S.C.C. File No. 39749

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

B E T W E E N:

THE CANADIAN COUNCIL FOR REFUGEES, AMNESTY INTERNATIONAL, THE CANADIAN COUNCIL OF CHURCHES, ABC, DE [BY HER LITIGATION GUARDIAN ABC], AND FG [BY HER LITIGATION GUARDIAN ABC], MOHAMMAD MAJD MAHER HOMSI, HALA MAHER HOMSI, KARAM MAHER HOMSI AND REDA YASSIN AL NAHASS and NEDIRA JEMAL MUSTEFA

APPELLANTS
(*Respondents*)

- AND -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

RESPONDENTS
(*Appellants)*

[*Style of cause continued on next page*]

FACTUM OF THE INTERVENOR THE CANADIAN CIVIL LIBERTIES ASSOCIATION

Pursuant to Rule 42 of the Rules of the Supreme Court of Canada, SOR/2002-156

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PART I – OVERVIEW AND FACTS

1. This appeal raises important questions of law relating to the available redress for *Charter* litigants confronting government assertions of privilege over relevant information and the appropriate evidentiary standards for *Charter* litigation. These related issues strike at the heart of this Court's commitment to access to justice and the rule of law.

2. These issues arise from two novel requirements imposed by the Court of Appeal which depart from standards established by this Court. First, the Court of Appeal imposes a new procedural hurdle on litigants faced with government assertions of privilege over relevant information. Specifically, the Court of Appeal requires litigants to make "constant and firm objection" to government non-disclosure as a precondition for drawing an adverse inference. Second, the Court of Appeal imposes a heightened evidentiary standard for *Charter* litigation. It also requires that litigants provide evidence of universal impact in order to substantiate systemic issues. That is, the Court of Appeal requires evidence that all members of the claimant group are impacted in the same way.

3. These novel and unnecessary requirements create undue technical barriers for *Charter* litigants, thereby increasing litigation costs, exacerbating delays, and further expending scarce judicial resources. These requirements are likely to not only impede access to justice, but also shield government action from judicial scrutiny. The risks of this occurring are particularly acute where both novel requirements are applied in tandem.

PART II – POSITION

4. CCLA's submissions are limited to questions of law regarding the evidentiary and procedural requirements imposed by the Court of Appeal and the impacts of those requirements on access to justice and government accountability.

PART III – ARGUMENT

A) Court of Appeal imposes novel and unnecessary requirements for *Charter* litigation

5. The Court of Appeal imposes two requirements which depart from the jurisprudence of this Court. The first is a new procedural hurdle imposed on litigants faced with government assertions of privilege. The second requirement is a heightened evidentiary standard

for *Charter* litigants.

A.1 Court of Appeal requires "constant and firm objection" to assertions of privilege prior to adverse inference being drawn

6. The Court of Appeal creates new procedural hurdles that litigants must overcome when faced with government non-disclosure of relevant documents. Specifically, the Court of Appeal finds that adverse inferences will be drawn only when the challenging party makes a "constant and firm objection" to the government's assertions of privilege.[1] This new "constant and firm objection" standard requires litigants to not only request all relevant evidence, but additionally, to raise and maintain objections to all assertions of privilege *and* exhaust litigation of those objections before a court will draw an adverse inference based on non-disclosure.[2] Problematically, the Federal Court of Appeal has subsequently endorsed this novel approach in *Portnov*, suggesting that full objections must be raised and maintained even where an objection will likely be unsuccessful because the government's assertion of privilege is valid.[3]

7. The Court of Appeal's imposition of a "constant and firm objection" standard deviates from the caselaw of this Court. This Court does not require a litigant to take steps to challenge asserted privilege in order for a negative inference to be drawn when the government claims privilege over relevant documents. For example, in *RJR-MacDonald*,[4] the majority rejected the Attorney General's arguments under section 1, which relied upon an assertion of privilege under s. 39 of the *Canada Evidence Act*.[5] This Court found that since it "lack[ed] authority to review the documents for which privilege is claimed under s. 39," the non-disclosed information undercut the government's minimal impairment claim.[6]

