Court File No.: 34336

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)

RESPONDENT'S MEMORANDUM OF ARGUMENT IN RESPONSE TO THE APPLICATION FOR LEAVE TO APPEAL

(Pursuant to rule 27 of the *Rules of the Supreme Court of Canada*)

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PART I – STATEMENT OF FACTS

A. OVERVIEW

1. In order to obtain her permanent residence status in Canada, the Applicant filed an In-Canada Application for Permanent Residence on Humanitarian and Compassionate ("H&C") Grounds. She sought an exemption from the statutory requirement to apply for permanent residency from abroad. In doing so, the Applicant also sought an exemption of the H&C processing fee, on the basis that she was indigent. Her request for waiving the fee was not accepted and her application package was returned to her.

2. The Federal Court of Appeal held that the language of subsection 25(1) of the *Immigration and Refugee Protection Act* ("*IRPA*")[1] obliged the Minister of Citizenship and Immigration ("Minister") to consider a foreign national's request to be exempt from paying the processing fee for H&C applications. The Federal Court of Appeal sent the Applicant's request for a fee exemption back to the Minister for re-determination on that basis. The Applicant does not seek to vary that order in any way. Rather, she is seeking leave to appeal from the Federal Court of Appeal's Reasons on the constitutional issues which are moot. There are no exceptional circumstances that would warrant allowing the Applicant to appeal the Reasons of the Federal Court of Appeal on the constitutional issues.

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[1] SC 2001, c 27 [*IRPA*].

3. In any event, the Federal Court of Appeal's determination that section 7 and subsection 15(1) of the *Charter* and the principle of Rule of Law were not engaged in this case does not raise a question of public importance. The determination was based on well established principles of law and was consistent with this Court's recent jurisprudence. Scarce judicial resources need not be expended to revisit these issues on the facts of this case.

4. Having obtained a favorable judgment from the Federal Court of Appeal on the statutory interpretation of subsection 25(1) of the *IRPA*, the Applicant should not now be permitted to appeal on the constitutional questions which are moot. Furthermore, as section 25 of the *IRPA* has since been amended, this Court need not examine the provision.

B. LEGISLATIVE SCHEME

5. Foreign nationals must comply with a number of requirements of the *IRPA* in order to obtain permanent residence visa in Canada. One of these is the general obligation to file an application for permanent residence at a visa post abroad.[2]

6. Subsection 25(1) of the *IRPA* allows a foreign national to seek an exemption from any criteria or obligations under the *IRPA* or the *Immigration and Refugee Protection Regulations* ("*IRPR*").[3] A foreign national may seek approval to dispense with the requirement to make a landing application from outside of Canada by

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[2] *IRPA, supra* note 1, s 11.
[3] SOR/2002-277 [*IRPR*]. *IRPA, supra* note 1, s 11.

using an H&C application made under section 25. Section 89 of the *IRPA* empowers the Governor-in-Council to enact regulations governing fees for services provided in the administration of the *IRPA* and the cases in which fees may be waived by the Minister.[4] Section 307 of the *IRPR* imposes a processing fee for H&C applications.[5] Subsection 10(1)(d) of the *IRPR* states that an application may not be processed unless the applicable processing fee is paid.[6]

7. The assessment of an H&C application determines whether a person's circumstances warrant discretionary relief. Even if an exemption is granted, a foreign national must still satisfy all other applicable criteria of the *IRPA* or the *IRPR.*

8. The *Balanced Refugee Reform Act,* which came into force on June 29, 2010, amended section 25 of the *IRPA* by providing that the Minister can only be seized of an H&C application if the applicable fees have been paid. [7] As the Applicant submitted her H&C application before that date, this amendment does not apply to her and she continues to be governed by the wording of section 25 prior to the amendment.

[4] *IRPA, supra* note 1, s 89.
[5] *IRPR, supra* note 3, s 307.
[6] *Ibid*, s 10(1)(d).
[7] SC 2010, c 7, s 4(1).

