Court file no. A-408-09

FEDERAL COURT OF APPEAL

BETWEEN:

NELL TOUSSAINT

Appellant

And

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

MEMORANDUM OF ARGUMENT OF THE INTERVENER

THE CHARTER COMMITTEE ON POVERTY ISSUES

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Overview

1. CCPI was granted intervener status because "this is one of those unique cases that raise issues of public policy, access to justice and discrimination and inequality." [1] Both the particular issue and the broader legal questions in this case are of immense significance to poor people. H&C review is "an important decision that affects in a fundamental manner the future of individuals' lives".[2] It is a rare provision for compassionate consideration of applicants as fellow human beings. For impoverished applicants to be barred from this recognition of their individual uniqueness and value by a refusal to waive a $550 fee goes to the core of CCPI's mandate to defend the rights of poor people to equality, dignity, security and access to justice.

2. Despite uncontroverted evidence and judicial and legislative recognition of widespread prejudice, stigma and discrimination against social assistance recipients and other poor people in Canada, the learned application judge found that the *Charter* provides no protection from discrimination on these grounds. She further found that section 7 and the principle of fundamental justice do not apply to H&C because it is provided "at the discretion of parliament". She held that the rule of law and the constitutional right of access to the courts do not apply to administrative tribunals and procedures which play an increasingly central role in the Canadian justice system, particularly for poor people.

3. If upheld, these findings would further marginalize poor people in Canada, a group "lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated."[3] The decision would deny them, procedurally and substantively, some of the most fundamental protections of our constitutional democracy.

PART I – Statement of Fact

4. CCPI relies on the facts as stated by the Appellant as well as the following.

5. 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

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[1] Order of Prothonothary Aalto, March 18, 2009.
[2] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 15.
[3] *Andrews* v. *Law Society of British Columbia,* [1989] 1 S.C.R. 143 [*Andrews*] at para. 51.

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."[4]

6. 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*[5], and *R. v. Clarke*[6]. 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.[7]

7. 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."[8] 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.[9] Geraldine Sadoway, an immigration lawyer with Parkdale Community Legal services, is "often unable to proceed with H&C files because the clients are unable to pay this fee."[10]

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[4] Affidavit of John Powell, Appeal Book, pp. 263-270.
[5] *Falkiner v. Ontario (Ministry of Community and Social Services)*, [2002] 59 O.R. (3d) 481 [*Falkiner*].
[6] *R. v. Clarke*, [2003] O.J. NO. 3883.
[7] Affidavit of Bruce Porter, Appeal Book, pp. 224-253.
[8] Affidavit of Richard Goldman, Appeal Book, p. 136.
[9] Affidavit of Carolyn Watson, Appeal Book, p. 140.
[10] Affidavit of Geraldine Sadoway, Appeal Book, p. 119.

8. Professor Ernie Lightman documents the gross inadequacy of social assistance entitlements in comparison to expenditures on basic necessities. The social assistance rate for single persons such as the Appellant is half of the estimated cost of basic necessities. Social assistance rates "are typically too low to allow for discretionary expenditures."[11] The Appellant'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.[12]

9. 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. 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. [13]

10. The learned judge 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 application judge 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." [14]

PART II - Issues To Be Addressed

11. CCPI adopts the position of the Appellant with respect to the proper statutory interpretation of s. 25 (1). CCPI will address the following constitutional issue:

> Does the failure of the government to provide for the waiver of fees for H&C consideration for foreign nationals who are unable to afford them because of poverty or reliance on social assistance:

[11] Affidavit of Ernie Lightman, Appeal Book, p. 174.
[12] *Ibid*., pp. 175-180.
[13] Affidavit of Josephine Grey, Appeal Book, p. 145; Affidavit of Geraldine Sadoway, Appeal Book, p. 119.
[14] Reasons for Judgment, Snider, J., Appeal Book, pp 48-49 at paras 95-97.

i. infringe the Applicant's rights under: s. 7 and/or s. 15 of the *Charter* in a manner that is not saved by s.1; or

ii. violate the constitutional principle of the rule of law or the common law constitutional right of access to the Courts?

