500-09-030116-222

COURT OF APPEAL OF QUEBEC

(Montreal)

On appeal from a judgment of the Superior Court, district of Montreal, rendered on May 25, 2022, by the Honorable Judge Marc St-Pierre.

No. 500-17-108083-190 C.S.M.

ATTORNEY GENERAL OF QUEBEC APPELLANT / INCIDENTAL RESPONDENT (defendant) v. BIJOU CIBUABUA KANYINDA RESPONDENT / INCIDENTAL APPELLANT (plaintiff) - and - COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE THIRD PARTY / INCIDENTAL APPELLANT (intervener) BRIEF OF THE RESPONDENT / INCIDENTAL APPELLANT Dated November 29, 2022

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ARGUMENTATION DE L’ INTIMÉE / APPELANTE INCIDENTE

TITRE I – SUR L’APPEL PRINCIPAL

INTRODUCTION

1. The present case concerns the eligibility of asylum seekers residing in Quebec and holding a work permit for subsidized educational childcare services.

2. Before this Court, the issue is to determine the legality and constitutionality of section 3 of the Regulation on Reduced Contribution (hereinafter, 'the RCR'), which sets the categories of individuals eligible for reduced contribution payment required from a parent whose child benefits from care services provided by a subsidized childcare provider.

3. The respondent / incidental appellant (hereinafter referred to as 'the respondent') was at the time of filing the application for judicial review in this case an asylum seeker residing in Quebec and holding a work permit, wishing to access subsidized childcare services and thus be eligible for reduced contribution payment, but was denied such access.

4. The respondent filed an application for judicial review consisting of three components:

a. an interpretative and declaratory component (under article 142 of the Code of Civil Procedure) seeking recognition that an asylum seeker residing in Quebec and holding a work permit is eligible for reduced contribution payment under the existing provisions of the Educational Childcare Act (hereinafter, 'the ECCA') and the RCR;

1 RLRQ, c. S-4.1.1, r. 1, Memorandum of the Respondent / Incidental Appellant (hereinafter 'M.I.A.I.'), vol. 5, p. 1647 et seq.

2 RLRQ, c. S-4.1.1, M.I.A.I., vol. 5, p. 1527 et seq.

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b. an administrative law aspect alleging that article 3 of the RCR is null and illegal, either because the LSGEE does not grant the government any power to adopt a regulation establishing conditions for eligibility for the reduced contribution, so that article 3 of the RCR was adopted without valid legislative authorization, or, if there was valid legislative authorization, it did not authorize the establishment of distinctions or categories of people restricting the right to the reduced contribution (discrimination in the sense of administrative law);

c. a constitutional aspect alleging that the exclusion of asylum seekers residing in Quebec and holding work permits from the right to the reduced contribution is unconstitutional because it unjustifiably infringes the right to equality guaranteed by article 15 of the Canadian Charter of Rights and Freedoms (hereinafter 'the Canadian Charter') and by article 10 of the Charter of Human Rights and Freedoms (hereinafter 'the Quebec Charter'), that it constitutes cruel and unusual treatment in the sense of article 12 of the Canadian Charter and that it constitutes an assault on the right to dignity of the person guaranteed by article 4 of the Quebec Charter.

5. The trial judge granted the respondent's request solely on the basis of the absence of valid legislative authorization for the adoption of article 3 of the RCR. The judge did not rule on the discriminatory nature in the sense of administrative law of article 3, presumably because of the conclusion that it is in any case ultra vires and null. He rejected the other conclusions sought by the respondent in the application.

6. It is solely the administrative law aspect that is the subject of the principal appeal by the Attorney General.

7. The respondent has, moreover, appealed incidentally the part of the judgment rejecting the conclusions sought regarding the fact that article 3 of the RCR infringes article 15 of the Canadian Charter without that infringement being justified under the first article. This aspect is addressed as part of the argumentation concerning the incidental appeal. It should also be noted that the Commission of Human Rights and Youth Rights has

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filed an incidental appeal concerning the interpretation of Article 3 of the RCR, particularly in the light of the Quebec Charter, and on the discriminatory nature of this provision under the Quebec Charter.

PART I – THE FACTS

a) The situation of the Respondent at the time of filing the application for judicial review

8. The respondent arrived in Quebec on or around October 9, 2018.

9. She is the mother of three children, who were, at the time of filing the appeal, 5 years, 4 years, and 2 years old.

10. She then had no family in Canada.

11. Upon her arrival in Quebec, the respondent filed an asylum application under the Immigration and Refugee Protection Act, SC 2001, c. 27 (hereinafter, "the IRPA").

12. The respondent held a work permit.

13. The respondent made efforts with several daycares to find a place for her children.

14. The respondent was denied access to daycare services.

15. Several daycares stated in their refusal that it was not possible to provide subsidized daycare services to a person whose status, like hers, was that of an asylum seeker.

16. In the absence of access to subsidized daycare services, the respondent was not able to work, even though she held a work permit that authorized it.

17. Two of the respondent's children were experiencing developmental difficulties.

18. The exclusion of the respondent from subsidized daycare services deprived her of access to integration measures and support for disabled children planned under the subsidized daycare services system.

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19. Due to the length of the process of obtaining refugee status under the IRPA, the respondent faced the prospect of a long period without access to subsidized childcare services – and thus the practical inability to work and the lack of access to integration and support measures for disabled children provided under the subsidized childcare services regime – insofar as this access depended on obtaining refugee status.

20. The respondent could not afford the costs of unsubsidized childcare services.

b) The legal and regulatory framework and the position of the ministry

21. On December 16, 2005, the government adopted the LSGEE. This law replaced the Act respecting childcare centers and other child care services.

22. Section 4 of the LSGEE provides as follows:

4. Every child has the right to receive, until the end of primary education, personalized quality educational childcare services.

This right is exercised taking into account the organization and resources of certified childcare service providers and home childcare coordinating offices, as well as the right of the service provider to accept or refuse to receive a child, the rules relating to subsidies, and the priority given to children from birth until their admission to preschool education.

[Emphasis added.]

23. Section 82 establishes the government's power to determine by regulation the amount of the contribution payable by a parent for subsidized childcare services.

24. Section 5 of the RCR sets the amount of the contribution – currently, $8.70 per day – and establishes an indexation formula for this amount.

25. Section 3 of the RCR, at the heart of the current dispute, establishes a series of categories of people eligible for the payment of the reduced contribution:

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

3 LQ 2005, c. 47.

4 LRQ, c. C-8.2.

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1° He is a Canadian citizen;

2° He is a permanent resident under the Immigration and Refugee Protection Act (S.C. 2001, c. 27);

3° He resides in Quebec mainly to work and 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 this Act;

4° He is a foreign student, holding a certificate of acceptance issued under the Quebec Immigration Act (chapter I-0.2.1) and a recipient of a scholarship from the Quebec government under the policy relating to foreign students in Quebec colleges and universities;

5° He is recognized by the competent Canadian tribunal as a refugee or a protected person under the Immigration and Refugee Protection Act and 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 resident permit issued under section 24 of the Immigration and Refugee Protection Act for the eventual grant of permanent residence and the selection certificate referred to in paragraph 5;

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

26. Prior to the issuance by the Ministry of the Family of a letter to the managers of subsidized childcare services, on April 10, 2018, which advocated an interpretation of the RCR whereby persons who had applied for asylum and held a work permit would not be eligible for the payment of the base contribution5, many subsidized childcare services accepted children whose parents were asylum seekers and considered them eligible for the reduced contribution payment.

27. The Ministry of the Family itself previously considered that asylum seekers holding a work permit, including an open work permit,

5 Exhibit P-1, Appellant's Memorandum (hereinafter "A.M."), vol. 2, p. 170. (Note: the "base contribution" is now referred to as the "reduced contribution.")

not indicating a specific workplace or employer, were eligible for the reduced contribution, as evidenced by an August 2015 email from a ministry representative:

An open work permit that does not indicate the place of work or the name of the employer must be accepted in a request for eligibility for the reduced contribution, despite Article 15(2) of the Reduced Contribution Regulation which requires the parent to provide a work permit indicating the place of work and the employer's name.

Thus, Article 15(2) of the Reduced Contribution Regulation is interpreted progressively, taking into account the legislator's initial intention. For these reasons, a parent residing in Quebec with a work permit issued in accordance with immigration and refugee protection legislation and regulations is eligible for the reduced contribution.

The Ministry's website and certain documents (e.g., the eligibility form for the reduced contribution or the guide Documents Required in Accordance with the Reduced Contribution Regulation for a Parent Born Outside Canada and Indigenous Parents) will be modified to reflect this interpretation.

[Emphasis added.]

28. In its letter of April 10, 20187, the ministry reversed and now stated:

Asylum seekers with work permits are therefore not eligible for the payment of the basic contribution. They will only be when they are recognized as refugees, if applicable.

[Emphasis in the original.]

29. As confirmed by the respondent's experience, subsidized childcare service providers treat this letter of April 10, 2018, as a directive establishing the interpretation to follow of Article 3 of the RCR and therefore no longer consider asylum seekers residing in Quebec and holding a work permit eligible for the reduced contribution.

30. In January 2021, the incidental appellant's asylum claim was accepted.

6 Exhibit P-2, M.A., vol. 2, pp. 171-172.

7 Exhibit P-1, M.A., vol. 1, p. 170.

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c) Le jugement de première instance (volet sur l’absence d’habilitation législative valide)

31. Before the Superior Court, the Attorney General argued that the court should refrain from ruling on the request on the grounds that the dispute had become theoretical due to the recognition of the respondent’s refugee status, which, once her selection certificate was obtained, made her eligible for the reduced contribution and thus for subsidized childcare services.

32. The first-instance judge concluded that despite the theoretical nature of the appeal concerning the respondent, there was reason to exercise the court’s discretion to rule on the request under the circumstances.

33. The Attorney General did not appeal this aspect of the judgment.

34. The first-instance judge upheld the respondent’s argument that no valid legislative authorization allowed the government to adopt Article 3 of the RRC.

35. The judge first notes that Article 106 of the LSGEE provides the government with the power to adopt regulations for a long list of objects, but the power to 'adopt a regulation to determine the conditions of eligibility of parents for the reduced contribution' is not part of it.

36. The judge reviews the potential sources of authorization in the LSGEE invoked by the Attorney General concerning the power to adopt a regulation that would establish conditions of eligibility for the reduced contribution.

37. He thus examines Article 84 of the LSGEE, which provides that '[t]he government may, by regulation, determine the conditions under which the contribution fixed for a full day or half-day of care shall be paid, as well as the cases of full or partial exemption from this contribution for all or part of the services it determines' (emphasis added) as well as paragraph 26 of Article 106, which reiterates this same power to include it in the centralized list of regulatory powers of this latter article.

8 Judgment of the Superior Court, para. 28, M.A., vol. 1, p. 29.

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38. The judge concludes that these provisions "obviously aim at something else"9 than the government's power to adopt a regulation establishing the conditions of eligibility for reduced contribution.

39. The judge then examines the argument that one would find in the 4th paragraph of article 42 of the LSGEE an indirect authorization granting the government the power to adopt article 3 of the RCR.

40. Article 42 lists a series of "functions" of the coordinating office and the 4th paragraph provides as follows:

42. The coordinating office is responsible, in the territory assigned to it and in compliance with instructions given under the second paragraph of article 40.0.1:

[...]

4° to determine, according to the cases and conditions determined by regulation, the eligibility of a parent for the contribution set by the government under article 82;

[...]

41. Referring to the doctrine on legislative authorization and more particularly on the case of indirect authorization, the judge notes "that at least the holder of the power (of authorization) must be identified"10, which is not the case here.

42. As for the Attorney General's argument that one must necessarily infer that the holder of the power is the government, the Court dismisses it, concluding that it would exceed its role by speculating on this matter, while it is the law that must identify the holder of the regulatory power11.

