

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

**Raja Jawad Irshad, by his Litigation Guardian, Mohammad Irshad,
Marie Antoinette Tudor, Sergio Bodington, by his Litigation Guardian, Marie
Antoinette Tudor, Leandra Bodington, by her Litigation Guardian, Marie Antoinette
Tudor, Robert Lee Melvin, Gnei Assan, Nagulamikai Karthigesu, Gabriella Simon
and Anna Dobrescu**

**Applicants
(Appellants)**

- and -

**Her Majesty the Queen in Right of Ontario, as Represented by the
Ministry of Health of Ontario and the Attorney General for Ontario**

**Respondents
(Respondents)**

- and -

**Women's Legal Education and Action Fund, Ontario Council of Agencies
Serving Immigrants and DisAbled Women's Network Canada**

Interveners

**FACTUM OF THE INTERVENERS, WOMEN'S LEGAL EDUCATION
AND ACTION FUND, ONTARIO COUNCIL OF AGENCIES SERVING IMMIGRANTS
and DISABLED WOMEN'S NETWORK CANADA**

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I - OVERVIEW

1. This appeal raises the issue of whether new immigrants, including those with disabilities, have the right to equal access to publicly funded health insurance in Ontario.
2. By order of McMurtry C.J., the Interveners, the Women's Legal Education and Action Fund, the Ontario Council of Agencies Serving Immigrants, and the DisAbled Women's Network Canada were granted leave to intervene in the appeal. LEAF was founded in April, 1985 to promote the equality rights of Canadian women through litigation, research, public education and other law reform efforts. OCASI is a province-wide non-profit organization, founded in 1978, to act as a collective voice for immigrant services and to co-ordinate responses to shared needs and concerns of immigrants and refugees. DAWN Canada is a non-profit advocacy and networking organization, founded in March, 1987, to provide a voice for Canadian women with all types of disabilities.

II - FACTS

3. The Interveners accept the facts set out in the Appellants' factum.

III - ISSUES

4. The issues in this appeal are: whether section 6 of the *Canadian Charter of Rights and Freedoms* (the "Charter") applies in the present case; whether the Ontario Health Insurance Plan ("OHIP") eligibility rules at issue violate section 15(1); and whether these rules can be justified under section 1 of the *Charter*.
5. The Interveners submit that section 6 of the *Charter* is not engaged in the present case. The Interveners further submit that the impugned eligibility rules are directly discriminatory on the grounds of new immigrant status and disability, and also have discriminatory effects on the bases

of sex, race, poverty, and age. The Interveners submit that these interacting forms of discrimination violate section 15(1), and cannot be justified under section 1.

IV. LAW

A. The Importance of Equal Access to Health Care

6. The present appeal must, the Interveners submit, be decided in light of the fundamental role of publicly funded health care as a defining feature of Canadian society and of the overarching purpose of section 15, “to ensure ... a society in which all are secure in the knowledge that they are recognized in law as human beings equally deserving of concern, respect and consideration.”

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

7. With the advent of publicly funded health insurance in all provinces and territories in the early 1970s, equal access to health care without financial barriers has come to be seen in Canada as a basic right of social citizenship. As Wilson J. states in *Stoffman v. Vancouver General Hospital*: “government has recognized for some time that access to basic health care is something no sophisticated society can legitimately deny to any of its members.”

Stoffman v. Vancouver General Hospital, [1990] 3 S.C.R. 483 at 544.

8. The Royal Commission on New Reproductive Technologies has described the role and significance of the publicly funded health insurance system in Canada in the following terms:

... the system is a source of national pride, it is an important factor in people’s lives, and it is a tangible way in which our society expresses mutual support and caring for its members. The health care system is a symbol of strongly held Canadian values ... In many ways [it] helps to define Canadians and how we see ourselves.

Proceed With Care: Final Report of the Royal Commission on New Reproductive Technologies, vol. 1 (Ottawa: Supply and Services Canada, 1993) at 69-70.

9. In its decision in *Eldridge v. British Columbia (Attorney General)*, the Supreme Court of Canada held that provincial health insurance regimes must respect substantive equality rights principles and must ensure that the benefits of publicly funded health insurance are provided without discrimination. In that case, the B.C. medicare system was found to violate section 15(1) because deaf persons had to pay to receive the same care which hearing persons received free of charge, “despite the fact that the system is intended to make ability to pay irrelevant.”

Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624 at para. 71.

10. Canadian governments’ obligation to ensure that the public health insurance system respects *Charter* equality rights principles is reinforced by Canada’s international human rights commitments, which the Supreme Court has held to be “a critical influence on the interpretation of the scope of the rights included in the *Charter*.” In particular, under the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, governments are obliged to take all steps necessary for “the creation of conditions which would assure to all medical service and medical attention in the event of sickness”, without discrimination “of any kind” on the basis of race, sex, and national or social origin, among other grounds.

Baker v. Minister of Citizenship and Immigration, [1999] S.C.J. No. 39 at para. 70; *International Covenant on Economic, Social and Cultural Rights*, December 16, 1966, Can. T.S. 1976 No. 46, Article 2(2) and 12(2)(d) [hereinafter *ICESCR*].

11. Article 28 of the *ICESCR* requires that its provisions “shall extend to all parts of federal States without any limitations or exceptions.” The *ICESCR*, like its sister covenant on civil and political rights, was ratified by Canada in 1978 after lengthy discussions, and with the full agreement of all provinces, including Ontario. As Canada’s first report under the *ICESCR* explains: “Before depositing Canada’s instruments of accession the Government of Canada obtained the agreement of all the provinces in the Canadian confederation, which undertook to adopt the measures necessary

for the implementation of the Covenants in the areas under their jurisdiction.”

ICESCR, supra, Article 28; A. Bayefsky, *International Human Rights Law* (Toronto: Butterworths, 1992) at 50-52.

