S.C.C. File No. 41210

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

B E T W E E N :

THE ATTORNEY GENERAL OF QUEBEC

Appellant

- and -

BIJOU CIBUABUA KANYINDA and COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE

Respondents

- and -

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(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW

1. There is significant doctrinal instability surrounding s. 15(1) of *Canadian Charter of Rights and Freedoms* (the ***"Charter"***).[1] The Supreme Court has regularly reworked the framework for assessing a s. 15(1) violation, adding and subtracting various requirements and branches of the test. This jurisprudential inconsistency is fundamentally the result of an approach that is unmoored from the *Charter*'s text.

2. To address this problem, Advocates for the Rule of Law ("**ARL**") proposes getting "back to the words" of s. 15(1) and "the object with which it was passed." In particular, ARL makes two interrelated submissions.

3. First, the text, context and purpose of s. 15(1) of the *Charter* reveal that it guarantees equality of legal treatment for individuals without discrimination. As such, where a claimant alleges that her equality rights were denied, the text, context and purpose of s. 15(1) require her to demonstrate the following: a) that the law in question denied her a benefit or imposed a burden; b) that she would not have faced this differential treatment but for her enumerated or analogous characteristic; and c) that the differential treatment is discriminatory.

4. Second, while there has been a significant lack of consistency and predictability in the s. 15(1) jurisprudence, the frameworks adopted in *Andrews v. Law Society of British Columbia*[2] and *R. v. Sharma*[3] best capture the text, context and purpose of the section.

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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).
2 *Andrews v. Law Society of British Columbia* [1989] 1 SCR 143 [***Andrews***].
3 *R. v. Sharma*, 2022 SCC 39 [***Sharma***].

PART II – QUESTIONS IN ISSUE

5. ARL intervenes on the proper approach to interpreting s. 15(1) of the *Charter.* ARL takes no position on the disposition of the appeal.

PART III – ARGUMENT

A. Section 15(1) guarantees an individual right to equal legal treatment without discrimination

i. Getting back to the words

6. The jurisprudence surrounding s. 15(1) of the *Charter* is in a constant state of flux. Borrowing Justice Stratas's analogy for administrative law in the pre-*Vavilov* era, s. 15(1) has become a "never-ending construction site where one crew builds structures and then a later crew tears them down to build anew, seemingly without an overall plan."[4]

7. Since the Supreme Court first provided a framework to assess whether a breach of s. 15(1) had occurred,[5] it has repeatedly rejigged that framework — adding a "dignity" criterion it would later remove,[6] holding that stereotypes are central to the analysis,[7] only to back away from this,[8] loosening the standard of causation only to tighten it once again,[9] and offering a conception of substantive equality that is inconsistently applied.[10]

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4 David Stratas, "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency" (2016) 42:1 Queen's L.J. 27 at 29.
5 *Andrews*, *supra* note 2.
6 *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 [***Law***]; *R v. Kapp*, 2008 SCC 41.
7 *Quebec (Attorney General) v. A*, 2013 SCC 5 [***Lola***].
8 *Fraser v. Canada (Attorney General)*, 2020 SCC 28 [***Fraser***].
9 *Fraser*, *ibid*; *Sharma*, *supra* note 3.
10 *Fraser*, *ibid*; *Sharma*, *supra* note 3.

8. This doctrinal instability reflects a jurisprudence that has often been unmoored from first principles—looking back on the more recent decisions, but rarely re-examining the text, context and purpose of s. 15(1) itself.

9. In the *Aeronautics Reference*, Lord Sankey, known best for authoring the *Persons* decision,[11] offered his "sixty colours" analogy which, while far less cited than the "living tree" metaphor, is no less important. He warned against constitutional interpretation moving away "from what has been enacted to what has been judicially said about the enactment"[12] and then said the following:

> To borrow an analogy; there may be a range of sixty colours, each of which is so little different from its neighbour that it is difficult to make any distinction between the two, and yet at the one end of the range the colour may be white and at the other end of the range black. Great care must therefore be taken to consider each decision in the light of the circumstances of the case in view of which it was pronounced, especially in the interpretation of an Act such as the British North America Act, which was a great constitutional charter, and not to allow general phrases to obscure the underlying object of the Act, which was to establish a system of government upon essentially federal principles.[13]

10. Lord Sankey concluded that "[u]seful as decided cases are, it is always advisable to ***get back to the words of the Act itself*** and to remember the object with which it was passed."[14] So too must we get back to the words of s. 15(1) and remember the object with which it was passed.

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11 *Edwards v Canada (Attorney General)*, [1930] AC 124.
12 *Canada (Attorney-General) v. Ontario (Attorney-General)* (1931), [1932] 1 DLR 58 [***Aeronautics Reference***] at 64.
13 *Aeronautics Reference*, *ibid*, at 64-65.
14 *Aeronautics Reference*, *ibid*, at 65 [Emphasis Added].

