File No. 41210

SUPREME COURT OF CANADA

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

BETWEEN:

ATTORNEY GENERAL OF QUEBEC
APPLICANT

(appellant /cross-respondent)

- and -

BIJOU CIBUABUA KANYINDA
RESPONDENT

(Respondent / cross-appellant)

- and -

COMMISSION ON HUMAN RIGHTS AND YOUTH RIGHTS
RESPONDENT

(intervenor / cross-appellant)

RESPONSE OF THE RESPONDENT

BIJOU CIBUABUA KANYINDA

(Rule 27 of the Rules of the Supreme Court of Canada)

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PART I – STATEMENT OF THE RESPONDENT'S POSITION

AND THE FACTS

1. The courts, including this Court1, have long recognized that women disproportionately shoulder the obligations related to the custody and care of children. They have also taken note of the disadvantages suffered by women in the labor market due to this inequality in the division of family responsibilities2.

2. The subsidized childcare program introduced in Quebec in 1997 aimed, among other things, to increase women's participation in the labor market; the scientific literature agrees that the program has succeeded in achieving this objective3.

3. In order for their children to attend a subsidized childcare service, parents must belong to one of the categories established in Article 3 of the Reduced Contribution Regulation4 (hereinafter, 'the RCR') adopted under the Early Childhood Educational Childcare Services Act5 (hereinafter, 'the ECEC Act').

4. Whereas previously it had been held that asylum-seeking parents who held a work permit were eligible for the reduced contribution and thus had access to subsidized childcare services, the government reversed its position in 2018.

5. Consequently, individuals – and in particular women – such as the respondent who sought asylum and obtained a work permit and who were seeking a place for their children in subsidized childcare services have encountered closed doors.

6. The respondent challenged Article 3 of the RCR. One of the bases of her appeal was that this article, by excluding asylum seekers, has a disproportionately negative effect on women, thereby constituting discrimination on the basis of sex as a result of its prejudicial effect.

1 Fraser v. Canada (Attorney General), 2020 SCC 28 ['Fraser'], para. 98-104.

2 Ibid.

3 Dr. Jill Hanley, The Labour Implications of the Exclusion of Refugee Claimants from Quebec’s Subsidized Childcare Program ['Hanley'], para. 22, 24, Memorandum of the Respondent Bijou Cibuabua Kanyinda (hereinafter 'M.I.'), pp. 32-34.

4 Reduced Contribution Regulation, RLRQ c S-4.1.1, r. 1.

5 Early Childhood Educational Childcare Services Act, RLRQ c S-4.1.1.

Respondent's Memorandum Statement of the Respondent's Position and the Facts

7. As part of her appeal, the respondent submitted what the Court of Appeal described as "compelling scientific evidence"6 to demonstrate the disproportionate effect on women seeking asylum of the exclusion resulting from section 3 of the Refugee Protection Regulations. Accordingly, Dr. Jill Hanley's expert report, supported by an extensive body of scientific literature, establishes the disproportionately negative effect on women — and particularly on women seeking asylum — linked to the deprivation of access to subsidized childcare services. In addition to the analyzed scientific literature, Dr. Hanley conducted a survey of 325 individuals who had applied for asylum in Quebec7. She also relied on a study conducted by a group of women researchers who also carried out interviews in Quebec with members of asylum-seeking families8.

8. By way of example, among the asylum seekers interviewed by Dr. Hanley who stated that they were unemployed because they were unable to pay for childcare services, all were women9.

9. The Court of Appeal, applying the principles established by this Court regarding section 15 of the Canadian Charter of Rights and Freedoms (hereinafter, the "Canadian Charter" or "the Charter"), concluded that section 3 of the Refugee Protection Regulations was unconstitutional due to sex□based discrimination resulting from its adverse effect.

THE CONTEXT

a) The situation of the respondent at the time of filing the application for leave to appeal

10. The respondent arrived in Quebec in October 2018. She is the mother of three children, who, at the time of filing the appeal, were 5, 4 and 2 years old. She had no family in Canada at that time.

11. Upon her arrival in Quebec, the respondent submitted an asylum claim and obtained a work permit.

12. The respondent approached several daycare centers to secure a spot for her children, but was denied access. Several of the daycare centers indicated as their reason for refusal that they were unable to provide subsidized childcare services to an individual with asylum seeker status.

6 Judgment of the Court of Appeal, para. 89, Application for Leave to Appeal (hereinafter, "A.L.A."), p. 49.

7 Hanley, supra note 3, para. 40, M.I., p. 39.

8 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, M.I., pp. 48-58.

9 Hanley, supra note 3, para. 44, M.I., p. 40.

Memorandum of the Respondent

Statement of the Respondent's Position and Facts

13. The respondent cannot defray the costs of unsubsidized childcare services10.

14. It should be noted in passing that asylum seekers are not eligible for advance payments of the childcare expense tax credit11, which exacerbates the prohibitive nature of unsubsidized services for these individuals.