PART III - Law And Argument

A. The Failure to Provide for Fee Waiver Violates s. 7 of the Charter

12. 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."[15] Section 7 may impose positive obligations on governments.[16]

13. 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.[17]

i. Protected Interests

14. The s.7 claim advanced by the Appellant 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 "right", which tainted jurisprudence under the *Canadian Bill of Rights,* is not acceptable under the *Charter*.[18] Whether H&C consideration is considered a privilege or a right does not determine whether it must conform to the *Charter*.

15. 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

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[15] *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 [*Rodriguez*] at para. 14.
[16] *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 [*G. (J.)*] at para. 107.
[17] *Rodriguez*, *supra*, at para. 12.
[18] *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 [*Singh*] at para. 50.

government puts in place a scheme to provide health care, that scheme must comply with the *Charter*."[19] 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 the Court was unanimous in concluding that it does.

16. In the present case, access to H&C consideration would provide the Appellant with the opportunity to explain why deportation poses significant risk to her physical and psychological health and well-being. Ms. Toussaint suffers from serious medical conditions, including sickle cell anemia, diabetes, uterine fibroids, ovarian cysts and high blood pressure.[20] She would not be able to receive treatment for these conditions in Grenada.[21] As was noted by the Supreme Court in *Singh* and more recently in *Chaoulli*, it is enough to engage security of the person if it is likely that one's health would be impaired.[22] 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 the Appellant. Denying access to H&C because of an inability to pay the fee also creates additional state-imposed anxiety, stress and stigma.[23]

17. Instead of assessing this evidence of s.7 protected interests at stake for the Appellant, the learned application judge relied on the decision of the Supreme Court of Canada in *Medovarski* to foreclose any possibility that s. 7 interests *may* be engaged.[24] The Court observed in the context of that case that "deportation of a non-citizen *in itself* cannot implicate the liberty and security interests protected by s. 7." Snider J. held that this statement "appears to be a full answer to the s.7 arguments of the Applicant and the Interveners." [25]

18. In CCPI'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

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[19] *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791 [*Chaoulli*] at para. 104.
[20] Affidavit of Nell Toussaint, Appeal Book, pp. 90-95.
[21] *Ibid.*
[22] *Singh, supra,* at para. 48.
[23] *Chaoulli, supra,* at para. 116.
[24] *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 [*Medovarski*] at para. 46.
[25] Reasons for Judgment, Snider, J., Appeal Book, pp. 24-25 at para. 37.

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." [26] Moreover, the 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, the Court notes that where such interests are engaged, they are dealt with under s. 25(1).[27]

ii. Fundamental Justice

19. In her analysis of whether the denial of a fee waiver for H&C is contrary to principles of fundamental justice the learned application judge focuses on whether H&C Review is a legal principle. Finding that it is provided "at the discretion of parliament", she concludes 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."[28]

20. 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 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 the Court considered whether failing to provide legal aid to impecunious parents engaged in complex custody hearings conformed with fundamental justice. In that case, the 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.[29] In CCPI's submission, the same principle applies in the present case with respect to fee waiver, without which impecunious applicants have no access to H&C – a procedure which, even if it is enacted at the discretion of parliament, must still be fair.

21. 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

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[26] *G. (J.)*] at para. 60. The Court distinguishes, in this case, between separation from a child resulting of 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. (para 63).
[27] *Medovarski, supra,* at paras. 45, 47.
[28] Reasons for Judgment, Snider J., Appeal Book, p. 29 at para 47.
[29] *G.(J.), supra*, at para. 91.

inconsistent with the objectives of H&C Review.[30] Barring the poorest applicants for humanitarian and compassionate exceptions under IRPA, when these precise persons may be deserving of such consideration because of their disadvantages or hardship linked to poverty, bears no relation to the objective of H&C Review.

