COURT FILE NO. C29900

COURT OF APPEAL FOR ONTARIO
(ON APPEAL FROM THE ONTARIO COURT (GENERAL DIVISION))

B E T W E E N:

CLEAVON FRANCIS, DANIELLA FRANCIS and SHANICE FRANCIS
THROUGH THEIR LITIGATION GUARDIAN MACDONALD SCOTT

APPLICANTS
(RESPONDENTS IN APPEAL)

A N D: THE MINISTER OF CITIZENSHIP AND IMMIGRATON

RESPONDENT
(APPELLANT)

AND
MARIA JOYCE FRANCIS

RESPONDENT
(APPELLANT)

FACTUM OF THE INTERVENOR

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COALITION OF VISIBLE MINORITY WOMEN (ONTARIO) INC.
CONGRESS OF BLACK WOMEN OF CANADA
METRO TORONTO CHINESE & SOUTHEAST ASIAN LEGAL CLINIC
NATIONAL ACTION COMMITTEE ON THE STATUS OF WOMEN
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Part I - Statement of Facts

1. The Intervenor coalition ACLC et al. is comprised of several provincial and national equality-seeking groups that work to further the rights of women and racial minorities in Canada: the African Canadian Legal Clinic, the Coalition of Visible Minority Women (Ontario) Inc., the Congress of Black Women of Canada, the Metro Toronto Chinese & Southeast Asian Legal Clinic, the National Action Committee on the Status of Women (NAC) and the Women's Legal Education and Action Fund (LEAF).

2. The Intervenor adopts the Statement of Facts set out in the Applicants' factum (Respondents in appeal) at paragraphs 1 -17.

Part II – Points in Issue

3. The Intervenor will address the following two issues in this case:

   (i) Did the Application judge err in asserting his *parens patriae* jurisdiction to consider children's interests in a matter related to a parent's removal from Canada?

   (ii) In a proceeding that may result in the separation of a parent from a dependent, minor child, does the state's failure to consider the children's interests, the parent's interests, the parent-child inter-relationships, and the potential harmful effects of a rupture in the relationships between children, their parent(s) and their siblings, contravene sections 7 and 15 of the *Charter*.

Part III – Law and Argument

Summary of Intervenor's Position

4. The Intervenor submits that when a parent-child relationship may be severed as a consequence of a proceeding that did not consider the child's interests, it is appropriate for a provincial superior court to assert its *parens patriae* role to consider the child's interests. In

the instant case, the Minister's order and the various processes under the *Immigration Act* failed to consider the applicant children's interests before making a determination to remove their mother from Canada. The Intervenor urges this court to defer to the discretion of Judge McNeely who assumed jurisdiction over the application to determine the children's interests.

5. Secondly, the Intervenor submits that a proper application of principles derived from sections 7 and 15 of the *Charter* to proceedings which potentially sever a parent-child relationship requires that:
   a) any determination of children's interests take into account the care-giving and inter-dependent relationships between children and their care-giving parent(s), and between the children and their siblings;
   b) children's interests be determined in light of the substantial overlap between their interests and those of their care-giving parent(s); and
   c) any potential for significant harm resulting from a rupture in the relationships between children, their parent(s) and siblings be assessed fairly.

6. Thirdly, the Intervenor submits that the failure to consider the above inter-relationships in proceedings under the *Immigration Act* has:
   a) a significant negative effect on dependent, minor children and their parents, and a disproportionate impact on mother-child relationships as mothers are by far the primary care-givers;
   b) a compounded negative effect on dependent, minor children of "single" mothers who are sole care-givers; and
   c) a further compounded negative effect on children whose mother is of a race, religion, country of origin or ethnic background that has historically received unfavourable consideration for entry into or permanent residence in Canada,

all of which is contrary to sections 7 and 15 of the *Charter.*

7. Fourthly, the Intervenor submits that in the instant case, the failure to consider the above inter-relationships could result in the state's removal of the mother from Canada (and implicitly, the expulsion of the applicant-children with her). This removal would deprive the children of the liberties, social and economic benefits attendant on their citizenship and residency in Canada. Alternatively, if the mother is compelled to leave her dependent, minor children behind in Canada, they would be deprived of a nurturing, care-giving mother-child relationship. In either case, both the mother's and the children's right to life, liberty and security of the person would be jeopardized by state action. Failure to consider these interests in accordance with the principles of fundamental justice is contrary to sections 7 and 15 of the *Charter.*

Issue No. 1 - Jurisdiction

Did the Application judge err in asserting his *parens patriae* jurisdiction to consider children's interests in a matter related to a parent's removal from Canada?