11. In the interpretation of any constitutional provision, the text has primacy.[15] By the same token, that text must be interpreted purposively, but the selection and use of purpose must be constrained by the text.[16] A "purposive" approach does not mean that a *Charter* right receives the most generous or liberal interpretation possible.[17]As the Supreme Court has eloquently put it, the *Charter* "is not an empty vessel to be filled with whatever meaning we might wish from time to time."[18] Rather, the interpretation of the *Charter* "is constrained by the language, structure, and history of the constitutional text, by constitutional tradition, and by the history, traditions, and underlying philosophies of our society."[19]

12. In sum, the interests of doctrinal stability — and, indeed, the rule of law itself — demand that this Court re-engage with the text, context and purpose of s. 15(1).

ii. The text, context and purpose of s. 15(1)

(1) Text

13. Section 15(1) of the *Charter* reads as follows:

> **15 (1) Every 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.**

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15 *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32 [***Québec inc***] at, in particular, para. 11.

16 *Quebec Inc*, *ibid*, at para. 9.

17 *R v. Poulin*, 2019 SCC 47 at para. 54.

18 *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at para. 151 [***Employee Relations***].

19 *Employee Relations*, *ibid*, aff'd *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34 at para. 65.

14. Four points bear emphasizing. First, s. 15(1) guarantees an ***individual, negative right***. It could have been written to state that every group is equal; but it crucially guarantees equality to the individual, defined as a restriction on unconstitutional action by state actors.

15. Second, s. 15(1)'s equality guarantees are robust, but they all concern "the law". Section 15 does not provide a freestanding right to equality of outcome. Rather, it very clearly concerns various forms of ***legal treatment***. For s. 15(1) rights to be limited, therefore, the law *qua* law must cause inequality.

16. Third, the words "based on" establish a clear nexus between the applicant's differential legal treatment on the one hand, and the grounds enumerated in s.15(1) (along with other non-enumerated but analogous grounds) on the other. Legal distinctions between grounds that are not enumerated (or analogous) do not offend s.15(1). An applicant must therefore demonstrate that her differential legal treatment was ***based on her enumerated or analogous ground***.

17. Fourth, the phrase "without discrimination" means that s. 15(1) will only be breached where ***discrimination*** is present. Section 15(1) could have been drafted to say that every individual is equal before and under the law and has equal protection and equal benefit of the law "without distinction". The inclusion of "discrimination" is a strong textual indicator that mere distinctions in the law do not offend s. 15(1) unless those distinctions are "discriminatory" in some way.

(2) Context and Purpose

18. As noted above, purpose is often best revealed from the text itself.[20] In the case of s. 15(1), the text reveals a purpose of ensuring equality to every individual in all aspects of legal treatment

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[20] *Québec inc, supra* note 15, at para. 11.

by the state, subject only to distinctions that are not discriminatory. Put another way, its purpose is to ensure substantive ***legal*** equality, not equality of outcome.

19. The *Charter*'s other provisions support this interpretation. The majority of the rights in the *Charter* are individual in nature. Where this is not so, it is evident from the text, such as s. 16, which expressly protects the equality of the English and French languages, not merely the individual's right to use them.[21]

20. Purpose is also fairly determined, in any interpretive context, by having regard to the "mischief" a provision was intended to remedy.[22] In the case of s. 15(1), that mischief was undoubtedly the narrower equality rights enumerated in s. 1(b) of the *Canadian Bill of Rights* ("CBR").[23] The inclusion in the *Charter* of equality under the law and equal benefit of the law indicate that s. 15(1) was intended to remedy the overly formalistic interpretation judges had afforded s. 1(b) of the CBR.

21. In particular, in *Bliss v. Canada,* the Supreme Court had upheld a law that discriminated against pregnant people on the basis that it did not expressly discriminate against women.[24] This was a clear denial of substantive legal equality, despite its facial neutrality. As McLachlin J. (as she then was) would later observe, "only males can cause pregnancy [and] only females are likely to become pregnant".[25]

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21 *Société des Acadiens v. Association of Parents*, [1986] 1 S.C.R. 549.
22 *Canada 3000 Inc., Re; Inter-Canadian (1991) Inc. (Trustee of),* 2006 SCC 24 at para 36, citing *Heydon's Case* (1584), 3 Co. Rep. 7a, 76 E.R. 637.
23 *Canadian Bill of Rights*, S.C. 1960, c. 44, s. 1(b).
24 *Bliss v. Canada,* [1979] 1 S.C.R. 183.
25 *R. v. Hess; R. v. Nguyen*, [1990] 2 S.C.R. 906 at 957 (dissenting but not on this point).

22. Similarly, in *Canada (AG) v. Lavell*,[26] a majority of this Court held that s. 12(1)(b) of the *Indian Act*, R.S.C. 1970, c. I-6 did not offend the CBR. This was notwithstanding the fact that women with Indian status would lose that status upon marrying men without status but men with Indian status would not lose that status upon marrying women without status. The majority reasoned that all women were treated the same under the legislation, so equality rights were not limited. This Court held that this provision might offend equality ***under*** the law, but distinguished that from equality ***before*** the law, with the former not being protected by the CBR.[27]

23. Section 15(1) of the *Charter* was clearly drafted to resist these formalistic conceptions of equality, as this Court noted in *Andrews*.[28] The incorporation of more robust equality guarantees into s. 15(1) ensured that legislatures could no longer shield discriminatory laws in facially neutral language. Courts are now required to assess not merely what the law *says*, but what it actually *does*. But by the same token, the language of s. 15(1) retains many similarities with that of s. 1(b) of the CBR, and thus its overall purpose: to ensure equality of legal treatment without discrimination. The central difference is that s. 1(b) the CBR is arguably limited to legal equality in form, while s. 15(1) ensures legal equality in substance.

