SCC Court File No. 41210

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC)

BETWEEN:

ATTORNEY GENERAL OF QUEBEC

APPELLANT

and

BIJOU CIBUABUA KANYINDA

and

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

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PART I. OVERVIEW

1. Discrimination is devastating.[1] It can live in subtle ways in our communities and in our laws, making it hard to detect and eliminate. Yet its impact is often profound, shaping many aspects of our lives from what pensions look like for retirees,[2] to how medical services are accessed,[3] to what jobs we have,[4] to what income support benefits are available to low-income mothers.

2. The test for s. 15 must meaningfully respond to this reality. It must accurately identify and address discrimination so that claimants can seek redress for the deep harms of inequality. Our courts have long struggled with how best to do this.[5] However, in *Fraser*, this Court outlined an approach to identifying and determining claims of adverse impact discrimination rooted in substantive equality—the lodestar of s. 15. Two years later, in *Sharma*, a majority of this Court "clarified" the test for s. 15 as set out in *Fraser*.[6]

3. The *Sharma* clarifications have not achieved their intended objective. Specifically, the clarifications left open questions related to "causation" and "legislative context" which lower courts have struggled to answer. [7] The result has been an uneven application of s. 15's doctrinal framework. The British Columbia Civil Liberties Association intervenes to assist this Court with two aspects of the s. 15 test and makes the following submissions:

(a) Under step one of the s. 15 test, courts should find that "causation" has been established where the impugned law is linked to the alleged distinction with "more

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[1] *Andrews v. LSBC*, [1989] 1 SCR 143, at 172 ("*Andrews*"): "[t]he worst oppression will result from discriminatory measures having the force of law. It is against this evil that s. 15 provides a guarantee."

[2] *Fraser v. Canada (Attorney General)*, 2020 SCC 28 ("*Fraser*").

[3] *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624.

[4] *Andrews*; *Vriend v. Alberta*, [1998] 1 SCR 493.

[5] *Andrews*, at p. 164.

[6] *R. v. Sharma*, 2022 SCC 39, at paras. 33-34 ("*Sharma*").

[7] *Yao v. The King*, 2024 TCC 19 ("*Yao*"); *Jacob v. Canada,* 2024 ONCA 648 ("*Jacob*"); *Metro Taxi Ltd. et al. v. City of Ottawa*, 2024 ONSC 2725; *Fair Change v. His Majesty the King in Right of Ontario*, 2024 ONSC 1895 ("*Fair Change*"); *A.P. v. Procureur général du Québec,* 2025 QCCA 24; *Power Workers' Union v. Canada (Attorney General)*, 2024 FCA 182; *Mathur v. His Majesty the King in Right of Ontario*, 2023 ONSC 2316; *Regina Anti-poverty Ministry v Saskatchewan*, 2025 SKKB 1; *Wright v. Yukon (Government of)*, 2024 YKSC 41 ("*Wright*").

than a web of instinct." A more exacting "causation" requirement (i) collapses the two-part test for s. 15, (ii) disregards evidentiary constraints faced by ordinary claimants, and (iii) risks overturning decades of s. 15 jurisprudence.

(b) Under step two of the s. 15 test, courts should consider "legislative context" only as background information. The state's objectives or intentions concerning the impugned legislation should have no bearing on the assessment of whether discrimination occurred. Doing so risks prejudicing claimants and improperly imports the s. 1 analysis into the s. 15 test.

PART II. POSITION ON THE QUESTIONS IN ISSUE

4. The BCCLA's submissions are set out above at paragraph 3.

PART III. LAW & ARGUMENT

A. Under Step One of the s. 15 Test, Causation Plays a Narrow Role

1. Since *Sharma*, Causation's Proper Function has been Distorted

5. Causation plays a role at step one of the s. 15 test.[8] The problem is that the *Sharma* majority's emphasis on causation ("a central issue"[9]) has since been misinterpreted by lower courts, leading to causation playing an outsized role in the analysis, to the point that established limits on causation have been diluted or outright ignored.[10] The result is an analysis hyper-focused on causation that is growing in the case law and which risks uprooting settled s. 15 principles.

