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File no :

SUPREME COURT OF CANADA

(ON APPEAL FROM A JUDGMENT OF THE COURT OF APPEAL OF QUEBEC)

BETWEEN :

ATTORNEY GENERAL OF QUEBEC

APPLICANT
(Appellant\incidental respondent)

AND :

CIBUABUA KANYINDA JEWEL

RESPONDENT
(Respondent\incidental appellant)

AND :

HUMAN RIGHTS COMMISSION
AND YOUTH RIGHTS

RESPONDENT
(Party\Incidental Appellant)

REQUEST FOR AUTHORIZATION TO APPEAL

(Section 40(1) of the *Supreme Court Act* and Rule 25 of *the Supreme Court Rules of Canada)*

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PART I - STATEMENT OF POSITION ON ISSUES OF IMPORTANCE AND STATEMENT OF FACTS

THE CHALLENGES

1. In Quebec, the *Educational Childcare Services Act1* (“the Act”) governs the provision of educational childcare services offered to young children.

2. In addition, the Act allows the Minister of Families (“Minister”) to grant subsidies to certain educational childcare service providers in return for which the contribution that they may require from a parent cannot exceed the amount provided for in the *Regulation on the reduced contribution2* (“the Regulation”). The Regulation determines also the eligibility conditions for a parent to benefit from this contribution. Asylum seekers are not eligible for payment of the reduced contribution as long as the Immigration and Refugee Board of Canada ("CISR") has not ruled on the merits of their application. They will if the CISR grants them refugee status.

3. The Court of Appeal decided that this condition of admissibility is contrary to paragraph 15(1) of the *Canadian Charter of Rights and Freedoms* (“ Canadian *Charter ”),* because it would discriminate against women, when the exclusion is clearly not based on the sex. Furthermore, the Court of Appeal's decision has the effect of granting a subsidized service not to women, but to all asylum seekers. Its decision also has the effect of requiring the state to subsidise a service for asylum seekers even before the CISR has ruled on the merits of their claim, and while Canada, and particularly Quebec, are experiencing a meteoric rise in the number of asylum seekers.

THE FACTUAL AND PROCEDURAL CONTEXT

4. The purpose of the Act is:

> “[…] to promote the quality of educational childcare services for children before their admission to school with a view to ensuring the health, safety, development, educational success, well-being and equal opportunities of

[1] RLRQ c. S-4.1.1.
[2] RLRQ c. S-4.1.1, r. 1.

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who receive these services, particularly those with special needs or who live in contexts of socio-economic deprivation.

It also aims to promote the harmonious development of a sustainable range of educational childcare services that take into account the needs of parents, in order to facilitate the reconciliation of their parental responsibilities with their professional or student responsibilities, as well as their right to choose the educational childcare service provider. »3

5. It applies to educational childcare service providers such as childcare centres early childhood ("CPE"), subsidized private daycare centers, persons responsible of an educational daycare service in a family environment and private daycare centers not subsidized, which must in particular implement an educational program in accordance with the Law and the elements prescribed by government regulation4 .

6. The Act grants the Minister the power to grant a subsidy to educational childcare service providers5 in return for which these providers cannot demand from a parent more than the required contribution fixed by regulation6 , namely the contribution reduced.

7. The Regulations provide for the conditions of eligibility for payment of this contribution:

3 A parent who resides in Quebec and meets one of the following conditions is eligible for payment of the reduced contribution:

1° he is a Canadian citizen ;

2° he is a permanent resident within the meaning of the Immigration and Refugee Protection Act (LC 2001, c. 27);

3° he is staying in Quebec primarily to work and he holds a work permit issued in accordance with the Immigration and Refugee Protection Act or is exempt from the requirement to hold such a permit under that Act;

4° he is a foreign student , holder of a certificate of acceptance issued under the Act respecting immigration to Quebec (chapter I-0.2.1) and recipient of a scholarship from the Government of Quebec in application of the policy relating to foreign students in colleges and universities of Quebec;

---

[3] Law, art. 1.
[4] *Ibid,* art. 2.1 and 5.
[5] *Ibid,* art. 89, 90.
[6] *Ibid,* art. 82, 86.

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 5° he

is recognized, by the competent Canadian tribunal, as a refugee or person in need of protection within the meaning of the Immigration and Refugee Protection Act and he holds a selection certificate issued under section 3.1 of the Quebec Immigration Act;

6° the Minister of Citizenship and Immigration has granted him protection under the Immigration and Refugee Protection Act and he holds the selection certificate referred to in paragraph 5;

7° he holds a temporary residence permit issued under section 24 of the Immigration and Refugee Protection Act with a view to the possible granting of permanent residence and the selection certificate referred to in paragraph 5;

8° he is authorized to submit to Canada an application for permanent residence under the Immigration and Refugee Protection Act or the Immigration and Refugee Protection Regulations (SOR/02-
227) and he holds the selection certificate referred to in paragraph 5.