24. This history and case law reveals that protecting "substantive equality" is indeed the purpose of s. 15(1). Formalistic interpretations that fail to reflect what facially neutral laws *do* may well offend s. 15(1). But s. 15(1)'s purpose is constrained by its text and context—it only prevents discriminatory treatment ***caused by laws***. Just as s. 8's broad purpose of protecting privacy is

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26 *Attorney General of Canada v. Lavell*, [1974] S.C.R. 1349.
27 *Lavell*, *ibid* at 1373.
28 *Andrews*, *supra* note 2, at 170-171.

restricted to the context of searches and seizures, s. 15(1)'s broad purpose of protecting substantive equality is confined to instances where laws cause substantive inequality.

25. Finally, this interpretation is consistent with the purpose and structure of the *Charter* as a whole. The *Charter* was never intended to represent a revolution to Canada's constitutional order. As Justices Rowe and Côté recently observed in their dissent in *Power*, "the year 1982 in Canada was not like the year 1789 in France: the passage of the Charter did not mark a "clean break" with existing constitutional structures that came before the passage of the *Constitution Act, 1982*."[29]

iii. Summary

26. To summarize, s. 15(1) incorporates an equality guarantee that is robust but constrained. Courts must look behind facially neutral language; but they must ultimately assess the substance of the law itself, not the law's mere interaction with other socioeconomic conditions already present in society.

27. As such, where a claimant alleges that she was denied her equality rights, the text, context and purpose of s. 15(1) require her to demonstrate the following: a) that the law in question denied her a benefit or imposed a burden differently than other members of the polity; b) that she would not have faced this differential treatment but for her enumerated or analogous characteristic; and c) that the differential treatment is discriminatory. The evidence an applicant will require to discharge these burdens is a matter for judicial doctrine. For the purposes of this intervention, it suffices to emphasize that the applicant must bear these burdens to give effect to the text, context and purpose of s. 15(1).

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[29] *Canada (Attorney General) v. Power*, 2024 SCC 26 at para. 321.

B. *Andrews* and *Sharma* best reflect the text, context and purpose of s. 15(1)

28. The Supreme Court's decision in *Andrews* offers a principled interpretation of s. 15(1) that best reflects its text, context and purpose, as expounded above. As the Court in *Andrews* noted, s. 15(1) does not provide a "general guarantee of equality." Rather, it is "concerned with application of the law."[30]

29. The virtue of the *Andrews* framework also lies in its simplicity. Under *Andrews*, it matters not whether the law "perpetuates [a] stereotype"[31] or "violates the human dignity"[32] of the claimant. Moreover, the Court is not asked to engage in a task to which it is wholly unsuited — a socioeconomic assessment of various societal groups and how laws inevitably interact with these pre-existing facts of our society.

30. *Sharma* is a doctrinally faithful successor to *Andrews.* While *Sharma* is nestled in the s. 15(1) framework as it has developed, it also reinforces the first principles laid down in *Andrews.* *Sharma* implies that s. 15(1) is directed primarily towards discriminatory *legal* distinctions. This is why it insists that "legislative context" must be analyzed when determining whether a law draws a discriminatory distinction in the first place.[33] This entails a close examination of the entire legislative scheme to determine whether the law itself causes substantive inequality.

31. *Sharma* also rejects the same proposition *Andrews* spurned: s. 15(1) does not impose a "general, positive obligation on the state to remedy social inequalities..."[34], nor does it impose a

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30 *Andrews*, *supra* note 2, at 164.
31 *Lola*, *supra* note 7, at para. 174, per LeBel J. (plurality).
32 *Law*, *supra* note 6.
33 *Sharma*, *supra* note 3, at para. 56.
34 *Sharma*, *supra* note 3, at para. 63.

generic substantive equality mandate. This is because of the individual, negative right that s.15(1) creates. Rather, while the pursuit of substantive equality is a relevant purpose of s. 15(1), that purpose is achieved by preventing discriminatory legal treatment. It does not require government action to remedy pre-existing inequalities. *Sharma* reinforces these points.

32. To summarize, ARL submits that, in determining the proper interpretive framework under s. 15(1) of the *Charter*, this Honourable Court should re-engage with the provision's text, context and purpose, and be guided by the decisions in *Andrews* and *Sharma*.

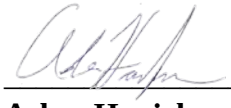
PART IV — SUBMISSIONS CONCERNING COSTS

33. As an intervener, ARL asks that no costs be awarded for or against it.

PART V — ORDERS SOUGHT

34. As an intervener, ARL takes no position on the outcome of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of April, 2025.



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Rule of Law

PART VI — TABLE OF AUTHORITIES

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