15. In the absence of access to subsidized childcare services, the respondent is unable to work, even though she holds a work permit authorizing her to do so.

16. Due to the lengthy process for obtaining refugee status, the respondent is faced with the prospect of a long period without access to subsidized childcare services. This effectively prevents her from working and deprives her of the special measures provided under the subsidized childcare services regime to support children with special needs, as is the case with two of her children.

17. In January 2021, the respondent obtains refugee status.

b) The Legal and Regulatory Framework and the Ministry's Position

18. Article 2 of the LSGEE states "the right" of "every child" "to receive high-quality, personalized educational childcare services from birth until the child enters the school system"12. This right is exercised "taking into account the availability, organization and resources of providers of educational childcare services" and "in compliance with the rules provided by the [LSGEE] relating to access to educational childcare services for children"13. Article 2 further provides that the minister is obliged to ensure that the supply of childcare services meets demand14.

19. The LSGEE and the RCR adopted under it establish a framework governing the granting of subsidies for childcare services and the reduced contribution required from a parent to obtain subsidized childcare services.

10. The conclusions derived from the respondent's expert evidence take into account childcare arrangements other than subsidized services, which are, in reality, illusory for individuals in the respondent's situation. In any event, the Attorney General has not presented any evidence regarding the concrete factual circumstances of asylum-seeking parents concerning the services described in paragraph 11 of his memorandum, D.A.A., p. 63.

11. Income Tax Act, RLRQ c I-3, art. 1029.8.80.2.

12. LSGEE, art. 2, para. 1.

13. LSGEE, art. 2, para. 2.

14. LSGEE, art. 2, para. 3.

Memorandum of the respondent Statement of the respondent's position and the facts

20. Article 3 of the RCR, at the heart of the present file, enumerates the categories of persons who are eligible for the payment of the reduced contribution and, consequently, for subsidized child care services:

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

1° he is a Canadian citizen;

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

3° he stays in Quebec primarily to work there and holds a work permit issued in accordance with the Immigration and Refugee Protection Act, or is exempt from the obligation to hold such a permit pursuant to that Act;

4° he is a foreign student, holding a certificate of acceptance issued pursuant to the Quebec Immigration Act (Chapter I -0.2.1) and a recipient of a study grant from the Government of Quebec under the policy concerning foreign students in Quebec colleges and universities;

5° he is recognized by the competent Canadian tribunal as a refugee or a person in need of protection within the meaning of the Immigration and Refugee Protection Act and holds a selection certificate issued pursuant to Article 3.1 of the Quebec Immigration Act;

6° the Minister of Citizenship and Immigration granted him protection pursuant to 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 pursuant to Article 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 pursuant to the Immigration and Refugee Protection Act or the Immigration and Refugee Protection Regulations (DORS/02 -227) and holds the selection certificate referred to in paragraph 5.

21. Previously, many subsidized child care services accepted children of asylum-seeking parents. The Ministry of Family itself considered that: [...] the parent who resides in Quebec and who holds a work permit issued in accordance with the legislation and regulations on immigration and refugee protection is eligible for the reduced contribution.15

15 Exhibit P-2, M.I., p. 60.

Respondent's Memorandum Statement of the Respondent's Position and the Facts

22. In April 2018, the ministry reversed its position and indicated that asylum seekers holding a work permit are not eligible for payment of the reduced contribution16.

23. On May 31, 2019, the respondent filed an application for leave to appeal in judicial review consisting of three parts: a) an interpretative and declaratory component seeking to have it recognized that a person seeking asylum who resides in Quebec and holds a work permit is eligible for payment of the reduced contribution under the existing provisions of the LSGEE and the RCR; b) an administrative law component alleging that section 3 of the RCR is null and illegal, as it was adopted without valid legislative authorization or because it is discriminatory in terms of administrative law; c) a constitutional component alleging that the exclusion of asylum seekers residing in Quebec and holding a work permit is unconstitutional because it unjustifiably infringes the right to equality guaranteed by section 15 of the Canadian Charter and by section 10 of the Charter of Human Rights and Freedoms (hereinafter, "the Quebec Charter"), that it constitutes cruel and unusual treatment within the meaning of section 12 of the Canadian Charter, and that it constitutes an infringement on the right to personal dignity guaranteed by section 4 of the Quebec Charter.

24. The prohibited grounds of discrimination alleged in the application, with respect to the component based on section 15 of the Canadian Charter, are sex (discrimination by adverse effect) as well as immigration status and citizenship (direct discrimination).

25. The trial judge upheld the respondent's application on the basis of the absence of valid legislative authorization permitting the adoption of section 3 of the RCR, and dismissed the other components of the application.

26. The Attorney General appealed the decision of the Superior Court regarding the absence of valid legislative authorization, while the respondent filed a cross-appeal on the part of the judgment rejecting the sought conclusions regarding the fact that section 3 of the RCR infringes section 15 of the Canadian Charter without that infringement being justified under section one. The Human Rights and Youth Rights Commission, which intervened at first instance, also filed a cross-appeal concerning the interpretation of section 3 of the RCR and the discriminatory nature of that provision under the Quebec Charter.

