Federal Court of Appeal Cour d'appel fédérale

Date: 20181010

Docket: A-169-17

Citation: 2018 FCA 181

CORAM: **PELLETIER J.A.**
GAUTHIER J.A.
DE MONTIGNY J.A.

BETWEEN:

SAJU BEGUM

Appellant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

and

ONTARIO COUNCIL OF AGENCIES SERVING IMMIGRANTS and SOUTH ASIAN LEGAL CLINIC OF ONTARIO

Interveners

Heard at Toronto, Ontario, on May 10, 2018.

Judgment delivered at Ottawa, Ontario, on October 10, 2018.

REASONS FOR JUDGMENT BY:	DE MONTIGNY J.A.
CONCURRED IN BY:	PELLETIER J.A. GAUTHIER J.A.

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] Saju Begum appeals from a decision rendered by Justice Russell of the Federal Court dated April 26, 2017 (2017 FC 409). The Federal Court dismissed the appellant's application for judicial review of a decision of the Immigration Appeal Division of the Immigration and Refugee Board of Canada (the IAD) dated July 7, 2016, by which it dismissed the appellant's appeal of an immigration officer's decision denying her request to sponsor her father, mother and five siblings for permanent residency in Canada.

[2] The Federal Court has certified the three following serious questions of general importance:

a) Given that s. 133(1)(j) and s. 134 of the *Immigration and Refugee Protection Regulations (IRPR)* were amended and came into force on January 2, 2014, should the Immigration Appeal Division (IAD) have retroactively applied the amended version of these regulations to a case where the applicant's Notice of Appeal to the IAD was filed before the amended version of the regulations came into force?

b) Does paragraph 133(1)(j) of the *Immigration and Refugee Protection Regulations* violate section 15 of the *Canadian Charter [of] Rights and Freedoms* (the "*Charter*")?

c) Does paragraph 133(1)(j) of the *Immigration and Refugee Protection Regulations* violate section 7 of the *Charter*?

[3] For the following reasons, I would dismiss the appeal without costs.

I. Factual context

[4] The appellant is a Canadian citizen born in Bangladesh. She moved to Canada in 1994 and was sponsored by her husband. In 1999, she acquired Canadian citizenship. She and her husband had five children, all under the age of 18 at the time of the application before the

Federal Court. The appellant's husband is a taxi driver and the sole source of income for the family.

[5] In 1996, the appellant's husband sponsored his father, mother and his four dependent siblings for permanent residence in Canada. In 2004, the appellant and her family visited her parents and siblings in Bangladesh. Two years after that visit, the appellant was diagnosed with "adjustment disorder with mixed anxiety and depressed features, mild in severity". The appellant explained that her symptoms of depression began following her visit to Bangladesh and were due to the lack of social support and the separation from her family she felt upon her return. In 2012, she was diagnosed with depression by her family physician and she was prescribed psychotropic medication, which she no longer takes. In 2015, the appellant was assessed by a psychologist for the purpose of the hearing before the IAD. She was diagnosed with a severe level of depression, a severe level of post-trauma distress and the likely presence of Posttraumatic Stress Disorder, purportedly due to her long-term separation from her parents and siblings, her lack of social support, as her husband works a great deal, and the fact that she had no other family in Canada.

[6] In 2008, the appellant submitted an application to sponsor her parents and five siblings. Her husband initially co-signed the application, but was then removed as co-signer because he failed to meet sponsorship requirements. His father and some siblings had received social assistance benefits during the sponsorship, which had not been repaid. Moreover, during his sponsorship of the appellant, the appellant's husband and the appellant both received Ontario Works payments.

[7] Under the relevant provisions of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the IRPA) and the *Immigration and Refugee Protection Regulations*, S.O.R./2002-227 (the IRPR), the appellant had to demonstrate that she could support 14 people. A visa officer refused the application on September 19, 2011, on the basis that the appellant did not meet the minimum necessary income (MNI) requirement under the governing regulations.

[8] Before turning to the decisions of the IAD and the Federal Court, a quick overview of the legislative framework is in order.

II. Legislative framework

[9] Section 12(1) of the IRPA provides for the selection of permanent residents on the basis of family reunification:

Family reunification	**Regroupement familial**
12 (1) A foreign national may be selected as a member of the family class on the basis of their relationship as the spouse, common-law partner, child, parent or other prescribed family member of a Canadian citizen or permanent resident.	**12 (1)** La sélection des étrangers de la catégorie « regroupement familial » se fait en fonction de la relation qu’ils ont avec un citoyen canadien ou un résident permanent, à titre d’époux, de conjoint de fait, d’enfant ou de père ou mère ou à titre d’autre membre de la famille prévu par règlement.
…	[…]

[10] However, section 120 of the IRPR requires that a sponsorship be provided for a request for permanent residence to proceed on the basis of family reunification:

Approved sponsorship application	**Parrainage**
120 For the purposes of Part 5,	**120** Pour l’application de la partie 5, l’engagement de parrainage doit être valide à l’égard de l’étranger qui

	présente une demande au titre de la catégorie du regroupement familial et à l'égard des membres de sa famille qui l'accompagnent, à la fois :
(a) a permanent resident visa shall not be issued to a foreign national who makes an application as a member of the family class or to their accompanying family members unless a sponsorship undertaking in respect of the foreign national and those family members is in effect; and	**a)** au moment où le visa est délivré;
(b) a foreign national who makes an application as a member of the family class and their accompanying family members shall not become permanent residents unless a sponsorship undertaking in respect of the foreign national and those family members is in effect and the sponsor who gave that undertaking still meets the requirements of section 133 and, if applicable, section 137.	**b)** au moment où l'étranger et les membres de sa famille qui l'accompagnent deviennent résidents permanents, à condition que le répondant qui s'est engagé satisfasse toujours aux exigences de l'article 133 et, le cas échéant, de l'article 137.

[11] Details are provided in sections 130 to 134 of the IRPR. Section 130 set outs the criteria to become a sponsor:

Sponsor	**Qualité de répondant**
130 (1) Subject to subsections (2) and (3), a sponsor, for the purpose of sponsoring a foreign national who makes an application for a permanent resident visa as a member of the family class or an application to remain in Canada as a member of the spouse or common-law partner in Canada class under subsection 13(1) of the Act, must be a Canadian citizen or permanent resident who	**130 (1)** Sous réserve des paragraphes (2) et (3), a qualité de répondant pour le parrainage d'un étranger qui présente une demande de visa de résident permanent au titre de la catégorie du regroupement familial ou une demande de séjour au Canada au titre de la catégorie des époux ou conjoints de fait au Canada aux termes du paragraphe 13(1) de la Loi, le citoyen canadien ou résident permanent qui, à la fois :
(a) is at least 18 years of age;	**a)** est âgé d'au moins dix-huit ans;
(b) resides in Canada; and	**b)** réside au Canada;

(c) has filed a sponsorship application in respect of a member of the family class or the spouse or common-law partner in Canada class in accordance with section 10.	**c)** a déposé une demande de parrainage pour le compte d'une personne appartenant à la catégorie du regroupement familial ou à celle des époux ou conjoints de fait au Canada conformément à l'article 10.
…	[…]

[12] Section 131 of the IRPR provides that an undertaking from the sponsor be given to the Minister of Citizenship and Immigration. This undertaking obliges the sponsor, pursuant to section 132, to reimburse the government of the province concerned in the event that the sponsored foreign national receives benefits from social assistance programmes during the period set out in subsection 132(1). The duration of that undertaking is defined in subsection 132(2) and is based on criteria such as the relationship between the sponsor and the sponsored foreign national, the age of the sponsored foreign national and the status of the foreign national in Canada. Section 133 of the IRPR sets out the requirements for sponsors. Among these requirements is the MNI requirement, set out at paragraph 133(1)(*j*) of the IRPR. Below is the text as amended and in effect as of January 1, 2014:

Requirements for sponsor	**Exigences : répondant**
133 (1) A sponsorship application shall only be approved by an officer if, on the day on which the application was filed and from that day until the day a decision is made with respect to the application, there is evidence that the sponsor	**133 (1)** L'agent n'accorde la demande de parrainage que sur preuve que, de la date du dépôt de la demande jusqu'à celle de la décision, le répondant, à la fois :
…	[…]
(j) if the sponsor resides	**j)** dans le cas où il réside :
(i) in a province other than a province referred to in paragraph 131(b),	**(i)** dans une province autre qu'une province visée à l'alinéa 131b) :
(A) has a total income that is at least equal to the minimum necessary	**(A)** a un revenu total au moins égal à son revenu vital minimum, s'il a

income, if the sponsorship application was filed in respect of a foreign national other than a foreign national referred to in clause (B), or	déposé une demande de parrainage à l'égard d'un étranger autre que l'un des étrangers visés à la division (B),
(B) has a total income that is at least equal to the minimum necessary income, plus 30%, for each of the three consecutive taxation years immediately preceding the date of filing of the sponsorship application, if the sponsorship application was filed in respect of a foreign national who is	**(B)** a un revenu total au moins égal à son revenu vital minimum, majoré de 30 %, pour chacune des trois années d'imposition consécutives précédant la date de dépôt de la demande de parrainage, s'il a déposé une demande de parrainage à l'égard de l'un des étrangers suivants :
(I) the sponsor's mother or father,	**(I)** l'un de ses parents,
(II) the mother or father of the sponsor's mother or father, or	**(II)** le parent de l'un ou l'autre de ses parents,
(III) an accompanying family member of the foreign national described in subclause (I) or (II) …	**(III)** un membre de la famille qui accompagne l'étranger visé aux subdivisions (I) ou (II),
…	[…]