6. For example, the emphasis on causation has led some courts to focus on evidentiary thresholds in ways that are practically unfeasible and doctrinally flawed. In *Yao*, a claim involving denial of a childcare related tax credit ("CCB") to refugee claimants failed at step one, largely due to a finding that there was insufficient evidence to prove that denial of the CCB caused a

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[8] Benjamin Perryman, "Proving Discrimination: Evidentiary Barriers and Section 15(1) of the Charter" (2024) 114 SCLR (2d) 93-109, at p. 9-10, online ("Perryman, Proving Discrimination").
[9] *Sharma*, at para. 42.
[10] *Yao*, at para. 198; *Metro Taxi*, at para. 305.

disproportionate impact on racialized women.[11] For the claimant to establish causation, the Tax Court required evidence that "excluding refugee claimants from the CCB significantly decreased the number of racialized people collecting the CCB."[12] A call for such comparative statistical evidence is inconsistent with the established principles of s. 15. While both contextual evidence about the claimant group's situation and statistical evidence about the law's impact can be helpful, there is no requirement to adduce both types of evidence.[13] Yet an overemphasis on causation led the Court in *Yao* to conclude that quantitative evidence was necessary, rendering contextual evidence about the claimant group's situation insufficient on its own to meet step one of the test.

7. The overemphasis on causation in *Yao* and other recent cases[14] is a canary in a coalmine. In the present appeal, certain Attorneys General urge the Court to go further and adopt a highly formalistic and technical approach to causation.[15] This Court should refuse that invitation.

8. Adding more layers to an already complex s. 15 test does not improve its doctrinal stability or how ordinary people can access their equality rights. For example, we should not need to divide a claimant into further sub-groups and rely on Venn diagrams to understand how step one should operate (as suggested by the Attorney General of British Columbia).[16] Such overly formulaic approaches make equality rights rigid and less able to account for the subtle and devastating ways that inequality impacts vulnerable people. More formalism does not mean more justice.

2. Causation has a Settled Meaning, and its Threshold is "More than a Web of Instinct"

9. Instead of an approach steeped in formalism, this Court should be pragmatic in how it addresses causation. Below, the BCCLA sets out a framework for how causation can operate under step one while remaining true to s. 15 principles and maintaining the right's flexibility. There are two questions to answer: (1) what does "causation" mean in step one (i.e., what is the "cause" and

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[11] *Yao*, at para. 197.
[12] *Yao*, at para. 198.
[13] *Fraser,* at para. 61; *Sharma*, at para. 49.
[14] *Wright*, at para. 208; *Ontario Health Coalition and Advocacy Centre for the Elderly v. Ontario*, 2025 ONSC 415 ("*Advocacy Centre*"), at para. 312; *Fair Change*, at para. 324.
[15] Factum of the Attorney General of Alberta, at para. 23; Factum of the Attorney General of Ontario, at paras. 12-14; Factum of the Attorney General of British Columbia, at paras. 23-24.
[16] Factum of the Attorney General of British Columbia, at para. 9.

"effect" to be assessed and under what threshold)? and (2) how should that causation analysis be applied?

10. ***Meaning of Causation.*** The claimant must establish that there is a link or nexus between the impugned law and the distinction drawn.[17] In an adverse impact discrimination case, that means all the claimant has to show at the first step is that while the law is facially neutral, it has some kind of an adverse impact on a group on the basis of a protected ground.[18] Causation means and requires nothing more than this, at step one.

11. There are good reasons for such an approach. First, the first step is "not a preliminary merits screen, nor an onerous hurdle designed to weed out claims on technical bases".[19] The purpose of the first step is to ensure that the analysis "exclude[s] claims that have 'nothing to do with substantive equality'",[20] not to impose scientific rigour or import elements of justification properly left to s. 1. Since *Taypotat*—decided over a decade ago—this Court has recognized that the purpose of causation in step one is merely to detect whether a claim falls within the *scope* of s. 15. In other words, under step one, causation is a rough detection tool.

12. Second, a more exacting causation analysis at step one collapses the distinct analytical functions of s. 15's two-part test.[21] The second step of the test requires a claimant to establish that the distinction drawn by the law reinforces, perpetuates, or exacerbates disadvantage,[22] which often requires a causation analysis. For example, in *Fraser*, Justice Abella conducted a causation analysis in finding that job-sharing was one cause of further engrained labour market disadvantages for women.[23] Further, since step two of s. 15 invariably contains some aspect of a causation analysis, an exacting causation analysis at the first step is duplicative and an unnecessary practical burden on claimants.

