Dossier no 41210

COUR SUPRÊME DU CANADA
(EN APPEL D'UN JUGEMENT DE LA COUR D'APPEL DU QUÉBEC)

E N T R E :

PROCUREUR GÉNÉRAL DU QUÉBEC

APPELANT
(appelant / intimé incident)

- et -

BIJOU CIBUABUA KANYINDA

INTIMÉE
(intimée / appelante incidente)

- et -

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

INTIMÉE
(mise en cause / appelante incidente)

- et -

PROCUREUR GÉNÉRAL DE L'ALBERTA
PROCUREUR GÉNÉRAL DE L'ONTARIO
PROCUREUR GÉNÉRAL DE LA COLOMBIE-BRITANNIQUE
PROCUREUR GÉNÉRAL DU CANADA

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(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

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PART I – OVERVIEW

1. This appeal offers the Court the opportunity to clarify when and how causation can be established by way of reasonable inference in step one of the test for whether a law infringes s. 15(1) of the *Charter*.

2. The step one test is settled: whether a law or policy, on its face or in its impact, creates a distinction based on enumerated or analogous grounds.[1] The requirements to satisfy the first step in indirect discrimination cases, however, face uncertainty, especially following this Court's recent decision in *R. v. Sharma*.[2]

3. The Black Action Defense Committee ("**BADC**") intervenes in this appeal given this case's potential effects on its Black, refugee and other historically marginalized constituents in cases of indirect discrimination. BADC makes two submissions in this respect.

4. First, evidence is not always necessary for claimants to satisfy the first step of s. 15(1). This Court's s. 15(1) jurisprudence authorizes causation to be established by way of a reasonable inference. In drawing a reasonable inference of causation, three methods are available to the Court: (a) contextual reasoning; (b) judicial notice; and (c) reasoning by precedent.

5. Second, the above causation by inference analysis is an integral component of the Court's well-settled substantive equality, rather than formalistic, approach to s. 15(1) generally, and to step one of the s. 15(1) test specifically.[3] The application of that test is intended to protect substantive

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[1] *Fraser v. Canada (Attorney General)*, 2020 SCC 28 [*Fraser*] at para. 27.
[2] *R. v. Sharma*, 2022 SCC 39 [*Sharma*].
[3] *Withler v. Canada (Attorney General)*, 2011 SCC 12 [*Withler*] at para. 43.

equality.[4] The test itself should not become a hurdle stacked against the individual.[5] Reasonable inferences play a key role in establishing causation in indirect discrimination, including in levelling the playing field with respect to the evidentiary burden faced by the claimant.

PART II – ISSUES

6. BADC takes no position on the immediate facts or the disposition of this appeal. As will be submitted below, from an analytical perspective, BADC supports the Court of Appeal's approach to causation based on inference in a case of indirect discrimination.

PART III – ARGUMENT

A. The Role of Causation in the First Step of Section 15(1)

7. Causation in step one of the s. 15(1) analysis should play a narrow role. The purpose of the first step is to "exclude claims that have 'nothing to do with substantive equality'".[6] It is not a preliminary merits screen, nor an onerous hurdle.[7]

8. The question of causation arises in both direct discrimination and indirect discrimination (or adverse effect) cases. However, it has the potential to become a larger burden in cases of indirect discrimination. As this Court stated in *Withler*:

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[4] *R. v. Sharma*, 2022 SCC 39 at para. 38.
[5] Ryder, Bruce, "The Strange Double Life of Canadian Equality Rights" (2013) The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference 63 at 277-78; *R. v. Sharma*, 2022 SCC 39 at para. 202.
[6] *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 at para. 26.
[7] *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30 at para. 34; *R. v. Sharma*, 2022 SCC 39 at para. 190.

> In some cases, identifying the distinction will be relatively straightforward, because a law will, on its face, make a distinction on the basis of an enumerated or analogous ground (direct discrimination). …. **In other cases, establishing the distinction will be more difficult, because what is alleged is indirect discrimination**: that although the law purports to treat everyone the same, it **has a disproportionately negative impact on a group or individual** that can be identified by factors relating to enumerated or analogous grounds. … **In that kind of case, the claimant will have more work to do at the first step. Historical or sociological disadvantage may assist in demonstrating that the law imposes a burden or denies a benefit** to the claimant that is not imposed on or denied to others. The focus will be on the effect of the law and the situation of the claimant group.[8] [emphasis added]

9. The question of discrimination based on sex in this appeal raises an indirect discrimination issue.[9] BADC's submissions likewise focus on causation in cases of indirect discrimination. In such cases the key question is whether state action created or contributed to a disproportionate impact on the claimant.