8. As the Court of Appeal has stated, asylum seekers are not eligible for payment of the reduced contribution according to the conditions established by article 3 of the Regulation [7]. However, under subsection 3(5) of the Regulation, they will become so if the CISR recognizes their refugee status.

9. According to the evidence on file, as of December 31, 2019, parents were eligible for 235,535 subsidized childcare places in CPEs and daycare centers subsidized and educational childcare services in a family environment and 70,349 places unsubsidized childcare services distributed across Quebec[8] .

10. As of December 31, 2018, the one-stop shop for access to childcare services had approximately 42,000 children registered and waiting for a subsidized or unsubsidized place in a CPE, daycare or with a person responsible for a family daycare service[9] .

11. Parents who are not eligible for payment of the reduced contribution or who are eligible persons without a place in subsidized daycare can have access to non-subsidized daycare centers, which are regulated educational childcare service providers by the same provisions as subsidized daycare centers, including those relating to

[7] Judgment under appeal, paras. 60 to 65.
[8] Sworn statement of Danielle Dubé, at para. 9.
[9] *Ibid,* at para. 11.

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the quality of services. Parents also have access to childcare provided in a private residence10, to daycare centers or can, depending on the case, send their child to nursery school from the age of 411 .

12. They can also benefit from the refundable tax credit for child care expenses12 if they decide to send their child to a non-subsidized daycare. As a for example, for a single person working full time at minimum wage ($13.10/hour13) and paying $38 per day14 for a space in non-subsidized daycare, the net cost of his place will be $9.66 per day compared to $8.35 for a subsidized place15.

THE ACTION BROUGHT BY THE RESPONDENT AND PREVIOUS JUDGMENTS

13. On 30 May 2019, the respondent filed an appeal for judicial review in which it claims that:

    a. Article 3 of the Regulation would be *ultra vires* since no legislative authorization would not authorize its issuance and that even if properly authorized, it could not include a distinction establishing eligibility conditions;

    b. Section 3(3) of the Regulations, properly interpreted, would confer on the asylum seekers the right to reduced contribution;

    c. Section 3 of the Regulations would violate sections 12 and 15 of the *Canadian Charter of Rights and Freedoms. rights and freedoms* and articles 4, 10 and 12 of the *Charter of Rights and Freedoms of the person* unjustifiably.

14. At first instance, the Superior Court of Quebec concluded that section 3 of the Regulation is *ultra vires* the jurisdiction of the Government of Quebec. It nevertheless concludes that subsection 3(3) of the Regulations cannot be interpreted to include the

[10] Under the conditions referred to in Article 6.1 of the Law.

[11] *Education Act,* CQLR c. I-13.3, art. 461.1; *Private Education Act,* RLRQ chapter E-9.1, art. 24.

[12] **Exhibit D-10 :** The refundable tax credit for child care expenses.

[13] Rates effective February 18, 2021.

[14] Preliminary examination of the applicant, p. 56.

[15] Out-of-court examination of the plaintiff, page 56; Exhibit D-11: Calculator – Cost of a place in daycare. (http://www.budget.finances.gouv.qc.ca/budget/outils/garde-net-fr.asp).

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asylum seekers, since their exclusion arises from paragraph 3(5)[16]. Finally, it concludes that section 3 of the Regulations does not infringe sections 12 and 15 of the *Canadian Charter*[17] or sections 4, 10 and 12 of the *Charter of Human Rights and Freedoms*[18] (" Quebec *Charter* ").

15. The Quebec Court of Appeal partially overturns these conclusions. Contrary to the Court superior, it concludes that the government of Quebec was authorized to adopt article 3 of Regulation 19. Then, it confirms the conclusion of the Superior Court according to which subsection 3(3) of the Regulations cannot be interpreted to include asylum seekers, since they are excluded by subsection 3(5). 20 Under sections 10 and 12 of the *Quebec Charter,* it decides not to take a position. 21 Finally, it reverses the conclusion of the Superior Court on the right to equality: according to it, article 3 of the Regulation generates an exclusion based on the ground of sex and unjustifiably infringes subsection 15(1) of the *Canadian Charter*[22].

16. As a remedy, the Court of Appeal affirms that it applies the technique of interpretation broad and concludes that subsection 3(3) of the Regulations "should henceforth be read as making eligible for payment of the reduced contribution the parent who resides in Quebec for the purposes of an asylum application while holding a work permit "[23].

QUESTIONS OF IMPORTANCE TO THE PUBLIC

17. This appeal raises two issues of central importance to all Canadians.

18. First, it concerns the extent of the right to equality of asylum seekers, in a context where their influx into Canada has been of historic magnitude since 2017.