12. Canadian governments’ obligation, under the *ICESCR*, to ensure access to public health care services without discrimination is reiterated under the *Convention on the Elimination of All Forms of Discrimination Against Women*, which guarantees women’s equal right to health care; under the *Convention on the Elimination of All Forms of Racial Discrimination*, which prohibits discrimination based on “race, colour or national or ethnic origin” in health care and other social programs; and under the *Convention on the Rights of the Child*, which guarantees children the right to “the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health”, “without discrimination of any kind.” Like the *ICESCR*, these treaties were ratified by Canada with the full consent and agreement of the province of Ontario.

Convention on the Elimination of All Forms of Discrimination Against Women, December 18, 1979, Can. T.S. 1982 No. 31, Article 12; *International Convention on the Elimination of All Forms of Racial Discrimination*, December 21, 1965, Can. T.S. 1970 No. 28, Article 5(e); *Convention on the Rights of the Child*, November 20, 1989, Can. T.S. 1992 No. 3, Article 2, 24; Bayefsky, *International Human Rights Law, supra* at 50-53.

B. Section 6 of the Charter

13. The Interveners submit that section 6 of the *Charter* is not engaged in the present case. As its heading indicates, section 6 is a mobility rights provision. The Appellants are not claiming a right to enter or leave Canada, or to move from one province to another to live or work, as guaranteed under section 6. Rather, they are seeking judicial review of provincial health insurance eligibility requirements which disqualify them from health insurance coverage in a manner which is both directly and systemically discriminatory within the meaning of section 15(1) of the *Charter*.

14. In its recent decision in *Canadian Egg Marketing Agency v. Richardson*, the Supreme Court held that: “the inclusion of s. 6 in the *Charter* reflects a human rights objective: to ensure mobility of persons, and to that end, the pursuit of a livelihood on an equal footing with others regardless of residence.” The Court emphasized that: “the freedom guaranteed in s. 6 embodies a concern for the dignity of the individual” and that section 6 is designed to protect the basic human right “closely related to equality” not to be subject to discrimination on the basis of one’s place of residence.

Canadian Egg Marketing Agency v. Richardson, [1998] 3 S.C.R. 157 at paras. 60, 66.

15. In his decision at trial, Dilks J. held that, since the rights contained under section 6 extend only to Canadian citizens and landed immigrants, the Appellants, “being neither Canadian citizens nor landed immigrants, cannot expect any better treatment” and “have no Charter right to insist that residency requirements affecting them be reasonable.” He concluded that “if there is discrimination, it is discrimination impliedly, but clearly recognized and tolerated by the Charter itself.”

Irshad (Litigation guardian of) v. Ontario (Ministry of Health), [1999] O.J. No. 301 at 13-14.

16. The trial judge was clearly in error in his finding that the residency-related qualification under section 6(3)(b), on the interprovincial mobility rights guaranteed under section 6(2), was relevant in the present case, or that such a qualification foreclosed the application of section 15(1) of the *Charter* to Ontario’s health insurance legislation. The Supreme Court has emphasized that section 15(1) is “the broadest of all guarantees” and that “it applies to and supports all other rights guaranteed by the *Charter*.” The Court has also held that, like section 15, section 6 of the *Charter* has as its object to prevent discriminatory treatment which undermines the dignity of the individual.

Andrews, supra at 185; *Canadian Egg Marketing Agency, supra* at para.60.

17. The trial judge’s reading of section 6(3)(b) as implicitly sanctioning the violation of the Appellants’ equality rights is inconsistent, not only with the overarching importance which the

Supreme Court has accorded equality rights principles within the general scheme of the *Charter*, but with the human rights-related concerns which the Court has identified as underlying section 6 itself.

18. As explained below, while in form the OHIP residency requirements treat everyone the same way, the requirements are clearly discriminatory in their effects. While Canadians moving from other provinces suffer no effective interruption in their health insurance coverage, new immigrants are disqualified from OHIP coverage for a minimum of three months and, in the case of those unable to meet the federal immigration medical requirements, they are permanently ineligible for public health insurance coverage in Ontario. The Interveners submit that, particularly in view of the fundamental importance of publicly funded health care as a defining social value in Canada, these eligibility rules must be subject to rigorous scrutiny under section 15.

C. Section 15 of the *Charter*

19. Section 15(1) of the *Charter* was intended to ensure substantive, and not merely formal, equality. Thus, in *Eldridge*, the Supreme Court held that, in allocating health care coverage, governments are obliged to act in a non-discriminatory manner. The Court rejected the argument that “governments should be entitled to provide benefits to the general population without ensuring that disadvantaged members of society have the resources to take full advantage of those benefits”, describing this as “a thin and impoverished vision of s.15(1)”.

Eldridge, supra at paras. 61-62, 72-73; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 947 at para. 25.

20. The Interveners submit that the impugned OHIP eligibility rules contravene section 15(1) of the *Charter* because they deny new immigrants access to publicly funded health care coverage in a discriminatory way. The impact of these rules must be assessed from the perspective of the

equality claimant. The exclusion of new immigrants from this comprehensive social program sends a message that new immigrants are “less capable or worthy of recognition or value as human being[s] or as member[s] of Canadian society” and denies new immigrants the equal concern, respect and consideration to which everyone is entitled.

Law, supra, paras. 59, 88; *M. v. H.*, [1999] 2 S.C.R. 3, paras. 65, 70; *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 83; *Eldridge, supra* at paras. 61-62; *Egan v. Canada*, [1995] 2 S.C.R. 513, paras. 160-161.

1. The Effect of the Impugned Eligibility Rules

21. The impugned rules re-define “resident of Ontario” to exclude new immigrants who reside in Ontario. Under the eligibility rules, immigrants are not recognized as “residents” of Ontario until after they pass the federal immigration medical examination. By contrast, Canadians who move to Ontario from other provinces are acknowledged as “residents of Ontario” from the day they arrive.