22. Further, "the principles of fundamental justice require that each person, *considered individually*, be treated fairly by the law".[31] The Appellant does not challenge the imposition of fees for H&C Review in their general application. Rather, she asks for a provision for individualized consideration in circumstances of poverty. The refusal to provide for such consideration is contrary to principles of fundamental justice.

23. Finally, it is submitted that there is consensus that the rule or principle at stake in fee waiver is "fundamental to the way in which the legal system ought fairly to operate".[32] Allowance for inability to pay because of poverty is a general principle in judicial and legislative practice in Canada as well as being recognized as a principle under international law.

24. The *Criminal Code*, for example, requires sentencing judges to consider ability to pay before imposing a fine so that impoverished offenders do not have their right to liberty compromised unfairly.[33] In bankruptcy proceedings courts make adjustments in order to ensure that access to necessaries and/or ability to pay is not compromised.[34] As the Ontario Court of Appeal recognized recently in *Mavi*, procedural fairness requires consideration of financial circumstances before enforcing sponsorship undertakings.[35] Courts in Canada have procedures for waiving fees.[36] The requirement to waive court fees in order to ensure fair access to justice for the poor is recognized as a component of the rule of law and the common law right of access

[30] *Chaoulli, supra,* at paras. 129-130.
[31] *Rodriguez, supra,* at para. 98 [emphasis added].
[32] *R. v. D.B.,* [2008] 2 S.C.R. 3, 2008 SCC 25 at para. 46.
[33] *Criminal Code*, R.S.C. 1985, c. C-46 at s. 734 (2).
[34] See generally ss. 67 and 68 of the *Bankruptcy and Insolvency Act*, R.S.C.1985, c. B-3.
[35] *Mavi. v. Canada (Attorney General)*, 2009 ONCA 794, 98 O.R. (3d) 1, 85 Imm. L.R. (3d) 1, 259 O.A.C. 33 at para. 147.
[36] See, for example, Supreme Court of Canada Rules, Rule 82 Schedule A.

to Courts.[37] International law recognizes that the right to an effective remedy, whether it be judicial or administrative in nature, must be affordable and made accessible to the poor.[38]

B. The Failure to Waive Fees for Impecunious Applicants Violates s. 15

25. Under the two step framework for assessing s. 15 claims described by the Supreme Court in *Kapp*[39], the first stage of the inquiry is to ask whether the decision not to waive fees for impecunious applicants creates a distinction and if so, whether the distinction is based on an enumerated or analogous ground. The second stage of the process is to ask whether the distinction is discriminatory.[40]

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

26. As the learned application judge found, this case is comparable to the situation that was before the courts in *Eldridge* in which the Supreme 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."[41]

27. 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. The 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. Similarly, in the present case, section 89 of the Act authorizes the adoption of regulations for fee waiver; hence, it is the failure to have adopted such regulations or to otherwise provide for fee waiver where necessary, which constitutes discrimination under s.15. As noted by the Supreme Court of Canada in

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[37] *Polewsky v. Home Hardware Stores Ltd.* (2003), 229 D.L.R. (4th) 308 (Ont. Div. Ct.) [*Polewsky*] at para. 76.
[38] See, for example, U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 9, "The Domestic Application of the Covenant," E/C. 12/1998/24 at para. 9.
[39] *R. v. Kapp*, [2008] 2 S.C.R. 483, 2008 SCC 41 [*Kapp*].
[40] *Kapp*, *supra,* at para. 17.
[41] *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 [*Eldridge*] at para 77; Reasons for judgment, Snider J., Appeal Book p.33 at para. 55..

Vriend, section 32 of the *Charter* is worded broadly so that the *Charter* will be engaged even if the government refuses to exercise its authority.[42]

28. In *Eldridge*, the failure to provide interpreter services was found to create a distinction between those who needed interpreter services to communicate (the deaf) and those who did not (the hearing population).[43] The learned application judge 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

29. 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".[44] 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".[45] In CCPI's submission, 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*.