19. Indeed, the North American socio-political context of recent years has given rise to a

[16] Trial Judgment, para. 27.
[17] *Ibid,* paras. 36-52.
[18] RLRQ c. C-12.
[19] Judgment appealed from, para. 51.
[20] *Ibid,* para. 65.
[21] *Ibid,* para. 124
[22] *Ibid,* paras. 76-116.
[23] *Ibid,* para. 125.

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of asylum seekers in Canada on an unprecedented scale.

20. For example, while the number of applications received in Quebec was 2,310 in 2016, they were 24,396 in 2017[24]. In Canada, their number was 3,045 in 2016 and 137,947 in 2023[25].

21. In 2017, 18,518 requests, including that of the respondent, were made following a interception by police authorities between official points of entry[26].

22. This significant increase in the number of asylum seekers has had an impact on the capacity of the CISR, a federal body over which Quebec has no jurisdiction, to hear asylum applications within the time limits of 30, 45 and 60 days provided for in *Immigration and Refugee Protection Regulations*[27] ("IRPR"): 61% of applications were heard on time in 2016, but only 18% were heard in 2017[28].

23. This inability to hear asylum applications within the time limits provided for in the RIPR means that asylum seekers can now wait up to two years before being granted refugee status or not[29].

24. At the same time, several Quebec legislative provisions[30], including article 3 of the Regulations, provide as a condition of admissibility that asylum seekers must obtain refugee or protected person status. This means that if the CISR is not able to meet the deadline provided for by the RIPR, eligibility for the benefit conferred

[24] **Exhibit D-3 :** Asylum applications by year – 2011-2016; **Exhibit D-4 :** Asylum applications, 2017.
[25] Asylum applications by country presented as country of persecution – 2023 - Commission of Immigration and Refugee Board of Canada (irb-cisr.gc.ca)
[26] Preliminary examination of the applicant, at p. 16; **Exhibit D-5 :** Asylum application, 2018.
[27] SOR/2002-227, s. 159.9.
[28] **Exhibit D-2 :** Auditor General of Canada-Spring 2019 – Report 2 – Processing of Asylum Claims, para. 2.25, MA, vol. 2, pp. 198-199
[29] *Ibid.*
[30] See in particular: *Act respecting financial assistance for education expenses,* RLRQ c. A-13.3, s. 11(1), 33(1); *Health Insurance Act,* RLRQ c. A-29, s. 5 al.1(4); *Family Benefits Act,* RLRQ, c. P-19.1, s. 2 al.1(4); *Taxation Act,* CQLR, c. I-3, art. 1029.8.33.2, al. 5(c), 1029.8.33.11.11 al. 10(c) 1029.8.61.8, al. 3(e)(iv); 1029.8.61.103 al.3(b)(iii); 1029.8.116.2. al. 6(c)(iii), 1029.8.116.41 al. 2(b)ii.

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by Article 3 of the Regulations – or by any other provision providing for the same condition eligibility – is delayed accordingly.

25. This case will also have repercussions for Canada as a whole.

Indeed, across Canada, section 3 of the Regulations is not the only provision that provides for the granting of refugee status as a condition of admissibility.31 For example, section 122.6 of the *Income Tax Act32* creates the Canada child benefit,

that is, an amount paid monthly to the persons designated in paragraph (e).

Among these people are refugees, here designated as protected persons, but not asylum seekers33 :

> **eligible individual** means, at any time, an eligible individual in respect of an eligible dependant, a person who meets the following conditions at that time:
>
> (e) she is, or her spouse or common-law partner is, either a Canadian citizen or:
>
> (i) permanent resident within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act,
>
> (ii) temporary resident or holder of a temporary resident permit under the Immigration and Refugee Protection Act who has resided in Canada during the 18-month period preceding that time,
>
> (iii) person protected under the Immigration and Refugee Protection Act
>
> (iv) a person who is a member of a class specified in the Regulations Respecting Classes of Immigrants Specified for Humanitarian Grounds made under the Immigration Act,
>
> (v) an Indian within the meaning of the Indian Act.

26. As with Article 3 of the Regulation, this measure has been the subject of a constitutional challenge. Indeed, in the Yao judgment34, asylum seekers

claimed before the Tax Court of Canada ("TCC") that the condition

---

[31] See in particular: *Child Care Subsidy Regulation,* BC Reg 74/97, s. 5.

[32] LRC (1985), ch. 1 (5th suppl.).

[33] In Quebec law, the credit providing for the family allowance provides for conditions of similar eligibilities: *Taxation Act,* CQLR, c. I-3, 1029.8.61.8, al. 3(e)iv).

[34] 2024 TCC 19. *[Yao]*

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of eligibility provided for in this section was contrary to subsection 15(1) of the *Charter Canadian.* They were of the view that their exclusion was based on the alleged analogous grounds of refugee status, their national or ethnic origin and sex35, thus grounds almost identical to those invoked by the respondent36.