9 Ibid., para. 29, M.A., vol. 1, p. 29.

10 Ibid., para. 32, M.A., vol. 1, p. 30.

11 Ibid., para. 33-34, M.A., vol. 1, p. 30.

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PART II – ISSUES IN LITIGATION

43. The respondent considers that the main appeal raises the following questions:

a) Did the trial judge err in concluding that Article 3 of the RCR was adopted in the absence of valid legislative authority?

b) Assuming that Article 3 of the RCR was adopted under valid legislative authority, is this article discriminatory in the sense of administrative law and therefore illegal?

PART III – REASONS

A. The LSGEE does not authorize the government to adopt a regulation that would establish eligibility conditions for the reduced contribution

i) Regulatory power exists only under valid legislative authority

44. Like any other delegated power, regulatory power exists only under valid legislative authority:

Patrice Garant, Administrative Law:

It has never been disputed that the regulation is essentially subordinate legislation deriving its strength and authority from the law. When it was attempted to assert that the government could have autonomous regulatory power under the royal prerogative, the Council responded: “The Governor in Council has no independent status as a law-making body.”

[…]

This rule has been emphasized by the Court of Appeal in several decisions. It even adds: “there can be no regulation unless the act of the Administration is clearly authorized by legislative authority.” The Supreme Court goes in the same direction: “There is no doubt that the power to adopt regulatory texts must be provided in the enabling law, and it is that law that must be examined to determine if the Act can support the adoption of an imperative regulatory text.”

12 Patrice Garant, Droit administratif, 7th ed., Montreal, Yvon Blais, 2017 [“Garant”], para. 4.1.1.3, EYB2017DRA22.

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2nd Rule:

Any regulation requires an enabling law.

As we have previously seen in the very definition of the regulation, the regulatory power exists solely by virtue of legislative authorization. […]

[Emphases added; references omitted.]

Pierre Issalys and Denis Lemieux, Governmental Action: A Treatise on the Law of Administrative Institutions:

7.4 The regulation is established by virtue of an authorization conferred by law

[…]

As in general with other discretionary acts of the administration, but to a higher degree still, the regulation must rest on a power conferred or recognized by law (see 4.2). The regulation can only be enacted by the authority designated by the law (see 4.13 et seq.), according to the formalities imposed by it (see 4.24). It can only address the subject determined by the law and cannot produce legal effects incompatible with the law.

[…]

Therefore, the regulation must normally be based on legislative authorization, that is to say, on a provision of a law (or on a set of provisions from one or more laws) granting the power to perform regulatory acts, designating the holder of this power, indicating the terms of its exercise, and delimiting the legal effects of the act potentially accomplished.

[…]

Apart from the somewhat theoretical hypothesis of regulatory power based on royal prerogative (see 7.4) and the rarely admitted one of implicit power to establish directives that may potentially have a normative effect (see 7.8), the existence of a text with a regulatory character must be based on an enabling provision in a law (the "parent law"). The content of the regulation, in particular, is conditioned in more or less precise ways by the terms of this provision. Any examination of the likelihood of regulation and any analysis of the legality of a regulation must therefore begin with a careful reading of the terms chosen by the legislator to confer the power to make regulations.

[Emphases added; references omitted.]

Ibid., para. 4.2, EYB2017DRA23.

Pierre Issalys and Denis Lemieux, Governmental Action: A Treatise on the Law of Administrative Institutions, 4th ed., Montreal, Yvon Blais, 2020 [“Issalys and Lemieux”], para. 7.4, EYB2020PIA47.

Ibid., para. 7.9, EYB2020PIA49.

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45. Thus, an authority—whether it be the government or another administrative entity—cannot adopt a regulation in the absence of a provision in the enabling legislation that authorizes it.

46. The adoption of a regulation in the absence of valid legislative authority is therefore an illegal act. A regulation adopted under such circumstances is ultra vires, null, and void.

47. There is no enabling provision in the LSGEE that grants the government the power to establish by regulation the eligibility for the payment of the reduced contribution.

ii) The general framework of the LSGEE regarding regulatory powers

48. The approach taken by the LSGEE concerning regulatory powers—namely, the power to adopt regulations—is that of special mandates (sometimes also referred to as specific) aimed at well-defined and circumscribed objects.

49. The respondent has no difficulty acknowledging that the "modern"16 trend in the interpretation of general mandates is to recognize a very broad scope. As an example of such general mandates, we can cite the one discussed in the Supreme Court decision CKOY17, where the legislature granted the Canadian Radio-Television Commission the power to make regulations on matters “that it deems necessary to pursue its objects”18 or article 410 of the Cities and Towns Act as it existed when the Court examined it in the Spraytech19 decision, which provided the power to make regulations "[t]o ensure peace, order, good government, safety, and general welfare in the territory of the municipality."

50. Special or specific mandates are of an entirely different nature and are not interpreted at all like these general mandates.

51. Authors Tremblay and Lagacé write that “the more detailed the mandate is drafted, the more it is likely to be interpreted a contrario and therefore restrictively.”20

16 This potentially dates back to 1979, if we take as a point of reference the Supreme Court decision in CKOY Ltd. v. R., [1979] 1 SCR 2.

17 Ibid.

18 Ibid., p. 5; Garant, supra note 12, para. 4.2, 11th rule, EYB2017DRA23.

19 114957 Canada Ltd. (Spraytech, Société d'arrosage) v. Hudson (City), 2001 SCC 40 [« Spraytech »].

20 Jacques Lagacé and Richard Tremblay, “Regulatory Mandates,” in Richard Tremblay, ed., Elements of Legislation: How to Draft Laws and Regulations, Cowansville, Yvon Blais, 2010, p. 624.

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52. According to the author Garant, the following is written concerning specific powers:

When the legislator proceeds by specific powers indicating the precise object of the regulation, if the court is convinced that the regulation concerns an object other than that which the enabling law aims, it will conclude to the nullity of the regulation. Thus, the Supreme Court decided that a regulation requiring the construction of fences surrounding the ground of public garages was about land use and not the regulation of public businesses (licensing and regulating the owners or operators of public businesses); this regulation was therefore ultra vires. The same Court invalidated a regulation enacted under section 930(d) of the Municipal Act providing that a municipality can regulate the removal of earth "and require the holding of a permit for that purpose and fix a fee for the permit": this regulation did not set fixed fees but an amount increasing based on the extent of activities undertaken under the permit.

The specific power by object is the one that leaves the least room for maneuver following the precision with which the content of the possible regulation is described. It is necessary to verify whether each regulatory provision is related to the object; failing that, the regulation will be subject to invalidation based on the absence or excess of empowerment. Thus, the Court of Appeal ruled that the enabling clause which gives the Bar the power to adopt measures to ensure the competence of shorthand writers does not authorize the imposition of territorial limits on the exercise of this profession.

The Supreme Court considered that the clause empowering to regulate "the retail sale on public roads" does not allow "to prohibit or regulate the obstruction of roads and sidewalks", even by interpreting the clause "in a liberal manner". Likewise, the clause empowering to prohibit or regulate "the obstruction, congestion, damage, and soiling of public roads" does not allow prohibiting "the display of articles of any kind on the roads [...] but which do not cause any obstruction or congestion".

[Emphasis added; references omitted.]

53. The specific powers of the LSGEE can also be related to the category of powers by object, which are more restrictive regarding the scope of the power attributed to its holder:

Considered according to the manner of describing their content, specific powers are divided into several types of formulation. A first type of formulation groups powers to make regulations having a specific object: the expression "may by regulation" or "may make regulations for" is then followed by an infinitive verb, or the expression "may make regulations" is followed by a present participle. The most commonly used verbs are: determine, prescribe, provide, fix, designate, oblige, exclude, classify, delimit, prohibit, classify, define, forbid, require, enact, remove, etc. [...]

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This type of wording restricts the discretionary margin enjoyed by the holder of the authority with regard to the content of the regulation. It delineates fairly clearly the possible regulatory domain and already indicates the general content of the rules that the holder is authorized to establish. [Emphasis added.]

54. Article 106 of the LSGEE provides a long list of authorizations conferring regulatory power on the government over various precisely determined objects.

55. This list could even be described as exhaustive. It is not a matter here of claiming that only the paragraphs included in the enumeration of Article 106 constitute genuine legislative authorizations conferring regulatory power on the government, but merely noting the government's manifest desire to group in one article all the regulatory powers conferred on the government by law.

56. Article 106, in this sense, constitutes a 'single window' for the regulatory powers attributed to the government by the LSGEE.

57. It reiterates, on the one hand, the direct authorizations that already appeared in other provisions of the LSGEE:

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6.1, 2nd paragraph "the modalities and conditions that a person must fulfill in order to obtain a certificate of non-impediment." 18.1

7 (note: "rules" rather than "regulation"; "regulation" is referred to in art. 106, para. 6) "rules concerning the election of board members, its operation and the content of its internal regulations" 6

14 "the standards with respect to which a certificate is required, the form of the certificate, the information it must contain and the time of its transmission" 16

16.4, 3rd paragraph "the applicable conditions and standards" in circumstances provided for in the 1st paragraph of art. 16.4 and "the standards from which the holder is exempted from application" 5.1

35 "rules for the operation of a parents' committee" 20

57.1 "the elements that make up the educational file, its medium as well as the standards for its maintenance, use, preservation, reproduction, and communication of the information it contains" 14.1

82 "the amount of the contribution payable by a parent for childcare services provided by a subsidized educational childcare service provider for this purpose" 25

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and "the methods of indexing the amount of this contribution"

"the conditions of payment of the contribution set for a day or half-day of care as well as cases of total or partial exemption from this contribution"

the fact "that a breach of a provision of a regulation made pursuant to this law may result in the imposition of an administrative penalty by the person designated by the minister" and "the amount of the administrative penalty or […] the calculation methods allowing to establish it, which may vary according to the severity of the violation of the standards"

Decisively in the present case, article 106 also contains direct authorizations which confirm and clarify the indirect authorizations that appear in other provisions of the LSGEE – with the notable and unique exception of what appears in paragraph 4 of article 42:

Article of the LSGEE citing a regulatory standard (indirect authorization) Regulatory standard Para. of art. 106 confirming by direct authorization the indirect authorization

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6.1, para. 5 "[…] first aid course determined by regulation of the government" 29.5

6.1, para. 6 "[…] a civil liability insurance policy whose amount and coverage are determined by government regulation" 29.4

6.1, 3rd paragraph (referring to art. 6.1, para. 7) "The notice must also contain any other element provided by government regulation." 29.6

8, para. 4 and 11, para. 2 and 3 "the fees and […] the other conditions determined by regulation" (CPE permit application)

"the other conditions provided by regulation"; "the fees determined by regulation" (daycare permit application) 1

17, 2nd paragraph "For a new director or a new shareholder, he must provide the information required by regulation" 17

19 and 20 "[…] if the premises or the proposed modifications do not appear to conform to the standards established by regulation."

"[…] the premises and the modifications made are always in compliance with the approved plans and the standards established by regulation." 5

27 "Every police body in Quebec is required to provide the information required by regulation and necessary for establishing the existence of any impediment […]" 18

30 "[…] ceases it in accordance with the conditions provided by regulation" 19

51.1 "any other condition provided by regulation" (cessation of activities by a coordinating office) 19

52 and 53 "[…] recognized as being responsible for a home childcare service by a coordinating office according to the 21 and 22

"[...] conditions and modalities determined by regulation"

"[...] recognized as responsible for a home daycare service by a coordinating office in the manner determined by regulation"

"[...] can be renewed, suspended or revoked, in the cases and according to the conditions provided by regulation"

"[...] keep and maintain according to the regulation an enrollment form and an attendance sheet for each child they receive"

"When the premises or play equipment no longer present danger for children and conform to the standards set by regulation [...]"

"The amount of the first level and the maximum amount of the second level, as well as the indexation terms of these amounts are set by government regulation [...]"

"[...] the age group, mode, daycare period, duration and schedule established by regulation."