[13] However, at the time the appellant filed her appeal of the refusal to grant her application for sponsorship to the IAD, on September 30, 2011, another version of the MNI was in effect (it was in effect until 31 December 2013) (pre-2014 MNI):

Requirements for sponsor	**Exigences : répondant**
133. (1) A sponsorship application shall only be approved by an officer if, on the day on which the application was filed and from that day until the day a decision is made with respect to the application, there is evidence that the sponsor	**133. (1)** L'agent n'accorde la demande de parrainage que sur preuve que, de la date du dépôt de la demande jusqu'à celle de la décision, le répondant, à la fois :
…	[…]
(j) if the sponsor resides	**j)** dans le cas où il réside :

(i) in a province other than a province referred to in paragraph 131(b), has a total income that is at least equal to the minimum necessary income…	**(i)** dans une province autre qu'une province visée à l'alinéa 131b), a eu un revenu total au moins égal à son revenu vital minimum […]
…	[…]

[14] The MNI is defined at section 2 of the IRPR:

minimum necessary income means the amount identified, in the most recent edition of the publication concerning low income cut-offs that is published annually by Statistics Canada under the *Statistics Act*, for urban areas of residence of 500,000 persons or more as the minimum amount of before-tax annual income necessary to support a group of persons equal in number to the total number of the following persons:	***revenu vital minimum*** Le montant du revenu minimal nécessaire, dans les régions urbaines de 500 000 habitants et plus, selon la version la plus récente de la grille des seuils de faible revenu avant impôt, publiée annuellement par Statistique Canada au titre de la *Loi sur la statistique*, pour subvenir pendant un an aux besoins d'un groupe constitué dont le nombre correspond à celui de l'ensemble des personnes suivantes :
(a) a sponsor and their family members,	**a)** le répondant et les membres de sa famille;
(b) the sponsored foreign national, and their family members, whether they are accompanying the foreign national or not, and	**b)** l'étranger parrainé et, qu'ils l'accompagnent ou non, les membres de sa famille;
(c) every other person, and their family members,	**c)** toute autre personne — et les membres de sa famille — visée par :
(i) in respect of whom the sponsor has given or co-signed an undertaking that is still in effect, and	**(i)** un autre engagement en cours de validité que le répondant a pris ou cosigné,
(ii) in respect of whom the sponsor's spouse or common-law partner has given or co-signed an undertaking that is still in effect, if the sponsor's spouse or common-law partner has co-signed with the sponsor the undertaking in respect of the foreign national referred to in paragraph (b). (*revenu vital minimum*)	**(ii)** un autre engagement en cours de validité que l'époux ou le conjoint de fait du répondant a pris ou cosigné, si l'époux ou le conjoint de fait a cosigné l'engagement avec le répondant à l'égard de l'étranger visé à l'alinéa b). (*minimum necessary income*)

[15] Finally, section 134 of the IRPR provides for income calculation rules and specifies that the sponsor's total income is primarily calculated on the basis of the last notice of assessment issued pursuant to the *Income Tax Act*, R.S.C., 1985 c. 1 (5th Supp.) or an equivalent document.

III. Decisions below

A. *Visa Officer's Decision*

[16] As previously mentioned, the Visa Officer advised the appellant on September 19, 2011 that her request to sponsor her father had been denied since she did not meet the MNI requirement (as set out at paragraph 133(1)(*j*)).

[17] In a letter also dated September 19, 2011, sent to her father, it was specified that the application for a permanent resident visa as a member of the family class had been denied since "subparagraph 133(1)(*j*)(i) of the Regulations states that if the sponsor resides in a province other than Quebec, the sponsor must have a total income that is at least equal to the minimum necessary income" (Appeal Book, at p. 288).

[18] The Visa Officer determined that this requirement was not met at the time the sponsorship application was filed. Accordingly, the application for permanent residency could not be allowed, pursuant to paragraph 120(b) of the IRPR in effect at that time. Pursuant to subsection 11(1) of the IRPA, the Visa Officer refused the application.

B. *The IAD Decision*

[19] Since the appellant did not challenge the validity of the Visa Officer's decision except on constitutional grounds, the IAD first reviewed whether special relief was warranted in light of the circumstances of the case. It noted that the appellant had the burden to prove "on a balance of probabilities, taking into account the best interests of a child directly affected by the decision, that sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case" (IAD Reasons, at para. 13).

[20] The IAD found that no such special relief was warranted since "physical separation alone is not sufficient to invoke special relief and there was insufficient evidence about hardship or any unusual and serious circumstances that might permit the imposition of special relief" (IAD Reasons, at para. 40). It was particularly concerned with the fact, on the one hand, that the appellant had not provided sufficient evidence regarding her income and that of her husband, and, on the other hand, that there was little evidence, other than generalities, that the appellants would be self-sufficient if they came to Canada. The IAD applied paragraph 133(1)(*j*) and section 134 of the amended IRPR for a 14-member family and determined that the applicable MNI ranged from $137,189 to $140,597 in 2013 to 2015, whereas the appellant's estimated income was $10,000 in both 2014 and 2015.

[21] Regarding the appellant's suffering caused by her separation from her family and its negative impacts on her mental health, the IAD noted that she left her family over 20 years ago to immigrate to Canada, and that there were alternative solutions to the immigration of her

family to Canada, such as visits between the appellant and her family and the use of telecommunications (particularly internet software such as Skype). It was also concerned with the fact that the appellant refused to follow her doctor's advice and take medication for her depression. Thus, it concluded that there was no evidence that the appellant would suffer any specific hardship from the dismissal of her appeal, and that the negative factors outweighed the positive ones.

[22] On the constitutional challenge, the IAD began by summarizing at length the expert evidence that was presented at the hearing, as well as the affidavit evidence. The IAD agreed with the appellant that section 27 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the Charter), was an interpretative guide. However, it disagreed with the appellant's submission that the evidence on file showed that the MNI requirement weakens the multicultural makeup of Canadian society. It noted that subsection 133(4) of the IRPR provides important exceptions to the MNI requirement.

[23] The IAD denied the appellant's claim under section 15 of the Charter. It considered that there was a lack of specific evidence relating to the appellant's "race" other than her country-of-origin description, and that the evidence regarding her disability was insufficient. Most of the evidence submitted was broad and generic, and did not relate to the appellant's specific situation. The IAD also found that the appellant had not established that section 133 of the IRPR created a distinction based on listed or analogous grounds. The evidence was insufficient to "produce a real comparative group, or demonstrate the actual impact of [section 133 of the IRPR] on that

group" (IAD Reasons, at para. 105). No causal connection between the impugned provision and a disproportionate or adverse effect on the appellant was demonstrated. In view of these findings, the IAD did not address the question of whether the distinction was discriminatory.

[24] Regarding the section 7 challenge, the IAD outlined that the Charter does not provide for a right to family reunification or an unqualified right to enter or remain in Canada. Moreover, the MNI requirement must be placed in the broader legislative context of the IRPA, which also provides for an alternative means for her relatives to be granted a permanent resident visa: the humanitarian and compassionate circumstances. The evidence about the psychological harm suffered by Ms. Begum was also not sufficient enough, in the IAD's view, to engage section 7 of the Charter. Finally, the IAD concluded that even if there was a deprivation of the appellant's right to liberty and security, it would be made in accordance with the principles of fundamental justice. Indeed, the MNI requirement is not fundamentally unfair to the appellant, and subsection 67(3) of the IRPR, which provides for an examination of humanitarian and compassionate circumstances, provides sufficient procedural fairness.

[25] Given these conclusions, an analysis of section 1 of the Charter was not deemed required.

C. *The Federal Court's Decision*

[26] The Federal Court first summarized at great length the IAD Decision as well as the parties' submissions. The Court then determined that the issue of whether the pre-2014 or the post-2014 version of section 133 of the IRPR applied, as well as the related procedural fairness issues raised by the appellant, were reviewable under the correctness standard. The constitutional

questions involving sections 7 and 15 of the Charter, in his view, also attracted the correctness standard of review, while the issues of the IAD's assessment of the evidence and the exercise of its discretion to grant the application on humanitarian and compassionate grounds was reviewable on a standard of reasonableness.

[27] As for the application of sections 133 and 134 of the IRPR, the Federal Court confirmed the IAD's decision to apply the amended provisions, since the IAD proceeds on a *de novo* basis. The IAD decides whether or not to grant the application based on the provision in force at the time of its decision. The Federal Court held that the existence of an appeal does not change the fact that the appellants have no accrued rights to have their application decided under certain provisions. *Gill v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 1522, was correctly decided and has been applied by the Federal Court in *Burton v. Canada (Minister of Citizenship and Immigration)*, 2016 FC 345, and *Patel v. Canada (Minister of Citizenship and Immigration)*, 2016 FC 1221.