O. Reg. 552, am. O. Reg. 490/94, 491/94, s.1.1(1)(b)(4) [hereinafter “*Regulation*”].

22. Because immigrants with disabilities may not pass the immigration medical examination, they are never recognized under the OHIP rules as “residents”, no matter how long they have lived in Ontario. Thus, medical condition is a precondition for new immigrants to be recognized as “residents” of Ontario. No medical requirements are imposed on Canadians moving to Ontario from other provinces or returning from abroad.

Regulation, s.1.1(1)(b)(4).

23. The impugned rules provide that, subject to exceptions set out in the *Regulation*, an individual is ineligible for OHIP coverage until three months after s/he becomes a “resident”. However, because new immigrants are not immediately recognized as “residents”, their period of

disqualification can last well in excess of three months after they begin to live in Ontario.

Regulation, s.3(3).

24. Moreover, new immigrants constitute the only group which faces categorical exclusion without any discretionary waiver or alternative public health insurance coverage. Although Canadians who migrate to Ontario from other provinces are nominally subject to a three-month disqualification period, the Ontario government has entered into an interprovincial eligibility and portability agreement that ensures that individuals moving to Ontario from other provinces will not experience any actual suspension of health care coverage. Ministerial discretion also exists to exempt Canadians returning from abroad from the application of the disqualification.

Regulation, s.3(3); Cross-examination of Heath, Appeal Book Vol. 5, Tab. 30, pp. 996, 998, 1007, 1008, 1036, 1037, 1040, 1044, 1049; Ministry of Health News Release, 31 March 1994, Appeal Book, Vol. 3, Tab 27E, pp. 58-59.

25. Thus, unlike any other Ontario residents, new immigrants' eligibility for OHIP coverage is premised on their medical condition, and they face a mandatory period of disqualification of three months or more. The denial of a publicly funded health benefit which is conferred upon others constitutes a clear denial of equal benefit of the law.

Egan, supra at para. 151, per Cory J.; *Eldridge, supra* at paras. 50, 80.

2. Direct Discrimination based on Immigration Status

26. The exclusion of new immigrants from OHIP coverage discriminates against new immigrants on the enumerated ground of nationality and the analogous ground of citizenship. It also discriminates on the basis of status as a new immigrant, which, the Interveners submit, is an analogous ground of discrimination within the meaning of section 15(1).

Andrews, supra at 183.

27. New immigrants have historically been, and continue to be, subject to discrimination, prejudice, stereotyping and disadvantage. Anti-immigration sentiment and anti-immigrant measures have historically been, and continue to be, linked with discrimination on the bases of race and ethnicity. For example, because of racialized stereotypes, Chinese immigrants were subjected to a head tax and, later, their entry was prohibited; Japanese immigrants (and Japanese Canadians, who were treated as foreigners) were interned during World War II; and women immigrants from the Caribbean faced racialized barriers to entry.

J. Dryer, "The Undocumented Convention Refugees in Canada Class: Creating a Refugee Underclass" (1998) 13 J.L. & Soc. Pol. 166 at 179-80; A. Calliste, "Women of 'Exceptional Merit': Immigration of Caribbean Nurses to Canada" (1993) 6 C.J.W.L. 85; L. Foster, *Turnstile Immigration: Multiculturalism, Social Order and Social Justice in Canada* (Toronto: Thompson Educational Publishing, 1998) at 86-87; K. Johnson, "Public Benefits and Immigration: the Intersection of Immigration Status, Ethnicity, Gender and Class" (1995), 42 U.C.L.A. L. Rev. 1509 at 1535-36.

28. Anti-immigrant prejudice remains common in Canadian society, and continues to be linked to racism. Since the 1980s, two thirds of new immigrants have been people of colour. Lorne Foster observes that "many Canadians are now inclined to believe immigration in general, and non-white immigration in particular, is threatening the root fabric of the country." Sherene Razack points out that immigrants are stereotypically constructed "as foreigners dependent on the generosity of Canadians". Such prejudice is often expressed in the form of allegations that immigrants strain public resources.

S. Razack, *Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms* (Toronto: University of Toronto Press, 1998) at 10-11; L. Foster, *supra* at 108, 137-140; Statistics Canada, *Wage Opportunities for Visible Minorities in Canada* (Ottawa: Minister of Industry, 1998) at 2; D.E. Bloom *et al*, "The Changing Labour Market Position of Canadian Immigrants" (1995) 28:4b Can. J. of Econ. 987 at 990, 995, 997.

29. New immigrants are uniquely vulnerable to majoritarian tendencies in the political process because they cannot vote. In 1996, for example, the Minister of Citizenship and Immigration tabled

a report suggesting that a “social backlash against immigration in recent years” had induced the government to “hold the line” on immigration levels in 1997. Similarly, through its “deterrent” rationale for disqualifying new immigrants for OHIP coverage, the Ontario government invokes stereotypical conceptions of immigrants as criminals or as abusers of Canada’s social programs.

Foster, *supra* at 140; Johnson, *supra* at 1533.

30. Immigration status is closely linked to several grounds enumerated in subsection 15(1) of the *Charter*, including race and national or ethnic origin, as well as the prohibited ground of citizenship. Thus new immigrants comprise the kind of “discrete and insular minority” that section 15 was designed to protect. Wilson J.’s reasons in *Andrews* for finding citizenship to be an analogous ground of discrimination apply equally to new immigrants:

Relative to citizens, non-citizens are a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated. They are among “those groups in society to whose needs and wishes elected officials have no apparent interest in attending.” ... Non-citizens, to take only the most obvious example, do not have the right to vote. Their vulnerability to becoming a disadvantaged group in our society is captured by John Stuart Mill’s observation ... that “in the absence of its natural defenders, the interests of the excluded is always in danger of being overlooked ...” I would conclude therefore that non-citizens fall into an analogous category to those specifically enumerated in s.15.