8. Notably in *RJR,* the applicant tobacco companies "studiously refrained" from taking any steps to obtain the information over which privilege was asserted,[7] yet this did not prevent the majority from drawing an adverse inference against the government. In concurring reasons,

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[1] *Canada (Citizenship and Immigration) v Canadian Council for Refugees*, 2021 FCA 72 at para 111 [*CCR* FCA] [emphasis added].
[2] *Ibid* at para 78.
[3] *Portnov v Canada (AG)*, 2021 FCA 171 at para 51.
[4] *RJR-MacDonald Inc v Canada (AG)*, [1995] 3 SCR 199, 127 DLR (4th) 1 [*RJR*] at 165-168.
[5] RSC 1985, c C-5 [*CEA*].
[6] *RJR*, *supra* note 4 at paras 165-66, McLachlin J.
[7] *Ibid* at para 101, LaForest J, (dissenting on the section 1 analysis).

Iacobucci J. cautioned against placing "part of the responsibility" for an incomplete factual record with the applicant. Highlighting concerns about access to justice and the principle of legality, Iacobucci J. was "reluctant to permit the justification of a conceded constitutional violation because of the inability of a party to the litigation to have pursued all possible avenues to obtain the non-disclosed information."[8]

9. This Court later affirmed in *Babcock* the importance of a court's ability to draw an adverse inference in the face of non-disclosure as a safeguard against the government abusing its broad authority to certify documents under the *CEA* in order to gain a tactical litigation advantage.[9] Nothing in *Babcock* supports the Court of Appeal's finding that a party must challenge or object to government non-disclosure prior to a court drawing an adverse inference. Indeed, this Court's approach in *RJR* and *Babcock* is consistent with the legal maxim that "all evidence is to be weighed according to the proof which is in the power of one side to have produced, and in the power of the other side to have contradicted,"[10] and it aligns with the guidance in *Vavilov* concerning justified and transparent decision-making.[11] In *Vavilov,* this Court made clear that an administrative decision maker cannot "expect that its decision would be upheld on the basis of internal records that were not available to [the affected parties]".[12]

10. The Court of Appeal's new procedural hurdle is therefore contrary to this Court's jurisprudence which carefully disincentivizes selective and tactical non-disclosure by the government. As set out below, it imposes significant and unnecessary barriers to *Charter* litigants

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[8] *Ibid* at para 186, Iacobucci J, (concurring on the section 1 analysis).

[9] *Babcock v Canada (AG)*, 2002 SCC 57 at para 36 [*Babcock*] Notably, in *Babcock* the government did not bear the legal onus, yet this Court held that by certifying documents under s. 39 the government "runs the risk that refusal [to disclose] may permit the court to draw an adverse inference" at para 52.

[10] *Blatch v Archer* (1774), 1 Cowp 63, 98 ER 969 at p 970. See also: *Clements v Clements*, 2012 SCC 32 at para 11; *Snell v Farrell*, [1990] 2 SCR 311, 72 DLR (4th) 289 at 329-30 [cited to SCR]; *R v Jolivet*, 2000 SCC 29 at paras 23-28; *Rohl v British Columbia (Superintendent of Motor Vehicles)*, 2018 BCCA 316 at para 1; *Stassis v Amicus Bank*, 2014 NLCA 38 at para 36; *Pustai v Pustai*, 2018 ONCA 785 at para 38; *Donner v Donner*, 2021 NSCA 30 at para 42; *Cook v Joyce*, 2017 ONCA 49 at para 99; *Appleby-Ostroff v Canada (AG),* 2011 FCA 84 at paras 36-37; *Merck & Co Inc v Apotex Inc*, 2003 FCA 488 at para 49; *Parris v. Laidley*, 2012 ONCA 755 at para 2.

[11] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 95.

[12] *Ibid* at para 95. See also *Gitxaala Nation v Canada*, 2016 FCA 187 at paras 320-24.

which can preclude the proper adjudication of valid *Charter* claims.

