SCC File No. 41210

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF QUÉBEC)

B E T W E E N:

ATTORNEY GENERAL OF QUÉBEC

APPELLANT
(Appellant / Respondent on Cross-Appeal)

- and –

BIJOU CIBUABUA KANYINDA

RESPONDENT
(Respondent / Appellant on Cross-Appeal)

- and -

COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE

RESPONDENT
(Mis-en-cause/ Appellant on Cross-Appeal)

- and –

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. The Attorney General of Alberta intervenes in this appeal to address the proper analytical approach to claims alleging a violation of s. 15(1) of the *Charter*.[1]

2. This Court has articulated the legal approach to s. 15(1) claims in various ways in the decades since the *Charter*'s adoption. In Alberta's submission, additional clarity can be brought to the first stage of the s. 15(1) framework by recognizing that the existing case law requires specific analytical connections between three constituent components: the impugned law, its alleged impact or effect, and the claimed protected ground.

3. A claimant must prove a link or nexus between each of these three constituent components. The connections are part of what makes state conduct discriminatory, and ensure the analytical framework remains grounded in the purpose and intent of s. 15(1).

4. As such, at the first stage of the s. 15(1) inquiry, a claimant must demonstrate that an impugned law (or state action) has **caused or contributed to** a differential adverse effect on a claimant or claimant group. This connection focuses s. 15(1) on constraining discriminatory state action, not imposing positive obligations on the state to rectify existing disparities in society that are disconnected from any law.

5. Further, a claimant must also demonstrate a link or nexus between the alleged adverse effect, and the claimed protected ground of discrimination. In particular, a claimant must show that any differential effect is **based on** a protected ground. Several implications flow from this requirement:

   (a) In cases alleging adverse effects discrimination, the key question is whether a facially neutral rule has the effect of placing members of a protected group at a disproportionate disadvantage because of their membership in that protected group. The disproportionate impact must still be linked to a protected ground.

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[1] *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 15(1) [***Charter***].

(b) A statistical disparity between the impact on a protected group as compared to others, without more, does not establish whether an impact is based on a protected characteristic – such a disparity tends to demonstrate correlation, but not causation. The assessment should be both qualitative and quantitative in nature, while recognizing that evidentiary requirements should be approached flexibly.

(c) The link between an adverse impact and the claimed protected ground is particularly important in cases where discrimination is alleged to arise from intersecting characteristics – one of which is protected by s. 15(1), and one of which is not. Intersectionality is an important contextual consideration, but should not become a back-door for finding discrimination on the basis of grounds that are not protected by s. 15(1).

6. Focusing on these aspects of the legal test can bring doctrinal clarity in a manner that is consistent with this Court's most recent pronouncements on the s. 15(1) analytical framework, including the principles identified in the recent decision in *Sharma*.[2] The law on s. 15(1) should be permitted to settle into a predictable and stable framework, to assist claimants and governments alike in achieving the promises of s. 15(1).

PART II – ISSUES

7. Alberta's submissions focus on the proper analytical framework applicable to s. 15(1) of the *Charter*. Alberta takes no position on the outcome of this appeal.

PART III – ARGUMENT

A. The purpose and intent of s. 15(1) of the *Charter* necessitates a connection between an impugned law, its impact, and the claimed protected ground

8. Section 15(1) of the *Charter* protects "every person's equal right to be free from discrimination."[3] Its purpose is "to ensure equality in the formulation and application of the law"

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[2] *R v Sharma*, 2022 SCC 39 [***Sharma***].

[3] *Withler v Canada (Attorney General),* 2011 SCC 12, [2011] 1 SCR 396 at para 31 [***Withler***].

and the recognition of the equal worth of all human beings in Canadian society.[4] It thus seeks to prevent and remedy discrimination against particular groups who have been subjected to social, political, and legal disadvantage in Canada by focusing on the personal characteristics enumerated in s. 15(1), or characteristics analogous to them.[5]

9. The two-step legal inquiry for assessing s. 15(1) claims is not at issue in this appeal. It requires a claimant to demonstrate that an impugned law (or state action):

(a) Creates a distinction – on its face or in its impact – based on an enumerated or analogous ground; and

(b) Imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.[6]

10. Alberta's submissions focus on the first stage of the s. 15(1) analysis, which asks whether an impugned law creates a distinction based on a protected ground, on its face or in its impact.

11. In particular, clarity can be brought to the s. 15(1) analytical framework by recognizing that the existing case law calls for specific analytical connections between three constituent components: an impugned law, its alleged impact or effect, and the claimed protected ground.

12. Courts have explored and elaborated upon these distinct elements of s. 15(1) in various ways. Regardless of how the legal test is articulated, it is clear there must be a link between the impugned law and its alleged impact, as well as between the alleged impact and the claimed protected ground. As such, the first stage of the s. 15(1) framework requires two connections:

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[4] *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 171 [***Andrews***]; *Quebec (Attorney General) v A,* 2013 SCC 5, [2013] 1 SCR 61 at para 136 [***Quebec v A***].