[28] The Federal Court rejected the appellant's argument that the IAD breached procedural fairness in failing to notify her that it would be applying the amended version of the IRPR. It concluded that the procedure was not unfair since the IAD raised the issue of the IRPR version to be applied and requested submissions from the parties. In the appellant's Notice of Constitutional Question, it was also clear that the constitutional challenge applied to both the pre-2014 and post-2014 version of paragraph 133(1)(*j*).

[29] On the question of whether section 15 of the Charter was breached, the Federal Court agreed with the IAD that the appellant was unable to establish an adverse impact on the intersectional basis of sex, race and disability. The IAD followed the guiding jurisprudence and appropriately concluded that the evidence was too “generic” and “indirect” to establish the necessary adverse impact on the appellant or the group concerned. While evidence on the larger social, political and legal context is relevant, it does not eliminate the need for evidence directed to the impact on the individual.

[30] The Federal Court concluded, as did the IAD, that Dr. Galabuzi and Professor Mykitiuk’s evidence was not sufficient to establish an adverse impact on Ms. Begum on the basis of her sex, race or disability. The IAD’s conclusion that Ms. Begum failed to establish a causal connection between the denial of her sponsorship for MNI reasons and the intersectional grounds she raised was endorsed by the Federal Court. As the Court stated, “the governing jurisprudence also makes it clear that ‘the main consideration must be the impact on the individual or the group concerned,’ and this is where the Applicant’s evidence fell short” (Federal Court Reasons, at para. 179).

[31] The Federal Court also dismissed the claim based upon section 7 of the Charter. The Court rejected the appellant’s contention that the IAD had not addressed the interests protected by the right to life, liberty and security of the person, and had not assessed her psychological evidence. In the Federal Court’s view, the appellant failed to establish that there was a sufficient causal connection between the government action embodied in paragraph 133(1)(*j*) and the deprivation of her right to liberty or security. The separation of the appellant from her family is a

choice that she made when she decided to come to Canada, and she must be taken to have known that family reunification would not be automatic. The Supreme Court has made it clear that family members do not have an unqualified right to enter or remain in Canada. Moreover, the evidence does not establish that the psychological harm alleged by the appellant was sufficient to engage section 7 of the Charter. That being the case, the Federal Court was unable to find any reviewable error with respect to the IAD's conclusion that section 7 is not engaged on the facts of this case and that it was therefore unnecessary to provide lengthy reasons explaining why it rejected the appellant's assertion that the MNI requirement was unfair and breached the principles of fundamental justice. In light of these conclusions, the Federal Court did not assess the section 1 arguments.

[32] Finally, the Federal Court concluded that there were no reviewable errors rendering the IAD Decision unreasonable. More specifically, it cannot be said that the IAD ignored and misconstrued evidence. Its reasons show that it was fully aware of the facts, considered the expert evidence, and provided reasons for its conclusions on said evidence. The IAD did not fail to address special relief. It also acknowledged the importance of considering the best interests of the child, which in its view needed to be given substantial weight, but weighed its conclusions against the other factors at play, as provided for by case law. The Federal Court dismissed the appellant's assertion that the reasons were inadequate, specifying that perfection is not required and that when read as a whole, it is substantially transparent, intelligible and justified.

IV. Issues

[33] This appeal raises the three following certified questions:

A. Given that s. 133(1)(*j*) and s. 134 of the IRPR were amended and came into force on January 2, 2014, should the IAD have retroactively applied the amended version of these regulations to a case where the appellant's Notice of Appeal to the IAD was filed before the amended version of the regulations came into force?

B. Does paragraph 133(1)(*j*) of the IRPR violate section 15 of the Charter?

C. Does paragraph 133(1)(*j*) of the IRPR violate section 7 of the Charter?

V. Analysis

[34] In an appeal from a decision of the Federal Court sitting in judicial review of a decision of an administrative tribunal, the applicable standard of appellate review is that set out by the Supreme Court in *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paras. 45-47. Accordingly, we must step into the shoes of the Federal Court and determine, first, whether it identified the appropriate standard of review, and, second, assess whether it applied the standard correctly. In other words, we must for all intents and purposes conduct the judicial review analysis afresh.

[35] The parties agree that the Federal Court correctly found that the standard of review for all three questions is that of correctness. The issue of whether the pre-2014 or the post-2014 version of section 133 applied is a pure question of law; while the IAD has expertise on the application of the IRPR, the retroactive or retrospective application of a provision clearly falls outside of its specialized expertise. It is also a question of law that is of general importance for the legal

system as a whole, upon which no deference is warranted: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 55.

[36] I am also of the view that the Federal Court was right to apply the correctness standard to the constitutional questions involving sections 7 and 15 of the Charter. That being said, the extricable findings of fact and the assessment of the evidence upon which the constitutional analysis is premised are entitled to deference. As the Supreme Court stated in *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, 2009 SCC 53, [2009] 3 S.C.R. 407 [*Consolidated Fastfrate*] at paragraph 26:

> The parties agree that the applicable standard of review in cases of constitutional interpretation is correctness: see *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5, at p. 17. However, as the respondent Teamsters also note, the ALRB's constitutional analysis rested on its factual findings. Where it is possible to treat the constitutional analysis separately from the factual findings that underlie it, curial deference is owed to the initial findings of fact: see *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, 2007 SCC 14, [2007] 1 S.C.R. 591, at para. 19…
>
> (See also: *Conseil de la Nation Innu Matimekush-Lac John c. Association des employés du nord québécois (CSQ)*, 2017 CAF 212 at paras. 18-19; *Northern Air Solutions Inc. v. United Food and Commercial Workers Canada, Local 175,* 2015 FCA 259 at para. 5; *CHC Global Operations (2008) Inc. v. Global Helicopter Pilots Association*, 2010 FCA 89 at para. 22.)

[37] Thus, the standard of reasonableness applies to questions of fact.

A. *Given that s. 133(1)(j) and s. 134 of the IRPR were amended and came into force on January 2, 2014, should the IAD have retroactively applied the amended version of these regulations to a case where the appellant's Notice of Appeal to the IAD was filed before the amended version of the regulations came into force?*

[38] The appellant argued that the IAD and the Federal Court erred in applying the amended version of paragraph 133(1)(*j*) of the IRPR to her appeal. Relying on the presumption that new legislation affecting substantive rights only apply prospectively unless a clear legislative intent to the contrary can be discerned, she also pointed out that not only is there no transitional provisions dealing with appeals filed before the new MNI requirement came into effect, but that the Regulatory Impact Analysis Statement and Citizenship and Immigration Canada (CIC) Operational Bulletin confirmed that the new MNI requirement is not meant to be applied retroactively. As interesting as this argument may be, this is not a question that is properly before us as it should not have been certified in the first place.

[39] It is well established that for a question to be properly certified pursuant to section 74 of the IRPA, it must be dispositive of the appeal. In the case at bar, it clearly does not matter whether one applies the original or amended version of paragraph 133(1)(*j*) of the IRPR. Based on the pre-2014 MNI requirement, in order to support 14 people (the 7 she sought to sponsor as well as her family members), the appellant would have needed a minimum income of $92,181 for 2007 (the taxation year immediately preceding the date of filing of the sponsorship application). Yet her income for that year was $1,200. She therefore would not have met the MNI requirement even under its original version. Needless to say, she does not meet the new MNI threshold either, which is 30 percent higher than the old one (between $137,189 to $140,597 in 2013 to 2015). In similar circumstances, this Court found that the certified question is not dispositive of the appeal, as it does not matter which version of the requirements was applied: see *Sran v. Canada (Minister of Citizenship and Immigration)*, 2018 FCA 16.

[40] The appellant also argued that her right to procedural fairness was breached because the IAD failed to advise her that it would be applying the amended version of paragraph 133(1)(*j*) and section 134 to her sponsorship appeal. In my view, the Federal Court was correct to reject that argument. As the Federal Court pointed out, the transcript reveals that the issue was raised with the appellant's counsel towards the end of the hearing, such that counsel could have made submissions in that respect. More importantly, it appears that the appellant's challenge to the constitutional validity of paragraph 133(1)(*j*) of the IRPR was directed to the MNI as such, rather than to any particular version of that requirement. Indeed, her Notice of Constitutional Question makes it clear that she intended to question the validity of any MNI, not just the pre-2014 or the post-2014 version of paragraph 133(1)(*j*). Accordingly, it is to be presumed that the appellant marshalled evidence and made arguments that went to any MNI, and a careful examination of the record bears this out. At the hearing, counsel for the appellant was unable to explain what difference it would have made to her argument whether the pre-2014 or the post-2014 version was applied. I find, therefore, that the appellant was not prevented from making her case as forcefully and compellingly as possible.

B. *Does paragraph 133(1)(j) of the IRPR violate section 15 of the Charter?*

[41] The appellant contends that the Federal Court erred in several respects in reviewing the IAD decision, and made errors of law as well as reviewable errors in its evidentiary findings.