A.2 Court of Appeal imposes novel evidentiary standards

11. The Court of Appeal imposes evidentiary standards for *Charter* litigation that depart from those articulated by this Court. Moreover, its requirement that the evidence be universal in impact sets an untenable threshold that minimizes the evidence of individual experiences.

A.2.i Court creates new heightened evidentiary standard for *Charter* litigation

12. The Court of Appeal purports to rely on the evidentiary standards set out by this Court in its assessment of the record. However, the Court of Appeal's evidentiary requirements are novel and substantially depart from those outlined by this Court.

13. The Court of Appeal comments that the record in this case is "too thin", "incomplete" and "hobbled"[13] and that it fails to meet the evidentiary sufficiency standards required by this Court in cases like *Mackay v Manitoba*[14] and *Danson v Ontario*.[15] However, unlike in *Mackay* and *Danson,* this is not a case without a full evidentiary record.[16] Following the direction of the Federal Court of Appeal in 2008,[17] the Appellants advanced individualized evidence from refugees directly impacted by the Safe Third Country Agreement along with expert opinions on the U.S. system and the governing international standard. Thus, they provided a comprehensive factual record upon which to assess the alleged *Charter* breaches. The Appellants filed 26 individual affidavits and nine expert affidavits.[18] The Respondents provided no individual evidence but did provide nine affiants. The Respondents' cross-examined most of the Appellants' affiants and the Appellants cross-examined most of the Respondents' affiants to establish the relevant adjudicative and legislative facts. In the end, the record was over 21,500 pages in length.[19] As the trier of fact, the Application's Judge noted the "extensive evidentiary record" filed by both parties,[20] and cited many of the affiants and cross-examinations in her *Charter* analysis.

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[13] *CCR* FCA, *supra* note 1 at paras 60, 76, 74.
[14] *Mackay v Manitoba*, [1989] 2 SCR 357, 61 DLR (4th) 385 [*Mackay* cited to SCR].
[15] *Danson v Ontario (AG)*, [1990] 2 SCR 1086, 73 DLR (4th) 686 [*Danson* cited to SCR].
[16] See *Mackay*, *supra* note 13 at 363; *Danson*, *supra* note 14 at 1100.
[17] *Canadian Council for Refugees v Canada*, 2008 FCA 229 at paras 102-103, 109.
[18] *Canadian Council for Refugees v Canada (Minister of Citizenship and Immigration*), 2020 FC 770 at paras 31-32 [*CCR* FC].
[19] Appeal Book, Index ["AB"].
[20] *CCR* FC, *supra* note 18 at para 30.

14. Therefore, the record in this case aligns with this Court's direction in *Danson* and *MacKay,* which identifies evidence that sufficiently fills "factual vacuums" in *Charter* litigation as including scientific, social, economic, and political expert opinions.[21] Consequently, by finding the robust record in this case insufficient to adjudicate the *Charter* claims, the Court of Appeal imposes a new and heightened evidentiary standard for *Charter* litigation.

A.2.ii Court imposes requirement to demonstrate universal impact for systemic issues

15. The Court of Appeal appears to require evidence of universal impact in order to demonstrate "system-wide" or "systemic" issues. This minimizes the value of individualized evidence and is contrary to the evidentiary standards established in *Charter* jurisprudence."[22]

16. The Court of Appeal's approach to assessing systemic issues is demonstrated through its repeated findings that the Application's Judge made palpable and overriding errors when assessing the sufficiency of the Appellants' evidence. The primary basis of the Court of Appeal's findings is that the evidentiary record did not establish an actual or perceived universality of impact among the claimant group. For example, the Court of Appeal finds that the evidence does not support the Application Judge's finding that the Appellants' liberty interests were engaged because returnees were detained upon re-entering the United States. This is despite the fact that the evidence of systemic detention of individuals after being returned to the United States consists of: individualized evidence of ten individuals "selected by the claimants" who had been detained, evidence from lawyers whose sworn statements demonstrated that "most are detained", and expert evidence demonstrating that detention is discretionary but not mandatory.[23] Indeed, the Court of Appeal notes that "[o]nly the opinion of experts testifying on system-wide phenomena, the content of United States law and its effects might suffice" to make the applicable factual inference.[24]