Provincial superior court is entitled to deference

8. The provincial superior courts have discretion to accept or decline *parens patriae* jurisdiction with respect to the determination of children's interests. That exercise of discretion is entitled to deference provided that all relevant considerations were taken into account.

   Reza v. Canada, (1994) 24 Imm.L.R. (2d) 117, at 125-126

9. The Intervenor submits that in the instant case, "all relevant considerations" include the interests of children who would be deprived of parental care should the state remove their parent(s) from Canada.

Federal Court lacks jurisdiction to determine children's interests

10. Both the *Immigration Act* and the *Federal Court Act* are silent regarding the consideration of children's interests in proceedings involving their parents. Accordingly, there is no forum either to ensure that children's interests are considered or to enable them to obtain an effective remedy in any decision-making at the administrative level or within the federal court system. As the Federal Court is a statutory court and lacks inherent jurisdiction, it has no authority to consider children's interests in a proceeding involving their parent(s) under the *Immigration Act*.

11. Furthermore, Federal Court jurisprudence to date indicates that children's interests are not engaged in state proceedings involving their parents under the *Immigration Act*. The Intervenor adopts the submission of the Applicants (Respondents in appeal): "[the Federal Court], which has expertise in immigration matters, has ruled that there are no interests in the circumstances of a Canadian child whose parent is subject to deportation that attract or invite legal protection under the *Charter of Rights and Freedoms* or otherwise. In the opinion of that court, the *Immigration Act* is not concerned with Canadians whose right to be in Canada is not in question."

    Applicants (Respondents) factum, paragraph 18

    Langner v. Minister of Employment ant Immigration, 98 F.T.R. 188

12. Maria Joyce Francis has exhausted her remedies in the Federal Court and, in all the proceedings involving her, there was no forum in which the children's interests could be put forward and considered. This created a "gap" whereby decisions were made without due regard to their effect on the affected children. Thus, the Intervenor submits that it is appropriate for the provincial superior court to assert its inherent *parens patriae* jurisdiction

to fill the "gap" in the proceedings and to consider and protect the interests of the affected children.

Provincial superior court is the only forum for relief

13. The Provincial superior courts' inherent jurisdiction is not restricted by statute. Through their *parens patriae* role, provincial superior courts can hear and determine *any* matter involving children's interests where children require protection.

> The *parens patriae* jurisdiction is, as I have said, founded on necessity, namely the need to act for the protection of those who cannot care for themselves. The courts have frequently stated that it is to be exercised in the "best interest" of the protected person, or again, for his "benefit" or "welfare."
>
> *E. (Mrs.) v. E.*, [1986] S.C.R. 388 at 426 per Justice La Forest for the court

14. The Intervenor submits that the very essence of the instant case is the lack of a forum where the children's interests in the processes dealing with their parent under the *Immigration Act* can be considered. The Appellant Minister at paragraph 18 of her factum claims that "His Honour failed to address the appropriate question, namely, whether the existence of the Court's *parens patriae* jurisdiction gave it some advantage over the Federal Court," relying on *Peiroo v. Canada.* The Intervenor submits that *Peiroo* is distinguishable on its facts as it is concerned with the *choice* of forum, not the *lack* of forum. In *Peiroo*, the provincial superior court declined an application for *habeas corpus* where the applicant had another forum for relief and had in fact concurrently filed for relief under s.28 of the *Federal Court Act.*

> *Peiroo v. Canada* (1989), 69 O.R.(2d) 253 (Ont. C.A.)

15. Furthermore, provincial superior courts have expertise in determining children's interests in a variety of proceedings, i.e. family law, child welfare, young offenders, etc. Given the subject matter, i.e. interference with the child-parent relationship, and the declaratory nature

of the relief sought regarding the unconstitutional application of the *Immigration Act*, the provincial superior court is a court of both inherent and "competent" jurisdiction.

