Court File No.: A-407-14

1096

FEDERAL COURT OF APPEAL

BETWEEN:

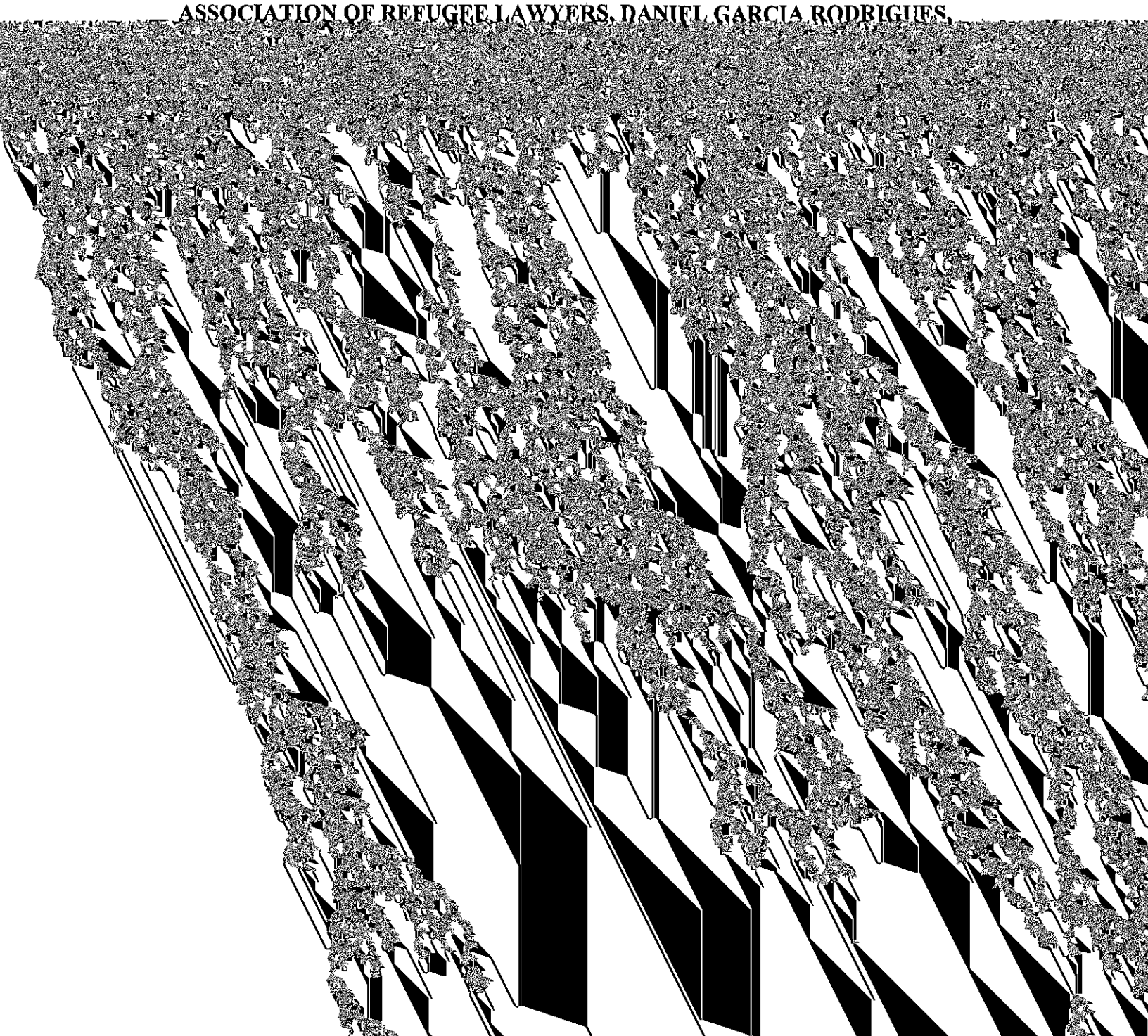
ATTORNEY GENERAL OF CANADA and MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellants

(Respondents in the Federal Court)

and

CANADIAN DOCTORS FOR REFUGEE CARE, THE CANADIAN ASSOCIATION OF REFUGEE LAWYERS, DANIEL GARCIA RODRIGUES,



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Respondents
(Applicants in the Federal Court)

and

REGISTERED NURSES' ASSOCIATION OF ONTARIO AND CANADIAN ASSOCIATION OF COMMUNITY HEALTH CENTRES

Interveners

APPELLANTS' MEMORANDUM OF FACT AND LAW

PART I – STATEMENT OF FACTS

A. OVERVIEW

1. The issue before this Court is whether there is a constitutional right to federally funded health care insurance for refugees, refugee claimants and failed refugee claimants in Canada.

2. In 1957, Canada created a discretionary, *ex gratia* program to fund health care for displaced persons and persons in "refugee like" circumstances. The Interim Federal Health Program ("IFHP") was designed to fund health insurance benefits for a short period, until beneficiaries were settled in Canada and could afford to pay for their medical needs. Over time, the number of beneficiaries grew, and beneficiaries received benefits for longer periods of time. The original intention of providing urgent interim coverage eroded. In June 2012, the federal Government (the "Government") made a policy choice to continue funding the program, while changing the categories of beneficiaries and the amount of benefits. The Government passed an Order In Council (the "2012 OIC") which authorized the changes. The Respondents sought judicial review of the 2012 OIC.

3. The Federal Court found that that the 2012 OIC did not the engage the s. 7 *Charter* rights of the Respondents. At the same time, the Federal Court found that the reduction of benefits to some individuals was cruel and unusual treatment contrary to s. 12 of the *Charter*. The Federal Court also found it was a breach of s. 15 to provide different levels of benefits to refugee claimants from Designated Countries of Origin ("DCOs").[1]

4. The Appellants' position is that the Federal Court was correct to find, on the basis of binding precedent, that there is no s. 7 *Charter* right to health insurance benefits under the IFHP, and therefore no s. 7 *Charter* right to require that benefits be provided at a certain level. The Federal Court's finding of a breach of s.

[1]Judgment and Reasons ("Judgment"), Appeal Book, Vol I, Tab 2

12 is completely inconsistent with the s. 7 finding. The Federal Court completely mischaracterized an *ex gratia* health insurance scheme as Government "treatment" within the meaning of "treatment or punishment" in s. 12. The Federal Court's finding of a breach of s. 15 ignores the fact that different benefits were given to nationals of certain countries based on an assessment of the general safety of the countries, and not on any discriminatory basis.

B. THE INTERIM FEDERAL HEALTH PROGRAM

1) History of the IFHP

5. In 1957, following the Second World War, Canada created a discretionary, *ex gratia* program to accept persons in "refugee like" circumstances and displaced persons from Europe. The purpose was to provide certain urgent and essential health care insurance benefits to eligible beneficiaries for a short period – until they reached the location of their employment in Canada, or until they could afford to pay for their medical needs themselves.[2] By 2012 circumstances had changed. The number of people qualifying for IFHP benefits also grew, as did the cost of the program. By 2012, the average time an IFHP beneficiary enjoyed insurance benefits was close to three years. The original intention of providing short-term, urgent, interim medical insurance coverage had eroded.[3]

6. The IFHP had always operated by way of an Order-in-Council ("OIC"). Before June 2012, a 1957 OIC provided the authority for the IFHP. The

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[2] *Le Bris Affidavit*, paras 8-10, Appeal Book, Vol X, Tab 40, at 2766-67

[3] *Le Bris Affidavit*, paras 11, 18-21, 28, Appeal Book, Vol X, Tab 40, at 2767, 2770-72, 2774; *Little Fortin Affidavit*, Ex "A", Appeal Book, Vol XI, Tab 42, at 3070

IFHP policy before June 2012 provided two primary types of health insurance coverage:

(a) Basic health care coverage (treatments normally covered by provincial or territorial ("PT") health insurance plans); and

(b) Supplemental coverage (health benefits similar to those provided by PT social assistance plans to social service recipients, such as pharmaceutical drugs, dental and vision care).[4]

7. Generally, both coverage types were available to all individuals who were eligible for IFHP, however for persons arriving in Canada as resettled refugees, basic coverage was terminated three months after their arrival in Canada, once any applicable PT health care coverage waiting period had passed.[5]

2) <u>Reform of the IFHP</u>

8. In September 2010 CIC undertook a policy review of the program, concurrent with the Government's broad refugee reforms. CIC decided that the IFHP was in need of reform and that five key guiding principles would guide the changes:

(a) Modernize, clarify and reaffirm the original intent of the IFHP as a temporary, interim, short-term *ex gratia* program;

(b) Change the IFHP to ensure "fairness to Canadians";

(c) Protect public health and safety in Canada;

(d) Defend the integrity of Canada's refugee determination system and deter its abuse; and

(e) Contain the financial cost of the IFHP.[6]

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[4] *Little Fortin Affidavit*, para 5, Appeal Book, Vol XI, Tab 42, at 3030
[5] *Little Fortin Affidavit*, para 6, Appeal Book, Vol XI, Tab 42, at 3030
[6] *Le Bris Affidavit*, paras 23-30, 40, 50, 61, 70, 80, Appeal Book, Vol X, Tab 40, at 2773-75, 2778, 2782, 2787, 2790, 2793

3) The 2012 OIC

9. The 2012 OIC was ultimately about reorienting the program to focus on refugee claimants in need of protection and reaffirming the notion that an individual's physical presence in Canada does not obligate any level of government to provide healthcare insurance benefits to non-citizens and non-permanent residents. For example, PT plans do not provide coverage for students and visitors and Canadian law does not require provinces and territories to provide coverage to them.

10. The 2012 OIC provided three main tiers of health insurance benefits:

(a) **Extended Health Care Coverage** ("EHCC") covered the cost of services and products provided in Canada, including hospital, physician, registered nurses, midwives and other health care professional services, in addition to supplemental services and products such as prescription medication, emergency dental and vision care;[7]

(b) **Health Care Coverage** ("HCC") provided coverage for services and products, such as hospital services, services of a doctor or registered nurse, and medications and vaccines needed to prevent or treat a disease posing a risk to public health or to treat a condition of public safety concern, in response to a medical emergency, for assessment and follow-up of a disease, symptom, complaint or injury, and for prenatal, labour and delivery and post-partum care;[8]

(c) **Public Health and Public Safety Coverage** ("PHPS") provided coverage for health care services and products provided in Canada, such as hospital, physician and registered nurse services, laboratory and diagnostic services and medications and vaccines, but only to diagnose, prevent or treat a disease posing a risk to public health or to diagnose or treat a condition of public safety concern.[9]

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[7] *Little Fortin Affidavit*, at paras 48-49 , Appeal Book, Vol XI, Tab 42, at 3045-46
[8] *Little Fortin Affidavit*, at para 57, Appeal Book, Vol XI, Tab 42, at 3048
[9] *Little Fortin Affidavit*, at para 63, Appeal Book, Vol XI, Tab 42, at 3050

11. The following individuals received EHCC: Government Assisted Refugees ("GARS"), Privately Sponsored Refugees ("PSRs") who received government income assistance through the Resettlement Assistance Program ("RAP") or the Quebec equivalent, victims of human trafficking, and individuals for whom the Minister exercise discretion under ss.25.1 or 25.2 of the *IRPA*. EHCC coverage is greater than what working Canadians receive under their respective provincial plans.

12. The following beneficiaries received HCC: protected persons not receiving RAP or the Quebec equivalent, including most PSRs, successful refugee claimants, non-DCO refugee claimants, and individuals who acquired protected person status following a positive PRRA. HCC provided a level of health insurance coverage that is comparable to provincial plans.[10]

13. The following beneficiaries received PHPS: DCO refugee claimants, rejected refugee claimants and persons whose refugee claims have been suspended while under investigation for inadmissibility that would make their claims ineligible for referral to the Refugee Protection Division ("RPD").[11]

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[10] *Little Fortin Affidavit*, paras 47, 56, 62, Appeal Book, Vol XI, Tab 42, at 3045, 3048, 3050

[11] *Little Fortin Affidavit*, paras 52, 60, 62, 68, Appeal Book, Vol XI, Tab 42, at 3046-47, 3049, 3050, 3052

14. Given the correlation between the IFHP and the refugee determination process, individuals who were not eligible to have their refugee claims referred to the RPD and who only qualified for a PRRA were not eligible for IFHP benefits.[12]

15. The evidence before the Federal Court[13] showed that:

(a) 14% of all IFHP beneficiaries received the top level of health insurance coverage, called Expanded Health Care Coverage ("EHCC");

(b) 62% of all IFHP beneficiaries received healthcare insurance benefits at the middle tier Health Care Coverage level ("HCC");

(c) 24% of IFHP beneficiaries received the lowest tier of health insurance benefits under the IFHP, which is called Public Health and Public Safety Coverage ("PHPS").[14]

16. The 2012 OIC also provided that the Minister could, on his own initiative, authorize granting certain levels of coverage and certain additional products in exceptional and compelling circumstances. This added element of Ministerial discretion provided flexibility from the normal confines of the IFHP.[15]

4) <u>Designated Countries of Origin</u>

17. The 2012 OIC provided PHPS to DCO refugee claimants. DCOs are defined in the *IRPA*. CIC carefully reviews country conditions, including the human rights record, availability of state protection and recourse mechanisms for victims of

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[12] *Little Fortin Affidavit*, paras 52, 60, 62, 68, Appeal Book, Vol XI, Tab 42, at 3046-47, 3049, 3050, 3052

[13] Figures current to the date the evidence was filed

[14] *Little Fortin Affidavit*, paras 47, 56, 62, Appeal Book, Vol XI, Tab 42, at 3045, 3048, 3050

[15] *Le Bris Affidavit*, para 49, Appeal Book, Vol X, Tab 40, at 2782; *Little Fortin Affidavit*, paras 75-81, Appeal Book, Vol XI, Tab 42, at 3055-57

discrimination in any country considered for designation before deciding whether or not to recommend to the Minister that it be designated as a DCO.[16]

18. A country may be identified as a candidate for designation based on certain quantitative or qualitative triggers set out in the statute. The quantitative trigger applies to countries which have a high percentage of rejected, abandoned or withdrawn refugee claims.[17] This indicates that most claims from those countries are unfounded.[18] The qualitative trigger refers to indicia of human rights within the country, such as an independent judicial system; recognition of basic democratic rights; and the existence of functioning civil society organizations.[19]

5) <u>The Respondent Hanif Ayubi</u>

19. Hanif Ayubi arrived in Canada in 2001 from Afghanistan. His refugee claim was denied. He came to Canada in part because of his health, as a diabetic. He was not removed to Afghanistan due to a temporary suspension of removals to Afghanistan. Mr. Ayubi received over $85,000 in IFHP benefits since his arrival in Canada. Although in June 2012 his level of IFHP benefits was reduced temporarily to PHPS, he received a positive Ministerial discretion decision under s. 7 of the 2012 OIC which elevated his IFHP benefits to the HCC level shortly thereafter. Despite having been granted valid CIC work permits and obtaining steady employment, Mr. Ayubi claimed he could not afford to pay for any of his own health care and he never