27. On February 15, 2024, eight days after the Quebec Court of Appeal's decision, the ICC rejected all of the applicants' arguments. At the first stage of the analysis under section 15(1) of the *Canadian Charter,* the ICC concludes that section 122.6(e) of the RIPR does not generate any distinction or exclusion based on the grounds of sex, in particular because women are not disproportionately penalized in eligibility for the Canada Child Benefit.37 At the second stage, the ICC concludes in particular that the exclusion of asylum seekers is temporary.38 These are :

same arguments as those pleaded by the PGQ before the Court of Appeal, but

These were dismissed in their entirety. A notice of appeal to the Federal Court of Appeal was filed in this case.39

28. Second, the Court of Appeal's judgment considerably broadens the criteria for for a court to conclude that there has been a distinction or exclusion with disproportionate effects.

29. As will be explained below, the jurisprudence of the Supreme Court establishes very clearly that section 15(1) of the *Canadian Charter* does not contain a general guarantee of equality between groups in society40, but rather a right to equality with respect to the benefits conferred and the burdens imposed by law41 .

30. However, the Court of Appeal focuses the two stages of a study under subsection 15(1) of the *Charter Canadian* not on the benefit conferred by section 3 of the Regulation, namely the contribution reduced and the conditions for accessing it, but rather on social factors and

---

[35] *Yao,* para. 173.
[36] Judgment under appeal, para. 76.
[37] *Yao,* para. 199-200.
[38] *Ibid,* para. 210.
[39] A-104-24.
[40] *Andrews v. Law Society of British Columbia,* [1989] 1 RCS, p. 163 *[Andrews].*
[41] *Andrews,* pp. 163, 182; *Auton (Guardian ad litem of) v. British Columbia (Attorney General),* 2004 SCC 78, paras. 27-29 *[Auton]; Withler v. Canada (Attorney General),* 2011 SCC 12, paras. 31 and 62 *[Withler].*

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economic interests that exist independently of this provision, namely the integration of women into the labour market42. This approach was, however, expressly rejected by this court in the *Sharma decision43.*

31. The Court of Appeal's decision therefore suggests that subsection 15(1) of the Canadian Charter confers a general guarantee of equality and requires the State to correct all inequalities, contrary to the teachings of this Court.

32. There is a minority line of case law in Canada that makes the same error. In the *Stadler* decision of the Manitoba Court of Appeal44, the applicant claimed to be suffering from discrimination based on physical disability due to the fact that a financial assistance scheme last resort from which he was a beneficiary required him, like any other beneficiary, to have recourse to his retirement pension as soon as possible45.

33. The Manitoba Court of Appeal also confuses the two stages of the analysis of the subsection 15(1) of the *Canadian Charter.* By the same token, it concludes that the imposition of the same rule to all beneficiaries had a disproportionate impact on people in a situation of deficiency, not because they were deprived of their retirement pension in circumstances where others would not be, but simply because people with disabilities often experience difficult economic situations46, that is, a situation independent of the law.

34. The intervention of the Supreme Court is therefore necessary to clarify the framework for analysis of the section 15(1) of the *Canadian Charter* which, despite the wish of this Court in the judgment *Sharma,* is still not well-understood by some Canadian courts.

35. For these reasons, the issues raised by the present case are of great importance to the public and therefore of national interest.

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[42] Judgment under appeal, paras. 90, 92, 93, 95 and 98.
[43] *R. v. Sharma,* 2022 SCC 39, para. 44. *[Sharma]*
[44] *Stadler* v. *Director, St Boniface/ St Vital,* 2020 MBCA 46 (application for leave to appeal) refused on November 26, 2020: 39269).
[45] *Ibid.,* paras. 4 and 5.
[46] *Ibid.,* paras. 85, 89-91 and 94.

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PART II

CONCISE STATEMENT OF THE ISSUES IN DISPUTE

36. This case raises the following constitutional questions:

1. Does subsection 3(5) of the Regulations create an exclusion based on the ground of sex? contrary to subsection 15(1) of the *Canadian Charter?*

2. If the answer to the first question is yes, is this infringement justified by Article 1 of the *Canadian Charter?*

3. If the answer to the second question is negative, what should be the compensation? appropriate?

37. It should also be noted that before the lower courts, the respondent also invoked grounds of citizenship and immigration status to conclude that there has been an infringement subsection 15(1) of the *Canadian Charter.* These grounds are likely to be invoked again by the respondent in this appeal if this Court were to grant this request for authorization.

