Docket: 2018-1471(IT)I

BETWEEN:

YUSHAN YAO

Appellant,

and

HIS MAJESTY THE KING,

Respondent,

and

INCOME SECURITY ADVOCACY CENTRE,

Intervenor.

Appeal heard on common evidence with the appeal of *Ning Jing Zhang* (2020-1041(IT)G) on November 22, 23 and 24, December 16 and 17, 2021 and March 29 and 30, April 11, 12 and 13, June 1 and 2, October 27 and 28, 2022 at Toronto, Ontario

Final written submissions completed and received on April 25, 2023

Before: The Honourable Justice Randall S. Bocock

Appearances:

Co-Counsel for the Appellant:	Alexander Cobb Andrew Boyd Graeme Rotrand Ada Chan Jacky Chiu
Counsel for the Respondent:	Arnold Bornstein Alexander Hinds Laoura Christodoulides

Counsel for the Intervenor:	Nabila Qureshi Adrian Merdzan

JUDGMENT

WHEREAS the Court has on this date published its common Reasons for Judgment attached in this appeal and the appeal of *Ning Jing Zhang v His Majesty the King*, docket 2020-1041(IT)G;

NOW THEREFORE THIS COURT ORDERS that:

1. the appeal concerning the Canada Child Tax Benefit applicable to the 2014 taxation year is dismissed; and

2. subject only to further submissions, there shall be no costs awarded in the appeal.

Signed at Vancouver, British Columbia, this 15th day of February 2024.

"R. S. Bocock"

Bocock J.

Docket: 2020-1041(IT)G

BETWEEN:

NING JING ZHANG,

Appellant,

and

HIS MAJESTY THE KING,

Respondent,

and

INCOME SECURITY ADVOCACY CENTRE,

Intervenor.

Appeal heard on common evidence with the appeal of *Yushan Yao* (2018-1471(IT)I) on November 22, 23 and 24, December 16 and 17, 2021 and March 29 and 30, April 11, 12 and 13, June 1 and October 27 and 28, 2022 at Toronto, Ontario

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JUDGMENT

WHEREAS the Court has on this date published its common Reasons for Judgment attached in this appeal and the appeal of *Yushan Yao v His Majesty the King*, docket 2018-1471(IT)I;

NOW THEREFORE THIS COURT ORDERS THAT:

1. the appeal concerning the Canada Child Benefit applicable to the 2016 and 2017 taxation years is dismissed; and,

2. subject only to further submissions, there shall be no costs awarded in the appeal.

Signed at Vancouver, British Columbia, this 15th day of February 2024.

"R. S. Bocock"

Bocock J.

Citation: 2024 TCC 19
Date: 20240215
Docket: 2018-1471(IT)I

BETWEEN:

YUSHAN YAO,

Appellant,

and

HIS MAJESTY THE KING,

Respondent,

and

INCOME SECURITY ADVOCACY CENTRE,

Intervenor;

Docket: 2020-1041(IT)G

AND BETWEEN:

NING JING ZHANG,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

and

INCOME SECURITY ADVOCACY CENTRE,

Intervenor.

COMMON REASONS FOR JUDGMENT

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I. INTRODUCTION

A. *The Canada Child Benefit*

[1] Parliament created the Canada Child Benefit (the "CCB") as an income-tested tax-free monthly payment administered by the Canada Revenue Agency (the "CRA") to help eligible families with the cost of raising children under 18 years of age. The rules surrounding the CCB are found in Subdivision A.1 of the *Income Tax Act*.[1]

[2] The CCB was introduced in 2016 to replace the Canada Child Tax Benefit (the "CCTB") and the Universal Child Care Benefit (the "UCCB").[2] The CCB differs most significantly from the prior programs in that it is income-based and non-taxable.[3]

[3] To receive the CCB, the taxpayer must live with a child who is under 18 years of age, be primarily responsible for the care and upbringing of the child, be a resident of Canada for tax purposes, and be or be the spouse or common-law spouse of someone who is: a Canadian citizen, a permanent resident, a protected person, or a temporary resident, within the meaning of the *Immigration and Refugee Protection Act*[4], or an individual who is registered, or entitled to be registered, under the *Indian Act*.[5]

B. *Part A – CCB Eligibility*

[4] Part A of this appeal determines whether refugee claimants are included in the constructive definition of temporary resident and, therefore, are entitled to the CCB.

[5] The Minister excluded Ms. Yao and Ms. Zhang (the "Appellants") during the relevant periods from the CCB because they were not temporary residents. The

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[1] RSC 1985, c 1 (5th Supp) [ITA].

[2] 2016 budget.

[3] 2016 budget.

[4] 4 SC 2001, c 27 [IRPA].

[5] Section 122.6 of the ITA.

rationale is that, as refugee claimants, they were persons not clothed with a status of sufficient permanence under the IRPA to provide a nexus to Canada above a threshold embedded within the concept of temporary resident.

[6] The Appellants argue that a textual, contextual, and purposive reading of the CCB provisions reveals that refugee claimants are included in the definition of "temporary resident" and are therefore eligible for the CCB.

C. *Part B – Constitutional Challenge Under Sections 7 and 15 of the Charter*

[7] Part B of this appeal determines whether the exclusion of refugee claimants from the CCB violates the *Canadian Charter of Rights and Freedoms*.[6]

[8] The Appellants claim that interpreting the ITA and the IRPA to exclude refugee claimants from the CCB contravenes their right to security of the person under section 7 of the *Charter* in a way that is not within the principles of fundamental justice.

[9] The Appellants also claim that the denying of the CCB contravenes their right to equality under section 15 of the *Charter* on the enumerated ground of race or on an analogous grounds of immigration status.

Preliminary Note: Intervenor

[10] Throughout these reasons, the position of the Appellants are described as such. To clarify, at the hearing the Intervenor, through counsel, almost invariably proffered submissions -- there was no examination or cross-examination by Intervenor counsel, although offered -- which differed only slightly from counsel for the Appellants, or were entirely compatible. To the extent the Court determines it relevant, specific reference is made to the Intervenor's submissions.

II. FACTS IN GENERAL

A. *CCB Process and Refugee Claimants*

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[6] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 91(24) [*Charter*].

[11] There are no material facts in dispute in these appeals. It would be simple to list the facts in a truncated narrative form. To do so in these appeals would be facile and unappreciative. The manifest struggle of refugee claimants is a frequent story in Canada, frequently informed and authored by the insensitive political, legal and/or economic structures of foreign regimes. Therefore, although less time might be spent on the facts of the Appellants' specific stories, the Court expends some effort to ensure that the stories are told.

B. *Refugee Claimant Status*

[12] At the relevant times, Ms. Yao, Ms. Zhang and Ms. Zhang's children were refugee claimants. For part of the period, Ms. Yao was also challenging the decision of the Immigration and Refugee Board (the "IRB"), which rejected her refugee claim, in the Federal Court of Canada ("Federal Court"). Ms. Yao's son, however, was a Canadian citizen at all times.

C. *CCTB or CCB Claim Process*

[13] A resident of Canada must actively apply for the CCB. The application form for the CCB or, as it was previously named the CCTB, is form RC66. In the application form, the claimant must state whether they (and their spouse or common-law partner) are citizens of Canada. If they are not citizens, or if they recently became new residents of Canada or returned as residents to Canada in the last two years, then they must complete another form: Status in Canada/Statement of Income form RC66SCl-L.

[14] In processing an application for the CCTB or the CCB, the CRA does not ask the claimant why they came to Canada.

D. *Ms. Yao*

a) Ms. Yao's background

[15] Ms. Yao married in Canada in August 2014. She and her husband were citizens of the People's Republic of China ("China"). Their son was born in Toronto in 2015. Therefore, the son is a Canadian citizen, while neither Ms. Yao nor her husband are or were.

[16] While residing with Ms. Yao, the husband was issued temporary work permits by Immigration, Refugees and Citizenship Canada ("IRCC").

[17] Ms. Yao entered Canada on foot near Vancouver, British Columbia in August 2012. She did not hold a permanent resident visa as required under the Immigration and Refugee Protection Regulations in order to establish permanent resident status. She claimed refugee protection under section 96 and subsection 97(1) of the IRPA.

[18] On March 20, 2014, the Refugee Protection Division of the IRB determined that Ms. Yao was not a Convention refugee or a person in need of protection.

b) Ms. Yao's refugee claim history

[19] On April 1, 2014, Ms. Yao appealed the Refugee Protection Division decision to the Refugee Appeal Division of the IRB. Later that month, the Refugee Appeal Division dismissed her appeal. In response, Ms. Yao filed an application for leave and judicial review of the decision, logically to stave off deportation.

[20] On March 12, 2015, the Federal Court granted Ms. Yao's application for leave and judicial review of the Refugee Protection Division decision. In September of 2015, the Federal Court granted the application for leave and judicial review of the Refugee Protection Division decision. On September 22, 2015, Ms. Yao was issued a new work permit by IRCC. She was issued subsequent temporary work permits *in seriatim* for the period from the original work permit in 2015 until she was declared a refugee on September 4, 2019.

c) Ms. Yao's CCTB (now CCB) claim history

[21] Ms. Yao applied for the CCTB, in respect of her son, retroactive to March 30, 2015.

[22] On August 20, 2015, the Minister of National Revenue (the "Minister") issued to Ms. Yao a Notice of Determination, which identified the amount to which Ms. Yao was entitled in respect of the CCTB. In February 2016, the Minister terminated payments to Ms. Yao under the CCTB. On July 1, 2016, the CCTB was replaced with the CCB.

[23] On August 19, 2016, the Minister redetermined Ms. Yao's entitlement and requested that Ms. Yao repay overpayments of the CCB totalling $1,199.21. In June 2017, Ms. Yao served a Notice of Objection and a request for an extension of time to file her Notice of Objection. In July 2017, the CRA granted Ms. Yao's

application for an extension of time to file her Notice of Objection, and requested documentation supporting her eligibility for the CCB. After Ms. Yao responded, the Minister issued a Notice of Confirmation, confirming the redetermination of Ms. Yao's eligibility and effectively denying her the CCB on the basis of her status as a refugee claimant.

d) Ms. Yao's testimony concerning her challenges

[24] Ms. Yao, like most refugee claimants, has had considerable financial challenges, arriving virtually penniless in a new country and unable to speak either official language. She attempted to reduce the language barrier by taking English lessons when she arrived in 2012. Although irrelevant to her appeal, her process for entry into Canada was unorthodox and suspect, and involved some unscrupulous actors. She paid some $20,000 to $30,000 Canadian to an illicit Chinese immigration "consultant", commonly known as a "snakehead."

[25] In 2014, Ms. Yao married. She and her husband separated sometime in 2017 or so. During that period, the family supported itself through her husband's intermittent income of $2,000 to $3,000 per month. She herself was employed selling skincare products. Her income was $1,000 per month or less. More recently, her income has become more stable.

[26] During 2015 and 2016, Ms. Yao was originally paid the CCB (then the CCTB). The money assisted her with necessities. After the benefit was terminated, her testimony was that she resorted to second-hand stores, borrowed items and community help. During that period, she was sad, anxious and without much hope. By contrast, now that the benefit has been restored, swimming lessons, marital arts lessons, piano lessons and golf lessons are within reach financially. Healthcare was always accessible.

[27] Her accommodation has changed as well. In 2014, she lived in the basement of a semi-detached house. In 2016, she moved to a large condominium. In this location, she had security, parking and close proximity (less than a block) to her son's school. In 2017, she again relocated to a two-storey house with a basement, double-car garage and a backyard. She lives there presently.

E. *Ms. Zhang*

a) Ms. Zhang's background

[28] Ms. Zhang and her children's pathway to refugee status is slightly more straightforward. The period in issue for Ms. Zhang is March 2018 to May 2019. During that time, she was a refugee claimant, and like all refugee claimants, under a conditional departure order.

[29] Ms. Zhang's children were essentially in the same position as Ms. Zhang to the extent that they had no different "immigration status" than their mother. Her children were both born in China, her daughter in 2010 and her son in 2012.

[30] Ms. Zhang divorced her husband, himself a Chinese citizen who never resided in Canada, in early 2018. At that time, Ms. Zhang was granted sole custody of her children by court order.

b) Ms. Zhang's refugee claim history

[31] From April 2013 to October 2014, Ms. Zhang and her children were in Canada by virtue of Ms. Zhang's study permit and V-1 visitor permits. Ms. Zhang and her children were all back in China by August 2014, prior to the expiration of the permits.

[32] In May 2017, Ms. Zhang claimed refugee protection under the IRPA. She and her children received a refugee claimant document and qualified for interim federal healthcare. A conditional departure order was also issued.

[33] From summer 2017 to October 2020, various work and study permits were issued, expired and/or were extended. Finally, in December of 2020, Ms. Zhang was issued a study permit, valid until August 31, 2023. It stated on its face, like all the others, that it "does not confer temporary resident status".

c) Ms. Zhang's CCB claim history

[34] Ms. Zhang applied for the CCB in respect of her children in May 2017. On July 20, 2017, the Minister issued to Ms. Zhang a Notice of Determination, stating that she was not entitled to the CCB for the 2016 base year.

[35] This Notice of Determination is not under appeal.

[36] Ms. Zhang again applied for the CCB in respect of her children by application dated May 4, 2018. On July 20, 2018, the Minister issued a Notice of Determination, notifying Ms. Zhang that she was entitled to the CCB for the 2016

base year. In 2018, a similar notice advised Ms. Zhang that she qualified for the 2017 base year.

[37] On September 20, 2019, the Minister changed her mind and notified Ms. Zhang that she was not entitled to the CCB for the 2016 and 2017 base years. On November 13, 2019, Ms. Zhang served a Notice of Objection in respect of the notices of determination disentitling her to the CCB. The Minister subsequently confirmed the denial of the CCB for the 2016 and 2017 base taxation years.

d) Ms. Zhang's testimony concerning her challenges

[38] The purpose of Ms. Zhang's second entry into Canada in August 2016 with her two children was twofold. Firstly, she wanted to study in Canada from August to December 2016. Secondly, and more existentially, she was fleeing an intolerable domestic arrangement, greater details of which are constrained by this Court's own confidentiality order.

[39] From 2017 until 2020, Ms. Zhang and her children lived in a secure living arrangement. Ultimately, the Ontario Superior Court of Justice awarded her sole custody under various protective court orders.

[40] During the years from 2018 to 2020, Ms. Zhang pursued her post-graduate studies and further continued her professional education in the fall of 2020.

[41] Her financial situation during these years was precarious. She used supports from parents, her community, food banks and churches to survive financially. She described her situation as "very tight" financially. She was an excellent student and received numerous bursaries and awards. The CCB moneys, when received for an interim period, were used for better clothing, groceries such as fresh fruits and vegetables and, of particular pride, extracurricular activities for her children.