[42] First, the appellant argues that both the IAD and the Federal Court applied the wrong legal test to her section 15 claim in disregarding the larger social, political and legal context of the case and in failing to analyze the social science evidence, dismissing it as too generic and

indirect. The appellant also claims that the Federal Court erred in dismissing her argument on the basis that it could not find a comparator group. She also argues that the IAD also misapprehended the notion of a comparator group by defining it as the group to which the appellant is a member as opposed to the group against which the appellant's conditions should be assessed. Relying on the decision of the Supreme Court in *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396 [*Withler*], she alleges it is not necessary to pinpoint a mirror comparator when the discrimination is indirect; in such cases, the focus must be on the effect of the law and the situation of the claimant group. As a result, the IAD and the Federal Court should have considered the sociological disadvantages faced by women, people with disabilities and members of racialized groups in order to assess the impact of the MNI requirement on the appellant.

[43] With respect to the evidentiary findings, the appellant contends that the IAD erred in dismissing her claim at least in part because it did not consider her to be a "racialized" person, despite the evidence that, in the Canadian context, the term "racialized people" includes visible minorities "who are non-Caucasian in race or non-white in colour" (Affidavit of Professor Galabuzi, Appeal Book, at p. 726, para. 13). The appellant is also of the view that the IAD erred in conflating section 15 arguments with the humanitarian and compassionate considerations, and in stating that most of the socio-economic disadvantages faced by people in the appellant's situation can be addressed through the availability of special relief pursuant to paragraph 67(1)(*c*) of IRPA. Finally, the appellant takes exception to the characterization of the social science evidence that she introduced as being too "generic" or "indirect", and stresses that all the

relevant evidence connecting the socio-economic disadvantages of the groups to the situation of prospective sponsors was completely ignored.

[44] The starting point to understanding the meaning and purpose of section 15 of the Charter is the seminal decision of the Supreme Court in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 [*Andrews*]. In that case, Justice McIntyre made it clear that the concept of human dignity that underlies the equality guarantee calls not only for formal equality ("things that are alike should be treated alike"), but, more importantly, for substantive equality (*Andrews*, at p. 166). Since the drawing of distinctions is inseparable from legislative action, the challenge has been to come up with a framework to identify those distinctions that are discriminatory. As Justice McIntyre stated, "[i]t must be recognized at once, however, that every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality" (at p. 164; see also pp. 167, 168 and 182). The key concept, therefore, will be that of discrimination, which Justice McIntyre defined, at page 174, as:

> …a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

[45] The approach proposed by Justice McIntyre was applied in a series of cases over the years, and evolved into a two-step approach best summarized by Justice McLachlin (as she then was) in *Miron v. Trudel*, [1995] 2 S.C.R. 418 at para. 128:

> …First, the claimant must show a denial of "equal protection" or "equal benefit" of the law as compared with some other person. Second, the claimant must show that the denial constitutes discrimination…

[46] It was not entirely clear, however, when a distinction based on an enumerated or analogous ground would not also be discriminatory. The Supreme Court came to grips with that question in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 [*Law*]. In that case, the Court considered the jurisprudential developments in equality law, and tried to refine the concept of discrimination. Specifically, it held that substantive equality would be infringed only where adverse differential treatment by the government has a negative effect on a person's human dignity. Writing for a unanimous Court, Justice Iacobucci summarized the "three broad inquiries" that a court should undertake when called upon to determine a claim under subsection 15(1) of the Charter. First, the court must decide whether the impugned law draws a formal distinction between the claimant and others on the basis of one or more personal characteristics, or fails to take into account the claimant's already disadvantaged position within Canadian society, thereby treating differently, in a substantive way, the claimant and others on the basis of one or more personal characteristics. Second, the court must deal with whether the basis for the differential treatment is an enumerated or analogous ground. Third, the court must determine, by answering the following question, whether the law has a purpose or effect that is discriminatory:

> Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?
>
> (*Law* at p. 549.)

[47] In trying to determine whether the differential treatment discriminates in a substantive sense, Justice Iacobucci proposed four relevant contextual factors: 1) pre-existing disadvantage experienced by the claimant or the group of which the claimant is a member; 2) correspondence, or lack thereof, between the ground or grounds on which the discrimination claim is based and the actual needs, capacity, or circumstances of the claimant or the affected group; 3) the ameliorative purpose or effect, or lack thereof, of the impugned law for certain members of society; and 4) the nature and scope of the benefit or interest which the claimant feels he or she has been denied (*Law*, at pp. 550-552).

[48] Almost a decade later, the Supreme Court once again endeavoured to streamline the application of the equality guarantee and to deal with some of the criticism levelled at the framework suggested in *Law*. These criticisms related primarily to the use of the violation of human dignity test, the application of the contextual factors, and the use of comparators required by the *Law* framework. In both *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483 [*Kapp*], and *Withler*, a unanimous Court (in reasons delivered jointly by Chief Justice McLachlin and Justice Abella) stressed that the concept of substantive equality has remained and still is the centerpiece of the analytical framework. In light of that overarching objective, the Court in *Kapp* re-articulated the three-stage analysis into a two-step process: 1) Does the law, on its face or in its impact, create a distinction based on an enumerated or analogous ground(s)?; and 2) Does the distinction impose a burden or deny a benefit by perpetuating or reinforcing a prejudice or a disadvantage?

[49] This approach has since been consistently applied: see *Withler* at para. 30; *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9, [2009] 1 S.C.R. 222 at para. 188; *Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61 at paras. 186, 324 and 418 [*Quebec v. A*]; *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548 at paras. 19-20 [*Taypotat*]; *Centrale des syndicats du Quebec v. Quebec (Attorney General)*, 2018 SCC 18 at para. 22. Acknowledging that the concept of human dignity is abstract and subjective and therefore difficult to operationalize, and that a comparator analysis is somewhat artificial, the Court emphasized that the four contextual factors set out in *Law* must be seen not as a formalistic test, but as a way of focusing on the central concern of section 15, that is, combating discrimination both in terms of perpetuating disadvantage and stereotyping (*Kapp* at paras. 23-24).

[50] Expanding on those reasons, the Court wrote in *Withler* :

> Whether the s. 15 analysis focusses on perpetuating disadvantage or stereotyping, the analysis involves looking at the circumstances of members of the group and the negative impact of the law on them. The analysis is contextual, not formalistic, grounded in the actual situation of the group and the potential of the impugned law to worsen their situation.
>
> (*Withler* at para. 37.)

[51] Of particular relevance for the case at bar is the Court's approach to comparison. Stressing emphatically that substantive equality (which is concerned with the actual impact of the impugned law, and not the mere absence or presence of difference) must be the focus of a section 15 analysis, the Court insisted that a formal analysis based on comparison between the claimant group and a "similarly situated" group will not always ensure a result that captures the wrong to which subsection 15(1) is directed (*Withler* at paras. 39-40). The Court agreed that the

use of mirror comparator groups raises a number of concerns, notably that: 1) the definition of the comparator group may determine the analysis and the outcome without regard to whether the distinction creates a disadvantage or perpetuates prejudice or stereotyping (*Withler* at para. 56); 2) the focus on finding a "like" comparator group may become a search for sameness rather than a search for disadvantage (*Withler* at para. 57); 3) confining the analysis to a rigid comparison between the claimant and a group that mirrors it except for one characteristic may fail to account for more nuanced experiences of discrimination (*Withler* at para. 58); and 4) finding the right comparator group places an unfair burden on claimants (*Withler* at para. 59).

[52] Far from denying the general usefulness of comparison, the Court suggested a more flexible approach to assess the impact of the impugned scheme on substantive equality. Indeed, the use of comparison cannot be completely done away with, as it is essential to establish a "distinction". What is crucial at the first stage, however, is not that a claimant identify a particular group that does not share the disqualifying characteristic that sets him or her apart, but rather that the claimant be able to establish that he or she is treated differently than others:

> The role of comparison at the first step is to establish a "distinction". Inherent in the word "distinction" is the idea that the claimant is treated differently than others. Comparison is thus engaged, in that the claimant asserts that he or she is denied a benefit that others are granted or carries a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds of s. 15(1).
>
> It is unnecessary to pinpoint a particular group that precisely corresponds to the claimant group except for the personal characteristic or characteristics alleged to ground the discrimination. Provided that the claimant establishes a distinction based on one or more enumerated or analogous grounds, the claim should proceed to the second step of the analysis. This provides the flexibility required to accommodate claims based on intersecting grounds of discrimination. It also avoids the problem of eliminating claims at the outset because no precisely corresponding group can be posited.
>
> (*Withler* at paras. 62-63.)

[53] The Court went on to add that it will be more difficult to establish a distinction when the discrimination alleged is of an indirect nature. In such a case, the claimant will have “more work to do” at the first step, because the impugned measure will on its face apply in the same way to all (*Withler* at para. 64). As the Court stated, “[h]istorical or sociological disadvantage may assist in demonstrating that the law imposes a burden or denies a benefit to the claimant that is not imposed on or denied to others. The focus will be on the effect of the law and the situation of the claimant group” (*Withler* at para. 64).