PART III

CONCISE STATEMENT OF ARGUMENTS

PARAGRAPH 3(5) OF THE REGULATIONS DOES NOT CREATE A BASED DISTINCTION ON THE GROUND OF SEX

38. The burden of demonstrating an infringement of the right to equality protected by paragraph 15(1) is divided into two stages: the applicant must demonstrate that the provision contested “creates, prima facie or by its effect, a distinction based on a ground listed or analogous; [and] imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating or accentuating disadvantage ”[47]

[47] *Sharma,* par. 28.

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39. In Sharma , the Supreme Court of Canada sought to make the application of the section 15(1) of the *Canadian Charter* clearer and more predictable, in order to assist the parties and judges who decide these disputes[48].

40. In this case, although the Court of Appeal relies in part on the *Sharma judgment*[49], it does disregarding all the warnings and clarifications of the Supreme Court. By ignorant, she makes the same mistakes that this Court attempted to correct in *Sharma.*

41. Indeed, two errors require the intervention of this Court. On the one hand, the analysis of the Court of Appeal considers independent and unrelated social and economic factors Article 3 of the Regulation. On the other hand, the Court of Appeal confuses the two stages of the subsection 15(1) of the *Canadian Charter* by answering the same question twice and in an identical manner.

THE COURT OF **APPEAL'S ANALYSIS CONCERNS ASPECTS WHICH ARE INDEPENDENT OF ARTICLE 3 OF THE REGULATIONS AND WITHOUT RELATION TO THIS ARTICLE**

42. At the first stage of the analysis under subsection 15(1) of the *Canadian Charter,* the The Court of Appeal's reasoning is limited to concluding that there is a social context leading to women taking on a disproportionate share of childcare, so that they are generally penalized in their access to the labor market. Thus, the exclusion of asylum seekers by Article 3 of the RCR would have a disproportionate impact on women seeking asylum and holding a work permit[50].

43. The Court of Appeal adds that the “lack of access to affordable childcare services has a effect on accessibility to the labour market for women, particularly women asylum seekers "[51].

44. However, Article 3 of the Regulation determines the conditions of eligibility for payment of the reduced contribution, which is a form of financial assistance granted by the State to help persons eligible to pay the costs of a place in a child care service. This article does not

[48] *Ibid,* para. 33.
[49] Judgment under appeal, paras. 82, 84, 97.
[50] *Ibid,* para. 89.
[51] Ibid, para. 95.

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does not guarantee a right to such a place, much less access to the labour market[52] . Furthermore, the lack of access to subsidized childcare services is a reality that affects also persons eligible for payment of the reduced contribution.

45. In the *Symes* and *Sharma judgments,* this Court explained that the demonstration of an infringement the right to equality must focus on the effects of the impugned provision, not on circumstances that exist independently of the provision[53].

46. In this case, the Court of Appeal ignores these lessons. It had to determine if, in exercising the advantage conferred by Article 3 of the Regulation, women are disproportionately excluded compared to a relevant comparison group.

47. In this regard, the *Sharma* judgment recalls that the causal link between the distinction, the exclusion or the preference and an enumerated or analogous motive is demonstrated by a comparison between persons covered by an enumerated or analogous ground of distinction and persons who are not covered by this ground[54]. Other decisions of the Court of Appeal also affirm that the comparison is fundamental in the analysis of paragraph 15(1) of the *Charter Canadian*[55].

48. Gender is not an eligibility requirement under section 3 of the Regulations. women are eligible for payment of the reduced contribution like men. Consequently, section 3 of the Regulation does not generate any distinction based on sex by its object, which the Court of Appeal and the respondent recognize[56]. The Court of Appeal instead concludes that there is an exclusion caused by way of disproportionate effects[57].

49. Such exclusion, based on the ground of female sex, requires determining whether the Women are disproportionately excluded from access to

[52] See by analogy *Weatherley* v. *Canada (Attorney General),* 2021 CAF 158, para. 59.
[53] *Sharma,* para. 44, citing *Symes* v. *Canada,* [1993] 4 RCS 695, p. 765 *[Symes].*
[54] *Sharma,* para. 31; see also *Symes,* p. 766-767.
[55] See in particular *RO* v. *Minister of Employment and Social Solidarity,* 2021 QCCA 1185, para. 53 and *Canadian Union of Public Employees, Local 3333 v. Longueuil Transport Network,* 2024 QCCA 204, para. 85.

[56] Judgment under appeal, para. 77. See also paragraph 102 in which the Court recognises that "persons seeking asylum are, for that reason alone, ineligible for the reduced contribution".

[57] Judgment under appeal, para. 88.

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the benefit provided by law, namely eligibility for payment of the reduced contribution. that it is not necessary to demonstrate that all women are excluded by Article 3 of the Regulation, the exercise of comparison remains necessary58.