[5] *Ontario (Attorney General) v G*, 2020 SCC 38, [2020] 3 SCR 629 at para 39 [***Ontario v G***]; *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 52 [***Law***].

[6] *Sharma* at para 28, citing *R v CP*, 2021 SCC 19, [2021] 1 SCR 679 at paras 56 and 141; *Fraser v Canada (Attorney General)*, 2020 SCC 28, [2020] 3 SCR 113 at para 27 [***Fraser***]; *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30, [2015] 2 SCR 548 at paras 19-20 [***Taypotat***].

- A nexus between the impugned law and its impact on a claimant or claimant group: a law must **create or contribute** to a distinction, in purpose or effect; and

- A nexus between the impact and the claimed protected ground: the distinction must be **based on** an enumerated or analogous ground.

13. These connections between the impugned law, the adverse impact or effect, and the protected ground of discrimination are part of what makes state conduct **discriminatory**.[7]

14. Indeed, there was a time in this Court's s. 15(1) jurisprudence where these aspects of the legal test were articulated as separate components, rather than being combined into the first step of the s. 15(1) inquiry. For example, in *Law*, this Court articulated the s. 15(1) legal inquiry as involving three (not two) steps: (1) whether a law imposes differential treatment; (2) whether a protected ground is the basis for the discriminatory treatment; and (3) whether the law in question has a "discriminatory" purpose or effect.[8] Today, the first and second elements have been collapsed into the first stage of the s. 15(1) inquiry, while the third remains as the second stage of the inquiry. The core of the legal inquiry has not changed, however.

15. Different types of claims may be resolved on different aspects of the first stage of the s. 15(1) inquiry, depending on the context.[9] However, the connecting pieces ensure that the analytical framework remains grounded in the purpose of s. 15(1).

B. Section 15(1) requires a connection between the law and the alleged impact

16. Part of the first stage of the s. 15(1) analysis obligates a claimant to establish that an impugned law creates or contributes to differential treatment, or an adverse impact. This is frequently referred to as the "causation" or "contribution" requirement.[10]

17. The causation requirement is supported by the text, purpose, and intent of s. 15(1). It enables the s. 15(1) legal framework to distinguish between discriminatory impacts that are

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[7] *Andrews* at 182; *Sharma* at para 51; *Withler* at para 31.
[8] See *Law* at para 23, citing *Andrews* at 171.
[9] See *e.g. Withler* at paras 64-66.
[10] See *e.g. Sharma* at paras 42-45; *Symes v R,* [1993] 4 SCR 695 at 764-65 [***Symes***].

"caused" by or "contributed to" by a law or state action, and those which exist independently of an impugned law or state action.[11] As Iacobucci J noted in *Symes*, "[w]e must take care to distinguish between effects which are wholly caused, or are contributed to, by an impugned provision, and those social circumstances which exist independently of such a provision."[12]

18. A claimant does not need to prove that an impugned law is the only or even the dominant cause of a differential impact – only that the law was a cause.[13] However, there must be a "real, as opposed to a speculative, link" between the alleged limitation and the state action.[14]

19. A causation requirement is not controversial, nor is it unique to s. 15(1). Indeed, claimants have always been required to demonstrate a nexus between state action and a limitation of a *Charter* right, through evidence.[15] Since the earliest days of s. 15(1), this Court has made clear that its role is to constrain discriminatory **state action**. As McIntyre J stated in this Court's seminal s. 15(1) decision in *Andrews*:

> Section 15(1) of the *Charter* provides for every individual a guarantee of equality before and under the law, as well as the equal protection and equal benefit of the law without discrimination. **This is not a general guarantee of equality; it does not provide for equality between individuals or groups within society in a general or abstract sense**, nor does it impose on individuals or groups an obligation to accord equal treatment to others. **It is concerned with the application of the law**.[16]

20. While s. 15(1) reflects an important promise of equality, its role is not (nor could it ever be) to solve every inequality or unfairness that may exist in a modern democratic society.

21. Courts must ensure they remain guardians of the constitution and adjudicators of disputes relating to the impact of a law. However, the separation of powers means courts should refrain from wading into the domain of policy and imposing a positive obligation to rectify underlying

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[11] *Sharma* at para 44, quoting *Symes* at 765 and *Taypotat* at para 34.

[12] *Symes* at 764-65.

[13] *Sharma* at para 49.

[14] *Canada (Attorney General) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101 at para 76.

[15] *Sharma* at paras 43-44, quoting, amongst others, *Weatherley v Canada (Attorney General)*, 2021 FCA 158 at para 42 [***Weatherley***].