C. THE APPLICANT

9. The Applicant is a citizen of Grenada who came to Canada in December 1999 as a visitor. Her visitor status expired six months later and she has remained in Canada without status since that time.[8]

10. In September 2008, the Applicant filed an H&C application seeking an exemption to pay the $550 processing fee on the basis that she was indigent.[9]

11. She was advised by a Minister's representative that the H&C application must be accompanied by the required processing fee and that an exemption was contrary to the legislative requirements. The application was returned to her unprocessed. The Applicant sought judicial review of this decision in the Federal Court of Canada ("Federal Court").[10]

D. JUDICIAL HISTORY

1) <u>Federal Court Judicial Review</u>

12. On an application for judicial review in the Federal Court, the Applicant argued that subsection 25(1) of the *IRPA*, when properly interpreted, required the Minister to consider a request to waive the processing fee for an Inland H&C application. She further asserted that the provisions of the *IRPR* purporting to prevent

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[8] *Toussaint v Canada (Minister of Citizenship and Immigration)*, 2009 FC 873, [2010] 3 FCR 452 [*Toussaint FC*].
[9] *Ibid* at paras 2-4.
[10] *Ibid*.

those foreign nationals who are indigent or on social assistance from seeking a waiver of the processing fee breached section 7 and subsection 15(1) of the *Charter*.

13. The Federal Court Judge dismissed the judicial review application and made the following rulings:

(1) Statutory Interpretation: Parliament had not intended that subsection 25(1) be used to waive all administrative requirements imposed by the *IRPA* and the *IRPR*. The inclusion of section 89 of the *IRPA* was consistent with the view that the waiver of processing fees be done through regulation and not through section 25.[11]

(2) Section 7 of the *Charter*: The removal of a non-citizen from Canada did not in itself engage section 7 of the *Charter*. Even if it did, the consideration of H&C factors prior to removal was not a legal principle and did not qualify as a principle of fundamental justice. [12]

(3) Subsection 15(1) of the *Charter*: The Applicant had failed to establish that the imposition of the H&C processing fee had a differential effect on the ability of foreign nationals to file H&C applications. In any event, poverty did not qualify as an analogous ground of discrimination for the purpose of subsection 15(1) of the *Charter*, as it was not a personal characteristic that is actually or constructively immutable. Furthermore, the requirement to pay a processing fee did not qualify

[11] *Ibid* at paras 14-33.
[12] *Ibid* at paras 34-51.

as discrimination, considering the evidence suggesting that poor foreign nationals were able to pay the processing fee and make applications.[13]

(4) The principle of the Rule of Law: The principle did not require the government (through the Governor-in-Counsel) to provide for a waiver of the H&C application processing fee for those who were not able to pay. An H&C application did not determine any legal rights. The common law principle of access to the Courts does not extend to matters involving discretionary administrative relief.[14]

2) Federal Court of Appeal

14. The Federal Court of Appeal set aside the decision of the Federal Court on the statutory interpretation of subsection 25(1), as it read prior to the *Balanced Refugee Reform Act* amendment, deciding instead that the Minister was obliged to consider a request for an exemption to waive the processing fee. The Court concluded that the broad language in subsection 25(1), which permitted the Minister to waive "any applicable criteria or obligation of this Act", together with the humanitarian and compassionate and public policy considerations, obliged him to consider a request for a processing fee exemption. The Court sent the matter back to the Minister for re-determination on that basis.[15]

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[13] *Ibid* at paras 52-108.
[14] *Ibid* at paras 109-117.
[15] *Toussaint v Canada (Minister of Citizenship and Immigration)*, 2011 FCA 146, at paras 40-55, [2011] FCJ no 696 [*Toussaint FCA*].