16 Exhibit P-1, M.I., p. 59.

Memorandum of the Respondent

Presentation of the Respondent's Position and the Facts

27. The Court of Appeal accepts the principal appeal by the Attorney General concerning the absence of valid legislative authorization and accepts the respondent's incidental appeal regarding section 15 of the Canadian Charter as it relates to the ground of sex.

28. The Court of Appeal concludes that the exclusion in section 3 of the RCR of parents seeking asylum constitutes discrimination as a result of a deleterious effect based on sex that violates section 15 of the Canadian Charter. In light of this conclusion, it does not decide on the two other grounds of discrimination raised by the respondent. The Court concludes that the infringement of section 15 is not justified under section 1 of the Charter and that the appropriate constitutional remedy is a broad interpretation. The Court of Appeal thus declares that section 3(3) of the RCR "shall henceforth be read as rendering a parent residing in Quebec for the purposes of an asylum claim, while holding a work permit, eligible for reduced contribution payment"17.

THE RESPONDENT'S POSITION ON THE OPPORTUNITY TO GRANT LEAVE TO APPEAL

29. The Attorney General contends in his application for leave to appeal that the Court of Appeal's decision "leaves one to believe that paragraph 15(1) of the Canadian Charter confers a general guarantee of equality and obliges the State to correct all inequalities"18.

30. In reality, the Attorney General is thereby attempting to resurrect the argument to the same effect that was rejected in the Alliance decision19.

31. If some ambiguity may have existed in this Court's jurisprudence regarding the possibility that section 15 of the Charter could give rise to a positive obligation on the part of the State to create new regimes or benefits, it has always been exceedingly clear that the discriminatory exclusion of certain categories of persons from access to certain existing benefits and advantages violates section 15 of the Charter:

Our Court has repeatedly held that, once the State effectively grants an advantage, it is obliged to do so without discrimination;

See Tétreault-Gadoury v. Canada (Commission of Employment and Immigration), [1991] 2 S.C.R. 22; Haig v. Canada (Chief Electoral Officer), [1993] 2 S.C.R. 995, at pp. 1041 and 1042; Association of Indigenous Women of Canada v. Canada, [1994] 3 S.C.R. 627, at p. 655; and Miron, supra. In many cases, governments will have to take measures.

17 Judgment of the Court of Appeal, para. 9, D.A.A., p. 20.

18 Memorandum of the Applicant, para. 31, D.A.A., p. 68.

19 Québec (Attorney General) v. Alliance of Professional and Technical Staff in Health and Social Services, 2018 SCC 17, para. 42 [Alliance].

concrete measures, for example by extending the scope of a benefit in order to allow a category of persons who were previously excluded to benefit; see Miron, Tétreault-Gadoury, and Schachter v. Canada, [1992] 2 S.C.R. 679. […]20

32. It is not the Court of Appeal that proposes an interpretation of section 15 of the Charter that is out of step with the jurisprudence of this Court, but rather the Attorney General. While the jurisprudence of this Court consistently reminds us that the analysis under section 15 is focused on the effects of the challenged measure21, on its "concrete repercussions"22, the Attorney General completely excludes these from the analysis, thereby emptying the fundamental standard of substantive equality that lies at the heart of the guarantee of section 15.23

33. The present case is a classic example of discrimination resulting from an adverse effect.

34. This Court has repeatedly had the opportunity to consider the analytical framework of section 15 of the Charter in recent years, notably in the specific context of discrimination based on an adverse effect. For example, it is only since the Alliance decision in 2018, which is sometimes considered to present the contemporary formulation of the section 15 test, that this Court has examined and applied this provision of the Charter in the cases of Fraser24, Ontario v. G25, R. v. C.P.26, Sharma27 and Dickson28.

35. The decisions of this Court in the Fraser and Sharma cases, in particular, thoroughly examine the analytical framework and the principles applicable to discrimination based on an adverse effect. Most recently, in the Dickson decision, these two decisions have been applied by the judges of this Court.

20 Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624 ["Eldridge"], para. 73; see also: Alliance, supra note 19, para. 42; Vriend v. Alberta, [1998] 1 S.C.R. 493, para. 63-64; Fraser, supra note 1, para. 132-133.

