Court File No.: A-407-14

FEDERAL COURT OF APPEAL

B E T W E E N:

ATTORNEY GENERAL OF CANADA and MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellants
(Respondents in the Federal Court)

and

CANADIAN DOCTORS FOR REFUGEE CARE, THE CANADIAN ASSOCIATON OF REFUGEE LAWYERS, DANIEL GARCIA RODRIGUES, HANIF AYUBI, and JUSTICE FOR CHILDREN AND YOUTH

Respondents
(Applicants in the Federal Court)

and

REGISTERED NURSES' ASSOCIATION OF ONTARIO AND CANADIAN

Table of Contents

Respondents' Memorandum of Fact and Law	1
OVERVIEW	1
PART I – STATEMENT OF FACTS	1
PART II – POINTS IN ISSUE	5
PART III – STATEMENT OF LAW	6
A. APPELLATE STANDARD	6
B. TREATMENT OF EVIDENCE	6
NO ERRONEOUS FINDINGS OF FACT IN FEDERAL COURT DECISION	6
THERE WAS NO ERROR IN ADMITTING THE EXPERT EVIDENCE	9
C. SECTIONS 12 AND 15 OF THE CHARTER	11
INTERNATIONAL LAW CONTEXT: MATERIAL RECEPTION CONDITIONS	11
D. THE FEDERAL COURT'S SECTION 12 FINDING MUST BE UPHELD	13
2012 CHANGES TO THE IFHP ARE CRUEL AND UNUSUAL	13
GOVERNMENT ACTION AMOUNTS TO "TREATMENT"	15
THE RESPONDENTS ARE UNDER THE SPECIAL ADMINISTRATIVE CONTROL OF THE STATE	17
NO INCOMPATIBILITY BETWEEN SECTION 7 AND SECTION 12	18
FEDERAL COURT DID NOT CREATE A NOVEL TEST FOR SECTION 12 BREACH	19
E. FEDERAL COURT'S SECTION 15(1) FINDINGS MUST BE UPHELD	20
THE 2012 OIC DRAWS A DISTINCTION BASED ON NATIONAL OR ETHNIC ORIGIN	20
THE DISTINCTION CREATES A DISADVANTAGE	21
F. THE SECTION 15(2) FINDINGS MUST BE UPHELD	23
G. THE FEDERAL COURT'S SECTION 1 FINDINGS MUST BE UPHELD	24
NO RATIONAL CONNECTIN TO OBJECTIVES	24
THERE WAS NO MINIMAL IMPAIRMENT AND EFFECT WAS DISPROPORTIONATE	25
THE PROPER EVIDENTIARY STANDARD FOR SECTION 1 EVIDENCE WAS USED	26
H. RELIEF TO HANIF AYUBI UNDER S. 24(1) WAS PROPER	27
RESPONDENTS' SUBMISSIONS AS CROSS APPELLANTS	27
A. FEDERAL COURT ERRED IN DISMISSING SECTION 7 CLAIM	27
SECTION 7 IS ENGAGED IN THE CASE AT BAR AND THERE IS A DEPRIVATION	27

THE DEPRIVATION IS CONTRARY TO THE PRINCIPLES OF FUNDAMENTAL JUSTICE	32
B. ANALOGOUS GROUND UNDER SECTION 15 OF THE CHARTER	33
2012 CHANGES TO THE IFHP DRAW A DISTINCTION ON GROUNDS OF ALIENAGE	33
IN THE ALTERNATIVE, THIS COURT SHOULD RECOGNIZE "REFUGEE OR ASYLUM-SEEKER" AS AN ANALOGOUS GROUND	37
2012 CHANGES TO THE IFHP DISCRIMINATE AGAINST THE RESPONDENTS ON THE BASIS OF ALIENAGE AND/OR REFUGEE OR ASYLUM-SEEKER STATUS	37
C. SECTION 1	39
CHILDREN'S ARGUMENTS (APPEAL AND CROSS APPEAL)	39
A. FEDERAL COURT CHARTER FINDINGS REGARDING CHILDREN SHOULD BE UPHELD	41
B. CROSS APPEAL ON SECTIONS 7 AND 15	41
C. CONTRAVENTION OF THE CHILDREN'S CONVENTION	43
PART IV – ORDER SOUGHT	44
PART V – LIST OF AUTHORITIES	45

OVERVIEW

1. In a detailed and carefully considered judgment, Justice Mactavish held that radical changes to a federal health insurance plan for persons seeking refugee protection in Canada, including children, placed the lives and health of these persons at risk. She ruled that, in instituting these changes in 2012, the Governor in Council deliberately targeted a poor, vulnerable and disadvantaged group, which included children, for deprivation of access to public health care in order to coerce them into leaving Canada more quickly and to deter others from coming.

2. Justice Mactavish was correct in finding that these actions violate s.12 of the *Charter* for all affected individuals and s.15(1) of the *Charter* in respect of refugee claimants from designated countries of origin. The Government's actions also violate the s.7 and s.15(1) *Charter* rights of all affected individuals, because, as found by Justice Mactavish, the changes to the health insurance plan put the lives and health of both adults and children at risk. Treating human beings as means toward an end denies the inherent dignity to which everyone is entitled under Canadian law. Similar measures attempted in Europe against refugees and asylum seekers have been struck down. There is no reason why a different result should obtain in Canada.

PART I – STATEMENT OF FACTS

3. For more than fifty years, the Government of Canada has funded basic health and drug insurance coverage for refugee claimants and others who have come to Canada seeking its protection through the Interim Federal Health Program (IFHP). It provided the same basic health and prescription drug coverage to refugees and asylum seekers as is available to low-income Canadians or Canadians on social assistance.[1] This coverage extended from the time the protection claim was lodged to the time the applicant became eligible for provincial health coverage or was removed

[1] Affidavit of Mitchell J. Goldberg ["Goldberg Affidavit"], Appeal Book Volume 7, p. 1962 ["AB 7 1962]; cross-examination of Sonia Le Bris ["Le Bris cross examination "], Question 93, AB 10 2987.

from the country, and was also available to Pre-Removal Risk Assessment (PRRA) applicants.[2]

4. In 2012, there were over 128,000 IFHP recipients,[3] the vast majority of them poor.[4] In April of that year, without any advance warning or consultation whatsoever,[5] the Governor in Council passed two Orders in Council which significantly reduced the level of health care coverage to many such individuals, and all but eliminated it for others pursuing risk-based claims. 86% of refugees and asylum seekers (110,000 people) had lost IFHP coverage for essential prescription medications such as insulin, asthma medication and cardiac drugs. 24% of them (30,000 people) *also* lost IFHP coverage for urgent and essential primary care, including doctor's visits for non-contagious disease or pre-natal care and hospital treatment for heart attacks, traffic accidents, or to give birth. A child's level of coverage depends on the immigration status of their parent(s). There is no differentiation, exception or consideration based on a child's age. [6]

5. Shortly after they were announced, the Appellant Minister's spokesperson explained the changes in the following terms:

> Canadians have been clear that they do not want illegal immigrants and bogus refugee claimants receiving gold-plated health care benefits that are better than those Canadian taxpayers receive. Our Government has listened and acted. We have taken steps to ensure that protected persons and asylum seekers from non-safe countries receive health care coverage that is on the same level as Canadian taxpayers receive through their provincial health coverage, no better. Bogus claimants from safe countries, and failed asylum seekers, will not receive access to health care coverage unless it is to protect public health and safety. Shamefully, the NDP and the Liberals support bogus and rejected asylum seekers receiving gold-plated health care benefits. We disagree. Those who have been through our fair system and [are] rejected should respect Canada's laws and leave the country.[7]

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[2] Goldberg Affidavit, AB 7 1880, 1939; Fortin Affidavit, para. 9, AB 11 3031.
[3] Reasons for Judgment and Judgment of Justice Mactavish ["Judgement"], para.49; Le Bris Affidavit, para.82, AB 10 2793.
[4] Regarding the economic situation of many refugees Dr. Rashid stated, "Almost all refugee claimants I have seen are low-income. They come with nothing, they clothe their kids with donations, they often don't have bus fare to come and see us in our clinic": Rashid cross examination, Q. 123, AB 4 1040-41; Ornstein affidavit, para.22, AB 3 682.
[5] Le Bris cross examination, AB 10 3001-3002.
[6] Fortin cross examination, AB 12 3436-3437.
[7] Goldberg Affidavit, AB 7 2087.

6. The Respondents challenged the IFHP changes before the Federal Court. In support of the challenge, the Respondents introduced wide-ranging affidavit evidence from health care professionals regarding the medical effects of the changes to the IFHP, including the medical effects on children. The evidence also addressed the serious concerns of provincial governments and some twenty-one national medical associations regarding the modifications and detailed the systemic consequences of the changes, including widespread confusion among medical professionals as to coverage and negative effects on overall health care spending and efficacy.

7. Furthermore, the individual Respondents, Daniel Garcia Rodriguez and Hanif Ayubi, provided evidence as to the negative consequences they had personally suffered as a result of the changes to the IFHP—consequences which constitute a violation of their constitutional rights.

8. Respondent Daniel Garcia Rodriguez, a rejected refugee claimant from Colombia (whose wife had been granted refugee status and was sponsoring him) was refused a sight-saving operation to repair a retinal detachment on the grounds that he no longer had healthcare coverage for such emergencies under the IFHP and could not afford the large fee for the operation.[8] His doctor agreed to perform the eye surgery at the last minute at a fraction of the cost. Further delay could have resulted in blindness.[9] He also suffered psychological stress and feelings of degradation during the course of these events.[10]

9. Respondent Hanif Ayubi, a rejected claimant from Afghanistan who suffered from type-1 diabetes, was still in Canada pursuant to a removals moratorium policy when the IFHP changes were made.[11] At that time, he lost coverage for the medical treatment and drugs (including insulin) required to treat his diabetes. As a low-

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[8] The cost could have been up to $10,000. Rodriguez Affidavit, Exhibit A, AB 6 1676); Respondent Rodriguez and family were not far above the low-income cut off figures: see, Rodriguez cross examination, q.35, AB 6 1698; Ornstein Affidavit, para.21, AB 3 682; Judgment paragraph 199.
[9] Rodriguez Affidavit, para.20, AB 6 1674.
[10] Rodriguez Affidavit, para.20-22, AB 6 1674-1675.
[11] Ayubi Affidavit, para.4, AB 5 1196.

income person[12] he could not afford these services and, contrary to the Appellants' contentions at paragraph 19 of their Memorandum, he did not qualify for OHIP.[13] At the time the case was heard, he was being kept alive on free samples of insulin obtained by a nurse through the charity of the drug manufacturer.[14] His lack of access to his other medications caused a hypertensive crisis[15] and caused him psychological stress.[16] Although the conflict in Afghanistan sometimes made it difficult to obtain medical treatment, had it not been for the Taliban, he would never have fled the country.[17]

10. Finally, affidavits in regard to six affected individuals as well as clinical references were introduced as further evidence of the serious impact on the physical health and psychological well-being of numerous individuals that was occurring as result of the changes to the IFHP. There was evidence of individuals having to choose between food and life-sustaining medicine, or having to beg for help accessing health care. Their physicians uniformly expressed shock and dismay at the situation of these patients.[18]

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[12] His income was about $10,000 per year (Ayubi Affidavit, para.4, AB 5 1196; para.10, para.4, AB 5 1197); Ayubi cross examination" Q.55, AB 5 1220; Bradley Affidavit, para 5, AB 2 330.

[13] Refugee claimants were expressly de-insured by OHIP in 1995 and transferred to the IFHP. The work permit he held for his intermittent jobs as a gas station attendant and busboy did not render him eligible for OHIP as a temporary foreign worker under the applicable regulations (see Goldberg Affidavit, AB 7 1868-69, 1871, 1876-77; Le Bris cross examination, q.131-133, AB 10 2999; General RRO 1990, *Regulation 552 (Health Insurance Act)*, s. 1.4(6).

[14] Ayubi Affidavit, para.8, AB 5 1197; Ayubi cross examination, q.87, AB 5 1126; Bradley Affidavit, para 5, AB 2 330. Respondent Ayubi was granted discretionary coverage under section 7 of the OIC; however, this discretionary coverage did not extend to prescription medication such as insulin (Ayubi cross examination Q.99, AB 5 1228).

[15] Bradley cross examination Q.81, AB 2 388; Q.73, AB 2 386: "I was speaking with a nurse that tries to obtain supplies, some of his supplies for him and they didn't have Ramipril, they prescribed a different blood pressure medication and his blood pressure apparently dropped. He came in in a hypotensive crisis and spent the afternoon being rehydrated by IV fluids."

[16] Ayubi Affidavit, para.14, AB 5 1198 and Exhibit A (Letter from Dr. Feder), AB 5 1200-1201; Bradley Affidavit, para 5, AB 2 330; Bradley cross examination, Q.81, AB 2 387, lines 16-21.

[17] Ayubi Affidavit, para.6, AB 5 1196.

[18] Adult cases were: BB (PRRA-only with HIV, Goldman Affidavit, AB 7 1786-1787; Judgment para.241; Victor Wijenaike (rejected claimant, H&C applicant with cancer, Wijenaike Affidavit, AB 3 696; Judgment, para.221); "Sarah" (non-DCO claimant with severe asthma, Mansfield Affidavit, AB 6 1769; Judgment, para.234,); Saleem Akhtar (non-DCO claimant with cancer, Akhtar Affidavit, AB 9 2631; Judgment, para.251,); pregnant DCO-claimant unable to secure hospital birth, Handa Affidavit AB 2 471; Judgment, para.247).