[42] Ultimately, after the relevant periods ended, in 2019 and 2020, the Refugee Protection Division of the IRB determined that Ms. Yao, Ms. Zhang and Ms. Zhang's children were Convention refugees.

[43] This meant that refugee protection was conferred on them and they became protected persons within the meaning of the IRPA. This also meant that Ms. Yao, Ms. Zhang and Ms. Zhang's children became eligible individuals for the purposes of the CCB, under subparagraph 122.6(e)(iii) of the ITA.

III. PART A – CCB ELIGIBILITY

[44] At a high level, the first specific issue in these appeals is:

> Did Ms. Yao and/or Ms. Zhang, as refugee claimants, qualify as eligible individuals within the meaning of subparagraph 122.6(e) of the ITA?

A. *Meaning of Temporary Resident*

[45] The determination of who qualifies for the CCB is governed by the ITA, the IRPA, and the Regulations thereunder. The ITA defines "eligible individual" to include a "temporary resident within the meaning of the *Immigration and Refugee Protection Act*". However, "temporary resident" is not explicitly defined in the IRPA.

[46] The Appellants, as refugee claimants, argue that they fall within the meaning of "temporary resident". Accordingly, the issue before this Court is whether, under subparagraph 122.6(e)(ii) of the ITA, a refugee claimant is a temporary resident within the meaning of the IRPA and is therefore eligible for the CCB.

a) Excerpt from the ITA

[47] Eligible individuals are entitled to apply for the CCB pursuant to section 122.6 of the ITA. Paragraph 122.6(e) defines "eligible individual" as follows:

> ***eligible individual*** in respect of a qualified dependent at any time means a person who at that time
>
> …
>
> (e) is, or whose cohabiting spouse or common-law partner is, a Canadian citizen or a person who
>
> > (i) is a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*,
> >
> > (ii) is a **temporary resident** within the meaning of the *Immigration and Refugee Protection Act*, who was resident in Canada throughout the 18 month period preceding that time,
> >
> > (iii) is a protected person within the meaning of the *Immigration and Refugee Protection Act*,

> (iv) was determined before that time to be a member of a class defined in the *Humanitarian Designated Classes Regulations* made under the *Immigration Act*, or
>
> (v) is an Indian within the meaning of the *Indian Act*,
>
> [Emphasis added.]

b)Excerpts from the IRPA

[48] The IRPA does not define "temporary resident". Instead, the IRPA describes the process and means by which one becomes a temporary resident.

[49] Section 22 authorizes an immigration officer ("IO") to determine whether a foreign national qualifies to be a temporary resident.

> **Temporary resident**
>
> **22 (1)** A foreign national becomes a temporary resident if an officer is satisfied that the foreign national has applied for that status, has met the obligations set out in paragraph 20(1)(b), is not inadmissible and is not the subject of a declaration made under subsection 22.1(1).
>
> **Dual intent**
>
> **(2)** An intention by a foreign national to become a permanent resident does not preclude them from becoming a temporary resident if the officer is satisfied that they will leave Canada by the end of the period authorized for their stay.

[50] Section 24 provides that an IO may grant a temporary resident permit.

> **Temporary resident permit**
>
> **24 (1)** A foreign national who, in the opinion of an officer, is inadmissible or does not meet the requirements of this Act becomes a temporary resident if an officer is of the opinion that it is justified in the circumstances and issues a temporary resident permit, which may be cancelled at any time.
>
> **Exception**
>
> **(2)** A foreign national referred to in subsection (1) to whom an officer issues a temporary resident permit outside Canada does not become a temporary resident until they have been examined upon arrival in Canada.
>
> **Instructions of Minister**

(3) In applying subsection (1), the officer shall act in accordance with any instructions that the Minister may make.

Restriction — pending application for protection

(3.1) A foreign national whose claim for refugee protection has been determined to be ineligible to be referred to the Refugee Protection Division may not request a temporary resident permit if they have made an application for protection to the Minister that is pending.

Restriction

(4) A foreign national whose claim for refugee protection has not been allowed may not request a temporary resident permit if less than 12 months have passed since

(a) the day on which their claim was rejected or determined to be withdrawn or abandoned by the Refugee Protection Division, in the case where no appeal was made and no application was made to the Federal Court for leave to commence an application for judicial review; or

(b) in any other case, the latest of

(i) the day on which their claim was rejected or determined to be withdrawn or abandoned by the Refugee Protection Division or, if there was more than one such rejection or determination, the day on which the last one occurred,

(ii) the day on which their claim was rejected or determined to be withdrawn or abandoned by the Refugee Appeal Division or, if there was more than one such rejection or determination, the day on which the last one occurred, and

(iii) the day on which the Federal Court refused their application for leave to commence an application for judicial review, or denied their application for judicial review, with respect to their claim.

Restriction — designated foreign national

(5) A designated foreign national may not request a temporary resident permit

(a) if they have made a claim for refugee protection but have not made an application for protection, until five years after the day on which a final determination in respect of the claim is made;

> **(b)** if they have made an application for protection, until five years after the day on which a final determination in respect of the application is made; or
>
> **(c)** in any other case, until five years after the day on which the foreign national becomes a designated foreign national.
>
> **Suspension of request**
>
> **(6)** The processing of a request for a temporary resident permit of a foreign national who, after the request is made, becomes a designated foreign national is suspended
>
> **(a)** if the foreign national has made a claim for refugee protection but has not made an application for protection, until five years after the day on which a final determination in respect of the claim is made;
>
> **(b)** if the foreign national has made an application for protection, until five years after the day on which a final determination in respect of the application is made; or
>
> **(c)** in any other case, until five years after the day on which the foreign national becomes a designated foreign national.
>
> **Refusal to consider request**
>
> **(7)** The officer may refuse to consider a request for a temporary resident permit if
>
> **(a)** the designated foreign national fails, without reasonable excuse, to comply with any condition imposed on them under subsection 58(4) or section 58.1 or any requirement imposed on them under section 98.1; and
>
> **b)** less than 12 months have passed since the end of the applicable period referred to in subsection (5) or (6).

[51] Subsection 46(1.1) provides that automatic conferral of temporary resident status occurs after renunciation of permanent resident status.

> **Effect of renunciation**
>
> **46(1.1)** A person who loses their permanent resident status under paragraph (1)(e) becomes a temporary resident for a period of six months unless they make their application to renounce their permanent resident status at a port of entry or are not physically present in Canada on the day on which their application is approved.

[52] Certain protected refugees are granted temporary resident status under subsection 95(1).

> **Conferral of refugee protection**
>
> **95 (1)** Refugee protection is conferred on a person when
>
> **(a)** the person has been determined to be a Convention refugee or a person in similar circumstances under a visa application and becomes a permanent resident under the visa or a temporary resident under a temporary resident permit for protection reasons;
>
> **(b)** the Board determines the person to be a Convention refugee or a person in need of protection; or
>
> **(c)** except in the case of a person described in subsection 112(3), the Minister allows an application for protection.

[53] This list is exhaustive and is not open and flexible. Notably, temporary resident status requires an IO or Board decision.

c) Jurisprudence

1. Leading Authority

[54] *Almadhoun v. Canada* [7] is the leading case resolving whether a refugee claimant is a temporary resident within the meaning of the IRPA. In *Almadhoun*, the Federal Court of Appeal (the "FCA") agreed with the Tax Court that a refugee claimant is not a temporary resident and is therefore not an eligible individual for the purposes of section 122.6 of the ITA. The FCA, at paragraphs 17 and 18, held:

> [17] … There is absolutely nothing in the legislation to support the appellant's assertion that section 122.6 of the Act necessarily includes a person whose application for status as a protected person is pending, and the appellant was unable to provide any case law in support of her contention. Contrary to Ms. Almadhoun's argument, there is no gap in the legislation; Parliament made a conscious policy choice as to the groups of persons on whom social benefits would be conferred. It is not for this Court to second-guess that deliberate choice …

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[7] *Almadhoun v Canada*, 2018 FCA 112 [*Almadhoun*].

> [18] The same reasoning applies in response to the appellant's second argument, namely that she should be considered at the very least a "temporary resident" with the meaning of the IRPA. The IRPA provides a process for the determination of temporary residency, which is not an open and flexible category. …

[55] The Appellants correctly recognize that in order to depart from vertical precedent, including decisions of the FCA, it is not enough to be manifestly wrong.[8] The appeal must raise a new legal issue, or present new evidence that will "fundamentally shift how jurists understand the legal question at issue."[9] The question at issue is admittedly a question of law, so new evidence cannot help.

[56] Where the same legal issue before the Tax Court is re-litigated, *Almadhoun* is binding, except in rare circumstances.[10] The Appellants cite the Supreme Court of Canada case *Bedford*[11] to assert that raising a new "critical statutory provision" is just such a sufficiently rare circumstance that applies in this case.[12] In *Almadhoun*, the Court did not analyze the relevant IRPA provisions, the *Convention on the Rights of the Child*[13] or statements of legislative intent. Further, *Almadhoun* was limited to on a strict textual interpretation of "eligible individual".

[57] The Respondent argues that because the issue in *Almadhoun* is the same issue before this Court, *Almadhoun* is binding on this Court.[14] Accordingly, a refugee claimant is not included in the meaning of temporary resident under the *IRPA* and is therefore not eligible for the CCB.

Analysis

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[8] Appellants' Written Submissions [AWS] at para 57, citing *Sanchez Herrera v Canada (Public Safety and Emergency Preparedness)* 2021 FC 401 at paras 84–85.

[9] AWS at para 58, citing *Canada (AG) v Bedford*, 2013 SCC 72 [*Bedford*] at para 42; *Carter v Canada (AG)*, 2015 SCC 5 [*Carter*] at paras 44–47; *R v Comeau*, 2018 SCC 15 at para 29.

[10] *Bedford*, *supra.*

[11] *Bedford*, *supra.*

[12] *AWS* at paras 60–61.

[13] *Convention on the Rights of the Child*, 20 November 1989 (entered into force 2 September 1990) [CRC].

[14] Respondent's Written Submissions [RWS] at para 22.

[58] *Almadhoun* is *prima facie* binding on this Court. The FCA specifically considered subparagraph 122.6(e)(ii) of the ITA, the same statutory provision raised in this appeal. This leads to the same issue being squarely before the Court: whether, under subparagraph 112.6(e)(ii) of the ITA, a refugee claimant is a "temporary resident" within the meaning of the IRPA.

[59] The Appellants' assertion that raising a new "critical statutory provision" allows a court to reconsider a settled issue is not founded in jurisprudence. It is partially correct that the Tax Court can depart from vertical precedent "if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate."[15] However, *Bedford* was about Charter provisions, not about "critical provisions" from legislation in general.

[60] To expand upon the Appellants' quotation from *Bedford*, "a trial judge can consider and decide arguments based on Charter provisions that were not raised in the earlier case; this constitutes a new legal issue."[16] Raising a new *Charter* challenge is more than just highlighting a different statutory provision; it raises a new independent claim. Further, the "significant development in the law" in *Bedford* allowing precedent to be re-argued was the development of jurisprudence on the "principles of fundamental justice" which significantly changed the s. 7 analysis.

[61] Identifying other provisions of the IRPA does not create new issues in the way that bringing a claim under the *Charter* or under a different *Charter* provision does. Further, the CRC and all documents regarding legislative intent were available at the time *Almadhoun* was heard, so no significant change in the law is apparent. Although the FCA's discussion on the "temporary resident" provision is short, that alone is not enough to overturn the binding precedent on the basis of new legislative facts or legislative amendments, when factually such terrain was identical when viewed by the FCA.

[62] To overturn vertical precedent, there must be a new issue raised, or a change in the law or circumstances that "fundamentally shifts the parameters of the debate."[17] The Appellants assert that the FCA incorrectly interpreted the legislation

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[15] *AWS* at para 59, citing *Bedford*, *supra* at para 42.

[16] *Bedford*, *supra* at para 42.

[17] *Bedford*, *supra* at para 42.

because it did not look at other materials such as other sections of the IRPA, the CRC, and other documents indicating legislative intent.[18] This is insufficient to overturn binding precedent. As a result, *Almadhoun* is binding on this Court.

d) Interpretation of the Statutes

[63] The question of whether refugee claimants are "temporary residents" and therefore "eligible individuals" under s. 122.6 can only be reconsidered if *Almadhoun* is not binding on this Court because the Court is prepared to distinguish it. For completeness, and despite the binding nature of *Almadhoun*, the Court pursues this issue.

[64] This is an issue of statutory interpretation. The Appellants argue that the interpretation should look beyond the text of the provision. The Court should take a contextual and purposive approach to resolve ambiguity.[19] The Appellants also assert that further ambiguities should be resolved in favour of the taxpayer.[20] Benefit schemes should be given a large and liberal interpretation, and such an approach has been applied to the CCB regime in the past.[21]

[65] In *Québec (Communauté urbaine) v. Corp Notre-Dame de Bon-Secours*,[22] the Supreme Court set out the principles which are to govern interpretation of tax legislation. The Court found that the interpretation of tax legislation should follow the ordinary rules of interpretation and that the choice between a strict or liberal reading of the text must not be guided by presumptions favourable to the state or the taxpayer, but by reference to the goal which underlies the provision.[23]

[66] The ordinary rule of statutory interpretation is that "[t]he words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention

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[18] RWS at para 22.

[19] AWS at para 15(a), citing *Canada Trustco Mortgage Co v Canada*, 2005 SCC 54 at para 47.

[20] AWS at para 15(b), citing *Québec (Communauté urbaine) v Corp Notre-Dame de Bon-Secours*, [1994] 3 SCR 3 [1994], SCJ No 78 (QL) [Québec (Communauté urbaine)].

[21] AWS at para 15(c), citing *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27, 154 DLR (4th) 193 [Rizzo & Rizzo Shoes] at para 36; AWS at paras 21–24.

[22] [1994] 3 SCR 3 at p 20, 171 NR 161.

[23] *Québec (Communauté urbaine)*, supra.

of Parliament."[24] The first step is to examine the text of the provision to determine its plain or ordinary meaning. However, the true meaning of the words can only be determined contextually by considering other indicators of legislative meaning, including context, purpose, and relevant legal norms.[25]

1. Immigration vs. Tax Issue

[67] Before discussing the text, context, and purpose, it is necessary to resolve the extent to which the Court should look at the IRPA and the functioning of the immigration regime to interpret this ITA provision.

[68] The Appellants argue that it is incorrect to look at the IRPA to resolve ambiguity about the ITA. The interpretation should focus on the CCB regime as this is not an immigration law case.[26] The Appellants cite the Alberta Court of Appeal ("ABCA") decision *Alberta v. ENMAX*[27] as authority that the focus should be on the purpose and context of the ITA –specifically the CCB regime– and not the IRPA and its immigration regime.[28]

[69] *ENMAX* focused on a provision of Alberta's provincial energy regulation regime (the "primary regime"). This provision required a calculation of "an amount equal to the amount of tax" that an entity would be liable to pay under the ITA (the "secondary regime").[29] To calculate that amount payable, the trial judge "effectively determined that anything outside the ITA was irrelevant".[30] The ABCA instead used the purpose and context informing the primary regime, resulting in a calculation that was different than if it had been done for income tax purposes instead.

