in terms of public transportation) job opportunities; and personal safety. The language spoken at home and in the neighborhood, as well as race, gender, nationality, and immigration status can further constrain information and availability of job opportunities and therefore income.

The education available in the neighborhood will further determine what skills and attributes one can bring to any available economic opportunities. In short, one's achieved or potential socioeconomic status is shaped by the structures and institutions of the neighborhood, metropolitan area, and region[3].

It is these neighborhood and economic institutions that mediate the inputs that determine poverty. Although individual efforts to rise above poverty matter, poverty must also be understood as reflecting structural disinvestment and marginalization on a global and a local scale. The intransigence or durability of poverty depends upon the *cumulative* deprivations suffered by individuals and individuals as members of a group.

People who are cash poor in the short-term, such as full time students or individuals who own their own business and report negative cash earnings, may not suffer the capability deprivations that characterize the condition of being impoverished. This reflects the problem the Ontario Court of Appeal faced in *R. v. Banks*, 2007 ONCA 19 (CanLII); that "the Poor" is left largely undefined. As stated in para. 104,

> "While the "poor" undoubtedly suffer from disadvantage, without further categorization, the term signifies an amorphous group, which is not analogous to the grounds enumerated in s. 15. The "poor" are not a discrete and insular group defined by a common personal characteristic. While it is common to speak of the "poor" collectively, the group is, in actuality, the statistical aggregation of all individuals who are economically disadvantaged at the time for any reason. Within this unstructured collection, there may well be groups of persons defined by a shared personal characteristic that constitutes an analogous ground of discrimination under s. 15."

For individuals who face deprivations along only a few dimensions – the cash poor – income generation and direct assistance can more directly lift one out of poverty. However, if one is facing multiple constraints, removing one constraint, such as providing child care or health services will not, alone, lift that person out of poverty. Group status can be critical in shaping the degree to which an individual faces structural barriers to opportunity.

IV. Group Status Matters in Determining the Durability of Poverty

In the United States, the difference between durable, intransigent poverty and that which is transitory or self-imposed often follows racial lines. For example, among white families who experience poverty in the US, two-thirds are poor for only three years or less, and only 2 percent are impoverished for more than 10 years.[4] In contrast, 17 percent of the black population are poor for ten or more years.[5] Thus, while half of poor people

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[3] The chart here is largely credited to the work of George C. Galster in his forthcoming chapter "Urban Opportunity Structure and Racial/Ethnic Polarization"

[4] Rebecca Blank, It Takes a Nation, 23 (1997).

[5] *Id.*

(in absolute numbers) are non-Latino White, Whites are more likely to experience poverty intermittently. African Americans, on the other hand, are more likely to suffer the cumulative effects of prolonged poverty, such as long-term, inadequate health care and lack of access to and experience in the mainstream labor market.

Poverty rates in Canada also appear to track racial and ethnic divisions. Persons of African descent or lineage living in Toronto suffer from much higher levels of poverty.

% of ethno-racial groups in Toronto living below Statistics Canada's low income cut-off:	
European	10.8%
South Asian, East Asian, Caribbean, South and Central American	20%
Arab and West Asian	30%
African	40%
Source: M. Ornstein, Ethno-Racial Groups in Toronto, 1971-2001: A Demographic and Socio-Economic Profile	

It is not simply the racial indicators which suggest those individuals that may be suffering durable as opposed to transitory poverty, but the race and gender intersections as well. Women now make up half of the international migration population.[6] Individuals like Ms. Chantal Krena may not only face severe income deprivation, but they may have the greatest needs, and thus require the most assistance in order to have functioning capabilities and rise out of the condition of poverty as defined by lack of basic capabilities. Women are among the most vulnerable to exploitation and often have the greatest relative needs, including health care, child care, and housing needs for infants and children.

POVERTY STATUS, NUMBERS AND RATES AMONG IMMIGRANTS IN CANADA'S LARGEST 46 CITIES, 2000

Population	Total #	Number Poor	Poverty Rate %
Canadian Born	9,449,710	1,598,245	16.9
Immigrant	4,039,300	974,355	24.1
Non-Permanent	146,820	80,230	54.6

Notes: Canadian-born refers to persons born in Canada. Immigrant refers to persons who immigrated to Canada at any point in time. Non-permanent residents include foreign students, foreigners with employment authorization or Minister's permits, and refugee claimants and their families.
Source: Prepared by the Canadian Council on Social Development using data from Statistics Canada's 2001 Census, custom tabulations.

United Nations, New York, 2006. Available on-line at http://www.un.org/womenwatch/daw/Review/documents/press-releases/WorldSurvey-Women&Migration.pdf

As this table illustrates, the poverty rate of individuals who reside in Canada's largest cities on a non-permanent basis is remarkably higher than those of permanent residents or naturalized citizens. Here, poverty is defined as those Canadians living below the Low Income Cut-off, which describes poverty in terms of family expenditure and family size (It is worth noting that the low income cut off is a rough proxy for measuring poverty as explained in this report, and will of course be both over- and under- inclusive in describing the capability definition proposed). This suggests that, in the case of people like Ms. Krena, without the possibility of a fee waiver, the government fee may result in a substantially differential treatment in the right of access to the Minister of Immigration to make a Humanitarian and Compassionate (H & C) application. We can expect, given the intersections of migration, race, and sex, that the capability-poverty deprivations faced by individuals like Ms. Krena are likely to be cumulative, enduring, and essentially immutable.

As stated in para. 99 of the Ontario Court of Appeal's *Banks* decision, "the common element of enumerated grounds" is that "[t]hey describe what a person is, rather than what a person does." Unlike the claimants in the *Banks* decision, Ms. Krena's identity as an impoverished refugee cannot be solely defined in terms of an activity. Her identity as an impoverished refugee is status, not activity, based. Moreover, as detailed above, Ms. Krena's status and those of other impoverished Humanitarian and Compassionate applicants, consists of immutable personal characteristics.

V. Durable Poverty as a Form of Social Exclusion

Being relatively poor in a wealthy country can result in a greater capability handicap than being poor in a poor country.[7] In a sense, this assertion is intuitive. One would expect commodity prices, transportation costs, and other living costs to be higher in a wealthier nation. However, even when incomes are adjusted in terms of living costs, being relatively poor in a wealthy country can result in greater capability deprivations than being poor in a poor country. For example, citizens of Gabon, South Africa, Namibia or Brazil may be richer in terms of per capita GDP than the citizens of Sri Lanka or China or the Indian state of Kerala, but the latter citizens with lesser income have very substantially higher life expectancies than the former.[8] This is because income alone does not translate directly into capabilities.

In wealthier nations such as Canada, more income is needed to achieve the same level of social functioning and inclusiveness.[9] Participation in community life may require access to modern technology, such as internet access, ownership of a telephone or an automobile. An individual's range of employment possibilities may depend upon transportation to a job site. A city or locale with fewer public transit options and where

[7] Sen at 89.
[8] Sen at 6.
[9] Sen at 89.

many of the highest paid jobs are far from residences or living quarters will induce greater demands for automobile ownership. Being poor in a rich country can come with a great "capability" handicap, because you may not be able to afford things (such as your own car) that many people depend on to be a productive member of society. Most importantly, this remains true even when one's absolute income is high in terms of world standards.

Ms. Chantal Krena was born in the Democratic Republic of Congo. According to the 2007/2008 Human Development Report, the per capita GDP in the Democratic Republic of Congo is $766 in Canadian dollars.[10] The compulsory application fee for Ms. Krena and her two children cost Ms. Krena $850, more than the average citizen of the DRC makes in a year. It is therefore not reasonable to expect a former citizen of DRC to "jump" to the average income level of a Canadian citizen soon after arriving in the country. It should not be surprising, therefore, to see higher poverty rates among persons like Ms. Krena and therefore the fees as a substantial deprivation.

Gross inequalities, particularly durable and cumulative ones, harm individuals and communities in several ways. First, great numbers of people lose the capacity for self advancement and civic contribution. Their ability to contribute to society as workers and as citizens is likely to be truncated. Second, gross inequalities inflate the need for mobility to a desperate level: people will do anything to get ahead, because the cost of losing is so high.

If a person is excluded from the life of the community, they suffer a discrimination and stigma brought about by their lack of capabilities. Poverty results in not being an equal member of society. Cultural attitudes and narratives of poverty help justify discrimination and perpetuate stigma and exclusion. This in turn perpetuates the arrangements that continue to produce poverty and limit capability for functioning.

[10] http://hdrstats.undp.org/countries/country_fact_sheets/cty_fs_COD.html

"PROPOSED CLASS PROCEEDING"

Court File No. IMM-2926-08

FEDERAL COURT

BETWEEN:

CHANTAL BAVUNU KRENA
and
KETSIA KRENA
and
JODICK MOUDIANDAMBU

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

AFFIDAVIT OF JOSEPHINE GREY

I, Josephine Grey, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:

1. My qualifications to give evidence in this proceeding are as follows. I am the Co-Founder and Chair of Low Income Families Together ("LIFT"). LIFT has twenty-two years of experience working in diverse low-income communities on popular civic education, basic rights education and advocacy, and consultation to inform social policy development. We also closely follow social research and statistical analysis produced by academic and government bodies. A copy of my current curriculum vitae is attached hereto and marked as Exhibit "A".

2. The substance of my proposed testimony in this proceeding includes the following. It is my opinion that the humanitarian and compassionate ("H & C") application fee has a

major economic and social impact on low-income people seeking permanent resident status in Canada.

3. The primary impact is that poverty, and specifically an inability to pay the fee, presents a formidable barrier to the H & C application. Foreign nationals living in poverty as they struggle to secure opportunities cannot realistically raise the funds in order to apply.

4. In my experience working with persons in poor communities, the H &C application fee creates additional adverse impacts of hardship and stress for individuals and families struggling with low and insecure incomes and increasing living costs. One factor is the stress created by the necessity of borrowing money from friends and relatives to pay the fee. This in turn can lead to the exploitation of the applicant and undermines dignity. Another factor is the hardship that is caused by foregoing basic necessities to save enough money to pay for the entire claim process, including the H & C application fee. A third factor is the anxiety, stress and depression that results from the inability to engage in the application process so they can know for certain whether they will be able to remain legally in Canada or have to face returning to their original country.

5. Poverty amongst recent immigrant and refugee claimants is disproportionately experienced by people who face multiple economic and social barriers including people of colour, people from southern countries and the Roma people, women, and

people with disabilities. Numerous studies in recent years have shown the growing extent of disparity faced by these groups. These disparities indicate the effects of multiple forms of discrimination that in turn lead to social exclusion and therefore exacerbate poverty. There is no program or subsidy available to assist those without means to pay the application fee. Thus, the imposition of the fee disproportionately affects people from low-income communities who, in turn, are disadvantaged in many ways.

6. The H & C fee disproportionately affects low-income, marginalized communities and is, therefore, a human rights issue. Those who have the economic resources can access the H&C process if needed, in order to secure permanent resident and ultimately citizenship status, while those who do not have the economic means most certainly face extra barriers, hardship and increased risk due to the high cost of the application fee and attendant expenses.

Sworn before me at the City of)
Toronto, in the Province of Ontario)
on September 17, 2008)

.....
Josephine Grey

.....
Andrew C. Dekany

Commissioner for Taking Affidavits

"PROPOSED CLASS PROCEEDING"

Court File No. IMM-2926-08

FEDERAL COURT

BETWEEN:

CHANTAL BAVUNU KRENA
and
KETSIA KRENA
and
JODICK MOUDIANDAMBU

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Affidavit of Ernie S. Lightman

I, Ernie S. Lightman, of the City of Toronto, Province of Ontario, professor, make oath and say as follows:

1. I am a Professor of Social Policy at the University of Toronto. I have written and published extensively on the social welfare system in Canada.
2. Attached hereto and marked as exhibit "A" is my report dated September 18, 2008, which I believe to be true and accurate.
3. Attached hereto and marked as exhibit "B" is my curriculum vitae.