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[16] *Dikranian Affidavit*, para 36, Appeal Book, Vol IX, Tab 38, at 2667
[17] *Dikranian Affidavit*, paras 32-39, Appeal Book, Vol IX, Tab 38, at 2665-68
[18] *Dikranian Affidavit*, para 34, Appeal Book, Vol IX, Tab 38, at 2666
[19] *Dikranian Affidavit*, para 35, Appeal Book, Vol IX, Tab 38, at 2666-7

applied under the Ontario Health Insurance Plan ("OHIP") despite being eligible, because after 12 years in Canada, he stated he did not know what OHIP was. [20]

C. FEDERAL COURT JUDGMENT

20. The Federal Court held that the 2012 OIC reforming the IFHP was not *ultra vires* the Governor in Council's ("GIC") executive authority under the Crown prerogative. The existence of the IFHP did not give rise to a legitimate expectation of notice or consultation before the GIC could make changes to the program.[21]

21. The Federal Court also found that the changes reflected in the 2012 OIC did not engage s. 7 of the *Charter*.[22] There was no breach of s.7, since s. 7 does not include a positive right to state funded healthcare.[23]

22. The Federal Court found that the 2012 OIC was in violation of sections 12 and 15 of the *Charter*, and that the violations were not justified under s. 1. With respect to s. 12, the Court found that "those seeking the protection of Canada are under immigration jurisdiction, and as such are effectively under the administrative control of the state", and that the Government "is intentionally trying to make life harder for vulnerable, poor and disadvantaged individuals" by reducing their health insurance benefits. The Court found on this basis that the IFHP beneficiaries were

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[20]Judgment, paras 174-197, Appeal Book, Vol I, Tab 2, at 54-59; Ayubi Transcript, at 11, lines 22-25; at 12, lines 1-11; at 17, lines 3-6, Appeal Book, Vol V, Tab 22, at 1216-17, 1222
[21]Judgment, paras 383, 401, 421, 424, 440, Appeal Book, Vol I, Tab 2, at 102, 106, 111-12, 116
[22]Judgment, paras 532, 567-570, Appeal Book, Vol I, Tab 2, at 138, 146-48
[23]Judgment, paras 493-571, Appeal Book, Vol I, Tab 2, at 128-148

therefore subject to "treatment" for the purposes of s. 12 of the *Charter* and that reduction of benefits under the 2012 OIC is "cruel and unusual".[24]

23. With respect to s. 15, the Federal Court found the lesser level of health care insurance coverage provided to a refugee claimant from a DCO as opposed to non-DCO refugee claimant creates a distinction based on the enumerated ground of national origin that is not "saved" under s. 15(2) of the *Charter* because the IFHP is not an ameliorative program. Rather, the Federal Court found the distinction constitutes substantive discrimination contrary to s. 15.[25]

24. Further, the Federal Court issued a declaration that the 2012 OIC is of no force or effect, and ordered a suspension of the effect of the declaration of constitutional invalidity for a period of four months. The Federal Court also ordered that the Appellants provide Mr. Ayubi "with health insurance coverage that is equivalent to that to which he was entitled under the provisions of the pre-2012 IFHP".[26]

PART II – POINTS IN ISSUE

25. The Federal Court erred in law or mixed law and fact in:

(a) the treatment of the evidence;

(b) finding the 2012 OIC violates sections 12 and 15 of the *Charter*;

(c) finding the *Charter* violations are not justified under s. 1;

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[24]Judgment, paras 572-691, Appeal Book, Vol I, Tab 2, at 148-176
[25]Judgment, paras 871-872, Appeal Book, Vol I, Tab 2, at 217-18
[26]Judgment, at 266, Appeal Book, Vol I, Tab 2, at 272

(d) granting the Respondent, Hanif Ayubi, health insurance coverage that is equivalent to that to which he was entitled under the provisions of the pre-2012 IFHP.

PART III – SUBMISSIONS

A. APPELLATE STANDARD OF REVIEW

26. The standard of review that applies to this appeal is correctness. The Federal Court made errors of law and errors of mixed law and fact so inextricably linked to the errors of law that they fall on the legal end of the mixed fact and law spectrum as discussed in the Supreme Court of Canada's decision in *Housen.*[27] Further the Supreme Court of Canada has stated that there are occasions where there can be no deference to the trial judge on any question, factual or legal, in a constitutional case.[28] Applying the standard of correctness affords appeal courts more scope to engage in their "recognized law-making role", a role that is critical in this case.[29] In addition, courts have reversed findings in *Charter* cases where the errors were of law and mixed fact and law that were inextricably intertwined, without either addressing *Housen* or the appellate standard of review to be applied.[30]

27. In the alternative, if this Court were to conclude that the more deferential standard of review of palpable and overriding error applies to some of the Federal Court's findings of fact, this standard has also been met. The Supreme Court of Canada stated in *HL* that this standard can be expressed by its "functional

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[27] *Housen v Nikolaisen*, [2002] 2 SCR 235, 2002 SCC 33, at paras 8-10, 26-37
[28] *HL v Canada (AG)*, 2005 SCC 25
[29] *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62, at para 36
[30] *Longley v Canada (Attorney General)* (2007), 88 OR (3d) 408, 2007 ONCA 852; *Cochrane v Ontario (Attorney General)* (2008), 92 OR (3d) 321, 2008 ONCA 718; *Vann Media Group Inc v Oakville (Town)* (2008), 95 OR (3d) 252, 2008 ONCA 752

equivalents, including "clearly wrong", "unreasonable" and "not reasonably supported by the evidence."[31] The Supreme Court has further specified that findings are reviewable on appeal if they "are unsupported by the evidence".[32] Further the Ontario Court of Appeal has identified the possible errors a lower court can make that constitute an unreasonable finding of fact:[33]

- the failure to consider the relevant evidence;
- the misapprehension of relevant evidence;
- the consideration of irrelevant evidence;
- a finding that has no basis in the evidence; and
- a finding based on an inference that is outside of even the generous ambit within which there may be reasonable disagreement as to the inference to be drawn; that is, an inference that is speculation rather than legitimate inference.

28. All these errors apply here. While it is not always clear on what basis the Federal Court made many of its findings, it is clear that the findings of fact were based on unreasonable inferences and evidence that was neither direct, nor reliable.

B. ERRORS IN THE TREATMENT OF EVIDENCE

1) Inconsistent allowance for inferences

29. The Applicants in the Federal Court had the onus of demonstrating a *Charter* breach on a balance of probabilities, using admissible evidence.[34] The Federal Court erred in law in accepting evidence from the Applicants that was either inadmissible or so general or non-specific so as to be of no probative value. The

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[31] *HL, supra,* at para 110; *Canada (AG) v. Canadian Human Rights Commission*, 2013 FCA 75, at para 26; *Alberta Union of Provincial Employees v. Alberta*, 2010 ABCA 216, at para 37; *Communications, Energy and Paperworkers Union of Canada Local 141 v Bowater Mersey Paper Co. Ltd.*, 2010 NSCA 19, at para 27

[32] *HL, supra,* at para 56

[33] *Peart v Peel Regional Police Services* (2006), 217 OAC 269, 2006 CanLII 37566 at para 159

[34] *Danson v Ontario (AG)*, [1990] 2 SCR 1086 at 1099-1100, 1990 CanLII 93 (SCC); see also *Canada v Stanley J. Tessmer Law Corp*, 2013 FCA 290 at para 9; *McKay v Manitoba*, [1989] 2 SCR 357 at 361-362, 1989 CanLII 26 (SCC)

cross-examinations of the Applicants' witnesses, including many healthcare service providers, revealed little to no direct knowledge, no certainty about critical facts, including IFHP eligibility or the tier of IFHP coverage to which their patients may have been, at a particular time, entitled.[35]

30. While in *Charter* litigation, a judge is permitted to draw inferences and refer to reasonable hypotheticals, the Federal Court erred in making inferences and hypotheticals at the extreme end of the range.[36] Inferences which "may" give rise to "possible" outcomes were treated by the Federal Court as proven on the balance of probabilities:

> *It... **appears** that a request for section 7 discretionary relief **may potentially** have consequences for the way in which an individual's refugee claim is processed.* [para 83]
>
> *...a request for IFHP coverage during or before an eligibility interview is cited as only one example of circumstances that could trigger a Ministerial intervention. **This does not, however, preclude the possibility** that a request for section 7 Ministerial relief at any point in the processing of a refugee claim could also potentially give rise to concerns... prompting Ministerial involvement in the claim. [para 87]*
>
> *Dr. Rachlis... asserts that study after study has confirmed that poor individuals without health insurance are less likely to seek medical care, which **can** increase the risk of adverse health effects.* [para 150]
>
> *...concerns about the extent of their health insurance coverage **may well deter** some IFHP beneficiaries, particularly those from DCO countries, from seeking medical treatment for health **conditions that***

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[35] *Rashid Affidavit*, para 51, Appeal Book, Vol IV, Tab 19, at 789-93; Rashid Transcript, at 158-160, Appeal Book, Vol IV, Tab 20, at 1148-1150; Wright Transcript, at 14 -21, Appeal Book, Vol III, Tab 15, at 646-653; Caulford Transcript, at 98-102, 119-20, Appeal Book, Vol V, Tab 25, at 1437-1441,1458-59

[36] *R v Goltz*, [1991] 3 SCR 485 at 515-516, 1991 CanLII 51 (SCC); *R v Wiles*, 2005 SCC 84 and *R v Ferguson*, 2008 SCC 6

> ***may turn out to be communicable*** *diseases, thereby* ***potentially jeopardizing*** *public health.* [para 954][37]

31. Where the Appellants sought to rely on inferences going beyond facts strictly established on the record, the Federal Court allowed no inferences to be drawn. For example:

> *There is, however,* ***no persuasive evidence*** *to show that the changes to the eligibility and coverage provisions of the IFHP have served to deter unmeritorious claims...* [para 617]

32. Where the established facts of the case do not indicate a *Charter* infringement, this lends support to a conclusion that the challenged legislation is valid under s. 12.[38] The established facts before the Federal Court demonstrated that the individual Respondents, Mr. Ayubi and Mr. Garcia Rodrigues had not suffered harm within the meaning of s. 12 as a result of changes to the IFHP,[39] and that others received the medical treatment they required.[40] The Federal Court erred in ignoring direct evidence showing little to no harm, and in relying exclusively on "worst case" hypotheticals which were not representative of the effects of the policy.

33. The Federal Court also made a palpable and overriding error of fact in concluding 2012 OIC is "causing illness, disability, and death."[41] There was no evidence in the record to support the finding that the IFHP, a health insurance benefits program, was the cause of illness, disability, or the death of any individual, or in fact, that any IFHP beneficiary had died as a result of the 2012 IFHP.

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[37]Judgment, paras 83, 87, 150, 954, Appeal Book, Vol I, Tab 2, at 32-33, 48, 236
[38]*Goltz, supra,* at 521
[39]Judgment, paras 203-212, Appeal Book, Vol 1, Tab 2, at 60-62
[40]Judgment, paras 215-249, Appeal Book, Vol I, Tab 2, at 62-70
[41]Judgment, paras 301, 1049, Appeal Book, Vol I, Tab 2, at 81-2, 257

34. The Federal Court also made factual errors in arriving at the sweeping generalization that "those seeking the protection of Canada" are "an admittedly poor, vulnerable and disadvantaged group"[42]. The conclusion ignores the evidence and the critical distinction between persons who have been determined to be refugees and those that are refugee claimants.

35. These factual errors and errors in the treatment of the evidence significantly undermine the Federal Court's finding of a violation of sections 12 and 15 of the *Charter*.

2) Errors in law in admitting affidavits as expert evidence

36. The Federal Court erred in law in admitting as expert evidence five affidavits containing opinion evidence of individuals who were not properly qualified as experts.[43] None of the affidavits were accompanied by a certificate in Form 52.2 when they were filed. At the hearing, over seven months after the affidavits were filed, the Respondents, by their own admission, did not purport to rely on these affidavits as containing expert opinion. Later in the hearing, the Respondents submitted that the failure to file proper certificates was an oversight, notwithstanding the fact that they were afforded an opportunity to file modified certificates.[44]

37. The acceptance by the Federal Court of the affidavits as expert opinion is contrary to the jurisprudence of this Court:

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[42]Judgment, para 1078, Appeal Book, Vol I, Tab 2, at 263
[43]*Federal Courts Rules*, SOR/98-106, Rule 52.2
[44]Hearing Transcript (December 2013), at 12, lines 18-19, Appeal Book, Vol XIV, Tab 51, at 3841; Hearing Transcript (January 30, 2014), at 200, lines 2-5, Appeal Book, Vol XV, Tab 61, at 4460

> *That Rule sets out an exacting procedure that must be followed for the admission of expert evidence, a procedure that, among other things, is designed to enhance the independence and objectivity of experts on whom the courts may rely.*[45]

38. Rule 52.5(1) only requires parties to raise an objection to an opposing party's proposed expert witness that could disqualify the witness from testifying "as early as possible in the proceeding" where the opposing party has, at the outset, clearly identified the affiant as a proposed expert.[46] The Federal Court erred in law in finding the Appellants had not complied with Rule 52.5(1) given that the Respondents by their own admission in the oral hearing did not intend to rely on the evidence as expert opinion. Further, the Appellants had previously raised an objection to the admissibility of the five affidavits as expert opinion in the Written Submissions Opposing the Increase to the Factum Length, dated September 13, 2014, almost three months prior to the hearing.

39. In accepting the affidavits as expert opinion, the Federal Court erred in the weight it gave this evidence which resulted in erroneous findings of fact in the s. 12 and s. 15 analysis.

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[45] *Es-Sayid v Canada (MPSEP)*, 2012 FCA 59 at para 42
[46] *Federal Courts Rules*, SOR/98-106, Rule 52.5(1)

C. ERROR IN FINDING THE 2012 OIC VIOLATES S. 12 OF THE CHARTER

3) Section 12 finding is incompatible with section 7 finding

40. The Federal Court correctly found, based on overwhelming and binding authority, that s. 7 does not include a positive right to state funded health care.

41. The Federal Court's conclusion that the 2012 changes to the IFHP constitute treatment which would shock the conscience of the public is inconsistent with the conclusion that the changes did not affect the Respondents' life, liberty and security of the person in a way that violated the principles of fundamental justice. Government action cannot be held to be cruel and unusual treatment, and at the same time be in accordance with the principles of fundamental justice.

42. Sections 8 to 14 of the *Charter* address specific deprivations of the right to life, liberty and security of the person in breach of the principles of fundamental justice, and as such, violations of s. 7. They are designed to protect, in a specific manner and setting, the right to life, liberty and security of the person set forth in s. 7. The Supreme Court of Canada has held that it would be "incongruous" to interpret s. 7 more narrowly than the rights in sections 8 to 14.[47] The Supreme Court has held that it would be "unacceptable" to attribute different standards to sections 12 and 7 in relation to the same subject matter.[48]

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[47] *Re BC Motor Vehicle Act*, [1985] 2 SCR 486, 1985 CanLII 81 (SCC) at para 28
[48] *R v Malmo-Levine*, 2003 SCC 74, at para 160

(f) Medical care imposed without consent on mentally ill patients.[67]

57. Government funding of a health insurance program is not analogous to any form of "treatment" contemplated in the jurisprudence. The Federal Court erred in law finding that it was.