11. The plight of children who found themselves without adequate IFHP coverage after June 30, 2012 was also highlighted in the evidence. These children were unable to access vital medical treatment that placed their health, lives and development at risk.[19] Also, in the evidence were instances of children whose lack of health coverage exposed them to potential stigmatization and social exclusion.[20]

12. Based on all of this evidence, Justice Mactavish found as a fact that in reducing coverage under the IFHP "the Canadian government has intentionally set out to make the lives of these disadvantaged individuals even more difficult than they already are"[21] and that the changes were "causing illness, disability, and death."[22] She found *Charter* violations under s.12 (for all affected individuals) and s.15 (for DCO claimants), but no violations of ss. 7 or 15 in regard to refugees and asylum seekers as a group. Justice Mactavish's judgment was suspended for four months. The Appellants sought a stay, but this was denied by Webb, J.A.

PART II—POINTS IN ISSUE

13. On the Appeal: Should Justice Mactavish's findings in regard to the evidence and ss.12, 15, 1 and 24(1) of the *Charter* be upheld? On the Cross-Appeal: Should Justice Mactavish's findings in regard to ss.7 and 15 of the *Charter* be overturned?

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[19] Children's situations were: 7 year old receiving only partial treatment, increasing risk of potentially life-threatening infections (Caulford Affidavit, para. 20, AB 5 1333; and, Caulford cross examination, pp.138-140, AB 5 1477-1479), no follow up treatment for malaria for financial reasons (Rashid Affidavit, para.51(c), AB 4 790; and, Rashid Cross-Examination, p.114-115, AB 4 1104-1105); two young seriously asthmatic children with no access to inhalers, (Rashid Affidavit, para. 51(e), AB 4 790; and, Rashid Cross-Examination, pp.123-125, AB 4 1113-1115); a toddler with fever and lethargy sent to Emergency Room instead of walk-in clinic and family presented with large bill (Rashid Affidavit, para.51(j), AB 4 791; and, Rashid Cross-Examination, pp.137-139, AB 4 1127-1129; a 7 year old with a fever and cough could not obtain chest x-ray to rule out pneumonia under her PHPS coverage (Rashid Affidavit, para.51(s), AB 4 793; and, Rashid Cross-Examination, pp.148-151, AB 4 1138-1141); and, a teenager with PTSD and previous suicide attempts cut off from essential psychiatric medications (Rashid Affidavit, para.52(g), AB 4 794).

[20] See the case of 14 year old Naomi whose coverage was reduced to PHPS coverage; as a consequence she was prevented from participating in activities at the Royal Canadian Sea Cadets – a group that was helping her deal with socialization issues, regain confidence, and integrate into Canadian society. Judgment paras.229-233; Arroyo Affidavit, para.2-11, AB 6 1662-1664; See also Bradley Affidavit, para.10-11, AB 2 333; Bradley Cross-Examination Q.222, AB 2 433-434; Q.235, AB 2 445; Q.248, AB 2 446.

[21] Judgment para.1079.

[22] Judgment para.1049.

14. With respect to children (Appeal and Cross Appeal), should the findings of Justice Mactavish under ss.12 and 15 of the *Charter* be upheld and should her findings under ss.7 and 15 of the *Charter* be overturned?

PART III-STATEMENT OF LAW

THE RESPONDENTS' SUBMISSIONS ARE AS FOLLOWS:

A. APPELLATE STANDARD

15. The standard applicable to findings of fact in *Charter* cases is the "palpable and overriding error" standard,[23] which is a highly deferential standard of review.[24] This same deferential standard applies as well to the weighing of evidence, the assessment of expert evidence, the findings on social and legislative facts and the application of legal principles to the facts.[25]

B: TREATMENT OF THE EVIDENCE

No Erroneous Findings of Fact in Federal Court Decision

16. The Appellants allege at paragraph 29 of their Memorandum that Justice Mactavish erred in accepting evidence from the Respondents "that was inadmissible or so general or non-specific as to be of no probative value". They cite three instances out of over a thousand pages of evidence in footnote 35 of their memorandum (from the evidence of Dr. Meb Rashid, the evidence of nurse Vanessa Wright, and the evidence of Dr. Paul Caulford).

17. When regard is had to these portions of the evidence, it is clear that the Appellants' arguments have no merit. Dr. Rashid details both the experiences of his own patients at paragraph 51 of his affidavit and those that had been brought to his attention as an officer of Respondent, Canadian Doctors for Refugee Care (CDRC),

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[23] *Ardoch Algonquin First Nation v Canada,* 2003 FCA 473 at 16; *Toussaint v Canada*, 2011 FCA 213 at para. 55 [*Toussaint FCA*]; *Jodhan v Canada,* 2012 FCA 161 at paras. 72-75; *Pillette v Canada* 2009 FCA 367 at 17.

[24] *Canada v RBC Life Insurance* 2013 FCA 50); *Hokhold v. Canada,* 2013 FCA 86 at para 24.

[25] *Hafizy v Canada* 2014 FCA 109, at para. 9; *Toussaint FCA, supra* note 23, para. 54; See also *Jodhan, supra* note 23 at paras. 72-75; *Pillette, supra* note 23 at 17; *Waxman v Waxman* (2004), 186 OAC 201 at paras. 296-297, 300; *Canada v Bedford,* [2013] 3 SCR 1101 paras 46-56 [*Bedford*].

by other physicians around Canada at paragraph 52. The testimony cited by the Appellants from both nurse Vanessa Wright and Dr. Paul Caulford does reveal several instances where they were not sure of exact dates of when certain events occurred in a patient's refugee claim, or where the patient had not been their patient but that of a clinic colleague. None of this renders their evidence inadmissible or of no probative value; it was just a question of weight. In any event, Justice Mactavish did not rely on this particular evidence. In fact, she did not need to because of the wealth of other direct evidence on the adverse impact of the changes.[26]

18. The Appellants also complain that Justice Mactavish drew inferences and used hypotheticals that showed possible, but not probable, harm arising from the IFHP changes, but insisted that the Appellants produce "persuasive" evidence that the IFHP changes served a valid purpose. This does not constitute palpable and overriding error. The key question in determining a *Charter* violation, particularly with regard to s.7, is *exposure* to adverse consequences.[27] In contrast, once a violation is found, s.1 requires that the violation be "demonstrably justifiable in a free and democratic society". This latter test would, at minimum, require that the government's evidence be "persuasive", whereas exposure could allow for a consideration of potentialities.

19. The Appellants also say that Justice Mactavish erred in relying on "worst case scenarios" not actually representative of the effects of the coverage reduction; that neither Respondent Garcia or Ayubi had suffered actual harm; and that others had in the end received the necessary treatment. Again, there was no error in this. So-called "worst case scenarios" are perfectly appropriate to consider when determining if there is *exposure* to harm. In any event, proof of actual harm is not necessary for a *Charter* violation to be made out.[28]

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[26] Judgment para.170-172.
[27] *Toussaint v AG Canada* 2010 FCJ 987 [*Toussaint FC*]. The FCA upheld Justice Zinn on this point: *Toussaint FCA*, *supra* note 23, para. 59-66; *Chaoulli v. Quebec*, 2005 1 SCR 791 para. 116-119, 123 [*Chaoulli*]; *Bedford, supra* note 25, para. 60.
[28] *Vriend v Alberta*, [1998] 1 SCR 493 at para. 47 [*Vriend*].

20. In point of fact, contrary to the Appellants' assertions, Justice Mactavish did have before her evidence of actual harm. For instance, Respondent Garcia's evidence that he had suffered a week of severe psychological stress at the prospect of going blind because he could not access surgery was uncontradicted.[29] Respondent Ayubi suffered similar stress,[30] plus a dangerous drop in blood pressure because he did not have access to the correct medication.[31] There were also numerous instances of other individuals – including children – suffering pain, distress and fear as a result of not having adequate coverage under the IFHP.[32]

21. Finally, the fact that many individuals did eventually obtain the necessary health care was irrelevant to the question before Justice Mactavish. It would be absurd to require that actual harm have occurred to show a *Charter* violation under s.12 or otherwise.[33] Moreover, where harm was minimized in a particular instance after the Government's coverage reductions, this was not because of the policy, but because of the heroic interventions of health care providers that blunted the effects of the policy.[34]

22. The Appellants are also mistaken in alleging that Justice Mactavish made a palpable and overriding error in concluding that the changes to the IFHP are "causing illness, disability and death". This conclusion was based primarily on the evidence of

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[29] Rodriguez Affidavit, para.20, AB 2 1674.

[30] Ayubi Affidavit, para.14, AB 5 1198, and Exhibit A (Dr. Feder's letter), AB 5 1200-1201; Bradley Affidavit, para.5, AB 2 330; Bradley Cross-Examination, p.30, line 16, AB 2 389; For other references to psychological impact of the cuts see: Bradley Affidavit, para.5, AB 2 330; Caulford Cross Examination, Q.172, AB 5 1400; Mansfield Affidavit, paras.3-7, AB 6 1769-1770; Handa Affidavit, paras.6-7, AB 2 471-472; Handa Cross-Examination, Q.74, AB 2 499 and p.24 AB 2 500.

[31] Bradley Cross Examination, Q.73, AB 2 386.

[32] Handa Cross examination, AB 2 499-500; Bradley Affidavit, para.7, AB 2 331; Caulford Affidavit, paras.10-11, 13-16, AB 5 1330, 1331-1332; Rashid Affidavit, paras.51b and 51q, AB 4 789, 793; Akhtar Affidavit, para.10, AB 9 2632; Wijenaike Affidavit para.10, AB 3 697.

[33] *Vriend, supra* note 28 at 47.

[34] Examples: Dr.Wong waives the $10,000 fee for Respondent Rodriguez' eye surgery (Rodriguez Affidavit, para.20, AB 6 1674); Nurse Bradley spends time seeking medical and donated services for Respondent Ayubi (Bradley Affidavit, para.5, AB 2 330-331; Bradley Cross Examination, pp.20-21, AB 2 379-380; Q.68, 383-384; Judgment para.190-194); Dr. Caulford begs hospital not to cancel caesarian section (Caulford Cross Examination, pp.62-63, AB 5 1401-1402: "We've had to go to the hospital for people who are uninsured, including refugee claimants, and stand there in the business office and say, no, don't cancel her caesarian section.... and to be standing there in the business office asking the hospital not to—we've paid that $800 sometimes out of our donations to keep the OR slot so she doesn't go into labour."

Dr. Michael Rachlis who was not cross-examined.[35] Dr. Rachlis based his assessment on numerous studies on morbidity rates among medically uninsured individuals and cited those studies.[36]

23. Finally, the Appellants allege in paragraph 34 of their Memorandum that Justice Mactavish's finding that "those seeking the protection of Canada" are "an admittedly poor, vulnerable and disadvantaged group" is unsupported by the evidence. Again, this is wholly inaccurate. This proposition as established as a fact by the uncontradicted affidavit of Michael Ornstein, the evidence Dr. Meb Rashid and was expressly accepted as fact by the Appellants.[37]

24. The Appellants further allege that Justice Mactavish, in reaching this conclusion, failed to make the necessary distinction between "refugees" and "refugee claimants". However, there is no practical difference, under refugee law, between the two categories. According to the UNHCR, a person is a refugee within the meaning of the 1951 *Refugee Convention*[38] as soon as he fulfills the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined.[39] Consequently, refugee claimants can claim core *Convention* rights pre-recognition.[40] This is a basic and rudimentary point of refugee law on which Justice Mactavish correctly relied.

There Was No Error in Admitting the Expert Evidence

25. The Appellants' contention that the affidavit evidence referred to in paragraphs 36 to 39 of their Memorandum was inadmissible has no foundation.

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[35] Rachlis Affidavit, para.38, AB 6 1734.

[36] Rachlis Affidavit para.34, AB 6 1732. On death and illness see also Caulford Affidavit, para.28, AB 5 1337; Bari affidavit and coroners' report; Bradley Affidavit, para.7, AB 2 331-332 (untreated ear infection) Bradley Cross Examination, pp.29-30, AB 2 388-389 (lack of medication for complications of diabetes).

[37] Judgment para.121,; Ornstein Affidavit, para.22, AB 3 1682; Rashid Cross Examination q.193, AB 4 1080; Transcript of FC hearing, Vol.2, p.182.

[38] UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, [*Refugee Convention*].

[39] UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV.3, para 28, [*UNHCR Handbook*].

[40] James Hathaway, *The Rights of Refugees under International Law*, Cambridge: 2005 at 278-279 [Hathaway].

26. First, contrary to the statements of the Appellants in their Memorandum, the Respondents did in fact take advantage of the opportunity provided by Justice Mactavish to file certificates under Rule 52.2.[41] The sole defect in these certificates was that they were supposed to have been retrospective in wording and instead they followed the wording in Form 52.2 of the Rules exactly because of an oversight.[42] In the face of what was essentially a technicality, Justice Mactavish, in exercising her judicial discretion, committed no error in allowing these affidavits to be admitted as expert evidence.

27. Second, the Appellants' contention that they complied with the notice provisions in Rule 52.5 is baseless. Rule 52.5(2) sets out the manner of raising any objection to the qualifications of an expert and a passing reference in response to a motion to increase factum length does not qualify under the Rule.

28. Third, if not admissible as expert opinion, the affidavits were admissible in any event as either lay opinion,[43] as summaries of voluminous materials,[44] or as legislative facts.[45] The affidavits of Michael Ornstein, Dr. Michael Rachlis and Christopher Anderson summarized existing literature and statistics for the Court's convenience, but the Respondents would have been entitled to submit this material directly. In addition, these affidavits provided background to the modifications to the IFHP. The affidavits of Dr. Daneman and Joanna Anneke Rummens (both of Toronto's Hospital for Sick Children) provided evidence of certain facts within their professional knowledge as health care professionals.

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[41] Expert Certificates, AB 15 4251-4260
[42] Transcript of FC hearing, Vol. 3, p. 200.
[43] Sopinka, *The Law of Evidence in Canada*, 2nd ed. (Toronto: LexisNexis Canada, 1999) at p. 609; *Graat v R*, [1982] 2 S.C.R. 819; *Dix v Canada (Attorney General of)*, 2001 ABQB 901 (CanLII), paras 21-22; *Catholic Children's Aid Society of Metropolitan Toronto v S. (J.)*, 62 OR (2d) 702.
[44] *R v Scheel*, (1978), 3 S.C.R. (3d) 359 (Ont. C.A.).
[45] *Danson v Ontario*, [1990] 2 S.C.R. 1086, at pg 1089.