15. On the constitutional issues, which it considered to be moot, the Federal Court of Appeal fully endorsed the rulings of the Federal Court. The Federal Court of Appeal held that the Applicant's potential removal from Canada prior to consideration of her H&C grounds did not engage section 7 of the *Charter*. Even if it did, the Applicant had not been deprived of any right without the application of the principles of fundamental justice.[16]

16. The Court held that the Applicant's subsection 15(1) claim failed for 3 reasons: (1) there was no evidence that foreign nationals living in poverty suffered disproportionate hardship which could have been attributed to the absence of a provision for a processing fee waiver; (2) the absence of a provision for a fee waiver did not affect access to a process for claiming a legal right. It affected only access to a process for claiming a discretionary and an exceptional benefit; and (3) "poverty" or "being in a need of social assistance" were not analogous grounds for the purposes of subsection 15(1).[17]

17. Finally, the Federal Court of Appeal was of the view that access to the Minister under subsection 25(1) of the *IRPA* was not analogous to access to the courts, because the Minister's authority was limited to providing an exceptional discretionary benefit. As such, the absence of a provision for the waiver of the processing fee was not

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[16] *Ibid* at para 58.
[17] *Ibid* at para 59.

contrary to the common law constitutional right of access to the courts or to the Rule of Law.[18]

PART II – POINTS IN ISSUE

18. This application for leave does not raise any issue of public importance which requires a determination by this Court.

(a) The Applicant's constitutional challenges are moot as she obtained a favourable judgment from the Federal Court of Appeal on the interpretation of subsection 25(1) of the *IRPA*;

(b) The Applicant's constitutional issues are completely answered by the established jurisprudence of this Court;

(c) Subsection 25(1) of the *IRPA* has now been amended and this Court should not examine legislation which is no longer in force.

PART III – ARGUMENT

A. CONSTITUTIONAL ISSUES RAISED BY THIS APPLICATION FOR LEAVE ARE MOOT

19. There is no need for this Court to consider whether section 25 of the *IRPA*, as it read, violates the *Charter* and the Rule of Law. The Applicant succeeded at the Federal Court of Appeal. She should not be permitted to appeal the Reasons of the Court on secondary issues.

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[18] *Ibid* at para 60.

20. An Applicant, who has obtained a favourable order, is rarely permitted to appeal from the Reasons of that order.[19] There is no important reason for allowing the Applicant to do so in this case.[20]

21. The Federal Court of Appeal granted the Applicant's appeal based on the statutory interpretation of subsection 25(1) of the *IRPA*. The Court declared that subsection 25(1) (as it read) permitted the waiver of the H&C application processing fee, and that the Minister was obliged to consider the Applicant's waiver request. Having granted the appeal on that basis, the Court held that the constitutional arguments were moot. The Applicant does not seek to change the Court's order in any way. Given that the Applicant obtained the remedy that she sought at the Court below, there is no reason for her to appeal to this Court.

B. CONSTITUTIONAL ISSUES DO NOT RAISE A QUESTION OF PUBLIC IMPORTANCE

22. The Federal Court of Appeal's Reasons on the constitutional issues are entirely consistent with well established jurisprudence of this Court. Therefore, the Applicant has not raised a question of public importance.

1) <u>Applicant's arguments are based on the wrong premise</u>

23. The Applicant's arguments are incorrectly based on the premise that there is a constitutional right to access the H&C process. The assessment of an H&C

[19] *Konecny v Ontario Power Generation*, 2010 FCA 340, [2010] FCJ no 1599.
[20] *R v DD*, 2000 SCC 43, [2000] 2 SCR 275.

application determines whether a foreign national's circumstances warrant discretionary relief. H&C relief is not a statutorily mandated exercise of discretion, but available on application. It is not part of the risk assessment process and it does not determine any legal rights. As such, there can be no violation of the *Charter* if a processing fee is payable to make an H&C application.