5) "Immigration jurisdiction" is not "special administrative control" within the meaning of s. 12

58. The Federal Court, having quoted the Supreme Court's test of "special administrative control of the state" [emphasis added], never cited it properly again. The Court's analysis began in error with the sweeping statement that "those seeking the protection of Canada are under immigration jurisdiction, and as such are effectively under the administrative control of the state".[68]

59. Refugee claimants and other migrants make a choice to leave their countries of origin, and make a choice to come to Canada rather than another country.[69] While it is common to describe refugee claimants as having "no choice" but to flee a dangerous situation, this is a metaphorical, non-legal expression. It describes, in a sympathetic way, the unpleasant circumstances in which many refugee claimants find themselves. In a literal and legal sense, the expression describes what is actually a choice between difficult alternatives: risk to the claimants if they stay where they are; and upheaval and uncertainty in a new country if they leave. Refugee

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[67] *Howlett v Karunaratne* (1988), 64 OR (2d) 418 (ON SC), 1988 CanLII 4729 (ON SC)
[68] Judgment, para 585, Appeal Book, Vol I, Tab 2, at 151
[69] Garcia Rodrigues' RPD Decision, at paras 2-6, 16, *Siskos Affidavit*, Ex A, Appeal Book, Vol XII, Tab 44A, at 3448, 3450; Ayubi's RPD Decision, at 1-2, *Siskos Affidavit*, Ex B, Appeal Book, Vol XII, Tab 44B, at 3465-66

protection is premised on the idea that those who have made the latter choice for genuine reasons should be protected, and treated with compassion. This does not mean the refugee claimants have not made a choice to bring themselves under Canada's "immigration jurisdiction".

60. The Federal Court erred by treating a sympathetic metaphor for the precarious situation of refugee claimants as if it described their legal situation. Refugee claimants and migrants do not arrive and remain in Canada through means completely beyond their control. This mistaken assumption that refugee claimants lack agency or autonomy led to the error in law that they are thus within the administrative control of the state.

61. The Federal Court relied on the following factors in reaching the conclusion that the beneficiaries of the IFHP insurance program were under the "administrative control of the state":

(a) some claimants may be detained;

(b) some claimants may be subject to obligations such as reporting requirements;

(c) their rights and opportunities (such as work or social assistance) may be limited by the state;

(d) their entitlement to benefits is dependent upon decisions made as to their right to seek protection, and the ultimate success of their claims for protection.[70]

62. It is true that some refugee claimants may be detained or subject to reporting requirements for specific reasons set out in the *IRPA*.[71] Most are not. The

[70]Judgment, para 585, Appeal Book, Vol I, Tab 2, at 151

chance that a person may be detained under the *IRPA* has nothing to do with his level of coverage under the IFHP.

63. If levels of health care insurance under the IFHP are indicia of "state control" because of the detention scheme under the IRPA, then the levels of OHIP coverage for residents of Ontario are indicia of "state control" because of the *Criminal Code of Canada* provisions dealing with imprisonment and bail. IFHP beneficiaries are "subject to" detention and reporting requirements under *IRPA* in the same way that Canadian citizens are "subject to" detention and bail under the *Criminal Code*. As the Supreme Court pointed out in *Rodriguez*, being subject to the edicts of the *Criminal Code* is not the same as experiencing "treatment" at the hands of the state.[72]

64. Likewise, the fact that refugee claimants may have their rights and opportunities (such as work or social assistance) limited by the state makes them no different from other foreign nationals, or from citizens of Canada. The Appellants note, further, that many (if not most) programs relating to work and social assistance are administered by provincial governments, and cannot reasonably be characterized as indicia of federal government "control".

65. None of the factors above identified by the Federal Court, in fact or in law, bring the case within the ambit of s. 12. The examples cited in the Judgment are examples of citizens interacting with an administrative structure. None of them

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[71] *IRPA*, ss 54-61
[72] *Rodriguez, supra*, at 612

suggest that individuals who happen to be insurance beneficiaries under the IFHP were in "the special administrative control of the state" or subject to an "active state process in operation, involving an exercise of state control over the individual".

66. There is a presumption that legislation should be interpreted in a way that avoids absurd consequences.[73] Likewise, the *Charter* should be applied in a manner so as to avoid absurd results.[74] Following the Federal Court's reasoning, any applicant for any benefit under any legislative or administrative scheme; or anyone subject to any area of the law; or anyone having any interaction with the state whatsoever would potentially be able to invoke s. 12. The reasoning of the Federal Court would have broad applications to a large number of government programs and policies, such as welfare; housing assistance; licensing; or cultural programs, to name but a few. The Federal Court's overbroad s. 12 finding should be overturned.

6) <u>Errors in interpretation of "cruel and unusual"</u>

67. In the alternative, if the 2012 changes to the IFHP constitute "treatment", the Federal Court erred in finding that the treatment was cruel and unusual.

68. The Federal Court never referred to and never applied the proper test for whether a treatment or punishment is cruel and unusual. While proportionality "is the essence of a s. 12 analysis", the constitutional standard is gross

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[73] *Re Rizzo and Rizzo Shoes Ltd*, [1998] 1 SCR 27 at 27, 1998 CanLII 836 (SCC)
[74] *R. v M (MR)*, [1998] 3 SCR 393, 1998 CanLII 770 (SCC) at para 67

disproportionality.[75] The Federal Court did not refer to the correct legal standard for establishing whether treatment is cruel and unusual. It simply suggested that the test involves "a kind of cost/benefit analysis".[76]

69. From the outset, the analysis is made difficult by the unprecedented nature of the Federal Court's Order. Save for a handful of examples, the cases which have dealt with breaches of s. 12 are concerned with state action that is clearly "punishment" (such as sentencing of criminals), or with "treatment" that is analogous to punishment. The factors traditionally identified to assess whether "treatment or punishment" violates s. 12 do not accord with the novel application by the Federal Court.

70. *Black's Law Dictionary* defines *ex gratia* as

> *Out of grace; as a matter of grace, favor, or indulgence; gratuitous. A term applied to anything accorded as a favor; as distinguished from that which may be demanded ex debit, as a matter of right.*[77]

71. *The Oxford English Dictionary* defines *ex gratia* as:

> *Of or by favour; done or given as a favour and not under compulsion; spec. implying the absence of any legal obligation.*[78]

72. A policy which subsidizes health insurance as a matter of grace, favour, or indulgence can be criticized for not being generous enough, but it cannot be for that reason, cruel or unusual treatment.

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[75] *R v Malmo-Levine*, 2003 SCC 74, at para 159; *Ferguson, supra*, at para 14
[76] Judgment, para 614, Appeal Book, Vol I, Tab 2, at 158
[77] *Black's Law Dictionary, sub verbo, "ex gratia"*, online: http://thelawdictionary.org/ex-gratia/ accessed Nov. 28, 2014
[78] *The Oxford English Dictionary, sub verbo "ex gratia"*, online: OED <www.oed.com>

73. The Federal Court referred to the "badges" of disproportionate conduct, such as conduct that "shocks the conscience" or causes "outrage to standards of decency", but it failed to engage in the analysis required by the jurisprudence.