[16] *Andrews* at 163-64 [emphasis added]; see also *Auton (Guardian ad litem of) v British Columbia (Attorney General),* 2004 SCC 78, [2004] 3 SCR 657 at para 27 [***Auton***].

social disadvantages.[17] The very nature of the *Charter* is to act as a restraint on state conduct. As Cromwell J articulated in *Kokopenace* (in dissent, but not on this point):

> The *Charter* protects against interference *by the state* with guaranteed rights: s. 32. In order to establish a breach of the *Charter*, the claimant must therefore show not only that there has been a limitation of his or her guaranteed rights but that the limitation can be attributed to state action. **The question is whether there is a sufficient connection between the conduct of the state and the limitation of the right such that the limitation can fairly be attributed to the state**.[18]

22. As a result, this Court has confirmed repeatedly that s. 15(1) does not oblige the state to take "positive actions to remedy the symptoms of systemic inequality" that exist independently of any law.[19] The focus of the analysis must therefore be on the adverse effects caused or contributed to by an impugned provision, not the social and economic circumstances that exist independently of such a provision.[20] Section 15(1) cannot address unfair treatment in general – it can only address discriminatory treatment caused by state action.

23. For this reason, evidence of a claimant's underlying social circumstances cannot be used to bypass the causation element of the s. 15(1) analysis. The social circumstances of a claimant group may be relevant at the second stage of the s. 15(1) analysis, but the requirement for a claimant to demonstrate a causal connection between an impugned law and an alleged adverse effect remains. The two steps of the test "ask fundamentally different questions", and thus the ultimate inquiry at both stages is distinct.[21]

24. This Court's jurisprudence clearly demonstrates flexibility in how the causation element can be met. For example, in *Sharma* a majority of this Court confirmed that no specific form of evidence is required, and there is flexibility in how the causal connection may be satisfied,

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[17] *Sharma* at para 63; *La Rose v Canada*, 2023 FCA 241 at paras 81-83.

[18] *R v Kokopenace*, 2015 SCC 28, [2015] 2 SCR 398 at para 251 [citations omitted] [italics in original; bolded emphasis added] [***Kokopenace***].

[19] *Thibaudeau v Canada*, [1995] 2 SCR 627 at 655; *Auton* at para 41; *Québec (Procureure générale) c Alliance du personnel professionnel et technique de la santé et des services sociaux,* 2018 SCC 17, [2018] 1 SCR 464 at para 42 [***Alliance***].

[20] *Begum v Canada (Citizenship and Immigration)*, 2018 FCA 181 at para 81, citing *Withler* at para 39.

[21] *Sharma* at para 30.

depending on context.[22] But, as the majority also confirmed, "to be clear, while the evidentiary burden at the first step should not be undue, **it must be fulfilled**."[23]

25. The question of whether the evidence establishes a sufficient causal connection between an impugned law and alleged adverse treatment is largely one of fact and must be assessed on a case-by-case basis, in light of the particular evidence presented.

C. Section 15(1) necessitates that any adverse impact be "based on" a protected ground

26. At the first stage of the s. 15(1) framework, a claimant must also demonstrate a connection between the alleged adverse impact and the claimed protected ground. In particular, a claimant must show, on a balance of probabilities, that any differential impact is **based on** an enumerated or analogous ground.

27. This element also stems directly from the text, purpose, and intent of s. 15(1). As set out above, s. 15(1) is not a generalized prohibition of discrimination. Rather, it is a prohibition of discrimination based on the grounds enumerated in s. 15(1), and those analogous to the enumerated grounds.[24]

28. The text of s. 15(1) clearly prohibits discriminatory distinctions in the law that are based on, or stem from, certain protected grounds: "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination **based on** race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."[25]

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[22] *Sharma* at para 49.

[23] *Sharma* at para 50 [emphasis added].

[24] Peter W Hogg, *Constitutional Law of Canada*, 5th ed Supp (Toronto: Thomson Reuters Canada Limited, 2024) at §55:17 [**Hogg**], citing *Andrews* [**Book of Authorities, TAB 1**].

[25] *Charter*, s. 15(1) [emphasis added]. The text of a constitutional provision plays a primary role in its interpretation; the *Charter* "is not 'an empty vessel to be filled with whatever meaning we might wish from time to time'" (*Quebec (Attorney General) v 9147-0732 Québec inc.*, 2020 SCC 32, [2020] 3 SCR 426 at paras 8-10, quoting *Reference re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313 at 394).