> *Young Offenders Act*, R.S.C. 1985, C. Y-1; *Divorce Act*, R.S.C. 1985 c.3 (2nd Supp.), ss. 16(8), 16(10), *17(5) and 17(9)*; *Family Law Act*, R.S.O. 1990 c.F.3, s.56; *Child and Family Services Act*, R.SO. 1990, C.c.11, ss.37, 136; *Children's Law Reform Act*, R.S.O. 1990, c.C.12, s.24(2), 56(1)

16. Although the deportation proceedings in issue arose under the *Immigration Act*, in light of Federal Court jurisprudence and the *parens patriae* jurisdiction of provincial superior courts, the latter is the appropriate forum for the relief sought in the instant case. The Intervenor submits that the issue of jurisdiction is not determined by reference to the legislative scheme under which the order arose, but rather by the nature of the remedy sought. In *Idziak*, a case where the provincial superior court took jurisdiction in a *habeas corpus* application, the court ruled:

> The crucial question in deciding whether this court has jurisdiction is not determined by reference to the identity or capacity of the decision-maker whose order is under attack, but by the nature of the remedy requested. Consequently, the conclusion that this application is properly characterized as challenging the Minister's order of surrender, rather than the jailor's right to detain Mr. Idziak in custody under the warrant of the extradition judge does not determine the jurisdictional issue. The question must be, does the Minister's order have consequences which permit Mr. Idziak to invoke the writ of *habeas corpus*.
>
> *Idziak v. Canada* (1989), 53 C.C.C.(3d) 385 (Ont.H.C.) per Doherty, J. at 395

Issue No. 2 - *Charter* violation

Does the state's failure to consider the children's interests, the parent's interests, the parent-child inter-relationships, and the potential harmful effects of a rupture in the relationships between children and their parent(s) and siblings, in a proceeding that may result in the separation of a parent from a child, contravene sections 7 and 15 of the *Charter*?

17. The interpretation of s.7 rights cannot proceed with the assumption that all rights-holders are historically, socially and economically similarly situated. Rather, in giving meaning to section 7 like section 15, courts must consider the experiences of those subject to discrimination in our society. The Intervenors submit that s.7 must be interpreted in a manner that explicitly

takes into account the differences which exist among rights claimants. A *Charter* claim made on behalf of the applicant-children must be assessed in light of the historical, social and economic disadvantage they already experience as a direct consequence of their care-giving parent's social and economic marginality as a "single" Black woman without landed status within Canada.

Godbout v. Longueuil (City) [1997] 3 S.C.R. 844 at 890-893, La Forest, J.

18. As any *Charter* analysis requires an understanding of the context within which competing rights and privileges are asserted, the Intervenor submits that in the instant case, Joyce Francis' relationship with her children, her role as their sole care-giver and her membership in a historically disadvantaged group are relevant factors in this court's consideration of the interests at stake in the instant case.

Social Context: Immigration laws and practices

Legacy of overt discrimination

19. Historically, Canada's immigration laws, policies and practices systemically discriminated against would-be immigrants on the basis of race, religion, country of origin, nationality or ethnic background. From the turn of the century to 1978, there was legislative authority to "prohibit for a stated period or permanently, the landing in Canada ... of immigrants belonging to any race unsuited to the climate or requirements of Canada." All Asians, both eastern and southern, were viewed as "unassimilable" and therefore faced severe restrictions on immigration and sponsorship of family members. "East Indians" were effectively excluded through the "continuous journey" stipulation imposed in the *Immigration Act* in 1908 and the Chinese were formally restricted and a "head tax" imposed on them under the *Chinese Immigration Act*, first enacted in1885, the same year that the railroad to

the west coast was completed. There was an operating assumption that "only British people could be Canadians".

Immigration Act, 1910, S.C. 1910, c.27, s.38

The Immigrant's Handbook, A Critical Guide by the Law Union of Ontario (Montreal, Black Rose Books, 1981) at 20- 27 and footnote 12

Robert Craig Brown and Ramsay Cook, *Canada 1896-1921* (Toronto: McClelland and Stewart Limited, 1974), Chap. 4 at 68-71

20. From the turn of the century to the 1960s, immigration laws and practices expressly restricted the entry of Black immigrants from the Caribbean. Caribbean subjects of the British Crown who were of mixed ancestry or descendants of African slaves or East Indian indentured labourers could only enter Canada under special arrangements or quota for persons of "exceptional merit". Canada's immigration policy "was based upon a demand for cheap labour, a desire to exclude blacks as permanent settlers, and a need to appease Caribbean people in order to further Canada's trade and investments in the British Caribbean."