[54] At the second step, though, the use of comparison may be helpful to better understand the claimant’s situation as well as the disadvantage or stereotype to which he or she is allegedly subjected. “At this step”, the Court wrote, “comparison may bolster the contextual understanding of a claimant’s place within a legislative scheme and society at large, and thus help to determine whether the impugned law or decision perpetuates disadvantage or stereotyping” (*Withler* at para. 65).

[55] On the basis of these principles, I will now address the arguments raised by the appellant and the interveners.

[56] The appellant does not contend that paragraph 133(1)(*j*) of the IRPR creates a direct and explicit distinction based on an enumerated or analogous ground. Rather, she submits that though neutral on its face, the MNI requirement has a differential impact on her and that she is disproportionately affected as a racialized woman with a disability. In other words, members of racialized communities, women, and people with disabilities experience higher unemployment

rates, earn less income, are more likely to live in poverty, and are thus less likely to be able to meet the MNI requirement.

[57] Focusing on a paragraph of the IAD's reasons, and more particularly on a single line of that paragraph, the appellant claims that the IAD's finding (confirmed by the Federal Court) that paragraph 133(1)(*j*) of the IRPR does not create a distinction under section 15, is based on a misapprehension of the law and on an application of the wrong legal test to the facts at hand. The paragraph of the IAD's reasons at issue reads as follows:

> [105] Moreover, the panel finds that the appellant has not established that *IRPR* s. 133 creates a distinction based on the enumerated or any analogous grounds. After reviewing the testimony and surrounding general statistical documentation previously discussed, the panel finds that it is broad, tenuous, non-definitive, often contradictory, and sometimes not directly applicable to the appellant (or even to a group that may have been arguably comparative). Considering an "intersectional" context, the evidence was not sufficiently substantive to produce a real comparative group, or demonstrate the actual impact of *IRPR* s. 133 on that group. The evidence was often nebulous and did not demonstrate a causal connection that produced a disproportionate impact or an adverse effect.

[58] On a fair reading of that paragraph, it seems to me the IAD was focused on the insufficiency of the evidence demonstrating that the appellant was, on the basis of her personal characteristics, denied a benefit that others enjoyed, or carried a burden others did not. Far from relying on the "outdated notion of a comparator group", as argued by the appellant (Federal Court Reasons, at para. 172), the IAD was simply not satisfied, on the basis of the evidence submitted, that there is a causal connection between the denial of her sponsorship for MNI reasons and the intersectional grounds she raised.

[59] While the reasons of the IAD could have been more elaborate and better articulated, I do not think it operated under the misconception that the identification of a comparator group is an essential prerequisite to establish a distinction. First of all, the IAD appropriately referred, in a footnote to the above-quoted paragraph 105, to the relevant and current jurisprudence of the Supreme Court on that issue (*Quebec v. A*; *Withler*). Moreover, it appears that the IAD was not referring to a comparator group as it has commonly been understood, that is a group which "mirrors the characteristics of the claimant (or claimant group) relevant to the benefit or advantage sought except for the personal characteristic on which the claim was based" (*Withler* at para. 40). Rather, it seems to have made this reference with a view to identifying the group to which the appellant may belong and which could be impacted by the MNI requirement even if she herself was not. In other words, it is clear that the IAD did not fall into the trap that *Withler* was meant to prevent, that is for claims to be dismissed because the claimant has failed to identify a proper comparator group. Rather, the IAD rejected the appellant's claim because she could not demonstrate that she was excluded from sponsoring her parents because of a distinction based on the grounds she asserted.

[60] I would add that the use of comparisons has not been entirely rejected by the Supreme Court in *Withler*, nor could it be in my opinion. After all, equality is inherently a comparative concept (see Denise Réaume, "Dignity, Equality, and Comparison", in Deborah Hellman and Sophia Moreau, eds., *Philosophical Foundations of Discrimination Law*, (Oxford University Press, 2013), at p. 7). As Justice McIntyre stated in *Andrews*, equality "may only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises" (see also *Law* at para. 56). The Supreme Court did not do away with the role

of comparison in establishing a distinction; on the contrary, it maintained in *Withler* that distinction necessarily implies a comparison. What it cautioned against is the notion that comparison can only be established through the identification of a comparative group that corresponds precisely to the claimant group save for the personal characteristic or characteristics alleged to ground the discrimination: *Withler* at paras. 62-63. What matters, in the end, is whether the impugned provision differentially impacts the individual or group involved.

[61] It is precisely in this respect that the appellant's submissions fall short of the mark. As previously mentioned, indirect discrimination is more difficult to establish than direct discrimination. Demonstrating that a law apparently treating everyone the same nevertheless negatively affects a group or individual in a disproportionate manner will always be more of a challenge. Evidence of sociological or historical disadvantage will sometimes assist in demonstrating such an adverse impact; but more will be required than a "web of instinct" and general statistical evidence with little or no relationship with the particular context of the claim: see *Taypotat* at paras. 31-32, 34.

[62] In the case at bar, the appellant filed extensive evidence purporting to document the socio-economic disadvantages faced by women, people with disabilities, and members of racialized communities, as well as evidence showing the importance of family in ensuring the full participation of these disadvantaged groups in Canadian society. The appellant also provided evidence relating to her personal situation, her limited employment history and the negative impact of the family separation on both her and her family. Having considered that evidence, the IAD came to the conclusion that it was of little help in demonstrating that the MNI requirement

had an adverse impact on the basis of race, sex or disability. The IAD characterized that evidence as “broad”, “tenuous”, “non-definitive”, “often contradictory”, “sometimes not directly applicable to the appellant”, and “often nebulous” (IAD Reasons, at para. 105). It also stated the following:

> [104] However, the appellant relied almost entirely on broad, generic evidence and did not produce specific instances relating to her. The historical development of immigration legislation and statistical evidence about race and the labour market she presented is mostly too indirect for this appeal. She provided minimal direct evidence about her own situation, relating any absence of her financial resources to those characteristics. There was no evidence that she has been denied employment due to discrimination. In fact, as seen above in this Decision, very little supporting evidence was presented at all about the appellant’s income or financial resources.

[63] These extricable findings of fact are obviously entitled to deference on judicial review (*Consolidated Fastfrate* at para. 26). Before the Federal Court, the appellant argued that the IAD had disregarded the larger social, political and legal context of the case and chose not to analyze the substantial socio-economic evidence. The Federal Court rejected that argument, being of the view that no adverse effect was established by the general statistical evidence produced by the appellant, thereby failing to establish that paragraph 133(1)(*j*) of the IRPR created a distinction based on an enumerated or analogous ground. In my view, such a conclusion was open to the Federal Court. Far from simply repeating the IAD’s “non-specific, dismissive treatment of the social science evidence” (Appellant’s Memorandum, at para. 38), the Federal Court relied on the governing jurisprudence according to which “the main consideration must be the impact of the law on the individual or the group concerned” (*Andrews* at p. 165, quoted in *Quebec v. A* at para. 319, Abella J.; see also *Withler* at para. 39). On this basis, it found, as did the IAD, that this is where the appellant’s evidence fell short. As I will now endeavour to show, that conclusion from the IAD was reasonable in light of the evidence put forward by the appellant.

[64] The appellant tendered three expert witnesses at the constitutional hearing before the IAD: Dr. Grace-Edward Galabuzi, Professor Roxanne Mykitiuk and Dr. Susan Chuang. The interveners also tendered Ms. Debbie Douglas, executive director of the Ontario Council of Agencies Serving Immigrants (OCASI). Having carefully reviewed their affidavits, as well as their examination and cross-examination, I think it was reasonable for the IAD not to give much probative value to their evidence with respect to the question that is at the core of this appeal, namely whether the MNI requirement adversely impacts people like the appellant on the basis of race, sex or disability.

[65] Professor Galabuzi, an Associate Professor of the Department of Politics and Public Administration at Ryerson University, testified about the limited access of women and racialized persons to the labour market, and the likely impact this might have on their prospect of meeting the MNI requirement. His research focused on racialization and gender in the labour market. He noted, for example, that "[b]etween 2000 and 2005, racialized Canadians earn 81.4 cents for every dollar paid to non-racialized Canadians" (Appeal Book, at p. 730). Further, "racialized people, racialized women in particular, and women in general are more likely to be unemployed and for longer periods of time than other Canadians. When employed, they are more likely to be in low paying jobs and sectors with lower paying occupations" (Appeal Book, at pp. 730, 734). Racialized Canadians are also more likely to be at the bottom end of the income spectrum – 69% compared to 56% of non-racialized Canadians – and "are two to three times more likely to be poor than other members of the community" (Appeal Book, at pp. 733, 737). This phenomenon is referred to as the racialization and feminization of poverty in Canada (Appeal Book, at p. 737).

[66] From the outset, Professor Galabuzi postulates that the use of a MNI to determine eligibility for family sponsorship has a disproportionate impact on racialized groups and women, because of the persistent economic and income inequalities along racial and gender lines. As a result of the differential access to the labour market, he affirms that “the seemingly neutral enforcement of the rule set out in [paragraph 133(1)(*j*) of the IRPR] in regard to family reunification, has a disparate and adverse impact on racialized groups and women” (Appeal Book, at p. 725).