29. The purpose of s. 15(1) also supports this conclusion. In *Andrews*, McIntyre J described the purpose of the equality protection as being to eliminate exclusionary barriers faced by individuals in protected groups.[26] Justice McIntyre's approach made clear that "[t]he analysis of discrimination […] must take place within the context of the enumerated grounds and those analogous to them."[27]

30. Limiting claims to enumerated or analogous grounds is not technical, but rather screens out claims "having nothing to do with substantive equality."[28] As this Court recognized in *Withler*, the first step of the s. 15(1) analysis "ensures that the courts address only those distinctions that were intended to be prohibited by the *Charter*."[29]

31. The law creates distinctions and differential impacts in many varied ways – it is only those distinctions that discriminate against certain protected groups that the *Charter* deems to be inappropriate. As Professor Moreau put the point:

> We think of discrimination not just as any sort of differential treatment but as a particular kind of differential treatment: to be discriminated against is not just to be denied something that others have but to be denied it in a way that is objectionable or unfair.[30]

32. The aim of s. 15(1) is to proscribe such inappropriate distinctions. A claimant need not explain **why** a law creates such a distinction, but they do need to establish that it does. A court's focus should remain on the s. 15(1) analytical framework.[31]

a. Adverse effects discrimination claims must still focus on finding differentiations based on protected grounds

33. There are cases where the distinction drawn by a law is not apparent on the face of the law itself. The concept of adverse effects discrimination has been developed to address such

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[26] *Andrews* at 165, 172-74.

[27] *Andrews* at 180.

[28] *Taypotat* at para 19, quoting *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para 8 [***Corbiere***].

[29] *Withler* at para 33; see also *Alliance* at para 26.

[30] Sophia Moreau, "The Promise of Law v. Canada" (2007), 57 UTLJ 415 at 426 [**Book of Authorities, TAB 2**], quoted with approval in *Quebec v A* at para 180.

[31] *Sharma* at para 38.

situations, and reflects a recognition that distinctions may be either direct (apparent on the face of a law) or indirect (based on the impact of a law on a protected group).[32] The commitment to substantive equality in s. 15(1) requires courts to go behind the façade of similarities and differences, to assess the true impacts of a law.[33]

34. Where adverse effects discrimination is claimed, courts must assess whether "a seemingly neutral law has a disproportionate impact on members of grounds protected on the basis of an enumerated or analogous ground."[34]

35. In such cases, the question of whether the differentiation or adverse impact is based on a protected ground must be assessed indirectly – sometimes involving the question of whether a law has a **disproportionately** negative impact on a protected group.[35] However, the disproportionate negative impact must still be connected to a protected ground – it must be "a disproportionately negative impact on a group or individual **that can be identified by factors relating to enumerated or analogous grounds**."[36]

36. The concept of adverse effects discrimination thus does not mean that s. 15(1) loses its central focus on differentiations that are **based on** certain protected grounds of discrimination. Notwithstanding divergences in the analytical approach to s. 15(1) claims over the past several decades, the requirement to show a link or nexus between the adverse impact alleged and the claimed protected ground has been consistently repeated.[37]

37. The requirement that an adverse impact of the law be based on, or because of, a protected ground is also consistent with the approach taken in human rights jurisprudence. Under human

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[32] *Sharma* at paras 29, 42; *Fraser* at paras 31, 37-38; *Ontario Human Rights Commission v Simpsons-Sears Ltd,* [1985] 2 SCR 536 at 551; *Andrews* at 165, 174.

[33] *Andrews* at 174; see also *Withler* at para 39 and *Fraser* at para 41, noting that "*Andrews* provided a robust template for substantive equality that subsequent decisions 'enriched by never abandoned'… It was a remedy for exclusion and a recipe for inclusion."

[34] *Fraser* at para 30; *Sharma* at para 29.

[35] *Fraser* at para 51.

[36] *Withler* at para 64 [emphasis added]; see also *Fraser* at paras 48-50.

[37] See *e.g. Sharma* at paras 3, 31; *Fraser* at paras 50, 52; *Taypotat* at para 21; *Alliance* at para 25.

rights legislation, to establish *prima facie* discrimination, a claimant is required to show that they have a characteristic protected from discrimination under the applicable legislation, they experienced an adverse impact, and that there is a "connection" between the prohibited ground of discrimination and the differential treatment complained of – in other words, that the protected characteristic was "a factor in" the adverse impact.[38]

38. As such, the key question is whether a facially neutral rule has the effect of placing members of a protected group at a disproportionate disadvantage because of their membership in that protected group.[39] The assessment is both qualitative and quantitative in nature, and necessarily invites a comparison between a claimant group and other groups or the general population who do not share the protected characteristic – it is in this way that a court assesses whether the impact is "disproportionate" based on a protected characteristic.[40]

39. As has been clear from the early days of s. 15(1) case law, the concept of equality is inherently comparative; a point that has been repeatedly reiterated by this Court.[41] While a strict reliance on comparator "groups" is no longer a component of the s. 15(1) analytical framework,[42] the nature of equality remains a comparative exercise.[43] Comparison must be

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[38] *Moore v British Columbia (Education)*, 2012 SCC 61, [2012] 3 SCR 360 at para 33; see also *Ward v Quebec (Commission des droits de la personne et des droits de la jeunesse),* 2021 SCC 43, [2021] 3 SCR 176 at para 96; *Québec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc (Bombardier Aéronautique Centre de formation),* 2015 SCC 39, [2015] 2 SCR 789 at paras 48, 52 [***Bombardier***]; *Vancouver Area Network of Drug Users v Downtown Vancouver Business Improvement Association,* 2018 BCCA 132 at para 57, leave to appeal to SCC refused, 38157 (Jan 31, 2019) [***Vancouver Area Network of Drug Users***]; *Stewart v Elk Valley Coal Corp,* 2017 SCC 30, [2017] 1 SCR 591 at para 46 [***Elk Valley Coal***].