Order-in-Council P.C: 1950-2856 and its predecessor P.C. 1923-183 cited in Agnes Calliste, *Women of 'Exceptional Merit': Immigration of Caribbean Nurses to Canada*, 1993 Canadian Journal of Women and the Law (CJWL) 85 at 88-89

Immigration Act, R.S.C., 1952, c.325, s.61(g) authorised regulations respecting "the prohibiting or limiting of admission of persons by reason of nationality, citizenship, ethnic group, occupation, class or geographical area of origin".

Narine-Singh v. The Attorney General of Canada [1955] S.C.R. 395

21. While there was no statutory bar to the entry of Black Americans, they too were excluded under the guise that they were "unassimilable" and their race made them inherently "unsuited to the climate of Canada". Black American settlers were unwelcomed while white American settlers were actively recruited by the Canadian government.

A number of proposals were made to Canadian agents by black spokesmen suggesting group settlement on the prairies, but these were consistently discouraged. The clearest policy statement came in 1911 when a significant number of blacks in Oklahoma

indicated a serious interest in moving north. They were given no encouragement and, as one immigration official explained to the black leader, W.E. Du Bois, though there was no law against blacks entering Canada, "all restrictions respecting health, money, etc. are strictly enforced."

Brown and Cook, *supra* at 61, footnote 50, citing Public Archives of Canada, Immigration Files, 76/115, 2552, L.M. Fortier to W.E. Du Bois, March 4, 1911

22. Racism, sexism and class inequality interacted in the formulation and application of Canada's immigration policy, producing a specific place for Black Caribbean women workers: domestic service or nursing. Although some Caribbean women gained entry into Canada through special efforts by the Canadian government to recruit domestic workers and nurses, these women faced discriminatory barriers to obtaining residency status. Some categories of Caribbean nurses had to meet "qualifications over and above" those required of white nurses to become eligible for landed status and domestic workers were initially classified as "migrant workers" and were thus ineligible for landed status.

Calliste, *supra*, C.J.W.L. 89 and 95

23. Blacks were stigmatized as being mentally, physically and socially inferior and a permanent social problem in Canada. There was also the assumption that "any influx of black immigrants would cause race relations problems similar to those experienced in Britain and the United States." In addition to the stigma of mental, physical, social and cultural inferiority ascribed to Black people generally, Black women were stigmatized as being promiscuous or as single mothers, likely to become a public burden. Throughout the 1950s and 1960s, these stigmas led to the presumption that Black women would be undesirable immigrants, although their cheap labour was in demand.

Calliste, *supra*, C.J.W.L. 89 – 90

Agnes Calliste, *Canada's Immigration Policy and Domestics from the Caribbean: The Second Domestic Scheme*, Chap. 8, Race, Class, Gender: Bonds and Barriers, Socialist Studies: A Canadian Annual No. 5 at 142-143

Historical and contemporary systemic and extra-legal discriminatory practices

24. In the period 1938-1948, without passing legislation or regulations, Canada severely restricted the entry of Jews who sought refuge in Canada. A memo prepared for the Office of the Prime Minister in November 1938 stated:

> We do not want too many Jews, but in the present circumstances we do not want to say so. We do not want to legitimize the Aryan mythology by introducing any formal distinction for immigration purposes between Jews and non-Jews. The practical distinction, however, has to be made and should be drawn with discretion and sympathy by the competent authorities, without the need to lay down a formal minute of policy.
>
> *The Immigrant's Handbook* at 35, Chap. 1, footnote 54

25. The Jewish experience illuminates how extra-legal discrimination operates notwithstanding apparently neutral immigration laws and policies.