Andrews, supra at 152, *per* Wilson J.; see also *ibid* at 183; *Egan, supra* at para. 171.

31. The fact that new immigrants, as a group, are diverse in terms of race, national or ethnic origin, and economic status does not bar the recognition of new immigrant status as an analogous ground. Section 15 jurisprudence has never required homogeneity as a precondition to recognition of an analogous ground of discrimination. Each of the enumerated grounds, such as gender and race, as well as analogous grounds such as citizenship, encompass a broad and diverse spectrum of humanity.

32. The focus of the analogous grounds analysis should not be on the supposed insularity or uniformity of the rights-claiming group, but on the “nature and situation of the individual or group at issue, and the social, political, and legal history of Canadian society’s treatment of that group.” The issue, ultimately, is “whether the interest advanced by the claimant is the sort of interest that s.15(1) was designed to protect ... [and] whether the basis of distinction may serve to deny the essential human dignity of the *Charter* claimant” by denying equal benefit of the law.

Egan, supra at para. 171, *per* Cory J.; *Law, supra* at para. 93; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at para. 59, *per* L’Heureux-Dubé J.; Razack, *Looking White People in the Eye, supra* at 8; N. Iyer, “Categorical Denials: Equality Rights and the Shaping of Social Identity” (1993) 19 *Queen’s L.J.* 179 at 193.

3. Direct Discrimination Based on Disability

33. The history of people with disabilities in Canada is one of exclusion, marginalization and social devaluation. Persons with disabilities have been “excluded from the labour force, denied access to opportunities for social interaction and advancement, subjected to invidious stereotyping and relegated to institutions.” As the Supreme Court observed in *Eldridge*, “their entrance into the social mainstream has been conditional upon their emulation of able-bodied norms.”

Eldridge, supra at para. 56; M.D. Lepofsky, “A Report Card on the *Charter*’s Guarantee of Equality to Persons with Disabilities After Ten Years: What Progress? What Prospects?” (1997), 7 *N.J.C.L.* 26 at 29; S.A. Goundry and Y. Peters, *Litigating for Disability and Equality Rights: The Promises and the Pitfalls* (Winnipeg: Canadian Disability Rights Council, 1994) at 4-5.

34. Under the impugned eligibility rules, new immigrants who do not pass the federal immigration medical are never recognized as “residents” of Ontario, and are therefore disqualified from OHIP coverage indefinitely. Thus the denial of health care coverage is a direct consequence of the new immigrant’s status as a person with disabilities.

Regulation, ss.1.1(1)(b)(4), 3(3).

35. The majority of the Supreme Court has held that "...it is inappropriate to look to provincial legislation to correct or rectify the denial of a benefit set out in a federal *Act*." Similarly, the Interveners submit, section 15 of the Charter precludes Ontario from relying on discriminatory federal legislation to excuse its choice to deny health care coverage on the basis of disability.

Egan, supra at paras 155-56, per Cory J.; *Vriend, supra* at para. 86; C. Tie, "Immigrant Selection and the *Canadian Human Rights Act*" (1994) 10 J.L. & Soc. Pol. 81 at 96-99.

4. Adverse Effect Discrimination

36. The Interveners submit that, beyond the direct discrimination described above, the impugned rules also have discriminatory effects on the bases of sex, race, poverty, and age.

37. Immigrant women were described by L'Heureux-Dubé J. in *Egan* as "a subgroup that has historically been both exploited and marginalized in our society." Under the OHIP rules, immigrant women's lives and health are particularly endangered because pregnant women require frequent health care which cannot be delayed. Discrimination on the basis of pregnancy is a form of sex discrimination.

Egan, supra at para. 80; *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219; *Ontario Cancer Treatment & Research Foundation v. Ontario Human Rights Commission* (1998), 38 O.R. (3d) 72 (C.A.); Affidavit of Dr. Caroline Bennett, Appeal Book, Vol. 2, Tab 18, paras. 5-7.

38. The impugned rules also have a disproportionate impact on people of colour. Two thirds of recent immigrants are of Asian, African, Latin American or Arab descent. These groups are subject to historic and ongoing racial discrimination in Canada. Thus any measure which excludes recent immigrants from access to health care coverage necessarily results in the disproportionate exclusion of a marginalized group -- people of colour -- from such access.

Statistics Canada, *Wage Opportunities for Visible Minorities, supra* at 2,8; Bloom *et al.*, "The

Changing Labour Market Position of Canadian Immigrants”, *supra* at 990, 995, 997; *R. v. R.D.S.*, [1997] 3 S.C.R. 484 at paras. 46-47; C. Aylward, *Canadian Critical Race Theory: Racism and the Law* (Halifax: Fernwood, 1999) at 39-49; C. Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900-1950* (Toronto: University of Toronto Press, 1999) at 15; Razack, *Looking White People in the Eye*, *supra* at 88-93.

39. The impugned rules also have a discriminatory impact on the basis of age. Because children under 10 years of age require more regular health care than adults, young children are more likely than adults to require health care during the period of their disqualification. Advancing age is also a major cause of disability; to the extent that elderly persons are disabled or in poor health, they may also face a disparate impact during the disqualification period.

Affidavit of Dr. Donna Goldenberg, Appeal Book, Vol. 2, Tab 19, paras.8-10; M. Shone, “Health, Poverty and the Elderly: Can the Courts make a Difference?” (1991) 29 Alta. L. Rev. 839 at 841.

40. While all new immigrants are denied access to OHIP coverage, new immigrants who are poor will be unable to obtain required health care because they will not be able to pay for it. The impact of the disqualification on poor immigrants is especially devastating because poverty is closely associated with poor health. The impugned rules thus impose a severe disparate impact on the basis of poverty, which, the Interveners submit, is an analogous ground of discrimination.