21 Fraser, supra note 1, para. 42; Withler v. Canada (Attorney General), 2011 SCC 12 ["Withler"], para. 39.

22 Ontario (Attorney General) v. G, 2020 SCC 38 ["Ontario v. G"], para. 43.

23 Fraser, supra note 1, para. 42.

24 Fraser, supra note 1.

25 Ontario v. G, supra note 22.

26 R. v. C.P., 2021 SCC 19.

27 R. v. Sharma, 2022 SCC 39 ["Sharma"].

28 Dickson v. Vuntut Gwitchin First Nation, 2024 SCC 10.

Memorandum of the Respondent Statement of the Respondent's Position and Facts

36. As the Attorney General noted, this Court did not grant the application for leave to appeal in the Stadler29 case decided by the Manitoba Court of Appeal, nor did it repudiate that decision in the subsequent rulings, namely the five cases decided since 2020 mentioned above. It should be noted that, contrary to what the Attorney General asserts, the Court of Appeal did not find in Stadler that the contested rule was discriminatory solely on the basis of its disproportionate effect on persons with disabilities, "simply because persons with disabilities often experience economic hardship"30, but only after determining that this rule reinforced the historic disadvantage suffered by those persons31. The same is true in the present case: the Court of Appeal does not conclude that section 3 of the RCR is discriminatory merely on the basis of an acknowledgment of the historic disadvantage experienced by women, and in particular asylum□seeking women, but rather after establishing that the provision "reinforces, perpetuates and exacerbates the disadvantage experienced by them, as women, in the labour market"32.

37. It should be noted in passing that, contrary to what the Attorney General33 suggests, Sharma in no way disregarded consideration of the applicants' situation – here, the situation of women, and in particular asylum□seeking women – which exists independently of the law. This exercise remains inherent to the entire approach under section 15, as expressly indicated by Sharma34.

38. What Sharma clarifies, however, is that it is necessary to establish a link between the contested provision and the discriminatory effect, by demonstrating that the law created or contributed to the disproportionate effect on the group in question. This is precisely what the Court of Appeal examined: indeed, the exclusion resulting from section 3 of the RCR creates or contributes to the disproportionately deleterious effects on asylum□seeking women, as identified particularly in Dr. Hanley's expert report.

39. The outcome of the present case largely depends on the evidence adduced to establish the disproportionate effect of the contested measure on the protected group. In the present case, the evidence presented by the respondent was "compelling"35 and the deleterious effects on the members of the

29 Stadler v Director, St Boniface/St Vital, 2020 MBCA 46 [Stadler].

30 Applicant's Memorandum, para. 33, D.A.A., p. 68.

31 Stadler, supra note 29, para. 95.

32 Judgment of the Court of Appeal, para. 102, D.A.A., p. 54.

33 Applicant's Memorandum, para. 30, D.A.A., p. 67-68.

34 Sharma, supra note 27, para. 49.

35 Judgment of the Court of Appeal, para. 89, D.A.A., p. 49.

A group of women seeking asylum "have been clearly demonstrated by Ms. Kanyinda, with scientific evidence in support"36.

40. In other cases, on the contrary, the evidence was not sufficient. That was the case, for example, in the Sharma case and in the Yao case cited by the Attorney General. In Sharma, the majority emphasized that the respondent "had produced no statistical data"37 (italicized in the original), expert evidence or other evidence to demonstrate that the contested provisions had a disproportionate effect on the group of Indigenous offenders. In Yao, the Canadian Tax Court concluded that there was not sufficient evidence of the disproportionate effect38 (subject to the forthcoming decision of the Federal Court of Appeal).

41. The decisive role of the nature and quality of the evidence is readily apparent. However, this Court does not entertain cases in order to fundamentally reweigh the evidence.

PART II – Statement of the Issues in Dispute

42. In the context of the Attorney General's application for leave to appeal, the following constitutional questions are raised:

a. Does section 3 of the RCR infringe section 15 of the Canadian Charter of Rights and Freedoms on the prohibited ground of sex?

b. Has the Attorney General demonstrated that the infringement of section 15 is justified under section 1 of the Canadian Charter of Rights and Freedoms?

c. What is the appropriate constitutional remedy in the circumstances?

PART III – Presentation of the Arguments

A. Section 3 of the RCR infringes section 15 of the Canadian Charter of Rights and Freedoms on the prohibited ground of sex

i) The Attorney General's argument alleging that the Court of Appeal's analysis is confined to circumstances independent of the contested provision

36 Judgment of the Court of Appeal, para. 115, D.A.A., p. 57.

37 Sharma, supra note 27, para. 36; see also para. 74, 76.

38 Yao v. The King, 2024 TCC 19, para. 197-199.

43. The thesis of the Attorney General is that the Court of Appeal merely observed the preexisting disadvantage faced by women regarding access to the labour market, so that its analysis under section 15 of the Charter would be entirely divorced from the impugned measure, namely section 3 of the RCR. However, this is not at all the case.

44. Indeed, the evidence examined by the Court of Appeal testifies both to "the situation of the group of claimants"39 and to the "practical consequences"40 of the impugned provision, namely the two categories of non-mandatory evidentiary elements that are "particularly useful in proving that a law has a disproportionate effect on members of a protected group"41 as identified in the Fraser and Sharma decisions. The Court of Appeal thus notes the preexisting obstacles that women face in accessing the labour market due to the fact that they bear a disproportionate share of responsibilities related to child care and supervision. But the evidence examined by the Court also considers the "practical consequences" of the impugned provision, namely the exclusion of asylum claimants from subsidized childcare services. For example, the Court notably cites the following consequences of this exclusion resulting from section 3 of the RCR as identified in Dr. Hanley's expert report:

[…] 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 workforce 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.