Sworn before me at the City of)
Toronto, Province of Ontario on)
September 18, 2008)

.....
Andrew C. Dekany
A commissioner for oaths

.....
Ernie Lightman

Exhibit "A" to the affidavit of Ernie S. Lightman sworn before me on September 18, 2008
A Commissioner, etc.

Low income, immigrants and the poverty lines in Canada

Expert report

Ernie S Lightman, PhD
Professor of Social Policy
University of Toronto
September 18, 2008

I hold a PhD in economics from the University of California, Berkeley. Between 1972 and 1974 I taught in the economics department at the London School of Economics and Political Science (LSE) in London, England. I began working at the University of Toronto as an Assistant Professor in 1974 and am presently Professor of Social Policy in the Faculty of Social Work. A complete Curriculum Vitae is attached.

My general area of professional interest and competence involves the relationship between economic policy and social policy, including the impact on the social welfare system of governmental economic policy. I have written and published extensively on these topics and consider myself knowledgeable about the academic and professional literature in this area. In 1988 I authored a study which contributed to the Report of the Social Assistance Review Committee (SARC) called *Transitions*. For a period of time I was primary author of this report. *Transitions* remains the only comprehensive review of welfare ever done in Ontario and the most comprehensive review of welfare ever done in Canada.

More recently, I authored the widely-used university textbook, *Social Policy in Canada* (Toronto: Oxford University Press, 2003), and I was actively involved on both the technical and policy committees of the recently completed Toronto MISWAA Project (*Modernizing Income Security for Working-Age Adults*).

I am currently the Principal Investigator of a multi-year research project, entitled *Social Assistance in the New Economy*, that has been funded by four successive grants from the Social Science and Humanities Research Council of Canada. The work is being done in partnership with the City of Toronto Social Services Department as well as four community agencies. We are examining the relationships among social assistance, precarious work, low income and health, using primary and secondary data sources. We have published extensively including one article that uses City of Toronto data to explore the work experiences of people who left social assistance (Ontario Works) about eight months after exiting the system: the specific focus is on a comparison between the experiences of immigrants and those born in Canada.

This report explores the low income status of immigrants in Canada. We look at two groups of low-income immigrants: those in the low-paid workforce and those on social assistance.

Low wages have become a feature of the labour market in Canada. The median wage has remained at around $10 an hour for the past two decades and more than one in four jobs now pays $10 an hour or less. In large urban centres such as Toronto (which remains the leading destination for immigrants to Canada) a person working full-time at $10 an hour – the informal but widely accepted definition of 'working poor' - earns less than Statistics Canada's Low Income Cut-off (LICO), a widely accepted definition of poverty. People on social assistance are also below this line.

Those immigrants on social assistance receive the same benefits as recipients who are not immigrants: that is, the social assistance system is formally blind with respect to immigration experience. However there is considerable evidence to suggest that those immigrants in the paid workforce receive lower wages and incomes than non-immigrants.

We look at each category separately.

Social assistance, household expenditures and poverty lines

Table 1 shows estimated maximum social assistance income for typical households in Ontario in 2008. It shows that the maximum estimated social assistance income for a single person, from all sources is approximately $7,300 or about one-third of the median income for single person households. Similarly, a lone parent with one child has an estimated maximum income of $16,000 or about one-half that of all lone-parent families.

Table 1: Ontario social assistance incomes 2006 and estimated for 2008

	Estimated maximum welfare income, 2006	Projected 2008[1]	As a percent of median	Low income cut-off (LICO) (after tax, 2006)	Low income measure (LIM)(after-tax, 2006)	2006 Welfare income, as percent of LICO	2006 Welfare income, as percent of LIM
Single person	$ 7,056	$ 7,341	33%	$ 17,570	$ 14,604	40%	50%
Single person with a disability	$ 12,160	$ 12,651	57%	$ 17,570	$ 14,604	69%	87%
Lone parent with one child	$ 15,534	$ 16,162	51%	$ 21,384	$ 20,446	73%	79%
Couple with two children	$ 20,155	$ 20,969	28%	$ 33,221	$ 29,208	61%	72%

1 Projected 2008 are 2006 amounts with 2% indexing for 2007 and 2008.

Sources: National Council of Welfare, Welfare Incomes 2006, Fact sheets #6, #10, accessed on-line at *www.ncwcnbes.net/documents/researchpublications/ResearchProjects/WelfareIncomes/2006WebOnlyData/factsheet10ENG.pdf*, September 15, 2008.
Statistics Canada (2008), *Low income cut-offs for 2007 and Low Income measures for 2006*, Ottawa: Ministry of Industry.

Social assistance incomes are far below all accepted poverty lines. Using two widely used measures of poverty in Canada, the Low income cut-off (LICO) and the Low Income Measure (LIM), Table 1 also shows that social assistance incomes are far below these widely used poverty lines. The amounts range from 40% of the poverty line for a single person, measured against the Low Income Cut-off, to 87% for a single parent with one child, measured against the LIM.

Social assistance incomes are typically too low to allow for significant discretionary expenditures.[1] Table 3 shows the maximum social assistance incomes for three typical family types as well as estimated budgetary requirements, limiting the focus to only basic categories of expenditures.[2] In all cases maximum incomes are insufficient to meet these basic requirements. The couple family with children and the single person households both fall more than $1,600 below the amount required for these basic expenditures. The lone parent is nearly $500 below the amount required to meet these expenditures.

	Dollar amounts			**Expenditures, as percentage of Canadian average**		
	Couples with children	Lone parents	Singles	Couples with children	Lone parents	Singles
Maximum welfare income	$ 20,155	$ 15,534	$ 7,056			
Expenditures:						
Rent[1]	$ 10,208	$ 8,492	$ 5,758	60%	76%	66%
Food[2]	$ 3,901	$ 2,676	$ 1,090	40%	42%	28%
Household operation	$ 1,740	$ 1,303	$ 550	37%	40%	30%
Clothing	$ 1,131	$ 798	$ 267	26%	30%	21%
Transportation	$ 3,376	$ 1,784	$ 625	25%	27%	14%
Health care	$	$	$	38%	35%	20%

[1] National Council of Welfare reference.
[2] Expenditure data is drawn from Statistics Canada (2006), *Spending Patterns in Canada*, Catalogue no. 62-202-X, Ottawa: Statistics Canada.

	881	494	222			
	$	$	$			
Personal care	558	444	172	34%	36%	29%
	$	$	$			
Sub-total	21,795	15,992	8,683	60%	74%	67%
	$	$	$			
Surplus(Deficit)	(1,640)	(458)	(1,627)			

Notes:
[1] Rents are taken from Canada Mortgage and Housing *Rental Market Survey* for the spring of 2008 and are 75% of the weighted average for all CMAs and census agglomerations over 50,000 in Ontario. This accounts for 96% of the private market rental units in the CMHC universe in Ontario.
2 For all remaining expenditure categories the amounts shown are 75% of the amount spent in the lowest income quintile, adjusted for family type. The family type adjustment consists of dividing each family type's expenditures in each category by the Canadian average, and multiplying that by the expenditures in the lowest quintile.

The expenditures included are for rent, food, clothing, household operation, transportation, health care and personal care. Other possible categories of expenditure which were not included in this basic list include: household furnishings and equipment, recreation, reading materials, education, tobacco and alcohol, or personal insurance or pension contributions.

The appendix to this report presents information on rents in the Census metropolitan Areas (CMAs) and the Census areas (CAs) in Ontario as reported by CMHC in the fall of 2007. This information was used in the calculations of rents in Table 2.

Low Wage Employment and Immigrants

Minimum wage incomes are also typically below accepted poverty lines. Table 3 shows that for typical family types minimum wage incomes, with a limited number of exceptions, are well below the Low-income Cut-off.

Table 3: Minimum wage income, in relation to the poverty line by Province, 2001

Province	Single person	Single parent, one child	Couple, two children (1.5 earners)
Newfoundland	$ (2,240)	$ (1,287)	$ (3,259)
Nova Scotia	$ (1,484)	$ (543)	$ (2,205)
PEI	$ (1,316)	$ (720)	$ (2,246)
New Brunswick	$ (1,618)	$ (415)	$ (2,108)

Quebec	$	(1,946)	$	1,033	$	(2,741)
Ontario	$	(2,015)	$	(80)	$	(4,207)
Manitoba	$	(2,956)	$	(2,238)	$	(5,699)
Saskatchewan	$	(1,391)	$	2,398	$	(446)
Alberta	$	(3,649)	$	(3,381)	$	(6,132)
British Columbia	$	(1,015)	$	533	$	(2,971)

Source: Battle, Ken (2003), *Minimum Wages in Canada*: A Statistical Portrait with Policy Implications, Ottawa: Caledon Institute of Social Policy.

There is a substantial literature that documents the nature and degree of economic disadvantage faced by immigrants in Canada (Hum and Simpson, 2002; Li, 2003; Picot and Sweetman, 2005; Reitz, 2005; Statistics Canada, 2007). Among other areas this disadvantage manifests itself in:

- Higher rates of unemployment;
- Higher incidence of low income; and
- Rising gaps between the earnings of immigrants and native-born Canadians.

Unemployment

Newer immigrants face greater difficulties finding work and securing stable, well-paying positions than both native-born Canadians and previous generations of immigrants[3]. While unemployment rates among immigrants vary dramatically they are consistently higher than among people born in Canada (Ornstein, 2006; Teelucksingh and Galabuzi, 2005). In 2001, for example, immigrant women had an unemployment rate of 8.1%, compared with 7% for Canadian-born women, and 6.8% for immigrant men (Statistics Canada, 2006b).

In 1980, the employment rate for newly arrived immigrant men was 86.3 per cent, compared with 91 per cent for Canadian-born men. However, by 1996 the employment rate for newly arrived immigrant men had fallen by about a fifth, to 68.3 per cent, while the rate for Canadian-born men had only fallen to 85.4 per cent (Reitz, 2005). Refugee immigrants face yet greater disparities. For example, Krahn *et al.* (2000) found much higher rates of unemployment, part-time and temporary employment, and downward occupational mobility, among refugee immigrants to Alberta, despite high educational attainment.

Recent immigrants face a variety of barriers that may impede their entry into the labour market. Language barriers and the transferability of foreign credentials are the most

[3] Immigrants who are "non-status" are often unable to work legally and so are at risk of exceptionally low wages. They are also frequently unable to access health and social services and may not qualify for language and employment training.

common challenges. Immigrants have difficulty accessing employment and training services due to eligibility criteria. Refugees, in particular, are frequently denied access to services because they are not permanent residents. As a result, many immigrants find themselves in low paid and insecure employment over an extended period of time. Indeed, research suggests that it may take from 10-15 years before new arrivals reach employment income levels comparable to the Canadian born population (Ornstein, 2005).

These difficulties in the labour market result in more frequent recourse to income transfer programs such as Employment Insurance (EI) and social assistance/welfare. Growing numbers of racialized people and many women are employed in part time and unstable work. This means they do not have employment insurance (EI), even though they pay into the EI fund. Burstein (2005) found that compared to earlier cohorts recent immigrants were twice as likely to be in receipt of social assistance. While social assistance provided an important safety net, as a whole recent immigrants were less likely to access this than other groups facing high levels of unemployment because there were ineligible.

Low Income

Research shows that immigrants, and especially recent immigrants, bear the brunt of this low wage economy. For example, a recent study by Statistics Canada (2007) found that the economic situation of new immigrants to Canada showed no improvement after the turn of the millennium, despite the fact that they had much higher levels of education and many more were in the skilled immigrant class than a decade earlier.

Picot and Hou (2003) found that poverty rates for recent immigrants – those who have been in Canada for five years or less - have risen substantially since 1980 (from 24.6% in 1980 to 35.8% in 2000). Increasing poverty rates were evident for newcomers in all age groups, at all education levels, of all language backgrounds, and in all family types. What the rising poverty numbers tell us is that the transition is becoming more difficult for new arrivals.

In 2002, low-income rates among immigrants during their first full year in Canada were 3.5 times higher than those of Canadian-born people. By 2004, they were 3.2 times higher. These rates were higher than at any time during the 1990s, when they were around three times higher than rates for Canadian-born people.