74. Treatment can be disproportionate or excessive without being "cruel and unusual". The treatment or punishment must be "so excessive as to outrage standards of decency".[79]

75. The Federal Court was preoccupied with the alleged arbitrariness of the changes to IFHP. The Supreme Court has held that arbitrariness is "a minimal factor in the determination of whether a punishment or treatment is cruel and unusual". The Federal Court erred by treating it as the determining factor. Even assuming that a given government action may be arbitrary, it may not necessarily produce grossly disproportionate results.[80]

76. The Federal Court further erred by substituting the opinions of interested parties, advocates and editorialists for analysis of whether the evidence demonstrated extreme results:

> *The 2012 changes to the IFHP were condemned by many involved in providing health care and other forms of assistance to those seeking the protection of Canada, as well as by newspaper editorial writers and provincial governments.*[81]

77. The scope of terms such as "outrage standards of decency" should not be equated to opinion polls. Conduct which shocks the conscience is so extreme that

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[79] *R v Smith*, [1987] 1 SCR 1045 at 1072, 1987 CanLII 64 (SCC)
[80] *Goltz*, *supra*, at 498-500 citing *R v Smith*, [1987] 1 SCR 1045, 1987 CanLII 64 (SCC)
[81] Judgment, para 126, Appeal Book, Vol I, Tab 2, at 42

it becomes the controlling issue in the process and overwhelms the rest of the analysis. Examples include stoning to death individuals taken in adultery, or lopping off the hands of a thief.[82]

78. Further, the existence of a discretionary provision which can mitigate the negative effects of a policy is relevant to the question of whether the policy is grossly disproportionate.[83] Under s. 7 of the 2012 OIC the Minister had discretion to provide relief to IFHP beneficiaries. One of the few witnesses to provide direct evidence in the case, Mr. Ayubi, benefited from this discretion.[84]

79. The Federal Court failed to apply the gross disproportionality test in general, and in particular, in improperly assessing the remedial aspects of the policy.

7) Error in applying novel test for s. 12 breach

80. The Federal Court, recognizing that the s. 12 finding had no precedent,[85] found that the case could be brought within the ambit of s. 12 because of the "intentional targeting of an admittedly poor, vulnerable and disadvantaged group for adverse treatment".[86]

81. The Federal Court erred in law in applying this novel test for establishing a s. 12 breach. The test proposed refers to factors which are not relevant

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[82] *US v Burns*, 2001 SCC 7, at paras 66-67
[83] *Wiles*, *supra*, at para 10
[84] Judgment, para 185, Appeal Book, Vol I, Tab 2, at 56
[85] Judgment, paras 577-78, Appeal Book, Vol I, Tab 2, at 149
[86] Judgment, para 587, Appeal Book, Vol I, Tab 2, at 151

to s. 12. Further, the test focuses on how a policy is targeted, and not on the proper consideration of whether its effects are grossly disproportionate.

82. It is the nature of many (if not most) government policies to "intentionally target" different groups within society. The Federal Court's unprecedented recourse to s. 12 cannot be supported simply because the policy "intentionally targets" a group. "Intentional targeting" is irrelevant to the s. 12 test. Likewise, many government policies target "admittedly poor, vulnerable and disadvantaged" groups. The unprecedented recourse to s. 12 cannot be supported by virtue of the fact that an "admittedly poor, vulnerable and disadvantaged" group is affected.

83. What is left is targeting "for adverse treatment". The Appellants repeat and rely on the above submissions as to why the policy in question cannot be considered "treatment" within s. 12.

84. The Federal Court's reasoning for why this case exceptionally falls into the ambit of s. 12 does not bear scrutiny. All state action that reduces benefits to a disadvantaged group can be said to be intentionally targeting a vulnerable group for adverse treatment.

85. The Federal Court erred in law in finding a breach of s. 12 *Charter* rights where there was no s. 7 breach. Further, IFHP beneficiaries are not under the

special administrative control of the state, nor are they subjected to treatment that is cruel and unusual. The Federal Court's erroneous s. 12 finding should be overturned.

D. ERROR IN FINDING THE 2012 OIC VIOLATES S. 15 OF THE CHARTER

1) No distinction on the basis of national or ethnic origin

86. The Federal Court erred in finding that the Applicants had demonstrated that the 2012 OIC created a distinction based on an enumerated or analogous ground.

87. The Federal Court erred by assuming that the 2012 OIC made distinctions "based on" nationality, when the policy uses nationality as a proxy for the relative safety of certain countries.

88. The 2012 OIC provides different levels of insurance benefits to nationals of DCOs. Before the Minister designates any DCO, a careful and thorough analysis of conditions in that country is undertaken, with a view to determining whether the country is generally safe.[87] DCOs are generally developed democracies, and do not generally produce refugees.[88] Further, the list of DCO countries changes over time, based on quantitative criteria set out in the *IRPA*, and based on the review of the relative safety of the country referred to above. Originating from a country that

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[87] *Dikranian Affidavit*, paras 32-39, Appeal Book, Vol IX, Tab 38, at 2665-68
[88] *Le Bris Affidavit*, paras 77-78, Appeal Book, Vol X, Tab 40, at 2792

has been found to be generally safe is not an "immutable" characteristic within the meaning of s. 15.[89]

89. A policy can use nationality as a proxy for taking into account different situations in different countries.[90] In *Pawar*, this Court held that where the public pension schemes in different countries of origin could be co-ordinated with Canada's old age security program, the Canadian program could make distinctions based the nationalities of the beneficiaries to establish the level of pension benefits in Canada. The Federal Court erred in distinguishing *Pawar*, which is directly applicable to the case at bar.

90. The Federal Court erred in finding that the 2012 OIC drew distinctions "based entirely on the country that the refugee claimant comes from".[91]

2) <u>IFHP is an ameliorative program</u>[92]

91. The 2012 OIC has an ameliorative purpose and targets a disadvantaged group identified. As the Federal Court found, there is no positive *Charter* obligation on the Appellants to fund refugee health care. But for the *ex gratia* payments provided by the Government under the IFHP, most IFHP

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[89] *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, 1999 CanLII 687 (SCC) at para 13; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 195; *Peterson v. Canada (Minister of State, Grains and Oilseeds)*, [1995] FCJ No. 580 (FCA)
[90] *Pawar v Canada*, [1999] FCJ No 1421 (FCA)
[91] Judgment, para 755, Appeal Book, Vol I, Tab 2, at 190
[92] *Canadian Charter of Rights and Freedoms, The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s. 15(2)

beneficiaries will not receive state-funded health insurance. The IFHP is an ameliorative program.[93]

92. The 2012 OIC provided different levels of insurance coverage to different beneficiaries. Governments are permitted to target subsets of disadvantaged people on the basis of personal characteristics, while excluding others.[94] The Government made a choice to provide greater benefits to refugee claimants arriving in Canada from sub-Saharan Africa over those arriving from the European Union, the United States, and Australia.

93. The Government also made the choice to provide higher levels of insurance coverage to those individuals who have been identified abroad as refugees, and who by definition, are in need of Canada's assistance. The Respondents' repeatedly attempted in the evidence to characterize rejected refugee claimants and refugee claimants awaiting a decision as "refugees". The IFHP recognizes there are differences between the needs of these groups, and the Federal Court erred by ignoring these legitimate distinctions. The IFHP is a genuinely ameliorative program directed at improving the situation of groups that are in need of assistance in order to enhance substantive equality.[95]

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[93] *R v Kapp*, 2008 SCC 41, at para 41
[94] *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37, at para 41, *Kapp, supra*, at para 41
[95] *Cunningham, supra*, at paras 42-44; *Kapp, supra*, at paras 41, 49

94. The Federal Court erred in dealing exclusively with the changes to funding levels set out in the 2012 OIC without considering the context that the IFHP as a whole is, and always has been, an ameliorative program.