[70] The Respondent asserts that the phrase "within the meaning of the Immigration and Refugee Protection Act" invites and directs the Court to look at the entirety of the IRPA to determine the meaning of "temporary resident".

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[24] *Rizzo & Rizzo Shoes*, supra at para 21.

[25] *La Presse Inc v Quebec*, 2023 SCC 22.

[26] *Alberta v ENMAX Energy Corporation* [ENMAX], 2018 ABCA 147 at para 70.

[27] *ENMAX*, *supra.*

[28] *ENMAX supra* at para 70.

[29] *ENMAX*, *supra* at para 25, citing *Electric Utilities Act*, SA 2003, c E-5.1, subsection 147(3).

[30] *ENMAX*, *supra* at para 69.

Further, Parliament has the right to determine immigration policy. Assigning the term "temporary resident" a meaning other than what it means in the IRPA will undermine that right and affect Canada's immigration policy while ingoing the use of such definition.

[71] In *ENMAX*, the ABCA did not ignore the secondary regime. Rather, the Court looked at the context and purpose of the primary regime and found that the ITA calculation would have contravened that purpose. The purpose and context of the secondary regime need not be ignored, it just ought not to undermine the primary regime's purpose.

[72] By analogy in these appeals, the CCB provisions of the ITA create the primary regime, and the IRPA is the secondary regime. To determine the meaning of "temporary resident", the overall purpose and context of the CCB cannot be ignored and the IRPA cannot be applied in a vacuum.

[73] Ultimately, the process is such that Parliament directs the reader from the primary regime to another regime, but only so far as it approaches the issue of defining "temporary resident", a concept more proximate to immigration law in this context than tax law. This ostensibly seeks consistency between legislation of the same law-making body and not the reverse.

2. Text

[74] The Appellants argue that the meaning of "temporary resident" is ambiguous because, although section 122.6 refers to a temporary resident "within the meaning of the Immigration and Refugee Protection Act," the IRPA does not contain a definition of "temporary resident".[31] While the IRPA sets out multiple methods of becoming a temporary resident, there is no indication that this is an exhaustive list.[32] The Court should not apply *expressio unius* (implied exclusion) to treat this as an exhaustive list.[33] Further, the IRPA itself has some confusing and inconsistent provisions regarding temporary residents.[34]

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[31] AWS at para 27.

[32] AWS at para 27.

[33] AWS at paras 30–32.

[34] AWS at para 28.

[75] The Respondent argues that the meaning of "temporary resident" is not ambiguous.[35] The IRPA sets out a finite number of ways to acquire temporary resident status.[36] All these methods require a determination by an IO.[37] The IRPA does not contemplate that refugee claimants acquire temporary resident status; refugee claims are not handled by IOs.[38] While temporary residents, permanent residents, and refugees are able to remain in Canada for a specific period, refugee claimants are subject to a conditional removal order until their claim is heard and a determination is made.[39]

[76] It is true that there is no singularly identifiable definition of "temporary resident" in the IRPA or an explicitly exhaustive list of methods to receive or achieve temporary resident status. This likely relates to the total absence of refugee claimant designation status from the IRPA.

[77] The Court finds consistency in the legislative approach. Refugee claimants pursue an entirely different process for a status which is not determined by IOs. The IRPA's notation on relevant documents that refugee claimants do not receive temporary resident status through work and student permits also supports this conclusion. This is consistent with the decision in *Almadhoun* when expressed as follows:

> [18] … The IRPA provides a process for the determination of temporary residency, which is not an open and flexible category. In the appellant's submission however, she met the conditions required to be considered as a "temporary resident" as a result of having been issued a Refugee Protection Claimant Document.
>
> [19] The problem with this argument is that the IRPA temporary resident regime explicitly requires the conferral of temporary residency by an immigration officer. …
>
> [21] … there is no such thing as a *de facto* temporary resident status. … [40]

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[35] RWS at para 24.

[36] RWS at para 30.

[37] RWS at para 28.

[38] RWS at para 33.

[39] RWS at para 35.

[40] *Almadhoun, supra* at paras 18–19, 21.

[78] Lastly, the ITA does not reference a temporary resident "as defined in the Immigration and Refugee Protection Act," but rather a temporary resident "within the meaning of the Immigration and Refugee Protection Act." In turn, this legislatively directs that the meaning is discernible in the legislation.

[79] As a result, the Court finds that the plain and ordinary interpretation of the text of the ITA is that the meaning of "temporary resident" status is found within the IRPA. Although the IRPA does not explicitly define temporary resident, it is clear from a plain reading that an individual can only become a temporary resident when an IO confers that status according to the legislation. Since the legislation does not provide for IOs or others to confer temporary resident status on refugee claimants, refugee claimants are not temporary residents within the meaning of the IRPA.

3. Context and Purpose

[80] Given the distinction between the domestic legislative history and the treaty obligation under the CRC, each will be analyzed separately.

Legislative History

[81] The Appellants claim that various government documents and speeches show that the CCB was created with the intention to help families, especially those of low income, with the cost of raising their children. This is uncontroverted. Further, the Appellants argue that Parliament did not intend to exclude refugee claimants. Rather, Parliament intended to include everyone who is legally entitled to stay in Canada. Refugee claimants are legally entitled to stay in Canada.[41]

[82] The Respondent argues that Parliament intended to leave out refugee claimants from the CCB program. Refugees, *per se*, were not initially included in the legislation, but amendments incrementally included refugees and other people in "refugee-like" situations.[42] However, refugee claimants were never included. Parliament had ample time to include refugee claimants if it so desired and it did not.[43]

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[41] Appellants' Reply Submissions [AR] at paras 3–4.

[42] RWS at paras 58–67.

[43] RWS at para 69.

[83] Parliament's intention is likely revealed by its approach. The legislative history shows a general goal of helping parents with the cost of raising their children and alleviating child poverty. It is clear that Parliament intentionally amended eligibility for the CCB to include certain of those with varying immigration status. There is no mention of refugee claimants, despite the eligibility being specifically extended to refugees (post immigration assessment). It is possible that this was an oversight but, on balance, it is more likely that refugee claimants were intentionally excluded. The text of the provision further supports this. If the inclusion of refugee claimants was intended, it would have been more simple to state that an "eligible individual" is anyone who otherwise qualifies and is legally domiciled or "entitled to stay" in Canada, rather than to use the chosen, but more exclusive, and perhaps more cumbersome categories of individuals listed in subparagraphs (e)(i) to (e)(v) of s. 122.6.

International obligation and the CRC

[84] The Appellants cite the 1992 budget speech, which explicitly linked the CCB to the CRC.[44] They argue that legislation is presumed to comply with Canada's international obligations. As a result, the Intervenor also stressed that the CRC creates an obligation for Canada to ensure that children have access to social security and social insurance sufficient to meet their developmental needs. Each child, regardless of their own nationality or the nationality of their parents, should be granted these rights.[45]

[85] The Respondent claims that international obligations cannot override clear statutory language.[46]

[86] There is a presumption that legislation conforms to international law. This means that "courts will strive to avoid construction of domestic law pursuant to

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[44] AWS at para 44.

[45] The Intervenors submitted that the best interests of the child comprise a golden thread which, when coupled with the CRC, places Canada in clear breach of its obligations: Intervenor's Written Submission [IWS] at paras 8(a) regarding Part A and 8(b) regarding Part B; AWS at paras 37–41.

[46] RWS at paras 80–86.

which the state would be in violation of its international obligations, unless the wording of the statute clearly compels that result."[47]

[87] Canada has committed to protecting all children, including children of refugee claimants, by signing the CRC. However, there is little ambiguity upon which one can conclude that Parliament inadvertently misaligned its specific legislative enactment with its treaty obligations. The wording of the statute clearly compels the result that refugee claimants are excluded from the CCB because the legislation does not define them as persons entitled to unconditionally remain in Canada.

e) Conclusion to Part A

[88] There are no new legal issues raised. There has been no significant development in the law that was not otherwise previously before the FCA; *Almadhoun* is binding precedent on this Court. Even if *Almadhoun* is not binding, the constructive definition of "temporary resident" is not ambiguous. Refugee claimants are not and were not intended to be temporary residents "within the meaning of" the IRPA.

[89] The legislative history points to an overall goal of alleviating child poverty and assisting parents to pay for necessities. However, Parliament may set specific eligibility criteria for the CCB, including those grounded in degree, length and certainty of residency. Such foundational logic embeds common sense at its root. Even those unfamiliar with the text, context, and purpose of the legislation grasp why it is logically so. The wording of the paragraph and the multitude of amendments to the eligibility criteria suggest that Parliament was quite deliberate; it did not intend to allow anyone without a defined legal status and established nexus to Canada to receive the CCB, regardless of its obligations under the CRC.

IV. PART B – THE CONSTITUTIONAL CHALLENGE

A. *Sections 1 and 15 of the Charter*

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[47] *Oroville Reman & Reload Inc. v R*, 2016 TCC 75 at para 31, quoting *R v Hape*, 2007 SCC 26 at para 53.

> Have the *Charter* rights of Ms. Yao or Ms. Zhang under s. 7 or subsection 15(1) been violated and, if such a violation has occurred, is such a violation not justified under s. 1 of the *Charter*?

[90] The excerpts from the *Charter* are relatively short; they are, however, ladened with nuance and covered by extensive legal interpretation.

[91] Section 7 of the *Charter* provides:

> **7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[92] Section 15 of the *Charter* provides:

> **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.
>
> **(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.

Preliminary Issue re: Notice of Constitutional Question

[93] During the portion of the hearing in October 2022, an issue arose among counsel and was raised with the Court. It concerned the sufficiency of the original notice of constitutional question sent to the provincial Attorneys-General. Specifically, the original notice referenced whether the "immigration status" as an eligibility requirement in the ITA violated the section 7 and 15 rights of the Appellants and their children. Counsel noted that submissions and argument up to that point had narrowed the status further to that of "refugee claimant status".

[94] In order to alert the provincial Attorneys-General, a clarification letter was sent to each describing the more refined status, a summary of where the appeals stood and an invitation to each Minister of the Crown to advise the Court and counsel should any now wish to make submissions concerning the sub-category of immigration status: refugee claimant. None accepted the offer.

B. *Summary of Expert Evidence*

[95] The background and certified area of expertise for each expert who testified before the Court are as follows:

For the Appellants:

Expert Witness	Education and/or Background	Certified Area of Expertise
Mr. John Stapleton	BA and MA in Sociology	Expert in the historical context and development of federal and provincial income security benefits for children and families with children in Canada
Dr. Grace-Edward Galabuzi	MA and PhD in Political Science	Expert in race and gender-based income inequality and public administration in poverty reduction
Dr. Luin Goldring	MS and PhD in Sociology	Expert in the subject of the sociological experience of newcomers to Canada, in particular those with precarious legal status
Dr. Leslie Roos	PhD in Psychology	Expert on the psychological effects of poverty and stress on children's mental, neurological and endocrine health and development

For the Respondent:

Expert Witness	Education and/or Background	Certified Area of Expertise
Dr. Andrew Sharpe	Founder of the Centre for the Study of Living Standards	Expert in economics and economic statistics.

[96] Clear from all expert testimony was that each expert for the Appellants felt strongly that the exclusion of refugee claimants from the CCB was, at the very least, a regrettable oversight, whether advertent or inadvertent. To that extent, they were biased. In today's political and media-dominated climate, perhaps only within a court's sterile environment, if even then, can those involved in social benefits policy not have a telegraphed viewpoint. In any event, this was identified for and by the Court several times. It is not a question of forgetting or ignoring any such bias, but properly characterizing it: a strong preference for policy change in their

field. Consequentially, calibrating the weight of the reports, and not excluding the witnesses, was the chosen path of the Court.

[97] From the evidence, no expert witness was immune to having used partial, dated or parsed data. More specific references are made subsequently throughout these reasons. Repeated and recurring comments, views and opinions marched along with observations regarding the CCB, immigration to Canada and the refugee and claimant process. To be specific, the Appellants' experts made such statements. For example, Dr. Galabuzi used outdated census data; cut and pasted a previous affidavit; and selected more general groups where more specific sub-category data were available. Dr. Goldring rarely referred to refugee claimants; understated available government programs; and failed to analyze data contrasting groups by sex.

[98] Dr. Roos used US-based research without clarifying that source in her evidence; was incorrect about access of refugee claimants to healthcare, generally; and utilized outdated data. Mr. Stapleton's testimony as a "social benefit designer" was anecdotal; untied to the underlying legislation; and provided evidence on economics, an area in which he was not qualified.

[99] The Respondent's expert witness also unintentionally salted the numbers; Dr. Sharpe cut and pasted excerpts from other reports, and he asked and answered questions not otherwise posed.

[100] Despite these lapses of reliability, from such expert testimony, the following were the balanced, weighted and proportional conclusions extracted by the Court:

(a) the qualifications for the CCB and the previous iterations of the benefit have consistently included both a prerequisite durational and connective tenure;

(b) refugee claimants are desperately and markedly poor when they enter Canada;

(c) there is an income gap between immigrants and longstanding residents in Canada; however, the income gap closes after entry and narrows as time spent living and working in Canada by immigrants passes;

(d) the majority of refugee claimants and immigrants in Canada are from the Global South and are racialized persons or visible minorities;[48]

(e) there are no precise data on refugee claimants *per se*, and so proxies of those with precarious legal status were used to infer conclusions which it was advanced such unavailable data might otherwise reveal;

(f) there are multiple benefit programs for refugee claimants in Canada from all levels of government; these programs are sometimes duplicative and work at cross-purposes;

(g) poverty impacts children negatively in social, developmental and ultimate outcomes;

(h) direct cash transfer benefits, such as the CCB, help parents and children because they constitute a consistent or predictable financial support;

(i) refugees who are women have measurably lower income levels than others, including male refugees; and,

(j) women refugee claimants are enumerated as parents more frequently than male refugee claimants.

[101] None of these conclusions are particularly surprising. Many such conclusions, if they had not been adduced in testimony, could simply be logically and knowingly observed through judicial notice. While overall the quality of expert testimony was less than stellar and not infrequently unrealiable, collectively, the factual summary drawn above provided the basis for conducting the *Charter* analysis.

C. *Section 7*

[102] Section 7 protects fundamental personal rights of survival and existence: life, liberty and security of the person. The rights broadly protect against state or quasi-state action, or arguably controllable omission, which depraves the subject of those three rights, except where deprivation of the established right aligns with fundamental justice.

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[48] Several expert witnesses advised that this term is anachronistic and inaccurate since such racialized persons may neither be visible nor in the minority within communities.