The report found that overall, the large increase in educational attainment of new immigrants, and the shift to the skilled class immigrant, had only a small impact on their likelihood of being in low income. The probability of entering a period of low income was very high for immigrants during their first year in Canada. It ranged from 34% to 46% depending upon their year of arrival. For immigrants who arrived during the early 1990s, about 65% entered low income at some time during their first 10 years in Canada.

Significantly, the report also found that nearly one in five (19%) of recent immigrants who arrived between 1992 and 2000 remained in chronic low income -- for at least four

of their first five years in Canada. This was more than twice the corresponding rate of around 8% among Canadian-born people.

Other research confirms this picture. For example, research by Statistics Canada (2006b) found that:

- In 2000, women who immigrated to Canada in the previous decade had an average income of just $16,700. This is about $6,000 less than the average for all foreign-born women ($22,400), as well as Canadian-born women ($23,100);

- In 1980, immigrant women were paid 23% less than Canadian-born women of similar ages and education. By 2000, this gap had doubled to 45%; and

- In 2000, 35% of women who immigrated to Canada between 1991 and 2001 were living in a low-income household. Forty-two percent of female immigrants under the age of 15 were living in a low-income household (almost three times as many as their non-immigrant counterparts at 17%).

Picot and Sweetman (2005), meanwhile, found that the incidence of low income among recent immigrants rose from 25 per cent in 1980 to 36 per cent by 2000. The authors identified three major causal factors: changes in the characteristics of immigrants (source regions, rising education), which accounted for one third of the increasing earnings gap; decreasing returns to foreign work experience; and general decline in labour market outcomes of *all* new entrants to the Canadian labour market. On this latter point, general economic conditions improved in the late 1990s, and as such, are not associated with the declining circumstances of immigrants, but a more polarized labour market may have manifested itself in poorer outcomes for all new labour market entrants, including and perhaps especially immigrants.

Kazemipur and Halli (2001) identify diminished returns for immigrants' human capital (work experience and education), as factors behind the higher rates of low income and poverty among immigrants. Similarly, Alboim et al (2005) found that foreign work experience was valued at only one-third that of Canadian work experience, while education acquired abroad was considered only 70 per cent as valuable as Canadian education. White immigrants however did not suffer this discounting and received recognition of their university education at parity with Canadian born residents.

Recent immigrants experience lower incomes and considerably lower returns to both education and foreign work experience. For example, Burstein (2005) found that over a six-year period, 25 per cent of recent immigrants experienced persistent low income. Compared to earlier cohorts, recent immigrants in the study were three times as likely to have low incomes. Moreover, starting incomes have fallen to the point where many recent immigrants are no longer able to catch up to the Canadian average. Various reasons have been advanced for the decline in immigrant economic fortunes: racism, the loss of educational advantage (in relation to native-born Canadians) enjoyed by earlier immigrants, a lack of experience in western labour markets, language difficulties,

and employer reticence in accepting immigrant credentials and qualifications. The real explanation likely involves some combination of all these factors.

Finally, a recent overview of research in the area, meanwhile, reported that some 41 per cent of people who came to Canada between 1990 and 1999 earn less than $10 an hour - double the rate for people who immigrated in the 10 years prior (Colour of Poverty, 2007).

Earnings Gap

The traditional pattern of earnings progression among immigrants has been to experience an initial earnings gap compared with native-born Canadians, followed by catch-up or 'assimilation'. However, there is now mounting evidence that this gap is closing more slowly than in the past.

Among earlier cohorts, the earnings gap reduced over time so that by 2001 the immigrants from the period 1975–1979 were earning 8 per cent more than Canadian-born workers (Picot and Sweetman, 2005). However, over recent years the earnings gap faced by new immigrants has widened. Picot and Sweetman (2005) for example, found that between 1980 and 2000 the earnings of recent immigrants to Canada who were working full-time and full-year fell by 13 per cent among men and rose 6 per cent for women, while among Canadian-born workers, earnings rose 10 per cent and 11 per cent among men and women respectively.

Reitz (2005) found that in 1980 recently arrived male immigrants earned about 80 per cent of what Canadian-born men earned, but by 1996, that figure had dropped to about 60 per cent. Li (2003), meanwhile, found that the earnings of both male and female recent immigrants were lower for immigrants who came in the 1990s than those who came in the 1980s, despite the fact that recent cohorts of immigrants were more likely to have a university degree. However, while immigrant levels of education have risen, their *relative* position may have declined as a result of more rapidly rising education among Canadian-born workers.

Kustec's (2008) analysis of the Labour Force Survey found that recent immigrants face severe challenges integrating into the labour market despite higher levels of education and that female immigrants face unique challenges. Labour market outcomes vary substantially by country of birth. Immigrants are over-represented in some higher and lower-skilled occupational groupings and, on average immigrants work longer hours and very recent and recent immigrants get paid less.

Mitchell, Lightman and Herd (2007) analyse the data from a survey of 800 people who left welfare in Toronto between January and March 2001 to explore income differences between immigrants and non-immigrants on exiting the social assistance system. Comparing employment outcomes, immigrants were more likely to be currently employed, but less likely to have a permanent job. Immigrants worked the same number of hours as non-immigrants, but earned significantly less per week. Since hours of work were not different the weekly earnings difference was due to a difference in the hourly

wage earned. Indeed the hourly wage of immigrants was just under $12, compared with nearly $14.50 among the non-immigrants. This is especially significant given that the immigrants had higher levels of education on average.

Mitchell Lightman and Herd (2007) also examine wage mobility when jobs were changed. They found that immigrants who changed jobs had an average wage gain of around 3%. Meanwhile, non-immigrants had an average wage gain of nearly 44%. Even after controlling for the many factors that can influence wages such as age, sex, education etc, the research showed that immigrants still experienced a wage disadvantage of nearly 11%. If they also received their education abroad that compounded their disadvantage by a further 17%.

City of Toronto

Data from the 2006 Census reveals that Toronto continues to be the prime immigrant reception centre. Between 2001 and 2006, 267,855 immigrants settled in Toronto, almost one-quarter of all new immigrants to Canada. However, recent immigrants and visible minority persons account for a disproportionate number of low income persons in the city.

In Toronto, racialized group members are 3 times more likely to live in poverty than other groups. Between 1980 and 2000 in Toronto, the poverty rate for the non-racialized population fell by 28%, but poverty among racialized families rose by 361%.

Research by Ornstein (2005) shows that the poorest ethno-racial groups in the Toronto region are predominantly non-European and all were extremely poor compared to the population as a whole. Groups with the highest proportion of low income persons include larger numbers of recent immigrants and a higher proportion of visible minority persons. Ethno-racial groups with a high incidence of low income face labour force barriers and have employment income well below the average. In 2001, for example, non-European groups had employment income 1/3 below that of European groups. At the same time, the 20 poorest groups in Toronto were all non-European. Groups with the highest incidence of low income (40% of members with income below the LICO in 2001) were Somalis, Afghans, Ethiopians, Bangladeshis, Iraqis and Taiwanese

Appendix A

Ontario CMAs and CAs over 50,000	Universe		Average rent			
	Number	Percent	Bachelor	One Bedroom	Two bedroom	Three + bedrooms
Barrie	3,321	0.6%	$ 618	$ 804	$ 906	$ 1,064
Brantford	4,618	0.8%	$ 529	$ 639	$ 712	$ 800
Guelph	6,636	1.1%	$ 578	$ 744	$ 839	$ 1,143
Hamilton	42,498	7.1%	$ 492	$ 644	$ 796	$ 946
Kingston	12,381	2.1%	$ 553	$ 688	$ 841	$ 1,051
Kitchener	27,923	4.7%	$ 563	$ 688	$ 824	$ 1,212
London	39,171	6.6%	$ 486	$ 628	$ 790	$ 961
St. Catharines	16,119	2.7%	$ 489	$ 636	$ 752	$ 850
Oshawa	11,490	1.9%	$ 616	$ 756	$ 861	$ 995
Ottawa	60,339	10.1%	$ 633	$ 774	$ 941	$ 1,146
Peterborough	5,434	0.9%	$ 534	$ 697	$ 818	$ 995
Greater Sudbury	10,995	1.8%	$ 419	$ 571	$ 706	$ 779
Thunder Bay	5,414	0.9%	$ 434	$ 571	$ 696	$ 804
Toronto	306,545	51.3%	$ 740	$ 896	$ 1,067	$ 1,272
Windsor	15,111	2.5%	$ 494	$ 650	$ 774	$ 881
Belleville	5,762	1.0%	$ 522	$ 656	$ 749	$ 847
Chatham-Kent	4,704	0.8%	$ 434	$ 538	$ 627	$ 593
Cornwall	3,749	0.6%	$ 459	$ 525	$ 641	$ 666
Kawartha Lakes	1,450	0.2%	$ 532	$ 687	$ 820	$ 872
Norfolk	896	0.1%	$ 465	$ 537	$ 594	$ 682

North Bay	3,245	0.5%	$ 456	$ 581	$ 729	$ 808
Sarnia	5,384	0.9%	$ 532	$ 622	$ 696	$ 894
Sault Ste-Marie	4,727	0.8%	$ 433	$ 538	$ 644	$ 706
Total	597,912	100.0%				
Total Ontario	622,648	96%				

Source: Canada Mortgage and Housing Corporation, Rental Market Statistics, Fall 2007.

Weighted Rent	Ontario	75% of average
Bachelor	$ 640	$ 480
One bedroom	$ 788	$ 591
Two bedrooms	$ 944	$ 708
Three + bedrooms	$ 1,134	$ 851

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"PROPOSED CLASS PROCEEDING"

Court File No. IMM-2926-08

FEDERAL COURT

BETWEEN:

CHANTAL BAVUNU KRENA

and

KETSIA KRENA

and

JODICK MOUDIANDAMBU

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

AFFIDAVIT OF J. BRUCE PORTER

I, J. BRUCE PORTER, of Peninsula Lake in the District Municipality of Muskoka, make oath and say as:

A. Subject Matter of this Affidavit

1. In this affidavit, I have assessed the effect of the absence of a fee waiver for applications for Humanitarian and Compassionate consideration under the section 25(1) of the *Immigration and Refugee Protection Act* on social assistance recipients. In addition, I assess the effects on parents living in poverty, single mothers, racialized minorities, persons with disabilities and newcomers to Canada. In my opinion this policy conforms with and exacerbates prevailing patterns of prejudice and discrimination against these groups, has a profoundly negative effect on the dignity and security of these groups, and perpetuates the devaluing and exclusion of these groups. It compounds the effect of other discriminatory barriers and prevents members of these groups from accessing a procedure which provides for the consideration of their most basic human rights and personal dignity. I have concluded that the absence of a fee waiver for those living in poverty seeking Humanitarian and Compassionate consideration perpetuates negative stereotypes and stigma attached to social assistance recipients and low income families, newcomers, persons with disabilities and racialized minorities and robs them of the sense of being valued as members of society worthy of equal dignity and respect.

B. Qualifications and Experience

2. I am a consultant and researcher in the area of discrimination, poverty and human rights. I am the Director of the Social Rights Advocacy Centre, a non-profit organization which conducts research, public education and advocacy in the area of human rights and poverty. I am Co-Director, with Professor Martha Jackman of the University of Ottawa, of a major human rights research project funded by the Social Sciences and Humanities Research Council. This five year project, which began in 2004, involves four university partners and four non-governmental organizations, with eight lead researchers, a number of collaborating researchers and a significant number of student researchers. Access to justice for poor people is a key component of the research in this project.

3. Since 1994 I have also been the Co-ordinator of the Charter Committee on Poverty Issues, an organization which has played an important role in increasing the understanding of human rights issues confronting poor people in Canada. From 1987 to 2002 I was the Executive Director of the Centre for Equality Rights in Accommodation (CERA), a non-profit, charitable organization working with low income people facing discrimination in housing. In both of these capacities, I have had extensive experience working with people living in poverty and with immigrants to Canada who were living in poverty or who relied on social assistance.