> Whatever the requirements were, Jews could not meet them in the climate of anti-Semitism that held sway in Ottawa. The Department of Immigration was headed by an avowed anti-Semite, Fred Blair, who removed the responsibility for processing Jewish applicants from other government offices to his own, where he personally scrutinized each application and decided on its eligibility. In virtually very case the answer was no....
>
> It [the Jewish experience] tells us that we do not need laws to have racist discrimination practices. All we need is unlimited bureaucratic discretion, an unsympathetic or passive public, unmotivated public leaders, or racists in positions of power to make apparently neutral laws racist.
>
> David Matas, *Racism in Canadian Immigration Policy*, in *Perspectives on Racism and the Human Services Sector: a case for change*, ed. Carl E. James (University of Toronto Press, 1996) Chap. 4 at 97-98

26. Today, after nearly a century of explicitly racist immigration laws, negative attitudes towards the immigration of Blacks, Asians and other people who comprise visible minorities in Canada still prevail among the general populace. Currently, intolerance of immigration is strongly correlated with intolerance of visible minorities and the assumption that immigrants

are a burden to the public. Recent studies commissioned by the federal government indicate that:

> [A] high percentage of Canadians (... 43%) agreed that a major weakness of the immigration system is that: "Too many immigrants end up taking advantage of social programs such as welfare". (Ekos, 1992)
>
> [There is] a steady increase in percentage of Canadians who believe that there are "too many immigrants" in Canada – increasing from 30% in 1988 to 53% in 1994. In addtion, 44% of respondents think that there are "too many visible minorities" in Canada." (Ekos, 1994)
>
> "*Backlash*" A Study on Discrimination against Immigrants and Refugees in Access to Social Services in Ontario, prepared by Howard Sinclair-Jones for Metro Toronto Chinese and Southeast Asian Legal Clinic (December 1995) at 20 citing Ekos Research Associates Inc. (1994) *Setting the Domestic and International Context for Immigration Policy: Changing Societal Perspectives* and Ekos Research Associates Inc. (1992) *The Public Opinion Impact of the New Immigration Legislation*

Relevance of the above legacy of exclusion and discrimination to the instant case

27. Joyce Francis sought landed status on "humanitarian and compassionate" grounds. As noted in the Applicants' factum, "she has been described as a person with 'integrity', a 'strong work ethic', someone who could, and would make a contribution to the work force ..." The record also discloses that she left her country of origin at the age of 16, due in part to the trauma she suffered as a result of a sexual assault committed against her by a parish priest.

> Applicants' factum , paragraph 11
> Appeal Book, vol. 1, page 115

28. Guidelines for assessing "humanitarian and compassionate" applications have been issued by the Minister and by their very nature are wholly discretionary. Immigration officers are to assess applications based, in part, on personal suitability and adaptability, financial self-sufficiency and roots in Canada. This, for the most part, is subjective. Immigration officers' decisions are not written and reasons are neither required nor provided to unsuccessful applicants. The Intervenor submits that this subjectivity permits ample opportunity for biases

to influence decision-making, and the lack of reasons makes it impossible to scrutinize decisions for fairness.

29. Joyce Francis has been a law-abiding resident and has demonstrated her willingness to maintain herself and her children throughout her years of residency in Canada. The Intervenor submits that notwithstanding the apparently neutral *Immigration Act* in force today, there is a possibility that single Black mothers like Joyce Francis might be viewed as personally "unsuitable" immigrants because of assumptions that they are "promiscuous", fit only for low paying service jobs, and sooner or later, they and their children would be "burdens to the state." Because of these negative stereotypes operating insidiously and sometimes unconsciously, Joyce Francis, as a Black woman, may have been subjected to a higher but undisclosed standard, similar to the "exceptional merit" criterion applied to Caribbean immigrants in the 1950s.

30. The Intervenor submits that it is imperative that courts of inherent jurisdiction carefully scrutinize immigration decisions that affect the rights and well-being of Canadian children to ensure that children's rights and well-being are not diminished by the operation of myths and stereotypes against their mothers. This is particularly necessary in light of Canada's legacy of sexist and racist exclusionary immigration laws and the continuing opportunities for bureaucratic discretion to be exercised in a discriminatory fashion. The lack of written reasons for unfavourable decisions and the lack of a mandate to consider children's interests necessitates the court's scrutiny and supervision over decisions that threaten parent-child relationships.

Social Context - Children's interests are linked with their mother's well-being

31. Historically, women and men have assumed gendered roles with respect to providing nurture and guidance to children. Women in marital and non-marital relationships have almost exclusively been responsible for child-care. When married and unmarried spouses separate, it is overwhelmingly mothers who obtain sole custody of their children, usually by agreement of the parties. For most women, the assumption of primary care-giving role after separation is simply a continuation of the responsibilities they held prior to separation.