"These services must include the services determined by regulation [...]"

"[...] unless they are subject to an exemption provided by regulation"

"Except as provided by regulation [...] (other goods and services subject to an additional contribution)"

"[...] goods and services determined under the exemptions provided by regulation" (additional contribution)

"the contribution fixed by regulation"

"The debtor is liable for the payment of collection fees, in the cases and according to

conditions determined by government regulation, according to the amount stipulated."

"[…] the documents and information required by regulation concerning their employment, category of annual income, family composition, and childcare needs." 59. Finally, Article 106 also contains entirely autonomous direct authorizations that do not appear in other provisions of the LSGEE. This is the case with the following paragraphs: 2, 3, 3.1, 4, 4.1, 7, 8, 8.1, 8.2, 8.3, 9, 10, 11, 12, 13, 13.1, 14, 23.1, 24, 27, 27.1, 29.7, 30.

60. Furthermore, Article 107 provides for direct authorizations conferring regulatory power to the minister responsible for implementing the LSGEE.

61. Originally, two objectives were targeted, namely the conditions under which the minister grants approval (paragraph 2) and the elements and services that an educational program of a childcare service provider must include (paragraph 1).

62. Paragraph 1 of Article 107 was repealed in 2017, with the regulatory power concerning the educational program having been transferred from the minister to the government.

63. Finally, Article 134 includes a direct authorization conferring zoning regulatory power to the council of a local municipality.

64. Nowhere in Article 106 or elsewhere in the LSGEE is there a direct authorization granting the government regulatory power to determine the eligibility conditions for the payment of the reduced contribution.

65. This is contrasted with the following paragraphs of Article 106, which confer, through direct authorization, regulatory power to the government concerning other aspects of the reduced contribution or related matters:

a. Paragraph 24.1 expressly provides the regulatory power to "determine the goods and services that childcare service providers must offer"

21 Law aimed at improving educational quality and promoting the harmonious development of educational childcare services, LQ 2017, c. 31, arts 2 and 21, M.I.A.I., vol. 5, p. 1681 and 1689.

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de garde subventionnés en contrepartie de la contribution qu’il fixe » (confirmant et précisant l’habilitation indirecte de l’article 83);

b. le paragraphe 24.2 prévoit expressément le pouvoir réglementaire de « déterminer les biens, les activités et les services pour lesquels un prestataire de services de garde subventionnés peut demander ou recevoir un paiement en sus de la contribution fixée » (confirmant et précisant les habilitations indirectes aux articles 83, 86 et 92);

c. le paragraphe 25 prévoit expressément le pouvoir réglementaire de « fixer, pour les services qu’il détermine, la contribution exigible du parent et prévoir les modalités d’indexation de ce montant » (réitérant l’habilitation directe de l’article 82);

d. le paragraphe 26 prévoit expressément le pouvoir réglementaire de « déterminer les conditions et modalités suivant lesquelles le parent verse la contribution fixée par le gouvernement et les cas où le parent en est exempté, totalement ou partiellement, pour tout ou partie des services déterminés » (réitérant l’habilitation directe de l’article 84);

e. le paragraphe 27 prévoit expressément le pouvoir réglementaire de « déterminer les personnes autres que le parent de qui peut être exigé le montant de la contribution qu’il fixe » (édictant une habilitation directe autonome);

f. le paragraphe 27.1 prévoit expressément le pouvoir réglementaire de « déterminer les conditions et les modalités que doit respecter un prestataire de services de garde éducatifs lors de la prestation des services de garde subventionnés » (édictant une habilitation directe autonome);

g. le paragraphe 28 prévoit expressément le pouvoir réglementaire de « déterminer la classe d’âge, le mode, la période de garde, la durée et la plage horaire auxquels la contribution qu’il fixe est applicable » (confirmant et précisant l’habilitation indirecte à l’article 83).

66. Let us emphasize, as the trial judge rightfully did, that it is evident that the regulatory power provided for in Article 84 and reiterated in paragraph 26 of Article 106 aims at something other than determining the eligibility conditions for the payment of the reduced contribution.

67. Indeed, these articles refer on the one hand to the power to determine by regulation the cases where the parent is exempt from the payment of the contribution (see Article 11 of the RCR) and on the other hand the conditions and methods of payment of the contribution.

68. In the latter case, it is in no way a question of eligibility for the reduced contribution, but rather how it will be paid. The words 'the conditions and methods under which the parent pays the contribution' necessarily imply that there is a payment of the contribution.

69. The second sentence of Article 5 of the RCR was clearly adopted under this regulatory power: 'The payment of this contribution is made monthly or at fixed periods of less than one month and in approximately equal instalments.'

70. Nor can we conclude, as proposed by the Attorney General, that the power to 'determine the conditions and methods under which the parent pays the contribution set by the government' provided for in Article 84 and paragraph 26 of Article 106 'necessarily includes that of determining the eligibility conditions for the reduced contribution.'

71. Indeed, the existence of regulatory power as to how a contribution is paid for subsidized childcare services does not at all imply that this contribution is subject to eligibility conditions – much less the existence of regulatory power that would provide for the determination of eligibility conditions.

72. Additionally, note that the reference to the enabling law at the beginning of the RCR – which only refers to Article 106 – as well as the preambles of the decree that enacted it clearly show that the regulatory powers invoked by the

22 Argument of the appellant, para. 53, M.A., vol. 1, p. 16.

23 Ibid.

24 Decree 583-2006 concerning the Regulation on the reduced contribution, Official Gazette of Quebec, July 19, 2006, 138th year, no 29, pp. 3149 et seq., M.I.A.I., vol. 5, p. 1667 et seq.

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government to adopt the RCR are those set out in Article 106 LSGEE and no other.

73. Moreover, note that the second recital of the decree by which the RCR was enacted mentions no authorization from LSGEE allowing the government to set conditions of eligibility for payment of a reduced contribution:

WHEREAS paragraphs 25° to 30° of Article 106 of this law authorize the government in particular to set, for the services it determines, the contribution required from a parent of a child receiving childcare services and to determine the conditions and modalities according to which the parent is exempted in whole or in part;

74. Paragraph 4 of Article 42, clarified, although it refers to the cases and conditions of eligibility established by regulation of a parent for the reduced contribution, is not a true legislative empowerment granting the government—or any other designated holder—a regulatory power in this regard.

75. Indeed, it is not a provision granting the coordinating office a function, whether it be to determine [...] the eligibility of a parent for the contribution set by the government under Article 82.

76. The reference to a regulation is at most an indirect empowerment, which raises particular legal obstacles and imposes rigorous conditions for it to exercise validly a regulatory power, as we will see in the next section.

77. Regarding Article 87, it is not of the same order as Paragraph 4 of Article 42. Indeed, although it refers to the request for review of a decision on a parent's eligibility for the contribution set by regulation, Article 87 makes no reference to the cases and conditions of eligibility established by regulation of a parent for a reduced contribution. In short, the only reference in Article 87 to a regulation concerns the fact that there is a contribution whose amount is set by regulation. Thus, it cannot in any way suggest a potential regulatory power for determining eligibility conditions for the reduced contribution.

78. In light of this review of the general economy of the LSGEE in matters of regulatory powers, the following conclusion is reached: every time the legislator

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refers to regulatory standards without, however, attributing regulatory power to a clearly determined holder, he took care to confirm the existence of the said regulatory power and to attribute it to a clearly identified holder, namely the government, within Article 106.

79. However, this enabling technique that the legislator systematically uses in the LSGEE is not employed in the case of paragraph 4 of Article 42, so that the indirect enabling which one might see there is not confirmed by a provision that would confirm the existence of a real regulatory power and attribute it to a specific holder.

iii) Indirect Enablings

80. The only provision that refers to a potential regulation on the eligibility conditions for the reduced contribution is paragraph 4 of Article 42.

81. However, as we have mentioned, this provision does not actually attribute any regulatory power to a specific holder, but simply refers to the possible existence of a regulation on a given subject in another context (namely the statement of the functions of the coordinating office).

82. It is, therefore, at most what doctrine calls an "indirect enabling."

83. On this subject, the author Garant writes the following:

Indirect enabling does not present the same degree of certainty. It is a provision of a law that mentions the existence of regulations and therefore supposes the existence of a power to establish them, while this law does not specifically attribute this power. In general, indirect enabling uses the word "regulation," which leaves no doubt about the nature of the power. It usually adds a mention of the authority empowered to establish these regulations, either in the same provision or in an interpretative article defining the word "regulation." In all cases, however, ambiguity remains about the very existence of the power, as it is not directly attributed. [Emphasis added; references omitted.]

Garant, supra note 12, para. 4.1.3, EYB2017DRA22.

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84. Dans le cas présent, contrairement à la situation normale évoquée par Garant, il n'y a pas de mention de l'autorité habilitée à établir le règlement en question, que ce soit à l'article 42 ou ailleurs.

85. L'ambiguïté quant à « l'existence même du pouvoir » dont parle Garant en ce qui concerne les habilitations indirectes n'est ainsi pas dissipée par une disposition qui en confirmerait indéniablement l'existence – ce que le législateur a précisément fait dans la LSGEE pour toutes les autres habilitations indirectes, comme expliqué ci-dessus – et qui attribuerait le pouvoir réglementaire à un titulaire déterminé.

86. Les auteurs Issalys et Lemieux formulent quant à eux les commentaires suivants sur les habilitations indirectes :

L'habilitation indirecte est moins satisfaisante, en ce qu'elle ne présente pas le même degré de certitude sur l'existence même d'une habilitation. Il s'agit en effet d'une disposition d'une loi qui fait mention de l'existence de règlements, et qui suppose par conséquent l'existence d'un pouvoir de les établir, alors que cette loi n'attribue pas par ailleurs spécialement ce pouvoir. C'est donc bien sur l'existence du pouvoir que porte l'incertitude; la nature de ce pouvoir n'est pas douteuse, puisque le terme « règlement » apparaît dans le texte, de même, très souvent, qu'une mention de son auteur. Ainsi, la simple mention, dans un passage de la loi, des « conditions déterminées par règlement » ou des « conditions que détermine un règlement du gouvernement », constitue une habilitation indirecte. Elle laisse subsister un doute sur l'existence et l'étendue exacte du pouvoir réglementaire, puisque celui-ci n'est pas directement attribué par un tel texte.

Ce doute ne peut être levé – et l'est d'ailleurs très fréquemment – que si la loi même comporte par ailleurs une disposition directement habilitante ayant un contenu correspondant à celui envisagé dans l'habilitation indirecte, ou qui l'englobe. Typiquement, cette disposition directement habilitante prend la forme d'une liste d'habilitations spéciales (voir 7.9). Dans ce cas, en effet, le pouvoir réglementaire spécial dont l'existence est présumée par l'habilitation indirecte est confirmé et précisé par la disposition directement attributive. La première fonctionne alors comme un renvoi implicite à la seconde. […]

87. Les auteurs sont ainsi du même avis : les habilitations indirectes laissent dans l'incertitude l'existence même d'un pouvoir réglementaire.

Issalys et Lemieux, supra note 14, para. 7.13, EYB2020PIA49.

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88. Authors Issalys and Lemieux expressly state that the doubt "can only be lifted [...] if the parent law also contains a directly enabling provision with a content corresponding to that envisaged in the indirect authorization, or that encompasses it" (emphasis added).

89. This is precisely what the legislator did in Article 106 for all indirect authorizations of the LSGEE, except for paragraph 4 of Article 42.

90. The failure to do so in this case means that, according to the authors' own terms, the very existence of the regulatory power remains doubtful and is not confirmed.

91. Authors Issalys and Lemieux mention a little further what could be described as a last resort in indirect authorization: they write that one could give effect to the indirect authorization even in the absence of a corresponding direct authorization—as is the case here—if the holder of the power referred to by the indirect authorization is "clearly identifiable"27.

92. However, this is not the case here.

93. First, the legislator did not specify in Article 42 the holder of the potential regulatory power referred to in paragraph 4.