4. I oversaw research at CERA on the link between poverty and citizenship status. This research was presented in a number of hearings before human rights boards of inquiry. The complaint of Catarina Luis, a refugee claimant from Angola, was considered in a major challenge to systemic discrimination in housing through the use of minimum income requirements (*Kearney et al v. Bramalea Ltd et al.*[1]) The Board of Inquiry, in that case, considered extensive evidence of the intersection of citizenship status and poverty and in a precedent setting decision, upheld on this point by the Divisional Court of Ontario, the Board found that policies which excluded low income families from housing because of low income constituted discrimination on the ground of citizenship because recent immigrants are more likely to have low incomes.

5. As Co-ordinator of the Charter Committee on Poverty Issues (CCPI) I played a central role in overseeing research for an intervention at the Supreme Court of Canada in *Baker v. Canada*, in which CCPI emphasized the importance for poor people to recognize the link between Charter values, international human rights values, and their importance in discretionary decisions made pursuant to Humanitarian and Compassionate Decisions. While it was unnecessary for the Court to address the issue of poverty and reliance on social assistance directly in its decision, I believe that CCPI's

[1] *Kearney et al. v. Bramalea Ltd et al* (1998), 34 CHRR D/1 (Ont. Bd. Inq.); finding of discrimination upheld in *Shelter Corporation et al. v. Ontario Human Rights Commission et al* (2001), 143 O.A.C. 54 (Ont. C.A.).

submissions as to the discriminatory attitudes displayed in the Immigration Officer's notes in relation to Ms. Baker's poverty, disability and reliance on welfare played a part in the Court's recognition that the exercise of discretion in this case was unreasonable and contrary to *Charter* and international human rights values.

6. I have published a significant number of articles and chapters of books on issues related to discrimination and discriminatory attitudes toward poor people, poverty and human rights. Recent and forthcoming publications are listed in my *curriculum vitae,* attached as 'Exhibit A' to this Affidavit.

7. I have also given speeches and lectures throughout Canada and around the world on poverty and human rights. I have been invited to speak on human rights, housing and poverty in Canada and internationally by, among others, the Office of the U.N. High Commissioner for Human Rights (at high level meetings in Oslo, Geneva and Beijing); the South African Constitutional Assembly (as one of two international guest speakers at a day of public hearings into the question of including social and economic rights in the new South African Constitution), the Inter-American Commission on Human Rights (on the right to housing in Canada); the Ministry of Foreign Affairs for France (at a high level international meeting of experts in Nantes, France); Forum Asia (on two occasions in South Asia), the United Nations Centre for Human Settlements (as a guest speaker for World Habitat day in New York), the Committee for the Administration of Justice, Queen's University, the Participation and Rights Project and the Bill of Rights

Consortium, all in Northern Ireland (to present guest lectures, meet with members of the Parliament, and sit on expert panels), the Irish Human Rights Commission (to present a paper to an international meeting of experts); the University of Barcelona (Faculty of Law); the Centre on Housing Rights and Evictions in Geneva, Switzerland and the National Law Centre on Poverty and Homelessness in Washington, D.C. For the last three years I have been an invited lecturer at an intensive one week course for academics and legal advocates from around the world, at the Human Rights Institute in Turku, Finland. Other speeches and presentations are listed in my *curriculum vitae*.

8. In Canada I have conducted extensive public education on human rights and poverty, and have been invited by, among others, the Canadian Bar Association, the Ontario Bar Association and the Canadian Association of Statutory Human Rights Agencies to speak on these issues at major conferences. I recently spoke at a series of workshops in major Canadian cities to judges and administrative decision-makers, funded by Heritage Canada, on the use of international human rights law in decisions affecting poor people in Canada.

9. I have also conducted extensive judicial education on poverty and access to justice both throughout Canada and internationally. The National Judicial Institute has retained me to provide keynote addresses at conferences of superior court judges in Alberta, Ontario, New Brunswick and Nova Scotia. Internationally, I have been retained

by the Office of the UN High Commissioner and the International Commission of Jurists to speak to judges from Japan, China, Mongolia and Korea at a meeting in Ulan Bataar, Mongolia. I have also provided training to legal advocates in South Asia, Latin America and the U.S.

10. I have been qualified as an expert before a number of tribunals and courts in Canada to give opinion evidence on the nature of discrimination against poor people; discriminatory stereotypes and prejudices applied to poor people and people relying on social assistance; on how these stereotypes intersect, interact and compare with discriminatory attitudes toward women, single mothers, people with disabilities, racialized minorities and other groups; on the nature of discrimination in the justice system affecting poor people and people on social assistance; and on the importance of considering international human rights values in the exercise of discretion in cases involving people living in poverty.

11. As will be noted from my c.v., a particular area of interest and expertise of mine is discriminatory attitudes and prejudice against families living in poverty and social assistance recipients and how such attitudes create barriers to ensuring the protection of the fundamental human rights of families. I have been qualified as an expert on discrimination, stereotype and stigma attached to parents, particularly in receipt of public assistance and people living poverty in a number of judicial proceedings. For example,

in *Falkiner v. Ontario*[2] I provided evidence on discrimination, prejudice and stereotypes experienced by single mothers and persons in receipt of public assistance and described how such attitudes and discriminatory barriers are perpetuated in regulations to Ontario Works defining spousal relationships.

12. I was qualified as an expert and provided evidence about prosecution and sentencing patterns for welfare fraud compared to other types of fraud in the Coroner's Inquest into the death of Kimberly Rogers (a pregnant woman who died while under house arrest for welfare fraud). I provided expert evidence on discrimination against social assistance recipients and those living in poverty within the criminal justice system and in policies related to welfare fraud in *Broomer et al. v. Ontario*, which was settled between the parties after the Government of Ontario agreed to repeal the imposition of a lifetime ban on receipt of social assistance for anyone convicted of welfare fraud.

13. I provided evidence with respect to prevalent discriminatory attitudes toward the poor and the homeless in *R. v. Clarke et al.* where the question of whether challenge for cause in jury selection may include questions related to bias against the poor and the homeless was raised. In that case, Justice Ferrier stated that he relied on my evidence and expertise in concluding that "there is widespread prejudice against the poor and the homeless" which "could incline a juror to a certain party or conclusion in a manner that is

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[2](200) 188 D.L.R. (4th) 52.

unfair." I provided expert evidence of discrimination toward the poor and those in receipt of public assistance in the justice system, in a *Charter* challenge to the imposition of a cost award on a litigant relying on Ontario Disability Support which would prevent him from pursuing his action.[3] Recently, I provided evidence on discrimination against the poor in relation to failure to allow for adjustment to hydro rates for low income households before the Nova Scotia Utilities and Review Board.[4]

14. A list of other cases in which I have provided expert evidence on discriminatory stereotypes and attitudes toward poor people, including those relying on social assistance, is contained in my curriculum vitae, attached as Exhibit 'A'.

15. The present affidavit draws on my extensive experience researching and working directly with low income families living in poverty and seeking access to courts or other bodies to assert or protect their fundamental human rights. It describes the nature of discrimination and negative stereotypes about poor families and social assistance recipients in Canada and the evolving recognition of the fact that these groups face discrimination that is analogous to other prohibited forms of discrimination.

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[3] KEYVAN RASEKHI NEJAD, MALIHE SHALI, KOMEIL RASEKHI NEJAD a minor under the age of 18 years by his Litigation Guardian KEYVAN RASEKHI NEJAD, and SOHEIL RASEKHI NEJAD a minor under the age of 18 years by his Litigation Guardian KEYVAN RASEKHI NEJAD and THOMAS VOLPE and THE GENERAL ACCIDENT ASSURANCE COMPANY OF CANADA (Respondents) (Ont. Div. Ct. File No. 328/03).

[4] NSUARB-NSPI-P-886(3)2008 NSUARB 1

C. Nature of Discriminatory Stereotypes and Treatment of Low Income Families and Social Assistance Recipients and Relationship of these to Discriminatory Stereotypes and Treatment of Women, Single Mothers, Persons with Disabilities, Racialized Minorities and Other Disadvantaged Groups

16. My work with low income families in need of housing dates back to the early 1980's when I first became involved in working with low income families with housing problems. At that time, a critical problem for low income families was a dramatic increase in discrimination in apartments against people with children. I was shocked, as a doctoral student studying "Social and Political Thought" to discover that in Canada, parents were being forced into the most inadequate and overpriced housing, and some even forced to relinquish their children to foster homes, because of widespread discrimination in housing. I helped to form a provincial coalition of families to press for changes to Ontario's *Human Rights Code* to prohibit discrimination on the basis of family status in apartments. The proposed changes to *the Human Rights Code* received all party support and were included in an amendment to the *Equality Rights Statute Law Amendment Act* (1986).

17. In the process of researching and lobbying on this issue, I became aware of the many discriminatory barriers facing low income families. This led to the idea of forming an organization to provide advice, assistance and representation to low income households facing discrimination in access to housing, and the formation of the Centre

for Equality Rights in Accommodation (CERA) in 1987, of which I was the Executive Director for fifteen years, working directly with approximately one thousand low income families seeking to affirm their basic human rights annually, many of which were newcomers and more than half of which relied on social assistance. During my years at CERA, as well as carrying out and directing extensive research into discriminatory barriers facing low income families, social assistance recipients, women, newcomers, people with disabilities and others facing discrimination in housing, I had direct contact with hundreds of low income individuals and families and heard first hand of their problems with discrimination and lack of access to justice to assert their human rights. I also provided research and reports to various federal and provincial ministries, departments and task forces on these issues, including Status of Women, the Toronto Mayor's Homelessness Action Task Force and the Canadian Human Rights Review Panel, chaired by former Supreme Court of Canada Justice Gerard LaForest.

18. Those who face discrimination in relation to their family status are primarily the poor. One of the first things I learned in my work in housing is that to understand discriminatory attitudes toward families with children in Canada, one must understand discriminatory attitudes toward poor people. Adult only policies among landlords increased dramatically in the 1980's when home ownership became impossible for low income families and low income families increasingly relied on rental apartments as the only available housing option. I learned in my work on this issue that the rise in discrimination against families in apartments had more to do with emerging attitudes

toward low income families, particularly single mothers and people relying on social assistance, than with more universal attitudes toward children. Adult only apartments were considered to be more "upscale" in the rental market in which tenants without children, such as young singles, childless couples or more elderly tend to be more affluent. We have become a society in Canada which values the parent-child relationship and the human rights attached to it more highly for higher income parents than for lower income parents.

19. Since CERA began its work in 1987, the trend toward discrimination against the poor has been on the increase. More than half of human rights claimants who contacted CERA in recent years reporting discrimination on any ground were in receipt of public assistance and most others were low income.

20. The close link between economic status, family status, sex, race, disability and other characteristics means that discriminatory exclusion of disadvantaged groups may focus on any of several characteristics or "proxies". Excluding families with children or households of a certain size is one very close proxy for economic status. Once adult only policies became illegal, the use of "minimum income criteria" became more prevalent in the rental market as a way to exclude low income families, who almost always have to pay a higher percentage of their income toward rent in order to provide housing for their children. Single mothers and social assistance recipients were almost completely excluded by such policies, and racial minorities and newcomers were much

less likely to qualify for apartments. We discovered in our research at CERA that apartment buildings which housed a large number of racialized minorities and newcomers in Toronto and other cities were the few which did not impose strict income, employment or credit requirements. The move toward this kind of segregation in the rental market in our cities has exacerbated the intersection of discriminatory attitudes toward the poor and attitudes toward racialized minorities and single mothers. Middle class "flight" from schools serving these groups is one manifestation of the increasingly discriminatory environment they face.

21. Prejudices and stereotypes about poor people intersect and overlap with other prejudices and discriminatory stereotypes. Racialized minorities are subjected to more discrimination when they are poor than when they are better off. Members of visible minorities arriving from impoverished countries tend to face more discrimination than those from more prosperous countries. Negative attitudes toward particular racialized minorities are often linked to negative attitudes toward extended families living together in one apartment or to families with more children.

22. In the private market, negative attitudes toward those who are less affluent is justified by landlords as just "good business". It is seen as "common sense" that lower income tenants or tenants who are paying a high percentage of their income toward rent are more likely to default on rent. Thus, a policy of denying apartments to such

applicants is seen by many landlords as a rational business decision rather than as any evidence of discriminatory attitudes.