M. Jackman, “Constitutional Contact with the Disparities in the World: Poverty as a Prohibited Ground of Discrimination under the Canadian *Charter* and Human Rights Law” (1994) 2 Rev. Const'l. Stud. 76 at 87-88; see also *Dartmouth/Halifax County Regional Housing Authority v. Sparks* (1993), 101 D.L.R. (4th) 224 at 233 (N.S.C.A.)

5. Interaction of Various Grounds of Discrimination

41. The Supreme Court of Canada recognized in *Law v. Canada (Minister of Employment and Immigration)* that “although *Andrews* spoke of differential treatment being based upon *one* enumerated or analogous ground, it is open to a s.15(1) claimant to articulate a discrimination claim on the basis of more than one ground ... a person or subgroup [may be] identified by several grounds.” Parliament has also recognized in the *Canadian Human Rights Act* that discrimination may occur on multiple, interacting grounds.

Law, supra at para. 37 (emphasis in original); *Canadian Human Rights Act*, R.S.C. 1985, c.H-6, s.3.1, am. S.C. 1998, c.9, s.11 [“CHRA”]; *Symes v. Canada*, [1993] 4 S.C.R. 695 at paras. 138 ff.

42. Nonetheless, courts have traditionally encountered analytical difficulty in addressing claims involving multiple grounds of discrimination. Nitya Iyer observes:

... current legal understandings of discrimination, almost all of which take a “separate grounds” view of discrimination: sex discrimination is something different from race discrimination, which is something different from age discrimination, and so on. There is virtually no consideration of the complex interactions of race, sex, and the various other grounds of discrimination that are so much a part of the lived experience (as opposed to the legal analysis) of discrimination.

N. Duclos [Iyer], “Disappearing Women: Racial Minority Women in Human Rights Cases” (1993) 6 C.J.W.L. 25 at 40, 27, 44; C. Aylward, “Intersectionality: Crossing the Theoretical and Praxis Divide” (Presented at West Coast LEAF Conference, “Transforming Women’s Future: Equality Rights in the New Century”, Vancouver, November 4-7, 1999) [unpublished] at 9; K. Crenshaw, “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics” (1989) U. Chicago Leg. Forum 139 at 143; Iyer, *supra* at 192-93.

43. As the Supreme Court has consistently held, the perspective of the equality claimant must inform any section 15 analysis. This requires courts to move beyond the construction of the grounds of discrimination as discrete and mutually exclusive. Individuals who are subject to multiple forms of discrimination, such as immigrant women or immigrant children with disabilities, do not experience themselves, or the discrimination to which they are subjected, in a fragmented way.

Dianne Pothier explains:

... as a woman with a disability (visual impairment due to Albinism)[.] I can never experience gender discrimination other than as a person with a disability; I can never experience disability discrimination other than as a woman. I cannot disaggregate myself, nor can anyone who might be discriminating against me. Even when only one ground of discrimination seems to be relevant, it affects me as a whole person. If I am excluded or marginalized from something because of my disability, I am also excluded or marginalized as a woman, and vice versa.

D. Pothier, "Connecting Intersecting Grounds of Discrimination to Real People's Real Experiences" (Presented at West Coast LEAF Conference, "Transforming Women's Future: Equality Rights in the New Century", Vancouver, November 4-7, 1999) [unpublished] at 9; Duclos [Iyer], *supra* at 42; E. Carasco, "A Case of Double Jeopardy: Race and Gender (1993) 6 C.J.W.L. 142 at 143.

44. The Interveners submit that discrimination is not caused by the inherent characteristics of the rights-claiming group. Rather, discriminatory treatment arises from systemic inequalities in Canadian society, which is structured hierarchically along the grounds enumerated in section 15 of the *Charter* and grounds analogous to them. Thus the grounds of discrimination, such as gender, disability, and immigration status, should not be conceptualized as *characteristics* of the rights-claiming group, but as *forms of discrimination* which combine and interact to produce a "matrix" of inequality.

P. Hill-Collins, *Black Feminist Thought* (Boston: Unwin Hyman, 1990) at 229; C. Backhouse, *supra* at 15; S. Razack, "Speaking for Ourselves: Feminist Jurisprudence and Minority Women" (1991) 4 C.J.W.L. 440 at 454 ff.; R. Ng, "Immigrant Women: the Construction of a Labour Market Category" (1990) 4 C.J.W.L. 96 at 111; M. Minow, *Making All the Difference: Inclusion, Exclusion and American Law* (Ithaca: Cornell University Press, 1990) at 174.

45. The Interveners therefore submit that the various grounds of discrimination that arise in this appeal must not be analyzed in isolation from each other. Rather, their interaction must be recognized. As Sherene Razack points out:

... it is vitally important to explore in a historical and site-specific way the meaning of race, economic status, class, disability, sexuality, and gender as they come together to structure women in different and shifting positions of power and privilege. ... each system relie[s] on the other to give it meaning, and ... this interlocking effect could only be traced in historically specific ways.

Razack, *Looking White People in the Eye*, *supra* at 12; Iyer, *supra* at 204; S. Razack, "Beyond Universal Women: Reflections on Theorizing Differences Among Women" (1996) 45 U.N.B.L.J. 209 at 213; Crenshaw, *supra*.

46. The interaction of the various grounds of discrimination is illustrated in the present case by the situation of the child Appellant, Raja Irshad. If he had been born in Canada, the rules would allow him OHIP coverage regardless of his disability. As a new immigrant, Raja faces disqualification from OHIP coverage for at least three months. Under the impugned rules, Raja faces long-term disqualification from OHIP coverage because he is an immigrant with disabilities.

47. State action which discriminates on multiple, interacting grounds is the most invidious kind of discrimination. Groups which face multiple forms of discrimination, such as immigrant women and immigrants with disabilities, are the most vulnerable groups in society. They face political, economic and social disenfranchisement. The Interveners submit that section 15 must be interpreted in a way that is responsive to the most severe forms of discrimination.