2) Federal Court of Appeal's Reasons on section 7 of the *Charter* do not raise a question of public importance

24. The decision of the Federal Court of Appeal, that section 7 of the *Charter* was not engaged, or if it was, that it was not breached, does not raise an issue of public importance.[21] The judgement and reasons are entirely consistent with this Court's jurisprudence, especially with the longstanding principle that foreign nationals do not have a *Charter* right to enter, remain in, or obtain status in Canada.[22]

25. The Applicant's right to life, liberty or security of the person is not engaged. Foreign nationals do not have a legal right to obtain a discretionary exemption from the regular requirements of the *IRPA* that would be protected by the section 7 liberty interests. The section 7 liberty interests involve the right to make fundamental personal choices that are inherently private and free from state interference. They do not create a right to the unrestricted freedom to make choices which a person is not legally entitled to make. Foreign nationals do not have a *Charter* right to enter, remain

[21] *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
[22] *Canada (Minister of Employment and Immigration) v Chiarelli*, [1992] SCJ no 27 at para 24, 90 DLR (4th) 289 [*Chiarelli*]; *Singh v Canada (Minister of Employment and Immigration)*, [1985] 1 SCR 177 at para 13, [1985] SCJ no 11.

in, or obtain status in Canada. Consequently, they do not have a right to live in Canada that would be protected by their liberty interests.[23]

26. The Applicant has not claimed that she faces any risk to her life or security of the person upon deportation. She has not sought refugee protection in Canada or requested a pre-removal risk assessment – processes available to her free of charge.[24] As the Courts below found, her removal from Canada, alone, does not engage section 7 of the *Charter*.

27. Even if section 7 of the *Charter* was engaged, the principles of fundamental justice do not require an H&C assessment prior to the removal of a foreign national without status in Canada.[25] In *Canada (Minister of Citizenship and Immigration) v Chiarelli*[26] and *Medovarski v Canada (Minister of Citizenship and Immigration)*,[27] this Court determined that fundamental justice does not require that foreign nationals be afforded an H&C assessment prior to their removal from Canada.

28. As such, the decision of the Federal Court of Appeal on section 7 of the *Charter* does not raise an issue of public importance.

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[23] *Chiarelli, supra* note 22; *Medovarski v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51 at para 46, [2005] 2 SCR 539 [*Medovarski*].
[24] *IRPA, supra* note 1, ss 96-97; *Toussaint FC, supra* note 8 at para 38.
[25] *R v Malmo-Levine*, 2003 SCC 74, [2003] 3 SCR 571.
[26] *supra* note 22.
[27] *supra* note 23.

3) Federal Court of Appeal's Reasons on subsection 15(1) of the *Charter* do not raise a question of public importance

29. There is no issue of public importance in the Federal Court of Appeal's determination that the Applicant failed to make out any element of subsection 15(1) of the *Charter*.[28] This determination was in accordance with this Court's jurisprudence on equality rights.[29]

30. As the Courts below noted, the Applicant adduced no objective evidence to demonstrate that the H&C processing fee resulted in a differential effect that bars the H&C review for those foreign nationals living in poverty. There was no evidence to suggest that those foreign nationals who do file H&C applications are not impecunious and not in receipt of social assistance. The number of foreign nationals who file inland H&C applications suggested that there was no affordability problem.[30]

31. In an attempt to demonstrate that a distinction is drawn, the Applicant has improperly applied *Eldridge v British Columbia (AG)* to the facts of this case.[31] *Eldridge* involved a person with a disability who sought equivalent access to core health services accorded to everyone under the British Columbia medicare scheme. In *Eldridge,* This Honourable Court recognized that deaf persons required the accommodation of sign-

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[28] *Charter, supra* note 21, s 15(1).
[29] *Law Society of British Columbia v Andrews*, [1989] 1 SCR 143, [1989] SCJ no 6; *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, [1999] SCJ no 12 [*Law*]; *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483 [*Kapp*].
[30] *Toussaint FC, supra* note 8 at paras 65-66; see e.g., *Veitch v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1400, [2008] FCJ no 1820; *Tharamalingam v Canada (Minister of Citizenship and Immigration)*, 2008 FC 463, [2008] FCJ no 579; *Palumbo v Canada (Minister of Citizenship and Immigration)*, 2009 FC 706, [2009] FCJ no 873.
[31] [1997] 3 SCR 624, [1997] SCJ no 86.

language interpretation to enjoy equal access to the benefit of government funded healthcare. In contrast, the law does not provide the right to H&C assessment prior to removal, but rather the opportunity to seek H&C relief. There can therefore be no requirement to accommodate the circumstances of foreign nationals who cannot afford the H&C processing fee.