94. We have also seen that this indirect authorization has not been confirmed in Article 106—or elsewhere in the LSGEE—which would have been another way to specify the holder of the power.

95. Indeed, nothing in the LSGEE "clearly" identifies the holder of the potential regulatory power of paragraph 4 of Article 42—recall that the very existence of this power is doubtful, as explained by the doctrine.

96. The Attorney General argues that we should somehow presume that the power in question must fall to the government and claims that any other possibility would be "unlikely"28.

27 Ibid.

28 Argumentation de l’appelant, para. 56, M.A., vol. 1, p. 17.

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97. With respect, the exercise to which the attorney general invites this Court consists of addressing a legislative deficiency through reasoning based on suppositions, however plausible they may be.

98. First, let us emphasize that there is nothing 'incoherent' at the hypothesis where the regulatory power to determine eligibility conditions for the reduced contribution is given to the minister and the regulatory power to determine exemption cases to the government. Each could exercise their regulatory power without difficulty.

99. It is quite usual for the power to regulate different aspects of the same issue to be distributed among different holders. To cite just another example, note the case of the Act respecting occupational health and safety, where the legislator entrusted the Commission for Standards, Equity, Health and Safety at Work with the regulatory power to 'determine the information that may be subject to an exemption request' under sections 62.7 and 62.8 of this law, while the government is given, among other things, the regulatory power to 'set the criteria for assessing such an exemption request.'

100. It quickly becomes apparent, in light of this example, how very risky it is to assume the role of the legislator in deciding who should be the holder of regulatory power over one aspect or another of a given subject.

101. It is rightfully so that the first instance judge pointed out that it is up to the legislator, not the court, to clearly identify the holder of regulatory power.

102. The history of the LSGEE regarding regulatory power related to the educational program clearly shows the real possibility of transferring power from one holder to another, another illustration that the distribution of regulatory powers is not self-evident and is subject to change. Let us recall that the power to adopt

29 Ibid., para. 57, M.A., vol. 1, p. 17.

30 RLRQ, c. S-2.1, M.I.A.I., vol. 5, p. 1709 et s.

31 Ibid., art. 223, 1st para., para. 21.6.1, M.I.A.I., vol. 5, p. 1710 and 1712.

32 Ibid., art. 223.1, para. 2, M.I.A.I., vol. 5, p. 1713.

33 Judgment of the Superior Court, para. 34, M.A., vol. 1, p. 30.

Respondent's Argumentation Grounds

regulations regarding the elements and services that must be included in the educational program of a child care service provider was initially entrusted to the minister34, but was subsequently transferred to the government, which was otherwise entrusted with all regulatory powers concerning the educational program35. Thus, regarding this last issue, the mere fact that all regulatory powers36 over a given matter are attributed to one holder does not mean that it is improbable that another holder could have been entrusted with these same powers or other related powers – the example of regulations concerning the educational program clearly demonstrates this.

103. Furthermore, it is important to understand here that when the legislator used indirect empowerment in the LSGEE, they clearly identified the holder of the regulatory power by confirming the indirect empowerment through a direct empowerment attributed to the government in section 106. However, this is precisely not the case in the – single – present case.

104. In sum, the holder of the potential regulatory power mentioned in paragraph 4 of section 42 is not 'clearly identifiable' and it is not up to the courts to speculate on their identity to remedy a legislator’s gap or error.

B. The LSGEE does not authorize the establishment by regulation of different categories of people with regard to eligibility for payment of the reduced contribution and is therefore discriminatory within the meaning of administrative law and consequently illegal

105. The power to make regulations does not allow the adoption of discriminatory provisions. As the Supreme Court wrote in the landmark decision on this issue, Arcade Amusements37 and reiterated in the more recent Spraytech decision38, 'there can only be discrimination if the enabling law expressly provides for it or if the discrimination is necessarily accessory to the exercise of the power delegated by the province' (emphasis in the original).

34 LSGEE, art. 107, para. 1 (now repealed), M.I.A.I., vol. 5, p. 1576.

35 Act to improve the educational quality and promote the harmonious development of educational childcare services, LQ 2017, c. 31, art. 2, M.I.A.I., vol. 5, p. 1681.

36 Cf. Appellant's Argumentation, para. 55, M.A., vol. 1, p. 17.

37 Montreal v. Arcade Amusements Inc., [1985] 1 RCS 368 ["Arcade Amusements"].

38 Spraytech, supra note 19.

Argument of the Respondent Grounds

106. This principle of administrative law prohibiting discriminatory regulations is not limited to cases of prohibition of discrimination under constitutional law.

107. The Attorney General argues that only 'unjust and arbitrary'39 discrimination is targeted by this principle.

108. However, the Supreme Court explicitly rejected this approach in the Arcade Amusements case. Indeed, the Court concluded that the prohibition of discriminatory regulations not authorized by the enabling legislation does not solely target cases where the discrimination is unreasonable. Thus, whether the categorization (or discrimination) established by the regulation is 'reasonable' or adopted in good faith is not relevant in the analysis of the discriminatory nature under administrative law40.

109. This position was notably reiterated in subsequent judgments Greenbaum41, Sharma42 – where the Court wrote that 'the overall reasonableness or rationality of the distinction is not in question'43 regarding whether the discrimination is authorized by the enabling law – and Spraytech44.

110. It should be noted that in Arcade Amusements, the Supreme Court notes, as an example of regulations invalidated in case law due to their discriminatory nature, 'the distinction, in terms of licensing, between residents and non-residents'45 (emphasis added). In one of the cases in this category cited by the Supreme Court, Jonas v. Gilbert46, the Court invalidated a regulation because of the discrimination it established in terms of licensing between residents and non-residents, whereas the enabling law did not grant the power to establish such a distinction.

39 Argument of the appellant, para. 64, M.A., vol. 1, p. 18.

40 Arcade Amusements, supra note 37, pp. 406 and 418.

41 R. v. Greenbaum, [1993] 1 SCR 674.

42 R. v. Sharma, [1993] 1 SCR 650.

43 Ibid., p. 668.

44 Spraytech, supra note 19, para. 28.

45 Arcade Amusements, supra note 37, p. 407.

46 (1881) 5 SCR 356.

Argumentation de l’intimée Les moyens

111. Besides the previously cited Supreme Court decisions, see, in particular, the cases of Quebec (Attorney General) v. Plantation de fruits Levy Inc.47; Laval (City) v. 9103-0445 Quebec Inc.48 as examples of regulations that have been deemed discriminatory.

112. Given the absence of an enabling provision in the LSGEE that would grant the government regulatory power to set eligibility conditions for reduced contribution payments, it follows that the LSGEE does not authorize or necessarily imply the establishment of distinctions between different categories of people.

113. Even if it were considered that article 3 of the RCR is authorized by an enabling provision granting the government regulatory power to set eligibility conditions for the reduced contribution—which is vehemently denied, as explained in the previous section—the LSGEE does not authorize the establishment by regulation of different categories of people with respect to eligibility for the reduced contribution as article 3 of the RCR does.

114. Once again, the examination of other enabling provisions of the LSGEE shows that this authorization was made in certain cases, in contrast to the case of eligibility conditions for the reduced contribution.

115. As an example of such authorizations, we note paragraph 2 of article 106, which clearly authorizes distinctions based on the "classes regarding the age of children received"; paragraph 3 of article 106, which clearly authorizes distinctions based on "the age class of the children"; paragraph 27 of article 106, which, by authorizing the government to determine "individuals other than the parent from whom the base contribution amount may be required," necessarily implies establishing distinctions between different categories of people (note that this paragraph is not at issue concerning art. 3 of the RCR, as this article concerns categories of people who are a parent); paragraph 28 of article 106, which clearly authorizes distinctions according to "the age class."

47 JE 89-1579.

48 2005 CanLII 58926 (QC CM).

Argumentation de l’intimée Les moyens

116. Thus, these paragraphs of Article 106 clearly show that the legislator has acknowledged the need to authorize the establishment of distinctions between categories of people so as not to violate the principles of administrative law applicable in matters of discriminatory regulation. However, it has not done so regarding the conditions of eligibility for the reduced contribution – which should not be surprising given the absence of an enabling provision.

117. Furthermore, discrimination is in no way 'necessarily ancillary' to the exercise of the delegated power to establish conditions of eligibility for the reduced contribution – if such a power existed.

118. Indeed, one can well imagine – and this is actually precisely what Articles 15 to 18 of the RCR aim for – that eligibility for the reduced contribution could depend on a parent having submitted a request for this purpose, used the prescribed form, and provided the required information and documents. No distinction between categories of people is 'necessarily' required for the concept of eligibility for the reduced contribution to be implemented.

119. Given the absence of legislative authorization, whether express or by necessary implication, in the enabling law of any power to adopt a discriminatory regulatory provision concerning conditions of eligibility for the reduced contribution, Article 3 of the RCR is discriminatory within the meaning of administrative law and is therefore illegal.

Argumentation of the Respondent The Conclusions

PART IV – THE CONCLUSIONS

For all these reasons, the respondent requests this honorable Court to:

REJECT the main appeal;

CONFIRM the judgment of the Superior Court regarding the conclusions stated in paragraphs 82 and 83;

ALL with legal costs both before the Superior Court and this Court.

Montreal, November 29, 2022

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MMGC

(M■ Sibel Ataogul)

(M■ Guillaume Grenier)

Attorneys for the Respondent / Incidental Appellant

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Respondent's Argument Sources

PART V – SOURCES

Case Law Paragraph(s)

Doctrine

Argumentation of the Incidental Appellant The Facts

TITLE II – ON THE INCIDENTAL APPEAL

PART I – THE FACTS

120. The respondent/incidental appellant (hereinafter referred to as "the incidental appellant") refers to the review of facts and the presentation of the legal and regulatory framework contained in the argumentation concerning the main appeal.

The judgment of first instance (section on discrimination prohibited by section 15 of the Canadian Charter)

121. The judge of first instance rejected the argument of the incidental appellant that the exclusion of asylum seekers residing in Quebec and holding a work permit, resulting from section 3 of the RCR, infringes the right to equality guaranteed by section 15 of the Canadian Charter.

122. The judge concludes that there is no distinction based on the analogous ground of citizenship because some of the categories of persons appearing in section 3 of the RCR are not citizens49.

123. Regarding the ground of immigration status proposed by the incidental appellant as an analogous ground, the judge of first instance seems to dismiss it without saying so explicitly, stating that "the migration status is temporary whereas this is not the case for religion"50.

124. Regarding the discriminatory distinction based on the enumerated ground of sex, the incidental appellant understands from the reasons of the judge of first instance that he concludes there is no distinction based on sex because "nothing allows determining in what proportion men and women asylum seekers would bear the additional childcare costs"51.

49 Judgment of the Superior Court, para. 46, M.A., vol. 1, p. 32.

50 Ibid., para. 50, M.A., vol. 1, p. 32.

51 Ibid., para. 44, M.A., vol. 1, p. 31.

Argumentation de l’appelante incidente Les questions en litige

PARTIE II – LES QUESTIONS EN LITIGE

125. L’intimée estime que l’appel incident soulève les questions suivantes :

a) Le juge de première instance pouvait-il se pencher sur la constitutionnalité de l’article 3 du RCR même s’il parvenait à la conclusion que celui-ci est ultra vires en raison de l’absence d’habilitation législative valide?

b) Le juge de première instance a-t-il erré en concluant que l’article 3 du RCR n’a pas d’effet négatif disproportionné sur les femmes?

c) Le juge de première instance a-t-il erré en concluant que l’article 3 du RCR n’établit pas de distinction discriminatoire sur la base de la citoyenneté?

d) Le juge de première instance a-t-il erré en concluant que le statut d’immigration n’est pas un motif analogue prohibé de discrimination et donc que l’article 3 du RCR n’établit pas de distinction discriminatoire sur cette base?

e) L’appelant a-t-il fait la démonstration que l’atteinte portée à l’article 15 de la Charte canadienne est justifiée en vertu de l’article premier de celle-ci?

f) Quelle est la réparation constitutionnelle appropriée à l’atteinte que porte l’article 3 du RCR à l’article 15 de la Charte canadienne?