30. "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.[46]

31. The distinction between low income level and the social condition of poverty parallels the distinction that has been applied by the Supreme Court in the context of enumerated grounds, between "functional limitations" and discriminatory governmental or societal responses to such

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[42] *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para 53 [*Vriend*] at para 60.
[43] *Eldridge*, *supra,* at para 80.
[44] Zinn, Russel W. *The Law of Human Rights in Canada: Practice and Procedure*, looseleaf (Aurora, Ont.: Canada Law Book, 1996) at pp 13-1 – 13-3.
[45] *Ibid*; *Campbell* v. *Yukon Housing Corp*. (2005), 56 C.H.R.R. D/151.
[46] See para 6, *supra*, referring to evidence of John Powell.

barriers. In *Meiorin*, the more limited aerobic capacity of women was "wrongly converted into a state-imposed job handicap which was no less objectionable because it was misconceived rather than intentionally discriminatory." In *Granovsky*, the Court distinguished between biomedical impairment on the one hand, and disability as "socially constructed" on the other.

> Exclusion and marginalization are generally not created by the individual with disabilities but are created by the economic and social environment and, unfortunately, by the state itself.[47]

32. The consideration of how a characteristic becomes socially constructed as a ground of discrimination is central to the consideration of whether it constitutes an analogous ground under s.15. In *Corbière* the 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"[48], serving as a jurisprudential marker for "suspect distinctions."[49]

33. In her consideration of whether poverty is an analogous ground, the application judge fails to consider the ways in which poverty is used to make "suspect distinctions" outside of the context of immigration law, and she fails to reference any of the evidence that supports this claim. Instead, she relies on *Corbière* 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 as "financial circumstances".[50] In *Corbière*, however, the 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 the Court analysed the extent to which residency status fundamentally informed social and political relationships. The fundamental issue in *Corbière*, 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

[47] *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703 at para. 30.
[48] *Corbière v.Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 [*Corbiere*] at para. 10.
[49] *Corbière* at para. 11.
[50] Reasons for judgment, Snider J., Appeal Book, p.40 at para. 75**.**

is analogous in all circumstances – what varies in different contexts is whether particular circumstances or decision-making amount to discrimination.[51]

34. 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, by the Ontario Court of Appeal. In that case, Laskin J.A. found that social assistance recipients face resentment and anger from others in society, who see them as freeloading and lazy, and that they are therefore subject to stigma leading to social exclusion.[52] Laskin J.A. drew support for his conclusion from two previous decisions from Nova Scotia finding on the basis of similar evidence that poverty is an analogous ground under section 15.[53]

35. Similar evidence was considered by the Canadian Human Rights Review Panel, chaired by Justice Gérard LaForest. The panel 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*. [54]

36. The application judge relies on *Guzman*[55], *Boulter*[56], and *Banks*[57] to conclude that poverty and receipt of public assistance are not analogous grounds under s. 15 of the *Charter*. None of these 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*.

37. Snider J. also distinguishes *Falkiner* from the present case on the basis that receipt of social assistance was not found to be an *independent* ground of discrimination. This is a misreading of that decision however. Laskin J.A. rejected the Divisional Court's decision to

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[51] *Corbière, supra,* at para 8.
[52] *Falkiner v. Ontario (Minister of Community and Social Services)* (2002), 59 O.R. (3d) 481 [*Falkiner*] at para 86.
[53] Ibid, at para. 88; See also, *Dartmouth/Halifax County Regional Housing Authority v. Sparks* (1993), 101 D.L.R. (4th) 224 (N.S.C.A.); *R. v. Rehberg* (1993), 111 D.L.R. (4th) 336 (N.S.S.C.); See also *Schaff v. Canada*, [1993] T.C.J. No. 389; *P.D. v. British Columbia*, 2010 BCSC 290.
[54] Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (Ottawa: Department of Justice, 2000), at p 106 – 110..
[55] *Guzman* v. *Canada* (Minister of Citizenship and Immigration), [2007] 3 F.C.R. 411.
[56] *Boulter v. Nova Scotia Power Inc.,* [2009] N.S.J. No. 64 (N.S.C.A.).
[57] *R.* v. *Banks,* 2007 ONCA 19 at para 104; leave denied, [2007] S.C.C.A. No. 139.