32. However, even if a distinction was created, "poverty" or "being in a state of social assistance" have been long rejected as analogous grounds for the purposes of subsection 15(1) of the *Charter*.[32] Most recently, in *Ontario v Fraser*, this Court rejected the notion that "employment status" or "economic equality" are analogous grounds.[33]

33. Subsection 15(1) of the *Charter* addresses personal characteristics that are immutable or changeable only at an unacceptable personal cost. Immutability is a key element to the recognition of an analogous ground.[34] The Courts below properly determined that one's financial situation is not an immutable characteristic for the purpose of subsection 15(1). This finding is consistent with established and accepted jurisprudence from appellate courts. As Fichaud J.A. has noted, "poverty is a clinging

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[32] *Masse v Ontario (Ministry of Community and Social Services)*, [1996] OJ no 363 at paras 365-379, 134 DLR (4th) 20; *Boulter v Nova Scotia Power Inc*, 2009 NSCA 17, leave to appeal to SCC refused, [2009] SCCA No. 172 (Sept 10, 2009) [*Boulter*]; *Alcorn v Canada (Commissioner of Corrections)*, 2002 FCA 154, [2002] FCJ no 620; *Federated Anti-Poverty Groups of British Columbia v Vancouver (City of)*, 2002 BCSC 105, [2002] BCJ no 493.

[33] 2011 SCC 20 at para 315, [2011] SCJ no 20.

[34] *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, [1999] SCJ no 24; *Law, supra* note 29; *Withler v Canada (AG)*, 2011 SCC 12 at para 33, [2011] 1 SCR 396.

web, but financial circumstances may change, and individuals may enter and leave poverty or gain and lose resources".[35]

34. While the Applicant may rely on *Falkiner v Ontario (Ministry of Community and Social Services)*, to support her position, *Falkiner* does not identify poverty as an analogous ground of discrimination – the finding of differential treatment in that case was based on the intersection of three other grounds.[36]

35. This is not the appropriate case to revisit the settled question that poverty is not an analogous ground. The Applicant has not provided a sufficient evidentiary basis to support any of her allegations. An equality analysis under subsection 15(1) of the *Charter* cannot be undertaken in an evidentiary vacuum.

36. Finally, even if a distinction was made on the basis of an analogous ground, there was no evidence that the distinction creates a disadvantage by perpetuating prejudice or stereotyping.

37. None of the contextual factors, described in *Law v Canada (Minister of Employment and Immigration)*,[37] as reframed by this Court in *R v Kapp*,[38] are present in this case. There was no evidence of a pre-existing disadvantage, stereotyping,

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[35] *Boulter, supra* note 32; *R v Banks*, 2007 ONCA 19 at paras 104-105, 84 OR (3d) 1; *R v Wu*, 2003 SCC 73 at para 31, [2003] 3 SCR 350; *Guzman v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1134 at paras 14-22, [2006] FCJ no 1443.
[36] (2003), 49 OR (3d) 564, [2002] OJ no 3492 (ONCA).
[37] *supra* note 29.
[38] *Supra* note 29.

prejudice or vulnerability. While some poor persons may face pre-existing economic disadvantage, there was no objective, statistical evidence that foreign nationals seeking to file an H&C application faced any disadvantage in paying the processing fee.

38. Importantly, there was no serious interest affected. An H&C assessment does not determine legal rights, but assesses the merits of granting exceptional and discretionary relief. Foreign nationals are not under the law entitled to any relief under subsection 25(1) of the *IRPA*. The absence of a provision for a fee waiver does not affect access to a process for claiming a legal right. Persons seeking the Minister's discretion under subsection 25(1) do so by choice.