39 Fraser, supra note 1, para. 56; Sharma, supra note 27, para. 49.

40 Fraser, supra note 1, para. 58; Sharma, supra note 27, para. 49.

41 Fraser, supra note 1, para. 56.

Memorandum of the Respondent Statement of Arguments

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.

[Underlinings added.]

45. The evidence examined by the Court of Appeal is by no means limited to the 'circumstances that exist independently of the provision'42. The entirety of the interview process with asylum seekers conducted by Dr. Hanley and by Drs. Morantz et al. further directly relates to the effects produced by the exclusion created by Article 3 of the RCR.

46. The Attorney General writes that Article 3 of the RCR does not guarantee the right to a place in childcare services or access to the labour market43. That is correct, but the constitutional challenge by the respondent does not at all claim a guaranteed right to a place or access to the labour market, but rather the removal of discriminatory obstacles, which is precisely the object of the substantive equality guarantee of Article 15.

47. The Attorney General completely dismisses the effects of Article 3 in framing the issue in terms that are far too restrictive, as he believes should be posed44. This is not consistent with the criterion of Article 15, which focuses on the effects of the measure.

48. Let us recall that it is a question of examining 'the real effect of the legislative measure on [the] situation'45 of the members of the group, the 'practical consequences of the law'46, and 'the significant concrete repercussions that the challenged law has on the applicant and on the protected group or groups to which he belongs in their actual situation, which includes historical or current social, political and legal disadvantages'47.

49. The Court of Appeal is thus perfectly in line with the teachings of this Court and faithful to the standard of substantive equality guaranteed by Article 15 by taking into account the effects of the exclusion of asylum seekers provided for in Article 3 of the RCR.

42 Memorandum of the Applicant, para. 45, D.A.A., p. 71.

43 Memorandum of the Applicant, para. 44, D.A.A., p. 70-71.

44 Memorandum of the Applicant, para. 46, 60, 64, D.A.A., p. 71, 74-75.

45 Fraser, supra note 1, para. 42; see also Withler, supra note 21, para. 39.

46 Fraser, supra note 1, para. 58; Sharma, supra note 27, para. 49.

47 Ontario v. G, supra note 22, para. 43.

50. Let us recall that at the first stage of the analysis under Article 15, the question is whether the contested measure 'creates, at first glance or by its effect, a distinction based on a stated or analogous reason'48 and that, in the case of discrimination resulting from a prejudicial effect, this exercise 'consists in asking whether the contested [measure] has created a disproportionate effect on the applicant group for a protected reason or has contributed to that effect.' (italics in the original)49.

51. The very essence of the concept of disproportionate effect is that the measure will not affect exclusively members of the invoked protected group, but also persons who do not belong to that group, whether to a lesser extent or in a mitigated manner.

52. In Fraser, this Court refers to the possibility of demonstrating a statistical disparity to prove the disproportionate effect, while emphasizing that it is not appropriate to establish a precise threshold50.

53. As early as the Symes decision51, this Court noted that discrimination by way of a prejudicial effect could exist in cases where a measure also has effects on persons who are not members of the protected group: [...] in a case requiring an analysis of prejudicial effects under section 63 of the Act, one might point out that a limit on the deduction for childcare expenses could have a negative impact on both men and women.52

54. The Attorney General appears to distinguish the Fraser case from the present case by heavily emphasizing the fact that the only persons who made use of the job-sharing program were women53. However, as indicated above, the criterion of Article 15 regarding discrimination by prejudicial effect is not one of exclusive effect, but rather one of disproportionate effect. Let us recall that, in any event, the disproportionate effect on women seeking asylum is massive here, as evidenced notably by the data collected during the investigation conducted by Dr. Hanley54.

48 Fraser, supra note 1, para. 27; Sharma, supra note 27, para. 28.

49 Sharma, supra note 27, para. 31.

50 Fraser, supra note 1, para. 59.

51 Symes v. Canada, [1993] 4 SCR 695.

52 Ibid., p. 770.

53 Applicant's Memorandum, paras. 50-51, 63, D.A.A., pp. 72, 75.

54 Supra para. 8.

55. Contrary to what the Attorney General55 asserts, the Court of Appeal engaged in a pertinent comparison pursuant to the applicable legal criterion. In matters of discrimination resulting from a prejudicial effect, the exercise of comparison involves demonstrating a disproportionate effect of the contested provision on the group members56. The Court of Appeal carries out such an examination by noting the evidence establishing the disproportionate effect on women seeking asylum from the exclusion provided for in Article 3 of the RCR.

56. The Attorney General argues that the Court of Appeal limited itself to noting an existing disadvantage for women, without carrying out the required comparison. The Attorney General further contends that the disadvantage should be taken into account solely at the second stage of the analysis57. This is incorrect.