95. The anomalous effect of the Federal Court's order seems to be that the IFHP is constitutionally frozen as it existed pre-2012, and cannot be altered without justification under s. 1 of the *Charter*. This result, if accepted, will have a chilling effect on governments who might seek to create innovative ameliorative programs.[96] In the context of s. 7, the Ontario Superior Court has held that an existing legislative regime cannot be treated as a constitutional "baseline" that can never be deviated from.[97]

3) No discriminatory purpose or effect

96. A distinction based on an enumerated or analogous ground is not by itself sufficient to found a violation of s. 15. At the last stage of the analysis, the central issue is whether the distinction amounts to discrimination in the substantive sense. The perpetuation of prejudice and stereotyping are indicia of discrimination but are not discrete elements that must be established.[98] The analysis of substantive discrimination requires a contextual analysis, taking into account factors such as the pre-existing disadvantage of the claimant group and the degree of correspondence between the differential treatment and the claimant group's reality.[99]

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[96] *R. v. Kapp, [2008] 2 SCR 483 at para 47; Cunningham, supra*; *Ferrel v Ontario*, [1998] OJ No 5074 (FCA), 1998 CanLII 6274 (ONCA)
[97] *Barbara Schlifer Commemorative Clinic v Canada*, 2014 ONSC 5140
[98] *Quebec (AG) v A*, 2013 SCC 5, at paras 325-330, 417-418
[99] *Quebec (AG) v A, supra*; *Whitler v. Canada*, 2011 SCC 12 at para 38

97. Refugee claimants from DCO countries do not suffer from pre-existing disadvantage on the basis of their national origin. Both DCO and non-DCO claimants consist of groups of refugee claimants or failed refugee claimants. Their nationality is the main issue, not their vulnerability as claimants in the refugee process. The 2012 OIC legitimately draws distinctions based on the fact that DCOs are generally developed democracies, and do not generally produce refugees.[100]

98. The IFHP does not draw any distinctions based on prejudices or stereotypes about the persons affected. Before the Minister designates any DCO, a careful and thorough analysis of conditions in that country is undertaken, with a view to determining whether the country is generally safe. Further, the list of DCO countries changes over time, based on quantitative criteria set out in the *IRPA*, and based on the review of the relative safety of the county referred to above. When a statistical trigger used as a preliminary threshold for designation, it is based on measurable, well-identified criteria relating to outcomes of claims before the RPD. A high percentage of RPD refusals, or a high rate of claimant withdrawals and abandonments from a given country, is indicative that many claims from that country are non-genuine and not well founded.[101]

99. The fact that legislation is premised upon statistical generalizations does not affect the ultimate conclusion that the legislation does not create or

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[100] See, e.g., *Gosselin v Quebec (Attorney General)*, 2002 SCC 84 at para 35
[101] *Ibid.*

perpetuate prejudice or stereotypes. Parliament is entitled to premise legislation upon informed generalizations without running afoul of s. 15(1) of the *Charter*.[102]

E. ERROR IN FINDING THE CHARTER BREACHES ARE NOT JUSTIFIED UNDER S. 1 OF THE CHARTER

100. The Appellants maintain the Federal Court erred in law in finding the 2012 OIC is in breach of the *Charter*.

101. In the alternative, the Federal Court erred in finding that the breaches were not justified under s. 1. While the Federal Court confirmed that some of the objectives of the 2012 OIC were pressing and substantial, it also found the impairment of the individual *Charter* rights was not proportional to the importance of the Government's objectives. It is in this latter part of the analysis that the Federal Court erred in law.

102. The objectives of IFHP were

(a) To reform Modernize, clarify and reaffirm the original intent of the IFHP as a temporary, interim, short-term *ex gratia* program;

(b) Change the IFHP to ensure "fairness to Canadians";

(c) Protect public health and safety in Canada;

(d) Defend the integrity of Canada's refugee determination system and deter its abuse; and

(e) Contain the financial cost of the IFHP.[103]

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[102] *Law v Canada (MEI)*, [1999] 1 SCR 497, 1999 CanLII 675 (SCC) at para 106

[103] *Le Bris Affidavit*, paras 23-30, 40, 50, 61, 70, 80, Appeal Book, Vol X, Tab 40, at 2773-75, 2778, 2782, 2787, 2790, 2793

1) Error in analysis of rational connection

103. The "rational connection" branch of the s. 1 analysis asks whether the law was a rational means for the legislature to pursue its objective.[104]

104. The Federal Court erred by applying an overly stringent standard for the connection between the objectives of the 2012 OIC and the means chosen to attain those objectives. For example, the Federal Court required proof that "the 2012 cuts to the IFHP will in fact serve the objective of deterring these individuals [non-genuine refugees] from coming to Canada" (emphasis added).[105] The Government is required to demonstrate that it is reasonable to suppose that the *Charter* limit may further the goal, not that it will do so.[106]

105. The Federal Court improperly focused on reductions in benefits rather than the appropriate question of whether the 2012 OIC is rationally connected to purpose of the policy:

> *...the respondents must show that reducing the level of health insurance coverage for some classes of individuals seeking the protection of Canada and eliminating it altogether for others is rationally connected to the four identified goals of the Governor in Council...*[107]

106. The Appellants provided evidence that the funding levels under the 2012 OIC reduced costs, were fairer to Canadians, and continued to protect public health and public safety and the integrity of the immigration system. The Federal

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[104] *Canada (AG) v Bedford*, 2013 SCC 72, at para 126
[105] Judgment, para 1025, Appeal Book, Vol I, Tab 2, at 250
[106] *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, at para 48
[107] Judgment, para 939, Appeal Book, Vol I, Tab 2, at 233

Court accepted it was reasonable to suppose that costs would be reduced[108] but it did not accept that the 2012 IFHP is fairer to Canadians by providing refugee claimants with a level of health insurance coverage that is comparable to that which is available to working Canadians[109] or that it is fair to give failed refugee claimants the lowest level of insurance coverage under the 2012 IFHP.[110] In doing so, the Federal Court substituted its own views of fairness and failed to apply the Supreme Court's rational connection test.

107. Further, and in so doing, the Federal Court ignored the Appellants' evidence that before 2012, the IFHP provided benefits far greater than what Canadians receive under state-funded provincial and territorial health insurance plans.[111] Rejected refugee claimants previously received health insurance coverage under the IFHP for prescription medications, vision care and dental services.[112] OHIP for example, does not provide coverage for these services. Rejected refugee claimants should not be the beneficiaries of a level of public health insurance benefits that exceeds the level of plans like OHIP. The 2012 IFHP is fairer to Canadians and there is a rational connection between this objective and the 2012 program. The Federal Court erred in failing to apply the correct rational connection test.

108. The Federal Court further erred in fact by relying on hypothetical possibilities to lead it to the conclusion that there is no rational connection between

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[108]Judgment, para 945, Appeal Book, Vol I, Tab 2, at 234
[109]Judgment, para 948, Appeal Book, Vol I, Tab 2, at 235
[110]Judgment, para 949, Appeal Book, Vol I, Tab 2, at 235
[111]*Le Bris Affidavit*, at paras 54-58, Appeal Book, Vol X, Tab 40, at 2784-85
[112]*Little Fortin Affidavit*, para 9, Appeal Book, Vol XI, Tab 42, at 3031

the 2012 IFHP and the protection of public health and public safety. For example, the Federal Court stated:

> *...concerns about the extent of their health insurance coverage* ***may well deter*** *some IFHP beneficiaries....from seeking medical treatment for health conditions* ***that may turn out to be*** *communicable diseases, thereby potentially jeopardizing public health.*[113]
>
> *...there are other* ***communicable diseases*** *such as conjunctivitis [pink eye], head lice, scabies and diarrhoea, all of which can jeopardize the health of school children....they may infect other children as a result of their untreated conditions, thereby jeopardizing the public health and safety of Canadian children.*[114]

109. The Federal Court erred in law by again misapplying the rational connection test. Contrary to the Court's conclusion, it is reasonable to suppose that by giving people health insurance benefits who would otherwise not qualify for any insurance, is rationally connected to protecting public health and public safety.