39. The Courts below applied well established principles related to equality rights in arriving at their determination. The Applicant's disagreement with their determination does not raise an issue of public importance.

4) Federal Court of Appeal's Reasons on the principle of Rule of Law do not raise a question of public importance

40. The Federal Court of Appeal's decision that an H&C application does not engage the principle of access to courts and the Rule of Law does not give rise to any issue of public importance.

41. The principles of access to the courts and Rule of Law are confined to the judicial context, where the legal rights of individuals are being determined.[39] An H&C application is an administrative application process whereby the merits of granting discretionary and exceptional relief are assessed. It does not determine legal rights, nor is it a step in legal proceedings. For those processes under the *IRPA* that determine the legal rights of foreign nationals, no processing fees are charged.[40] The Federal Court of Appeal's finding in this regard was proper and does not raise a question of public importance.

C. SECTION 25 OF THE *IRPA* HAS SINCE BEEN AMENDED AND NEED NOT BE REVISITED

42. Section 25 of the *IRPA* has now been amended. The Applicant's arguments and her application record are based on a historic scheme and do not warrant the granting of leave.

43. The statutory provision at issue in the appeal has been amended. It would not serve the public interest to assess the constitutional propriety of a historical scheme which is no longer in effect. There is nothing preventing other, affected foreign nationals, from advancing a constitutional challenge to the new legislative scheme. The threshold for granting leave to judicially review a decision made under the *IRPA* to the

[39] *British Columbia v Imperial Tobacco Canada*, 2005 SCC 49, [2005] SCR 473; *Polewsky v Home Hardware Stores*, (2003), 66 OR (3d) 600. [2003] OJ no 2908.
[40] See e.x. *IRPA*, *supra* note 1, ss 96-97, *Toussaint FC*, *supra* note 8 at para 38.

Federal Court is not high - an Applicant must demonstrate an "arguable issue".[41] Cases raising constitutional issues of any merit meet that standard.[42]

44. Following the direction of this Court in *Baker v Canada (Minister of Citizenship and Immigration)*, there is no compelling reason to decide a constitutional question that can be, and has been, resolved on other grounds. This is not an exceptional case in which an appeal from the Reasons of the Federal Court of Appeal should be allowed.[43]

PART IV – SUBMISSIONS CONCERNING COSTS

45. The Respondent does not seek an order of costs. The respondent does oppose however the applicant's request for costs regardless of the outcome. She has obtained the relief she requested in the Federal Court of Appeal, but is nonetheless advancing an unnecessary appeal to this Court on issues which no longer affect her. In these circumstances she should not be awarded any costs.

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[41] *Bains v Canada (Minister of Employment and Immigration)*, [1990] FCJ no 457, 109 NR 239 (FCA).

[42] See e.g. *Heredia v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1215, [2010] FCJ no 1514; *Toronto Coalition to Stop the War v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 957, [2010] FCJ no 1092; *Rosenberry v Canada (Minister of Citizenship and Immigration)*, 2010 FC 882, [2010] FCJ no 1101; *Cabrera v Canada (Minister of Citizenship and Immigration)*, 2010 FC 709, [2010] FCJ no 864; *Walker v Canada (Minister of Citizenship and Immigration)*, 2010 FC 392, [2010] FCJ no 474; *Ndungu v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1269, [2009] FCJ no 1612.

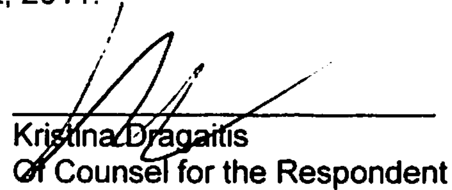
[43] [1999] 2 SCR 873, 174 DLR (4th) 193.

PART V – NATURE OF ORDER SOUGHT

46. The Respondent, the Minister of Citizenship and Immigration, requests that this application for leave be dismissed, without costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto this 23rd day of August, 2011.



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