[39] *Fraser* at para 53, citing Sophia Moreau, "The Moral Seriousness of Indirect Discrimination", in Hugh Collins & Tarunabh Khaitan, eds., *Foundations of Indirect Discrimination Law* (Portland, Or: Hart Publishing, 2018) 123 at 125.

[40] *Sharma* at para 31.

[41] *Andrews* at 164, see also *Fraser* at paras 55, 172; *Sharma* at para 41; *Withler* at para 41; *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483 at para 15 [***Kapp***].

[42] *Withler* at paras 55-64.

[43] *Sharma* at para 41.

approached with caution and viewed in light of the entire relevant context,[44] but there is no question that it plays a role throughout the analysis.[45] As this Court explained in *Withler*:

> **Inherent in the word "distinction" is the idea that the claimant is treated differently than others. Comparison is thus engaged**, in that the claimant asserts that he or she is denied a benefit that others are granted or carries a burden that others do not, **by reason of a personal characteristic that falls within the enumerated or analogous grounds of s. 15(1)**.[46]

40. A court must necessarily compare the circumstances of individuals who belong to a protected group, or share a protected characteristic, with those that do not, while recognizing that the analysis should not be unduly formalistic.

41. For example, a claimant who alleges that eligibility criteria for a benefit program cause or contribute to a disproportionate impact based on a protected ground must demonstrate a connection or nexus between the differentiation (the eligibility criteria), and a disproportionate impact on a protected group. The fact that a claimant belongs to a protected group, and some members of the group are among those who are ineligible, does not automatically mean there is a disproportionate impact **based on** the protected ground. Any eligibility criteria will draw distinctions between those who are eligible, and those who are not. Just because some of the people who are ineligible belong to a protected group does not make the eligibility criteria discriminatory. More is (and should be) required to fulfill the promise of s. 15(1).

42. Virtually all legislation distinguishes and makes categories in some way; different rules, regulations, requirements, and eligibility qualifications are necessary for the governance of a modern society.[47] As Professor Hogg notes, "every statute or regulation employs classifications

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[44] *Withler* at para 43.

[45] *Withler* at para 62.

[46] *Withler* at para 62 [emphasis added]; see also *Jacob v Canada (Attorney General),* 2024 ONCA 648 at para 65, leave to appeal to SCC requested (41526): "[w]hile discrimination can be experienced at either the individual or group level, the discrimination that s. 15 protects against is based on the individual's membership in a group, whose parameters are defined by the enumerated or analogous ground alleged by the claimant."

[47] *Andrews* at 168-69; *Quebec v A* at para 141.

of one kind or another for the imposition of burdens or the grant of benefits. Laws never provide the same treatment for everyone."[48] But as this Court has made clear, not every distinction is discriminatory.[49]

43. In the context of childcare, there is no question that women have been historically disadvantaged in the workplace, and have taken on a disproportionate share of child rearing responsibilities throughout history.[50] However, this does not mean that every set of eligibility criteria for a benefits program relating to childcare discriminates against women, solely because some women may not qualify for the benefit. Put another way, the mere fact that some ineligible people belong to a protected group, on its own, would not satisfy the first step of the s. 15(1) inquiry – it is not the type of "disproportionality" that s. 15(1) is aimed at combatting. The key is whether the eligibility criteria impact a protected group because of a characteristic inherently linked to being a member of that protected group.

44. Reaching such a conclusion would skip over the essential elements of the first step of the s. 15(1) analysis and disregard the requirement that a claimant show that a law treats a claimant group differently because of their membership in a protected group. It would risk creating an obligation on the state to actively take steps to rectify existing societal disadvantages rather than to refrain from making discriminatory distinctions in laws.

45. The law is clear that such an obligation would be inappropriate because it would pull courts "into the complex legislative domain of policy and resource allocation, contrary to the separation of powers."[51] The underlying causes of pre-existing societal disadvantage are often multi-faceted, and policy responses may give rise to a range of costs and benefits that must be weighed. Moreover, the allocation of resources to address pre-existing disadvantage involves complex trade-offs among competing objectives. Crafting policy responses to address the needs of socially disadvantaged groups, and making resource allocation decisions that prioritize among competing interests, are core functions of the legislative branch of the state.

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[48] Hogg at §55:9 [**Book of Authorities, TAB 1**].
[49] *Andrews* at 168-69; *Kapp* at para 28; *Sharma* at para 51.
[50] *Fraser* at paras 103, 166.
[51] *Sharma* at para 63, and the cases cited therein.