29. Finally, even if the affidavits were admitted in error, there was no material effect on the outcome. The facts contained in the affidavits were either non-controversial or were proven by other evidence in the record in any event.[46]

C. SECTIONS 12 AND 15 OF THE CHARTER

International Law Context: Material Reception Conditions

30. Access to health care for refugees and asylum seekers in a receiving country is part of what are known in academic and policy circles as "material reception conditions". Material reception conditions include detention, entitlements to work, to receive education, and to access food, shelter and medical care. They are applicable regardless of whether the individuals are situated in a refugee camp or reception centre, or are permitted to circulate within the host country. It is crucial that any assessment of the *Charter* claims, on both the appeal and cross-appeal, take this context into account.

31. In *The Rights of Refugees under International Law*, James Hathaway notes that refugees and asylum seekers draw a freestanding right to access to health care from Article 12 of the *International Covenant on Economic, Social and Cultural Rights* to which Canada is signatory.[47] In this regard he notes:

> As such, state parties with the resources to implement the right to health may not lawfully decide to refrain from taking the necessary steps fully to implement Art. 12. . . . It would similarly not be open to countries such as Germany or Sweden to deny refugees access to other than purely emergency healthcare, nor to the United States to avoid its responsibility to treat healthcare for refugees and others as an essential public service.
>
> Even states with insufficient resources must nonetheless give priority to the realization of the right to health without discrimination of any kind...This critical duty of non-discrimination means that India's decision to deny health care to Chakma refugees and Thailand's refusal to allow Kmer Rouge refugees to receive medical treatment was not lawful.

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[46] Rashid Cross Examination q.193, AB 4 1080; Goldberg Affidavit, AB 8 2386-2484.

[47] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, Art. 12 [*ESCR Covenant*]; Article 12 applies to asylum seekers: See UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4, para 34, 40, 65 [*General Comment No. 14*].

> . . .[T]he right to "essential primary health care" is one of the four core entitlements of all persons, whatever the circumstances of the host state....The substance of this non-derogable responsibility to provide essential primary health care comprises the duty of non-discrimination in access to healthcare...More specifically, the right to essential primary healthcare binds all state parties to "provide essential drugs, as from time to time defined under the WHO Action Program on Essential Drugs".[48]

32. The failure to provide health care for impecunious refugees and asylum seekers would also breach international norms[49] and international practice.[50] The right to non-discrimination in the provision of health care (vis-a-vis other asylum seekers, other lawful aliens in the host territory and nationals of host state) is drawn from both the *Refugee Convention* and the *International Covenant on Civil and Political Rights*.[51]

33. It is important to note that "rejected refugee claimants" are still "asylum seekers" as a matter of historical fact, and some cannot return home or are in refugee-like situations.[52] Norms around material reception conditions still apply if they are in the process of applying for complementary forms of protection such as PRRA or humanitarian relief.[53] Failed asylum seekers are still under the jurisdiction of the UNHCR and deserve to be treated humanely in the run-up to their removal.[54]

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[48]Hathaway, supra, pp. 511-513 [emphasis added].

[49] EC, *Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, [2013] OJ, L 180/96 at Article 19, 20, [EU *Reception Directive*].

[50] Most countries with a publically funded universal health insurance system ensure that both asylum seekers and failed asylum seekers have access at least to urgent and essential primary and emergency health care. Goldberg Affidavit, AB 8 2356-2453.

[51] *Refugee Convention, supra* note 38, Articles 3 and 7(1); UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171 [ICCPR], Article 26; UN Human Rights Committee, *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, 11 April 1986, para. 2; Hathaway *supra* note 48, at pp.259-260.

[52] Ayubi Affidavit, AB 5 1196 (removals moratorium); Goldman Affidavit, paras.7-17, AB 2 527-528; Goldman Cross Examination, Q.33, AB 2 553, Q.42, AB 2 554 (statelessness). Respondent Rodriguez, who was the husband of a recognized Convention refugee and enjoys similar protections under the principle of family unity (see *UNHCR Handbook, supra* note 39, para 181ff).

[53] EU *Reception Directive, supra* note 49, Preamble, point 13. See Wijenaike affidavit, para 3 (applying for PRRA and H&C); Bradley Affidavit, para 7; (refused child claimant who had made a humanitarian application but who had no IFHP coverage for an ear operation).

[54] UN High Commissioner for Refugees, *Conclusion on the return of persons found not to be in need of international protection*, 10 October 2003, No. 96 (LIV) – 2003.

Certainly, they would not be denied medical care if they were still residing in a refugee camp or reception centre post-determination.[55]

34. Had the aforementioned international norms and provisions been incorporated directly into Canadian law, Canada's actions in regard to the IFHP would be clearly illegal. The terms of the 2012 IFHP provide inferior health care coverage for DCO-claimants vis-à-vis non-DCO claimants, and also fails to provide access to health care for refugees and refugee claimants at the same level as other lawful aliens.[56] What is worse, thousands of asylum seekers no longer receive funded coverage for essential prescriptions drugs such as insulin or even for basic, essential primary or emergency health care. The *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights instruments that Canada has ratified.[57]

D. THE FEDERAL COURT'S SECTION 12 FINDINGS MUST BE UPHELD

2012 Changes to the IFHP are Cruel and Unusual

35. Justice Mactavish correctly determined that the 2012 changes to the IFHP amount to "cruel and unusual treatment" and violate s.12 of the *Charter*. By instituting these changes, Justice Mactavish found as a fact that the executive branch of the Canadian government has deliberately set out to make poor, vulnerable, and disadvantaged individuals suffer to force them to leave Canada more quickly and deter others from coming here.[58] By jeopardizing the health – indeed, the lives – of these vulnerable individuals, including children,[59] the government has shown a wanton disregard for their humanity. It has failed to show that this treatment was

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[55] UNHCR, *Handbook for Emergencies*, 3rd ed, February 2007, at 336ff. See also: UNHCR, *UNHCR Manual on Refugee Protection and the European Convention on Human Rights (April 2003, updated August 2006)*, August 2006.

[56] With the exception of visitors, aliens in Canada (i.e. permanent residents, work visa holders and students) generally are included in provincial health care schemes, and by extension most drug benefit plans, provided their presence is of extended duration (Fortin Affidavit, AB 11 3345-3356).

[57] *Health Services and Support-Facilities Subsector Bargaining Assn. v British Columbia*, 2007 SCC 27 [*Health Services*].

[58] Judgment, para.690.

[59] Judgment, para.691

necessary to achieve any legitimate aim.[60] Using the denial of health care as leverage for immigration policy is needlessly punitive, and is both cruel and unusual.

36. The Appellants take issue with Justice Mactavish's findings that the 2012 changes to the IFHP amount are "cruel and unusual". The Supreme Court of Canada has ruled that "cruel and unusual" means "so excessive as to outrage [our] standards of decency".[61] Justice Mactavish made no error in applying this test; she did so with the help of the nine factors set out in *R. v. Smith.*[62] The fact that Justice Mactavish may have described this as "a kind of cost/benefit analysis", as descried by the Appellants in paragraph 68 of their Memorandum, is immaterial, since she applied the correct test in the correct fashion. She gave all the factors equal weight and was not, as alleged by the Appellants in paragraph 75 of their Memorandum "preoccupied" with questions of arbitrariness.

37. The evidence established and Justice Mactavish correctly found that changes to the IFHP satisfied the nine factors in *Smith*. Contrary to the claims of the Appellants in paragraph 77 of their Memorandum, the fact that health care professionals,[63] newspaper editors (some directly in response to the situation of the Respondent, Daniel Garcia Rodriquez)[64] and some provincial politicians,[65] expressed not just disagreement, but real and palpable outrage, was admissible evidence relevant to the determination of such public standards of decency.

38. Justice Mactavish correctly concluded that it shocks the conscience to deprive impecunious people of insured health care for the express purpose of inflicting predictable and preventable physical and psychological suffering, as a means of

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[60] Judgment, para.159.
[61] *R v Smith,* [1987] 1 S.C.R. 1045 [*Smith*].
[62] *Ibid,* at 44, 92.
[63] Rashid Affidavit, Exhibit "B", AB 4 808-852.
[64] Goldberg Affidavit, Exhibit "R", AB 8 2341-2355 ("Neither sound, nor caring" Winnipeg Free Press June 20, 2012; "Chopping health coverage for refugees is a false saving", *Toronto Star*, June 23, 2012; "A Dose of Common Sense", *Calgary Herald* July 6, 2012; "A Toronto doctor saves a refugee's eyesight, but what about others?", *The Toronto Star*, August 22, 2012; "Amid Kenney's worthy reforms, a misstep on refugees' health", *The Globe and Mail*, August 23, 2012.
[65] Goldberg Affidavit, Exhibit "R", AB 8 2341-2355 (letter from Ontario Health Minister Deb Matthews to Federal government, June 27, 2012); Akhtar Affidavit, Exhibit "A", AB 9 2633-2634: *CBC News*, "Saskatchewan's Wall slams federal cuts to refugee health").

deterring people from exercising their entitlement under Canadian law to seek refuge. This is as cruel by today's standards as the stoning and the lopping off of hands mentioned by the Appellants in paragraph 77 of their Memorandum and exhibits disregard for the victim's value as a human being.[66]

39. Contrary to the Appellants' contentions, the existence of a discretionary coverage provision in s.7 of the OIC does not mitigate the gross disproportionality of the cuts to the IFHP. Justice Mactavish did have regard to this provision, but found that the evidence before her showed that: this provision is illusory in practice;[67] does not allow the Minister to cover prescription drugs such as insulin or cardiac medication; and, is not effective in emergency situations, among other things.[68] In any event, the possibility of discretionary relief cannot compensate for the deprivation of a right.[69]

Government Action Amounts to "Treatment"

40. What constitutes the "treatment" in this case is not, contrary to the Appellants' submissions,[70] the IFHP *per se*, but the intentional reduction or elimination of health insurance coverage under the IFHP for the express purpose of immiserating asylum seekers to deter them from coming to Canada or inciting them to leave. Accordingly, the "active state process" that subsists in the case at bar is the action taken by way of the 2012 OIC to reduce or eliminate previously available public health insurance benefits for immigration control purposes, and the

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[66] *Trop v Dulles* 78 S.Ct. 590; *Estelle v Gamble* 97 S.Ct. 285; *Bowring v Godwin* 551 F.2d 44; *Helling v McKinney* 113 S.Ct. 2475; *International Federation of Human Rights Leagues (FIDH) v. France COMPLAINT No. 14/2003; D v UK* [1997] 24 EHRR 423; *Covarrubias v Canada (Minister of Citizenship and Immigration),* 2006 FCA 365 at para. 39.

[67] Judgment paras.677 and 287-294.

[68] Judgment, para.287-293. Responses were months in coming and not always clear (Ayubi Affidavit paras.10-11 AB 5 1197-1198; Ayubi Cross Examination, p.23-24, AB 5 1228-1229; Wijenaike Affidavit, paras.5-12, AB 3 696-698, Wijenaike Cross Examination, p.34, AB 3 758; Goldman Affidavit, paras.15-16, AB 2 528, paras.25-26, AB 2 529.) Respondent Ayubi was able to obtain health care coverage under this provision, but not insulin or other necessary medications (Ayubi Affidavit, paras.10-11, AB 2 1197-1198).

[69] *R v Morgentaler,* [1998] 1 SCR 30; *R v Parker*, [2000] OJ No 2787, at paras. 174-184.

[70] See paragraphs 57, 65,70 71,72,85 of the Appellants' Memorandum.

manner of its behaviour in doing so.[71] The Appellants' misunderstanding of "treatment" obviates the remainder of their s.12 arguments.

41. Justice Mactavish's interpretation of "treatment" is consistent with relevant and persuasive European case law which has declared the withdrawal of social benefits for asylum seekers for deterrence purposes to be illegal under, *inter alia*, Article 3 of the *European Convention on Human Rights* – a provision which the Supreme Court of Canada consults for assistance in interpreting s.12 of the *Charter*.[72] This case law renders the Appellants' objections essentially moot. It would be hard to justify a different interpretation of "treatment" in Canada. The interpretation of asylum law and practice, including in relation to material reception conditions should be uniform among signatory States to the *Convention*.

42. In *R v Secretary of State for the Home Department, ex parte Adam et al*,[73] expressly relied on by Justice Mactavish, the UK House of Lords ruled that a British law that disqualified certain asylum seekers from receiving government support in the form of accommodation and the barest necessities of life constituted "treatment" because it was a deliberate action of the state designed to discourage asylum applications. The House of Lords declared, albeit in obiter, that a bar from receiving health care services under the national health care service would constitute "treatment" under Article 3 where the government provides such services and determines entitlement to them, even where it is not required to do so. Lord Scott noted that

> It could not, in my opinion, sensibly be argued that a statutory bar preventing asylum seekers, or a particular class of asylum seekers, from obtaining NHS treatment would not be treatment of them for article 3 purposes.[74]

43. Relying on the Federal Court's decision in *Lord v Canada*, the Appellants suggest that since the 2012 changes to the IFHP do not involve an element of

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[71] *Canada (Minister of Employment and Immigration) v Chiarelli*, [1992] 1 SCR 711, at para. 29, citing the *Concise Oxford Dictionary* (1990).
[72] *R v Smith*, *supra* note 61, at paras 25-26; *United States of America v Burns*[2001] SCC at para 5.
[73] *R v Secretary of State for the Home Department, ex parte Adam et al*, [2005] UKHL 66, (2006) 1 AC 396.[*ex parte Adam*]
[74] *Ibid*, para. 69.