[103] The Appellants argue that paragraph 122.6(e), which operates to exclude the Appellants from the definition of "eligible individual" and thus disentitles them from the CCB, deprives them and their minor children of their right to security of the person in a way that is not in accordance with the principles of fundamental justice.[49] The Appellants do not argue that their rights to life or liberty have been deprived.

[104] The Respondent claims that the Appellants and their children are not deprived of their right to security of the person under s. 7 and that even if a deprivation of the Appellants' and their children's s. 7 rights is established, this was in accordance with the principles of fundamental justice.[50]

[105] To establish that there was a violation of s. 7, the Appellants must first establish that their interest falls within the ambit of s. 7. If it does, the Appellants then must show that the impugned law interferes with, or deprives them of, their life, liberty, or security of the person and that the deprivation is not in accordance with the principles of fundamental justice.[51]

[106] Accordingly, there are three elements to resolve in this part: (i) whether the legislation affects an interest protected by the right to security of the person within the meaning of s. 7; (ii) whether excluding refugee claimants from the CCB constitutes a deprivation of that right by the state; and (iii) if the first two elements are established, whether this deprivation was in accordance with the principles of fundamental justice.

a) Does the legislation affect an interest protected by the right to security of the person?

[107] The first step is to determine whether the right contended for –in this case, refugee claimants' right to the CCB– garners. 7 protection.[52] This requires consideration of the content of the right to security of the person and the nature of the interests protected by s. 7.[53]

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[49] AWS at para 164.

[50] RWS at paras 232–233.

[51] *Carter*, *supra* at para 55.

[52] *Gosselin v Québec (AG)*, 2002 SCC 84 [*Gosselin*] at para 76.

[53] *Gosselin*, *supra* at para 76.

1. Is the administration of justice implicated?

[108] In *Gosselin*, Chief Justice McLachlin explained that the jurisprudence up to that time suggested that only certain kinds of deprivation of life, liberty and security of the person are protected by s. 7: those attributable to state action implicating the administration of justice.[54] The "administration of justice" phrase refers to "the state's conduct in the course of enforcing and securing compliance with the law".[55]

[109] The administration of justice can be implicated in a variety of circumstances: criminal processes, human rights processes, parental rights in relation to state-imposed medical treatment, parental rights in the custody process, and liberty to refuse state-imposed addiction treatment.[56]

[110] The administration of justice is not patently or readily implicated in these appeals. The Chief Justice also held that it was not implicated in *Gosselin*. The issue in *Gosselin* was whether the right to security of the person included a particular level of governmental social assistance to meet basic needs. That is similar to the question in these appeals.

[111] However, the Chief Justice disagreed that s. 7 protection must always be narrowly confined to state action implicating the administration of justice. She suggested that s. 7 could possibly apply to rights or interests wholly unconnected to the administration of justice. Accordingly, the extent to which and the situation where s. 7 applies outside the context of the administration of justice remains unsettled, or more precisely, until this time unattained.[57]

[112] Further, the Chief Justice said that it was not necessary to provide an exhaustive definition of the administration of justice in *Gosselin* by stating that "[t]he issue here is not whether the administration of justice is implicated — plainly it is not — but whether the Court ought to apply s. 7 despite this fact."[58]

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[54] *Gosselin*, *supra* at para 77.

[55] *Gosselin*, *supra* at para 77, citing *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46, 177 DLR (4th) 124 [*G(J)*].

[56] *Gosselin*, *supra* at para 78.

[57] *Association of Justice Counsel v Canada (AG)*, 2017 SCC 55 at para 49.

[58] *Gosselin*, *supra* at para 79.

[113] Similarly, the issue in these appeals is whether the Court ought to apply s. 7 despite the fact that the administration of justice is not implicated. Uncertainty arises in this respect because the Appellants effectively ask this Court to impose a positive obligation on the state to provide a social benefit. Whether the *Charter* protects economic rights, or more specifically whether s. 7 protects a basic minimum of social assistance, has been the subject of considerable debate, and is described by proponents and legislative bodies as the "social charter".[59]

2. Can s. 7 protection place a positive obligation on the state?

[114] The Appellants say that they do not seek that a positive obligation be recognized pursuant to s. 7. However, the argument does just that; imposing a positive obligation is imposed on the state to provide a benefit. If exclusion from the CCB scheme is a deprivation, the right to be included is the implicit right that was denied. That is, if omission deprives an individual from a right, then inclusion confers it. As a result, the Appellants request that the Court should recognize presently that s. 7 can place positive obligations on the state; the Supreme Court has left the door open, and a fulsome evidentiary record is at the threshold in these appeals.

[115] *Gosselin*, did not resolve whether s. 7 could be read to encompass economic rights. However, the Chief Justice commented that even if s. 7 could be read to protect economic rights, s. 7 has been interpreted as a restriction of the state's ability to deprive people of rights, not the placement of a positive obligation on the state.[60] However, the Chief Justice left the door open for a positive obligation of the state to sustain security of the person informed by special circumstances in the future.[61]

[116] The Appellants argue that *Chaoulli v. Quebec (Attorney General)*[62] is an example of a case where the Supreme Court effectively mandated a positive right.[63] The Supreme Court unanimously found that a Quebec law prohibiting

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[59] Although more honoured in the breach, the "social charter" broadly refers to the positive obligations to provide economic rights of a minimum standard to certain persons, including "migrants": The European Social Charter, Council of Europe.

[60] *Gosselin*, *supra* at para 81.

[61] *Gosselin*, *supra.*

[62] *Chaoulli v Quebec (AG),* 2005 SCC 35 [*Chaoulli*].

[63] AWS at para 177.

insurance for private medical care deprived the claimants of their security of the person. The Court found that although the *Charter* does not provide a freestanding right to healthcare, where the government puts a healthcare scheme in place, the scheme must comply with the *Charter*.[64] The Appellants argue that this was akin to a positive benefit and analogous to the case at bar: the government put in place a scheme designed to provide benefits intended to alleviate child poverty, and the scheme must comply with the *Charter* by not withholding these benefits from the Appellants in violation of the s. 7 or analogous rights.[65]

[117] The Appellants' argument is flawed because the situations are not analogous. In *Chaoulli*, the government imposed an exclusive healthcare scheme on all citizens of the province, which caused delays in healthcare treatment, resulting in adverse physical and psychological consequences. Finding this law unconstitutional did not place a positive obligation on Quebec to *legislate* for adequate healthcare; it *removed a law* that curtailed citizens' access to adequate healthcare. On the contrary, in this case, the government put in place a law providing a benefit to certain people in Canada. The question is whether the government should be forced to *extend* that benefit to refugee claimants. This is a positive obligation to which the reasoning in *Chaoulli* does not apply.

[118] Although s. 7 has not been interpreted to place a positive obligation on the state in the past, the Supreme Court conceives of such an interpretation in the future given that the "living tree" doctrine is a part of Canada's constitutional landscape.[66] Therefore, this issue does not does not hinge on whether s. 7 *can* be interpreted to impose a positive right on the state to ensure security of the person, but on whether the novel application of s. 7 *should be* interpreted in such a way given the circumstances of this case.

3. Does s. 7 place a positive obligation on the state in this case?

[119] The appellant in *Gosselin* argued that a social assistance regime which set the base amount of welfare payable to persons under the age of 30 lower than the amount payable to those 30 years of age and over violated s. 7 of the *Charter*.[67]

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[64] *Chaoulli*, *supra* at para 104.

[65] *Chaoulli*, *supra* at para 179; AWS at para 179.

[66] *Gosselin*, *supra* at para 317.

[67] *Gosselin*, *supra* at para 4.

The appellant asked the Supreme Court to require Quebec to remove the age-based distinction so that those 30 years of age and older would receive the same amount as those under 30. The majority found that the factual record in *Gosselin* was insufficient to support the proposed interpretation of s. 7.[68] The trial judge did not find the appellant's statistical and expert evidence convincing, and there was a lack of other important evidence.[69] Further, the record contained no indication that the appellant could be considered representative of the class.[70] As a result, the factual record could not "support the weight of a positive state obligation of citizen support."[71]

[120] The Appellants argue that the relevant evidence from the Appellants and experts demonstrates that denying access to the CCB prevented the Appellants from meeting their basic needs.[72] Dr. Sharpe, in particular, confirmed that during their first few years in Canada, refugee claimants are, on average, desperately poor (women in particular).[73] This Court does not disagree that the Appellants had difficulty meeting their basic needs upon arriving in Canada and that they experienced financial hardship while awaiting refugee status, but this alone does not warrant the application of a novel interpretation of s. 7. For it to be possible for s. 7 to be applied in this way, the Appellants ought to have provided convincing statistical and expert evidence showing that their hardship warrants a positive obligation on the state to provide refugee claimants with childcare benefits.

[121] Ultimately, s. 7 does not impose a positive obligation on the state concerning security of the person based upon individual economic need where generally a program otherwise creates broad economic benefits without violating the principles of fundamental justice. The evidence must be grounded in deprivation of the guaranteed right, not upon imputed economic amelioration based upon a sooner qualification to increased payments. These temporary, or at least finite, hardships of the Appellants and their children fail to meet the threshold set by the Supreme Court as a violation of the guaranteed right to security of the person. While this ends the s. 7 analysis, the Court pursues the balance for completeness.

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[68] *Gosselin*, *supra* at para 75.

[69] *Gosselin*, *supra* at para 51.

[70] *Gosselin*, *supra* at para 47.

[71] *Gosselin*, *supra* at para 83.

[72] AWS at para 175.

[73] AWS at para 175.

[122] The economic hardship of refugee claimants is lamentable and demonstrable. Their needs are great, but a guarantee to a certain benefit ought not to be a judicially created economic benefit masquerading as a constitutional right to security of the person. Properly assigned, it is the elected representatives within Parliament who should change and enhance the economic benefit if they deem fit, within their constitutionally assigned role as managers and payors of the public purse. Judicially created economic benefits under the ITA derogate from the democratic political process embedded through taxation by elected representation and its emblematic participation by citizens.

4. Conclusion

[123] The financial benefit of the CCB is not a deprived right. The non-qualification for the CCB is not linked to the right to security of the person; the state is not legislating to deny or curtail an existing right. The scheme relates to taxation and benefits; the CCB falls within an economic calculation extracted from the T1 Income Tax and Benefit Return form promulgated under the ITA. That is the very legal reason that it is before *this Court*.

[124] Concerning distribution and redistribution of economic benefits, Parliament, if not given deference in such areas, shall be constrained and fettered by an ever-expanding judicially determined and coined economic "charter" which applies where "security of the person" becomes a key to such a guaranteed "read-in" positive economic emolument despite Parliament's determination that it not be so. This would convert an economic need to a constitutional right, based upon judicially determined subjective need, anxiety and stress.

[125] The Appellants provided insufficient evidence to prove, on balance, that the hardship experienced by refugee claimants upon entry to Canada is severe enough to warrant a novel interpretation of s. 7. As a result, the legislation does not affect an interest protected by the right to security of the person under s. 7 of the *Charter*.

b) Does the exclusion of refugee claimants from the CCB deprive the Appellants of their right to security of the person?

[126] Security of the person is engaged by "state interference with an individual's physical or psychological integrity, including any state action that causes physical or serious psychological suffering".[74] It provides for personal autonomy involving

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[74] *Carter*, *supra* at para 64, citing *G(J)*, *supra*; *Blencoe v British Columbia (Human Rights Commission)*, [2000] 2 SCR 307, 190 DLR (4th) 513 [Blencoe]; *Chaoulli*, *supra*.

control over one's bodily integrity free from state interference.[75] The issue at this stage is whether the exclusion of refugee claimants from the definition of "temporary resident" deprives refugee claimants of their security of the person.

[127] The Appellants argue that by denying their eligibility to the CCB, the state deprived them and their minor children of a benefit necessary for human life and survival, which in turn deprives them of their security of the person. The Appellants' argument centres on the evidence, claiming that it reveals that access to the CCB improved the lives of the Appellants and their children, and that denial of access to the CCB caused both physical and psychological harm. The Appellants argue that there is a sufficient causal connection between the deprivation of the CCB and the poverty experienced by the Appellants because the Supreme Court has mandated a broad approach to causation under s. 7.

[128] The Respondent argues that the Appellants have not been deprived of their security of the person because the state has not interfered with the Appellants' physical or psychological integrity.[76] Any physical and psychological hardship experienced by the Appellants arose mainly from their difficult financial situations that began before they applied for and received the CCB.[77] For a deprivation to be made out under s. 7, there must be a "sufficient causal connection" between the harm experienced and the impugned law, of which there is none in this case. The Appellants' poverty existed before and independently of their eligibility for the benefit.[78]

1. Is the psychological harm serious and profound?

[129] The right to security of the person protects the physical and psychological integrity of the individual.[79] This right does not protect an individual from the ordinary stresses and anxieties that a person of reasonable sensibility would suffer from government action.[80] To establish an infringement of security of the person,

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[75] *Carter*, *supra* at para 64, citing *Rodriguez v British Columbia (AG)*, [1993] 3 SCR 519, 107 DLR (4th) 342.

[76] RWS at para 241.

[77] RWS at para 243.

[78] RWS at para 243.

[79] *G(J)*, *supra.* at para 58 and *R v Morgentaler*, [1988] 1 SCR 30 at 173.

[80] *G(J)*, *supra*.

the claimant must demonstrate, on a balance of probabilities, that the state conduct in issue:

> … [had] a serious and profound effect on a person's psychological integrity. The effects of the state interference must be assessed objectively, with a view to their impact on the psychological integrity of a person of reasonable sensibility. This need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety.[81]

[130] The Appellants argue that they and their minor children were deprived of their security of the person by denial of the CCB, a benefit necessary for human life and survival.[82] Receiving the CCB and then losing it affords analysis of both situations: the period while they received the benefit and the period after they lost it. The CCB was the difference not between life and death, but between grinding poverty and a more stable standard of living: security of the person.[83]

[131] Ms. Zhang testified that the receipt of the CCB alleviated her poverty and allowed her to purchase essentials. She also described the effects of no longer receiving the CCB, including the effects on her and her children's mental health.[84] Ms. Yao testified to the effect of having and then losing access to the CCB.[85] Both Appellants testified that in addition to allowing them to provide the necessities of life, the CCB enabled them to provide their children with enhanced opportunities. It is not unreasonable that these additional activities could improve child development in the long term.[86]

[132] A factual witness on the plight of refugee claimants testified. Mr. Meagher testified to the deep levels of poverty faced by refugee claimants with whom he works. [87] He described how many refugee claimants rely on social assistance to

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[81] *G(J), supra* at para 60.

[82] AWS at para 183.

[83] Appellants' Oral Submission [AOS].

[84] AWS at para 183(a), citing Transcript from Examination of Ms. Zhang (22 November 2021) [Zhang Transcript] at 95–103.