    Moge v. Moge [1992] 3 S.C.R. 813 at 861

    Young v. Young [1993] 4 S.C.R. 3 at 49

    Statistics Canada, *Women in Canada: A Statistical Report*, 3rd edition, Target Groups Project, Cat. No. 89-503E at 18 and 25

32. The Supreme Court of Canada has recognized that a child's best interest is inextricably linked to the well-being of her mother who acts as the primary care-giver. That court has also stated that "the link between a child and parent is of a particular unique and intimate nature" and thus, the treatment of parents can be easily visited upon their children.

    Moge v. Moge, *supra* at 871

    Young v. Young, supra at 70

    Benner v. Canada (Secretary of State) [1997] 1 S.C.R. 358 at 400

33. The Intervenor submits that the inextricable link between the best interests of the child and the well-being of the primary care-giving parent requires a recognition of the realities and interests of the care-giver, usually the mother. Thus an examination of the inter-relatedness of mother-child interests is necessary in any determination of a child's best interest. As the achievement of substantive equality in society is necessary for the well-being of women as well as their children, the Intervenor submits that children's interests at common law should be assessed in a manner that is consistent with the constitutional goals of promoting

women's substantive equality, liberty and security interests. Any exercise that attempts to assess a child's interests in complete isolation from her mother's interest, and vice versa, is artificial and is bound to ignore relevant factors that contribute to the child's and the mother's mutual well-being.

CHARTER ANALYSIS

Section 15 applies to section 7 of the *Charter*

34. The purpose of s.15 of the *Charter* is to ensure equality in the formulation and application of the law, including the *Charter*. In *Andrews*, Justice McIntyre stated that "[T]he section 15(1) guarantee is the broadest of all guarantees. It applies to and supports all other rights guaranteed by the *Charter*."

    Andrews v. Law Society of British Columbia [1989] 1 S.C.R. 143 at 171 and 185,

35. A purposive interpretation of s.7 of the *Charter* is informed by s.15 of the *Charter* and must not only protect individuals against abuses of state power, but must take into account the state's responsibility to protect and promote the dignity, autonomy, worth and welfare of every individual.

    Hunter et al. v. Southam Inc. [1984] 2 S.C.R. 145 at 155-156

    R.B. v. Children's Aid Society of Metropolitan Toronto [1995] 1 S.C.R. 315 at 367-69

36. The Intervenor submits that this court's recognition of the dependent, minor children's relationship with their mother as a security interest worthy of protection under section 7 of the *Charter* is consistent with promoting the dignity, autonomy and welfare of all the individuals within the family unit.

37. The Intervenor further submits that the Appellant Minister's argument that the deportation of a single mother is not effectively a deportation of her children serves to reinforce the minor dependent children's disadvantaged status (relative to other Canadian children) since it denies the worth of their relationship with their mother and their profound and continuing need for attachment to their sole care-giver.

38. Any failure to recognize the child-parent relationship as being worthy of protection under s.7 of the *Charter* will have a disproportionate and negative impact on children who are already disadvantaged by their mother's lack of immigration status, her limited resources as a sole-support parent and her membership in a group that has historically encountered race and gender barriers to obtaining status in Canada. Substantive equality demands an approach that ensures that the impact of the law is neither less beneficial nor more burdensome to disadvantaged groups. As the Chief Justice of the Supreme Court of Canada stated in *Rodriguez*:

> [T]o promote the objective of the more equal society, s.15(1) acts as a bar to the executive enacting provisions without taking into account their possible impact on already disadvantaged classes of persons.
>
> *Rodriguez v. B.C. (A.G.)* [1993] 3 S.C.R. 519 at 549

Section 7 – liberty interest

39. The Supreme Court of Canada has held that "respect for the inherent dignity of the human person" and "faith in social and political institutions which enhance the participation of individuals and groups in society" are essential to a free and democratic society.

R. v. Morgentaler [1988] 1 S.C.R. 30 at 163-171

R.B, supra at 362 –374

40. The ability to care for and ensure the well-being of loved ones who are dependents is essential to one's sense of self-worth and dignity. True liberty cannot be enjoyed if individuals are denied the ability to maintain intimate familial relationships.

> The relations of affection between an individual and his family and his assumption of duties and responsibilities towards them are central to the individual's sense of self and of his place in the world.
>
> *R. v. Jones* [1986] 2 S.C.R. 284 at 319 per Wilson, J.