"compliance" or "non compliance", they do not amount to "treatment".[75] The Supreme Court in *Rodriguez v Canada,* imposed no such requirement. Furthermore, *Lord*'s finding that state conduct constitutes "treatment" when a policy is imposed in the context of enforcing a state administrative structure[76] applies in this case. The IFHP is integrated into the immigration system's regulatory framework and the changes were made to promote government objectives regarding refugees and asylum seekers. This constitutes an active state process that amounts to "treatment".

44. Finally, the Appellants' assertion that the government's action is not analogous to any "treatment" contemplated in the jurisprudence is not substantiated or supported.[77] State conduct involving *specific* punitive measures imposed in the penal, institutional, or immigration setting (e.g. DNA sampling further to conviction, lengthy detention in immigration proceedings, medical care imposed without consent in an institutional setting and potentially, deportation) can constitute "treatment".[78] In contrast, state conduct involving *general* measures imposed on citizens outside these settings (e.g. taxation, licensing, and welfare) does not constitute treatment. In the case at bar, the government's actions are targeted and specific, and imposed only on persons who are subject to the state's immigration jurisdiction. This constitutes "treatment".[79]

The Respondents Are Under the Special Administrative Control of the State

45. The Appellants assert that since refugee claimants do not arrive and remain in Canada through means completely beyond their control, they bring themselves under Canada's immigration jurisdiction and are therefore not subject to the administrative control of the state.[80] This assertion wrongly suggests that individuals cannot be subject to the administrative control of the state if they exercise choice, agency, or

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[75] Appellants Memorandum at para.54, relying on *Lord v Canada,* 2001 FCT 397, at para.56
[76] *Lord, ibid,* at para. 56.
[77] Appellants Memorandum, at para.57.
[78] Appellants Memorandum, at para. 56.
[79] See also *Carlston v New Brunswick,* 99 N.B.R. (2d) 41(non-smoking policy in jail); Such an interpretation is also consistent with international law. Interference with health was considered treatment in *Bitiyeva v Russia,* Case Nos. 57953/00 & 37392/03 para.107 (ECtHR. June 21, 2007).
[80] Appellants' Memorandum at paras.59-60.

autonomy.[81] The logical corollary of the Appellants' argument would be that federal inmates cannot be considered as being subject to the administrative control of the state, because they *chose* to commit a crime and therefore *bring themselves* within the administrative control of the state. In reality, the act of seeking protection is animated by the normative involuntariness inherent in the legal notion of "necessity".

46. The Appellants' suggestions that since programs relating to work and social assistance that limit the rights and opportunities of the Respondents are administered by the province, they cannot reasonably be characterized as indicia of federal government 'control', ignores the simple fact that the Respondents are subject to the jurisdictional authority of the Federal government under s. 91(25) of the *Constitution Act,* 1867 and that, internationally, refugees and asylum seekers are considered to be "subject to a state's jurisdiction".[82]

No Incompatibility Between Section 7 and Section 12

47. While the Appellants recognize that Justice Mactavish's s.7 analysis focused on whether the claim seeks to impose a positive obligation on government,[83] they nonetheless assert that Justice Mactavish found that the 2012 IFHP "*did not affect* the Respondents' life, liberty and security of person", and "*does not pose a risk* to the life, liberty and security of the person within the meaning of s.7".[84] This is not accurate. Justice Mactavish only concluded that s.7 was not *engaged* in the circumstances of the case. At no point did she consider whether the 2012 changes to the IFHP affected, or otherwise endangered, the Respondents' life, liberty, or security of person.

48. In any event, Justice Mactavish's s.12 findings are not in conflict with her findings on s.7. The Supreme Court of Canada has held that "[e]stablishing a deprivation of life, liberty or security of the person is not a prerequisite to relying

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[81] Appellants' Memorandum, para.60.
[82] Hathaway, *supra* note 40, at p.160ff.
[83] Judgment, para.510, AB 1 132, and para.571, AB 1 148. For analysis, see paras.511-570, AB 1 132-148. As the Appellants note at para.44 of their Memorandum, the Federal Court "did not, at any point, analyse the 2012 OIC by reference to the actual words of s.7".
[84] Appellants' Memorandum, at paras.41 and 45 [emphasis added].

upon the protection afforded through ss. 8 to 14."[85] Furthermore, since deciding *Reference Re Motor Vehicle Act*, the Supreme Court has clarified that the concern over incongruity raised in paragraph 42 of the Appellants' Memorandum is "related to the scope of the principles of fundamental justice, not that of life, liberty, and security of the person".[86]

49. *R v Smith* identifies several factors that must be considered in determining whether government action violates s.12. These factors, which were correctly considered by Justice Mactavish, are congruent with the principles of fundamental justice, namely: arbitrariness, overbreadth, and gross disproportionality.[87] There is no incongruity between s.12 and s.7 in Justice Mactavish's decision.

50. The Appellants make much of the fact that Justice Mactavish's s.12 finding is "completely unprecedented".[88] To the extent that this is accurate, it reflects the unprecedented nature of the government's actions, both in comparison to past conduct of the Canadian government, and past and present conduct of other states. To reject Justice Mactavish's s.12 finding simply because it is unprecedented goes contrary to basic principles of *Charter* interpretation.[89]

Federal Court Did Not Create a Novel Test for Section 12 Breach

51. Finally, the Appellants' contend that Justice Mactavish erred in creating a "new" test under s.12 not sanctioned by previous jurisprudence. This is not so. Justice Mactavish's observation that the modifications to the IFHP intentionally targeted a poor and vulnerable group for adverse treatment was a perfectly relevant consideration in determining whether the test for "treatment" had been met. Contrary to the claims of the Appellants, Justice Mactavish's use of the word "adverse" is not

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[85] *R v CIP Inc*, [1992] 1 SCR 843, at para.28. See also *R v Wiles*, 2004 NSCA 3, at para.15.

[86] *CIP supra*, at para. 28; *R v Mills*, [1999] 3 SCR 668, at para. 87. Notably, contrary to the Appellants' assertion at para. 47 of their Memorandum, a s.12 violation need not, of necessity, be *contrary* to the principles of fundamental justice. *R v Nur*, 2013 ONCA 677, cited by the Appellants, states only that s.12 is "*illustrative* of a principles of fundamental justice".

[87] See *Bedford, supra* note 25, at paras. 111, 120; *Lord, supra* note 75, at para. 57, noting that the test for s.12 review is "one of gross disproportionality".

[88] Appellants' Memorandum, para. 50.

[89] See *Reference re Same-Sex Marriage*, [2004] 3 SCR 698, 2004 SCC 79, at para.22, noting that the *Charter* develops by way of progressive interpretation to address the realities of modern life.

problematic for future s.12 cases; the word merely reflects the nature of the evidence in this case and should be interpreted in that light.

52. In this case of first impression, Justice Mactavish made no legal error in concluding that s.12 was violated in the highly exceptional circumstances that prevailed, particularly in light of the House of Lords' decision in *ex parte Adam*.

E. FEDERAL COURT'S SECTION 15(1) FINDINGS MUST BE UPHELD

53. The Supreme Court of Canada clarified the s.15(1) test most recently in *Quebec v A*.[90] To prove a s.15(1) violation, it must be determined first, that the government has made a distinction based on an analogous or enumerated ground, and second, that the distinction's impact upon the individual or group creates a disadvantage by perpetuating prejudice or stereotyping.[91]

The 2012 OIC Draws a Distinction Based on National or Ethnic Origin

54. The 2012 IFHP provides an inferior level of health benefit coverage to DCO claimants from in comparison to claimants from non-DCO countries.[92] DCO claimants receive no health care coverage unless it is for the purpose of protecting Canadians from risks to public health or safety. The IFHP thus clearly draws a distinction based on national or ethnic origin – an enumerated ground under s.15.

55. The Appellants contend in paragraphs 87-89 of their Memorandum that the claimants' national origin is being used as a mere "proxy" for the safety of a country and that therefore the distinction is not "based on" nationality. What this means is that national origin is a proxy for a pre-judgment by the Minister that a claimant from a given country is not genuine and therefore does not deserve health care coverage. Pre-judgment on the merits of a refugee claim based on national origin falls squarely within the purview of s.15.

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[90] *Quebec (Attorney General) v. A.*, [2013] 1 SCR 61 [*Quebec v A*].
[91] *Ibid* at para 324.
[92] Notably as well, s. 4(3) of the OIC specifically removes the Minister's discretion to pay "the cost of health care coverage incurred for refugee claimants who are *nationals of a country* that is ... *designated under subsection 109.1(1) of the Act*". *Order Respecting the Interim Federal Health Program*, 2012 SI/2012-26.

56. The Appellants misapprehend the legal significance of "immutability". The immutable characteristic at issue here is the Respondents' *nationality*. The fact that the list of countries characterized as DCO is mutable does not impeach the finding that the distinction drawn between DCO claimants and non-DCO claimants is based on an immutable characteristic – here, national or ethnic origin.

The Distinction Creates A Disadvantage

57. According to *Andrews v Law Society of British Columbia*, differential treatment on the basis of a prohibited ground is discriminatory when it "withholds or limits access to opportunities, benefits and advantages available to other members of society".[93] As the Court explained in *Quebec v A,* "[i]f the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory".[94] Moreover, s. 15 jurisprudence mandates not only that the purpose of a particular policy be assessed—but also the effect of that policy.[95] Here, at the very least, the effect of the policy is to discriminately eliminate health care for a group of individuals as a result of their particular nationality. Regardless of the Government's motives, such action constitutes a violation of the equality guarantees set out in s.15 of the *Charter.*

58. Prejudice and stereotyping are not discrete elements of the test under s. 15(1); they are simply *indicia* that may help to identify discrimination.[96] The 2012 changes to the IFHP draw a distinction between DCO claimants and non-DCO claimants that perpetuates the prejudicial idea that claimants from DCO countries are "illegal", "bogus", cheats, and liars, and that their lives are therefore of lesser value. The 2012 changes to the IFHP were devised to deliberately immiserate refugee claimants from DCO countries to deter them from coming to Canada,[97] suggesting that the predictable suffering inflicted on DCO claimants by denial of basic, essential, urgent or life-saving health care matters less than the suffering of others. Their effect is to

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[93] *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 174 [*Andrews*].
[94] *Quebec v A, supra* note 90, at para 332. Further, the government must not act in manner that results "in the denial of the equal benefit and protection of the law". See: *Vriend, supra* note 28 at 544.
[95] *Eldridge v. British Columbia (AG)*, 1997 3 SCR 624 [*Eldridge*].
[96] *Quebec v A*, *supra* note 90, at para 325.
[97] Judgment, para.798. See also paras.823-836.

widen the gap between DCO claimants and the rest of society, contrary to *Quebec v A.*[98]

59. The comments of the Minister's spokesperson, cited by Justice Mactavish at paragraph 56 of her judgment, belie the Appellants' argument that the distinction drawn is not based on prejudice or stereotype. The assertion that "[b]ogus claimants from safe countries, and failed asylum seekers, will not receive access to health care coverage unless it is to protect public health and safety" implicitly adopts the view that DCO claimants are "cheats" seeking to take advantage of Canada's social benefits and generosity. One struggles to find a clearer example of stereotyping.

60. The Appellants' contention at paragraph 97 of their Memorandum that "claimants from DCO countries do not suffer from pre-existing disadvantage on the basis of their national origin" ignores the fact that the distinction marginalizes minorities who are known to face significant persecution in DCO countries, such as Roma people fleeing persecution in Hungary.[99] Even if only some group-members suffer discrimination by virtue of their membership in that group, the distinction and adverse impact can still constitute discrimination.[100] Regardless, the s.15 (1) inquiry does not direct towards a "race to the bottom".[101]

61. The Appellants contend in paragraphs 98-99 of their Memorandum that the distinction drawn by the 2012 changes to the IFHP is not based on prejudice or stereotype owing to the classification scheme's reliance on statistical and other data. This submission fails to recognize that s.15 (1) is concerned primarily with the *effect* of government action.[102] Irrespective of the government's intention, the *effect* of the 2012 IFHP is to perpetuate prejudice or stereotyping.

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[98] *Quebec v A, supra* note 90 at para. 32.
[99] Goldberg Affidavit, paras.38-39, AB 7 1789-1790; Goldberg Affidavit, AB 8 2253-2340 (Amnesty International "Human Rights Here - Roma Rights Now, April 2013; US Department of State *Country Reports for 2012*, Hungary; "Patterns of Prejudice, The Exclusion of Roma Refugee Claimants in Canadian Refugee Policy").
[100] *Quebec v A, supra* note 90 at para. 355, referring to *Nova Scotia (Workers' Compensation Board) v Martin*, [2003] 2 S.C.R. 504.
[101] *Lovelace v Ontario*, [2000] 1 SCR 950, 2000 SCC 37, at para. 69.
[102] *Eldridge, supra* note 95 at para 62.

62. In paragraph 98 of their Memorandum, the Appellants rely on statistics showing a high percentage of RPD refusals and claimant withdrawals from some countries as indicating that claims from that country are not well founded. The first flaw in relying on this data is that rejection of a refugee claim does not prove that the claimant acted in bad faith in seeking protection. Secondly, many DCO claimants succeed in their refugee claims.[103] While these statistical generalizations may be appropriate to draw some distinctions in law, they are not an appropriate basis on which to exclude "core" medical benefits for an entire class.

63. There is no correspondence between the differential treatment and the claimant group's reality. The suggestion in paragraph 97 of the Appellants' memorandum that the 2012 OIC legitimately draws distinctions based on the fact that DCOs are generally developed democracies misapprehends the issue. None of the asserted claims about the alleged condition in countries of origin bear on the Respondents' health needs in Canada.

64. Moreover, the 2012 changes to the IFHP are not in keeping with the overall purpose of the IFHP, which is to provide much needed health benefits to individuals who come to Canada seeking protection. Indeed, this Court in *Toussaint* held that the exclusion of "a particular group in a way that undercuts the overall purpose of the program" would likely be discriminatory as "it amounts to an arbitrary exclusion of a particular group."[104] This is the case even if the program furthers the benefit of the group above others in society.