50. The *Fraser* decision illustrates this approach well: at the first stage of the analysis, this Court held concluded that female employees of the Royal Canadian Mounted Police ("RCMP") were disproportionately penalized relative to the ability to buy back years of services for the purpose of contributing to their pension plan. While this buyback of service was possible for several types of leave, it was not possible for employees who chose to share their position. However, the people who had made such a choice were *only* women, and *mostly* women who wanted to have more time to take care of themselves of their children59.

51. It was therefore clear in this case that women were being penalised in the exercise of a right granted by their employer when no man was.

52. In this case, the Court of Appeal did not carry out any exercise of comparison equivalent to that made in particular in the *Fraser* decision and thereby commits a significant error of right. Indeed, it simply concludes that women seeking asylum and having a work permit holders are "disadvantaged" because they are not eligible for payment of the reduced contribution60. This analysis is erroneous in light of the *Fraser decision,* but also in light of the *Symes decision,* because "if a group or subgroup of women could to prove the required detrimental effect, the proof would come from a comparison with the relevant group of men "61.

53. By ignoring the comparative examination, the Court of Appeal suggests that any exclusion of the benefit conferred by Article 3 of the Regulation would automatically

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[58] *Symes* v. *Canada,* [1993] 4 RCS 695, 771; *Westmount (City of)* v. *Quebec (Attorney General of),* 2001 CanLII 13655 (QC CA), para. 163; *Canadian Union of Public Employees, Local 3333* v. *Longueuil Transport Network,* 2024 QCCA 204, para. 85.

[59] *Fraser v. Canada (Attorney General),* 2020 SCC 28, [2020] 3 RCS 113, para. 97. *[Fraser]*

[60] As will be explained later, disadvantage is a concept that can only be addressed the second stage of the analysis.

[61] *Symes,* p. 771.

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based on the grounds of sex62.

54. For example, subsection 3(4) of the Regulations provides that foreign students are eligible for payment of the reduced contribution if they reside in Quebec and if they are holders of a certificate of acceptance and recipients of a scholarship from Government of Quebec.

55. If a foreign student residing in Quebec does not hold the certificate and the scholarship designated by subsection 3(4) of the Regulations, he will not be eligible for payment of the reduced contribution. However, if requiring an asylum seeker to obtain refugee status generates an exclusion based on the reason of female gender, request that a student obtaining a certificate and a scholarship would also generate an exclusion based on this ground.

56. According to the PGQ, the Court of Appeal had to conclude that the exclusion of asylum seekers is not not based on the motive of sex either by object or by effect. Clearly, this reason is in no way involved in the eligibility for the reduced contribution. The example The respondent's statement is clear: she is a woman who was seeking asylum and was not admissible. to the reduced contribution. Then the CISR granted her refugee status and she is became eligible, since it now met the eligibility condition provided for by subsection 3(5) of the Regulations. Her gender had no influence on her eligibility: only his immigration status has changed.

THE COURT OF APPEAL CONFUSES THE TWO STEPS UNDER PARAGRAPH 15(1) OF THE CANADIAN CHARTER BY ANSWERING THE SAME TWICE QUESTION

57. In Sharma , the Supreme Court indicated that the two stages of a study under the Section 15(1) of the *Canadian Charter* raises fundamental questions different. More precisely,

> "The first step is to ask whether the challenged law created or contributed to a disproportionate effect on the claimant group for a protected reason. To do this, it is necessary to establish a

[62] Under Article 10 of the Quebec Charter, this approach is denounced by a decision of the Court appeal: *Attorney General of Quebec* v. *Human Rights and Human Rights Commission youth (Duperron),* 2024 QCCA 12, para. 31-33.

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comparison between the claimant group and other groups or the general population (*Andrews* v. *Law Society of British Columbia,* [1989] 1 SCR 143, at p. 164). The second step, in turn, is to determine whether that effect imposes burdens or denies benefits in a way that has the effect of reinforcing, perpetuating or accentuating disadvantage. A finding that the impugned law has a disproportionate effect on a protected group (first step) does not automatically lead to a finding that the distinction is discriminatory (second step). »63

58. In this case, at the first stage of the analysis, the Court of Appeal concludes that:

"The disadvantages faced by women in entering the labour market have been recognised in Supreme Court case law on the issue.