PARTIE III – LES MOYENS

A. Le juge de première instance pouvait se pencher sur la constitutionnalité de l’article 3 du RCR même s’il parvenait à la conclusion que celui-ci est ultra vires en raison de l’absence d’habilitation législative valide

126. Devant la Cour supérieure, le procureur général a plaidé que si le tribunal accueillait le moyen de l’appelante incidente portant sur l’absence d’habilitation législative valide pour adopter l’article 3 du RCR, il devrait s’abstenir d’examiner et de trancher les arguments constitutionnels.

127. The trial judge rejected this proposal, considering it important in the circumstances to decide the constitutional aspects – despite dismissing them.

128. In the event that the Attorney General maintains this argument in the incidental appeal, the incidental appellant argues that the trial judge possessed all the discretion required to decide to address the constitutional questions and that there is no reason to interfere on appeal with the exercise of this judicial discretion.

129. It is true that courts sometimes show a certain judicial restraint by declining to address a constitutional question when it is possible to completely dispose of the case on another basis.

130. It is also equally true that "[i]f a court deems it desirable for reasons of public interest to rule on a constitutional question and if this question has been fully debated, it may obviously do so."

131. In the book Constitutional Law of Canada, authors Hogg and Wright present the question in these terms: "If a constitutional issue has in fact been fully argued on the basis of an adequate factual record, and if the issue is likely to recur, there is much to be said for deciding the issue then and there, even if the case could be disposed of on a non-constitutional or narrower constitutional basis. A decision takes advantage of argument and evidence that would otherwise be wasted, in the sense that fresh argument and fresh evidence would be needed in a later case where the issue recurred. And a decision settles the issue, providing certainty and rendering relitigation unnecessary. Therefore, in the appropriate case, a court is not to be faulted for basing its decision on reasons that are more expansive than are strictly required to give judgment."

132. In the case of Guindon v. Canada, the majority judges of the Supreme Court concluded that it was appropriate for the Court to decide the constitutional question concerning the application of section 11 of the Canadian Charter in the context of a tax-related proceeding even though this question had not been the subject of a constitutional question notice before the lower courts.

52 Henri Brun, Guy Tremblay and Eugénie Brouillet, Constitutional Law, 6th ed., Cowansville, Yvon Blais, 2014, para. IV.30, EYB2014DCO22.

53 Peter W. Hogg and Wade Wright, Constitutional Law of Canada, 5th ed., Toronto, Thomson Reuters, 2022, para. 59.11

54 2015 SCC 41.

Argumentation de l’appelante incidente Les moyens

133. The majority bases its position on considerations that are equally applicable to the current issue. It holds as considerations justifying the exercise of discretionary power to decide the constitutional question the importance for the public that the question be resolved, the absence of prejudice for the attorneys general—particularly the fact of not having "been deprived of the opportunity to produce evidence"55 and the opportunity they were given to express themselves "on the merits of the constitutional argument"56—the fact that the lower courts considered the constitutional question and "[t]he extent of judicial resource wastage that would result from the Court's refusal to rule"57 on the constitutional issue.

134. In the present case, all these considerations argue in favor of resolving the constitutional question even in the scenario where it is concluded that Article 3 of the RCR is ultra vires due to the absence of valid legislative authorization.

135. First, the constitutional issues in question have been part of the claim since the very beginning of the case.

136. The attorney general was fully informed of the constitutional issues from the start. He was able to make all the representations he deemed appropriate on these issues and present any evidence he considered useful before the Superior Court.

137. The question of the constitutional validity of eligibility for reduced contributions is an important issue that it is appropriate to decide when it is presented before the courts, with a party having standing, a suitable factual basis, complete representations from the parties on matters of law, and a reasoned judgment—even if it is somewhat lacking from the standpoint of the appellant on record—in the first instance.

138. Moreover, deciding the case solely based on the absence of legislative authority, if this argument is upheld on appeal, poses a substantial risk that the judicial debate will have to be resumed. Indeed, the vice of the lack of valid legislative authorization is

55 Ibid., para. 35.

56 Ibid.

57 Ibid., para. 36.

susceptible d’être corrigé de façon relativement aisée par le législateur, qui, si tel était son désir, pourrait ajouter à la LSGEE une habilitation législative valide. La constitutionnalité de l’exclusion des personnes demandant l’asile, séjournant au Québec et titulaires d’un permis de travail du droit à la contribution réduite demeurerait entière, et le débat judiciaire devrait être repris depuis le début. Cela représenterait un important gaspillage des ressources judiciaires déjà déployées dans le cadre du présent dossier.

139. Pour tous ces motifs, il convient de trancher les questions constitutionnelles faisant l’objet du présent appel incident même si le moyen relatif à l’absence d’habilitation législative de l’article 3 du RCR était maintenu en appel.

Note préliminaire à l’analyse portant sur la discrimination

140. Les moyens relatifs à la discrimination dans le présent dossier font valoir que le bénéfice du paiement d’une contribution réduite pour avoir accès à des services de garde subventionnés est nié de façon discriminatoire à certaines catégories de personnes.

141. Ce type d’obligation découlant du droit à l’égalité – à distinguer d’une obligation positive pour l’État de créer de nouveaux régimes ou bénéfices – a été bien reconnu par la jurisprudence de la Cour suprême, qui en a notamment rappelé les contours dans l’arrêt Eldridge :

58 R. c. Sharma, 2022 CSC 39 [« Sharma »], para. 63; Eldridge c. Colombie-Britannique (Procureur général), [1997] 3 RCS 624 [« Eldridge »], para. 73.

59 Eldridge, supra note 58, para. 73. Voir aussi Québec (Procureure générale) c. Alliance du personnel professionnel et technique de la santé et des services sociaux, 2018 CSC 17, para. 42.

37

Argument of the Incidental Appellant The Means

B. The trial judge erred in concluding that article 3 of the RCR does not have a disproportional negative effect on women

i) Discrimination resulting from adverse effect and discrimination against sub-groups

142. From the early days of jurisprudence on article 15 of the Canadian Charter, since at least 1985, in the case Ontario Human Rights Commission v. Simpsons-Sears, the Supreme Court and other courts have recognized that this provision prohibits both direct discrimination and indirect discrimination—also known as adverse effect discrimination.

143. Thus, a provision will be discriminatory if it is "seemingly neutral [but] has a disproportionate impact on members of groups protected against discrimination based on an enumerated or analogous ground".

144. Article 3 of the RCR does not directly target women—it is at first glance neutral regarding whether parents are men or women—and thus does not establish direct discrimination based on sex.

145. However, this article, by excluding asylum seekers, has a disproportionate negative impact on women, making it discriminatory due to adverse effect.

146. Women—and particularly women seeking asylum—disproportionately bear, alone or in partnerships, the obligations related to childcare and nurturing.

147. The deprivation resulting from article 3 of the RCR constitutes an obstacle to integration into the labor market, to learning French, and more broadly to integration into Quebec society, creating a disproportionate barrier for women—and particularly women seeking asylum.

60 [1985] 2 SCR 536.

61 Fraser v. Canada (Attorney General), 2020 SCC 28 [“Fraser”], para. 30.

Argument of the Incidental Appellant The Means

148. At this stage, we emphasize the fact that discrimination can exist – it often presents itself in this manner – even if a measure only impacts a portion of a group associated with a prohibited ground or affects a subgroup.

149. In the judgment Symes v. Canada, on which we will return below, the Supreme Court wrote the following:

The appellant belongs to a specific subgroup of women, that of married women entrepreneurs. It is important to understand that this is the aspect on which she focused her evidence.

[...]

In another context, a different subgroup of women, presenting different evidence related to sec. 63, could well succeed in demonstrating the adverse effects required by sec. 15(1). For example, although I do not wish to express a view on the subject, I notice that no effort was made in this case to highlight the situation of single mothers.

My review of jurisprudence clearly shows that an adverse effect suffered by a subgroup of women can still constitute discrimination: Brooks v. Canada Safeway Ltd., aforementioned; Janzen v. Platy Enterprises Ltd., [1989] 1 S.C.R. 1252 [...]

[Emphasis added.]

150. The Supreme Court reiterated this same notion in the key judgment on discrimination from adverse effect in Fraser v. Canada (Attorney General):

[72] Third, plaintiffs do not need to show that the criteria, characteristics, or other factors used in the challenged law affect all members of a protected group in the same way. Our Court has long considered that the fact "[t]hat discrimination is only partial does not change its nature" (Brooks v. Canada Safeway Ltd., [1989] 1 S.C.R. 1219, p. 1248, citing James MacPherson, "Sex Discrimination in Canada: Taking Stock at the Start of a New Decade" (1980), 1 C.H.R.R. C/7, p. C/11). In Brooks, the Court held that the regime established by a company denying benefits to employees during their pregnancy constituted sex-based discrimination. The employer had argued

62 [1993] 4 S.C.R. 695 [“Symes”].

63 Ibid., pp. 765-766.

64 Ibid., p. 766.

65 Ibid., p. 769.

that the scheme did not deny benefits to 'women,' but only to 'pregnant women' (p. 1248, citing MacPherson, p. C/11). Speaking on behalf of the Court, Chief Justice Dickson explained that 'partially discriminatory' practices are no less discriminatory than those that disadvantage all members of a protected group (p. 1247-1248).

[73] The Court reiterated this principle in Janzen v. Platy Enterprises Ltd., [1989] 1 S.C.R. 1252, where it concluded that the sexual harassment experienced by two female employees constituted sex-based discrimination. It rejected the employer’s argument that there was no sex-based discrimination because some of the store's employees had been sexually harassed. Chief Justice Dickson reiterated the approach to partial discrimination that he had previously set out in Brooks:

27 If it were necessary, to find discrimination, for all members of the affected group to be treated identically, legislative protection against discrimination would have little or no value. In reality, a discriminatory measure is rarely expressed so clearly that it applies identically to all members of the target group. In almost all cases of discrimination, the discriminatory measure includes various elements such that some members of the concerned group are not affected, at least directly, by the discriminatory measure. Refusing to acknowledge discrimination in the circumstances of this appeal amounts to denying the existence of discrimination whenever discriminatory practices do not affect the entire target group. This is to assert, for example, that an employer who only hires a woman if she has twice the qualifications of a man is not guilty of sexual discrimination if, despite this policy, he nevertheless hires a few women.66

[Italics in original; emphasis added.]

151. In this case, the subgroup of women targeted is that of women seeking asylum.

152. In the recent Supreme Court judgment R. v. Sharma, where the majority judges provide certain methodological clarifications on discrimination following an adverse effect while taking care to emphasize that they were not changing the applicable equality rights criterion67 nor repudiating or changing the

66 Fraser, supra note 61, para. 72-73. See also Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur, 2003 SCC 54, para. 76-80.

67 Sharma, supra note 58, para. 33.

principles outlined in the Fraser ruling, it is said of the first step of the article 15 criterion, in a context of discrimination due to adverse effect, that it "consists of asking whether the challenged law has created a disproportionate effect on the claimant group for a protected ground or contributed to this effect" (italics in original).

153. In this case, the question is whether the exclusion of asylum seekers resulting from article 3 of the RCR creates or contributes to a disproportionate effect on the claimant group – in this case, in the context of this argument, women asylum seekers – for a protected ground (gender, in this instance).

154. The answer to this question is yes, and it can be reached by two possible paths.

155. One can first simply observe the disproportionate effect of the exclusion resulting from article 3 of the RCR on women asylum seekers. We will examine the evidence for this below. In this path, the disproportionate effect is directly examined within the concerned subgroup of women.