46. A freestanding constitutional obligation to address societal disadvantages would turn the separation of powers on its head and thrust the courts into what is fundamentally a legislative domain. This outcome is avoided by continuing to adhere to a framework that requires a causal link between the impugned law and the adverse effect, and a sufficient connection between the adverse effect and a protected ground.

47. As with the causal link between the impugned law and the adverse effect, the question of whether the evidence establishes a sufficient connection between adverse effect and a protected ground is largely one of fact, to be assessed on a case-by-case basis.[52] The link must be based on evidence, and should not be assumed.[53] This concept is not unique to s. 15(1). A proper factual foundation is essential to any constitutional claim; "*Charter* decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel."[54]

b. Evidence of a statistical disparity does not, on its own, establish the requisite connective link; statistical evidence shows correlation, not causation

48. While there are many ways to establish a distinction based on a protected ground, the evidence must go beyond speculative and hypothetical.[55] Claimants who allege adverse effects discrimination may, for example, bring evidence of a statistical disparity between the impact on a protected group as compared to other groups who do not share the protected characteristic. A strong correlation between membership in a protected group and the alleged disadvantage may tend to demonstrate the existence of a sufficient link.

49. However, a statistical disparity alone, without more, does not establish whether the impact is **based on** a protected characteristic. As majority of this Court recognized in *Fraser*, "[e]vidence of statistical disparity, on its own, may have significant shortcomings that leave open the possibility of unreliable results."[56]

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[52] *Vancouver Area Network of Drug Users* at para 81; *Elk Valley Coal* at paras 39, 46.
[53] *Elk Valley Coal* at para 39.
[54] *MacKay v Manitoba*, [1989] 2 SCR 357 at 361-62 [***MacKay v Manitoba***].
[55] *Taypotat* at para 34; *Fraser* at para 60.
[56] *Fraser* at para 60; see also *Ontario Teacher Candidates' Council v Ontario (Education)*, 2023 ONCA 788 at paras 70-71 [***Ontario Teacher Candidates' Council***].

50. Statistical evidence shows correlation, but correlation is not causation.[57] Resting a finding of discrimination on a statistical disparity alone reflects an unduly mechanical or mathematical approach to s. 15(1) issues, and does not demonstrate the requisite nexus. It may be part of a constellation of evidence, but must be accompanied by qualitative contextual information demonstrating that the differentiation or adverse impact is based on a protected ground, and not some other unrelated factor.[58]

51. The British Columbia Court of Appeal decision in *Vancouver Area Network of Drug Users* is instructive in terms of the value of statistical disparity evidence in a discrimination inquiry.[59] The appeal involved a human rights challenge to an initiative aiming to prevent people from loitering or sleeping in front of businesses and in certain areas of a Vancouver park. The Court concluded the initiative targeted people experiencing homelessness, a disproportionate number of whom were Indigenous or had disabilities. However, the Court found that the evidence did not demonstrate an adverse effect based on protected characteristics, making the following key points:

- Statistical evidence is, by definition, circumstantial. It can show a correlation between membership in a particular group, and a facially neutral rule; such correlation can point to a connection between adverse treatment and protected grounds.[60]

- However, correlation is not sufficient – "a statistical correlation is not, itself, a link."[61] A correlation may result from many factors, including mere coincidence. Or, a correlation "may be the result of confounding factors or a constellation of influences that are so remote from protected grounds of discrimination as to fail to constitute a link."[62]

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[57] *Fraser* at para 180, per Brown and Rowe JJ (dissenting); *Vancouver Area Network of Drug Users* at paras 88, 90.
[58] *Miceli-Riggins v Canada (Attorney General)*, 2013 FCA 158 at para 76, quoting *Symes* at 764-65.
[59] *Vancouver Area Network of Drug Users* at para 98, cited with approval in *Fraser* at para 60.
[60] *Vancouver Area Network of Drug Users* at paras 88, 90.
[61] *Vancouver Area Network of Drug Users* at para 91.
[62] *Vancouver Area Network of Drug Users* at para 91.

52. On the facts of the case, the Court noted that the root causes of homelessness are complex and multi-dimensional, and the statistical correlations were insufficient to demonstrate that prohibited grounds of discrimination were a factor in the adverse treatment alleged.[63]

53. Grounding a finding of discrimination in quantitative statistics alone creates a risk of a sterile analytical approach that could become untethered from the purpose of s. 15(1). It also creates a lack of clarity around what level of disparity means a law is discriminatory. One academic has articulated the point this way:

> Any law, when subjected to close scrutiny, might be seen as having a disparate impact on a […] "disadvantaged" group, in the sense that it might exclude from its benefit a higher percentage of disadvantaged group members than members of the general population. However, should every instance of disparate impact on a disadvantaged group […] be considered a violation of subsection 15(1), thus requiring the state to justify the law under the terms of section 1? If 55 percent of a disadvantaged group are excluded from the benefit of a particular law, while only 50 percent of the general population are excluded, should the courts find such a differential sufficient to support a claim of discrimination?[64]