Indeed, it has long been recognised that women are at a disadvantage in the labour market because of their family responsibilities. "64

59. It turns out that at the second stage, the Court of Appeal repeats exactly the same thing as at the first:

"Indeed, although women seeking asylum are not specifically excluded by Article 3 *RCR,* the latter reinforces, perpetuates and accentuates the disadvantage suffered by women, as women, in the labour market. The evidence provided by Ms Kanyinda demonstrates this.
Women have historically been disadvantaged in the workplace because they disproportionately shoulder the burden of child care and caregiving responsibilities. This has been recognized by the Supreme Court on numerous occasions, as I have noted. The result is that women have lower participation rates than men in the workforce. The fact that asylum seekers are, by that very fact, ineligible for the reduced contribution for subsidized child care spaces clearly has a disproportionate impact on women in this group. "65 [Emphasis added]

60. As set out above, at the first stage of the analysis the role of the Court was to determine whether women were disproportionately excluded from a relevant comparison group66. Its role was not to determine whether this exclusion reinforces, perpetuates or accentuates a disadvantage suffered by women, since this question

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[63] *Sharma,* par. 31.
[64] Judgment under appeal, paras. 98-99.
[65] *Ibid,* para. 102.
[66] *Sharma,* para. 42; See also *Ward v. Quebec (Human Rights and Human Rights Commission) of youth),* 2021 CSC 43, para. 96.

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arises only at the second stage of the analysis.

61. The *Sharma* judgment is clear: "although the evidence may overlap at Each of the steps, the two steps, pose fundamentally different questions. The analysis carried out at one stage must therefore remain distinct from the analysis carried out at the other "[67]. The Court of Appeal could not confuse the questions which it had to analyse in the first step and the burden of proof which fell on the respondent in this regard with the questions she had to answer in the second stage, nor import in the first stage considerations only relevant to the second.

62. In fact, the Court of Appeal's analysis boils down to setting out the pre-existing disadvantage experienced by women in accessing the labor market through their family role, but without making the link with Article 3 of the Regulation and without questioning the cause of their exclusion, as required by the precedents of this Court relating to section 15(1) of the *Charter Canadian.*

63. This is not a situation analogous to that in the *Fraser judgment,* in which the disadvantage pre-existing experience of women employed by the RCMP was exacerbated by the measure emanating from their employer, which denied the possibility of buying back years of service mainly or even only to women.

64. In this case, again, it is impossible to conclude that access to the contribution reduced is denied to women directly or disproportionately.

65. The Court of Appeal's approach is likely to create confusion between the stages of the analysis relating to paragraph 15(1) of the *Canadian Charter,* despite the lessons from the *Sharma decision.* Indeed, this approach confuses the two stages of the analysis into one and distorts the analytical framework developed by this Court.

66. This kind of confusion also threatens the State's ability to act within a framework predictable constitutionality and limits its ability to make public policy choices.

IF THERE IS AN INFRINGEMENT, WHICH IS DENIED, IT IS JUSTIFIED BY VIRTUE OF ARTICLE 1 OF THE CANADIAN CHARTER

[67] *Sharma,* par. 30.

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67. The PGQ argues that the Court of Appeal erred in concluding that, if there is an infringement, it is not justified under section 1 of the *Canadian Charter.*

68. In this case, the categories of persons eligible for the reduced contribution under Article 3 of the Regulation reflects an objective recognized in case law, that of providing financial assistance to persons who have a sufficient link68 with Quebec. More specifically, this link is manifested in that people are eligible to the extent that a status is duly recognized by the administrative authority competent and that all steps to obtain this status have been completed before their eligibility.

69. As mentioned above, since 2017, the North American socio-political context has has led to a dramatic increase in asylum seekers in Canada, particularly in Quebec. This has increased the number of requests that cannot be heard in the time limits provided for in the RIPR. In both cases, these are facts on which Article 3 of the Regulation has no influence.

70. However, the Court of Appeal ignores all of these arguments and the evidence, which leads her to conclude that the infringement of the right to equality protected by subsection 15(1) of the *Canadian Charter* is not justified. 69 In doing so, she commits three errors of law important.

71. First, the Court of Appeal indicates that it is irrational to impose as a condition of eligibility for refugee status in subsection 3(5), since the Regulations make eligible for payment of the reduced contribution of persons who, like asylum seekers, may reside in Quebec temporarily70. With respect, it This is a hasty generalization, which reduces each immigration status to a simple question of length of stay, regardless of the specific grounds for each status.

72. Secondly, the Court of Appeal states that "what seems rather to be the common point

[68] *Peterson* v. *Canada (Minister of State (Grains and Oilseeds),* 1993 CanLII 9367 (FC), para. 23 (affirmed in *Peterson* v. *Canada (Minister of State, Grains and Oilseeds),* 1995 CanLII 11038 at para. 28 (FCA) *Ruel* v. *Quebec (Minister of Education),* [2001] RJQ 2590, para. 124.
[69] Judgment under appeal, para. 104.
[70] *Ibid,* para. 111.

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among all the categories of persons referred to in Article 3 of the Regulation, it is the fact that they must all have a work permit and not that they can remain in Quebec "71. This passage is erroneous.

73. On the one hand, residence in Quebec is the first condition of eligibility required by section 3 of the Regulation, and this applies to all persons72. On the other hand, the only paragraph which provides as a condition of admissibility the fact of having a work permit is subsection 3(3) of the Regulations73. The other subsections do not provide anything equivalent: the ability to work, the right to work or being employed are not conditions of eligibility for payment of the reduced contribution.