[85] AWS at para 183(b), citing Transcript from Examination of Ms. Yao (24 November 2021) [Yao Transcript] at 32–36.

[86] AWS at para 187.

[87] AWS at para 184, citing Transcript from Examination of Mr. Meagher (24 November 2021) [Meagher Transcript] at 87–88.

survive. He also explained that ineligibility for the CCB pushes refugee claimants into deeper levels of poverty.[88]

[133] Depriving the Appellants' minor children of the CCB exposes them to the negative effects of poverty to the fullest degree, which could be mitigated or eliminated by access to the CCB.[89] The withholding of the CCB contributes to the significant and potentially permanent negative effects of poverty. Dr. Roos testified to the effect that poverty has on children. Direct cash transfers, such as the CCB, can improve child well-being.[90]

[134] Despite the findings above, being excluded from the CCB does not rise to the necessary threshold. Without the CCB, the Appellants were able to secure the means necessary for human life and survival in a multitude of ways.[91] Any impact resulting from the Appellants' poverty was not permanent and was mitigated by their eventual eligibility for the CCB.[92]

[135] In *Scheuneman*,[93] the Federal Court determined that the suspension of Canada Pension Plan disability benefits, which served as partial income replacement, did not cause psychological stress at a level that would breach s. 7.[94] The Supreme Court explained the following regarding this issue in *G(J)*:

> … It is clear that the right to security of the person does not protect the individual from the ordinary stresses and anxieties that a person of reasonable sensibility would suffer as a result of government action. If the right were interpreted with such broad sweep, countless government initiatives could be challenged on the ground that they infringe the right to security of the person, massively expanding

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[88] AWS at para 188, citing Meagher Transcript at 93.

[89] AWS at para 185.

[90] AWS at para 186, citing Transcript from Examination of Dr. Roos (1 June 2022) [Roos Transcript] at 59–61, 82, 98 and Transcript from Examination of Dr. Goldring (12 April 22) [Goldring Transcript] at 85.

[91] RWS at paras 245–247, citing in part Yao's and Zhang's refugee protection claimant documents, under Additional Information, in Compendium of Agreed Statements of Fact, Tab 1, Yao, Exhibit H, at 32 and Tab 3, Zhang, Exhibit G, at 149.

[92] RWS at para 248, citing Dr. Roos' Report at para 26 and Roos Transcript at 75–76.

[93] *Scheuneman v Canada (Human Resources Development)*, 2004 FC 1084, aff'd 2005 FCA 254.

[94] RWS at paras 249–251.

> the scope of judicial review, and, in the process, trivializing what it means for a right to be constitutionally protected. …[95]

[136] While the mental health of the Appellants and their children was impacted, this does not constitute a "serious and profound effect" as described within *G(J)* and pertaining to s. 7. Ordinary stress and anxiety are not sufficient, including, even when government action causes those present, ordinary stresses and anxieties.

2. Is there sufficient casual connection?

[137] The Appellants must not only prove that they experienced serious psychological harm, but also that it resulted from the conduct of the state.[96] In other words, there must be a causal link between the impugned state conduct and the *Charter* violation claimed. This connection can be established by a reasonable inference on a balance of probabilities, and does not require that the impugned law be the only or dominant cause of the prejudice suffered by the claimant.[97] A causal connection exists where the state action is a foreseeable and necessary cause of the prejudice, but this is not the only way to establish causation.[98] The burden of establishing this connection is on the Appellants. The Supreme Court in *Bedford* cautioned that although mere speculation is not sufficient, setting the bar too high would risk barring meritorious claims.[99]

[138] If the Appellants have been deprived of their security of the person, is there a sufficient causal connection between the deprivation and the definition of "eligible individual"? It is clear that the CCB eligibility requirements are not the only or primary cause of the Appellants' poverty. However, it is not necessary to determine if the requirements are the dominant cause.

[139] The Supreme Court has mandated a broad approach to causation under s. 7 and to the test of whether the "sufficient causal connection" standard has been met. The evidence demonstrates that the Appellants' security of the person was enhanced while receiving the CCB, and deprived once they lost access to the

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[95] *G(J)*, *supra* at para 59.

[96] *Blencoe*, *supra* at paras 57, 60.

[97] *Bedford*, *supra* at para 76, citing *Canada (Prime Minister) v Khadr*, 2010 SCC 3.

[98] *Bedford*, *supra* at para 77.

[99] *Bedford*, *supra* at para 78.

CCB.[100] Potentially, the Appellants have moved beyond "mere speculation." Receipt of the CCB improved their situations, and they suffered without it. A reasonable inference could be drawn that a sufficient causal connection exists between the requirements and the Appellants' poverty. The bar must not be set too high.

[140] Other factors are at play: is ineligibility for the CCB a *cause* of the Appellants' poverty, if only a meaningful partial cause? If so, arguably, poverty in Canada is at least partially perpetuated or sustained by the state; poverty could be alleviated if the government provided "sufficient" financial assistance. Equally, Parliament chose to provide the CCB, which the Appellants would otherwise have been able to receive *but for* the unattained residency requirements in the definition of "eligible individual". Overall, "[a] sufficient causal connection is sensitive to the context of the particular case … ."[101]

[141] The novel finding of a positive element to s. 7 colours this context. The sufficient causal connection requirement sits differently from other cases.

[142] Any physical or psychological hardships experienced by the Appellants were initially caused by their difficult financial or domestic situations subsisting before applying for the CCB, which were not caused, perpetuated or worsened by the Canadian state before or after entry. The Appellants' poverty existed before and independently of their ineligibility for the CCB.[102]

[143] The world's largest totalitarian communist regime, the People's Republic of China, created the intolerable situation and justification for which the Appellants needed to flee China, and to apply for and ultimately receive full refugee status. The legislation that creates that critical beneficial environment, arguably essential to the life, liberty and/or security of each Appellant's person, is the very piece of legislation now maligned, the IRPA. Moreover, the ITA incorporates the IRPA to employ the durational and qualitative connection necessary for the Appellants to qualify for the CCB when they become Convention refugees, and simply not before that point.

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[100] AWS at paras 190–192.

[101] *Bedford*, *supra* at para 76.

[102] RWS at paras 241–243.

c) Is the deprivation in accordance with the principles of fundamental justice?

[144] The three central principles of fundamental justice recognized in the jurisprudence are arbitrariness, overbreadth, and gross disproportionality.[103] The analysis of these principles involves comparison with the *object* of the law that is challenged.[104] This analysis does not consider the law's *effectiveness*.[105]

[145] The first step is to identify the object of the impugned law.[106] The object of the impugned law must be defined precisely for the purposes of s. 7; the "direct target of the measure" must be identified.[107] Defining the objective too broadly would make it difficult to determine if the means used to further it are overbroad or grossly disproportionate.[108]

[146] At this stage, competing social interests and public benefits conferred by the impugned law are not relevant. These factors should instead be considered under the s. 1 analysis.[109]

[147] The Supreme Court described how to characterize Parliament's purpose in a s. 7 analysis regarding overbreadth in *Moriarity*.[110] More recently, the Court explained that:

> The most significant and reliable indicator of legislative purpose would, of course, be a statement of purpose within the subject law. Beyond that, generally, courts seeking to identify legislative purpose look to the text, context, and scheme of the legislation and extrinsic evidence, which can (subject to the caution we offer below) include Hansard, legislative history, government publications and the evolution of the impugned provisions … .[111]

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[103] *Carter*, *supra* at para 72.

[104] *Carter*, *supra* at para 73, citing *Bedford*, *supra*.

[105] *Bedford*, *supra* at para 123.

[106] *Carter*, *supra* at para 73.

[107] *Carter*, *supra* at para 78.

[108] *Carter*, *supra* at para 77.

[109] *Carter*, *supra* at para 79, citing *Bedford*, *supra*.

[110] *R v Moriarity*, 2015 SCC 55 at paras 24–32; see also *R v Safarzadeh-Markhali*, 2016 SCC 14 at paras 25–29 for a summary.

[111] *R v Sharma*, 2022 SCC 39 [*Sharma]* at para 88.

1. Arbitrariness

[148] A law is arbitrary where there is no rational connection between its object and the limit that it imposes on life, liberty or security of the person. An arbitrary law is not capable of fulfilling its objectives.[112]

2. Overbreadth

[149] A law is overbroad where it is arbitrary in part; it is "so broad in scope that it includes *some* conduct that bears no relation to its purpose." In this situation, there is no rational connection between the purpose of the law and some, but not all, of its impacts.[113] The law may be rational in some cases, while overreaching in its effect in others. However, "[d]espite this recognition of the scope of the law as a whole, the focus remains on the individual and whether the effect on the individual is rationally connected to the law's purpose."[114]

3. Gross disproportionality

[150] The gross disproportionality inquiry compares the law's purpose with its negative effects on the rights of the claimant in order to determine if the impact is "completely out of sync with the object of the law".[115] The standard for gross disproportionality is high.[116]

[151] Further, the number of people who experience grossly disproportionate effects is not relevant; "a grossly disproportionate effect on one person is sufficient to violate the norm."[117]

[152] Arbitrariness and overbreadth are the two principles of fundamental justice present before the Court is these appeals. These issues turn on the purpose of the eligibility requirements.

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[112] *Carter*, *supra* at para 83, citing *Bedford*, *supra*.

[113] *Bedford*, *supra* at para 112.

[114] *Bedford*, *supra* at para 113.

[115] *Carter*, *supra* at para 89, citing *Bedford*, *supra*.

[116] *Carter*, *supra* at para 89, citing *Bedford*, *supra*; *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1.

[117] *Bedford*, *supra* at para 122.

[153] The Appellants argue that the purpose of the requirements ensures that those in receipt of the CCB have meaningful, but not necessarily permanent, connections to Canada. In that case, it may be arbitrary to exclude refugee claimants who have resided in Canada for at least 18 months, and who may have formed many meaningful connections to Canada during that time, including bearing children who are legally Canadians by birth on Canadian soil.

[154] On the other hand, the purpose of the requirements is to exclude anyone whose legal attachment to Canada is uncertain. Fairly put, the stay of a refugee claimant in Canada is transient and uncertain in the sense that a claim may be rejected at any point and the claimant is *de jure* subject to a conditional removal order which compels the person to leave the country upon notice, regardless of the connections that this person has formed in the meantime.

[155] The Appellants assert that *Vriend*[118] stands for the proposition that the measureable durational purpose of the legislative regime should be considered and preferred. However, this is contrary to the jurisprudence that explains that it is the "direct target" of the impugned measure that is relevant at this stage of the analysis. The impugned measure is the definition of "eligible individual" in paragraph 122.6(e) of the *ITA*, not the CCB regime as a whole.

[156] *Vriend* was decided under s. 15, not s. 7. At the cited paragraph, Justice Iacobucci was undertaking a s. 1 analysis. That being said, a s. 1 analysis requires a rational connection, similar to a s. 7 arbitrariness analysis. However, Justice Iacobucci was trying to discern the *objective* of the omission, not whether there was a rational connection.

[157] It is also difficult to rely on Justice Iacobucci's analysis as analogous because the government in *Vriend* did not provide any object for the omission: it argued that only the overall goal of the legislation needed to be examined. Therefore, the state failed the s. 1 analysis for want of pressing and substantial objective.[119] Justice Iacobucci did continue the analysis and found that there was no rational connection, but that was only assuming "solely for the sake of the analysis, that the [government] correctly argued that where the objective of the

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[118] *Vreind v Alberta*, [1998] 1 SCR 493, 156 DLR (4th) 385 [Vriend]

[119] *Vriend v Alberta*, [1998] 1 SCR 493, 156 DLR (4th) 385 at paras 113-115 [*Vriend*].

whole of the legislation is pressing and substantial, this is sufficient to satisfy the first stage of the inquiry under s. 1 of the *Charter*."[120]

[158] The Court accepts that the purpose of the requirements is to exclude those without the requisite legal attachment to Canada from the CCB. It can be argued that the requirements appear overbroad in that they may prevent children who are Canadian citizens, and whose strong connections to Canada are clear, from benefiting from the CCB. However, this is also true of such Canadian children awaiting the otherwise unchallenged 18-month period.

[159] Ultimately, the Court is left with a view that the more refined and precise rationale of the impunged section and the definition of "eligible individual" is hybrid in nature.

[160] This two-pronged feature appeared from all legislative expert witnesses who referenced the tension in the evolved definition between longstanding and meaningful presence versus temporary and more permanent legal rights to stay. In conclusion, duration and certainty of tenure march hand in hand as twin objects.

d) Section 7 Summary

[161] Ultimately, Parliament created the CCB and its predecessor programs as an economic benefit to foster and assist the long-term health and development of children resident in Canada during parental rearing. The implication of the administration of justice is not proximate to that right. The Supreme Court has yet to settle the extent to which s. 7 applies outside the context of the administration of justice. The CCB is not a constitutional right; it is not justiciable.

[162] For the CCB, the heart of this duality embraces two concepts for qualification: a durational measure of 18 months and a qualitative measure of residential certainty, namely, achievement of temporary resident status or greater. These two thresholds qualify one for the economic right, the CCB.

[163] The CCB is first and foremost a negative assessment under the ITA; refundable benefits and credits created by the ITA are negative taxes. The FCA has

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[120] *Vriend*, *supra* at paras 117–119.

spoken on this: an assessment, and by deduction a negative assessment, under the ITA cannot deprive the subject of security of the person.[121]

[164] The objectives of the IRPA, in combination with the ITA, are rationally connected to the durational and qualitative thresholds required to create a suitable CCB regime; from its genesis, the CCB has used both duration of residency and degree of attachment to Canada in tandem, with legislative emphasis ebbing and flowing, as conjunctive measures or proxies. Preferring one over, or without, the other to achieve broader or sooner economic benefits is motivational reasoning.

[165] A s. 7 *Charter* violation has not occurred in these appeals for compelling legal and factual reasons directly related to the CCB's nature, creation and context.

D. *Section 15 of the Charter*

[166] In order to establish a *prima facie* violation of s. 15(1), the claimant must demonstrate that the impugned law: (1) on its face or in its impact, creates a distinction based on enumerated or analogous grounds; and (2) imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.[122] Neither step of the analysis is concerned with whether the challenged law created the social, political, or legal disadvantage of protected groups.[123]

[167] The two steps of the test should be kept distinct where possible, but in adverse effects cases, there is potential for overlap. As explained by the Supreme Court in *Fraser*, "[w]hat matters in the end is that a court asks and answers the necessary questions relevant to the s. 15(1) inquiry, not whether it keeps the two steps of the inquiry in two impermeable silos."[124] More recently, the Supreme Court stated in *Sharma* that while the two steps are not watertight compartments and that there may be overlap in the evidence relevant at each step, the two steps

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[121] *Gratl v Canada*, 2012 FCA 88 at paras 7–8 (leave ref'd).