2) Error in analysis of "minimal impairment"

110. Contrary to Supreme Court of Canada jurisprudence,[115] the Federal Court accorded the Government no deference in selecting the means to achieve the objectives of the 2012 changes to the IFHP. Perfect correspondence between a benefit program and the actual needs and circumstances of the claimant group is not required under s. 15(1).[116]

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[113] Judgment, para 954, Appeal Book, Vol I, Tab 2, at 236
[114] Judgment, paras 954, 957, 958, Appeal Book, Vol I, Tab 2, at 236-37
[115] *Hutterian Brethren, supra*, at para 53; *Quebec (AG) v A*, 2013 SCC 5, at para 439; *Newfoundland (Treasury Board) v. Newfoundland and Labrador Assn. of Public and Private Employees*, [2004] 3 S.C.R. 381, at para 53
[116] *Gosselin v Quebec (Attorney General)*, 2002 SCC 84, at para 55; *Withler v Canada (Attorney General)*, 2011 SCC 12, at para 67

111. The test at the minimum impairment stage is whether there is an alternative, less drastic means of achieving the objective in a real and substantial manner.[117] The existence of a less impairing option does not result in a finding of the government failing to meet the minimal impairment stage of the s. 1 test. The Government considered the viability of the scheme that had been made available under the 1957 OIC and rejected that scheme as an option in 2012. The role of the Court is not to order that the Government should have decided otherwise. This is precisely the type of policy review that is beyond the reach of the Courts.[118]

112. The Federal Court erred in concluding there were alternatives to reducing benefits under the IFHP that could reasonably achieve the Government's goal of cost containment.[119] Where both financial and non-financial factors are at play, the minimal impairment test ought to be relaxed when considering the distribution of scarce government resources.[120]

113. The Federal Court ignored the Government's evidence of the obvious and direct relationship between reducing the number of IFHP beneficiaries, reducing the amount of time benefits would need to be provide, reducing the level of benefits, and reducing costs. The Court wrongly addressed the goal from the perspective of global cost savings for the Government, accepting that if the Government appointed more adjudicators to the Immigration and Refugee Board ("IRB") and directed

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[117] *Hutterian Brothers, supra,* at para 55
[118] *Lavoie v Canada*, [2002] 1 SCR 769, 2002 SCC 23
[119] Judgment, para 1017, Appeal Book, Vol I, Tab 2, at 249
[120] *Reference re: Remuneration of Judges of the Provincial Court of PEI*, [1997] 3 SCR 3, 1997 CanLII 316 (SCC) at para 283; *Irwin Toy Ltd. v Quebec (Attorney General)*, [1989] 1 SCR 927, 1989 CanLII 87 (SCC)

Canada Border Services Agency ("CBSA") to remove rejected refugee claimants more quickly, this would somehow achieve the goal of cost containment for the IFHP and the IFHP would not have had to change in 2012. The relevant question was whether "the means chosen by the GIC to achieve...the goal of cost containment...w[as] reasonably tailored to address the problems of escalating costs."[121] It was reasonable for the GIC to use reform of the IFHP to address escalating costs.

114. The Federal Court accepted that the availability of state-funded medical care in Canada may provide something of an incentive for some individuals to come to Canada[122] and that some failed refugee claimants may indeed seek to remain in Canada in order to access potentially life-saving medical care.[123] The Federal Court erred by concluding that the Government could address the objective of deferring non-genuine claimants by devoting additional resources to the timely removal of failed refugee claimants, rather than reducing IFHP benefits. The Court again did not provide the correct frame of reference. It is CIC, not CBSA, who administers the IFHP. It was reasonable for CIC to modify the IFHP in order to achieve the pressing and substantive goals that had been identified in relation to this policy.

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[121]Judgment, para 995, Appeal Book, Vol I, Tab 2, at 244-45
[122]Judgment, para 1025, Appeal Book, Vol I, Tab 2, at 251
[123]Judgment, para 1026, Appeal Book, Vol I, Tab 2, at 252

3) Errors in finding the IFHP changes are not proportionate in their effect

115. The final stage of the s. 1 analysis allows for a broader assessment of whether the deleterious impact on the right in question is outweighed by the importance of the government objective. The proportionality analysis under s. 1 more often than not repeats the balancing that has been done under the previous headings.[124] The Appellants rely on the submissions above as to the salutary effects of the 2012 OIC. The Appellants repeat that he Federal Court erred in fact and in law by exaggerating its deleterious effects. The 2012 OIC permits the program to continue to deliver important benefits to the most needy beneficiaries in a financially sustainable fashion, while minimizing deleterious effects on those excluded.

4) Wrong standard for s. 1 evidence applied

116. The Federal Court also erred in law in imposing a standard of proof under s. 1 that was too high. In demonstrating a justification of government action under s. 1, proof to the standard of science is not required.[125] The balance of probabilities may be established by the application of common sense to what is known, even though what is known may be deficient from a scientific point of view.[126]

117. The Appellants relied on the common-sense proposition that a generous policy of state funded health insurance will attract persons to Canada who

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[124] *Hutterian Brethren, supra,* at para *75*

[125] *Ross v New Brunswick School District No 15,* [1996] 1 SCR 825, 1996 CanLII 237 (SCC) at para 101

[126] *RJR Mac-MacDonald Inc v Canada (AG),* [1994] 1 SCR 311 at 333, 1994 CanLII 117 (SCC)

are economic migrants rather than genuine refugees. The Appellants relied on the common-sense proposition that evidence of this fact, from the mouths of the non-genuine refugees, would be impossible to obtain.[127] The Appellants also referenced evidence that Mr. Ayubi came to Canada in part, because of his health[128], and Victor Wijenaike, a 76 year old failed refugee claimant, remained in Canada because up until the introduction of the 2012 OIC all his health care needs (approximately $89 000) were covered under the IFHP[129], among others.[130]

118. The Federal Court, in response to the submission that evidence to justify the policy need not rise to scientific proof, proposed an epidemiological study of disease rates in the refugee population and the country of origin.[131] The Federal Court erred in effectively imposing a standard of scientific proof.

F. JURISDICTIONAL ERROR IN GRANTING HANIF AYUBI RELIEF

119. The Federal Court lacked jurisdiction to direct the Government to provide Mr. Ayubi with health insurance coverage that is equivalent to that to which he was entitled under the provisions of the pre-2012 IFHP. The Court mistakenly exceeded its statutory authority by effectively granting a remedy that is within the Minister's discretion to make.

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[127] Judgment, para 970-971, Appeal Book, Vol I, Tab 2, at 239-240
[128] Ayubi's RPD Decision, at 1-2, *Siskos Affidavit*, Ex B, Appeal Book, Vol XII, Tab 44B, at 3465-66
[129] *Wijenaike Affidavit*, para 3, Appeal Book, Vol III, Tab 17, at 696; Wijenaike Transcript, Ex 1, Appeal Book, Vol III, Tab 18, at 774
[130] *Dikranian Affidavit*, para 8, Appeal Book, Vol IX, Tab 38, at 2658
[131] Judgment, para 973, Appeal Book, Vol I, Tab 2, at 240

120. The Federal Court has no jurisdiction to make a decision on behalf of the Minister. Whereas it remains open to the Court to determine whether the 2012 OIC complied with the *Charter*, the Federal Court had no authority to impose or to direct a particular level of health insurance coverage for Mr. Ayubi.[132]

G. CONCLUSION

121. The Federal Court found the Government's policy to be uncharitable, misguided, and not connected to its objectives by empirical evidence. As serious as these criticisms are, in the absence of a *Charter* breach they fall into the realm of questioning the Government's policy choices of how to allocate finite resources. The Supreme Court has made it clear in a number of cases that these choices are matters for governments, not courts.[133] The Federal Court erred in law in finding the 2012 IFHP was the cause of a violation of the beneficiaries' s. 12 and s. 15 *Charter* rights by not applying the correct legal tests, and by misapprehending or ignoring the evidence.

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[132] *Neskonlith Band v Canada (Attorney General)* (1997), 138 FTR 81, at para 17
[133] *Lavoie v Canada*, [2002] 1 SCR 769, 2002 SCC 23, at para 69

PART IV – ORDER SOUGHT

122. The Appellants respectfully request that the appeal be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto, this 18th day of December, 2014

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