48. Discrimination is especially pernicious when it occurs in access to health care coverage. In addition to jeopardizing their security and health, the exclusion of new immigrants, and especially of immigrants with disabilities, sends a message that those groups are less worthy of recognition or value as human beings or as members of Canadian society. Such a result is incompatible not only with the purposes of section 15, but with the values underlying the *Charter* as a whole.

Eldridge, *supra* at para. 50; S. Sansom, "Refugee Claimants, OHIP Eligibility, and Equality" (1997) 12 J.L. & Soc. Pol. 202 at 225.

49. The Interveners submit that the Respondents have failed to meet the requirement that governmental decisions affecting access to health care must respect constitutional principles: by

denying new immigrants the equal protection and benefit of publicly funded health care in Ontario, the impugned OHIP eligibility requirements clearly violate section 15(1) of the *Charter*.

D. Section 1 of the *Charter*

50. The Respondents argue that the impugned eligibility rules are designed to “maintain the future viability and integrity of the health care system by directing publicly funded health care resources to *bona fide* permanent Ontario residents,” to achieve “more equal treatment” of all newly arriving residents, and to improve its ability to “monitor and authenticate health information.”

Factum of the Respondents in the Court below, para. 182, p. 63.

51. The Interveners submit that the government has chosen to pursue its health care cost cutting objectives in a politically palatable way: targeting an unpopular and politically powerless group, playing upon public fears about whether the publicly funded health care system is sustainable, and reinforcing negative stereotypes about new immigrants. In defending their objective, the Respondents argue that:

Non-residents of Ontario should not be entitled to access publicly provided social services. To guarantee such services to non-residents would make Ontario a magnet to people from all over the world who would come to Ontario only to access social services like medical care, education and social assistance. Ontario taxpayers could not afford to support free social services for all the world.

Factum of the Respondents in the Court below, para. 195, p. 67.

52. The Respondents repeatedly refer to the need to “preven[t] bogus residents from attempting to acquire OHIP” coverage; to avoid “abuse by persons who make an application [for landed immigrant status] for the sole purpose of obtaining OHIP coverage; to “ensur[e] that scarce resources go to the benefit of the people of Ontario”; and “to ensure the viability of the health care system”. The Respondents provide no evidence to support the view that health insurance fraud by new immigrants presents a real, particular or pressing problem; that the provision of OHIP coverage to

new immigrants would place undue strain on the province's health care system; or that health insurance use by new immigrants absorbs a disproportionate amount of health care resources.

Factum of the Respondents in the Court below, para. 185, p. 64; para. 189, p. 65-66; para. 194, p. 67; para. 203, p. 69-70.

53. In *Singh v. Minister of Employment and Immigration* Wilson J. emphasized that *Charter* guarantees would be illusory if section 1 could be used by governments to justify rights violations on the basis of financial cost or administrative convenience. As Lamer C.J. declared in his judgment in *Schachter v. Canada*: "This Court has held, and rightly so, that budgetary considerations cannot be used to justify a violation under section 1."

Singh v. Minister of Employment and Immigration, [1985] 1 S.C.R. 177 at 218-219; *Schachter v. Canada*, [1992] 2 S.C.R. 679 at 709 [hereinafter *Schachter*].

54. The Interveners submit that the Respondents' cost-cutting objectives are especially objectionable in the present case because they are directed at a group which is particularly vulnerable, both in terms of its lack of political voice and its historic and continuing marginalization, and because they perpetuate public fears and stereotypes which compound immigrants' vulnerability in the context of a government program of fundamental importance.

55. The Interveners submit further that, even if the Respondents' objectives were found to be pressing and substantial, the means adopted are not reasonable or demonstrably justifiable. There is no rational basis to suggest that new immigrants to Ontario, who have formally applied for landed immigrant status, do not have a settled intention to live in the province, and are not therefore "*bona fide* residents of Ontario" equally deserving of OHIP coverage. Far from ensuring more equal treatment of newly arriving residents, the impugned measures are, as outlined above, clearly discriminatory, since new immigrants are the only class of entrants or re-entrants to Ontario who

effectively face a mandatory period of disqualification from health insurance coverage.

56. Nor are the impugned eligibility rules a rational means of reducing health care costs. The Respondents have failed to provide any evidence that the eligibility rules will achieve any cost savings. Without access to public health insurance, diagnosis and treatment for many new immigrants may simply be delayed, increasing long-term costs to individual immigrants' health as well as costs to the provincial health care system as a whole. The false economy of the denial of OHIP coverage to new immigrants is particularly evident with regard to prenatal care, where private coverage is not available, and where regular medical care is vital not only to the physical and psychological health of the pregnant woman, but also to the long term health of her child.

57. The measures at issue also fail to meet the minimal impairment requirement of section 1. The effect of the current eligibility rules is a total deprivation of access to publicly funded health care for the period of disqualification. In the case of Raja Irshad and other new immigrants with disabilities, this period of ineligibility may last forever. For new immigrants, the mandatory period of disqualification from OHIP coverage constitutes a clear threat to health, security and possibly even to life. The Interveners submit that, as with the denial of medical interpretation services in *Eldridge*, the grave impact on the Appellants' right to equal benefit of publicly funded health services can in no way be characterized as a minimal impairment.

Eldridge, supra at para. 94.

58. Finally, the impugned measures do not meet the proportionality requirement of section 1. As argued above, the Respondents have failed to show that the disqualification of new immigrants from health insurance coverage will achieve real long term cost savings, or that this exclusion is in any way necessary to ensure the continued viability of the publicly funded health insurance system.

For the individuals affected, however, the disqualification from health insurance coverage poses a direct and severe threat to life and health.

59. For new immigrants as a group, the impugned measures create an additional harm which compounds the injury suffered by new immigrants as individuals. As argued at the outset, universal access to publicly funded health care is a defining characteristic of Canadian society and is widely perceived as a fundamental right. The mandatory period of disqualification of new immigrants from public health insurance coverage, on the grounds that they are not “*bona fide*” residents of the province, sends a message that new immigrants are not worthy of recognition or acceptance as full and equal members of Ontario society. This exclusion reflects and perpetuates their social, economic and political marginalization.