13. Third, an appropriately circumscribed role for causation is important in adverse impact

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[17] *Sharma*, at para. 44.
[18] *Fraser*, at paras. 52-53.
[19] *Quebec (Attorney General) v. Alliance*, 2018 SCC 17, at para. 26 ("*Alliance*")
[20] *Alliance*, at para. 26 (emphasis added).
[21] Perryman, "Proving Discrimination" at p. 10; *Stadler v St. Boniface/St. Vital*, 2020 MBCA 46.
[22] *Sharma*, at para. 53.
[23] *Fraser*, at paras. 108-113.

discrimination cases because of the already increased burden at step one for claimants, who must pre-emptively demonstrate a law's effects to prove that a distinction exists. This is in contrast to the "relatively straightforward" task at the first step for direct discrimination cases, in which the distinction is obvious and analysis of the effects of a law takes place only at step two.[24]

14. ***Threshold for Causation.*** The threshold to prove causation at step one is that the relationship between (1) the distinction on the basis of a ground and (2) the impugned law or state action amounts to more than a "web of instinct".[25] As long as a claimant can show based on *some* evidence that a distinction is drawn on the basis of an enumerated or analogous ground that results in differential treatment, the threshold for causation at step one is met.[26]

15. A "web of instinct" in its plain language means that a causal relationship may not be established based on intuition alone. Rather, there is something beyond intuition that is available to the court. Legally, this means that the threshold of "more than a web of instinct" is a flexible and contextual threshold that does not predetermine the *type* or depth of evidence needed.[27] That is necessary because establishing differential treatment at step one varies greatly both in form and substance depending on the factual matrix.[28] The threshold of a "web of instinct" allows for an appropriate burden for claimants at the first step, and recognizes the myriad ways that laws and state action can harm marginalized groups.

3. Statistical Evidence is not Required to Establish Causation

16. With respect to how the causation analysis should be applied, the evidence required to satisfy the causation analysis at step one is not rigid. Differential impacts that stem from the distinction drawn "can be proven in different ways."[29] This is not new.

17. The current challenge is that after the majority in *Sharma* stressed that causation is a "central issue" and focused in its analysis on statistical evidence, lower courts have increasingly

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[24] *Withler v. Canada (Attorney General)*, 2011 SCC 12, at para. 64.
[25] *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, at para. 34; *Sharma*, at para. 44.
[26] *Stadler*, at para. 70; *Withler,* at para. 63; *Alliance*, at para. 26.
[27] *Fraser*, at para. 55; *Hutlet v. Attorney General of Canada et al*., 2022 MBKB 223, at para. 138.
[28] *Fraser*, at para. 55.
[29] *Fraser*, at para. 55 (emphasis added).

indicated that statistical evidence is *de facto* necessary in adverse impact discrimination cases.[30] That cannot be correct. This interpretation risks expanding the role of causation at step one and imposes an evidentiary hurdle that ordinary claimants often cannot meet.

18. Statistical evidence is not a prerequisite in adverse impact discrimination cases:

(a) There will be instances where statistics are not necessary in adverse impact discrimination cases. In some cases, evidence about a group will show a strong association with certain traits—such as pregnancy with gender—such that the disproportionate impact on members of that group "will be apparent."[31]

(b) Statistical evidence about the systemic impact of a law is not always available, particularly to ordinary claimants.[32] Any suggestion that such evidence is required or preferred in adverse impact discrimination cases hollows equality protections.[33]

(c) Even if quantitative evidence is available, courts at times lack the institutional expertise to engage critically with such evidence. They may not fully understand particular statistical methodologies or what inferences or conclusions can be properly drawn from them.[34]

(d) Even if the statistical evidence is such that the courts have the institutional capacity to process it, statistical evidence often centres on correlation, not causation. Statistical methodologies can normally provide evidence of correlation and evidence that describes a social phenomenon, but not evidence of causation.[35]

19. A claimant can, and should be permitted to, establish causation (i.e., a "link" or "nexus") at the first step of the s. 15 test through both their circumstances and/or the impact of the law. The allegations raised will inform the type of evidence needed. However, the recent jurisprudential