23. 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. Behaviour which might seem neutral on its face, such as consideration of whether a person can afford an apartment, or charging a fee to ensure that a procedure is not abused, can only be seen if the effect of such behaviour on poor people and other disadvantaged groups is entirely erased from view. In other words, 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 or refuses to consider their unique circumstances. 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.

24. Most provinces and territories have also now recognized those living in poverty as a group facing discrimination and requiring the protection of human rights legislation. Ontario's *Human Rights Code* prohibits discrimination on the ground of "receipt of public assistance" in housing. Nova Scotia's *Human Rights Act* prohibits discrimination in housing because "the individual or class of individuals receive income maintenance

payments from any level of government ..." Quebec's *Charter of Human Rights and Freedoms*, first passed in 1977, prohibits discrimination because of "social condition" which has since been interpreted to prohibit discrimination because of receipt of social assistance as well as discrimination because of poverty or low level of income. Saskatchewan prohibits discrimination because of "receipt of public assistance." Newfoundland prohibits discrimination because of "social origin." Manitoba, Alberta, Prince Edward Island and the Yukon prohibit discrimination because of "source of income" in their human rights legislation and British Columbia's *Residential Tenancy Act* prohibits the denial of rental accommodation on the basis of "lawful source of income." This protection has been interpreted to include protection from refusals based on the level of income people receive on social assistance.

25. The *Canadian Human Rights Act* is the only human rights legislation in Canada which does not include “social condition” as a prohibited ground of discrimination. Tge *Canadian Human Rights Act* was reviewed by a special review panel chaired by former Supreme Court Justice Gerard 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*. After extensive research and consultation, the panel released a report entitled *Promoting Equality*, in which it recommended the inclusion of social condition as a prohibited ground of discrimination in all areas covered by the *Act*. The panel stated that:

> Our research papers and the submissions we received provided us with ample evidence of widespread discrimination based on characteristics related to social conditions, such as poverty, low education, homelessness and illiteracy. We believe there is a need to protect people who are poor from discrimination. ...
>
> We believe it is essential to protect the most destitute in Canadian society against discrimination. At the very least, the addition of this ground would ensure there is a means to challenge stereotypes about the poor in the policies of private and public institutions. We feel that this ground would perform an important educational function.

26. Discrimination against poor people and parents living in poverty is based largely on characteristics that are imputed to the members of the group with little or no evidence. Social assistance recipients, for example, are often imagined to be able-bodied men who are idle at the expense of the "generous" tax-payer. In fact, the majority of those relying on social assistance are women, children and persons with disabilities. Poor people are often characterized as being dishonest and irresponsible with money when in fact they are forced to develop budgeting skills that are far superior to those of more affluent households. Even as one who works with low income families, I find it difficult to imagine how, for example, a mother with two children survives on an income of just over $13,000 a year on social assistance, when this amount would barely cover the cost of an average rent, two bedroom apartment in Toronto. Though not explicitly based on a moral condemnation of poor people, an insistence by governments that anyone who cannot pay a fee will be denied access to Humanitarian and Compassionate consideration has similar discriminatory logic and effect.

27. One is likely to be surprised when we test common stereotypes against the facts. Low income tenants, for example, are widely believed by landlords to pose a greater risk of default on rent, and refused apartments on the basis that they would be paying too high a percentage of their income toward rent. In fact, studies have shown no difference in the risk of default associated with low income tenants.

28. Discrimination against the poor is related to the demographic make-up of the poor. Economic and social trends such as the feminization of poverty, the break-up of the traditional family, widespread poverty among female-led single parent families, persons with disabilities, Aboriginal people, and newcomers to Canada means that discriminatory attitudes toward the poor intersect and interact with attitudes toward these other groups. Discrimination against the poor often masks hostility toward those groups which are over-represented among the poor and may provide a more acceptable gloss on invidious discriminatory attitudes toward racialized minorities, people with disabilities, single mothers or newcomers.

29. Many instances of discrimination against poor people are disturbingly reminiscent of the most destructive forms of racial discrimination. Theories of the genetic inferiority of the poor are not uncommon. Closely related to this is a widespread resentment against poor people for having children, the myth that they are procreating at a higher

than normal rate, the devaluing of their value as parents and the lower value placed on family unity for poor families than for more affluent ones. A denial of low income parents access to H & C consideration conforms with a prevailing pattern of devaluing these parents and families.

30. While crass ideas of genetic inferiority may be rarely spoken in the more professional community, it is nevertheless common to hear that the problem of poverty is primarily a problem of people having children who should not have had children. One of the most dramatic changes in attitudes toward poor people in the last 20 years is the increasing acceptability of the idea that this group in society does not even have the right to procreate.

31. Low income parents are branded as irresponsible for having had children and then falsely labeled as inferior parents after they have children. Those trying to combat poverty in the 1990's learned that hostility toward adults living in poverty had become so widespread in Canada that it was best to talk exclusively about "child poverty" and avoid any reference to the parents of children living in poverty. As Rick Salutin asked in the *Globe and Mail* a few years ago, "where are the parents of these poor children. Are they not also poor?" The denial of H & C consideration to members of this group exacerbates a prevailing pattern of exclusion and failure to consider them as members of society deserving of equal respect and consideration.

32. The parenting skills of low income parents are frequently disparaged. Problems encountered by children living in poverty which used to be attributed to the negative effects of living in poverty now are blamed on the parenting skills of low income parents and single mothers. Schools with a high proportion of children from low income households, usually also with a higher number of immigrant families, and a higher proportion of racialized groups, are now branded as undesirable or lower quality and more affluent families living in mixed income downtown neighbourhoods frequently drive their children to schools in other neighbourhoods with less poverty. One frequently hears assertions that the problems in the schools are related to the number of children from single mother households.

33. While I am aware of the serious obstacles confronting low income single mothers and parents relying on social assistance, including higher rates of illiteracy among the parents, I have also been struck, in my own work with this group, at their incredible determination to ensure that their children receive a good education. This led me to request a special run from data available through Statistics Canada on the reading habits of parents. Surprisingly, the available data suggested that single mothers and parents on social assistance actually ensure that their children are read to as much or more than is the case with two parent households not on social assistance.

34. Attitudes toward larger families associated with immigrant families have also turned more hostile in recent years. Romantic images of the morally upright and self-sufficient immigrant families with a number of children have been replaced with the discriminatory stereotype of the immigrant parent or parent with a large family that presumes on the "generosity" of "Canadians". When immigrants run into any type of hardship, linked with disability, poverty or domestic violence, rather than invoking sympathy and compassion, there is now a tendency toward a more hostile attitude toward any immigrant who is not "paying his or her own way." This is the kind of attitude which was evidenced in the notes of the Immigration Officer in the case of Mavis Baker, found to be unreasonable by the Supreme Court of Canada. Noting that Ms. Baker had a mental disability and had relied on welfare as a result, the Officer completely ignored all of her hard work as a domestic worker or her value as a mother of four Canadian-born children. The immigration officer wrote:

> She will of course be a tremendous strain on our social welfare systems for (probably) the rest of her life. There are no H&C factors other than her Four CANADIAN-BORN CHILDREN. Do we let her stay because of that? I am of the opinion that Canada can no longer afford this type of generosity.

35. These types of discriminatory attitudes which devalue the contributions of immigrants living in poverty, dealing with disabilities or other hardship, both as parents

and as productive members of society, though entirely ill-founded and without any empirical validity, have had a profound effect on government policies. Provincial policies to attack "welfare fraud" and cut welfare rates in the mid-1990's were in large part responses to dramatic shifts in public opinion polls after the recession of the early 1990's. While the rise in unemployment and poverty in the early 1990's was clearly the result of larger economic forces, low income people, particularly those on social assistance, became a target for scapegoating. As a confidential memorandum prepared by the public opinion firm EKOS for the federal government in 1997 explained, the more affluent tended increasingly to attribute poverty to moral failures. "Lack of responsibility, effort or family skills were universally cited explanations."

> Welfare recipients are seen in unremittingly negative terms by the economically secure. Vivid stereotypes (bingo, booze, etc.) reveal a range of images of SARs [social assistance recipients] from indolent and feeble to instrumental abusers of the system. Few seem to reconcile these hostile images of SARs as authors of their own misfortune with a parallel consensus that endemic structural unemployment will be a fixed feature of the new economy.[5]

36. Poor people suffer everyday assaults on dignity and self-esteem. For example, social assistance recipients use drug benefit cards for purchasing prescription drugs and are therefore distinguishable from other customers. Several have reported to me that once it is known they are social assistance recipients, they are made to wait until

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[5]Ekos Research Associates Inc., *Memorandum Concerning Child Poverty Focus Groups: Revised Conclusions* (February 4, 1997). Secured through a Freedom of Information Request.

everyone else is served even when they were the first to request service. While many families tend to go shopping on pay day, cashiers in grocery stores may make comments about social assistance recipients coming to shop when their cheques come in, as if there is something morally inferior about this pattern.

37. Another familiar pattern is the paternalistic attitudes that are used to justify discrimination is paternalistic notions that poor people must be encouraged to improve themselves and to learn to "pay their own way" in society. Shoppers will monitor the groceries of people known to be on social assistance to see if they are purchasing anything that is not a necessity. Landlords and social housing providers inform low income applicants that they are being refused the most affordable housing they can find "for their own good." Whereas affluent households frequently benefit from government subsidies to keep costs down, government policy has responded to growing prejudice and hostility or paternalism toward social assistance recipients and other poor people by seeking to ensure that they "pay their own way." The imposition of fees without consideration of their effect on poor people conforms with this discriminatory pattern.

38. Stigmatization is another common feature of discrimination against low income individuals and households. Housing developments which are targeted to poor people invariably meet with community resistance. Concerns raised include all of those raised in racially discriminatory neighbourhood reactions in the past - declining property values,

increased crime and violence, fear for the children, and concerns about "ghettoization". Negative assumptions are made about children when it is discovered they are living in a low income housing project or that their family relies on welfare. Denying access to humanitarian and compassionate consideration conforms with this pattern of marginalization and exclusion.

39. Another feature of discriminatory attitudes toward poor people is the tendency to ignore the obvious effect of a policy or requirement on this group. There is an increasing resistance to acknowledging and addressing the effects of policies and requirements on poor families which effectively erases their recognition as human beings equally deserving of respect and consideration. School fees for class activities, for example, have become increasingly common, with little consideration given to the effects these have on the rights of children living in poverty to dignity and equality in school. The effects of an increasing tendency to impose "same treatment" on poor people with respect to fees and other requirements may have devastating consequences. In order to try to ensure that their children have access to educational activities, women may choose to return to or remain with abusive partners or remain in abusive work situations. Families may feel that they must relinquish their children to the Children's Aid Society in order to ensure that they have access to basic dignity and security, education, housing and nutrition. I have witnessed these outcomes among families I have worked with, and have been deeply disturbed by a growing acceptance that somehow such outcomes are

tolerable in Canadian society. The refusal to provide for a waiver of the H & C consideration fee conforms with and exacerbates these discriminatory patterns.

D. The Loss of an Effective Democratic Voice and the Increased Need for Legal Recourse

40. Poor people in Canada have lost many of the traditional avenues through which to bring their concerns to the attention of the public and of governments. Whereas in the past, social policy related to poverty alleviation was a prominent feature of election campaigns, legislative debate and committee hearings, it has in recent years increasingly been shifted to the domain of closed-door inter-ministerial meetings or negotiations with trading partners and international financial institutions. Poor people are increasingly dependent on alternative institutional processes which may permit marginalized groups to get a hearing. I have assisted poor people to make use of human rights complaint processes, judicial processes such as challenges under the *Canadian Charter of Rights and Freedoms* and processes available under international human rights law as means to ensure that fundamental human rights of the poor receive attention.

41. Legislative and parliamentary hearings into poverty issues have become rare and ineffective. Much social policy affecting poor people is now put into effect by way of

regulation rather than legislation, and not subject to hearings in same way as legislation. Many of the most critical decisions about social policy related to poverty are now made through inter-ministerial meetings. There are no opportunities for poor people to make submissions to these and no minutes of meetings.