74. Thirdly, the Court of Appeal is silent on the difficulties encountered by the CISR to meet the deadlines provided for by the RIPR. By the same token, it does not take into account the that the eligibility condition provided for in subsection 3(5) of the Regulations is temporary and depends on an organization that falls under another level of government.

75. Let us assume that the Quebec legislature has chosen, as required by the Court, appeal, that asylum seekers are eligible for payment of the contribution reduced if they hold a work permit74. This condition would necessarily depend from the moment the federal government grants them the work permit. This means that Until then, asylum seekers will not be eligible for payment of the reduced contribution. During this period, the respondent could also accuse Article 3 of the Regulation is an "obstacle" to the francisation of women, since they "assume disproportionately, alone or as a couple, the obligations relating to the custody and care of children "75.

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[71] *Ibid,* para. 112.

[72] "A parent who resides in Quebec and who is eligible for payment of the reduced contribution is: satisfies one of the following conditions." [our emphasis]

[73] "He is staying in Quebec mainly to work and he holds a work permit issued under the Immigration and Refugee Protection Act or is exempt from the requirement to hold such a permit under that Act."

[74] See paragraph 120 of the reasons for the judgment under appeal.

[75] Judgment under appeal, para. 77.

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76. These errors require the intervention of the Supreme Court.

THE APPROPRIATE REMEDY WAS A DECLARATION OF INVALIDITY WITH EFFECT SUSPENDED FOR TEN MONTHS

77. Before the Court of Appeal, the PGQ requested, in the event that it concluded that Article 3 of the Regulation generates an infringement of the right to equality which is not justified, to suspend a possible declaration of invalidity for a period of ten months76.

78. However, the Court of Appeal decides instead that the appropriate remedy is a broad interpretation of subsection 3(3) of the Regulations. More specifically, "that section 3(3) of the Regulations read as making eligible for payment of the reduced contribution the parent who resides in Quebec for the purposes of an asylum application while holding a work permit "77.

79. The remedy awarded by the Court of Appeal is not consistent with the principles developed by this Court for two reasons.

80. First, the Court of Appeal concludes that the exclusion of asylum seekers arises from subsection 3(5) of the Regulations. 78 It thus confirms the conclusion of the Superior Court. 79 Despite this, the Court of Appeal decides that paragraph 3(3) of the Regulation must be interpreted so as to correct the exclusion arising from subsection 3(5). In short, the Court appeal concludes that the exclusion of asylum seekers with work permits should be corrected by a paragraph which does not exclude them, which is in itself wrong.

81. Second, in Ontario *v .* G, the Supreme Court stated that: "the interpretation "broad is for a court to extend the scope of a law by declaring inoperative an implied limitation on its scope "80. In *Schachter,* the Court Supreme Court states that "the object of broad interpretation is to be as faithful as possible, within the framework of the requirements of the Constitution, to the legislative text adopted by the legislature "81. In both cases, the Supreme Court specifies that the broad interpretation does not must not allow the courts to override the intention of the legislature.

[76] Appellant/incidental respondent's brief PGQ, 500-09-030116-222, January 30, 2023, para. 96 ss.
[77] Judgment appealed from, para. 120.
[78] *Ibid,* para. 65.
[79] Trial Judgment, para. 27.
[80] *Ontario (Attorney General)* v. G, [2020] 3 RCS 629, para. 113.
[81] *Schachter* v. *Canada,* [1992] 2 RCS 679, 700.

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82. However, by concluding as it did, the Court of Appeal substitutes its role for that of the legislator. The wording of subsection 3(3) of the Regulations clearly indicates that the eligible for payment of the reduced contribution are persons staying in Quebec mainly in order to work there. However, the Court of Appeal decides to interpret this article of broadly to include asylum seekers with work permits, but in deleting the words "who stay in Quebec mainly in order to work there". By the In fact, the Court decides not only that asylum seekers must be eligible for payment of the reduced contribution, but also under what conditions legislator must make them admissible.

83. Again, this error requires the intervention of the Supreme Court.

PART IV

EXPENSES

84. The Attorney General of Quebec requests that costs be awarded to him if the application leave to appeal is granted, in accordance with the rule that costs follow the outcome of the dispute.

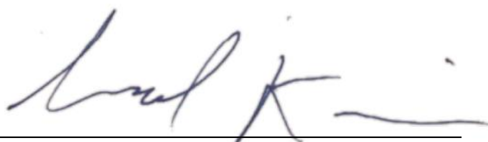
PART V

ORDERS REQUESTED

85. The Attorney General of Quebec requests that the application for leave to appeal be granted with costs.

ALL RESPECTFULLY SUPPORTED.

Montreal, April 8, 2024



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PART VI

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