

Court File No: A- 178 -22**FEDERAL COURT OF APPEAL**

MICHAEL PHILIPPUS BRINK AND FUH-CHII YANG

FEDERAL COURT OF APPEAL		D E P O S E
COUR D'APPEL FÉDÉRALE		
F I L E D	September 01, 2022	
Jagwinder Kang		
VANCOUVER, BC		1

APPELLANTS

AND:

HER MAJESTY THE QUEEN

RESPONDENT

NOTICE OF APPEAL**TO THE RESPONDENT:**

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellant. The relief claimed by the appellant appears on the following page.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellant. The appellant requests that this appeal be heard at **Vancouver, British Columbia**.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341 prescribed by the Federal Courts Rules and serve it on the appellant's solicitor, or where the appellant is self-represented, on the appellant, WITHIN 10 DAYS of being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341 prescribed by the Federal Courts Rules instead of serving and filing a notice of appearance.

Copies of the Federal Courts Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR
ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: September 1, 2022

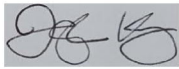
ORIGINAL SIGNED BY
JAGWINDER KANG
A SIGNÉ L'ORIGINAL

Issued by: _____
(Registry Officer)

Address of local office: Pacific Centre
P.O. Box 10065
701 West Georgia Street
Vancouver, BC
V7Y 1 B6

TO: HER MAJESTY THE QUEEN

I HEREBY CERTIFY that the above document
is a true copy of the original *issued out of*
the Court on 01/09/2022

 Dated 04/09/2022
Jagwinder Kang

APPEAL

THE APPELLANTS APPEAL to the Federal Court of Appeal from the order of Mr. Justice Zinn dated August 26, 2022 by which the appellants' motion to certify the action as a class proceeding was dismissed and the respondent's motion to strike under Rule 221 was granted in Federal Court file number T-465-21.

THE APPELLANTS ASK that.

1. The appeal be allowed and the order of Mr. Justice Zinn pronounced on August 26, 2022 be set aside.
2. For the respondent's motion to strike (the "**Motion to Strike**"), an order that it be dismissed without leave to re-apply.
3. For the appellant's class action certification motion (the "**Certification Motion**"):
 - a. a finding from this Honourable Court that the appellants have met the first criterion for class action certification under Rule 334.16(1)(a) to plead a reasonable cause of action and;
 - b. an order from this Honourable Court remitting back to the Federal Court the remaining four class action certification criterion under Rule 334.16(1)(b)-(e), with directions that it be decided on an expedited basis.
4. The parties bear their own cost in accordance with Rule 334.39.
5. This Honourable Court grant such further orders and relief as it deems just.

THE GROUNDS OF APPEAL are as follows:

1. The Federal Court erred in dismissing the appellants' Certification Motion and in granting the respondent's Motion to Strike under Rule 221.
2. The Federal Court had correctly found that the appellants have identified a distinct group of individuals that are being treated differently (i.e., differential treatment based on the personal characteristic that the identified individuals were not born inside of Canada, but were born elsewhere).¹

¹ Reasons for Order in T-465-21 of August 26, 2022 ("**Reasons for Order**") at para. 3.

3. The proposed class members were being charged a Right of Permanent Residence Fee and Right to be a Citizen Fee (collectively the “**Fees**”), when those that do not bear these personal characteristics (i.e., individuals who have the personal characteristic of being born in Canada) are generally not charged the Fees. These Fees are fees for a “right or privilege” and were not fees for services rendered.
4. For at least three reasons, the Federal Court fell into legal error in concluding that this personal characteristic (i.e., not being born in Canada) was not protected as an enumerated ground, or alternatively as an analogous ground, under section 15(1) of the *Canadian Charter of Rights and Freedoms* (“**Charter**”) and/or section 1(b) of the *Canadian Bill of Rights* (“**Bill of Rights**”).
 - a. **Firstly**, the Federal Court cited very limited instances of individuals that bear the personal characteristic of not being born in Canada but did not have to pay the Fees, or vice versa.² The Federal Court’s approach, in effect, would mean that a claim for equality could never be made out if a limited number of individuals sharing the same personal characteristic that were not being affected or discriminated against.
 - i. The Federal Court’s approach is contrary to the Supreme Court of Canada guidance that claimants asserting a section 15(1) *Charter* claim is not required to establish membership in a sociologically recognized group in order to be successful,³ and this “does not translate into a requirement that the complainant identify a particular group that has suffered or may potentially suffer the same discrimination.”⁴
 - ii. To the extent the personal characteristic the appellants raised do not fall within an enumerated ground under section 15(1) of the *Charter*, the Supreme Court of Canada stated that recognition of an analogous ground requires a thorough analysis of the submissions and evidence.⁵
 - iii. The Federal Court’s approach in summarily dismissing, on a motion to strike, a possible analogous ground under section 15(1) of the *Charter* deprived the appellants of any opportunity to lead evidence to substantiate the analogous ground of birth and/or place of birth.