17. Similarly, the Court of Appeal disagrees with the Application Judge's finding that the alleged "safety valves" of the impugned legislation are "illusory", because a few of the Appellants in the case used the alleged "safety valves" to avoid removal. The Court of Appeal reaches this conclusion by contradicting the Application Judge's explicit finding that the circumstances of those individuals were exceptional, and that access to these alleged "safety valves" is not generally

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[21] *Mackay*, *supra* note 13 at 361.
[22] *CCR* FCA, *supra* note 1, at para 78.
[23] *CCR* FCA, *supra* note 1 at paras 138-39.
[24] *CCR* FCA, *supra* note 1 at para 139.

available to refugees who arrive at ports of entry.[25] The Court of Appeal's new standard effectively requires that the safety valves are universally inaccessible to every refugee regardless of how exceptional outlying cases might be.

18. Finally, the Court of Appeal interferes with the Application Judge's finding that detention conditions in the United States are cruel and unusual and cause psychological suffering, in part because, "…broad, system-wide inferences concerning the United States from the limited nature of the individual incidents described in the record cannot be made."[26] In so doing, the Court of Appeal again minimizes the individual evidence adduced in this case and improperly requires that the evidentiary record show a universal impact on all claimants.

19. The Court of Appeal's repeated findings that the Application Judge made palpable and overriding errors because the evidentiary record showed that there were, or potentially could be, examples that ran counter to her findings, sets a dangerous precedent. The Court of Appeal's standards stray from the guidance of this Court and others, which consistently affirm the ability of litigants to establish *Charter* violations based, at least in part, on individualized evidence, even when there are exceptions to the evidence tendered.

20. In *Fraser v Canada,* for example, this Court reviewed the *Charter* breach on the basis of three individuals, combined with statistics, reports, and academic work.[27] In *Bedford v Canada,* this Court reviewed individualized evidence of three witnesses, combined with social science experts, studies, and reports.[28] In clarifying that only one person needs to be negatively impacted to establish a s.7 breach, this Court recognized that not every person impacted by an impugned law must be impacted in the same way.[29] Indeed, demonstrating systemic issues based on individualized evidence is a common and sometimes necessary approach to establishing the factual basis in a *Charter* claim.

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[25] *CCR* FC, *supra* note 18 at para 130.
[26] *CCR* FCA, *supra* note 1 at para 146.
[27] *Fraser v Canada (Attorney General),* 2020 SCC 28 at paras 21, 56-59, 72.
[28] *Bedford v Canada*, 2010 ONSC 4264 at para 84, aff'd 2013 SCC 72 [*Bedford*].
[29] *Ibid* at para 123. See also *PHS Community Services Society v Attorney General of Canada*, 2008 BCSC 661, aff'd 2011 SCC 44.

21. Lower courts have also repeatedly adopted this approach in *Charter* cases.[30] For example in *Canadian Doctors for Refugee Care v Canada,* the Federal Court reviewed individualized evidence from impacted refugees, as well as affidavit evidence from community workers, health care providers and lawyers about unnamed individuals.[31] In that case, the possibility that not every refugee was negatively impacted in precisely the same way did not prevent the Federal Court from finding a *Charter* breach.

22. The Court of Appeal's dismissal of the evidentiary record in this case, and its implicit requirement for universality of impact to demonstrate systemic issues, interjects new evidentiary requirements in *Charter* litigation that are not grounded in precedent, are practically unworkable, and if upheld, would erect significant barriers for future litigants. Indeed, had the Court of Appeal's new evidentiary standard been applied in the above noted cases, it could have precluded findings of *Charter* breaches despite the meritorious nature of the litigants' claims.

B) Requirements impede access to justice and erode existing safeguards against immunization of government decision-making

23. The Court of Appeal's heightened procedural hurdles and evidentiary requirements impede access to justice by creating significant technical barriers for *Charter* litigants and by increasing litigation costs and delays. These new requirements also erode the safeguards put in place by this Court to avoid immunization of government actions from judicial scrutiny.