F. THE SECTION 15(2) FINDINGS MUST BE UPHELD

65. The two-part test for interpreting legislation or programs according to s.15(2) set out in *R v Kapp*[105] must be interpreted in its proper anti-discrimination context: s.15(2) was designed to shield affirmative-action-type programs. Otherwise, any

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[103]Dikranian Cross Examination, Exhibit A, AB 9 2751, Tab 39 1; Dikranian Cross Examination, Exhibit B, AB 9 2758.
[104] *Toussaint FCA, supra* note 23, at para. 107.
[105] *R v Kapp,* [2008] 2 SCR 483 at paras. 41, 54 [*Kapp*].

social benefit program could be interpreted as an ameliorative program and be sheltered from *Charter* scrutiny.

66. At issue in this case is the changes to the IFHP made in 2012, not the concept of the IFHP itself. The revisions were driven by a destructive and exclusionary ideology and were designed to "use the hardship that will be suffered by claimants in Canada as a means to an end in deterring others from coming to Canada".[106] The 2012 changes to the IFHP were explicitly configured to *take away* essential health benefits that were previously available to the Respondents, and are thus properly characterized as restrictive or punitive. Measures designed to "restrict or punish" behaviour, that take away benefits from a disadvantaged group, or do not have a sincere purpose of promoting equality, cannot be seen to be ameliorative and do not qualify for s. 15(2) protection.[107] To decide otherwise would make a mockery of s.15's substantive equality guarantee.

G. THE FEDERAL COURT'S SECTION 1 FINDINGS MUST BE UPHELD

67. Justice Mactavish made no error in her analysis of s.1 of the *Charter*. The underlying premise of many of the Appellants' s.1 arguments is flawed. Once again, the Appellants fail to understand that it is in fact the reduction or elimination of health insurance benefits to refugees and asylum seekers that is at the heart of the constitutional question in this case.[108] Therefore, what must be assessed under s.1 is not the insurance plan itself, but the changes that were made from the previous plan.

No Rational Connection To Objectives

68. The Appellants allege that they 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"

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[106] Judgment, at para.836, speaking of the 2012 changes cutting health insurance benefits for DCO claimants. See also: Goldberg Affidavit, AB 7 2087; Le Bris Affidavit, paras.77-78, AB 10 2792.
[107] *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, [2011] 2 SCR 670, 2011 SCC 37, at para. 53; see also *Kapp, supra* note 105 at paras. 47, 54.
[108] See para.105 of the Appellants' Memorandum

(Memorandum, paragraph 106). This is untrue. The Appellants provided no such evidence and do not point to any in their Memorandum.

69. In particular, the Appellants allege that Justice Mactavish ignored evidence that the pre-2012 IFHP provided "benefits far greater than what Canadians receive under state-funded provincial and territorial health insurance plans". However, no such evidence existed, because the underlying claim is untrue, as admitted by the Appellants' officials.[109] In any event, the Appellant steadfastly refuses to explain why providing refugees and refugee claimants, including children, with health care that is *less generous* than that available to Canadians is "fair" to Canadians.

70. Justice Mactavish also did not err in failing to locate a rational connection between the changes and the protection of public health and safety. It is manifest that when an entire group of asylum seekers (PRRA-only applicants) no longer qualify for even PHPS coverage, public health is put at risk by the changes.

There was No Minimal Impairment and Effect was Disproportionate

71. Justice Mactavish correctly found that the Appellants failed to show that the means chosen to achieve the putatively legitimate aims of the modifications to the IFHP interfered as little as possible with the protected rights. The evidence was clear that simply relying on changes to *Immigration and Refugee Protection Act* (IRPA), e.g. faster processing times at the RPD, restricted access to complementary forms of protection, etc., would have reduced the numbers of IFHP recipients at any given time and achieved the goal of cost containment. The government witnesses admitted as much.[110]

72. Furthermore, Justice Mactavish did not err in assessing *global* cost savings to the government when evaluating the issue of minimal impairment (as alleged in paragraph 113 of the Appellants Memorandum). The ultimate goal of cutting costs in

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[109] Goldberg Affidavit, AB 7 1962; Le Bris Cross Examination, Q.93, AB 10 2987; For instance, **Ontario**: *Ontario Drug Benefits Act, General, O Reg 201,* ss.3.8-10 (Trillium Drug Program) **Quebec**: *An Act respecting Prescription Drug Insurance*, s. 15; *Regulation respecting the Basic Prescription Drug Insurance Plan*, s. 4); **BC**: *Pharmaceutical Services Act*, SBC 2012 c 22 (BC PharmaCare).

[110] Dikranian Cross Examination, p.33, lines 10-17, AB 9 2713; and, p.65, lines 5-6, AB 9 2745.

any government department is to save the taxpayers' money overall. Thus, it was perfectly correct for Justice Mactavish to have looked at cost containment from a global perspective.

73. In terms of deterring alleged abuse of the refugee system, Justice Mactavish was correct in finding that changes to IRPA also addressed this issue. The fact that it is Citizenship and Immigration Canada not the Canada Border Services Agency, that administers the IFHP, as noted in paragraph 114 of the Appellants' Memorandum, was irrelevant.

74. Furthermore, there was no error of fact or law in Justice Mactavish's conclusion that the cuts to the IFHP had a disproportionate effect. In *Sauvé v Canada,* the majority found that denying inmates the right to vote as a means of deterring Canadians from breaking the law was the wrong type of pedagogy.[111] One might assume that denying inmates health care would also not be a *Charter*-compliant deterrence technique. Violating the *Charter* rights of asylum seekers is not a means to deter others, and is grossly disproportionate.

The Proper Evidentiary Standard for Section 1 Evidence Was Used

75. The Appellants argue that Justice Mactavish erred in effectively imposing a standard of scientific proof under s. 1 (see paragraphs 116-118 of their Memorandum). As evidence of this error, they cite Justice Mactavish's suggestion that a scientific study could have been conducted to establish that the reduction of health coverage was rationally connected to the goal of deterring abuse. Properly read in context, her remark simply adverts to the striking and complete absence of any impact analysis research done by the Government prior to changing the policy. However, the comment was immaterial, since she accepted that the Appellants had established a rational connection to this goal in any event.[112] The Appellants cite no other instance where Justice Mactavish required proof on a scientific standard.

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[111] *Sauvé v Canada (Chief Electoral Officer),* [2002] 3 SCR 519, 2002 SCC 68.
[112] Judgment, paragraph 983.

76. Furthermore, for the record, the Appellants entirely misstate the evidence at paragraph 117 and footnote 129 of their Memorandum. Victor Wijenaike never stated (in paragraph 3 of his affidavit or otherwise) that he "remained in Canada" *because* he had been receiving IFHP benefits prior to the changes. He stated that he remained in Canada after his claim was refused based on to changes in country conditions in Sri Lanka, in order to pursue a PRRA and humanitarian application.[113]

77. The changes to the IFHP were not demonstrably justifiable on any basis.

H. RELIEF TO HANIF AYUBI UNDER SECTION 24(1) WAS PROPER

78. Contrary to the Appellants' assertions at paragraph 119 of their Memorandum, Justice Mactavish did not err in granting relief to Respondent Ayubi under section 24(1) of the *Charter*; trial judges have the widest possible discretion under this provision.[114]

THE RESPONDENTS' SUBMISSIONS AS CROSS APPELLANTS ARE AS FOLLOWS:

A. FEDERAL COURT ERRED IN DISMISSING SECTION 7 CLAIM

79. In *Canada v Bedford,* the Supreme Court of Canada clarified that the s.7 analysis "is concerned with capturing inherently bad laws: that is, laws that take away life, liberty, or security of the person in a way that runs afoul of our basic values."[115] The facts of this case support a violation of s.7 guarantees.

Section 7 is Engaged in the Case at Bar and There is a Deprivation

80. Section 7 is engaged in the case at bar because access to health care implicates life and security of the person. There is a deprivation because the government acted intentionally to limit that access. Where the government puts in place a scheme to provide health care, that scheme must comply with the Charter.[116] Justice Mactavish

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[113] Wijenaike Affidavit, para.3, AB 3 696.
[114] *Ardoch, supra* note 23; *R v Bellusci*, [2012] 2 SCR 509, para. 30; *R v Bjelland*, [2009] 2 SCR 651, para. 42. Notably as well, per *New Brunswick (Minister of Health and Community Services) v G. (J.)*, [1999] 2 SCR 46, at para. 51 [*G. (J.)*]: "remedies can be ordered in anticipation of future Charter violations, notwithstanding the retrospective language of s. 24(1)".
[115] *Bedford, supra* note 25, at para.96.
[116] *Chaoulli, supra* note 27 at para. 104.

erred by requiring the *Charter* to confer a freestanding positive right to health care in order for s. 7 to be engaged. This approach is contrary to leading *Charter* case law.

81. The issue in the case at bar is the *withdrawal* of a previously available service caused by the 2012 changes to the IFHP, of the kind that has been found to attract constitutional scrutiny under s.7. For instance, in *Inglis v British Columbia,*[117] the Supreme Court of British Columbia held that the cancellation of a program that allowed provincially incarcerated mothers to maintain contact with their babies in jail engaged s.7. The Court rejected the proposition that the claim required the imposition of a positive right.[118] Instead, focusing on the *effects* of the government's actions, the Court held that the withdrawal of a previously available service caused a deprivation, namely, "the involuntary separation of mothers and newborns caused by the cancellation of the Mother Baby Program".[119] The 2012 changes to the IFHP similarly caused a deprivation: they put the Respondents' health and indeed, their very lives, at risk.[120] As explained in *Canada v PHS Community Services Society ("Insite")*

> Where a law creates a risk to health by preventing access to health care, a deprivation of the right to security of the person is made out... Where the law creates a risk not just to the health but also to the lives of the claimants, the deprivation is even clearer.[121]

82. The case at bar does not involve Canadians who want more health coverage than the government wants to give them. Rather, this case involves a discrete and insular group of individuals who are subject to the special administrative control of the state and are therefore "wholly dependent upon decisions made by various

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[117] *Inglis v British Columbia,* 2013 BCSC 2309 [*Inglis*].

[118] *Inglis, ibid* at para. 394. *Inglis* made clear that the mere fact that the state "might be required to expend some resources does not transform a claim into one alleging a positive obligation". See *Inglis* at para. 393, cited in Judgment at para. 523.

[119] *Inglis, ibid,* at para. 394. The Court supported this finding by relying on evidence showing that "[d]ue to the cancellation of the Mother-Baby Program.... Children of mothers incarcerated at the ACCW have been separated from their mothers", at para.394.

[120] Judgment, at para.297 and para.301.

[121] *Canada v PHS Community Services Society*, [2011] 3 SCR 134, 2011 SCC 44, at para. 93 [*Insite*]. See also: *Rodriguez v British Columbia (AG),* [1993] 3 SCR 519 [*Rodriguez*]. *Bedford, supra* note 25, at paras.74-76, further clarified that to substantiate a s.7 claim, it is not necessary to show that the state action is the *only* cause of the prejudice suffered by the claimant, or event its dominant cause and that the "sufficient causal connection" standard must be context-sensitive and non-speculative.

branches of the Government of Canada".[122] As they are subject to the state's special administrative control, asylum seekers and refugees are, effectively, wholly dependent on government pending the determination of their claim.[123] To deny the Respondents health care is to deprive them of the only reliable or appropriate source of medical care available to them in clear violation of their s.7 right to security of person. It is in view of this highly vulnerable and powerless position that refugees and asylum seekers enjoy a positive right to health care pursuant to Canada's international legal obligations and refugee law norms. Canadians and other non-citizens are not in a similar position, and the s.7 claim in the case at bar must be assessed with these legal obligations in mind.

83. Justice Mactavish's finding of no engagement was based on cases involving vastly different circumstances than those at issue the case at bar. Cases like *Flora v Ontario,*[124] *Wynberg v Ontario,*[125] and *Auton v British Columbia*[126] involved health claims advanced by Canadians who were not subject to the special administrative control of the state, let alone pre-existing international legal obligations around the provision of funded *primary-level* medical care. These cases are distinguishable on that basis alone,[127] as well as on the basis that the case at bar involves a discrete and deliberate decision by government to use the denial of health care coverage for core medical services as leverage for immigration policy.[128]

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[122] Judgment, para.585.

[123] As Justice Mactavish found at paras.678-679 that forcing individuals to rely on the charity of others "is not a reliable or appropriate alternate source of medical care", and none of the government's proposed alternatives to the IFHP are adequate.

[124] *Flora v Ontario (Health Insurance Plan, General Manager),* 2008 ONCA 538 cited at Judgment para.540-549.

[125] *Wynberg v Ontario,* [2006] O.J. No.2732, cited at Judgment paras. 514, 534, 549, 565.

[126] *Auton (Guardian ad litem of) v British Columbia (AG),* [2004] SCR 657 (*Auton*), cited at Judgment paras. 549, 554. Also relied on were health cases of *Sagharian v Ontario (Minister of Education),* 2008 ONCA 411, and *Tanudjaja v Canada (Attorney General),* 2013 ONSC 5410 [*Tanudjaja*], see Judgment para. 564-566.

[127] Justice Mactavish also relied on *Covarrubias, supra* note 66, a PRRA-applicant who was similarly under the special administrative control of the state. However, the *Charter* claim sought to compel the government to create a new right to a minim level of health care under s.97 of IRPA, whereas the current claim concerns cancellation of health coverage under a program responsible for the provision of health.

[128] See eg Judgment, para.605. In addition, characterizing the changes to the IFHP as a "policy choice" also does not insulate them from the ambit of section 7, per *Insite supra* note 121, para 106, 107.