42. With the erosion of democratic voice, poor people become increasingly dependent on legally mandated procedures for the consideration of their rights and circumstances. However, many of these avenues have also been closed. For example, under the Canada Assistance Plan (CAP), in place from 1967 to 1996, provinces were required to ensure that anyone in need was provided with assistance to cover basic requirements such as food, clothing and housing and provided for federal cost-sharing of civil legal aid to increase access to justice for the poor. A person who felt that a provincial program or policy did not comply with requirements under CAP could be granted "public interest standing" in court to provoke a review of the program for compliance with this requirement. This critical ability to gain "public interest standing" was lost when the Canada Assistance Plan was revoked by the Government of Canada, without any debate or discussion, by way of the *Budget Implementation* Act in 1995.

A denial of access to H & C consideration under the Immigration and Refugee Protection Act to those unable to pay the fee conforms with this growing pattern of

exclusion from consideration of the unique needs and circumstances of poor people by decision-makers, and exacerbates existing discriminatory patterns in Canadian society.

E. The Importance of Recourse to International Human Rights Values to Poor People, Women, Single Mothers, Racialized Minorities, Disabled Persons and Newcomers

43. Faced with an increasingly discriminatory environment at home, poor people in Canada have, like Aboriginal people, refugees and other disenfranchised groups, increasingly turned to international human rights treaties ratified by Canada to affirm their fundamental human right to equal dignity and consideration. They have increasingly relied on international human rights values in trying to ensure fair and reasonable decision-making in relation to their circumstances. I have assisted poor people to attend and/or participate in United Nations human rights treaty monitoring bodies' reviews of Canadian governments' compliance with the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, the *Convention on the Rights of the Child* and the *Convention on the Elimination of All Forms of Discrimination Against Women.*

44. References to fundamental human rights under international human rights law have been critical for poor people and other disadvantaged groups in Canada in their

struggle for dignity and equality. The provisions of international human rights covenants and international human rights jurisprudence clarify the obligations of governments toward vulnerable groups such as newcomers, poor people, women, families, persons with disabilities, children and racialized minorities, providing important guidance to domestic decision-makers about how to exercise discretion reasonably or how to interpret and apply statutes as they apply to vulnerable groups. International human rights values are therefore of particular importance to these groups. Procedures through which these values may be considered and applied to their circumstances, including H & C consideration, are of critical importance to them.

45. UN Committees monitoring Canada's compliance with all of the above-mentioned human rights treaties have focused their concerns with respect to Canada in recent reviews on the problems associated with poverty. Stronger concerns have been expressed about emerging patterns of discrimination against the poor in Canada than in any other country, with particular emphasis on the emerging inequality, strongly linked with poverty, among women, single mothers, African-Canadians and people with disabilities. All of these UN Committees have joined the Committee on the Rights of the Child in expressing unprecedented concerns about the plight of children living in impoverished households and the systemic denial of their fundamental human rights because of discrimination against their parents.

F. The Effect of the Absence of A Fee Waiver for H & C Consideration

46. The absence of a fee waiver for H & C Consideratiion under the *Immigration and Refugee Protection Act* represents a profound and unequivocal assault on the dignity and equality of poor people and those in need of or relying on social assistance. The effect of a refusal to waive the fee for those who cannot afford to pay it denies poor people access to the procedure or, in some cases, allows them access to the procedure only by sacrificing necessities that are recognized as components of fundamental human rights, dignity and security, such as adequate food, clothing and housing.

47. Some potential applicants unable to pay the fee may try to beg for or borrow the money necessary. Many lack any contacts with potential donors. The discriminatory attitudes that I have described above also affect access to charitable money. More importantly, however, forcing poor people to rely on charity to mitigate the effects of an exclusionary policy is itself discriminatory. It is analogous to suggesting that a person with a disability who asks to be treated equally by an employer could achieve equality by securing assistance from a charity, so as to mitigate the effect of the employer's discriminatory conduct.

48. The absence of a fee waiver policy for low income applicants for H & C consideration denies poor people, those who rely on or need social assistance and other groups identified above a critical interest that is directly related to personal dignity and

security. Denying potential applicants for H & C consideration, because of their inability to pay a fee, their opportunity to have their fundamental human rights, their children's fundamental human rights, and the best interests of their children considered in relation to decisions as critical as deportation from or the ability to live in or receive permanent residence status in Canada represents a profound assault on their dignity. The fact that the Supreme Court of Canada has directed that H & C consideration must be consistent with fundamental values of international human rights law and with the Canadian Charter of Rights and Freedoms highlights the critical dignity issues at stake for vulnerable groups such as poor people. In my work with poor people, I have found that any procedure through which they may have the values entrenched in international human rights and the *Charter* considered in the context of their unique circumstances is of critical importance to their enjoyment of equality. The fact that the interest at stake in H & C consideration under section 25(1) may involve a possible separation of parents from children or loss of enjoyment of fundamental human rights such as access to food or housing makes the assault on equality and dignity even more profound.

49. Should the absence of a fee waiver for H & C consideratiion remain in place, the rights affirmed in the decision of the Supreme Court of Canada in *Baker*, to reasonable consideration, consistent with international human rights values, of such significance and importance for poor people, women, newcomers, racialized minorities and others would be rendered illusory. The right to the reasonable and non-discriminatory H & C

consideration, informed by the values of international human rights, would be denied to those who cannot afford to pay the fee.

50. The absence of a fee waiver institutionalizes a refusal to accord to poor families the dignity and respect due to any individual and any family. It conforms with prevailing patterns of discrimination against poor families described above, by devaluing low income parents and families, denying them meaningful participation in society, and denying them consideration of the most fundamental human rights and humanitarian values in relation to their unique circumstances. The challenge brought by the applicants in the present case raise issues of profound importance to the equality rights of poor people, women, families, newcomers, persons with disabilities and racialized groups in Canada.

SWORN BEFORE ME at Dwight)
In the Township of Lake of Bays)
In the District of Muskoka)
This 19th day of September 2008)

J. Bruce Porter

Kelly Stronks
COMMISSIONER etc

Kelly Bryce Stronks, a Commissioner, etc.,
District Municipality of Muskoka, for the
Corporation of the Township of Lake of Bays.
Expires October 5, 2010.

Federal Court | Cour fédérale

Date: 20090227

Dockets: IMM-2926-08
IMM-3045-08
IMM-326-09

Toronto, Ontario, February 27, 2009

PRESENT: Kevin R. Aalto, Esquire, Prothonotary

BETWEEN:

Docket: IMM-2926-08

CHANTAL BAVUNU KRENA, KETSIA KRENA and JODICK MOUDIANDAMBU

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

AND BETWEEN:

Docket: IMM-3045-08

JANOS ROBERT GUNTHER, JANOSNE (MARIA) GUNTHER, ANITA GUNTHER and MARIA GUNTHER

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE ATTORNEY GENERAL OF CANADA

Respondents

AND BETWEEN:

Docket: IMM-326-09

NELL TOUSSAINT

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER

UPON a case conference being held on Wednesday, February 25, 2009,

AND UPON counsel for the Respondent advising that the Respondent does not oppose leave being granted to the Applicant in file IMM-326-09; and upon being advised that these three proceedings should be consolidated and upon being satisfied that this is a fit and proper case in which to make such an order;

THIS COURT ORDERS that:

1. These proceedings shall continue as a consolidated proceeding.

2. IMM-326-09 shall continue as a specially managed proceeding within the consolidated proceeding and be referred to the Office of the Chief Justice for the appointment of the same Case Management Judge as in IMM-2926-08 and IMM-3045-08.

I HEREBY CERTIFY that the above document is a true copy of the original issued out of / filed in the Court on the _____ day of March 2/09 A.D. 20___

Dated this _____ day of _____ 20___

Rochelle S. Dickenson
AGENT DU GREFFE
REGISTRY OFFICER

"Kevin R. Aalto"
Prothonotary

S.C.C. File No. _____

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

NELL TOUSSAINT

Applicant
Appellant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent
Respondent

AFFIDAVIT OF BONNIE MORTON
(Sworn _____)
June 24, 2011

I, Bonnie Morton of the City of Regina in the Province of Saskatchewan, MAKE OATH AND SAY:

1. I am the Chairperson of the Charter Committee on Poverty Issues ("CCPI"). As such, I have knowledge of the matters to which I hereinafter depose.

A. The Charter Committee on Poverty Issues (CCPI)

2. CCPI is a national committee founded in 1989 which brings together low-income representatives and experts in human rights, constitutional law and poverty law for the purpose of assisting poor people in Canada to secure and assert their rights under international human rights law, the *Canadian Charter of Rights and Freedoms* ("the *Charter*"), human rights legislation and other laws in Canada. The membership of CCPI includes people who live in or have lived in poverty as well as experts in relevant human rights and constitutional law.

3. CCPI has intervened in 12 important cases at the Supreme Court of Canada as well as others at lower courts and tribunals, raising issues of concern to people living in poverty. CCPI's interventions before the Supreme Court of Canada have included the following:

- *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, in which CCPI argued that the right to healthcare under section 7 of the *Charter* should be interpreted in a manner which ensures access to healthcare for those who lack the means to access private healthcare;

- *R. v. Wu*, 2003 SCC 73, in which CCPI argued that poor people are systemically disadvantaged in the justice system and that poverty should not be allowed to result in any form of incarceration because of inability to pay a fine;

- *Gosselin v. Québec (Attorney General)*, 2002 SCC 84, in which CCPI argued, *inter alia*, that the right to security of the person in section 7 of the *Charter* ought to be interpreted as including positive obligations on governments to ensure that disadvantaged members of society have access to adequate food, clothing and housing;

- *Lovelace et al. v. Ontario et al.*, 2000 SCC 37, in which CCPI argued jointly with other interveners that section 15(2) of the *Charter* ought to be interpreted so as to ensure that poor people enjoy the full protection of section 15 from discrimination in ameliorative programs;

- *J.G. v. Minister of Health and Community Services (New Brunswick) et al.*, [1999] 3 SCR 46, in which CCPI argued that governments are required by section 7 of the *Charter* to take positive measures to ensure the provision of legal aid in custody cases in which liberty and security issues of parents and children are at stake;

- *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, in which CCPI argued that administrative decision-makers, when

making discretionary decisions, must take human rights considerations into account, including systemic disadvantages such as poverty;

- *Eldridge v. A.G.B.C.*, [1997] 3 SCR 624, in which CCPI argued that governments are required by section 15 to act affirmatively to ensure that persons who are deaf enjoy the same benefit of public health services as the hearing population;

- *R. v. Prosper*, [1994] 3 SCR 236, in which CCPI argued that in light of the requirements of fundamental justice and the principles of equality underlying sections 7 and 15 of the *Charter*, circumstances of poverty and disadvantage should not be a barrier which would deny access to fundamental rights and fairness in our justice system, including the right to effective representation by counsel; and

- *Symes v. Canada*, [1993] 4 SCR 695, in which CCPI argued that the *Charter* ought to be applied with equal rigor in the social and economic domain as in other areas of government activity and that deference to the role of parliament and legislatures should be exercised at the remedial stage rather than invoked as a shield to effective *Charter* scrutiny.

4. Through these interventions, CCPI has become well known for bringing to courts' attention relevant and important concerns, which are not raised by other parties. CCPI's facta have not only been relied upon extensively by courts, but

are frequently cited and used by researchers and advocates across Canada and internationally.

B. CCPI's Potential Role in this Appeal

5. The present case raises critically important public interest issues for CCPI's constituency. CCPI has significant interest and relevant expertise with respect to the impact of a requirement to pay fees to process Humanitarian and Compassionate (H & C) Applications without a waiver for persons living in poverty. Moreover, CCPI has been working for many years on the legal issues at stake in this case, particularly whether the rule of law and access to justice for those living in poverty applies to administrative justice and whether the social condition of poverty constitutes an analogous ground of discrimination.

6. CCPI was granted intervener status at both the Federal Court and at the Federal Court of Appeal in the present case to address the constitutional issues that are the subject of the present Application for Leave to Appeal. In granting intervener status before the Federal Court, Prothonotary Aalto stated 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..."