54. As such, while statistical evidence can assist in demonstrating an available inference, a statistical correlation must be supplemented with evidence explaining the connection. Indeed, this is what lead this Court to confirm that the evidence to show a breach of s. 15(1) "must amount to more than a web of instinct" in *Taypotat.*[65] Ultimately, it is for a trier of fact to determine whether to infer the necessary connection based on all the evidence, including circumstantial statistical evidence.[66]

55. As such, if statistical disparities are used, it is essential to take into account qualitative considerations alongside quantitative considerations.[67] This does not require a claimant to show

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[63] *Vancouver Area Network of Drug Users* at paras 100-102.

[64] Richard Moon, "Comment on *Fraser v Canada (AG):* The More Things Change" (2021) 30:2 Const Forum Const 85 at 93, quoting Richard Moon, "A Discrete and Insular Right to Equality: Comment on Andrews v Law Society of British Columbia" (1989) 21:3 Ottawa L Rev 563, 1989 CanLIIDocs 38 at 578-79.

[65] *Taypotat* at para 34.

[66] *Vancouver Area Network of Drug Users* at para 98; see also *Taypotat* at paras 30-34.

[67] *Fraser* at paras 60, 63, citing Colleen Sheppard, "Of Forest Fires and Systemic Discrimination: A Review of *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*"

an intention to discriminate, or to bear the burden of showing why a law has such an effect – but does require the claimant to demonstrate the connection between the claimed adverse impact and the ground of discrimination itself.

56. This approach avoids the possibility that neutral laws will be found to draw a distinction based on a protected ground simply because a population they affect has a particular demographic composition that differs from that of the population as a whole. It prevents a distinction in an adverse effects discrimination claim being based solely on a "web of instinct."[68]

57. The precise nature of the evidence required will vary depending on the context, and the reasonable inferences available from that evidence. There may be cases where the nexus between the adverse effect of a law and a protected group is sufficiently straightforward that disproportionate representation within an affected group will suffice because of the reasonable inferences that can be drawn.[69] This Court's decision in *Brooks* is such an example.[70] In other cases, additional evidence will be required.

58. Courts have recognized the difficulties in making out some claims of adverse effect discrimination, and have been "careful not to dictate rigid evidentiary requirements."[71] While an excessively technical approach to evidence could risk creating artificial barriers for claimants, a disproportionate impact **based on** a protected ground must still be established.[72]

59. It is not excessively technical to require evidence of a connection or nexus between the differential treatment and the claimed protected ground. The Ontario Court of Appeal put the

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(2001), 46:2 McGill LJ 533, 2001 CanLIIDocs 59 at 548; *Ontario Teacher Candidates' Council* at paras 86-89.

[68] *Taypotat* at para 34.

[69] *Vancouver Area Network of Drug Users* at para 95; *Fraser* at para 61.

[70] *Brooks v Canada Safeway Ltd*, [1989] 1 SCR 1219 [***Brooks***]. In *Brooks*, the Court held that a corporate plan which denied benefits to employees during pregnancy discriminated on the basis of sex.

[71] *Sidhu v Canada (Attorney General),* 2024 YKCA 14 at para 62 [***Sidhu***]; see also *Sharma* at para 49; *Ontario Teacher Candidates' Council* at para 68, citing *Fraser* at paras 59-60.

[72] *Sharma* at para 50; *Taypotat* at para 34; *Sidhu* at para 63.

point cogently in *Ontario Teacher Candidates' Council*: a "sufficient evidentiary record is not a mere technicality. It is essential in all cases and particularly in constitutional litigation, which frequently engages concepts and principles that are of fundamental importance to Canadian society, and which may profoundly affect the lives of Canadians."[73]

60. A sufficient evidentiary basis has always been a fundamental component of the first stage of the s. 15(1) analysis.[74] It ensures that s. 15(1) remains focused on the type of state action intended to be prohibited by the *Charter* – discrimination based on grounds that act as "constant markers of suspect decision making or potential discrimination."[75] As the Federal Court of Appeal stated in *Weatherley*, "[d]ecades of unbroken Supreme Court case law forbids courts from" circumventing evidentiary requirements through "assumptions or guesswork."[76]

61. Although the nature of the evidence presented may vary from case to case, the legal test does not – and should not – change.[77] This is necessary to maintain the integrity and predictability of the law.

c. An established connection is particularly important in cases claiming intersectional grounds

62. The connection between a distinction or adverse effect and the protected ground is particularly important in cases where discrimination is alleged to arise from intersecting characteristics – one of which is protected by s. 15(1), and one of which is not. Protecting this connective requirement ensures that s. 15(1) remains grounded in its purpose and does not become a backdoor for the recognition of discrimination claims on the basis of grounds that are not intended to be protected.