84. Other cases cited by Justice Mactavish focus on economic rights claims involving changes to *levels* of funded services in the areas of housing, welfare or social assistance, which are clearly distinguishable from the case at bar.[129] Firstly, the case at bar does not involve an "economic right". The fact that health care costs money does not transform it into an "economic right" any more than the fact that enabling people to vote costs money turns the franchise into an economic right. Second, this case involves elimination of funding for (and therefore access to) the *most basic and rudimentary* forms of medical care for a highly vulnerable population, not merely an adjustment in "levels" of a government service that can be obtained privately. Limits on access to health care can infringe the right to personal inviolability and cannot be characterized as infringements of an economic right.[130]

85. It was the 2012 changes to the IFHP that give rise to the deprivations at issue, not any actions on the part of the Respondents. The Respondents do not *choose* to come within the special administrative control of the state by seeking Canada's protection in any meaningful sense. For instance, the Court in *Inglis* did not find that it was the mothers' choice to commit a crime that occasioned the deprivation. Nor did the Court in *Bedford* find that it was sex workers' choice of livelihood that deprived them of their s.7 rights.[131] Constrained choice cannot defeat causation for the purposes of the s.7 analysis.[132]

86. In *Toussaint v Canada,* the Federal Court accepted that exclusion from the IFHP engages s.7. This Court affirmed the proposition that exclusion from the IFHP subjects individuals to risk, but found there was no s.7 violation since it was Ms. Toussaint's actions, and not the actions of government, that were the operative cause of the risk. In the case at bar, the facts establish that the government's actions, and

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[129] See eg Judgment para.561 citing *Masse v Ontario (Ministry of Community and Social Services)* (1996), 134 DLR (4th) 20; Judgement para.561 citing *Tanudjaja, supra*; Judgment para.562 citing *Gosselin v Quebec (Attorney General),* 2002 SCC 84 [*Gosselin*].
[130] *Chaoulli, supra* note 27 at paragraph 34, See also *Gosselin supra* note 129 at para 311.
[131] *Bedford, supra* note 25, at paras. 86-87. See also para.68, specifically rejecting the proposition that the "claim in this case is a veiled assertion of a positive right to vocational safety".
[132] *Ibid* at paras. 86-87.

not the conduct of the Respondents, are the operative cause of the risk at issue.[133] There is therefore no reason to depart from the Federal Court's findings that exclusion from the IFHP engages s.7.

87. Justice Mactavish correctly found that the 2012 IFHP coverage reductions have had a "serious impact on the physical health and psychological well-being of numerous individuals".[134] This amounts to deprivation: security of person is violated where the physical integrity of the individual is threatened,[135] or where the impugned state action has "a serious and profound effect on a person's psychological integrity".[136] Justice Mactavish's equally correct finding that the government "deliberately cut access to health insurance coverage" makes it clear that a deprivation of these rights has occurred.[137] On the basis of these findings alone, it is clear that the Respondents' rights to life and security of person are engaged. The impugned claim does not require the existence of a positive freestanding constitutional right to health care.

88. In the case at bar, the Respondents do not seek to enforce a free standing constitutional right to health extending to all individuals. Instead, the Respondents seek to address a deprivation cause by the denial of basic, life saving health coverage for a discrete group of individuals who are subject to the special administrative control of the state. The obligation imposed on government in the case at bar would extend only as far as is necessary to remedy this deprivation as per the Supreme Court's decision in *G (J)*.[138]

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[133] Judgment, at paras.297-301 (finding as a fact that the 2012 changes to the IFHP are causing illness, disability, and risk of death).

[134] Judgment at para.250. See also: Judgment, para.188, para.263, para.266, para.285, para.297, para.299, 1106, For further evidence of psychological distress suffered by individual asylum seekers, including the Respondents, *see:* Ayubi Affidavit, Exhibit A, AB 5 1200-1201; Rodriguez Affidavit, para.20, AB 6 1674; Bradley Affidavit, para.5, AB 2 300-331; Caulford Cross Examination p.62, lines 23-25, AB 5 1401, and, p.63 lines 1-4, AB 5 1402; Mansfield Affidavit, paras.3-7, AB 6 1769-1771; Handa Affidavit, para.6-7, AB 2 471-472; Handa Cross examination, p.23, lines 17-25, AB 2 499, and, p.24, lines 1-24, AB 2 500.

[135] *Morgentaler, supra,* note 69 at 173 (per Wilson J.); *Rodriguez, supra* note 121 at 587-88.

[136] *G. (J.), supra,* note 114 at para.60.

[137] Judgment, para.605.

[138] *G. (J.), supra,* note 114, finding that while s.7 did not provide an "absolute right to state-funded counsel at all hearings", s.7 did impose a "constitutional obligation on governments to provide counsel

The Deprivation is Contrary to the Principles of Fundamental Justice

89. *Bedford v Canada* clarified that the principles of fundamental justice attempt to capture the "basic values underpinning our constitutional order".[139] This includes the principle of gross disproportionality, which aims to catch laws that have an effect that is "so grossly disproportionate to its purposes that they cannot rationally be supported".[140] The gross disproportionality principle does not consider the beneficial effects that might flow from the law for society, but rather, "balances the negative effect on the individual against the purpose of the law".[141]

90. The negative effects of the 2012 changes to the IFHP on the Respondents are profound: the changes are causing illness, disability, and risk of death.[142] The four stated goals of the 2012 changes to the IFHP – i.e. fairness to Canadians, deterring abuse of the refugee system, cost containment, and safeguarding public health and public safety – are grossly disproportionate to these effects. Through the 2012 changes to the IFHP, the federal government has set out to deliberately target Canada's refugee population, and intentionally expose them to illness, disability and death for the express purpose of getting them to leave the country and deterring more from coming.[143] Such government action violates the basic principles underpinning our constitutional order as set out in s.7 of the *Charter*.

91. The Supreme Court held in *Bedford* that the rule against gross disproportionality "only applies in extreme cases where the seriousness of the deprivation is totally out of sync with the objective of the measure."[144] This is one such extreme case. To withhold health coverage from one refugee claimant to deter another from seeking protection in Canada is a particularly egregious instance of

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in those cases when it is necessary to ensure a fair hearing" (at para.107). See also *Dunmore v. Ontario (AG)* [2001] 3 SCR 1016.

[139] *Bedford, supra* note 25, paras. 96, 120, 121.

[140] *Ibid* at para. 120.

[141] *Ibid* at para. 121.

[142] Judgment, at para.297, and para.301

[143] Since health is "a jurisdiction shared by both the province and the federal government" (see: *Reference re Assisted Human Reproduction Act,* [2010] 3 SCR 458, 2010 SCC 61, at para.52), the federal government should not be constitutionally permitted to abdicate responsibility in this manner.

[144] *Bedford, supra* note 25, para.120.

treating a human being instrumentally as merely a means to an end.[145] A lack of fundamental justice has been made out on the facts, and is not cured by the availability of discretionary provision of insured health services in "exceptional circumstances" for the reasons given by Justice Mactavish.[146]

92. The substantive injustice in the present case is exacerbated by the arbitrary and unaccountable process by which the Minister effectuated the cuts: the existing IFHP scheme was revoked without prior notice, consultation or opportunity to comment to the provinces, health professionals, or refugee organizations.[147] The Minister's actions peremptorily and abruptly defeated the legitimate expectations, built up over several decades since 1957, that people in refugee and refugee-like situations accessed public health care via the IFHP. The Minister's action was not subject to any process designed to ensure democratic accountability, such as Parliamentary debate, or even the notice, comment, and regulatory impact assessment available prior to the Governor-in-Council enacting regulations. To the extent that principles of fundamental justice encompass procedural and substantive injustice,[148] this Court may have regard to these procedural defects.

B. ANALOGOUS GROUND UNDER SECTION 15 OF THE CHARTER (CROSS APPEAL):

2012 Changes to the IFHP Draw a Distinction on Grounds of Alienage

93. Applying the s.15 (1) test outlined in *Quebec v A,* cited above, Justice Mactavish erroneously found that the Respondents' immigration status did not constitute an analogous ground under s.15(1) of the *Charter.*[149] This Court should

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[145] It is at least as egregious as the measures applied to vulnerable populations in *Chaoulli, supra* note 27, *Insite, supra* note 121, *Bedford, supra* note 25, *Sfetkopoulos v Canada (AG)* [2008] 3 FCR 399 and *A.C. v. Manitoba (Director of Child and Family Services),* [2009] 2 SCR 181.

[146] Judgment, paras.287-293. The possibility of discretionary relief cannot compensate for the deprivation of a right. See: *Morgentaler, supra* note 69 at 72; *Parker, supra* note 69 at paras. 174-184.

[147] Le Bris Cross Examination, AB 10 2999-3001. There had been a long history of consultation with Provincial stakeholders in the past around the IFHP and health issues generally. Goldberg Affidavit, AB 7 1803-1824, 1825-1880.

[148] *Re BC Motor Vehicle Act,* [1985] 2 SCR 48.

[149] Notably, Justice Mactavish arrived at this conclusion while acknowledging that a distinction exists in law between persons seeking Canada's protection and other persons legally in Canada, and while acknowledging that persons seeking Canada's protection are a disadvantaged group. But see *Jaballah*

reverse Justice Mactavish's findings and recognize the Respondents' immigration status, properly described as "alienage", as an analogous ground.

94. Acknowledging that the case law is "mixed",[150] Justice Mactavish relied on *Lavoie v Canada* to find that this Court's prior rejection of "immigration status" as an analogous ground could not be judicially revisited.[151] This proposition is incorrect. The Supreme Court's findings in *Lavoie* that, once identified, an analogous ground need not be established again in subsequent cases, applies only where an analogous ground has *already* been recognized.[152] Nothing in the jurisprudence precludes future courts from revising prior courts' findings.

95. Moreover, Justice Mactavish's conclusion is contrary to the Supreme Court of Canada's decision in *Andrews v Law Society of British Columbia.*[153] There, the analogous ground, which was described as "citizenship" or "lack of citizenship status", was *expressly* based on the dichotomy between citizens and "aliens".[154] Equality jurisprudence tends to be imprecise in identifying grounds of discrimination: One may identify "ability" as a ground of discrimination, but the class who are disadvantaged tend to be those who are disabled. Citizenship expresses the presence and alienage expressed the absence of the same thing. Accordingly, the ground in *Andrews* is most properly described as "alienage" and is, in fact, the analogous ground in the case at bar, since refugees and asylum seekers are simply one category of "alien" or "non-citizen".

96. To suggest that a person's alienage cannot be an analogous ground under s. 15(1) is therefore inconsistent with the ratio in *Andrews*. Indeed, alienage has been recognized not only in Canada as a prohibited ground of discrimination, but also

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(Re) [2006] 4 FCR 193 at paras. 80-81 where "immigration status" was recognized as an analogous ground.

[150] Judgment, para.856.

[151] Judgment, para.868-698, citing *Lavoie v. Canada*, [2002] 1 S.C.R. 769 at para.2 [*Lavoie*].

[152] *Lavoie, ibid,* at para.2. See also *Quebec v A., supra* note 90, para. 335.

[153] *Andrews, supra* note 93.

[154] *Andrews, supra* note 93 at para 69: "This case concerns the application to aliens of the 'equality' provision of the *Canadian Charter of Rights and Freedoms*, s. 15(1)".

under the United States' Constitution since 1886.[155] As noted in *Andrews*: "Non-citizens are a group of persons who are relatively powerless politically and whose interests are likely to be compromised by legislative decisions".[156] Or, as the United States Supreme Court opined in 1977: "Aliens as a class are a prime example of a 'discrete and insular' minority".[157]

97. "Alienage" satisfies the criteria of historic discrimination and immutability.[158] The Supreme Court recognized in *Andrews* and *Lavoie* that alienage is a condition for marginalization and disadvantage.[159] Refugees and asylum seekers are a particularly vulnerable subset within this historically disadvantaged group.[160] They are generally individuals who have suffered prolonged and sustained marginalization. Their existing disadvantages are exacerbated by the invidious portrayal of them as "bogus" and "fraudulent" which in turn fosters public opinion that they should be regarded with suspicion and disdain.[161]

98. In *Andrews,* the Supreme Court of Canada recognized that citizenship as immutable because it is an immigration status that is "typically not within the control of the individual."[162] Alienage (the absence of citizenship) is immutable to the same extent and in the same way.[163] While the Respondent's status is subject to change, this does not make it immutable. Indeed, "the concept of immutability...is not

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[155] *Yick Wo v Hopkins,* 118 U.S. 356 (1886), at 369.
[156] *Andrews, supra* note 93 at headnote.
[157] Nyquist v. Mauclet, 91 S.Ct. 2120, at 2129.
[158] Per *Corbiere v Canada (Minister of Indian and Northern Affairs*], [1999] 2 SCR 203 at para 13, there are two criteria required for recognizing an analogous ground under s. 15(1).
[159] *Andrews, supra* note 93; *Lavoie, supra* note 151 at paras. 10-11.
[160] Notably as well, the fact that the government's treatment of individuals within the Respondent group varied according to different sub-categories of alienage does not detract from the discrimination they suffer on the basis of that ground. Per *Quebec v A, supra* note 90, not all members of a group have to receive the same treatment for an impugned law to be deemed discriminatory: "heterogeneity within a claimant group does not defeat a claim of discrimination" (at para. 354). See also *Brooks v Canada Safeway Ltd,* [1989] 1 SCR 1219.
[161] Anderson Affidavit, paras.5-7, AB 6 1523-1524. To substantiate a s.15(1) claim, it is not necessary to prove that a distinction perpetuates negative attitudes. As the Federal Court explained "Caution must... be exercised so as to avoid improperly focusing on whether a discriminatory *attitude or conduct* exists, rather than on whether the impugned government action has a discriminatory *impact*", at para.726, relying on *Quebec v A., supra* note 90, at paras. 327-330.
[162] *Andrews, supra* at para. 67.
[163] See *Nyquist v Mauclet,* 432 U.S. 1 (1977), at 18-19. This statement was made by Justice Burger in dissent not on this point.

synonymous with eternity."[164] The immutability analysis must look beyond mere ability to change – it must distinguish between change that is within the control of the individual, and change that is not within said control. The courts have long recognized this in relation to age: the fact that one's age will eventually change does not make one's age any less immutable at a particular point in time. The same applies for alienage: the fact that the litigants in *Andrews* or *Lavoie* were eventually eligible for Canadian citizenship does not detract from the immutability of their status as aliens at the time their s. 15(1) claim was heard.