7. In the decision of the Federal Court of Appeal, the Honourable Madam Justice Sharlow found the constitutional issues were "moot" but still offered a

decision on them because they had been "dealt with thoroughly" by the Honourable Madam Justice Snider and "were the subject of full argument" in the appeal.[1] CCPI played a key role in ensuring that the constitutional issues were fully argued before both courts.

8. Should this Court grant the Applicant leave to appeal, CCPI intends to seek leave to be added as an intervener, or alternatively as a party with public interest standing, to ensure that the issues of significant public interest at stake in the Federal Court of Appeal's ruling are fully argued before this Court.

C. The Importance of Addressing the Public Interest Issues in the Present Case

9. If allowed to stand, the decision of the Court below on the constitutional issues in this case will have a significantly detrimental effect on the rights of CCPI's constituency.

10. The Court's finding that the rule of law and access to justice does not apply to discretionary administrative decision-making procedures, such as H & C consideration under the *Immigration and Refugee Protection Act*,[2] sends direction to governments across Canada and to officials exercising decision-

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[1] *Toussaint v. Canada (Minister of Citizenship and Immigration)*, 2011 FCA 146 at para 56 [*Toussaint*].
[2] SC 2001, c 27.

making authority under a wide range of statutes as to their constitutional obligations. It tells them that they need not exercise discretion or administer justice in a manner consistent with the goal of ensuring access to justice for persons living in poverty. This has devastating implications for the integrity of the Canadian justice system which increasingly relies on administrative bodies to protect fundamental rights. Denying poor people access to administrative bodies that are charged with overseeing a range of programs that determine their access to food, housing, income security, shelter, support services and healthcare, solely on the basis of an inability to pay fees, renders *Charter* rights illusory in many of the areas poor people rely on most for their protection.

11. The issues that were decided by the Federal Court of Appeal under section 15 of the *Charter* are also of immense significance and importance for CCPI's constituency. The Court below placed an insurmountable evidentiary burden on poor people alleging the discriminatory impact of fees. The Applicant was found on the evidence to have been excluded from the fees because of her poverty, yet her allegation that fees have an adverse effect on poor people was rejected because she was unable to provide any specific numbers of potential applicants for H & C who had been unable to file applications because of

poverty.[3] Such data would be impossible to obtain in this case, and in most other cases alleging the discriminatory impact of fees.

12. The Court below also found that section 15 had not been breached because the Applicant was denied a "discretionary and exceptional benefit" rather than a "legal right."[4] If protections under section15 were to be limited to "legal rights" and denied in areas of discretionary benefits, the protections from discrimination that are afforded to poor people (and presumably all other disadvantaged groups) would be dramatically limited in scope and effect.

13. Moreover, the Court below found that poverty and receipt of social assistance are not analogous grounds of discrimination under section 15 because "[a] person's financial condition is not an immutable personal characteristic."[5] For more than 25 years, CCPI and poor people in Canada have been advocating for legal remedies to widespread discrimination and prejudice on the basis of the social condition of poverty and receipt of social assistance. During that time, human rights legislation in Canada has been improved so that all provincial human rights legislation now includes protection from this kind of discrimination. In 2000, CCPI made submissions to the Canadian Human Rights Review Task Force, chaired by Justice LaForest, which found "ample evidence of widespread discrimination based on characteristics related to social conditions,

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[3] *Toussaint*, *supra* note 1.
[4] *Ibid* at para 59.
[5] *Ibid.*

such as poverty, low education, homelessness and illiteracy" and recommended the inclusion of "social condition" as a prohibited ground of discrimination in the *Canadian Human Rights Act*.[6] Provincial and federal appellate courts have reached contradictory conclusions about whether these grounds are analogous under section 15. It is of critical importance to CCPI's constituency that the issue be considered and determined by this Court.

14. This Court has recognized that the determination of whether a characteristic is an analogous ground under section 15 of the *Charter* is to be made based on a complete analysis of the nature and situation of the individual or group at issue, and the social, political and legal history of Canadian society's treatment of the group.

15. Abundant expert evidence was filed by the Applicant on the nature of discriminatory prejudice and stereotype applied to poor people and the social construction of poverty as a suspect ground of decision-making which meets this Court's test for analogous grounds. In CCPI's view, this case provides an excellent opportunity for this Court to conduct the kind of purposive and contextual analysis of the legal and historical situation of poor people in Canadian society and of the patterns of discrimination in society's treatment of the group.

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[6] Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (Ottawa: Canadian Human Rights Act Review Panel, 2000) at 107, 110.

D. Lack of Clear Direction from this Court on Governments' Obligations with respect to Poor People.

16. CCPI has confronted significant difficulties in bringing poverty issues before this Court. In the twenty-six years since section 15 of the *Charter* came into effect, this Court has considered, to my knowledge, only one case dealing with an allegation of discrimination by a recipient of social assistance under s.15 of the *Charter*. In that case, *Gosselin v. Quebec,* the ground of discrimination pleaded was age, and not receipt of social assistance.[7] This Court has heard no appeal, to my knowledge, dealing with the issue of discrimination on the ground of social condition, poverty or receipt of social assistance. Similarly, it has heard no case, to my knowledge, dealing with access to justice for poor people outside of the context of the right to state-funded counsel.[8] The discriminatory or prejudicial effect of fines on impoverished offenders was considered indirectly in *R. v. Wu*,[9] in which CCPI intervened, but the constitutionality of a refusal to waive fees for accessing judicial or administrative processes for those living in poverty has not been considered in a broader context by this Court.

17. CCPI is concerned that the scarcity of cases to be heard by this Court dealing with the most significant public interest issues confronting the millions of Canadians living in poverty leaves governments with scant direction from this

[7] *Gosselin v. Québec (Attorney General)*, 2002 SCC 84 at para 35, [2002] 4 SCR 429.
[8] *J.G. v. Minister of Health and Community Services (New Brunswick) et al.*, [1999] 3 SCR 46; *R. v. Prosper*, [1994] 3 SCR 236.
[9] 2003 SCC 73.

Court as to its constitutional obligations with respect to poor people. There is little jurisprudence to guide the exercise of discretion, the drafting of regulations or the development of new legislation. With disparate and conflicting opinions among appellate courts as to whether discrimination on the ground of social condition, poverty or receipt of social assistance is prohibited under the *Charter*, poor people are left without an important tool in their attempt to seek fairer treatment by governments. In this case, the Federal Court of Appeal's ruling on the constitutional issues leaves the government unclear as to its obligations under the amended *Immigration and Refugee Protection Act*, and applicants for H & C uncertain as to their rights. While media coverage has suggested that the decision of the Federal Court of Appeal represents a victory for "justice with compassion" and "an affirmation that everyone, regardless of income, is entitled to the protection of the law", government officials were reported to have expressed doubt that the decision would have any wider impact beyond the two appellants. Attached as Exhibits A and B are two articles from the *National Post* and *Toronto Star*, respectively, on the Federal Court of Appeal's decision.

E. Barriers to Bringing the Public Interest Issues Dealt with by the Court Below before This Court in a Future Case

18. The limited number of cases dealing with issues of discrimination and access to justice for poor people is no accident. There are numerous obstacles and barriers to bringing cases like the present one to reach this Court.

19. First, there is a significant emotional and psychological risk to poor people who bring forward these types of rights claims. Impoverished applicants are almost invariably subjected to negative comments and stereotypes when they seek justice through the courts and they are often in a position of vulnerability in relation to the government they are challenging. The Applicant in the present case experienced this kind of vulnerability as an undocumented migrant vulnerable to the initiation of deportation proceedings at any time.

20. Second, there is significant expense involved in effectively litigating public interest cases. When this case commenced, funding was available to the Applicant and to CCPI as an Intervener through the Federal Court Challenges Program. However, all funding for new cases under the Court Challenges Program was cancelled by the federal government on September 25, 2006. The Applicant, as well as CCPI as an Intervener, have continued to remain eligible for funding through the Program through the appeals process. If this Honourable Court were to grant leave in the present case, the Applicant and CCPI would be eligible for Court Challenges funding for the appeal. However, subject to a change of government policy, no such funding is available to future applicants attempting to bring these issues before this Court.

21. Third, issues of mootness, such as those that arise in the present case, are likely to occur again if similar litigation is initiated anew. Poor people often live in unstable situations. Changes in their lives may render some components

of their claims moot. Public interest litigation takes a long time and often involves legislation that is subject to periodic amendment. Mootness may also be created by actions of the Respondent. The present Applicant was originally joined with two families in similar circumstances. One family was deported prior to the hearing of their case. Their application was determined by Madam Justice Snider of the Federal Court to be moot. Another applicant managed to borrow money to pay the H & C fee and her application was similarly dismissed as moot. These challenges are typical of public interest cases of this sort.

22. Attempting to bring forward a future case in which the public interest issues can be placed before this Court with no mootness concerns or legislative amendments to contend with, would require significant expenditure of public resources with no guarantee that similar problems of mootness would not arise. Such cases may not even be possible to initiate if alternative financial resources, such as those which were available in the present case through the Court Challenges Program, cannot be found. It is unclear whether CCPI could play the same role in a future case that it has played in the present one. CCPI has no operational funding, no staff and no independent resources. It's capacity to represent the interests of poor people in this kind of litigation has been dramatically undermined by the cancellation of the Court Challenges Program.

23. CCPI is of the view that consideration of the public interest issues in the context of the present appeal would represent a responsible use of scarce public

and other resources. The constitutional issues decided by the Federal Court of Appeal are immensely significant to poor people; they were decided on the basis of a full evidentiary record; and they have had the benefit of full argument at all levels of court in this case.

24. CCPI is willing to participate in an appeal in any capacity deemed appropriate and helpful to this Court in order to encourage the efficient use of public and judicial resources and facilitate the determination by this Court of public interest issues that have been left unresolved for too long.

25. This affidavit is made in support of a motion by Nell Toussaint for leave to appeal to this Court in the above case, and for no improper purpose.

SWORN BEFORE ME in the City of Regina)
in the Province of Saskatchewan this)
this 24 day of June, 2011)

Bonnie Morton
Bonnie Morton

Catherine Pilkey
A Commissioner of Oaths
EXPIRES JUNE 30, 2015

List of Exhibits

Exhibit A: Adrian Humphreys, "Waive immigrant fees, court rules", *National Post* (12 May 2011).

Exhibit B: Carol Goar, "Justice tempered with compassion", *Toronto Star* (17 May 2011).

Bonnie Morton

CATHERINE PILKEY
COMMISSIONER OF OATH IN
AND FOR THE PROVINCE
OF SASKATCHEWAN
EXPIRES JUNE 30, 2015

Bonnie Morton
CATHERINE PILKEY.
COMMISSIONER OF OATH IN
AND FOR THE PROVINCE
OF SASKATCHEWAN.
EXPIRES JUNE 30, 2015

National Post
Waive immigrant fees, court rules
Adrian Humphreys, National Post
May 12, 2011 | Last Updated: May 13, 2011 7:04 AM ET

The Federal Court of Appeal has opened the doors to indigent immigrants by forcing the government to consider requests to waive application fees from would-be immigrants who claim they can't afford to pay.

The case challenges a long-held tenet that immigration requires an economic component to help stimulate the Canadian economy rather than deplete social assistance.

The hard-fought appeals involve two people who ran afoul of Canada's immigration officials and then sought intervention from the Minister of Immigration, allowing them to stay on humanitarian and compassionate grounds. Their applications were refused because neither paid the $550 fee.

The Federal Court turned down both appeals but the decisions have been overturned by the appeal court, which combined the cases into one ruling and gave both claimants another hope at remaining here.

Andrew Dekany, who represents one of the applicants, Nell Toussaint, hailed the decision as a welcome relief for hard-luck cases.

"It is not meant to provide an alternate route for immigration into this country, by any means at all. It is for rare, exceptional cases that cry out for relief," he said in an interview.

He pointed to the precedents the government set after the 2004 Indian Ocean tsunami and the 2005 Pakistan earthquake when the government waived fees for victims wishing to move to Canada. This ruling opens that possibility to everyone rather than just members of those specific classes, he said.