41. In *R.B.*, Justice La Forest, writing on behalf of four members of the Supreme Court of Canada held that the right to liberty includes "the right to nurture a child, to care for its development, and to make decisions for it in fundamental matters." Furthermore, "parental decision-making must receive the protection of the *Charter* in order for state interference to be properly monitored by the courts, and be permitted only when it conforms to the values underlying the Charter.

> *R.B., supra* at 370, 372, 389-90

42. The Intervenor submits that any state action that results in the potential rupture of the parent-child relationship must be subject to strict judicial scrutiny to ensure that the child's best interest is determined without any negative influence arising from the disadvantaged status of the parent, and must be effected in accordance with the principles of fundamental justice. It would be inconsistent with s.15 of the *Charter* if a parent's lack of status negated or determined the existence of the child's or parent's liberty interest in maintaining a nurturing and mutually beneficial relationship.

Section 7 – security interest

43. The Supreme Court of Canada has ruled that the right to security of the person under s.7 of the *Charter* protects an individual's psychological and emotional integrity.

> *Morgentaler, supra* at 55 –56
>
> *Rodriguez, supra* at 586-589

44. The deportation of a sole care-giving mother raises fundamental issues of security of the parent and the child. If the child remains in Canada without her mother, she will be deprived of positive parenting and her development will be placed at risk. As in the instant case, children who experience multiple barriers in society as a result of racism and other challenges faced by their mother as a sole care-giving parent without citizenship or residency status, (for example, poverty) benefit from her guidance and example in coping with those specific challenges. This parent cannot readily be substituted for by child welfare agencies into whose care the minor children would fall if there are no relatives in Canada who are prepared to stand *in loco parentis*. It is therefore all the more crucial that the applicant-children in the instant case be allowed to benefit from the presence of their mother on whom they are wholly dependent for their physical, emotional and psychological well-being.

45. On the other hand, if the child leaves Canada with her mother, she likely will be exposed to risk factors associated with life in the country her mother sought to escape including poverty, lack of various social, educational and vocational opportunities, and lack of familial and community support. The lack of familial and community support is likely to be heightened for those families that have been resident in Canada for a significant number of years and who have severed links with the mother's country of origin and replaced them with community support in Canada.

46. The Intervenor submits that a forced (state-initiated) rupture of the parent-child relationship is a severe sanction against both the parent and child, particularly mothers. Women's identity as care-givers and mothers is important to their self-concept and self-esteem. The fact that forced, prolonged separation has severe negative impact on the physical and

emotional well-being of both mothers and children is well recognized by courts so that in sentencing hearings, a convicted woman's status as a sole-care giver is considered in deciding if a custodial term is appropriate. In the instant case, the record discloses that the Francis family unit has experienced severe stress because of the deportation proceedings against the sole care-giver and mother and the anticipated *de facto* deportation of the children and their separation from their home and attachments in Canada.

Appellant's Appeal Book, volume 1, tab 8 (f) and (g), Affidavits of Wilkes and Katz

47. Courts have long recognized that parents whose children are removed from their custody through state wardship proceedings suffer tremendous psychological trauma. Studies have also demonstrated that women who have lost or even anticipate losing custody of a child suffer significant clinical symptoms of grief and mourning, often lasting long after separation. Similarly, in non-wardship proceedings where care-giving arrangements are put at risk by state-initiated proceedings, the Intervenor submits that parents are likely to suffer psychological and emotional harm in anticipation of the rupture of the parent-child relationship.

Andrea Kovalesky and S. Flagler, *Child Placement Issues of Women with Addictions* (Sept./Oct. 1997) 26:5 JOGNN 585 at 588-589; J. Lauderdale and J. Boyle, *Infant Relinquishment through Adoption* (Fall 1994) 26:3 *IMAGE*: Journal of Nursing Scholarship 213

48. The Intervenor submits that in the instant case, the failure to consider the parent-child inter-relationships in the proceedings under the *Immigration Act* has a significant negative effect on dependent, minor children and their parents, a disproportionate impact on mother-child relationships as mothers are by far the primary care-givers, and a compounded negative effect on children of "single" mothers who are sole care-givers and are members of historically disadvantaged groups, all of which is contrary to section 7 of the *Charter.*

Section 7 – principles of fundamental justice

49. The state may deprive an individual of the right to life, liberty and security of the person, but such deprivation must be done in accordance with the principles of fundamental justice. It is not the position of the Intervenor ACLC et al. that the state has no right to interfere in the family. It is the position of the Intervenor that the care-giving parent's interests as they relate to the children's best interests must be considered before the state takes any action that has the potential to sever the relationship between children and their care-giving parents.