99. The decisions in *Irshad (Litigation guardian of) v Ontario,*[165] and *Toussaint,*[166] relied on by Justice Mactavish in dismissing immigration status as an analogous ground, strayed from the principles outlined in *Andrews,*[167] and are otherwise distinguishable on their facts.

100. Although alienage is an analogous ground under s.15(1), the fact of the matter is that many of the distinctions that tend to be drawn between citizens and aliens are non-discriminatory. For instance, there would be any number of legitimate reasons to exclude tourists, students, or migrants unlawfully in Canada from social benefit schemes, or to prohibit permanent residents from voting in Federal elections for that matter. As *Lavoie* instructs, the first stage of the s.15(1) analysis is not designed to constrain s.15(1) to cases of genuine discrimination. That is the task of the second stage of the s.15(1) analysis, and it "should not be pre-empted".[168] Similarly, many instances of discrimination on the basis of alienage may demonstrably justifiable, and therefore "saved" by s.1.[169] Just because a successful discrimination claim on the ground of alienage might be relatively rare, this does not mean that there cannot be unusual factual situations that would provide the foundations for such claim. The case at bar presents one such situation.

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[164] *Quebec v A., supra* note 90, at para. 182, per LeBel J. (dissenting on s.15(1)).
[165] *Irshad (Litigation guardian of) v Ontario (Minister of Health)* (2001), 55 O.R. (3d) 43 (*Irshad*).
[166] *Toussaint FCA, supra* note 23.
[167] *Irshad, supra* note 165, para. 136, cited in Judgment para.867.
[168] *Lavoie, supra* note 151 at para. 41.
[169] As Chief Justice McLachlin cautions in *Quebec v A, supra* note 90, "it is important to maintain the analytical distinction between s.15 and s.1", at para. 421.

Alternatively, "Refugee or Asylum-Seeker Status" is the Analogous Ground

101. In the alternative, the analogous ground of discrimination in this case could also be the affected individuals' status as "refugees and asylum seekers" or as Justice Mactavish herself categorized them, "persons lawfully seeking Canada's protection."

102. According to the UNHCR, over 51 million people are now forcibly displaced worldwide, the largest number since World War II, and half of them are children.[170] They are a discrete and insular minority and almost entirely powerless. Like women, children, and racial and religious minorities, they are a population of concern on the world stage and the subject of at least one international Convention.[171] Furthermore, the right to non-discrimination in the ICCPR on the basis of "birth or other status" has been interpreted to extend to refugees and asylum seekers.[172]

103. This is sufficient authority for this Court to consider "refugees and asylum seekers" as constituting a separate analogous ground under s.15(1), rather than simply as a sub-set of the more general category of "aliens".

The 2012 Changes to the IFHP are Discriminatory

104. The 2012 changes to the IFHP establish a hierarchy of moral worthiness,[173] unprecedented in any other area of Canadian law, in which access to health care is not calibrated according to health needs or even ability to pay, but instead according to whether refugees and asylum seekers, as a class, are perceived to *deserve* health care. This amounts to discrimination.[174]

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[170] UN High Commissioner for Refugees (UNHCR), *UNHCR Global Trends 2013: War's Human Cost*, 20 June 2014, p. 2.

[171] *Refugee Convention, supra* note 38, UN General Assembly, *Convention Relating to the Status of Stateless Persons*, 28 September 1954, United Nations, Treaty Series, vol. 360, p. 117

[172] UN Human Rights Committee, *General Comment No. 31 [80], The Nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev/1/Add.13 at para.10. *Karakurt v. Austria,* UNHRC Comm. No. 965/2000, 4 April 2002; Hathaway, *supra* pp.127.

[173] See *Quebec v A, supra* note 90, at para. 197, where LeBel J., dissenting on s.15(1), cautions against "establishing a hierarchy of worth based on a prohibited ground of discrimination".

[174] The 2012 changes to the IFHP also run afoul of the four contextual factors listed in *Law v Canada,* [1999] 1 SCR 497 which continue to be relevant for finding discrimination(*Kapp,*note105 para 24).

105. The 2012 changes to the IFHP send the message that the Respondents' lives are "worth less than the lives of others".[175] It is precisely against this kind of discrimination that s.15(1) was designed to protect. With the 2012 IFHP, the Respondents, already a marginalized group, are further marginalized "from the fabric of Canadian life".[176] The 2012 IFHP "widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it", and thus violates s.15(1).[177]

106. In *Eldridge v. British Columbia (AG)*[178] the Supreme Court found that if a law or program restricts access to a fundamental social institution on a protected ground, it is discriminatory in its effect. Like the patients in *Eldridge,* the Respondents are asking for health care services at the same level as other persons lawfully in Canada in similar economic circumstances without discrimination. As these services are currently not being provided, an s.15(1) breach is made out.[179]

107. The 2012 changes to the IFHP are rooted in perceptions that refugees and asylum seekers are less deserving of health coverage than Canadians or even other lawful aliens. The 2012 IFHP explicitly treats these individuals as undeserving, notwithstanding that "in all relevant respects – sociological, economic, moral, intellectual – [they] deserve tantamount concern and respect".[180] *Auton* instructs that "it is not open to Parliament...to enact a law whose policy objectives and provisions single out a disadvantaged group for inferior treatment."[181] The 2012 changes to the IFHP are discriminatory in their effect and violate s.15(1).

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[175] Judgment, para.688, emphasis added. See also para.586, para.680, para.649-651; paras.678-679, para.681, para.685, and, para.688 finding that the 2012 changes to the IFHP subject the Respondents to demeaning treatment, and physical or psychological harm.
[176] *Lavoie, supra* note 151 at para.1
[177] *Quebec v A, supra* note 90, at para.332
[178] *Eldridge, supra* note 95.
[179] In the recent case of Finch v. The Commonwealth of Massachusetts 959 NE 2d 970 (2012) the Supreme Judicial Court of Massachusetts ruled that a scheme to exclude certain lawful residents from the state's public health insurance plan constituted impermissible discrimination on the basis of alienage and national origin. See also Aliessa v. Novello 96 N.Y.2d 418 (2001).
[180] *Lavoie, supra* note 151 at para 44.
[181] *Auton, supra* note 126 at para. 41.

C. SECTION 1 (CROSS APPEAL)

108. The s.7 and s.15 violations are not saved by s.1 for the reasons outlined earlier and those provided by Justice Mactavish.

CHILDRENS' ARGUMENTS (APPEAL AND CROSS APPEAL)

109. The legal rights and health care needs of children ought to be considered separately from those of adults. Children are a highly vulnerable group, lacking in political power, access to resources, decision-making power within the family, and are also disadvantaged in that it is easy to overlook their interests. Child refugees or child refugee claimants are further disadvantaged in that they generally have no choice in re-location decisions. The recognition of the inherent vulnerability of children and their dependence on adults to provide for their care already exists in Canadian legislation.[182]

110. A foundational knowledge of the special health needs of children is required to be able to address the legal rights of children in the healthcare context. The evidence on record, including the United Nations Committee on the Rights of Children (UN Committee),[183] affidavits from medical professionals Dr. Denis Daneman[184] and Dr. Anneke Rummens,[185] as well as Government of Canada reports,[186] outlines the different developmental needs of children. This evidence

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[182]Child welfare legislation in every Canadian jurisdiction recognizes the shared responsibility to protect children from harm; the preamble of the *Youth Criminal Justice Act*, S.C. 2002, c.1 recognizes the shared societal responsibility to address the developmental challenges and needs of young persons, and that Canada is a party to the United Nations *Convention on the Rights of the Child*; and all Canadian courts have an inherent parents patriae jurisdiction.

[183] UN Committee on the Rights of the Child, *General Comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24)*, 17 April 2013, CRC/C/GC/15 [*UNCRC General Comment No. 15*]. Paragraph 2 includes the right of children to grow and develop to their full potential and para 20 includes that it is necessary to protect children at every stage of their development since the stages are cumulative and each stage has an impact on subsequent phases, influencing the children's health, potential, risks and opportunities.

[184] Daneman Affidavit, para.9, AB 6 1558-1559.

[185] Rummens Affidavit, paras.5-7, AB 5 1264-1265; preliminary findings of study showed that uninsured children are more likely to access pediatric emergency care for bodily injury and trauma, mental health crisis, and chronic health problems compared to children with IFHP coverage, and as such children were more highly represented at more serious triage levels than children with IFHP coverage.

[186]See: A Canada Fit for Children, Canada's plan of action in response to the May 2002 United Nations Special Session on Children, (Ottawa: Her Majesty the Queen in Right of Canada, 2004). Referred to in: Government of Canada, "Convention on the Rights of the Child, Third and Fourth

identifies a child's right to health as an inclusive right – extending to the right to grow up and develop to one's full potential – and also identifies the different healthcare needs of children, particularly refugee and refugee claimant children, as well as uninsured children. Justice Mactavish accepted at the Application level that the IFHP 2012 cuts affects children's health differently than that of adults.[187] She further found that lack of access to health care may also affect children's ability to access social services and schools.[188] The Appellants have failed to address the nature of coverage provided to children.[189]

111. Children are being denied healthcare for a variety of reasons because of the IFHP 2012, including a reduction in coverage,[190] delays in issuing eligibility certificates,[191] and denial of healthcare treatment due to confusion over changes to IFHP coverage.[192] The examples on record demonstrate that harm has been realized and are not based solely on hypothetical situations. These denials fail to address the potential lifetime harm imposed on vulnerable and marginalized children who can not affect their own status and imposes punishment on innocent children for the actions of their parents; contrary to the values of Canadian society.[193]

Reports of Canada, Covering the period January 1998 – December 2007", submitted to the UN Committee on the Rights of the Child on November 20, 2009, Appendix 5, page 187; highlights the goal of children to be healthy and acknowledges that migrant children are more likely to suffer the associated risks of poverty (paras 19, 20, 59). Also see: Citizenship and Immigration Canada Resettlement Assistance Unit, "A National Approach to Meeting the Needs of GAR Children and Youth within the Resettlement Assistance Program, June 30, 2007, page 76; points to the need for special attention to the health concerns of GAR children, given any trauma they may have experienced or health issues endemic in their source country.

[187] *See* Judgment, para.353.

[188] Ibid.

[189] Fortin Affidavit, AB 11 3047: Appellants were unable to provide a breakdown of IFHP beneficiaries by adult and child population. Fortin Cross-Examination, p.45-46, AB 12 3436-3437: There is no differentiation, exception, or consideration that was made based on age.

[190] Bradley Affidavit, para.7, AB 2 331-332 and Bradley Cross-Examination, line 11, p.42, AB 2 401, and, line 14, p.50, AB 2 409; Rashid Affidavit, para.51(s), AB 4 793; and Rashid Cross-Examination, line 1 page 148, AB 4 1138, to line 8, page 15, AB 4 1105; Rashid Affidavit, para.52(g), AB 4 794.

[191] Rashid Affidavit, para.51(c), AB 4 790; and Rashid Cross-Examination, p.114-115, AB 4 1104-1105; Rashid Affidavit, para.51(e), AB 4 790; and, Rashid Cross-Examination, p.123-125, AB 4 1113-1115; Rashid Affidavit, para.51(j) AB 4 791; and, Rashid Cross-Examination, p.137-139, AB 4 1127-1129.

[192] Caulford Affidavit para.20, AB 5 1333; Caulford Cross-Examination pp138-140, AB 5 1477-1479.

[193] *Plyer v Doe* 457 U.S. 202 (1982), as reference by Mactavish J. in Judgment para. 664-669.

A. FEDERAL COURT CHARTER FINDINGS REGARDING CHILDREN SHOULD BE UPHELD (APPEAL):

112. Justice Mactavish's findings on ss.12, 15 and 1 of the *Charter* regarding children should be upheld.

113. In terms of s.12 of the *Charter*, the IFHP 2012, in as much as it cancels, diminishes or denies basic and life-sustaining health care coverage for refugee applicants and privately sponsored refugees who are children, is particularly cruel and unusual.

114. In terms of s.15 of the *Charter*, children are under a distinct disadvantage, in that they generally have no choice in where they live, are excluded and marginalized, and are prevented from receiving a benefit by conditions not created by the child him or herself.[194] If they are also DCO claimants, the situation is exacerbated.

115. On the issue of s.1 of the *Charter*, it is to be noted: 1) that Canada is one of the wealthiest countries and it has appropriate resources to ensure that children who are legally within its borders are able to attain a level of healthcare that meets their best interests; 2) the discretion available in section 7 of the OIC does not effectively protect children in these circumstances; [195] and, 3) the goal of preventing abuse by "bogus" refugee claimants and deterrence cannot apply to children who generally have no say in their circumstances and where they live.

B. CROSS APPEAL ON SECTIONS 7 AND 15

116. The best interests of the child is an accepted legal principle in Canadian law and must be applied in assessing the validity of the 2012 IFHP.[196] This principle recognizes that children are deserving of heightened protection because of their

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[194] *Granovsky v Canada (Minister of Employment and Immigration)*, 2000 SCC 28, [2000] 1 S.C.R. 703, para 30.

[195] It is an uncertain process, access is dependent on knowledge and access to resources to assist the child, will result in treatment delays, and does not provide adequate access to all the medications a child may require. (Judgment paras 287-294)

[196] *Canadian Foundation for Children, Youth and the Law v Canada (AG)*, [2004] 1 SCR 76, 2004 SCC at para 9; *R v Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45, para 170 [*Sharpe*].

inherent vulnerability.[197] The "best interests of the child" is the *only* primary consideration in the United Nation's *Convention on the Rights of the Child ("Children's Convention")*, which Canada has ratified. [198] There is a positive duty on the state to act on behalf of a child, as well as refrain from taking actions that may harm a child.