156. Alternatively – or cumulatively –, one can examine the evidence showing that the lack of access to subsidized childcare services (which results from the denial of the benefit of the reduced contribution) has a disproportionate effect on women, note that article 3 of the RCR deprives all asylum seekers of such access, including all women who seek asylum, and draw the conclusion that follows from these two facts, namely that article 3 of the RCR has a disproportionate effect on women. In this path, the interest is in the disproportionate effect of denying the benefit within the group of women as a whole, and then it is noted that the subgroup of women asylum seekers concretely suffers this disproportionate effect due to article 3 of the RCR.

ii) The Symes Decision

157. Before examining the question of disproportionate effect, it is appropriate to say a few words about the Symes decision, on which the Attorney General heavily relied in the first

Ibid., para. 28-30, 37, 38, 41, 42, 46-49, 52-55, 71.

Ibid., para. 31.

instance et qui constitue en définitive la raison pour laquelle le juge de première instance a rejeté l’allégation de discrimination fondée sur le sexe, en affirmant que « rien ne permet de déterminer dans quelle proportion l’homme et la femme demandeus -esses d’asile assumeraient les frais supplémentaires de garde de leurs enfants ».

158. Le juge de première instance a commis une erreur de droit en traitant l’affaire Symes comme un précédent applicable, pertinent et exhaustif pour l’analyse de la discrimination fondée sur le sexe alléguée par l’appelante incidente.

159. La réclamation dans l’affaire Symes était d’une nature fort différente du présent recours. Dans l’affaire Symes, la demanderesse alléguait qu’une disposition de la Loi de l’impôt sur le revenu retenue pour lui refuser des déductions à titre de dépense d’entreprise qu’elle avait demandées pour le salaire qu’elle avait versé à une gardienne pour s’occuper de ses enfants portait atteinte à l’article 15 de la Charte. Les arguments de la demanderesse fondés sur l’article 15 reposaient exclusivement sur le préjudice allégué pour un sous -groupe particulier de femmes, les femmes mariées entrepreneures, du fait que la déduction fiscale de frais de garde d’enfants à titre de dépense d’entreprise leur était refusée.

160. Il s’agissait donc d’une réclamation d’une nature bien différente du recours de l’appelante incidente.

161. La raison pour laquelle il était crucial dans cette affaire de « démontrer que les femmes paient une part disproportionnée des frais de garde d'enfants » est exposée de façon claire dans ce passage des motifs du juge Iacobucci, écrivant pour la majorité : C'est seulement si les femmes paient une part disproportionnée de ces frais que l'art. 63 peut avoir un effet quelconque, puisque le seul effet de cette disposition est de limiter le montant de la déduction fiscale à cette fin. [Soulignement ajouté.]

162. Dans le présent dossier, tant la disposition contestée que la nature des effets disproportionnés allégués sont bien différentes.

70 Judgment of the Superior Court, para. 44, M.A., vol. 1, p. 31.

71 Symes, supra note 62, p. 763.

72 Ibid.

42 Argumentation de l’appelante incidente Les moyens

163. What is alleged here is that the deprivation resulting from Article 3 of the RCR constitutes an obstacle to integration into the labor market, French education, and more broadly, integration into Quebec society, which is disproportionately affecting women. Thus, this is a legal action presented in completely different terms from those in Symes.

164. Starting from the premise that demonstrating disproportionate effects on women necessarily involved—and was reduced to—determining the respective share of men and women in paying childcare costs, the trial judge completely distorted the question he had to decide regarding sex-based discrimination.

165. Furthermore, although this point is not determinative regarding the impact of the Symes decision in the present case, since the above is enough to dispose of this question, this 1993 decision is not entirely consistent with contemporary jurisprudence on the right to equality.

166. Certainly, in the recent Sharma decision, the majority judges cite Symes to emphasize that in that decision, "the Court insisted on the importance of distinguishing between adverse effects 'caused in whole or in part' by the contested law and effects that 'exist independently of' the contested State provision or measure (p. 765)," while recalling, notably relying on Fraser, that in matters of discrimination due to adverse effects, it must be shown that "the contested law creates a disproportionate effect due to a distinction based on a protected ground or contributes to this effect."

167. However, this does not mean that proof of discrimination due to adverse effects cannot be shown when there are existing social obstacles in a given situation not created by the law, as the Court recalled in Fraser:

"[71] It is also unnecessary to ask whether the law has in itself the effect of creating fundamental social or physical obstacles that have made a rule, requirement, or particular criterion disadvantageous for the group. "

73 Sharma, supra note 58, para. 44.

74 Ibid., para. 45.

appellants' arguments. If we return to the Griggs case, this would mean asking whether Duke Power Co. was responsible for the low percentage of African Americans holding a high school diploma. Clearly, it was not the case — but this question was absolutely not relevant to decide whether a disproportionate effect had been established. It has always been necessary in the examination required by section 15(1) to pay attention to systemic disadvantages affecting members of protected groups, even if these disadvantages are not created by the State (Alliance, para. 41; Centrale, para. 32; Vriend, paras. 84 and 97; Eldridge, paras. 64-66; Eaton, para. 67; R. v. Turpin, [1989] 1 S.C.R. 1296, pp. 1331-1332).

168. In other words, it is necessary to distinguish what might be called pre-existing social barriers, which are not necessarily attributable to the State and need not be, and the disproportionate effect created by the contested provision on the protected group (or to which it contributes). To the extent that the Symes decision does not make this distinction, this aspect of the judgment must be set aside.

169. Let us recall that the very essence of the second prong of the section 15 test is to ask whether the challenged provision 'denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating the disadvantage suffered by the affected group'75 (emphasis added).

170. In sum, what is important, as the majority judges recall in Sharma, is that one cannot economize on demonstrating that the contested measure creates or contributes to a disproportionate effect. This does not at all imply that the contested measure is responsible for pre-existing disadvantages.

171. It should also be noted that '[t]he claimant does not have to show that the law or State measure in question was the sole or the principal cause of the disproportionate effect; it is enough to show that the law was a cause'76.

172. In the present case, the fact that the contested provision — section 3 of the RCR — creates an obstacle to labor market integration, French language acquisition, and more broadly to integration into Quebec society, which disproportionately affects women or contributes to this obstacle, is evident: if section 3 of the RCR did not exclude

75 Ibid., paras. 51-55.

76 Ibid., para. 49, subpara. b).

not asylum seekers, and in particular women seeking asylum, from eligibility for the reduced contribution, this barrier would be lifted.

iii) Article 3 of the RCR has a disproportionate effect on women and perpetuates their historical disadvantage

173. In the Fraser and Sharma decisions, the Supreme Court established the following guidelines regarding the evidence required to demonstrate that a provision has a disproportionate effect: no particular form of evidence is required; two main types of evidence can be useful to make this demonstration, namely evidence on the situation of the claimant group and evidence on the consequences of the law; ideally, evidence from both categories would be presented, but this is not absolute, because "[b]oth evidence of statistical disparity and evidence of disadvantage on the group as a whole can demonstrate a disproportionate effect, but neither is mandatory and their importance will vary depending on the case"; in some cases, the causal link between the contested measure and the disproportionate effect may be obvious and require no evidence; certain issues may be under-documented and in some aspects, there may not necessarily be statistics; "[t]o concretely fulfill the promise of par. 15(1), […] it should not be unduly difficult for the claimant to meet their burden of proof"; courts must remain "aware of the evidentiary obstacles and those related to the asymmetry of knowledge (compared to the State) faced by many claimants."

174. In addition to the facts related to her personal situation, the incidental appellant produced two expert reports, including that of Dr. Jill Hanley, entitled The labour implications of the exclusion of refugee claimants from Quebec’s subsidized childcare program, which is particularly relevant to the question of the disproportionate effect on women – and notably women seeking asylum – of the deprivation of access to

77 Fraser, supra note 61, para. 67.

78 Sharma, supra note 58, para. 49.

79 Ibid.

80 Ibid.; Fraser, supra note 61, para. 55-67.

81 M.A., vol. 1, pp. 138 et s.

services of subsidized daycare services resulting from ineligibility for reduced contributions as well as all sources supporting this expertise, namely, scientific articles supporting the conclusions of the expertise82.

175. Following a survey conducted with 325 people who requested asylum in Quebec, Dr. Hanley was able to identify the following data:

I. among the unemployed respondents, the majority (54.5%) had children under 6 years old;

II. of this group, 25% stated that the reason they were unemployed was the unaffordability of daycare services;

III. all these people (the 25% stating they were unemployed because they could not afford daycare services) were women83.

176. Dr. Hanley also reproduces certain testimonies collected from asylum-seeking women who, like the incidental appellant, are unable to work due to their ineligibility for subsidized daycare services. One of the interviewed women recounted the following:

I did not have a daycare, not even for my son because refugees don't get daycares, like the subsidized daycares. They no longer give it to refugees, so all refugee children are home. So most refugee moms cannot work... That's the only thing that makes me sad, because I feel – I don't know if this is right, but I feel useless. I can't work. I can't even help them, like, some things I want to do for them, I can't afford it because I don't have a job, you know? And I'm on welfare. I'm not used to being on welfare. I'm used to working hard to... make ends meet. I'm not used to sitting at home and someone giving me money to take care of my children... I'm grateful that I have welfare, but I wish I could work... Let me pay. I want to pay taxes. Let me give back to the society. I'm tired of sitting at home. I wish I could be a volunteer somewhere, but what's going to happen to the kids? There's nothing I can do right now, 'cause I don't have family here, I don't have daycare...84

82 M.I.A.I., vol. 1-4, p. 124 et s.

83 Jill Hanley, The labour implications of the exclusion of refugee claimants from Quebec's subsidized childcare program ["Hanley"], para. 44, M.I.A.I., vol. 1, p. 116.

84 Ibid., para. 50, M.I.A.I., vol. 1, p. 117-118.

177. Dr. Hanley also recounts the obstacles faced by women seeking asylum who are excluded from subsidized childcare services in terms of learning French and social integration.

178. In a scientific publication cited in Dr. Hanley's expertise titled Resettlement challenges faced by refugee claimant families in Montreal: lack of access to child care, the authors, who conducted interviews with 75 individuals in families with children who arrived in Quebec as asylum seekers, note the obstacles reported by the mothers:

One-third of all adult participants, representing 11 out of 29 mothers, were engaged in full-time child care. Mothers of young children explain that they are unable to access formal child care services because they cannot afford them and are not eligible for reduced fees because of their immigration status. According to them, this lack of child care services renders it more difficult to work outside home, to learn French and to run errands. Mothers report reduced family income, poor language acquisition and decreased opportunity for social integration. Several mothers describe symptoms of depression as a result of social isolation. Single mothers appear to be the most affected.

179. Furthermore, Dr. Hanley's expertise and the supporting sources establish the disproportionately negative effect on women as a general group due to the deprivation of access to subsidized childcare services.

180. She recalls that women disproportionately assume the responsibilities related to the care and nurturing of children, noting among other things that women in heterosexual couples are substantially more likely to decide that the mother will stay home to take care of the children if the cost or availability of childcare services is an obstacle to employment.

181. She notes the high degree of consensus in the scientific literature that "access to affordable childcare increases women’s (i.e. mothers’) participation in the

85 Ibid., para. 55-57, M.I.A.I., vol. 1, p. 119-120.

86 Gillian Morantz, Cécile Rousseau, Anna Banerji, Carolina Martin and Jody Heymann, Resettlement challenges faced by refugee claimant families in Montreal: lack of access to child care, Child and Family Social Work 2013, 18, pp. 318-328 ["Morantz et al."], M.I.A.I., vol. 4, p. 1322-1332.

87 Ibid., p. 322, M.I.A.I., vol. 4, p. 1326.

88 Hanley, supra note 83, para. 23-29, M.I.A.I., vol. 1, p. 108-112.

89 Ibid., para. 25, M.I.A.I., vol. 1, p. 110-11.

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182. She also notes that wage disparities that continue to disadvantage women may mean that access to employment does little to improve the financial situation of women, or even worsens it, in the absence of subsidized childcare services.