² Reasons for Order at paras. 48-50 and paras. 55-56.

³ [*Law v. Canada \(Minister of Employment and Immigration\)*](#), 1999 CanLII 675 (SCC) at para. 66.

⁴ [*B. v. Ontario \(Human Rights Commission\)*](#), 2002 SCC 66 at paras. 55-57.

⁵ [emphasis added] [*Fraser v. Canada \(A.G.\)*](#), 2020 SCC 28 at paras. 114-120 and 183.

- b. **Secondly**, the Federal Court overlooked the jurisprudence from both levels of federal courts that “place of birth” was previously accepted as an analogous ground under section 15(1) of the *Charter*.⁶ The appellants had cited this jurisprudence before the Federal Court, but the jurisprudence was not cited, nor referred to, in the Reasons for Order.
- c. **Thirdly**, the Federal Court cited the *International Covenant on Civil and Political Rights* (the “**Covenant**”) for which Canada is a signatory of, and that this international instrument protected discrimination based on birth. However, the Federal Court fell into error in interpreting the *Charter* and the *Bill of Rights* without actually considering the protection mandated under the *Covenant*.
 - i. The Federal Court failed to interpret section 15 of the *Charter* and section 1(b) of the *Bill of Rights* in a manner that is consistent with this international instrument, as mandated by the Supreme Court of Canada and this Court.⁷
 - ii. The Federal Court erroneously presumed that the *Charter* and the *Bill of Rights* already encompassed the protections under the *Covenant*, without conducting any analysis.⁸
 - iii. The Federal Court conducted no analysis on how “birth” was protected under the *Charter* and the *Bill of Rights*, although this ground is expressly provided for in the *Covenant*.
 - iv. The Federal Court’s remark that the appellants’ failed to provide a definition for the term “birth” is a cascading effect from the Federal Court overlooking the jurisprudence that the federal courts had recognized “place of birth” as an analogous ground under section 15(1) of the *Charter*.⁹

5. With respect to the appellant’s Certification Motion, the Federal Court further erred in deciding only one of the five certification criteria.

⁶ [*Veffer v. Canada \(Minister of Foreign Affairs\)*](#), 2007 FCA 247 at para. 56, upholding [*Veffer v. Canada \(Minister of Foreign Affairs\)*](#), 2006 FC 540 at para. 36-39.

⁷ [*Henry v. British Columbia \(Attorney General\)*](#), 2015 SCC 24 at para. 136; [*Moretto v. Canada \(Citizenship and Immigration\)*](#), 2019 FCA 261 at para. 74 citing [*Kazemi Estate v. Islamic Republic of Iran*](#), 2014 SCC 62 at para. 150.

⁸ Reasons for Order at para. 60.

⁹ See paragraph 4(b) above.

- a. Both parties had provided detailed submissions on all five of the certification criteria and the Federal Court should have decided all of them in a single decision.
- b. The Federal Court's approach effectively bifurcated the Certification Motion into multiple rounds of hearings (and decisions), creating the risk of multiple rounds of appeals before different panels of this Court, and disrupts the orderly appellate review of the Certification Motion.
- c. The Federal Court's approach is inconsistent with the objective of the *Federal Courts Rules* to secure the just, most expeditious and least expensive outcome of every proceeding.

Dated: September 1, 2022



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