117. The UN Committee has provided extensive guidance on how the best interest principle is to be applied[199] and states that the child's right to health (Article 24 of the Convention) and his or her condition *are central* in assessing the child's best interest.[200] State parties are obliged to (i) ensure that the best interests of the child are appropriately integrated and consistently applied in every action taken by a public institution, and (ii) ensure that all judicial and administrative decisions as well as policies and legislation concerning children demonstrate that the best interests of the child, or particular group of children, have been a primary consideration.[201] Further, within the parameters that give full effect to the best interests of the child, short, medium, and long-term effects of actions related to the development of the child over time must be borne in mind.[202]

118. The Appellants have failed to consider and take measures in the best interests of the child in terminating previous levels of healthcare coverage to refugee claimants and privately sponsored refugees who are children legally within the jurisdiction of Canada. There is no evidence that a full and proper assessment of the special circumstances of child refugees and their unique health care needs was undertaken prior to implementing the IFHP 2012.[203] This includes the failure to address the best interests of the child as it relates to the daycare and school context, in that children who

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[197] *Sharpe, ibid,* para 170; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, para 67 and 70 [*Baker*].
[198] UN General Assembly, *Convention on the Rights of the Child,* 20 November 1989, 3 U.N.T.S. 1577, Can T.S. 1992/3 No. 3 Article 3(1) [*Children's Convention*].
[199] UN Committee on the Rights of the Child, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, 29 May 2013, CRC/C/GC/14.
[200] *Ibid*, para 77.
[201] *Ibid*, para 14 and 32.
[202] *Ibid*, para 16.
[203] Fortin Cross-examination, Q 150, pp. 45-46. AB 12 3436-3437.

have been reduced to a lower level of healthcare coverage will be unable to obtain healthcare for common illnesses (such as conjunctivitis, head lice, scabies, and diarrhea) are not covered by PHPS coverage.[204] The affected children could be excluded from school, possibly ostracized or blamed for not getting treatment, and may end up infecting other children.

C. CONTRAVENTION OF THE CHILDREN'S CONVENTION

119. Canadian laws must be interpreted to comply with Canada's international treaty obligations.[205] Children's rights, and attention to their interests, are central humanitarian and compassionate values in Canadian society.[206] Canada played an instrumental role in drafting and promoting the *Children's Convention* and ratified it in 1991. Canadian courts accept that the values articulated in international human rights law inform the context in which the *Charter* must be read.[207]

120. The *Children's Convention* is essential for the interpretation of the rights of children under the *Charter,* as the *Charter* does not otherwise directly address their rights as a group who need special consideration and protection. The *Children's Convention* provides that, "State Parties shall respect and ensure the rights set forth in the present *Convention* to each child *within their jurisdiction without discrimination* of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status." [208] The *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified.[209]

121. The *Children's Convention* requires Canada to act in the best interests of the child and codifies a State's obligation to ensure to the maximum extent possible, the survival and development of the child, this includes providing necessary medical

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[204] Bradley Affidavit, para.10-11, AB 2 333-334. Bradley Cross-Examination Q.222, AB 2 433-434; Q.235, AB 2 437; and, Q.248, AB 2 446-447.
[205] *Canadian Foundation, supra* at para. 32.
[206] *Baker, supra* at para 67.
[207] *Baker, ibid,* paras. 70-71; *Canadian Foundation, supra* at para. 31; *Sharpe, supra* at para 171.
[208] *Children's Convention, supra,* Article 2(1) [emphasis added].
[209] *Health Services, supra.*

assistance and health care, with an emphasis on the development of primary health care.[210] The UN Committee has stated that the child's right to health and his or her condition *are central* in assessing the child's best interest,[211] children are entitled to quality health services, and barriers to children's access to such care must be identified and eliminated.

122. Canada has reaffirmed to the Canadian Senate Standing Committee on Human Rights and the UN Committee that it "is maintaining its commitment to the *Children's Convention* and to the obligations it contains."[212] However, in implementing the IFHP 2012, Canada has failed to live up to this commitment. Canada has also contradicted its claim that, "Refugee children, separated children who are determined not to be in need of protection, but remain in Canada, as well as unaccompanied children seeking refugee protection are entitled to essential health services through the (IFHP)."[213]

PART IV: ORDER SOUGHT

123. The Respondents/Cross-Appellants seek an order dismissing the Appeal and allowing the cross-appeal, no order as to costs and such further and other relief as counsel may advise and this Honourable Court may allow.

All of which is respectfully submitted at the City of Toronto this 5th day of February 2015.

LORNE WALDMAN

MAUREEN SILCOFF

EMILY CHAN

[210] *Children's Convention, supra* note 198, Articles 6(2), 24(1) and 24(2).
[211] *UNCRC General Comment No. 15, supra* note 183 at para 77 and paras 25, 29 and 30.
[212] Government of Canada Response to: Standing Senate Committee on Human Rights, *Children: the Silenced Citizens, Effective Implementation of Canada's International Obligations with Respect to the Rights of Children* (Ottawa: Senate of Canada, 2007). Contained in Government of Canada, "Convention on the Rights of the Child, Third and Fourth Reports of Canada, Covering the period January 1998 – December 2007", submitted to the UN Committee on the Rights of the Child on November 20, 2009, Appendix 5.
[213] Government of Canada, "Convention on the Rights of the Child, Third and Fourth Reports of Canada, Covering the period January 1998 – December 2007", submitted to the UN Committee on the Rights of the Child on November 20, 2009, para 103.

PART V: LIST OF AUTHORITIES

A. Statutes and Regulations

General RRO 1990, *Regulation 552 (Health Insurance Act)*
Regulation respecting the Basic Prescription Drug Insurance Plan

B. Jurisprudence

Judgment and Reasons of Justice Mactavish, July 4, 2014
Ardoch Algonquin First Nation v Canada, 2003 FCA 473
Toussaint v Canada, 2011 FCA 213
Jodhan v Canada, 2012 FCA 161
Pillette v Canada 2009 FCA 367
Canada v RBC Life Insurance 2013 FCA 50
Hokhold v. Canada, 2013 FCA 86
Hafizy v Canada 2014 FCA 109
Waxman v Waxman (2004), 186 OAC 201
Canada v Bedford, [2013] 3 SCR 1101, 2013 SCC 72
Toussaint v AG Canada 2010 FCJ 987
Chaoulli v. Quebec, 2005 1 SCR 791
Vriend v Alberta, [1998] 1 SCR 493
Graat v R, [1982] 2 SCR 819
Dix v Canada (Attorney General of), 2001 ABQB 901 (CanLII)
Catholic Children's Aid Society of Metropolitan Toronto v S. (J.), 62 OR (2d) 702
R v Scheel, (1978), 3 S.C.R. (3d) 359 (Ont. C.A.)
Danson v Ontario, [1990] 2 S.C.R. 1086
Health Services and Support-Facilities Subsector Bargaining Assn. v British Columbia, 2007
R v Smith, [1987] 1 S.C.R. 1045
Covarrubias v Canada (Minister of Citizenship and Immigration), 2006 FCA 365
R v Morgentaler, [1998] 1 SCR 30
R v Parker, [2000] OJ No 2787
Canada (Minister of Employment and Immigration) v Chiarelli, [1992] 1 SCR 711
Lord v Canada, 2001 FCT 397
Canadian Foundation for Children, Youth and the Law v Canada (AG), [2004] 1 SCR 76, 2004 SCC 4
Carlston v New Brunswick, 99 N.B.R. (2d) 41
R v CIP Inc, [1992] 1 SCR 843
R v Wiles, 2004 NSCA 3
R v Mills, [1999] 3 SCR 668
R v Nur, 2013 ONCA 677
Reference re Same-Sex Marriage, [2004] 3 SCR 698, 2004 SCC 79
Quebec (Attorney General) v. A., [2013] 1 SCR 61
Andrews v Law Society of British Columbia, [1989] 1 SCR 143
Jaballah (Re) [2006] 4 FCR 193
Eldridge v. British Columbia (AG), 1997 3 SCR 624
Nova Scotia (Workers' Compensation Board) v Martin, [2003] 2 SCR 504.

Lovelace v Ontario, [2000] 1 SCR 950, 2000 SCC 37
R v Kapp, [2008] 2 SCR 483
Alberta (Aboriginal Affairs and Northern Development) v Cunningham, [2011] 2 SCR 670, 2011 SCC 37
Sauvé v Canada (Chief Electoral Officer), [2002] 3 SCR 519, 2002 SCC 68
R v Bellusci, [2012] 2 SCR 509
R v Bjelland, [2009] 2 SCR 651
New Brunswick (Minister of Health and Community Services) v G. (J.), [1999] 2 SCR 46
Inglis v British Columbia, 2013 BCSC 2309
Canada v PHS Community Services Society, [2011] 3 SCR 134, 2011 SCC 44
Rodriguez v British Columbia (AG), [1993] 3 SCR 519
Flora v Ontario (Health Insurance Plan, General Manager), 2008 ONCA 538
Wynberg v Ontario, [2006] O.J. No.2732
Auton (Guardian ad litem of) v British Columbia (AG), [2004] SCR 657
Sagharian v Ontario (Minister of Education), 2008 ONCA 411
Tanudjaja v Canada (Attorney General), 2013 ONSC 5410
Gosselin v Quebec (Attorney General), 2002 SCC 84
Reference re Assisted Human Reproduction Act, [2010] 3 SCR 458, 2010 SCC 61
Sfetkopoulos v Canada (AG) [2008] 3 FCR 399
A.C. v. Manitoba (Director of Child and Family Services), [2009] 2 SCR 181
Lavoie v. Canada, [2002] 1 SCR. 769
Brooks v Canada Safeway Ltd, [1989] 1 SCR 1219
Irshad (Litigation guardian of) v Ontario (Minister of Health) (2001), 55 OR (3d) 43
Dunmore v. Ontario (AG) [2001] 3 SCR 1016
Law v Canada, [1999] 1 SCR 497
R v Sharpe, 2001 SCC 2, [2001] 1 SCR 45
Baker v Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817

C. Legislation

Legislation

Ontario Drug Benefits Act, General, O Reg 201, ss.3.8-10
An Act respecting Prescription Drug Insurance
Pharmaceutical Services Act, SBC 2012 c 22 (BC PharmaCare).
Canadian Charter of Rights and Freedoms, The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11

D. International and Foreign Sources

International instruments

UN General Assembly, *Convention Relating to the Status of Refugees,* 28 July 1951
UN General Assembly, *International Covenant on Economic, Social and Cultural Rights,* 16 December 1966
UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant),* 11 August 2000, E/C.12/2000/4
EC, *Directive 2013/33/EU of the European Parliament and of the Council of 26 June*

2013 laying down standards for the reception of applicants for international protection (recast), [2013] OJ, L 180/96
UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966
UN Human Rights Committee, *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, 11 April 1986
UN General Assembly, *Convention Relating to the Status of Stateless Persons*, 28 September 1954
UN Human Rights Committee, *General Comment No. 31 [80], The Nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev/1/Add.13
UN Committee on the Rights of the Child, *General Comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24)*, 17 April 2013, CRC/C/GC/15 [*UNCRC General Comment No. 15*]
UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, 3 U.N.T.S. 1577, Can T.S. 1992/3 No. 3
UN Committee on the Rights of the Child, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, 29 May 2013, CRC/C/GC/14.

International and foreign jurisprudence

Trop v Dulles 78 S.Ct. 590
Estelle v Gamble 97 S.Ct. 285
Bowring v Godwin 551 F.2d 44
Helling v McKinney 113 S.Ct. 2475
International Federation of Human Rights Leagues (FIDH) v. France COMPLAINT No. 14/2003
D v UK [1997] 24 EHRR 423
R v Secretary of State for the Home Department, ex parte Adam et al, [2005] UKHL 66, (2006) 1 AC 396
Bitiyeva v Russia, Case Nos. 57953/00 & 37392/03 para.107 (ECtHR. June 21, 2007).
Yick Wo v Hopkins, 118 U.S. 356 (1886)
Nyquist v Mauclet, 91 S.Ct. 2120
Nyquist v Mauclet, 432 U.S. 1 (1977)
Finch v. The Commonwealth of Massachusetts 959 NE 2d 970 (2012)
Aliessa v. Novello 96 N.Y.2d 418 (2001)
Karakurt v. Austria, UNHRC Comm. No. 965/2000
Plyer v Doe 457 U.S. 202 (1982)
Granovsky v Canada (Minister of Employment and Immigration), 2000 SCC 28, [2000] 1 S.C.R. 703

E. Other Secondary Sources

UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV.3
Sopinka, *The Law of Evidence in Canada*, 2nd ed. (Toronto: LexisNexis Canada,

1999)
James C. Hathaway, *The Rights of Refugees under International Law*, (Cambridge: Cambridge University Press, 2005)
UNHCR, *Conclusion on the return of persons found not to be in need of international protection*, 10 October 2003, No. 96 (LIV) – 2003.
UNHCR, *Handbook for Emergencies*, 3d ed, February 2007
UNHCR Manual on Refugee Protection and the European Convention on Human Rights (April 2003, updated August 2006), August 2006.
Amnesty International "Human Rights Here - Roma Rights Now, April 2013
US Department of State *Country Reports for 2012*, Hungary; "Patterns of Prejudice, The Exclusion of Roma Refugee Claimants in Canadian Refugee Policy
A Canada Fit for Children, Canada's plan of action in response to the May 2002 United Nations Special Session on Children, (Ottawa: Her Majesty the Queen in Right of Canada, 2004)
Citizenship and Immigration Canada Resettlement Assistance Unit, "A National Approach to Meeting the Needs of GAR Children and Youth within the Resettlement Assistance Program, June 30, 2007
Government of Canada Response to: Standing Senate Committee on Human Rights, *Children: the Silenced Citizens, Effective Implementation of Canada's International Obligations with Respect to the Rights of Children* (Ottawa: Senate of Canada, 2007)
Government of Canada, "Convention on the Rights of the Child, Third and Fourth Reports of Canada, Covering the period January 1998 – December 2007

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