50. The Intervenor submits that the opportunity to participate effectively in decisions affecting one's liberty or personal security is an integral aspect of the right to be treated in accordance with the principles of fundamental justice. What constitutes principles of fundamental justice depends on the particular rights at stake. In the instant case, the dependent, minor children's interests are significant and the consequences of removing their sole parent are serious. Thus, the content of fundamental justice must be high. As McNeely, J. ruled in the instant case:

> I am satisfied that forcing the removal of the applicant children by deporting their mother is a sufficiently direct interference by the state with the section 7 liberty rights of the Canadian children that the procedures leading to such action must comply with the requirements of fundamental justice.
>
> What are those requirements? In *Re: Singh et al. V. Minister of Employment and Immigration* (1985) 17 D.L.R. (4th) [sic] Beetz said: "The most important factor in determining the procedural content of fundamental justice in a given case are the nature of the legal rights at issue and the severity of the consequences to the individual concerned."
>
> Judgment of McNeely J., May 6, 1998, at 6, Appellant's Appeal Book, volume 1, tab 6

51. The Intervenor submits that when a parent-child relationship is put at risk by a state-initiated proceeding, a fair determination of the child's best interest must be made. This determination can only be achieved if both parent and child can effectively participate to

inform the decision-maker of their unique inter-dependent relationship and their circumstances, so that a reasoned decision can be made regarding the child's best interest.

52. The Intervenor submits that the state's act of removal or threat of removal of a parent from the country of birth and residence of her children violate both the parent's and the child's right to liberty and security of the person under s.7 of the *Charter*, unless it is conducted in accordance with the principles of fundamental justice. These principles must be observed to protect the constitutional rights of both parents and children and to ensure that reasoned decisions are made regarding children's best interest. In all proceedings involving a risk of rupture in the parent-child relationship, the Intervenor submits that fundamental justice requires a process that includes:

a) Notice to the children
b) Legal representation of the minor children's interests
c) An impartial, independent decision-maker
d) Opportunities to address the decision-maker orally if credibility is in issue
e) Written reasons for an unfavourable decision.

Part IV – Order Sought

53. The Intervenor submits that this appeal be dismissed and the decision of the learned Application Judge upheld.

ALL OF WHICH IS RESPECFULLY SUBMITTED this 31ST day of December, 1998.

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Part V – List of Authorities

I. Articles

Agnes Calliste, *Women of 'Exceptional Merit': Immigration of Caribbean Nurses to Canada*, 1993 Canadian Journal of Women and the Law 8,9

Agnes Calliste, *Canada's Immigration Policy and Domestics from the Caribbean: The Second Domestic Scheme,* Chap. 8, Race, Class, Gender: Bonds and Barriers, Socialist Studies: A Canadian Annual No. 5 9

"Backlash" A Study on Discrimination against Immigrants and Refugees in Access to Social Services in Ontario, prepared by Howard Sinclair-Jones for Metro Toronto Chinese and Southeast Asian Legal Clinic, December 1995 11

Statistics Canada, *"Women in Canada"* A Statistical Report, 3rd edition, Target Groups Project, Cat. No. 89-503E 13

Andrea Kovalesky and S. Flager, *Child Placement issues of Women with Addictions* (Sept./Oct. 1997) 26:5 JOGNN 585 18

J. Lauderdale and J. Boyle, *Infant Relinquishment through Adoption* (Fall 1994) 26:3 IMAGE: Journal of Nursing Scholarship 18

II. Statutes Referenced

Canadian Charter of Rights & Freedoms, ss. 7, 15

Young Offenders Act, R.S.C. 1985, C. Y-1

Divorce Act, R.S.C. 1985 c.3 (2nd Supp.), ss. 16(8), 16(10), 17(5) and 17(9)

Family Law Act, R.S.O. 1990 c.F.3, S.56

Child and Family Services Act, R.S.O. 1990, C.c.11, ss.37, 136

Children's Law Reform Act, R.S.O. 1990, c.C.12, ss.24(2), 56(1)

Immigration Act, 1910, S.C. 1910, c.27, s.38

Order-in-Council P.C.1950-2856