define the analogous ground as a combination of grounds, as sole support parents on social assistance, in favour of recognizing the more general category of receipt of social assistance as an independent ground of discrimination, linked with prevailing prejudice and stereotype.[58]

38. The application judge also failed to consider the importance of what is now universal recognition of grounds related to social condition or receipt of public assistance in provincial and territorial human rights statutes. As Laskin J.A. noted in *Falkiner*, such recognition was accepted in *Miron* as an important indicator of analogous grounds, and in relation to this ground the evidence is "compelling."[59]

iii. The Distinction is Discriminatory

39. The second stage of the s.15 analysis should focus on the substantive equality purposes of s. 15 and on whether the impugned distinction perpetuates disadvantage and prejudice or imposes a disadvantage based in stereotype.[60]

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

41. However, it has been well established, since *Brooks* v. *Canada Safeway*, 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 understanding that discrimination affecting pregnant women constitutes sex discrimination. Similarly, the fact that the absence of fee waiver does not prevent all impecunious applicants from accessing H&C Review, does not mean there is no discrimination on the ground of poverty.

42. The learned application judge further finds that other than the evidence of the Appellant herself, there is "no evidence" of an exclusionary effect of the failure to provide for fee waiver

[58] *Falkiner*, *supra* at para. 92.
[59] *Ibid*, at para 90; Zinn, *Law of Human Rights*, *supra*.
[60] *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9 at paras. 188-194.

experienced by impecunious foreign nationals. As noted above (paras. 8-9) there is in fact an abundance of evidence on the record showing the exclusionary effect on other foreign nationals who are unable to pay the fee. Moreover, even without this evidence, the fact that the Appellant herself was prevented from filing an application because of her poverty is enough to establish discrimination on this ground. In *Eldridge*, the 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 application judge 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 experienced by impoverished applicants of a failure to provide for fee waiver.

43. The learned applications judge also suggests that because the fee arises from a "neutral and rationally defensible policy choice" rather than from a demeaning stereotype, the policy cannot be discriminatory. Yet there is ample evidence in the record to show that the failure to offer a fee waiver to impecunious applicants perpetuates and exacerbates patterns of historical disadvantage, prejudice and stereotype.[61] The refusal to waive fees for impoverished H&C applicants denies them consideration as an individual worthy of compassion, and has many consequences which exacerbate pre-existing disadvantage and prejudice as described in Part I. The fee contributes to the social cycle of poverty. Those who cannot make an H&C application lack immigration status and are precluded from accessing social assistance and municipal assisted housing. These fundamental exclusions from the life of the community exacerbate stigma and discrimination.[62]

C. Not Saved By Section 1

44. The Respondent argues that charging fees for H&C applications is justified as a form of cost recovery for services provided. However, the Appellant does not challenge the charging of the fee, but rather the failure to waive the fee for Applicants living in poverty. The Respondent provides no evidence of the estimated cost of discretionary fee waiver.

[61] Affidavit of Bruce Porter, *supra,* pp 1205, 1214.
[62] *Ibid.,* pp. 1192-1230; Affidavit of Josephine Grey, *supra,* pp 1110-1116; Affidavit of Ernie Lightman, *supra*, pp 1138-1191; Affidavit of John Powell, *supra*; Affidavit of Geraldine Sadoway, *supra*, pp 1081-1095; LIFT Report at p. 2.