57. First, while it is true that disadvantage is an important part of the second stage of the analysis, it is incorrect to say that it cannot be addressed within the framework of the first stage. Moreover, the term "disadvantaged" appearing in paragraph 99 of the Court of Appeal's decision reproduced by the Attorney General in his memorandum is in fact essentially based on a citation by the Court of Appeal from paragraph 103 of Fraser, which is located precisely in the portion of the analysis devoted to the first stage. This is not surprising, since the analysis of the applicants' situation, which is part of the first stage, focuses on "evidentiary elements [that] are intended to demonstrate that membership in the group of applicants is associated with certain characteristics that have disadvantaged members of the group"58 (underlining added).

58. That being the case, the Court of Appeal did not confine itself to the pre-existing disadvantage for women in its analysis of the disproportionate effect, this aspect being, moreover, relevant. The Court first takes into account the situation of the group – the disadvantage suffered by women with regard to access to the labor market due to their family responsibilities.

59. It also finds that the exclusion in Article 3 of the RCR has, in particular, the practical consequence of posing an obstacle to access to the labor market that women seeking asylum face in a disproportionate manner. The evidence also establishes that these latter

55. Applicant's Memorandum, paras. 52-53, D.A.A., p. 72.

56. Sharma, supra note 27, paras. 31, 41-42.

57. Applicant's Memorandum, para. 52 and footnote 60, D.A.A., p. 72.

58. Fraser, supra note 1, para. 57.

are subject in a disproportionate manner, due to the effects of Article 3, to obstacles regarding the promotion of French and, more broadly, regarding integration into Quebec society.

60. The exercise is clearly comparative: the Court finds that the measure has a disproportionate effect on women, and in particular on women seeking asylum, compared to men. The evidence shows that women are the most likely to be affected (due to the predominant role played by women in family responsibilities and the obstacles presented by the lack of access to child care services to enter the labor market) and that it is indeed they, and particularly women seeking asylum, who are most affected by the exclusion provided for in Article 3 of the RCR (as confirmed in particular by the investigations conducted by Drs. Hanley and Morantz et al.).

61. It is important to emphasize that the Court of Appeal concludes that there is sex-based discrimination because Article 3 of the RCR "has a disproportionately negative impact on women seeking asylum"59 (emphasis added). In other words, sex-based discrimination targets a subgroup of women.

62. It is well established in case law that discrimination against a subgroup can be demonstrated. For example, in the Symes decision, Justice Iacobucci, for the majority, wrote the following:

"In another context, a different subgroup of women, which might present different evidence regarding Art. 63, could well demonstrate the detrimental effects required by para. 15(1). […]60"

In my opinion, if it were possible in another case to establish that Art. 63 of the Act has a prejudicial effect on a certain group of women, then that article would be discriminatory on the basis of sex, according to the Brooks and Janzen decisions cited above. […]61

63. The Attorney General argues that the reasoning adopted by the Court of Appeal would lead to the same conclusion of sex-based discrimination if foreign students did not have the certificate and scholarship established as conditions under paragraph 4 of Article 3 of the RCR and were consequently ineligible for the reduced contribution.

59 Judgment of the Court of Appeal, para. 88, D.A.A., p. 49.

60 Symes, supra note 49, p. 766.

61 Ibid., p. 770.

Respondent's Memorandum Statement of Arguments

64. Without issuing a definitive ruling on the hypothetical case raised by the Attorney General, we nevertheless note that one cannot simply apply the Court of Appeal's conclusion to this hypothetical situation, since it is based on a finding of discrimination against the specific subgroup of women seeking asylum, which implies a situation very different from that of foreign students.

65. The Attorney General's argument that the respondent's attainment of refugee status would demonstrate the absence of sex-based discrimination is likewise without merit. By becoming a recognized refugee, the respondent was no longer subject to the exclusion of section 3 of the CCR. She then no longer belonged to the subgroup of women seeking asylum. The disproportionate effect of the exclusion on the women still in that subgroup has not been eliminated: these women continue to suffer it precisely because they still belong to that subgroup.

66. Moreover, note that the Duperron62 case cited by the Attorney General63 does not provide a useful perspective here, since the nature of that case and the evidence were markedly different. In that case, the complainant was treated differently from all the detainees, whether they were men or women. In short, there was no distinction in treatment between men and women, but merely an inappropriate treatment of the complainant. There was therefore no allegation in that case of a disproportionate effect on men – and, naturally, no evidence of such a disproportionate effect.

ii) The Attorney General's argument that the two stages of the analysis under article 15 were not distinctly fulfilled

67. The Attorney General alleges that the Court of Appeal did not adhere to the two distinct stages of the analysis under article 15.