60. The harm caused by the OHIP eligibility requirements to the equality and security of the individuals directly affected, to the dignity and equality of new immigrants as a group, and to the fundamental *Charter* value that all are to be treated as human beings equally deserving of concern, respect and consideration, outweighs any possible beneficial effects of the impugned rules, which cannot be justified under section 1, and which must therefore be found unconstitutional.


V - ORDER SOUGHT

61. The Interveners endorse the remedy sought by the Appellants. In keeping with the Supreme Court’s reasoning in *Schachter v. Canada* the Interveners submit that, by ensuring equal access to publicly funded health insurance without discrimination, this remedy is the one which best respects the purposes of section 15 and of the *Charter* as a whole.


Schachter, supra at 721-22.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED this 18th day of November, 1999



Martha Jackman



Kim Buchanan

Counsel for the Interveners, LEAF, OCASI
and DAWN Canada

SCHEDULE A - LIST OF AUTHORITIES

1. *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143
2. *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483
3. *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624
4. Royal Commission on New Reproductive Technologies, *Proceed With Care: Final Report of the Royal Commission on New Reproductive Technologies*, vol. 1 (Ottawa: Supply and Services Canada, 1993)
5. *Baker v. Minister of Citizenship and Immigration*, [1999] S.C.J. No. 39
6. *International Covenant on Economic, Social and Cultural Rights*, December 16, 1966, Can. T.S. 1976 No. 46, Article 2(2) and 12(2)(d)
7. Anne Bayefsky, *International Human Rights Law* (Toronto: Butterworths, 1992)
8. *Convention on the Elimination of All Forms of Discrimination Against Women*, December 18, 1979, Can. T.S. 1982 No. 31, Article 12
9. *International Convention on the Elimination of All Forms of Racial Discrimination*, December 21, 1965, Can. T.S. 1970 No. 28, Article 5(e)
10. *Convention on the Rights of the Child*, November 20, 1989, Can. T.S. 1992 No. 3, Articles 2, 24
11. *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157
12. *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497
13. *M. v. H.*, [1999] 2 S.C.R. 3, para. 65; *Egan v. Canada*, [1995] 2 S.C.R. 513
14. *Vriend v. Alberta* [1998] 1 S.C.R. 493
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23. *Corbiere v. Canada (Minister of Indian and Northern Affairs)* [1999] 2 S.C.R. 203
24. Nitya Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity" (1993) 19 Queen's L.J. 179
25. David Lepofsky, "A Report Card on the *Charter's* Guarantee of Equality to Persons with Disabilities After Ten Years: What Progress? What Prospects?" (1997), 7 N.J.C.L. 26
26. S.A. Goundry and Y. Peters, *Litigating for Disability and Equality Rights: The Promises and the Pitfalls* (Winnipeg: Canadian Disability Rights Council, 1994)
27. *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219
28. *Ontario Cancer Treatment & Research Foundation v. Ontario Human Rights Commission* (1998), 38 O.R. (3d) 72 (C.A.)
29. Carol Aylward, *Canadian Critical Race Theory: Racism and the Law* (Halifax: Fernwood, 1999)
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32. Martha Jackman, "Constitutional Contact with the Disparities in the World: Poverty as a Prohibited Ground of Discrimination under the Canadian *Charter* and Human Rights Law" (1994) 2 Rev. Const'l. Stud. 76
33. *Dartmouth/Halifax County Regional Housing Authority v. Sparks* (1993), 101 D.L.R. (4th) 224 (N.S.C.A.)
34. *Symes v. Canada*, [1993] 4 S.C.R. 695
35. Nitya Duclos, "Disappearing Women: Racial Minority Women in Human Rights Cases" (1993) 6 C.J.W.L. 25
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45. Steve Sansom, "Refugee Claimants, OHIP Eligibility, and Equality" (1997) 12 J.L. & Soc. Pol. 202

46. *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177

47. *Schachter v. Canada*, [1992] 2 S.C.R. 679

SCHEDULE B - RELEVANT LEGISLATIVE PROVISIONS

Canadian Charter of Rights and Freedoms, sections 6 and 15:

Mobility Rights

Mobility of Citizens

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

Rights to Move and Gain Livelihood

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

- (a) to move to and take up residence in any province; and
- (b) to pursue the gaining of a livelihood in any province.

Limitation

(3) The rights specified in subsection (2) are subject to

- (a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and
- (b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

Affirmative action programs

(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

Equality Rights

Equality before and under law and equal protection and benefit of law

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Affirmative action programs

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Selected provisions of O. Reg. 552 (*Health Insurance Act*), amended O. Reg. 490/94, 491/94