[122] *Fraser v Canada (AG)*, 2020 SCC 28 [*Fraser*] at para 27, citing *Québec (AG) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17; *Centrale des syndicats du Québec v Québec (AG)*, 2018 SCC 18 [*Centrale des syndicats*].

[123] *Ontario (AG) v. G*, 2020 SCC 38 [*G*] at para 42, citing *Centrale des syndicats*, *supra.*; *Vriend*, *supra*.; *Fraser*, *supra*.

[124] *Fraser*, *supra* at para 82.

ask fundamentally different questions. Therefore, each step must remain distinct from the other.[125]

[168] After the claimant proves a s. 15(1) violation, the government can justify the distinction by demonstrating that the impugned law is ameliorative, and thus constitutional, pursuant to s. 15(2).[126] However, s. 15(2) is not typically mentioned if it is not relevant.[127] This Court observes that s. 15(2) is neither relevant nor before the Court in these appeals and therefore only an analysis of s. 15(1) follows:

a) Does the impugned law, on its face or in its impact, create a distinction based on enumerated or analogous grounds?

[169] Step one of the s. 15(1) analysis asks the Court to determine whether a law, on its face or in its impact, creates a distinction based upon an enumerated or analogous ground. In the case of direct discrimination, where the law makes a distinction on its face, identifying that distinction is relatively straightforward. In the case of adverse effects discrimination, the claimant must establish that the law creates a distinction in its impact.

[170] The enumerated grounds are found in the text of s. 15(1): race, national or ethnic origin, colour, religion, sex, age and mental or physical disability.

[171] Courts, specifically the Supreme Court, have expanded the enumerated grounds by creating, or revealing (depending on one's perspective) analogous grounds. Analogous grounds are implicitly read into the section. They are based on personal characteristics that are immutable or changeable only at unacceptable cost to personal identity. Recognized analogous grounds include sexual orientation, marital status, and citizenship.[128] Analogous grounds may be empirically immutable, such as sexual orientation, or constructively immutable, such as

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[125] *Sharma*, *supra* at para 30.

[126] *R v Kapp*, 2008 SCC 41 [*Kapp*] at para 40.

[127] See e.g. *Centrale des syndicats*, *supra.* at paras 22, 37–41; *Fraser*, *supra* at para 27.

[128] *Withler v Canada (AG)*, 2011 SCC 12 [Withler] at para 33, citing *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, 173 DLR (4th) 1 [*Corbiere*].

religion.[129] Once an analogous ground has been recognized, "it stands thereafter as a constant marker of potential legislative discrimination".[130]

[172] It is no impediment that an analogous ground is limited to a subset of the Canadian population, as embedded analogous grounds "may be necessary to permit meaningful consideration of intra-group discrimination."[131]

[173] In these appeals, the Appellants have made two s. 15 arguments: (1) direct discrimination on the basis of refugee claimant status, which they assert should now be recognized as an analogous ground; and (2) alternatively, adverse effects discrimination on the basis of race and/or sex, which are enumerated grounds, through their exclusion under s. 122.6 of the ITA.

1. Does the law, on its face, create a distinction on the basis of refugee claimant status?

[174] The Appellants argue that by denying refugee claimants access to the CCB, s. 122.6 creates, on its face, a direct distinction based on refugee claimant status.[132] They claim that refugee claimant status should be recognized as a new analogous ground, and that there is no case law preventing the Court from reaching this conclusion.[133]

[175] The Appellants say that two *Corbiere* factors militate in favour of establishing refugee claimant status as an analogous ground: refugee claimant status is immutable, very difficult to change, or changeable only at unacceptable personal cost; and refugee claimants are lacking political power and are disadvantaged and vulnerable.[134] *Corbiere* also shows that embedded analogous grounds may be necessary.[135]

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[129] *Corbiere*, *supra* at para 13.

[130] *Corbiere*, *supra* at para 10.

[131] *Corbiere*, *supra* at para 15.

[132] AWS at para 98.

[133] AWS at para 106.

[134] AWS at para 112.

[135] AOS.

[176] According to the Appellants, refugee claimant status is functionally immutable because refugee claimants cannot change their status on their own unless they abandon their claim, which is an unacceptable personal cost.[136] Factually, refugee claims may take many years.[137]

[177] Further, the Appellants argue that refugee claimant status is not a choice, which distinguishes their case from the *Toussaint*[138] decision. Choice was at the heart of the *Toussaint* analysis, where the FCA held that immigration status is not an analogous ground. Additionally, it is argued that the *Toussaint* case does not apply to refugee claimants because refugee claimants are not in Canada illegally, as the appellant was in *Toussaint*.[139]

[178] The Appellants also argue that refugee claimants are disadvantaged in numerous ways and are vulnerable to having their interests overlooked. Refugee claimant status parallels citizenship as a ground of differential treatment. In *Andrews*,[140] the Supreme Court explained that relative to citizens, non-citizens are a group lacking in political power and are vulnerable to having their interests overlooked.[141] Refugee claimants: are more likely than others to experience deep poverty; may face limited, arbitrary, or no access to necessary benefits and services; and, are vulnerable to exploitation by their employers.[142] Further, they are disproportionately racialized and experience significant disadvantages based on race.

[179] The Appellants recognize that a number of cases have concluded that immigration status is not an analogous ground, but they maintain that refugee claimant status is different. *Almadhoun* was decided without the benefit of *Fraser*,

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[136] AWS at para 113.

[137] AWS at para 114, citing Transcript from Examination of Dr. Sharpe (2 June 2022) [Sharpe Transcript] at 69, 71–72 Meagher Transcript at 95–97 and Yao Transcript at 18.

[138] *Toussaint v Canada (AG)*, 2011 FCA 213 [*Toussaint*].

[139] AWS at paras 115–118.

[140] *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, aff'g 1986, 27 DLR (4th) 600, [1986] 4 WWR 242 (BCCA), rev'g (1985), 22 DLR (4th) 9, [1986] 1 WWR 252 (BCSC).

[141] AWS at paras 119–120.

[142] AWS at para 121, citing Sharpe Transcript at 74, Statutory Declaration of Dr. Goldring (24 February 2021) at paras 42–43, 49, 55 [Goldring Report] and Goldring Transcript at 79, 81.

and comments in that case about s. 15 are *obiter dicta*.[143] Immigration status, in the abstract, includes people in a wide variety of circumstances. The Appellants must be considered in their unique, distinct circumstances.[144]

[180] The Respondent relies on *Toussaint*, *Irshad*[145], and *Li*[146] for the proposition that immigration status is not an analogous ground. While the FCA did not specifically deal with refugee claimants in those decisions, this is not fatal because:

i. in *obiter*, the FCA in *Almadhoun* saw no reason to reconsider immigration status in the particular context of refugee claimants;

ii. in *Doctors for Care*,[147] the Federal Court held that it was bound by decisions rejecting immigration status as an analogous ground to refugee claimants because immigration status includes refugee claimant; and

iii. in *Kanyinda c Quebec (P-G)*,[148] the Superior Court of Quebec held that being a refugee claimant was not an immutable characteristic because being a refugee claimant is temporary.[149]

[181] The Respondent further argues that even if immigration status does not cover refugee claimants, refugee claimant status is still not an analogous ground because being a refugee claimant is not an immutable characteristic.[150] Refugee claimant status can and does change, both because of a government decision or a personal choice.[151]

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[143] AWS at paras 124–125.

[144] AOS.

[145] *Irshad (Litigation Guardian of) v Ontario (Ministry of Health)*, [2001] OJ No 648, 197 DLR (4th) 103 [*Irshad*].

[146] *Li v British Columbia*, 2021 BCCA 256, aff'g 2019 BCSC 1819.

[147] *Canadian Doctors for Refugee Care v Canada (AG)*, 2014 FC 651.

[148] *Kanyinda c Procureur général du Québec*, 2022 QCCS 1887.

[149] RWS at paras 183–185.

[150] RWS at para 189.

[151] RWS at para 189.

Analysis

[182] When considering the identification of a new analogous ground, the main focus should be on whether the characteristic is immutable or constructively immutable. The Appellants claim that in *Corbiere*, the Supreme Court established four factors that inform whether a particular characteristic is an analogous ground: (1) whether the characteristic is fundamental; (2) whether the characteristic is immutable; (3) whether those with the characteristic are lacking in political power, disadvantaged, or vulnerable to having their interests overlooked; and (4) whether the characteristic is included in federal and provincial human rights codes.[152] However, these four factors come from the minority opinion, written by Justice L'Heureux-Dubé.

[183] Justice McLachlin, as she then was, and Justice Bastarache, writing for the majority, explained:

> … It seems to us that what [the enumerated] grounds have in common is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity. This suggests that the thrust of identification of analogous grounds … is to reveal grounds based on characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law. To put it another way, s. 15 targets the denial of equal treatment on grounds that are actually immutable, like race, or constructively immutable, like religion. Other factors identified in the cases as associated with the enumerated and analogous grounds, like the fact that the decision adversely impacts on a discrete and insular minority or a group that has been historically discriminated against, may be seen to flow from the central concept of immutable or constructively immutable personal characteristics, which too often have served as illegitimate and demeaning proxies for merit-based decision making.[153]
>
> [Emphasis added.]

[184] The Court is bound by the FCA's decision in *Toussaint* that immigration status is not an analogous ground. The same conclusion was reached by that Court earlier in *Forrest*,[154] which was later overruled in *Tan*,[155] but not on the issue of the

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[152] AWS at para 111.

[153] *Corbiere*, *supra* at para 13.

[154] *Forrest v Canada (AG)*, 2006 FCA 400.

[155] *Tan v Canada (AG)*, 2018 FCA 186.

absence of immutability.[156] Refugee claimant status is conceptually a subset of immigration status. Immigration status refers to whether a person is a non-immigrant, an immigrant, or a non-permanent resident. Refugee claimants are non-permanent residents while they await an IRB decision.

[185] Under the IRPA, Parliament may treat people differently based on their immigration status (or lack thereof), so Parliament should also be able to do so in other legal regimes deploying that same definition. This is particularly true if the benefit or negative tax arises within the ITA. The Ontario Court of Appeal for Ontario recognized in *Irshad*[157] that where the constitutionality of Canada's immigration laws is not being challenged, a legislature may allocate social benefits based on immigration status.[158]

[186] Even if this Court concludes that binding precedent on immigration status does not cover refugee claimants, refugee claimant status is still not an analogous ground. Admittedly, refugee claimant status is subjectively immutable such that refugee claimants cannot change it themselves (without abandoning their claim). However, by definition, refugee claimant status is entirely mutable: at some point, the claim will either be approved or denied and the individual will no longer be a refugee claimant. As a result, refugee claimant status can and does change, as it did for these very Appellants. Further, and with reference to the government having "no legitimate interest in expecting us to change to receive equal treatment under the law", there are precise, detailed and prescribed governmental processes by which the very status of "refugee claimant" ought to and optimally will change.

[187] Further, changing one's refugee claimant status does not come at an unacceptable cost to personal identity, as is the case with sexual identity, marital status, and citizenship. Refugee claimant status is not in itself tied to identity and refugee claimants all likely hope that their status indeed changes, ideally to that of refugee. Refugee claimants may abandon or withdraw their claims. Additionally, merely because a change in status is in the control of government agents does not make it immutable.[159] The ability to change personal characteristics is not a criterion within the test for immutability. To say that a refugee claimant has no

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[156] RWS at para 183.

[157] *Irshad, supra*.

[158] RWS at paras 186–188.

[159] RWS at para 189.

choice but to stay in Canada is hindsight; the merits of the claim have not then been decided on that point.[160]

[188] For these reasons, the Court concludes that the first part of the test is not achieved; refugee claimant status is not an analogous ground, and as a result, step one of the s. 15(1) test is not met.

2. Does the law, in its impact, create a distinction on the basis of race and/or sex?

[189] The Appellants assert that because refugee claimants are predominantly racialized and women, s. 122.6 creates a distinction, in its impact, on the basis of race and sex. The provision is facially neutral or projects formal equality, but the exclusion of refugee claimants from CCB eligibility disproportionately impacts racialized people. The asserted distinction is on the basis of race, an enumerated ground.[161] Ample evidence demonstrates that refugee claimants are consistently and disproportionately visible minorities, and Dr. Sharpe explained that the country of origin is the best available indicator of refugee claimants' racialized status.[162] This is not a transitory phenomenon.[163] Implicitly, it is also the best indication of an immigrant's racialized status.

[190] In addition to refugee claimants from Africa and Asia, claimants from the "Global South" are also likely visible minorities.[164] The Appellants assert that this case parallels the circumstances in *Fraser* and *Flette*.[165]

[191] The Respondent argues that, considering the overall distribution of the CCB, the requirements do not have a disproportionate impact on racialized people. The

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[160] Respondent's Oral Submissions [ROS].

[161] AWS at para 134 (re: race) and at para 156 (re: sex).

[162] AWS at para 144.

[163] AWS at para 147, citing Transcript from Examination of Dr. Galabuzi (30 March 2022) at 45 [Galabuzi Transcript], Goldring Report at para 27 and Sharpe Report at 7; The Court assumes that this refers to the "Sharpe Report": "Report prepared for the Department of Justice and the Canada Revenue Agency", but this is not noted in the AWS.

[164] AWS at para 146, citing Statutory Declaration of Dr. Roos (15 December 2021) at para 27.

[165] AWS at paras 151–153, citing *Fraser, supra; Flette et al v The Government of Manitoba et al*, 2022 MBQB 104.

Respondent further argues that racialized people are affected more by the requirements as a matter of chance.

Analysis

[192] The asserted distinction is on the basis of race and sex, both enumerated grounds.[166] The CCB eligibility requirements exclude refugee claimants, and measurably more often women. Indeed, refugee claimants appear to be predominantly racialized, and race is a protected ground. Thus, the analysis need not contain a determination of an analogous ground. Instead, the analysis can move to a determination of adverse impact.

[193] The Respondent acknowledges that racialized people face disadvantage, but systemic or historical disadvantage among racialized people is not in itself enough to show that the requirements have a discriminatory impact.[167]

[194] In *Fraser*, the Supreme Court explained that in adverse effects discrimination cases, the first stage of the s. 15 test will be met if the law has a disproportionate impact on members of a protected group.[168] As noted in *Fraser*, "claimants need not show that the criteria, characteristics or other factors used in the impugned law affect all members of a protected group in the same way."[169] Rather, adverse effects discrimination occurs "when a seemingly neutral law has a disproportionate impact on members of groups protected on the basis of an enumerated or analogous ground".[170] As the Supreme Court explained at paragraph 34:

> … the application of "neutral" rules may not produce equality in substance for disadvantaged groups. Membership in such groups often brings with it a unique constellation of physical, economic and social barriers. Laws which

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[166] AWS at para 134.

[167] RWS at para 209.