68. First, let us emphasize that the combined reading of the Fraser and Sharma decisions – in which the majority indicates that it does not modify the criterion applicable to the right to equality64 nor repudiate or modify the principles set out in the Fraser decision65 – brings forth the following elements66: there are no impermeable partitions between the two stages; the two stages are distinct, but may

62. Attorney General of Quebec v. Commission for Human Rights and Youth Rights (Duperron), 2024 QCCA 12.

63. Claimant's memorandum, footnote 62, D.A.A., p. 73.

64. Sharma, supra note 27, para. 33.

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

66. Fraser, supra note 1, para. 82; Sharma, supra note 27, para. 30 and 194.

They may overlap, the important thing being to answer the distinct questions posed by each stage; the same pieces of evidence may be used to answer the questions in both stages.

69. Let us first note that the Attorney General omits an important part of the findings made in the first stage by retaining only those portions relating to the historical disadvantage of women, thereby excluding, among other things, everything contained in paragraphs 93 to 95 of the decision.

70. With regard to the second stage, the Court of Appeal clearly answers the distinct question it raises, indicating that the exclusion resulting from Article 3 reinforces, perpetuates, and accentuates the disadvantage suffered by women seeking asylum.

71. It is natural, in the present case, that the analysis of the second stage be concise and rely on evidence used in the first stage. Indeed, in this case, the overlap between the historical disadvantages suffered by women and the disproportionate effect of exclusion on women seeking asylum makes it immediately apparent that Article 3 of the RCR reinforces, perpetuates, and accentuates the disadvantage they suffer.

72. In short, the most important part of the work in this case was to establish the disproportionate effect of Article 3 of the RCR on women seeking asylum, which explains why the majority of the analysis is devoted to it.

73. The Attorney General also criticizes the Court of Appeal in this part of its argument for not "making the link with Article 3 of the Regulation"67. Let us first note that the issue of the link essentially falls within the first stage68. That being so, the evidence presented by the Court of Appeal clearly establishes the link between the exclusion resulting from Article 3 of the RCR and the disproportionate effect suffered by women seeking asylum, as explained above69. Thus, the exclusion provided for in Article 3 is clearly identified as one of the causes of the difficulties that women seeking asylum face in integrating into the labor market. Finally, let us emphasize that Sharma is explicit in stating that it "is enough to demonstrate that the law was a cause"70 (italics in the original), and not "the sole or the principal cause of the disproportionate effect"71.

67. Applicant's memorandum, para. 62, D.A.A., p. 75.

68. Sharma, supra note 27, para. 49.

69. Supra, para. 47-48.

70. Sharma, supra note 27, para. 49(b).

71. Ibid.

74. Contrary to what the Attorney General72 claims, the situation in the present case is analogous to the Fraser case: in the same way that the pre-existing disadvantage of women in that case was exacerbated by the deprivation of the right to redeem service linked to the job-sharing program, here, the pre-existing disadvantage of women seeking asylum is exacerbated by the exclusion resulting from section 3 of the RCR.

B. The Attorney General has not demonstrated that the infringement of section 15 is justified under section 1 of the Canadian Charter of Rights and Freedoms.

75. The Attorney General's appeal to dismiss the concrete situation of Quebec asylum seekers regarding the processing delays for their claims amounts to proposing a constitutional analysis divorced from reality. The analysis of the constitutionality of legislative or regulatory provisions should not be carried out in an abstract and theoretical framework; the provision must be considered as it produces its effects in practice.

76. Thus, the long processing delays for asylum claims, far from conferring immunity on the State or serving as a defense, exacerbate the harmful effects experienced by the members of the group at issue here.

77. Moreover, contrary to what the Attorney General73 claims, the Court of Appeal summarized all of its arguments with respect to section 1 of the Canadian Charter of Rights and Freedoms74.

78. Let us recall that the objective proposed by the Attorney General was to limit financial assistance to individuals with a 'sufficient tie' to Quebec. One might wonder whether this objective truly pertains to the specific infringing measure at issue here75 rather than a more general objective, but the Court of Appeal nevertheless accepted it while expressing reservations76.

79. As the Court of Appeal has pointed out, several of the categories of persons eligible under section 3 of the RCR are present in the territory of Quebec on a clearly temporary basis: this is the case for workers referred to in paragraph 3, for foreign students referred to in paragraph 4, and for persons holding a temporary residence permit issued under section 24 of the Act.

72 Memorandum of the Applicant, para. 63, D.A.A., p. 75.

73 Ibid., para. 70, D.A.A., p. 76.

74 Judgment of the Court of Appeal, para. 105 et seq., D.A.A., p. 55-57.

75 Frank v. Canada (Attorney General), 2019 SCC 1, para. 46.

76 Judgment of the Court of Appeal, para. 106, D.A.A., p. 55.

On immigration and refugee protection77. As the Court has acknowledged, this latter scenario is particularly striking: the permit provided for in article 24 of this Act is granted in exceptional circumstances to allow a foreign national to remain in Canada despite a territorial ban or non-compliance with this Act, is obviously temporary and is moreover revocable at any time.

80. The Attorney General does not explain in what way these persons would demonstrate a sufficient connection to Quebec, whereas asylum seekers would not. In particular, he provides no explanation regarding paragraph 7 of article 3.