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[30] *Yao*, at para. 198; *Wright*, at para. 208; *Metro Taxi*, at para. 320.
[31] *Taypotat*, at para. 33.
[32] Jennifer Koshan and Jonnette Watson Hamilton, ""Clarifications" or "Wholesale Revisions"?" 114 SCLR (2d) 15 at 13, online; *Fraser*, at para. 60; *Sharma*, at para. 49.
[33] See Perryman, "Proving Discrimination," at p. 18.
[34] Perryman, "Proving Discrimination," at p. 14.
[35] Perryman, "Proving Discrimination," at p. 14.

pattern of requiring or preferring statistical evidence—or treating a lack of statistical evidence as fatal to the claim—has no footing in substantive equality.[36]

4. Causation at Step One does not Require Strict Comparison

20. When assessing causation at step one, comparison has a limited but flexible role. The determination of differential treatment on the basis of an enumerated or analogous ground may require comparing the protected class with the general population.[37] The majority in *Sharma* recognized this and concluded that "comparison is necessarily" introduced at step one of the test.[38]

21. The problem, however, is that the *Sharma* majority's emphasis on comparison as part of conducting the causation analysis at step one has since been misinterpreted as requiring forms of comparison that are rigid and formalistic.

22. For example, in *Metro Taxi,* the Ontario Superior Court determined a s. 15 challenge concerning a city's treatment of taxi drivers and those working for ride share services such as Uber.[39] The Court stressed the importance of comparison at step one and stated that the *Withler* decision neither abandoned nor precluded the use of comparator groups.[40] While the Court did not use a mirror comparator group, it remained preoccupied with the "right" group for comparison.[41]

23. *Metro Taxi* is part of a broader pattern of formalistic approaches to comparison contrary to substantive equality and the objective of step one.[42] One recent case insisted on the need for a "carefully defined comparator group" as a result of the causation analysis required at step one.[43]

24. While comparison between members of a protected group and non-group members can be part of step one, the analysis can be undertaken in many ways. For example, a court may focus on over-representation of members of a protected group in the group affected by a law as compared

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[36] *Yao*, at para. 198; *Wright*, at para. 208; *Metro Taxi*, at para. 320.
[37] *Andrews*, at 164.
[38] *Sharma*, at para. 31.
[39] *Metro Taxi Ltd*., at para. 249.
[40] *Metro Taxi Ltd*., at para. 305.
[41] *Metro Taxi Ltd*., at para. 312.
[42] *Power Workers' Union v. Canada (Attorney General)*, 2024 FCA 182, at para. 165.
[43] *Advocacy Centre,* at para. 312; *Fair Change*, at para. 324.

to their prevalence in the general population.[44] A court may also focus solely on the population affected by the impugned law and compare members of a protected group and non-group members within the group affected by the law.[45] Courts may approach comparison in these and other ways and should compare the two groups with an eye to their context. The variation in methodologies for comparison throughout s. 15 jurisprudence reflects the need for a flexible approach to equality, with recognition that courts may view a law's effects from different angles to understand them.

25. Against this background, and to the extent courts elect to rely on comparison as part of the step one analysis, the following principles rooted in substantive equality should be followed:

(a) While comparison can play a role in conducting the causation analysis at step one, it cannot allow for the introduction of mirror comparator groups, which have been rejected for close to a decade now.[46] Mirror comparator groups (or some variation of them) were ill-conceived then, and continue to be now.[47]

(b) Context-driven comparison is to be conducted at step one as part of the causation analysis.[48] Once the court has identified the distinction that the claimant has alleged, it may then look to the general population to determine the law's impact on those outside the claimant group.[49] Contrary to the submissions of the Attorney General of British Columbia, this Court should not categorize the different "types" of comparative analysis and only endorse a particular form of comparison for the purposes of step one. Equality claims cover vastly different factual and legislative areas. A pre-set idea of the "proper" type of comparison undermines the different analytical approaches that the Court can take depending on the context and limits on a claimant's ability to fully argue their case in the spirit of substantive equality.

(c) Following decades of case law,[50] the comparative analysis is not mechanical or

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[44] *Jacob,* at paras. 82-83.
[45] *Fraser*, at paras. 97-102.
[46] *Withler*, at paras. 40, and 55-60.
[47] Shreya Atrey, "Comparison in Intersectional Discrimination" (2018) Legal Studies 379, at 380.
[48] *Withler*, at paras. 51 and 54; *Moore v. British Columbia,* 2012 SCC 61, at paras. 28-31.
[49] *Lavoie v Canada*, 2002 SCC 23, at para. 40
[50] *Withler*, at paras. 51-54; *Lovelace v. Ontario*, 2000 SCC 37, at para. 62.

rigid, but a rough analytical device. It is one of many ways to test whether the impugned law generates differential treatment for the claimant group at step one. Such an approach limits the inherent dangers of rigid comparison in the equality context, which "can doom the outcome of the whole s. 15 analysis" in many cases.[51] Accordingly, comparison should be flexible with an eye to promoting substantive equality—and not denying its protections on technical grounds.