[168] *Fraser*, *supra* at para 52.

[169] *Fraser*, *supra* at para 72.

[170] *Fraser*, *supra* at para 30, citing *Withler v Canada (Attorney General)*, 2011 SCC 12 [*Withler*]; *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 [*Taypotat*].

> distribute benefits or burdens without accounting for those differences … are the prime targets of indirect discrimination claims. …[171]

[195] The majority in *Sharma* sought to bring clarity to the concept of adverse effects discrimination by discussing the standard by which courts should measure impact, and how claimants might prove impact.[172] In doing so, the Supreme Court stated that the first step of the s. 15(1) test examines whether the impugned law created or contributed to "a *disproportionate* impact on a protected group, as compared to non-group members."[173] [emphasis in original] This involves drawing a comparison between the claimant group and other groups or the general population.[174] A "mirror comparator group" is no longer required as "[i]t is unnecessary to pinpoint a particular group that precisely corresponds to the claimant group except for the personal characteristic or characteristics alleged to ground the discrimination."[175]

[196] Causation is a central issue in step one.[176] The Court explained in *Sharma* that, at the first step, the claimant must "present sufficient evidence to prove the impugned law, in its impact, *creates* or *contributes* to a disproportionate impact on the basis of a protected ground" (emphasis in original), and that causation is thus a central issue.[177] The majority in *Sharma*, citing *Fraser*, found that two types of

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[171] *Fraser*, *supra* at para 34 [emphasis added].

[172] *Sharma*, *supra* at para 39.

[173] *Sharma*, *supra* at para 40 [emphasis in original].

[174] *Sharma*, *supra* at para 31.

[175] *Withler*, *supra*.at para 63.

[176] *Sharma*, *supra* at para 41.

[177] *Sharma*, supra at para 42 [emphasis in original]. The Court in *Sharma* said that it was not altering the two-step test for s. 15, and just bringing clarity and predictability: at para 33. The bench split markedly on that point: Justice Karakatsanis raised just the opposite concerns in her dissent in *Sharma* (Justices Martin, Kasirer, and Jamal concurring). She explained that under the guise of "clarity", the majority sought to revise the test. She stated that the revisions "are not only unsolicited, unnecessary, and contrary to *stare decisis*; they would dislodge foundational premises of our equality jurisprudence. She further concluded: "this is not 'clarification'; it is wholesale revision": at paras 204-206. The Court majority stated multiple times in *Sharma* that to satisfy the first step of the s. 15(1) test in adverse effects cases, the claimant must demonstrate that the impugned law or state action created or contributed to the disproportionate impact on the claimant group: see e.g. paras 31, 42, 45, 50. Whatever the "correct" characterization by justices on the high Court, trial judges must reconcile all directions in order to chart the waypoints and follow the course in a *Charter* analysis.

evidence are helpful in proving causation: contextual evidence about the claimant group's situation, and evidence about the result of the law in practice.[178] While ideally a claimant would provide evidence of both, the evidentiary burden should not be unduly difficult to meet.[179] The majority confirmed that no specific form of evidence is required to prove causation, but Courts should "carefully scrutinize scientific evidence" and only admit it where it has a reliable foundation.[180] Causation may be proved by a reasonable inference.[181]

[197] Considering the overall distribution of the CCB, there is insufficient evidence that the requirements have a disproportionate impact on racialized women. The question in *Fraser* was whether the inability of participants in the job-sharing program to acquire full-time pension credit for their service, a rule which the employer applied to all job-sharers equally, had a disproportionate impact on women. The Court concluded that impugned measures had an adverse impact on women because the majority of people in job-sharing roles were women, but this was not the case for individuals in roles with other forms of job status, who obtained full pension rights.[182] Further, the Manitoba Court of Queen's Bench in *Flette* found that the first step of the s. 15 test was met because, *inter alia*, while the impugned measures applied equally to all children in care, the children in care were predominantly Indigenous. Therefore, the law had a disproportionate impact on Indigenous children.

[198] The question in this case is whether the inability of refugee claimants to receive the CCB has a disproportionate impact on racialized people, who in the context of the CCB are mostly women. It is possible that the law creates a distinction on the basis of race, since refugee claimants are predominantly racialized people. However, in order to pass the test as set out in *Fraser* and "refined" in *Sharma*, the distinction must have a disproportionate impact on members of the protected group. The question therefore becomes whether there is evidence that excluding refugee claimants from the CCB significantly decreases the number of racialized people collecting the CCB. There is no evidence of this before the Court. There are many other groups beyond refugee claimants who are

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[178] *Sharma*, *supra* at para 49.

[179] *Sharma*, *supra* at para 49.

[180] *Sharma*, *supra* at para 49.

[181] *Sharma*, *supra* at para 49.

[182] *Fraser*, *supra* at para 106.

eligible for the CCB, and these groups, such as refugees, include a disproportionate number of racialized people.

[199] Qualifying refugee claimants for the CCB might increase the absolute number of racialized people and women collecting the benefit (as it would be the absolute number *per se*), but no evidence suggests that it would measurably increase the proportion of racialized people and women collecting the CCB. Hence, deductively, one cannot have disproportional adverse impact, if reversing the qualification, thereby including refugee claimants, would not increase the proportion of racialized people collecting the benefit versus the proportion when just refugees qualify. The same logic applies to women, who in any CCB-receiving group form a large, constant and uncontroverted majority.

[200] The qualification requirements of the CCB do not have a disproportionate impact on racialized individuals who have reached refugee or temporary resident status because the requirements do not prevent a racialized person from getting the CCB in that capacity. The statistical data bear this out. Racialized people receive the CCB at a proportion equal to, or, in fact, greater than, their representation within the Canadian population.[183]

[201] Given the finding above, stage one of the two-part test is not reached. However, the Court will complete the stage two analysis on an alternative basis.

b) Does the impugned law impose burdens or deny a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating disadvantage?

[202] This second stage of the analysis is similar for either direct or adverse impact discrimination. The objective is to examine the impact of the harm caused to the affected group, which may include economic exclusion or disadvantage, social exclusion, psychological harms, physical harms, or political exclusion. The harm "must be viewed in light of any systemic or historical disadvantages faced by the claimant group".[184] The law will be discriminatory if it widens the gap between the historically disadvantaged group and the rest of society, rather than narrows or is indifferent to it.[185] It becomes a larger comparator than the step one analysis.

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[183] RWS at paras 194–196.

[184] *Fraser*, *supra* at para 76.

[185] *Taypotat*, *supra* at para 20, citing *Quebec (AG) v A*, 2013 SCC 5.

[203] The contextual factors relevant at the second step depend on the nature of the case.[186] Though they may assist at this stage of the s. 15 test, the presence of social prejudices and stereotyping are not necessary factors.[187]

[204] At step two of the test, the claimant need not prove that the legislature intended to discriminate; judicial notice can play a role; and courts may infer that a law has the effect of reinforcing, perpetuating, or exacerbating disadvantage, where the inference is supported by the evidence.[188] Courts should also consider the broader legislative context.[189]

1. Does the law reinforce, perpetuate or exacerbate disadvantage of refugee claimants?

[205] The Appellants argue that denying refugee claimants the CCB discriminates by perpetuating and exacerbating the disadvantages faced by refugee claimants.[190]

[206] Refugee claimants are a fundamentally disadvantaged group. A distinction that denies them a benefit because they are refugee claimants, a benefit that would otherwise be available to them, deepens their disadvantage relative to other Canadians.[191]

[207] The evidence of Dr. Goldring, Dr. Sharpe, Mr. Meagher, and the Statistics Canada data demonstrate the measurable poverty of refugee claimants.[192] Mr. Meagher's testimony illustrates the difficulty faced by refugee claimants who are parents in providing for their family's basic needs, the exact type of disadvantage that the CCB was enacted to ameliorate.[193]

[208] The CCB can make a measurable difference in the family' lives of refugee claimants. The Appellants' evidence illustrates the disadvantage faced by refugee

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[186] *Withler*, *supra* at para 66, citing *Kapp*, *supra* note 42.

[187] *Fraser*, *supra* at para 78.

[188] *Sharma*, *supra* at para 55.

[189] *Sharma*, *supra* at para 56.

[190] AWS at para 107.

[191] AWS at para 127.

[192] AWS at para 128, citing Goldring Report at para 53 and Meagher Transcript at 87.

[193] AWS at para 130, citing Meagher Transcript at 93–94.

claimants without access to the CCB, and the positive impact of receiving the benefit.[194]

[209] The Appellants make a strong argument that the inability of refugee claimants to receive the CCB perpetuates and exacerbates their disadvantage. There are however some countervailing arguments, which in light of the decision in *Sharma* have certain weight. The permanent impact and contributory effect do not rise to the threshold necessary.

[210] The temporary, or at least finite, ineligibility for the CCB does not have the permanent effects on the Appellants' well-being that the Appellants contend that it has. This evidence comes from Dr. Goldring, Dr. Galabuzi, and Dr. Roos, all of whom are advocates and are approaching unreliability in their deeply held conclusions. Their evidence that the denial of the benefit has permanent impact is not persuasive.[195]

[211] The deprivation of the CCB is mitigated by open work permits, employment-related benefits, various federal non-refundable tax credits, primary and secondary education for refugee claimant children at no cost, the Interim Federal Health Program, and social assistance.[196] These other benefits soften the temporary ineligibility for the CCB.[197]

[212] The broader constitutional and legal context supports the distinction made by the requirements. The constitutional context is that immigration status has so far not been recognized as a protected ground of discrimination. The legal context is that, as stated by the Supreme Court in *Chieu*,[198] Parliament may treat people differently based on immigration status. If that is the case under the IRPA, Parliament should also be able to make reasonable distinctions on this basis in other legal regimes.[199]

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[194] AWS at paras 131–132, citing Zhang Transcript at 95–100 and Yao Transcript at 14, 23, and 28.

[195] RWS at paras 225-226.

[196] RWS at para 228.

[197] [ROS].

[198] *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3.

[199] RWS at para 210.

[213] Ineligibility for the CCB is almost always temporary for refugee claimants, although the length of such status varies. Once a claim is accepted, the "new" refugee becomes a protected person and qualifies for the benefit. Similarly, CCB ineligibility is even temporary for those whose claims have been withdrawn, have been abandoned, or have failed. These individuals will either leave the country, and therefore be ineligible for other reasons, or stay in Canada through a humanitarian and compassionate application and ultimately become entitled to the CCB.[200] No one permanently stays, or is intended to stay, in the refugee claimant category.

2. Does the law reinforce, perpetuate or exacerbate disadvantage of racialized persons and women?

[214] The Appellants contend that denying refugee claimants the CCB creates a distinction in its impact on the basis of race. Section 122.6 perpetuates the substantial disadvantages faced by refugee claimant mothers, who are predominantly racialized women.[201] Racialized women suffer economic disadvantages compared to nearly every other group.[202]

[215] For racialized women with children, economic disadvantage is self-perpetuating. A certain level of financial support is necessary. For many refugee claimants, their principal source of financial support is government assistance.[203]

[216] Denying refugee claimants the CCB also exacerbates and perpetuates the disadvantages faced by their minor children, who are racialized children living in poverty. The experience of child poverty and precarity has lasting, even lifelong impacts.[204]

[217] In addition, by approving the Appellants' CCB claims and providing the benefit for a time and then cutting off access and demanding repayment, the government's conduct in administering s. 122.6 did even more to perpetuate

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[200] RWS at paras 222–224.

[201] AWS at para 156.

[202] AWS at para 157.

[203] AWS at para 158, citing Galabuzi Report at para 34.

[204] AWS at para 159, citing Roos Transcript at 66–69.

disadvantage than denying the benefit based on that provision itself.[205] Mr. Meagher testified that he has seen even government workers advise refugee claimants to apply for the CCB.[206]

[218] The Appellants cite *Stoffman* for the proposition that the government's conduct in enforcing s. 122.6 is a freestanding ground that must be considered. It is true that in *Stoffman* the Supreme Court stated:

> … It is also clear that the "law" in question comprehends not just Reg. 5.04 alone, but the policy which is followed in its application to those who come within its terms as well. It would be incongruous if our entitlement to equality "before and under the law" and to the "equal protection and equal benefit of the law" did not reach the manner in which a law was interpreted and enforced by those charged with its operation. It will often be this process of interpretation and enforcement that determines the impact that a law has on the lives of those who come within its scope. …[207]

[219] However, the context of that case was different. *Stoffman* concerned the admitting privileges of physicians at a hospital. The impugned regulation provided that staff would be expected to retire in the year that they reached the age of 65, but those who wished to defer retirement could make a special application to a board of trustees. The policy of the board in implementing this regulation was that all physicians were expected to retire unless they had something unique to offer to the hospital. On this basis, most of the respondent physicians did not have their admitting privileges renewed upon turning 65.

[220] The respondents in *Stoffman* argued that the regulation violated the *Charter* either by its terms or by the manner of its application.[208] The Supreme Court found that the regulation and the policy that the board adopted as a guide to its application came within the sphere of s. 15 of the *Charter*.[209]

[221] The impact of the requirements does not include the method of administration, as argued by the Appellants. This is not a free-standing ground that

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[205] AWS at para 160.

[206] AWS at para 161, citing Meagher Transcript at 89–93.

[207] *Stoffman v Vancouver General Hospital*, [1990] 3 SCR 483, 76 DLR (4th) 700 [Stoffman] at para 109.

[208] *Stoffman*, *supra* at paras 73–74.

[209] *Stoffman*, *supra* at para 110.

must be considered when determining whether s. 122.6 is constitutional. *Stoffman* is wrongly relied upon in this context. The administration of the ITA is not relevant in determining the constitutionality of the provisions. Further, the ITA authorizes the government to provide the CCB and then ask for it back. The Appellants have not challenged the constitutionality of any of the relevant administrative provisions of the ITA. Finally, the conduct of the Minister or the CRA is not the proper subject matter for an appeal to this Court.

[222] The Court is not in a position to make a finding of economic disadvantage applicable to all racialized groups who are women. Not all racialized groups are in the same economic position. In *Tabingo,*[210] a similar conclusion was reached by the Federal Court.[211] However, according to 2006 and 2016 census data utilized by the Appellants' experts, there are particular racialized groups that do better economically than non-racialized groups, female comparators included.[212] Further, there are wide variations among racialized groups in both average employment earnings and low-income rates. Even in lower-income deciles, there are instances where particular racialized groups do better than non-racialized groups.[213] These countervailing facts stare in the Court's face.

[223] On an alternative basis, even if the eligibility requirements make a distinction based on the enumerated ground of race, they do not deny the benefit in a way that perpetuates, reinforces, or exacerbates disadvantage.[214]

c) Section 15 Summary

[224] The Appellants' claim that the CCB eligibility requirements infringe their section 15 rights fails. First, refugee status is not an analogous category. *Toussaint* is binding precedent in this respect, and even if no precedent existed, refugee status would not be an analogous ground because it is not immutable. Refugee claimant

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[210] *Tabingo v Canada (Citizenship and Immigration)*, 2013 FC 377.