B.1 Imposition of technical barriers impede access to justice

24. This Court has made it clear that undue technical barriers can impede access to justice. For example, in *TeleZone*, this Court noted that "[a]ccess to justice requires that the claimant be permitted to pursue its chosen remedy directly and, to the greatest extent possible, without procedural detours."[32] Similarly, in *Downtown Eastside*, this Court identified "practical and effective ways to challenge the legality of state action" as a core element of the principle of

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[30] See e.g. *Y.Z. v Canada (Citizenship and Immigration),* 2015 FC 892 at paras 125-26; *British Columbia Civil Liberties Association v Canada (Attorney General),* 2018 BCSC 62; *Hitzig v Canada*, 231 DLR (4th) 104 (ON CA).
[31] *Canadian Doctors for Refugee Care v Canada (AG)*, 2014 FC 651 at paras 165-72.
[32] *Canada (AG) v TeleZone Inc*, 2010 SCC 62 at paras 18-19. See also *Nevsun Resources Ltd v Araya,* 2020 SCC 5 at para 145, citing *Hryniak v Mauldin*, 2014 SCC 7 at paras 24-25, 32 [*Hryniak*].

legality.[33] The Court of Appeal's decision runs afoul of these principles.

25. The Court of Appeal's novel procedural and evidentiary standards are onerous and compel litigants to expend additional resources in order to undertake increased litigation and to compile an all-encompassing evidentiary record when advancing a *Charter* challenge. For example, the Court of Appeal's requirement that litigants resort to "tools" to address the non-disclosure of evidence, generally requires costly and prolonged litigation.[34] Indeed, the "constant and firm objection" standard even requires that litigants formally object to *and* litigate any non-disclosed information certified by the government under s. 39(1) of the *CEA*, despite those challenges often being doomed to fail if there are no indications that the certification is improper or otherwise objectionable.[35] Similar concerns arise with respect to the Court's evidentiary expectations which increase the amount of evidence required to ground a *Charter* claim, without allowing for exceptions. Indeed, the Court of Appeal acknowledges that its articulated threshold is beyond the capacity of *Charter* litigants to meet.[36] In both instances, the Court has erected significant and unnecessary technical barriers that will hinder the ability of litigants to access the courts.

B.2 Increased costs and delays associated with litigation impede access to justice

26. Beyond simply screening out unmeritorious allegations of *Charter* breaches, the Court of Appeal's heightened evidentiary standard and requirement that litigants make "constant and firm objection" risks discouraging justice-seeking groups and disadvantaged litigants from advancing valid *Charte*r claims by superimposing economic and logistical costs to a level that precludes access to the courts.

27. In *Hryniak*, this Court made clear that a just adjudication of disputes must be affordable. Yet, increased evidentiary requirements and litigation comes with increased time, the potential for undue delay, and the expenditure of scarce judicial resources. In the case at bar, the Appellants had a counsel team of 9 lawyers and it is clear that preparing the record required a great deal of time and effort. Motions regarding contested disclosure had already delayed the proceedings for

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[33] *Canada (AG) v Downtown Eastside Sex Workers United Against Violence Society,* 2012 SCC 45 at para 31 [*Downtown Eastside*].
[34] *CCR* FCA, *supra* note 1 at paras 107-22.
[35] *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at paras 605-06 [*Greenhouse Gas*].
[36] *CCR* FCA, *supra* note 1 at para 83.

eight months and yet, along with the evidentiary record, were still found wanting.

28. This Court has repeatedly found that the right to access the courts in a timely manner is "one of the foundational pillars protecting the rights and freedoms of our citizens."[37] If upheld, the Court of Appeal's "constant and firm objection" standard and increased evidentiary requirements could significantly increase preparation time and overwhelm court resources in the assessment of protracted contested disclosure claims, and in so doing, delay the adjudication of rights claims. When court costs and delays become too onerous, this Court has cautioned that, "people look for alternatives or simply give up on justice".[38] Such a result would be antithetical to the access to justice commitments outlined by this Court.