Critics question the value of encouraging immigration by people who cannot even afford the application fee.

"Immigration is supposed to be an economic benefit for Canada, and I can see a level of justification for the government charging a fee to recover some of the costs of processing these applications," said Martin Collacott, a former Canadian ambassador in Asia and the Middle East and spokesman for the Centre for Immigration Policy Reform.

"Why would we want her to stay here if she's so broke, to be quite brutal about it. We'd be generous enough to allow her to legalize her status without her asking us to pay for everything," he said.

He said convention refugees fleeing tyranny and persecution abroad fall into a different

category than indigent, illegal migrants and should be allowed to arrive in Canada with nothing.

Sergio Karas, an immigration lawyer and analyst, said it will inevitably lead to increased litigation and appeals in an already cluttered system.

"Anytime you ask bureaucrats to evaluate specific circumstances of a case you are going to have diverging results and people who will litigate the results," he said. "And if the claimants are indigent, usually that means replying on legal aid and increased costs to the taxpayer."

The Ministry of Citizenship and Immigration (CIC), meanwhile, said officials would abide by the ruling and reconsider the fee waiver applications but questions the ruling having much of a wider impact.

"CIC is considering what impact, if any, this decision has on the assessment of pending humanitarian and compassionate applications," said Kelli Fraser, a CIC spokeswoman. "However, with the recent refugee reform, we do not believe at this time that this should be an issue."

Ms. Toussaint is a citizen of Grenada who came to Canada in December 1999 as a visitor. Her visitor's permit expired six months after her arrival, but she remained here without legal status.

She does not want to return to Grenada and remains unemployed in Canada while suffering kidney problems.

Ben Ndungu is a citizen of Kenya who came to Canada in July 2000 and later made a refugee claim, which was abandoned in 2002. He took no further steps to sort out his status until 2007, when he came to the attention of immigration authorities seeking to deport him.

Mr. Ndungu claimed he could not pay the fee because his family has no savings, his spouse receives social assistance and he is prohibited from working because of his illegal status.

Both claimed the fee was an "undue financial hardship."

The cases drew support from a coalition of poverty and immigration support groups who championed their cause, creating a Drop the Fee campaign, drafting petitions, holding marches and some being granted intervener status to argued their position in court.

The interveners pushed a Charter challenge of the fee, saying it discriminated against the poor but both the original ruling and the appeal dismissed the Charter argument. None of the groups involved could be reached yesterday.

The Immigration and Refugee Act states that foreign nationals are inadmissible for financial reasons if they are "unable or unwilling to support themselves."

The appeal court ruled that the statutory provision for the minister to grant discretion overruled the provision requiring an application fee.

About half of the applications for humanitarian and compassionate grounds to the minister are successful.

Bonnie Morton
CATHERINE PILKEY.
COMMISSIONER OF OATH
IN AND FOR THE PROVINCE
OF SASKATCHEWAN EXPIRES JUNE 30, 2015

Toronto Star
Justice tempered with compassion
Carol Goar
Published On Tue May 17 2011

The timing was unfortunate, but the verdict was an affirmation of Canada's humanitarian values.

On April 29 - the same day as the biggest royal wedding in 30 years and the final countdown to a suspenseful Canadian election - the Federal Court of Appeal ruled that Ottawa cannot reject an immigration application from an individual who is too poor to pay its $550 processing fee.

"The Minister is obliged to consider a request for an exemption from the requirement," the court said in a unanimous judgment.

The precedent-setting decision was obliterated by the publicity surrounding Prince William and Kate Middleton's storybook nuptials. Then it was swamped by the election and its aftermath.

But word of the ruling is now filtering out. To immigrant groups, it is a legal breakthrough. To critics of the court, it is a retrogressive judgment that will drive up costs and unleash a flood of applications from illegal immigrants.

The Department of Citizenship and Immigration, while grudgingly accepting the verdict, insists it will have little or no practical impact.

But it will make a difference.

Federal bureaucrats will no longer be able to deport would-be immigrants because they can't afford Ottawa's steep application fees ($550 for an individual seeking to build a better a life in Canada, $550 for his or her spouse, $150 for every dependent child).

The immigration minister will no longer be able to bend the rules for some foreign nationals, but not others. (Processing fees were waived for victims of the deadly South Asian tsunami in 2004 and the massive 2005 earthquake in Pakistan, but not for Haitians fleeing the devastation of last year's earthquake and not for individuals who apply from within
Canada.)

What the ruling will not do is strip the government of its decision-making authority. Ottawa will still be able to deny residency to applicants who don't meet its immigration criteria. The immigration minister will still have the final say over who gets to stay in the country on compassionate grounds.

Nor will it affect the vast majority of cases. Most would-be immigrants can afford - or

manage to scrape together - the money to pay Canada's application fees. "It is for rare, exceptional cases that cry out for relief," said lawyer Andrew Dekany, who represented one of the two plaintiffs.

Neither is likely to elicit much public sympathy.

The first, Nell Toussaint, arrived from Grenada in 1999 on a visitor's permit. When it expired, she remained in Canada working illegally. Then she developed kidney problems. Desperate to stay, she applied for permanent resident's status, but her application was turned down because she did not submit the $550 fee.

The second, Ben Ndungu, arrived from Kenya in 2000 seeking asylum. Two years later, he abandoned his refugee claim and slipped into the woodwork. Immigration authorities caught up with him in 2007. Facing possible deportation, he pled his case unsuccessfully before the Federal Court. As a last resort, he applied to the minister for clemency, but his plea was blocked because he could not come up with $550.

Both claimed the fee would have imposed "undue financial hardship" on them.

Neither candidate appears likely to get a reprieve from Immigration Minister Jason Kenney, who resents judicial activism and wants newcomers who can contribute to the economy.

But the court was not asked to determine their fate. It was asked whether the minister is required, under the Immigration and Refugee Protection Act, to consider a request to waive the fee when an applicant is unable to pay. Its answer was a categorical yes.

To Toussaint and Ndungu, the ruling offers a sliver of hope.

To those who believe in even-handed justice, it was an affirmation that everyone, regardless of income, is entitled to the protection of the law.

File Number: _____

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN

NELL TOUSSAINT

Applicant
Appellant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent
Respondent

AFFIDAVIT OF GERALDINE SADOWAY

I, Geraldine Sadoway, Barrister and Solicitor, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY AS FOLLOWS:

1. I am an Adjunct Professor of Law for Osgoode Hall Law School. I am employed as staff lawyer and clinical law instructor at Parkdale Community Legal Services (PCLS), 1266 Queen Street West, Toronto, Ontario, M6K 1L3 and have held this position since May of 1997. I have previously provided affidavit evidence to the court of first instance in this matter concerning the immigration fees required for filing an application for permanent residence in Canada on humanitarian and compassionate grounds. This present affidavit is for the purpose of giving evidence about the impact of the Federal Court of Appeal's decision in this matter on the persons to whom PCLS provides legal services.

2. Parkdale Community Legal Services is a poverty law clinic funded primarily by the Government of Ontario through the Ontario Legal Aid Plan, with financial contribution from Osgoode Hall Law School as law students from Osgoode complete the clinical law program at PCLS and are case workers at PCLS working under the

supervision of lawyers. As a poverty law clinic, we provide legal services to people who cannot afford to retain lawyers privately and one of the areas of practice for our clinic, since it was founded forty years ago, is immigration and refugee law.

3. PCLS is open for intake for new clients four days per week all year round, excepting a brief period between Christmas and New Year. In the immigration and refugee law group we see an average of 7 to 10 new clients seeking legal advice on immigration matters each day that we are open for intake. At least twice a week, or about 100 times per year, we provide clients with information about making an application for permanent residence based on "humanitarian and compassionate" (H & C) grounds pursuant to section 25(1) of the *Immigration and Refugee Protection Act* (*IRPA).* We typically provide the clients with the H & C application forms and explain the process and the requirement for the $550 fee to commence the application.

4. As I stated in my previous affidavit, the fee is a significant barrier for some clients, particularly families with young children, and persons with serious disabilities.

5. I and others at PCLS were heartened by the decision of the Federal Court of Appeal in this matter, because the Court found that the proper interpretation of section 25(1) of the *IRPA* allowed for an exemption from the fee on humanitarian and compassionate grounds if paying of the fee would cause undue financial hardship. The Court stated unanimously that under section 25(1) "the Minister is obliged to consider a request for an exemption from the requirement" of the fee.

7. However, at the same time this matter was being litigated in the Federal Court of Appeal, the *Balanced Refugee Reform Act* (*BRRA*) was passed by Parliament and section 25(1.1) was added. Section 25(1.1) provides that "The Minister is seized of a request referred to in subsection (1) only if the applicable fees in respect of that request have been paid". In contrast, amended section 25.1 dealing with H & C cases where the Minister acts on the Minister's own initiative rather than on an individual's request, provides in subsection 25.1(2): "The Minister may exempt the foreign national from the

payment of any applicable fees in respect of the examination of their circumstances under subsection (1)."

8. A spokesperson for Citizenship and Immigration Canada, Kelli Fraser, was quoted in the *National Post* as stating that "CIC is considering what impact, if any, [the Federal Court of Appeal's] decision has on the assessment of pending humanitarian and compassionate applications." She then said, "However, with the recent refugee reform, we do not believe at this time that this should be an issue." I believe that Ms Fraser was referring to the *BRRA* and, specifically, to the passage of section 25(1.1).

9. Our office is currently advising two families about applying for permanent residence on humanitarian and compassionate grounds. Both of these cases involve families with young children who are relying on social assistance and food banks to survive. In one of these cases, the husband and father is disabled. In the other case, one of the children has a serious health condition. These two families might succeed in being granted permanent residence in Canada on grounds of the hardship they would face if returned to their country of origin where they have experienced serious discrimination due to their ethnic origin. However, they are unable to pay the fees to apply for permanent residence on humanitarian and compassionate grounds and without such payment it would be futile for them to so apply since under section 25(1.1) the Minister would not be seized of their requests.

10. Given the authority of the Federal Court of Appeal's ruling on the constitutional issues in this matter these clients and others like them who cannot afford the fees appear to be left without any practical or effective means of seeking fee waiver for an H & C application for permanent residence.

Sworn before me at the City of Toronto, in the)
Province of Ontario this 24th day of June, 2011)
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.....
Geraldine Sadoway

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Andrew C. Dekany
A commissioner for taking oaths and affidavits

File Number: _____

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN

NELL TOUSSAINT

Applicant
Appellant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent
Respondent

AFFIDAVIT OF NELL TOUSSAINT

I, Nell Toussaint, of the City of Toronto, in the Province of Ontario, the applicant herein, MAKE OATH AND SAY AS FOLLOWS:

1. When I started this litigation I was seeking to address both my specific problem in not being able to pay the fee, and as well to have the court determine my constitutional rights in a way that also would provide protection for others in similar circumstances.

2. I have been able to pursue this litigation with funding from the Court Challenges Program of Canada and Legal Aid Ontario only because it was seen as litigation that would clarify the rights of persons in circumstances similar to mine and provide a benefit for others as well as myself.

3. After the decision of the Federal Court of Appeal, Citizenship and Immigration Canada invited me to submit for their consideration my application for permanent residence based on humanitarian and compassionate grounds, stating they were doing so pursuant

to the decision of the Federal Court of Appeal. They did not ask me to pay any fee at the time and I submitted that application without paying any fee. Since then CIC has invited me to make submissions regarding a fee waiver.

4. I am happy that my request for a fee waiver will be reconsidered. However, the remedy that I was seeking in this litigation was not solely with respect to having my own fees waived, but to address what I perceived to be an injustice for others in circumstances similar to mine. I am therefore seeking leave to appeal the Federal Court of Appeal's decision in order to secure the constitutional remedies that I have sought from the outset.

Sworn before me at the City of Toronto, in the)
Province of Ontario this 27th day of June, 2011)
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Nell Toussaint

Nell Toussaint

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Andrew C. Dekany
A commissioner for taking oaths and affidavits