[67] He returned to that theme in the concluding paragraph of his affidavit, where he stated:

> 43. In conclusion, there is a definite differential impact on the ability of Canadian citizens and permanent residents to sponsor their family members by applying the minimum necessary income requirement because of the racial and gender inequalities in the Canadian labour market and the differential access to the income structure. Given the racialized and gendered differentials in employment, income employment patterns and low income status, and given that these differentials are due to structural and systemic factors beyond the individuals’ control, the economic disparity experienced by racialized groups and women will persist and are unlikely to change in the near future. As a group, members of racialized communities will continue to be over-represented among the low income group. As such, they will likely to be disproportionally affected by the minimum necessary income requirement for family class sponsorship.
>
> (Appeal Book, at p. 740.)

[68] The main problem with Professor Galabuzi’s assertion that racialized groups and women are disproportionally impacted by the MNI, however, is that it rests on inferences and assumptions. As noted by the IAD, Professor Galabuzi has not researched sponsorship MNI approval and refusal rates or trends. There is also no discussion in his affidavit (let alone data evidence) supporting his claim that women, racialized communities and people with disabilities are, as a result of the MNI requirement, treated differently from others when attempting to

sponsor parents or grandparents. Indeed, Professor Galabuzi conceded on cross-examination that the last sentence of paragraph 43 of his affidavit (Appeal Book, at p. 740) is speculative.

[69] Although Professor Galabuzi's evidence demonstrates income disparities along gender and racial lines, I agree with the IAD and the Federal Court that none of it relates precisely to the impact of the MNI requirement. Professor Galabuzi does not rely on studies in this respect, but rather draws an inference from his knowledge and from other studies regarding the limited access to labour market that he transposed to the MNI requirement. It was not unreasonable to conclude that this kind of evidence falls short of establishing that the appellant and people who share her characteristics are denied a particular benefit that others receive. It also happens to be contradicted by more relevant and specific evidence pertaining to approval and refusal rates, which will be addressed later in these reasons.

[70] The second expert provided by the appellant is Professor Mykitiuk, who is an Associate Professor at Osgoode Hall Law School. She was asked to provide opinion testimony and evidence with respect to issues of discrimination, barriers and poverty experienced by persons with disabilities and their families, and how the MNI requirement may affect persons with disabilities who wish to sponsor their families from overseas. Based on her experience and research, she concluded that the MNI "has a disproportionately adverse impact on persons with disabilities, as they are more likely to live in poverty and face significant socio-economic barriers" (Appeal Book, at p. 1396). She also found that it deprives them of the presence of family members whose support is critical to become full and equal participants in Canadian

society. Her evidence, however, is plagued with the same deficiencies as the evidence of Professor Galabuzi.

[71] Professor Mykitiuk testified that persons with disabilities are over-represented within the low income population (Appeal Book, at p. 1366). Disabled women report an average income of around $4,000 less than able-bodied women, whereas disabled men report an average income difference of almost $13,000 (Appeal Book, at pp. 1366-1367). The more severe their disability, the less income they report (Appeal Book, at p. 1368). However, the income of persons with disabilities remains more stable throughout their lives than able-bodied persons (Appeal Book, at pp. 1367-1368). Persons with disabilities also have an employment rate of approximately 20% less than able-bodied persons (Appeal Book, at p. 1368).

[72] Professor Mykitiuk then dealt with a number of socio-economic barriers commonly faced by persons with disabilities, including accessibility in the workplace, appropriate housing, accessibility of assistance and assistive technologies and education. She also underlined the importance of family support to the well-being of parents of disabled children. As emphasized by the IAD, however, Professor Mykitiuk referred mostly to studies pertaining to parents of disabled children rather than to disabled persons *per se*. The appellant having no disabled children, but rather invoking her own alleged disability, it was reasonable to conclude that the evidence pertaining to parents of disabled children is of limited relevance.

[73] Like the Federal Court, and for a number of reasons, I see no reason to interfere with the IAD's determination that Professor Mykitiuk's evidence is of limited relevance. She did not

relate her opinions and comments to the appellant's particular circumstances, if only because the appellant does not have any disabled children.

[74] More importantly, Professor Mykitiuk's evidence is focused on showing that persons with disabilities generally have lower income, and that they benefit from the support that family members (including their extended family) can provide. She also opined that lack of assistance with basic domestic labour often prevents disabled women from accessing paid labour. Yet, she provided no evidence whatsoever regarding the impact of the MNI requirement on persons with disabilities or, for that matter, on racialized women, with respect to sponsorship applications. To that extent, her evidence is more relevant to demonstrate the existence of a perpetuated disadvantage than of a distinction created by the MNI requirement.

[75] The third witness tendered by the appellant was Dr. Susan Chuang, who is an Associate Professor at the Department of Family Relations and Applied Nutrition at the University of Guelph. She testified about the importance of family support, in particular the support of parents and grandparents, for Canadians and the Canadian society as a whole. Her affidavit dealt for the most part with the various contributions of grandparents, their critical role in nurturing positive development and their contribution to the family's well-being and interpersonal relationships. In her view, the additional source of emotional and psychological support provided by the family is particularly important for low income individuals, women, and racialized persons.

[76] Dr. Chuang's only reference to the MNI requirement and its impact is found in the last paragraph of her affidavit, where she states that "[b]y requiring Canadians to meet the minimum

necessary income in order to become eligible for sponsorship of their families, the Government is depriving Canadians, particularly women, low income groups and racialized Canadians an important part of their lives" (at para. 47 of her affidavit, Appeal Book, at p. 1965).

[77] In my view, the IAD reasonably found Dr. Chuang's evidence to be of a low probative value. It was mainly concerned with the psychological benefits for children of having grandparents around when the children are growing up and the potential support the grandparents can provide, especially for women, racialized communities, and people with disabilities, due to their higher needs in this regard. As noted by the IAD, Dr. Chuang acknowledged that she has not written about family class sponsorships and is not an expert on those issues (IAD Reasons, at para. 67). More importantly, her evidence was of tangential interest for the issue to be decided in this case, namely whether the appellant was denied a benefit and therefore treated differently than others on the basis of one or more personal characteristics that falls within the enumerated or analogous grounds. On that issue, her affidavit is silent except for the bald assertion referred to earlier.

[78] Finally, the interveners relied upon the opinion evidence of their executive director, Ms. Douglas. Her testimony was accepted despite the fact that it amounted in large part to submissions as opposed to direct evidence about research and results, and that some of the written supporting documentation amounted to plain advocacy. She testified on the racialization and feminization of poverty in Canada, that family reunification is essential to the successful integration of immigrants, and that the increased MNI requirement for parent and grandparents is prohibitive for racialized groups and women. She referred to research and policy analysis

showing the positive economic contributions made by sponsored parents and grandparents. She discussed the disproportionate impact of the MNI requirement on racialized immigrant communities as a result of them having a broader conception of “family”, one that goes beyond the Western nuclear model. She also mentioned that OCASI’s research, “whether academic, empirical or anecdotal”, shows that sponsored parents and grandparents often provide critical childcare and nurturing and support the healthy psychological and emotional development of young people.

[79] On cross-examination, Ms. Douglas acknowledged that OCASI has done no statistical research on the approval rates of parent and grandparent sponsorships, or on humanitarian and compassionate applications. Nor has there been any study on their part concerning the associated costs of family reunification. In light of her testimony, and of the shortcomings of some of the surveys on which Ms. Douglas was relying, it was not unreasonable for the IAD to give little weight to her affidavit. While I may not go as far as saying, as did the IAD, that she was advocating there be no economic considerations for immigration, I am satisfied that her testimony provided little more than anecdotal evidence as to the disproportionate impact on the appellant and other people sharing similar characteristics of the increased MNI requirement for sponsoring parents and grandparents.

[80] In summary, it was reasonable for the IAD to conclude that the appellant and the interveners failed to establish that the MNI requirement creates a distinction based on enumerated grounds and that it has a disproportionate impact on the appellant as a racialized woman with a disability. While the evidence clearly documents the socio-economic

disadvantages faced by women, people with disabilities, and members of racialized communities, and demonstrates the importance of family to those disadvantaged groups to ensure their full participation in Canadian society, I see no reason to interfere with the IAD's determination that it was too indirect and generic to support a claim that an increased MNI negatively impacts the appellant or the groups to which she belongs. As the Supreme Court stated in *Withler* at para. 64, claimants seeking to establish that a law is indirectly discriminatory will have "more work to do" at the first stage of the subsection 15(1) test. General statistical evidence that is only tangentially related to the particular context of the claim will not be sufficient to establish an adverse effect; the evidence "must amount to more than a web of instinct" (*Taypotat* at para. 34).