45. The Respondent has the onus to prove its actions are justified, but has provided no evidence that the financial implications of a fee waiver for impecunious applicants for H & C Review would constitute an unreasonable or disproportionate expenditure.[63]

D. The Rule of Law

46. In *Polewsky* v. *Home Hardware*[64] the Divisional Court found that the failure to waive Small Claims Court fees for indigent individuals violated both the common law right of access to courts *in forma pauperis* and the constitutional principle of the rule of law. In support of applying the constitutional principle of the rule of law, the Court cited Dickson, C.J. on the centrality of access to courts in relation to the integrity of the *Charter*. "Of what value are the rights and freedoms guaranteed by the Charter if a person is denied or delayed access to a court of competent jurisdiction in order to vindicate them? ... The Charter protections would become merely illusory, the entire Charter undermined."[65]

47. The learned application judge accepts that access to the courts is a component of the rule of law but restricts the application of the rule to "constitutional and statutory courts", finding that it does not extend to "discretionary administrative determinations."[66]

48. This finding is at odds with the Supreme 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*.[67] As Lady Justice Hale of the Court of Appeal in England has found "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."[68]

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[63] *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.
[64] *Polewsky, supra*.
[65] *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214 at para. 24.
[66] Reasons for judgment, Snider J., Appeal Book, p.55 at para 115.
[67] *R. v. Conway*, 2010 SCC 22 at paras. 20-23.
[68] *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: Edmond Montgomery Press, 2008), ch. 15.

49. 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 *Baker* decision.

> 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 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*.[69]

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

PART IV - ORDER SOUGHT

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: 29 June 2010

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

[69] Dyzenhaus, D., "Constituting the Rule of Law: Fundamental Values in Administrative Law" (2001-2002) 27 Queen's L.J. 445 at 503-504.

PART V – AUTHORITIES

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2. *B.C.G.E.U., Re.*, [1988] 2 S.C.R. 214 (S.C.C.)
3. *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817
4. *Boulter v. Nova Scotia Power Inc.*, [2009] N.S.J. No. 64
5. *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791
6. *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203
7. *Dartmouth/Halifax County Regional Housing Authority v. Sparks* (1993), 101 D.L.R. (4th) 224 (N.S.C.A.)
8. *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624
9. *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9
10. *Falkiner v. Ontario (Ministry of Community and Social Services)* (2002), 59 O.R. (3d) 481 (C.A.)
11. *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703
12. *Guzman v. Canada (Minister of Citizenship and Immigration) (F.C.)*, [2007] 3 F.C.R. 411
13. *Lalonde v. Ontario (Commission de restructuration des services de santé)* (2001), 56 O.R. (3d) 505 (C.A.)
14. *Miron v. Trudel*, [1995] 2 S.C.R. 418
15. *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46
16. *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 S.C.R. 381
17. *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54

18. *P.D. v. British Columbia,* 2010 BCSC 290

19. *Polewsky v. Home Hardware Stores Ltd.* (2003), 229 D.L.R. (4th) 308

20. *R. v. Banks*, 2007 ONCA 19 (leave denied [2007] S.C.C.A. No. 139)

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

22. *R. v. Conway*, 2010 SCC 22

23. *R. v. D.B.*, [2008] 2 S.C.R. 3, 2008 SCC 25

24. *R. v. Kapp* 2008 SCC 41

25. *R. v. Rehberg* (1993), 111 D.L.R. (4th) 336 (N.S.S.C.)

26. *R. v. Turpin*, [1989] 1 S.C.R. 1296

27. *Saleem v. Secretary of State For Home Department*, [2000] EWCA Civ 186

28. *Schaff v. Canada*, [1993] T.C.J. No. 389

29. *Singh v. Canada* (*M.E.I.*), [1985] 1 S.C.R. 177

30. *Vriend v. Alberta*, [1998] 1 S.C.R. 493

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32. Dyzenhaus, D., "Constituting the Rule of Law: Fundamental Values in Administrative Law" (2001-2002) 27 Queen's L.J. 445

33. Sossin, Lorne., "Access to Administrative Justice and Other Worries," in Lorne Sossin & Colleen Flood, eds., Administrative Law in Context (Toronto: Edmond Montgomery Press, 2008)

34. Zinn, Russel W. The Law of Human Rights in Canada: Practice and Procedure, looseleaf (Aurora, Ont.: Canada Law Book, 1996)