[211] RWS at paras 211–212.

[212] RWS at paras 213–214, citing Galabuzi Report at Tables 2, 5, and 9. Also Block, Galabuzi and Tranjan, "Canada"s Colour Coded Income Inequality" at 12, Table 5 – Employment income by racialized group: Canada, 2015 in Galabuzi Report, Exhibit C.

[213] RWS at para 215, citing Galabuzi Report at tables 5, 6, and 9.

[214] RWS at para 203.

status can and does change, and such change does not come at a cost to one's personal identity.

[225] Second, exclusion of refugee claimants from the CCB does not discriminate on the basis of race or sex. While a large portion of refugee claimants are racialized women, groups that presently qualify for the CCB include racialized women and those groups make up a significant portion of those eligible for the CCB. As a result, there is insufficient evidence that excluding refugee claimants from the CCB disproportionately affects racialized women receiving the benefit such that, as a whole, the CCB qualification requirements discriminate on the basis of race and/or sex.

E. *Section 1*

[226] Given that the Court need not consider it, the discussion concerning s. 1 shall be brief; the Court also cautions that it is moot. Consequently, it is observational.

[227] Once the claimant has established an infringement of a *Charter* right, the burden shifts to the government to justify that infringement under s. 1 on a balance of probabilities.[215] Section 1 provides:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[228] The legal test for the application of s. 1 is known as the *Oakes* test. The government must establish that: (1) the law has a pressing and substantial objective; and (2) the means chosen are proportional to that object. The second step, the proportionality test, has three prongs that ask if: (i) the means adopted are rationally connected to that objective; (ii) the law is minimally impairing of the right in question; and (iii) there is proportionality between the deleterious and salutary effects of the law.[216]

[229] In cases where s. 7 is infringed, the law may still be justified under s. 1.[217] It is difficult to justify a s. 7 violation, but there may be situations where the

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[215] *R v Brown*, 2022 SCC 18 [*Brown*] at para 110.

[216] *Carter*, *supra.* at para 94, citing *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200 [*Oakes*].

[217] *Carter*, *supra.* at para 82.

countervailing public good justifies depriving an individual of life, liberty, or security of the person.[218]

[230] More importantly, the s. 1 analysis is distinct from and embarked upon once a stand-alone violation of a guarantee infringed right occurs; the test is whether that existing infringement may be justified. It is again noted that the Court's finding is that no violation has occurred in the first instance.

a) Does the law have a pressing and substantial object?

[231] The object of the law must be sufficiently pressing and substantial to justify the infringement of a *Charter* right.[219] For a law's purpose to be pressing and substantial, that purpose "must be characterized in light of the requirements of the Oakes test to be of value". Too broad of a characterization will frustrate the purpose of the s. 1 analysis.[220]

[232] Courts must be skeptical of using budgetary constraints to justify *Charter* infringements, but financial crises may provide exceptions.[221] As the Supreme Court explained, "[t]o the extent that the objective of the law was to cut costs, that objective is suspect as a pressing and substantial objective under the authority in N.A.P.E.".[222]

[233] The Respondent asserts that the objective of the eligibility requirements is to ensure that individuals receiving the CCB have the requisite legal attachment to Canada by excluding those whose attachment to Canada is transient or uncertain. This is a pressing and substantial objective. Canada should not be required to pay a

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[218] *Carter, supra* at para 95.

[219] *Brown, supra* at para 110.

[220] *Brown, supra* at para 116, citing *Frank v. Canada (AG),* 2019 SCC 1; *Alberta v Hutterian Brethren of Wilson Colony* , 2009 SCC 37 [*Hutterian Brethren*].

[221] *Newfoundland (Treasury Board) v NAPE,* 2004 SCC 66 at paras 69–72.

[222] *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia,* 2020 SCC 13 at para 152, citing *Health Services and Support – Facilities Subsector Bargaining Assn v. British Columbia,* 2007 SCC 27.

social benefit to every person who enters the country.[223] The legislative history supports that this is the objective.[224]

[234] Observationally, the Respondent has not meaningfully explained *why* ensuring CCB recipients have the requisite legal attachment to Canada is a pressing and substantial objective needed to override and justify a *Charter* violation, if one had occurred. Is it because expanding the scope of the benefit would lead to greater public expenditures? If so, the Supreme Court has cautioned against using budgetary constraints as a pressing and substantial objective.

[235] Little of the evidence cited by the Respondent is attributable to Parliament's intent.[225] The Respondent would have failed to establish a pressing and substantial objective to justify a breach.

b) Are the means chosen proportional to that object?

1. Rational Connection

[236] The Respondent need only show that there is a causal connection between the infringement and the benefit sought on the basis of reason or logic.[226] The standard is not onerous.[227]

[237] The stay of refugee claimants in Canada is uncertain given that their claims may ultimately be rejected. While the Appellants have made a balanced argument that refugee claimants have a sufficient attachment to Canada, the rationale for the exclusion is still rational, at least to the extent that it is logically linked to the objective.

[238] The eligibility requirements render those, whose stay in Canada is transient or uncertain, ineligible for the CCB. Refugee claimant stays in Canada are

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[223] RWS at para 277.

[224] ROS.

[225] AR at para 34(a).

[226] *Carter*, *supra* at para 99, citing *RJR-MacDonald Inc v Canada AG)*, [1995] 3 SCR 199, 127 DLR (4th) 1 [RJR-MacDonald].

[227] *R v Ndhlovu*, 2022 SCC 38 [Ndhlovu] at para 121, citing *R v Appulonappa*, 2015 SCC 59.

uncertain and may be transient. Thus, there is a rational connection between the exclusion of refugee claimants and the objective.[228]

[239] Under the IRPA, a refugee claimant is under a conditional removal order pending determination of their claim. By contrast, the statuses listed under paragraph 122.6(e) of the ITA confer a definite right or authorization to enter or remain in Canada.[229] The Appellants argue that a high acceptance rate demonstrates certainty. It is unclear how it does. These rates fluctuate.[230]

[240] The Appellants argue that Canadian-born children do not have transient or uncertain connections to Canada. However, not all children of refugee claimants are Canadian.[231] Even if refugee claimant has children who are Canadian citizens, the exclusion is rationally connected to the objective. Entitlement to the CCB relates to the parent's status, as the parent is paid the benefit, not the child.[232] Further, granting the benefit to these children, as opposed to all, would be making a distinction based on citizenship, which is concerning.[233]

[241] Proportionality does not require perfection and courts must afford the legislature a measure of deference.[234] A higher degree of deference should generally be afforded when considering a complex regulatory response to a social problem.[235]

2. Minimal Impairment

[242] The Supreme Court has explained that financial considerations alone cannot justify *Charter* infringements, but governments must be afforded wide latitude to determine the proper distribution of resources in society.[236] Determining

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[228] RWS at para 279.

[229] RWS at para 281.

[230] ROS.

[231] ROS.

[232] RWS at para 282.

[233] ROS.

[234] *Carter*, *supra* at para 97, citing *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11.

[235] *Carter*, *supra* at para 97, citing *Hutterian Brethren*, *supra*.

[236] RWS at para 284, citing *Eldridge v British Columbia (AG)*, [1997] 3 SCR 624, 151 DLR (4th) 577 [Eldridge] at para 85.

entitlement to the CCB is a complex policy decision involving high government expenditures.[237]

[243] The impact of the requirements is minimal because it is temporary if the refugee claims are ultimately accepted or immigration status is obtained by another route.[238] The impact is also limited because refugee claimants may obtain the benefit depending on the status of their spouse or common-law partner, the impact is mitigated by other benefits and programs, and there is no impact on the children of refugee claimants who are in institutional or foster care because those caregivers do not receive the CCB and instead receive a special allowance.[239]

[244] Parliament has made a parent who lacks the requisite status eligible for the CCB when they have a partner who does have the requisite status. Parliament also decided to make temporary residents who live in Canada for at least 18 months eligible for the benefit. These decisions are the kind of line drawing that warrants deference to Parliament's role in managing complex circumstances and significant government expenditures.[240]

[245] In *Eldridge*, the decision cited by the Respondent regarding government expenditures, the issue was whether a provincial government's decision to not fund medical interpretation services for the deaf when they received medical services violated s. 15 of the *Charter*. The Supreme Court found that s. 15 was infringed. In the s. 1 analysis, the Court assumed, without deciding that the objective of controlling healthcare expenditures was pressing and substantial, that the decision was rationally connected to the objective. The Court found that the decision did not constitute a minimum impairment:

> In the present case, the government has manifestly failed to demonstrate that it had a reasonable basis for concluding that a total denial of medical interpretation services for the deaf constituted a minimum impairment of their rights. As previously noted, the estimated cost of providing sign language interpretation for the whole of British Columbia was only $150,000, or approximately 0.0025 per cent of the provincial health care budget at the time. … In these circumstances, the refusal to expend such a relatively insignificant sum to continue and extend

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[237] RWS at para 285.

[238] RWS at para 286(a).

[239] RWS at para 286(b).

[240] RWS at para 287.

> the service cannot possibly constitute a minimum impairment of the appellants' constitutional rights.[241]

[246] The Respondent cites the amount of money the government expends on the CCB. If this factor is determinative, the Respondent would need to provide an estimate concerning how much more the government would have to expend if refugee claimants who have been residing in Canada for at least 18 months were to become eligible for the benefit. Otherwise it is speculation.

[247] The question is whether there are less harmful means of achieving the legislative goal; a court must determine whether the limit is reasonably tailored to the objective.[242] Restated: does the law "falls within a range of reasonable alternatives open to Parliament to achieve its objectives? If it is within this range, it should not fail the minimal impairment test merely because, in the Court's view, an alternative would have been better suited to the objective".[243]

[248] The alternative measures need not satisfy the objective to exactly the same extent as the impugned measures, but must substantially achieve the challenged measures' objective.[244]

3. Proportionality between deleterious and salutary effects

[249] In balancing public versus private rights, "the Oakes analysis weighs the impact of the law on protected rights against the beneficial effect of the law in terms of the greater public good."[245] In *Ndhlovu*,[246] the Supreme Court explained that "[b]enefits that are speculative and marginal in nature carry less weight when balanced against a measure's significant and tangible deleterious effects".[247]

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[241] *Eldridge, supra* at para 87.

[242] *Carter, supra* at para 102, citing *Hutterian Brethren, supra*.

[243] *Brown, supra* at para 135, citing *RJR-MacDonald, supra*.

[244] *Ndhlovu, supra* at para 122, citing *Hutterian Brethren, supra*.

[245] *Carter, supra* at para 122.

[246] *Ndhlovu,supra*.

[247] *Ndhlovu, supra* at para 130, citing *R v J(KRJ)*, 2016 SCC 31; *Thomson Newspapers Co v Canada (AG)*, [1998] 1 SCR 877, 159 DLR (4th) 385.

[250] The Respondent argues that the negative effects on refugee claimants whose claims are accepted is arguably partial or limited because they will be entitled to the CCB once their claims are accepted. The negative effect on failed claimants is not limited in this way, unless they obtain the requisite status another way, because failed refugee claimants must leave Canada.[248] Not everyone who enters the country should get a social benefit.[249] As such, the positive effects of the eligibility requirements outweigh any impact on the *Charter* rights of refugee claimants and their children.[250] Overall, had a violation occurred, the Respondent was short on the measurable public good attained by a *Charter* violation.

c) Section 1 Summary

[251] The Respondent has not explained what the positive effects of the eligibility requirements are. The Respondent has also not meaningfully dealt with the negative effects that the requirements have on refugee claimants. The fact remains that while the temporary nature of refugee claimant status is theoretically evident, it is empirically much more mediate in duration. Ultimately the Court would have, if necessary, have found that a public good could not in the case countermand the deleterious effect.

F. *Remedy*

[252] In light of the dismissal of the appeals, the issue of remedy need not be addressed. For completeness, the Court offers some observations.

[253] The Court notes that the Respondent stated that no remedy was legally available to the Appellants should the Court have allowed the appeals. The Court disagrees.

[254] While presently moot, these appeals strike the heart of the Court's exclusive and originating jurisdiction: the correctness of the assessments by the Minister under the ITA. It is precisely within the ITA that an answer is found.

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[248] RWS at para 290.

[249] RWS at para 291.

[250] RWS at para 288.

[255] Under subsection 171(1) of the ITA, the Court may dispose of an appeal by dismissing it, or allowing it and, if so, vacating, varying or referring the assessment back to the Minister for reconsideration and reassessment.

[256] The Court's reasons for disposition are distinct from its statutory power to grant relief or dismiss. If the Minister's assessments had been incorrect because of a faulty interpretation of the ITA under the IRPA in Part A, or because of *Charter* violations in Part B, it would be the reassessments disallowing the CCB which would be incorrect. Those errors would alter the assessment of tax for these taxpayers. In short, the Court's decision affects the Appellants' legal rights, as taxpayers. Other refugee claimants, taxpayers, if these appeals had been successful, might then have relied upon such precedent using the principle of *stare decisis*. For that reason, declaratory relief to invalidate the ITA and invoke subsection 24(1) of the *Charter* was not in issue because it would not have been needed to provide other taxpayers with a future remedy. In these specific matters, the appeals would have been allowed and the CCB then paid by the Minister.

[257] In any event, as stated, this is moot given the outcome.

V. COSTS

[258] The parties addressed the issue of costs in passing only and the Court did not request submissions.

[259] The complexity of the grounds of these two appeals hides their basic nature; these are and remain appeals for the denial of the CCB to two Appellants who a short time ago: fled a communist, totalitarian dictatorship; became refugee claimants, then refugees; and, are now Canadian citizens. Throughout, their near penury has been evident.

[260] Similarly, counsel for the Appellants and Intervenor acted *pro bono publico*. The Court applauds this support by them for access to justice.

[261] The Court's strong preference is that there be no costs awarded, despite the outcome, the Rules and precedent. If the parties feel strongly otherwise, then within 30 days, they may make submissions in writing. Otherwise, this cost direction shall become final after 30 days after the date of these two judgments.

Signed at Vancouver, British Columbia, this 15th day of February 2024.

"R. S. Bocock"

Bocock J.

CITATION:	2024 TCC 19
COURT FILE NOS.:	2018-1471(IT)I 2020-1041(IT)G
STYLES OF CAUSE:	Yushan Yao. v. His Majesty the King Ning Jing Zhang v. His Majesty the King
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	November 22, 23 and 24;December 16 and 17, 2021; March 29 and 30; April 11, 12 and 13; June 1 and 2; June 20; and October 27 and 28, 2022
REASONS FOR JUDGMENT BY:	The Honourable Mr. Justice Randall S. Bocock
DATE OF JUDGMENT:	February 15, 2024

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