81. Moreover, he provided no evidence before the lower courts nor did he present any argument to demonstrate that the beneficial effects of the exclusion outweighed the prejudicial effects suffered by the excluded persons.

C. The appropriate constitutional remedy in the circumstances is the method of broad interpretation

82. The Attorney General argues that, in the event of a finding of unconstitutionality, the appropriate remedy would have been the outright invalidation of article 3 of the RCR – accompanied by a ten□month suspension – rather than the broad interpretation adopted by the Court of Appeal78.

83. This position is surprising considering the – unfounded – criticism that the Attorney General directs at the Court of Appeal for having improperly encroached on the legislative domain by applying the technique of broad interpretation.

84. Indeed, the invalidation of article 3 would have been a remedy that encroached much further on the legislative domain. Rather than merely correcting the unconstitutional exclusion, this remedy would have completely annulled the concept of eligibility categories and extended access to subsidized child care services to everyone, including categories that remain uncovered to this day. Moreover, the Attorney General has provided absolutely no evidence that this is one of the "exceptionally rare cases in which it is appropriate to temporarily suspend the effect of a declaration of constitutional invalidity"79 on the basis of the very stringent criterion that applies in this matter80.

77 Immigration and Refugee Protection Act, LC 2001, c 27.

78 Applicant's Memorandum, para. 77, D.A.A., p. 78.

79 R. v. Albashir, 2021 SCC 48, para. 1.

80 Ontario v. G, supra note 22, para. 117.

Memorandum of the respondent Statement of the arguments

85. In the case at hand, the three conditions established by case law for the application of the broad interpretation are met81: a) the broad interpretation would further the achievement of the government's objective of providing affordable and high-quality educational child care services and would constitute a lesser encroachment on that objective than the invalidation of article 3; b) the choice of means employed by the legislator to achieve this objective is not sufficiently incontrovertible for the broad interpretation to constitute an unacceptable encroachment on the legislative domain; c) the broad interpretation would not involve an encroachment so significant on the legislature's financial decisions as to alter the nature of the subsidized child care services regime.

86. The Attorney General also criticizes the Court of Appeal's decision to extend access to subsidized child care services to all asylum seekers rather than solely to women82. However, not only is such a result not unusual in cases of discrimination resulting from a harmful effect, it is even expected.

87. By way of example, in Fraser, the remedy ordered was to declare that there had been a violation of the rights guaranteed under section 15(1) to full-time RCMP members who temporarily reduce their working hours under a job-sharing arrangement, due to these members' inability to buy back their full-time service period entitling them to a pension83.

88. If the position of the Attorney General were accepted, it would amount to criticizing this Court's decision in Fraser for granting a working condition not to women, but rather to all full-time RCMP members who temporarily reduce their working hours under a job-sharing arrangement.

89. In any case, as explained above, it is inherent in a measure that has a disproportionate effect on one group of people that it also has – albeit to a lesser extent – effects on other groups. Thus, the correction of this discriminatory measure will naturally also have effects on these other groups of people.

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

82 Applicant's memorandum, para. 3, D.A.A., p. 60.

83 Fraser, supra note 1, para. 138.

90. Finally, the Attorney General argues that the exclusion of asylum seekers results solely from paragraph 3(5) of the RCR, so that the broad interpretation applied by the Court of Appeal to paragraph 3(3) would be inappropriate.

91. In reality, the Court of Appeal does not state that asylum seekers are excluded by paragraph 5, but rather that neither paragraph 3 nor paragraph 5 applies to asylum seekers84. Their exclusion actually stems from article 3 as a whole85. Moreover, the Attorney General himself does not propose, as a subsidiary measure, the invalidation of only paragraph 3(5), but rather the invalidation of the entire article 3, because only the invalidation of the entire article would remedy the unconstitutional under-inclusion in the case of this remedial hypothesis.

92. The broad interpretation allows the unconstitutional exclusion to be remedied in the most narrowly tailored way possible. The remedy is also conceived in connection with the discrimination argument presented, which largely relies on the effects of the exclusion on integration into the labor market, hence the requirement concerning the work permit and the fact that it is modeled on paragraph 3. Moreover, the remedy sought essentially revives the interpretation of article 3 that the government had adopted prior to its 2018 U-turn. The government remains free to extend access to asylum seekers who do not hold a work permit if it so desires.

PART IV – ARGUMENTS ON COSTS

93. Considering the nature of the dispute, the parties involved and the very great disparity in their respective resources, with the respondent's means being extremely limited and those of the Attorney General not so, the respondent requests that costs be awarded to her if the application for leave to appeal is rejected and that no costs be awarded against her otherwise.

PART V – ORDERS REQUESTED

94. The respondent requests that the application for leave to appeal be dismissed, with costs.

84 Judgment of the Court of Appeal, para. 64-65, D.A.A., p. 42.

85 Ibid., para. 7, 60, 67.

Memorandum of the Respondent

Orders Requested

Montreal, May 10, 2024

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PART IE VI – TABLE OF SOURCES

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