1.1.(1) For the purposes of the Act, "resident" means an individual,

- (a) who is present in Ontario by virtue of an employment authorization issued under the Caribbean Commonwealth and Mexican Seasonal Agricultural Workers Programme administered by the federal Department of Citizenship and Immigration, or
- (b) who is ordinarily resident in Ontario and who is one of the following:
 - 1. A Canadian citizen or a landed immigrant under the *Immigration Act* (Canada).
 - 2. A person who is registered as an Indian under the *Indian Act* (Canada).
 - 3. A Convention refugee as defined in the *Immigration Act* (Canada).
 - 4. A person who has submitted an application for landing under the *Immigration Act* (Canada), who has not yet been granted landing and who has been confirmed by the federal Department of Citizenship and Immigration as having satisfied the medical requirements for landing.
 - 5. A person who has made a claim to be a Convention refugee under the *Immigration Act* (Canada) and in respect of whom,
 - i. a senior immigration officer has determined that the person is eligible to have his or her claim determined by the Refugee Division, and
 - ii. a removal order, as defined in the *Immigration Act* (Canada), has not been executed.
 - 6. A person who has finalized a contract of employment or an agreement of employment with a Canadian employer situated in Ontario and who, at the time the person makes his or her application to become an insured person, holds an employment authorization under the *Immigration Act* (Canada) which,
 - i. names the Canadian employer,
 - ii. states the person's prospective occupation, and
 - iii. has been issued for a period of at least six months.
 - 7. The spouse or dependent child under the age of 19 years of a person referred to in paragraph 6 if the Canadian employer provides the General Manager with written confirmation of the employer's intention to employ the person referred to in paragraph 6 for a period of three continuous years.
 - 8. A member of the clergy of any religious denomination who has finalized an agreement of employment to minister on a full-time basis to a religious congregation in Ontario for a period of not less than six consecutive months and whose duties will consist mainly of preaching doctrine, presiding at liturgical functions and spiritual counselling.
 - 9. The spouse and dependent children under the age of 19 years of a member of the clergy referred to in paragraph 8 if the religious congregation provides the General Manager with written confirmation that it intends to employ the member for a period of at least three consecutive years.
 - 10. A person granted a minister's permit under section 37 of the *Immigration Act* (Canada) which indicates on its face that the person is a member of an inadmissible class designated as case type 86, 87, 88 or 89 or, if the permit is issued for the purpose of an adoption by an insured person, as case type 80.
 - 11. A person granted an employment authorization under the Live-in Care Givers in Canada Programme or the Foreign Domestic Movement administered by the federal Department of Citizenship and Immigration.

- 1.1.(2) For the purposes of subsection (1), a person is ordinarily resident in Ontario only if,
- (a) in the case of an insured person or of a person who comes to Ontario from another province or territory in which that person was insured by the provincial or territorial health insurance authority, the person,
 - (i) makes his or her permanent and principal home in Ontario, and
 - (ii) is present in Ontario for at least 183 days in any twelve-month period; and
 - (b) in the case of a person who is applying to be an insured person for the first time or who is re-establishing his or her entitlement after having been uninsured for a period of time, other than a person who comes to Ontario from another province or territory in which that person was insured by the provincial or territorial health insurance authority, the person,
 - (i) intends to make his or her permanent and principal home in Ontario, and
 - (ii) is present in Ontario for,
 - (A) at least 183 days in the twelve-month period immediately following the application, and
 - (B) at least 153 of the 183 days immediately following the application.

3(3) A resident who makes an application under subsection (1) shall only be enrolled as an insured person three months after the day the person becomes a resident.

(4) The three-month waiting period referred to in subsection (3) does not apply to the following persons who are residents and who apply to become insured persons:

1. A child under the age of 16 who is adopted by an insured person.
2. A newborn born in Ontario to an insured person.
3. A person who satisfies the General Manager that he or she has been resident in Ontario for at least three months at the time of his or her application to become an insured person.
4. A member of the Canadian Forces who was an insured person immediately before becoming a member and is discharged from the Canadian Forces.
5. A member of the Royal Canadian Mounted Police who had been appointed to a rank therein and who was an insured person immediately before becoming a member and is discharged.
6. A Canadian diplomat who returns to Ontario after a posting to a place outside Canada and who was an insured person immediately before the posting.
7. The spouse, or dependant child under 19 years of age, of a Canadian diplomat referred to in paragraph 6 who was an insured person immediately before the posting of the Canadian diplomat.
8. An inmate at a penitentiary as defined in the *Corrections and Conditional Release Act* (Canada) who is released.
9. An inmate at a correctional institution established or designated under Part II of the *Ministry of Correctional Services Act* who is released.
10. A person who,
 - i. takes up residence in Ontario directly from elsewhere in Canada where the person was insured under a government health plan or a hospital insurance plan, and
 - ii. upon taking up residence in Ontario, becomes a resident of an approved charitable

home for the aged under the *Charitable Institutions Act*, a home under the *Homes for the Aged and Rest Homes Act* or a nursing home under the *Nursing Homes Act*.

11. A Convention refugee as defined in the *Immigration Act* (Canada).
12. A person who has made a claim to be a Convention refugee under the *Immigration Act* (Canada) and in respect of whom,
 - i. a senior immigration officer has determined that the person is eligible to have his or her claim determined by the Refugee Division, and
 - ii. a removal order, as defined in the *Immigration Act* (Canada), has not been executed.
13. A person granted a Minister's permit under section 37 of the *Immigration Act* (Canada) which indicates on its face that the person is a member of an inadmissible class designated as case type 86, 87, 88 or 89 or, if the permit is issued for the purpose of an adoption by an insured person, as case type 80.
14. A person who is present in Ontario by virtue of an employment authorization issued under the Caribbean Commonwealth and Mexican Seasonal Agricultural Workers Programme administered by the federal Department of Citizenship and Immigration.
15. A pregnant woman who became pregnant before April 1, 1994 and who applied to become an insured person during the course of that pregnancy.
16. A pregnant woman who,
 - i. has submitted an application for landing under the *Immigration Act* (Canada) and has not yet been granted landing,
 - ii. became pregnant before April 1, 1994, and applied to become an insured person during the course of that pregnancy, and
 - iii. has been confirmed by the federal Department of Citizenship and Immigration as having satisfied,
 - A. all the medical requirements for landing, or
 - B. all the medical requirements for landing except for the ... x-ray.

Canadian Human Rights Act, R.S.C. 1985, c.H-6, s. 3.1, am. S.C. 1998, c.9, s.11

Multiple grounds of discrimination

3.1 For greater certainty, a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds.

Raja Jawad Irshad, *et al*

- and -

Her Majesty the Queen in Right of Ontario *et al*

Applicants

Respondents

COURT OF APPEAL FOR ONTARIO

FACTUM OF THE INTERVENERS
WOMEN'S LEGAL EDUCATION AND ACTION FUND,
ONTARIO COUNCIL OF AGENCIES SERVING IMMIGRANTS
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