B. Under Step Two of the S. 15 Test, Courts Should Consider "Legislative Context" Only as Background Information

26. The consideration of "legislative context" at the second step of the s. 15 analysis must be solely about what the impugned law says and its intersection with other legislative or regulatory schemes (if any). In other words, courts should consider legislative context only as "background information." Anything more than that—such as assessing the alleged "benefits" or intention of the legislative scheme—creates doctrinal duplication with the s. 1 analysis and unfairly tilts the playing field in favour of the state.

27. One of *Sharma's* clarifications to step two of the s. 15 test was to introduce "legislative context."[52] The *Sharma* majority held that to determine whether a distinction is discriminatory, courts should consider the broader legislative context.[53] The majority did not define what the analysis regarding "legislative context" comprises.[54] As such, it remains unclear how courts should conduct a legislative context analysis at the second step of the s. 15 test.

28. To the extent legislative context continues to be a part of step two of the s. 15 test, it should have two defined parameters. First, "legislative context" should not become a vehicle for establishing the "legitimate" state objectives or "benefits" of a challenged law. The perpetuation of disadvantage does not become less serious under s. 15 because it was incidental to a legitimate or well-intentioned state objective.[55] The test for a breach of s. 15 is concerned with *whether*

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[51] *Hodge v. Canada (Minister of Human Resources Development)*, 2004 SCC 65, at para. 18.
[52] *Sharma*, at paras. 56-61; Caitlin Salvino, "*R v Sharma*'s "Clarification" of the Section 15 Framework" (2024) 32:4 *Constitutional Forum* 1, at 7, online.
[53] *Sharma*, at para. 56.
[54] *Sharma*, at para. 59.
[55] *Fraser*, at para. 79.

discrimination occurred, not with whether the discrimination is justified.[56] Whether the discriminatory impact can be justified is saved for s. 1

29. Importing s. 1 considerations into the s. 15 analysis undermines both s. 1 and s. 15. As an interpretive exercise, ss. 1 and 15 are distinct provisions with distinct purposes and functions. Duplication of part of the s. 1 analysis within the s. 15 test would render s. 1 redundant and weaken its distinct role in the constitutional architecture.[57]

30. Using "legislative context" to sneak in s. 1 considerations in the s. 15 analysis also creates yet another hurdle for ordinary claimants. For example, if pursuant to legislative context considerations, the state can lead evidence about how the law advances legitimate state objectives and benefits many groups (typically s. 1 considerations), then the claimant may have to lead evidence refuting this and/or demonstrating that discrimination exists regardless, in order to establish a s. 15 breach. If successful, they have to do this again under a s. 1 analysis. This results in "two kicks at the can" for the state and seriously prejudices ordinary claimants.

31. Second, to the extent "legislative context" continues to play any role in the s. 15 analysis, that role must be limited to providing background information only. It is open to a court to assess background information under legislative context such as the details about the challenged law, how it works, or how it intersects with other legislative and/or regulatory regimes. All of that is fair game and, in fact, may enable a court to conduct an analysis rooted in substantive equality. However, "legislative context" should not be an open-ended category or a guise for the state to adduce evidence about its intention.[58] That is irrelevant to establishing a s. 15 breach and legislative context should not become a vehicle to uproot a pillar of s. 15 jurisprudence.

PART IV. ORDER REQUESTED | PART V. COSTS

32. The BCCLA takes no position on the outcome of this appeal. The BCCLA does not seek costs and asks that no costs be awarded against it.

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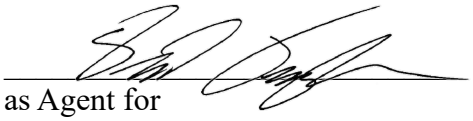
[56] *Fraser*, at para. 79.
[57] Chris Bredt, et al, "The Increasing Irrelevance of Section 1" (2001) SCLR 175 at 175-176.
[58] *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, at para. 80.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

April 24, 2025



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