183. These conclusions are all supported by several scientific publications, attached to support the expertise.

184. We also note in passing that asylum seekers are not eligible for advance payments of the childcare expense tax credit (which allows for obtaining an amount in multiple payments throughout the year rather than after filing a tax return).

185. In summary, the evidence on record clearly establishes that the lack of access to subsidized childcare services – here in the form of reduced contribution eligibility – has a disproportionate effect on the subgroup of asylum-seeking women as well as on women as a general group.

186. Article 3 of the RCR therefore creates a disproportionate effect on women, whether one follows one or the other of the two paths to demonstrate this disproportionate effect mentioned above. The first step of the article 15 criterion is thus satisfied.

187. The second step of the article 15 criterion is to determine whether the contested measure "imposes a burden or denies a benefit in a way that reinforces, perpetuates, or exacerbates disadvantage."

188. It is evident that this aspect is also met in the present case.

189. The historical disadvantage experienced by women is highlighted by the evidence whose key elements are reported above.

90 Ibid., para. 24, M.I.A.I., vol. 1, p. 109-110.

91 Ibid., para. 27, M.I.A.I., vol. 1, p. 111.

92 Taxation Act, RLRQ, c. I-3, art. 1029.8.80.2, M.I.A.I., vol. 5, p. 1723.

93 Fraser, supra note 61, para. 27; Sharma, supra note 58, para. 28.

190. Women disproportionately assume obligations related to child care and nurturing.

191. This state of affairs results in less participation in the labor market than among men.

192. They also bear the brunt of ongoing wage disparities based on gender.

193. By denying asylum-seeking women the benefit of reduced contribution and hence access to subsidized childcare services, Article 3 of the RCR reinforces and perpetuates the historical disadvantage experienced by these women.

194. The distinction created by the exclusion resulting from Article 3 therefore constitutes discrimination due to an adverse effect based on gender.

C. The trial judge erred in concluding that Article 3 of the RCR does not establish a discriminatory distinction on the basis of citizenship

195. Citizenship is an analogous ground under Article 15 of the Canadian Charter recognized since the Andrews decision of the Supreme Court.

196. The trial judge concluded that Article 3 of the RCR does not establish a distinction based on the ground of citizenship because some of the categories of people appearing in Article 3 of the RCR are not citizens.

197. Asylum seekers all share the same characteristic of not holding Canadian citizenship.

198. The fact that Article 3 of the RCR does not disadvantage all non-citizens does not lead to the conclusion that there can be no discrimination based on citizenship.

199. Indeed, as explained in the previous section, it is well established that a measure can be discriminatory even if it only targets a part of a group.

200. In other words, it is frequently concluded that there is discrimination regarding a subgroup of a group associated with a prohibited ground of discrimination.

94 Andrews v. Law Society of British Columbia, [1989] 1 SCR 143 [“Andrews”].

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Pregnant women constitute discrimination based on sex. In the same way, and as we explained in the previous section, discrimination against the subgroup of women seeking asylum constitutes discrimination based on sex.

201. Here, discrimination against the subgroup of non-citizens constituted by asylum seekers is discrimination based on citizenship.

202. Let's recall that at the first stage of the analysis under Article 15, it is about demonstrating that the contested provision "creates, at first glance or by its effect, a distinction based on an enumerated or analogous ground."

203. Article 3 of the RCR excludes all members of the subgroup of non-citizen asylum seekers from eligibility for reduced contribution, solely based on their membership in this group.

204. This article therefore establishes a distinction based on the analogous ground of citizenship, as it deprives all members of the subgroup of non-citizen asylum seekers of the benefit of the reduced contribution.

205. The lack of citizenship is far from being a remote, indirect, or arbitrary consideration in the distinction made by Article 3, but rather has "a direct relation with their inability to benefit equally from services provided by the government," as was precisely the case for example with individuals with hearing impairments in the Eldridge case or with injured workers suffering from chronic pain in the Martin case.

206. The distinction is therefore based on a prohibited ground, so the first part of the Article 15 criterion is met.

207. As for the second part concerning the discriminatory nature of the distinction, we refer this Court to the following section of the brief, since the analysis is the same for arguments invoking the ground of citizenship and the ground of immigration status.

95 Fraser, supra note 61, para. 72.

96 Sharma, supra note 58, para. 28.

97 Eldridge, supra note 58, para. 76.

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D. Le juge de première instance a erré en concluant que le statut d'immigration n'est pas un motif analogue prohibé de discrimination et donc que l'article 3 du RCR n'établit pas de distinction discriminatoire sur cette base

i) Le statut d'immigration est un motif analogue visé par l'article 15

208. Without explicitly ruling on the issue, the trial judge seems to dismiss immigration status as an analogous prohibited ground of discrimination under section 15 of the Canadian Charter. In any case, the trial judge does not conduct any discrimination analysis related to this ground.

209. The judge writes that "migratory status is temporary while this is not the case for religion"98 and notes that some decisions have concluded that immigration status is not an analogous ground within the meaning of section 15 of the Charter.

210. In concluding this way, the judge erred in law, as he did not adhere to the guidelines set by the Supreme Court regarding the recognition of an analogous ground under section 15.

211. Let's immediately note that the jurisprudence on the question of recognizing immigration status as an analogous ground is divided.

212. While some decisions conclude that immigration status does not qualify as an analogous ground, other decisions have recognized it as an analogous ground.

213. In the Jaballah case99, the Federal Court concluded that the detention of the applicant without the possibility of judicial review of this constituted discrimination based on immigration status:

[80] There is another reference group, that of permanent residents detained under a security certificate who, according to section 83 of the IRPA, enjoy procedural rights that foreigners do not have. When a warrant is issued, the permanent resident subject to a security certificate issued by the ministers is subject to mandatory detention, but this detention continues subject to review by a judge within 48 hours after the start of detention, and it continues subject to additional periodic review at least once every six months thereafter. This review is not

98 Judgement of the Superior Court, para. 50, M.A., vol. 1, p. 32.

99 Canada (Citizenship and Immigration) v. Jaballah, 2006 FC 115.

offered to a foreign national detained under subsection 82(2) of the IRPA. Regarding admission to the bar of a province, nationality is considered a ground of discrimination analogous to those enumerated in subsection 15(1) (Andrews v. Law Society of B.C., [1989] 1 S.C.R. 143). In my view, treating a foreign national differently from another person admitted as a permanent resident, with only a limited right to remain in Canada, cannot be considered treatment that offers equality before the law and the right to the same benefit of the law.

In my opinion, detention without judicial review under subsection 82(2) leads to a loss of the right to equal protection and benefit of the law for a foreign national, purely because of their immigration status. This treatment constitutes discrimination based on a ground analogous to those enumerated in subsection 15(1) of the Charter, without any discernible reason, at least none of relevance to national security considerations, the purpose of detention under subsection 82(2) and section 83 of the IRPA.

[...]

[...]

ii) with regard to the circumstances of the current case, the prolonged detention of Mr. Jaballah under subsection 82(2) of the IRPA, as a foreign national, without the possibility of judicial review of this detention until a decision is made on the reasonableness of the ministers' certificate, leads to a deprivation of his right to equality before the law and his right to the same protection and benefit of the law, due to discrimination based on his immigration status, in violation of subsection 15(1) of the Charter, when Mr. Jaballah's situation is compared to that of a permanent resident detained similarly under a security certificate according to section 83 of the Act;

[Emphases added.]

The Ontario Court of Appeal also accepted immigration status as an analogous ground under section 15 of the Charter in the case R. v. Church of Scientology of Toronto, even though it concluded that there was no discrimination in the case before it.

In the case of Fraser v. Canada (Attorney General), decided before the Jaballah case, the Ontario Superior Court on a striking out motion determined that it was not "plain and obvious" that immigration status could not be an analogous ground under section 15 of the Charter.

100 1997 CanLII 16226 (ON CA), pp. 41-42.

101 2005 CanLII 47783 (ON SC).

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216. Furthermore, it should be noted that the decisions concluding that it is not an analogous ground all rely on the fact that immigration status is not an immutable characteristic – or, to use the words of the trial judge, a temporary characteristic.

217. However, the Supreme Court's jurisprudence has consistently emphasized "that a difference in treatment can be discriminatory even if it is based on choices made by the individual or the group affected."

218. Moreover, the Supreme Court's jurisprudence clearly states that the fact that a personal characteristic is not immutable or is temporary does not preclude its recognition as an analogous ground:

148 Among the qualifiers that judges have associated with analogous grounds, there is the theme of violation of a person's dignity and freedom when restrictions and disadvantages are imposed based on a stereotypical attribution of group characteristics rather than on an individual's abilities or merits or their particular circumstances. An indicator of an analogous ground could be the fact that the group has suffered a historical disadvantage, regardless of the contested distinction: Andrews, supra, at p. 152, Justice Wilson, and Turpin, supra, at pp. 1331 and 1332. Another could be that the group constitutes a "discrete and insular minority": Andrews, supra, at p. 152, Justice Wilson, and at p. 183, Justice McIntyre; Turpin, supra, at p. 1333. Another indicator could be when a distinction is based on a personal characteristic; as Justice McIntyre stated in Andrews, "distinctions based on personal characteristics attributed to an individual due to their association with a group are almost always considered discriminatory, whereas those based on an individual's merits and abilities are rarely so" (pp. 174 and 175). By extension, it has been argued that distinctions based on personal and immutable characteristics must be discriminatory within the meaning of section 15(1): Andrews, supra, at p. 195, Justice La Forest. A comparison between the raised ground and the enumerated grounds can also be useful, as can the recognition that legislators and jurists consider the ground in question to be discriminatory: see Egan v. Canada, supra, Justice Cory.

149 All these elements can be valid indicators in the sense that their presence may constitute evidence of the existence of an analogous ground. However, the opposite proposition is not valid – according to which a or

102 As an example: Toussaint v. Canada (Attorney General), 2011 FCA 213, para. 99; Almadhoun v. Canada, 2018 FCA 112, para. 28.

103 Fraser, supra note 61, para. 86.

104 Emphasis in the original.

all these elements must be present if one is to conclude the existence of an analogous ground. As Judge Wilson recognized in Turpin (at p. 1333), they are only 'an analytical tool' used to 'determine' a question. For example, one cannot limit analogous grounds to historically disadvantaged groups; to keep the Charter relevant for future generations, it must allow for the recognition of new grounds of discrimination. It is also not essential for the analogous ground to concern a discrete and isolated minority; this is confirmed by the inclusion of sex as an enumerated ground in paragraph 15(1). Furthermore, although discriminatory group markers often involve immutable characteristics, this is not necessarily always the case. For example, religion, an enumerated ground, is not immutable, nor is citizenship, recognized in the Andrews case, or province of residence, examined in the Turpin case. These elements can, among others, be indicators of analogous grounds; however, the unifying principle is more general: we must avoid stereotyped reasoning and the creation of legal distinctions that violate human dignity and freedom based on a preconceived notion of characteristics attributed to a group rather than on individual capabilities or merits or specific circumstances.105

[Italics in original, underlining added, except where indicated.] 219. The Court did not disavow this perspective in the Corbiere v. Canada (Minister of Indian and Northern Affairs)106 decision, which approvingly cites the aforementioned Miron v. Trudel case.

220. Furthermore, after the Corbiere decision, the Court has continued to recognize analogous grounds of citizenship and marital status, even though they do not constitute immutable characteristics. It is worth noting that in the cases of Nova Scotia (Attorney General) v. Walsh107 and Quebec (Attorney General) v. A108, both post-Corbiere, the Court continued to recognize marital status as an analogous ground, while some lower courts had refused to do so, specifically arguing that it was not an immutable characteristic, as the trial judge did in the present case.

105 Miron v. Trudel, [1995] 2 SCR 418, para. 148-149.

106 Corbiere v. Canada (Minister of Indian and Northern Affairs), [1999] 2 SCR 203.

107 2002 SCC 83.