63. This Court's jurisprudence has rightly been careful and cautious in the recognition of analogous grounds of discrimination, emphasizing that they must denote personal characteristics

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[73] *Ontario Teacher Candidates' Council* at para 81, citing *MacKay v Manitoba* at 361-62.
[74] *Alliance* at para 26; *Lewis v Alberta Health Services,* 2022 ABCA 359 at para 70, leave to appeal to SCC refused, 40549 (Jun 8, 2023).
[75] *Alliance* at para 26, quoting *Withler* at para 33.
[76] *Weatherley* at para 43.
[77] *Bombardier* at para 69.

that are immutable, or constructively immutable.[78] Analogous grounds are those that are essential components of personal identity.[79] The concept of "refugee status" bears few of these characteristics. Moreover, the recognition of a new analogous ground must be based on a proper record.[80]

64. To protect the rigour of this analogous grounds inquiry, it is essential to avoid expanding the concept of intersectionality to effectively protect a ground of discrimination that does not meet the legal test for an analogous ground.

65. There is no question that individuals can experience discrimination or differentiation differently based on a constellation of personal characteristics. As the dissenting justices noted in *Sharma,* the "grounds of discrimination shaping [a claimant's] situation may intersect, compounding to form an individual or group's experience."[81] The law surrounding s. 15(1) is, and must be, sufficiently sophisticated to recognize that discrimination may arise from intersections between multiple protected grounds. It does so by considering the full context, including the situation of a claimant group and the impact of an impugned law on that group.[82]

66. However, to violate s. 15(1), an impugned law must create, or contribute to, a disadvantage that is based on protected grounds of discrimination, lest the analytical approach become disconnected from the text and purpose of s. 15(1).

67. The requirement for a claimant to demonstrate that any adverse treatment or differentiation is based on a protected ground also serves the function of centering the analysis around the proper form of comparison. The differential treatment must stem from the protected ground that is invoked, not another ground that may not be protected. The comparison must be between those who belong to the protected group, and those who do not. The protected (or

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[78] *Corbiere* at paras 13-15 (per McLachlin and Bastarache JJ) and 58-62 (per L'Heureux-Dubé J, concurring).

[79] *Corbiere* at para 13 (per McLachlin and Bastarache JJ) and 60 (per L'Heureux-Dubé J, concurring).

[80] *Fraser* at paras 116-17.

[81] *Sharma* at para 196, per Karakatsanis J (dissenting), citing *Withler* at para 58.

[82] *Ontario v G* at para 47.

claimed) characteristic cannot shift throughout the analysis, lest the chain of connections between the constituent components of s. 15(1) be broken.

D. Stability in the s. 15(1) case law ought to be maintained

68. Clarity, predictability, and stability are essential in the law. Concerns with instability are perhaps particularly acute in the context of s. 15(1), where the analytical framework has experienced a "winding course of judicial interpretation" over the past several decades.[83]

69. In this Court's recent decision in *Sharma*, the majority sought to bring "clarity and predictability" to the legal test for s. 15(1) claims, particularly as it relates to the causation element and the role of the state in remedying existing social inequalities.[84] While courts may properly disagree on the application of the legal framework to a particular set of facts, the essential core features of this Court's majority decision in *Sharma* should be retained, both for doctrinal consistency, and to allow the law to settle into a predictable and stable framework.

70. As pointed out in a concurring decision, "*stare decisis* is fundamental to legal stability, judicial legitimacy, and the rule of law" and "[f]ailing to have proper regard to *stare decisis* has serious, far-reaching consequences."[85] A legal analysis that is in constantly in flux does not assist claimants or respondents, and does not allow for the stability that is so integral to the rule of law.

71. As this Court pointed out in *Alliance*, "[l]egislatures understand that they are bound by the *Charter* and that the public expects them to comply with it."[86] Maintaining clarity and consistency in the approach to s. 15(1) helps facilitate the overarching goals of the equality guarantee.

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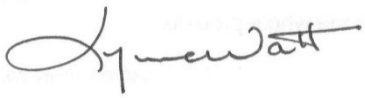
[83] Hogg at §55:15 [**Book of Authorities, TAB 1**]; see also *Sharma* at para 34.
[84] *Sharma* at paras 32-33.
[85] *R v Kirkpatrick*, 2022 SCC 33, [2022] 2 SCR 480 at paras 116, 172 (per Côté, Brown and Rowe JJ, concurring).
[86] *Alliance* at para 42.

PART IV – COSTS

72. Alberta does not seek costs and submits that the ordinary rule that costs are not awarded against an Intervener should apply.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of April, 2025.



for:

Leah M. McDaniel
Counsel for the Intervener,
Attorney General of Alberta

PART VII – TABLE OF AUTHORITIES & LEGISLATION

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