[81] At the end of the day, it is the adverse effects that are caused or contributed to by an impugned provision that must be the focus of the analysis, not the social and economic circumstances that exist independently of such a provision (see *Withler* at para. 39). Otherwise, any fee increase for public services provided by the state, for example, would be inherently suspect and presumptively run afoul of section 15 equality rights when applied to economically disadvantaged groups; yet, economic status or poverty is not a characteristic considered to be immutable or changeable only at unacceptable cost to personal identity (see, for *e.g.*, *Toussaint v. Canada (Attorney General)*, 2011 FCA 146, [2013] 1 F.C.R. 3 at para. 59, leave to appeal to SCC denied, 34336 (November 3, 2011). This is why an impugned measure will create an impermissible distinction only if it can be established, as a fact, that it disproportionately impacts a group of persons who share one or more enumerated or analogous characteristics.

[82] The argument of the appellant and of the interveners is premised on the notion that a large majority of sponsors for parents and grandparents are immigrants (indeed, it would appear that nearly all Canadian-born sponsors are sponsoring spouses and partners, while 99% of the sponsors of sponsorships for parents and grandparents are immigrants). It holds that, considering the generalized societal disadvantages experienced by them on the grounds of sex, race and disability, it would follow that racialized immigrants, women, and people with disabilities will be the most impacted group when a MNI is required to be qualified as an eligible sponsor. Unfortunately for the appellant, the evidence does not bear out this hypothesis; indeed, the evidence put forward by the respondent tends to disprove the disproportionate impact of the MNI requirement on both women and racialized immigrants.

[83] The affidavit sworn by Alexandre Bilodeau, employed by CIC as a Statistical Officer, provides data from the computer-based Global Case Management System regarding applications to sponsor parents and grandparents between 2012 and 2014. That data shows that female applicants are not disproportionately impacted by the MNI requirement. For those three years, women submitted on average more sponsorships than men (57.91% vs. 42.06%). More interestingly, women were also the successful sponsors 57.7% of the time, which shows that they were not adversely impacted by the requirements to be a sponsor. This is noted by the IAD at paragraph 90 of its reasons.

[84] I note that the appellant also provided data regarding the percentage of female sponsors and principal applicants per region from 2002-2011 (Affidavit of Jack Cheng, Exhibits “K” and “L”, Appeal Book, at pp. 2974 and 2978). However, this data is not as persuasive because it is

not associated with approval and refusal rates. It only shows that there are proportionally less female sponsors and principal applicants in Asia and Africa, regions where people are more likely to be racialized.

[85] Other data submitted by the appellant classifies, based on the sex of the principal applicants and their region of origin, the applications which did not meet the MNI requirement and which were forwarded to visa offices (Affidavit of Jack Cheng, Exhibit “M”, Appeal Book, at p. 2982). Once again, this data is not persuasive because it is not associated with the approval and refusal rates. Whether or not an application was forwarded to a visa office does not correlate with any refusal or approval. Moreover, there is no distinction between men and women, and between applicants from racialized and non-racialized countries.

[86] The interveners also raised the ground of family status. In their view, the MNI requirement is discriminatory against single, divorced, widowed and unmarried persons who want to sponsor their closest family members (i.e. their parents and grandparents). They point out that, contrary to the latter, applicants who want to sponsor their spouses, common law partners or dependent children are not required to satisfy the MNI requirement to bring their close relatives to Canada. In my view, this ground relates to family status and is not properly before us. The appellant, whose husband and children live in Canada, has not raised that ground, and the interveners cannot expand litigation beyond what has been raised by the parties.

[87] With respect to the alleged racial discrimination, the data found in Tables 3 and 5 attached to Alexandre Bilodeau’s affidavit (which sets out the overall number of approved and

refused sponsors, listed by country of origin), demonstrates that South Asian applicants are not negatively impacted in a disproportionate manner compared to applicants from European or North American countries. According to the data, South Asian applicants' success rates were only 4% less than those of North American and European applicants.

[88] It is worth pointing out, moreover, that these refusal rates include all grounds and not just the failure to meet the MNI requirement. In 2012-2014, according to Table 4 (overall number of refused sponsors, as listed by reason of refusal) attached to Mr. Bilodeau's affidavit, it appears that 91.9% of all sponsorship applications were approved, which means that 7.9% were refused. Of that 7.9%, 43% were refused because they did not satisfy the MNI requirement so that, in the end, only 3.4% of all sponsorship applications were refused because of the MNI requirement. Moreover, a significant proportion of the rejected applications are ultimately approved on appeal to the IAD. In 2009-2014, 1120 appeals were considered with respect to the failure to meet the MNI requirement. Among them, 60.45% were allowed and only 16.07% dismissed (the remaining appeals were either withdrawn or abandoned) (Affidavit of Fraser Fowler, Exhibit "K", Appeal Book, at p. 3960). Furthermore, there is no statistical connection between the enumerated grounds of section 15 of the Charter (or, for that matter, a sponsor's country of origin) and approvals/rejections of sponsorship applications for parents and grandparents.

[89] Finally, with respect to the alleged discrimination on the basis of physical or mental disability, neither the respondent nor the appellant and the interveners provided any data. Given that the appellant bears the burden of establishing a distinction, the IAD could reasonably conclude that the appellant failed to adduce direct evidence in this respect.

[90] Before concluding, a word must be said about the interveners' argument to the effect that racialized immigrant sponsors disproportionately self-select out of submitting a sponsorship application for parents and grandparents because they know they will not meet the MNI requirement. They relied for that proposition on a survey conducted by OCASI demonstrating that a large proportion of the 87 participants attending a professional development training conference in 2012 were aware of clients who would have liked to sponsor family but failed to do so because of the MNI eligibility requirement.

[91] This survey is problematic for a number of reasons. First, none of the respondents are potential applicants; on the contrary, they are all OCASI employees. Second, the sample is too small to yield convincing results. Third, the question ("Are you aware of clients who would have liked to sponsor family, but didn't because of the LICO [MNI] eligibility requirement?") (Appeal Book, at p. 3107) is much too imprecise to allow the assessment of the extent of potential applicants who might have been deterred. Those who answered positively could have been aware of only one such client or dozens of clients; conversely, several employees may have been aware of the same potential applicant(s) being deterred by the MNI requirement. Fourth, the survey does not tell us the proportion of potential applicants who were not deterred from applying, relative to those who were. It does not tell us, moreover, whether or not disabled, racialized and/or female potential applicants are more significantly represented in the second category – those who were deterred from applying because of the MNI requirement. Because of all these deficiencies, the IAD could reasonably give little or no weight to that piece of evidence.

[92] To conclude, I am of the view that the IAD did not make a reviewable error in assessing the evidence in support of the section 15 challenge. The appellant had the burden of showing that she (or people in the same situation as her) was adversely impacted by paragraph 133(1)(*j*) of the IRPR and, as a result, denied the benefit of eligibility to sponsor her parents. The evidence that she and the interveners filed in support of her application fell short of meeting that burden, and for that reason it is not necessary to move to the second part of the test under subsection 15(1) of the Charter and to determine whether any distinction created by the MNI requirement is discriminatory.

C. *Does paragraph 133(1)(j) of the IRPR violate section 7 of the Charter?*

[93] A claimant wishing to establish an infringement of section 7 of the Charter bears the burden of showing, first, that a provision interferes with his or her right to life, liberty or security (or deprives him or her of that right), and second, that such deprivation or infringement is not in accordance with the principles of fundamental justice. This two-step analysis has been consistently followed by Canadian courts, and most recently reiterated by the Supreme Court in *Ewert v. Canada,* 2018 SCC 30 at para. 68.

[94] Pursuant to the first step of this analysis, the appellant had to demonstrate that one of the listed rights is engaged, and that there is a sufficient causal connection between the harm she has allegedly suffered and the law that is challenged. As the Supreme Court found in *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101 at para. 76 [*Bedford*], "[a] sufficient causal connection standard does not require that the impugned government action or

law be the only or the dominant cause of the prejudice suffered by the claimant, and is satisfied by a reasonable inference, drawn on a balance of probabilities”.

[95] The appellant submitted that her rights to both liberty and security are infringed by the MNI requirement. She characterizes her right to liberty as “the right to decide with whom she wishes to live, the kind of relationship she wishes to maintain with her family, and the right to impart to her children cultural and family values as handed down by her parents consistent with their ethnic background” (Appellant’s Memorandum, at para. 56). As for her right to security, she claims that she has suffered anxiety and depression as a result of the MNI requirement, denying her the possibility of reunifying her extended family and causing long-term family separation (Appellant’s Memorandum, at para. 57). For the reasons that follow, I agree with the IAD that neither of the rights protected by section 7 of the Charter have been infringed by paragraph 133(1)(*j*) of the IRPR.