B.3 New requirements immunize laws and government action from review

29. In *Trial Lawyers Association of British Columbia v British Columbia (AG)*,[39] this Court emphasized the fundamental importance of allowing litigants to challenge government action in court as a basic cornerstone of the rule of law.[40] The Court of Appeal's imposition of a heightened evidentiary standard and further procedural hurdles risks immunizing government decisions from judicial scrutiny by making it very difficult for litigants to access the necessary information and adduce a sufficient evidentiary record in order to advance their case. This contravenes this Court's longstanding commitment to ensuring the pragmatic feasibility of rights-seeking litigation.[41]

30. Practically, the Court of Appeal's evidentiary requirements are so onerous as to make government action unchallengeable in certain situations. The Appellants adduced a comprehensive evidentiary record, the contents of which are outlined above. It is difficult to contemplate how under-resourced, rights-seeking litigants would be able to adduce a more detailed, pointed, and rigorous record. To dismiss the justiciability of this claim, and others like it, on the basis of the insufficiency of the evidentiary record creates a real risk that government actions will be immunized from judicial scrutiny and that, as a result, fundamental rights will be neglected.

31. Moreover, the Court of Appeal's "constant and firm objection" standard erodes important

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[37] *BCGEU v British Columbia (AG)*, [1988] 2 SCR 214, 53 DLR (4th) 1 at para 26; See *Hryniak*, *supra* note 32 at para 24.
[38] *Hryniak, supra* note 32 at para 25.
[39] 2014 SCC 59 [*Trial Lawyers*].
[40] *Ibid* at para 40.
[41] See e.g. *R v Kokopenace*, 2015 SCC 28; *Trial Lawyers, supra* note 39.

safeguards and creates incentives for governments to withhold disclosure, thereby imposing additional costs on litigants—hobbling disadvantaged litigants in particular. Especially when combined with the increased evidentiary burden, the impact of the Court of Appeal's decision may effectively immunize government action from review. Indeed, that is what happened in this case. As noted, the record was comprehensive. Yet, the Court of Appeal still found the record insufficient because of the individualized nature of the evidence and its alleged lack of universal impact. With respect to the reasonableness of the ongoing designation of the United States as a "Safe Third Country", and the sufficiency of the government's periodic reviews in particular, the Court of Appeal faulted the Appellants for not providing sufficient evidence even though the *only* evidence not provided was what the government had redacted or refused to disclose.

32. As noted, the Court of Appeal declined to draw adverse inferences from the government's non-disclosure because the Appellants had not made "constant and firm objection" to the privileges raised.[42] This was even though the Appellants had specifically sought all of the relevant government records, conducted a three-day cross-examination of the public servant in charge of the reviews, *and* successfully litigated the Respondent's claim that the evidence was not relevant.[43] The only thing that the Appellants did not do was challenge the non-disclosure made by the Respondents on the basis of valid privileges. Given the nature of the privilege claimed, they may not have viewed success as likely.[44]

33. This case therefore demonstrates how the Court of Appeal's new evidentiary standards and procedural hurdles, particularly when taken in combination, can allow the government to evade judicial scrutiny of its actions, thereby effectively immunizing government action from judicial review.

PART IV– SUBMISSION ON COSTS

34. The CCLA does not seek costs and requests that no costs be ordered against it.

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[42] *CCR* FCA, *supra* note 1 paras 74, 83, 106-20.
[43] *Canadian Council for Refugees v Canada* (7 March, 2019), Toronto, FC IMM-2977-17, IMM-2229-17, and IMM-775-17 (motion for directions) 2019 FC 285.
[44] *Greenhouse Gas*, *supra* note 35; *Babcock*, *supra* note 9 at paras 38-40.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 16th DAY OF JUNE, 2022

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PART VII – TABLE OF AUTHORITIES

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38.	*Y.Z. v Canada (Citizenship and Immigration),* 2015 FC 892	21