108 2013 SCC 5.

54 Argument of the Incidental Appellant The Grounds

221. The Supreme Court similarly recognized that citizenship was an analogous ground within the meaning of section 15 of the Charter even though this status is not immutable. It recognized this notably by pointing out that members of this group constitute a "discrete and insular minority" targeted by the protection of section 15. The Court also noted the fact that members of this group are "relatively powerless politically" and that their "interests are likely to be compromised by legislative decisions."

222. These comments fully apply to immigration status. Those seeking asylum may actually be the most archetypal illustration imaginable of the category of analogous grounds depicted in the aforementioned Supreme Court jurisprudence: they belong to a discrete and insular minority, they are relatively powerless politically, their interests are likely to be compromised by government decisions, and overall, they are part of a group that has suffered historical disadvantage.

223. For these reasons, immigration status clearly falls within the category of analogous grounds protected by section 15 of the Canadian Charter, just like, for example, citizenship or marital status.

ii) Section 3 of the RCR establishes a discriminatory distinction based on immigration status

224. Section 3 of the RCR denies a benefit—the reduced contribution—to persons belonging to the category of asylum seekers. In other words, section 3 creates a distinction—the non-admissibility to the reduced contribution—which is based on the analogous ground of immigration status, since this section, as interpreted by the Court, specifically excludes persons whose immigration status is that of asylum seekers. When the immigration status of these persons changes so that they become refugees or protected persons within the meaning of the IRPA, they become eligible for

109 Andrews, supra note 94, pp. 152-153, 183.

110 Ibid., p. 195 (see also p. 152).

111 Ibid.

the reduced contribution. Thus, their exclusion is clearly based on their immigration status. The first part of the criterion of Article 15 is thus met, since the disputed provision creates a distinction based on an analogous ground.

225. At the second stage of the criterion of Article 15, it is a matter of determining whether the measure "imposes a burden or denies a benefit in a way that reinforces, perpetuates, or exacerbates disadvantage"112.

226. We will examine this question regarding the analogous grounds of citizenship and immigration status in combination, as the analysis is the same for this aspect in either case.

227. Asylum seekers constitute a historically disadvantaged group facing very significant challenges upon their arrival in the country. Some aspects of this reality – a matter of the tribunal's common knowledge – are summarized by the authors Morantz et al. as follows:

In addition to pre-migratory traumas, many refugee claimants face significant post-migratory challenges: poverty, discrimination, social isolation, language barriers, difficulty accessing work, limited healthcare and precarious immigration status (Renaud et al. 2003; Gerritsen et al. 2006; Momartin et al. 2006; ter Kuile et al. 2007; Rousseau et al. 2008; Toar et al. 2009).

[...]

While waiting for their refugee hearings, refugee claimants in Canada are eligible for minimal social assistance and are usually permitted to work and attend school. However, they encounter many barriers to employment: language barriers, discrimination and their temporary status (Renaud et al. 2003).

Refugee claimants with young children may also face the additional barrier of child care. Because refugee claimants usually arrive without a social support system, it may be difficult for them to access informal child care (Kindon & Broome 2009; Dolan & Sherlock 2010; Tyler 2010). Many experience social isolation and prolonged separation from family; their claim must be approved before they can apply for family reunification (Silove et al. 1998; Rousseau et al. 2001; Gerritsen et al. 2006; Momartin et al. 2006; Citizenship and Immigration Canada 2010)

112 Sharma, supra note 58, para. 28.

113 Morantz et al., supra note 86, p. 319, M.I.A.I., vol. 4, p. 1323.

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228. The expertise of Dr. Hanley and the supporting sources, including the previously mentioned article by Morantz et al., eloquently demonstrate that denying the benefit of subsidized childcare services perpetuates and reinforces the disadvantage experienced by asylum seekers.

229. In light of the scientific literature she reviewed and her investigations, Dr. Hanley draws the following conclusions regarding different effects of the exclusion of asylum seekers from subsidized childcare services:

We can be very confident that the exclusion of refugee claimants – a highly racialized population – from Quebec's subsidized childcare program results in the following effects:

A. Many parents – particularly mothers, and even more so single mothers – of young children are unable to access the labour market in the absence of affordable childcare.

B. Parents denied access to the labour market find themselves dependent on Last Resort Financial Assistance, at high cost both for the state and in terms of parents' financial and social wellbeing.

C. Other parents enter the work force while either paying an unreasonably high proportion of their income on childcare (introducing other budgetary problems) or relying on informal, unregulated childcare (introducing instability into their job tenure).

D. Refugee claimants who are unable to work while their children are preschool age (the claims process takes years to complete) face lifelong employment effects related to deskilling, earning potential and career trajectories that will follow many of them into their lives as Permanent Residents and, eventually, Canadian citizens.

E. Denial of subsidized childcare to refugee claimants creates social exclusion. Refugee claimants may feel unable to contribute socially while experiencing reinforced dependence on social assistance and many parents feel acutely that their children are being denied opportunities for development and social connection.

230. The incidental appellant emphasizes that the Attorney General did not provide any evidence aimed at refuting or countering this evidence.

114 Hanley, supra note 83, para. 58, M.I.A.I., vol. 1, p. 120.

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238. Moreover, the fact of having explicitly allowed for several years asylum seekers and holders of work permits to benefit from eligibility for a reduced contribution, as is notably evidenced by the email from August 2015 from the ministry118, makes it particularly difficult to demonstrate an urgent and real objective specifically related to the contested measure.

239. The rule set out by the first article of the Canadian Charter imposes on the party attempting to justify an infringement of a Charter-protected right a burden of reasoned demonstration (“[…] whose justification can be demonstrated […]”). It is not enough to satisfy this burden with unsubstantiated assertions.

240. The Attorney General must first demonstrate a rational connection between the contested measure and the urgent and real objective, which requires demonstrating “that the measure is neither ‘arbitrary, nor inequitable, nor based on irrational considerations’”119.

241. Regarding the criterion of minimal impairment, the Attorney General must demonstrate that “the measure in question restricts the right as little as is reasonably possible in order to achieve the legislative objective”120, which implies that the measure must be ‘carefully tailored’ to ensure that the infringement on rights does not exceed what is reasonably necessary”121.

242. Finally, at the last stage of the analysis concerning proportionality between the effects and objectives, it is necessary to ask “whether there is proportionality between the overall effects of the measure infringing the Charter and the legislative objectives”122, which implies conducting “the broadest possible evaluation of the advantages”123 of the contested provision or measure “for society, balancing them with the price to pay for the restrictions”124 imposed on the right guaranteed by the Charter.

118 Exhibit P-2, M.A., vol. 2, pp. 171-172.

119 Frank, supra note 117, para. 59.

120 Ibid., para. 66.

121 Ibid.

122 R. v. Brown, 2022 SCC 18, para. 143.

123 Ibid.

124 Ibid.

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243. Le procureur général ne s’est déchargé de son fardeau à l’égard d’aucun de ces critères.

244. Il est à tout événement difficile de voir comment le procureur général pourrait faire la démonstration d’une justification en vertu de l’article premier sur la base du « lien suffisant avec le Québec » qu’il a mise de l’avant vu le contenu de l’article 3 du RCR.

245. En effet, plusieurs des catégories établies à l’article 3 sont par nature des catégories de personnes séjournant au Québec de façon temporaire : c’est le cas notamment de la personne qui séjourne de façon temporaire au Québec pour y travailler en vertu d’un permis de travail d’une durée déterminée (paragraphe 3), de l’étudiant étranger titulaire d’un certificat d’acceptation délivré par le gouvernement québécois (paragraphe 4) et du titulaire d’un permis de séjour temporaire délivré en vertu de l’article 24 de la LIPR (paragraphe 7).

246. Ce dernier cas de figure est particulièrement frappant : le permis prévu à l’article 24 de la LIPR est octroyé dans des circonstances exceptionnelles pour permettre à un étranger d’être au Canada malgré une interdiction de territoire ou l’inobservation de la LIPR, est évidemment temporaire et est de surcroît révocable en tout temps.

247. Les personnes demandant l’asile au Canada souhaitent pour leur part s’établir au pays. De plus, le cadre du présent recours et la réparation sollicitée font en sorte de viser de façon circonscrite les personnes demandant l’asile qui séjournent au Québec et sont titulaires d’un permis de travail, ce qui ajoute à la connexion substantielle que ces personnes ont avec le Québec.

248. Le gouvernement ne peut du même souffle prétendre vouloir exclure les personnes demandant l’asile de l’admissibilité à la contribution réduite au motif qu’elles n’ont pas un lien suffisant avec le Québec et d’autre part rendre admissibles des personnes qui sont au Québec de façon nécessairement temporaire, voire dont le statut peut être révocable en tout temps.

125 Voir les articles 2 et 3 du Règlement sur l'immigration au Québec , RLRQ , c. I-0.2.1, r. 3, M.I.A.I., vol. 5, p. 1735.

126 LIPR , art. 24(1) , M.I.A.I., vol. 5 , p. 1731.

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F. La réparation constitutionnelle appropriée à l’atteinte que porte l’article 3 du RCR à l’article 15 de la Charte canadienne est la méthode de l’interprétation large

249. The most appropriate remedy in the present case to rectify the violations of the Charter consists in applying the method of broad interpretation (reading in).

250. The three conditions established by the jurisprudence127 for this method to be applied are met: a) broad interpretation would favor achieving the government's objective to provide affordable and quality educational childcare services and would be less intrusive on this objective than annulling Article 3; b) the choice of means used by the legislator to achieve this objective is not so indisputable that broad interpretation constitutes an unacceptable intrusion into the legislative domain; c) broad interpretation would not intrude so significantly on the financial decisions of the legislator that it would alter the nature of the subsidized childcare regime.

251. It is therefore appropriate to declare, as a remedy for the infringement caused by Article 3 of the RCR on the right to equality guaranteed by the Charter, the following remedy: Article 3 must henceforth be read as also covering the following case: "he is an asylum seeker within the meaning of the Immigration and Refugee Protection Act (SC 2001, c. 27), residing in Quebec and holding a work permit."

127 Schachter v. Canada, [1992] 2 SCR 679, pp. 695-696, 700-702, 707 and 711-715; Vriend v. Alberta, [1998] 1 SCR 493, para. 150, 153, 155 and 160-171.

PART IV – CONCLUSIONS

For all these reasons, the incidental appellant requests this honorable Court to:

ADMIT the incidental appeal;

OVERTURN the judgment at first instance regarding the rejection of the conclusions seeking to declare that the exclusion of persons requesting asylum residing in Quebec and holders of a work permit under Article 3 of the Regulation on reduced contribution, RLRQ, c. S-4.1.1, r. 1 violates Article 15 of the Canadian Charter of Rights and Freedoms and that this violation is not justified under the first article of the Charter;

AND, PROCEEDING TO RENDER THE JUDGMENT THAT SHOULD HAVE BEEN RENDERED:

DECLARE that the exclusion of persons requesting asylum residing in Quebec and holders of a work permit under Article 3 of the Regulation on reduced contribution, RLRQ, c. S-4.1.1, r. 1 violates Article 15 of the Canadian Charter of Rights and Freedoms and that this violation is not justified under the first article of the Charter;

DECLARE as remedy for this violation that Article 3 of the Regulation on reduced contribution, RLRQ, c. S-4.1.1, r. 1 must henceforth be read to include the following case: "it is an asylum seeker within the meaning of the Immigration and Refugee Protection Act (SC 2001, c. 27), resides in Quebec and holds a work permit;"

ISSUE any other order that the Court deems appropriate;

ALL with costs both before the Superior Court and on appeal.

Montreal, November 29, 2022

MMGC

(Me Sibel Ataogul)

(Me Guillaume Grenier)

Attorneys for the respondent / incidental appellant

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PARTIE V – LES SOURCES

Jurisprudence Paragraphe(s)

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Case Law (continued) Paragraph(s)

Doctrine