[96] The Supreme Court has repeated over and over again that the right to liberty protected by section 7 of the Charter is not unlimited and that it does not include every personal decision an individual may wish to make. Only those choices that are “fundamentally or inherently personal” have been found to fall within the ambit of the right to liberty. As the Supreme Court stated in *Godbout v. Longueil (City)*, [1997] 3 S.C.R. 844 at para. 66 [*Godbout*]:

> The foregoing discussion serves simply to reiterate my general view that the right to liberty enshrined in s. 7 of the *Charter* protects within its ambit the right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference. I must emphasize here that, as the tenor of my comments in *B.(R.)* should indicate, I do not by any means regard this sphere of autonomy as being so wide as to encompass any and all decisions that individuals might make in conducting their affairs. Indeed, such a view would run contrary to the basic idea, expressed both at the outset of these

> reasons and in my reasons in *B.(R.)*, that individuals cannot, in any organized society, be guaranteed an unbridled freedom to do whatever they please. Moreover, I do not even consider that the sphere of autonomy includes within its scope every matter that might, however vaguely, be described as "private". Rather, as I see it, the autonomy protected by the s. 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence…
>
> (See also: *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571 at para. 85; *Association of Justice Counsel v. Canada (Attorney General)*, 2017 SCC 55, [2017] 2 S.C.R. 456 at para. 49; *R. v. Morgentaler*, [1988] 1 S.C.R. 30.)

[97] In *Blencoe v. British Columbia (Human Rights Commission),* 2000 SCC 44, [2000] 2 S.C.R. 307 at para. 54 [*Blencoe*], the majority of the Supreme Court agreed with Justice La Forest in *Godbout* that "personal autonomy, however, is not synonymous with unconstrained freedom", and endorsed his view that the sphere of inherently personal decision-making deserving of the law's protection is "narrow". Indeed, there have been very few cases where the right to liberty has been applied outside the context of the administration of justice. In terms of family and parental rights, the removal of child custody from a parent was recognized by three judges of the Supreme Court as a breach of the right to liberty (*New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46 [*New Brunswick*] at para. 118). In a similar vein, the Supreme Court found that the right to liberty of a parent was breached when his child was imposed a medical treatment without his consent (*B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315).

[98] The right to nurture a child and to make fundamental decisions for it, such as medical care, clearly falls within the core of what it means to enjoy individual dignity and independence. It is not at all clear to me that the right claimed by the appellant to bring her parents and siblings

to live in Canada is of the same nature. While I appreciate how important it may be for the appellant to be able to live close to her parents and siblings, I am not convinced that such an interest is so intertwined with the “intrinsic value of human life” and “the inherent dignity of every human being” (*Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 at p. 585).

[99] I need not, however, come to a definitive conclusion on that issue in the context of the case at bar. It is well established that Charter rights take their colour from the context and must be interpreted in light of the circumstances in which they arise. Since the family members with whom the appellant wishes to be reunited have no status in Canada, I must draw upon the principles and policies underlying immigration law to define the right to liberty and security protected by section 7 of the Charter. The Supreme Court has often repeated that the most fundamental principle of immigration law is that non-citizens, such as the appellant’s family members, do not have an unqualified and untrammelled right to enter or remain in Canada: see *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711 at para. 27; *Medovarski v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, [2005] 2 S.C.R. 539 at para. 46 [*Medovarski*]. The Charter itself recognizes and gives effect to that distinction in providing at subsection 6(1) that only citizens have the right to enter, remain in and leave Canada. As a result of that core principle, the Supreme Court has acknowledged that Parliament has the right to adopt an immigration policy and to enact legislation prescribing the conditions under which non-citizens will be permitted to enter and remain in Canada.

[100] Courts have consistently declined to recognize a right to family unity or family reunification under section 7. In *Medovarski*, for example, the appellant had argued that deportation would remove “her liberty to make fundamental decisions that affect her personal life, including her choice to remain with her partner”, and that her security would be infringed “by the state-imposed psychological stress of being deported” (at para. 45). The Supreme Court rejected that claim, stating that “the deportation of a non-citizen in itself cannot implicate the liberty and security interests protected by s. 7 of the [Charter]” (at para. 46). Similarly, this Court found in *Idahosa v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 418, [2009] 4 F.C.R. 293 at paras. 45-49, that section 7 does not invalidate the removal of a non-national, unless it can be established that he or she would be at risk of serious harm in the country to which the removal is to take place. In so concluding, the Court rejected the appellant’s claim that section 7 includes the right of parents and children not to be separated by state action: see also *Naredo v. Canada (Minister of Employment and Immigration)*, [1995] FCJ No. 867 (FCA).

[101] Nor does the removal of the parents of Canadian born children to their countries of origin, when they are inadmissible to remain in Canada, engage the children’s section 7 interests. Such children have no Charter right to demand that the Canadian government not impose on their parents the penalties for violating Canadian immigration laws: see *Langner v. Canada (Minister of Employment and Immigration)*, [1995] FCJ No. 469 (FCA); *Lewis v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2017 FCA 130.

[102] As aptly pointed out in the Respondent's Memorandum of Fact and Law (at para. 32), a sponsor's inability to bring a non-citizen parent or grandparent to Canada is even further removed from the interests protected by section 7 than the deportation of a non-citizen who is already in Canada. If it were otherwise, Canada would be prevented from setting out any kind of legislative requirements (including those pertaining to health, criminality and security) to foreign nationals who wish to establish themselves in Canada. This would run contrary to the most basic principle of international law and Canadian constitutional law, that a sovereign state has the right to control who enters and remains on its territory (subject to the *United Nations Convention Relating to the Status of Refugees*, 189 U.N.T.S. 150). This is a quintessentially governmental responsibility, and Canadian citizens or permanent residents cannot be left to dictate on their own the legal status of foreigners. This is clearly not a liberty (or, for that matter, a security) interest that falls within the ambit of the protection offered by section 7 of the Charter.

[103] The same is true with respect to the right to security of the person. Not only is that right no more engaged than the right to liberty by the appellant's inability to bring her parents and siblings to Canada, but there is very little evidence of psychological harm at the level necessary to substantiate an infringement of the appellant's right to security of the person.

[104] The Supreme Court has made it clear that for the right to security to come into play, a claimant must establish a serious interference from the state. As stated for the majority by Chief Justice Lamer in *New Brunswick* at para. 60:

> For a restriction of security of the person to be made out, then, the impugned state action must have a serious and profound effect on a person's psychological integrity. The effects of the state interference must be assessed objectively, with a view to their impact on the psychological integrity of a person of reasonable

> sensibility. This need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety.
>
> (See also: *Kazami Estate v. Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 S.C.R. 176 at paras. 125-126; *Blencoe*, at paras. 55-61.)

[105] The appellant argues that the MNI requirement violates her right to security as the denial of the possibility of reunification with her extended family and the long-term family separation caused her psychological impacts such as anxiety and depression. The IAD considered that argument, and understood that the appellant's separation from her family was difficult and that she experienced depression and anxiety. Yet it came to the conclusion that it was not severe enough to meet the high threshold set out by the jurisprudence, and that the appellant was merely suffering from general separation.

[106] The IAD relied heavily on the fact that the appellant did not take her medication despite allegedly suffering from a depression, and that she dismissed the possibility of travelling to Bangladesh without her family to solve her condition. Moreover, the appellant had left Bangladesh 20 years ago, and the IAD noted that her anxiety and depression was mild in severity. Therefore, the IAD concluded that the appellant's psychological harm was no more serious than ordinary stress or anxiety.

[107] The appellant obviously does not agree with that assessment, but has not put forward any other arguments with respect to her right to security. In light of the fact that the IAD did not misapprehend the law and is owed deference with respect to its findings of fact, the intervention of this Court would not be warranted. This is not to belittle the pain and sorrow the appellant

may experience at the prospect of not being able to reunite with her parents and siblings; however, it is not sufficient to establish a violation of her constitutional right to security.

[108] I would further add that the separation of the appellant from her family is the result of her own choice, and not the result of government action. This Court outlined in *de Guzman v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436, [2006] 3 F.C.R. 655, that the decision to immigrate to Canada without the assurance of being joined later by family members, is a voluntary decision that a person makes. While the appellant may have assumed, falsely, that she would eventually be able to bring her family members here, statutory and regulatory requirements for bringing family members to Canada have existed for many decades and were in place at the time the appellant went through the process of acquiring status in Canada.

[109] Relying on *Bedford*, the appellant tried to argue that the "sufficient causal connection" test is a flexible one, and that she is not required to show that the MNI requirement is the only or dominant cause of the prejudice she suffers. In that case, it will be remembered, the Supreme Court rejected the Attorney General's submission that it was not the law, but the choice made by sex workers to engage in inherently risky activity, that was the real cause of their injury. The highest Court rejected that argument, first because many sex workers have no meaningful choice but to do so, and also because sex work is not illegal. The causal question, in that case, was whether the impugned laws made this lawful activity more dangerous. Needless to say, this situation bears no resemblance with that of the appellant. It cannot be said that the appellant had no meaningful choice but to immigrate to Canada and leave her family behind. Moreover, what

the appellant is seeking is the right to bring her family members to Canada on her own terms, which has never been recognized as a right in Canada (nor, for that matter, in any other country).

[110] Given that the appellant's rights to liberty and security are not engaged, and that there is no causal connection between the MNI requirement and the alleged harm suffered by the appellant, there is no need to determine whether the principles of fundamental justice have been breached.

VI. Conclusion

[111] For all of the above reasons, I would therefore dismiss the appeal without costs.

"Yves de Montigny"
J.A.

"I agree
J. D. Denis Pelletier J.A."

"I agree
Johanne Gauthier J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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