10. While causation in this sense can be established by various types of evidence,[10] evidence is not always necessary to satisfy the first step of the test.[11] Just as evidence of causation is rarely required in direct discrimination cases, sometimes "causation may be obvious and require no evidence".[12] Reasonable inferences, where available, can assist.[13]

11. The principle that a claimant can satisfy their burden of proof at the first step of s. 15(1) by reasonable inference is not new. It finds its origins in this Court's earliest *Charter* jurisprudence

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[8] *Withler v. Canada (Attorney General)*, 2011 SCC 12 at para. 64.
[9] *Procureur général du Québec v. Kanyinda*, 2024 QCCA 144 at paras. 87-88.
[10] *Fraser v. Canada (Attorney General)*, 2020 SCC 28 at para. 58.
[11] *R. v. Sharma*, 2022 SCC 39 at para. 49; *Fraser v. Canada (Attorney General)*, 2020 SCC 28 at para 61.
[12] *R. v. Sharma*, 2022 SCC 39 at para 49.
[13] *R. v. Sharma*, 2022 SCC 39 at para 49.

and it has been reiterated perennially.[14] The latest restatement occurred in *Sharma* where the majority's reasons point to a renewed focus on causation at the first step of the s. 15(1) test.[15]

B. The Framework for Reasonable Inferences

12. The Court cannot draw a reasonable inference from a "web of instinct".[16] This expression refers to an accumulation of intuition[17] devoid of reasoning. Furthermore, a reasonable inference cannot be drawn based on *a priori* reasoning, namely, theoretical deductions.[18]

13. However, the Court can deploy three methods to draw a reasonable inference: (a) contextual reasoning; (b) judicial notice; and (c) reasoning by precedent.

i. Reasonable inference by contextual reasoning

14. The first method of drawing a reasonable inference is where a distinction is "apparent and immediate".[19] A reasonable inference is one that is clued into and responsive to a law's real-world, common sensical effects and context, such as the "intersectionality of disadvantage".[20]

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[14] *Law v. Canada (Minister of Employment and Immigration)*, 1999 CanLII 675 (SCC), [1999] 1 SCR 497 [*Law*] at paras. 75-78; *Andrews v. Law Society of British Columbia*, 1989 CanLII 2 (SCC), [1989] 1 SCR 143 at pp. 151-152.
[15] *R. v. Sharma*, 2022 SCC 39 at paras. 42-49.
[16] *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30 at para. 34.
[17] *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30 at para. 34. See also the official French translation of "web of instinct", which translates to an 'accumulation of intuitions'.
[18] *R. v. Sharma*, 2022 SCC 39 at para. 55.
[19] *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30 at para. 33; *Fraser v. Canada (Attorney General)*, 2020 SCC 28 at para. 61; *R. v. Sharma*, 2022 SCC 39 at para 191.
[20] *R. v. Sharma*, 2022 SCC 39 at para. 196.

15. In *Law v. Canada*, this Court observed that it has "**routinely and appropriately** undertaken analysis under s. 15(1)" on the basis of logical reasoning.[21] The differentiating factor between a "web of instinct" and an "apparent and immediate" distinction identified through reasonable inference is a contextual reasoning, a mainstay principle in s. 15 jurisprudence, which allows the Court to conclude that there is an evident, disparate impact on the protected group rather than a hunch that this is the case.[22]

16. *Andrews v. Law Society of British Columbia*[23] offers an example of this type of inference. The central issue was whether a citizenship requirement for entry into the legal profession in British Columbia infringed the right of non-citizens within Canada to equal treatment. The Court found, using reasoning alone, that barring non-citizens from certain forms of employment solely because of the personal characteristic of citizenship was a real disadvantage to the claimant, resulting in an infringement of s. 15(1).[24]

17. *Weatherall v. Canada (Attorney General)* deployed similar conclusions based on contextual reasoning.[25] Male inmates alleged that having female prison guards conduct frisk and other searches on them violated their s. 15(1) right, pointing to female inmates who only underwent

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[21] *Law v. Canada (Minister of Employment and Immigration)*, 1999 CanLII 675 (SCC), [1999] 1 SCR 497 at para 78 (emphasis added).
[22] *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30 at paras. 33-34; *Fraser v. Canada (Attorney General)*, 2020 SCC 28 at paras. 190-191.
[23] *Andrews v. Law Society of British Columbia*, 1989 CanLII 2 (SCC), [1989] 1 SCR 143 [*Andrews*].
[24] *Law v. Canada (Minister of Employment and Immigration)*, 1999 CanLII 675 (SCC), [1999] 1 SCR 497 at para. 78; *Andrews v. Law Society of British Columbia*, 1989 CanLII 2 (SCC), [1989] 1 SCR 143 at pp. 151-152.
[25] *Weatherall v. Canada (Attorney General)*, 1993 CanLII 112 (SCC), [1993] 2 SCR 872.

same-gender searches. In concluding that there was no *Charter* violation, Justice La Forest drew upon contextual reasoning:

> Given the **historical, biological and sociological differences between men and women**, equality does not demand that practices which are forbidden where male officers guard female inmates must also be banned where female officers guard male inmates. The **reality of the relationship between the sexes** is such that the **historical trend of violence perpetrated by men against women** is not matched by a comparable trend pursuant to which men are the victims and women the aggressors. Biologically, a frisk search or surveillance of a man's chest area conducted by a female guard does not implicate the same concerns as the same practice by a male guard in relation to a female inmate. Moreover, **women generally occupy a disadvantaged position in society in relation to men**. Viewed in this light, it becomes clear that the effect of cross-gender searching is different and more threatening for women than for men...[26] [emphasis added]

18. As further detailed below, the dissenting reasons in *Sharma* similarly drew upon, amongst others, contextual reasoning in its approach to the overrepresentation of Indigenous people in Canada's prisons.[27]

ii. Reasonable inference by judicial notice

19. The Court may also draw a reasonable inference based on judicial notice. In *Law*, this Court observed that "it is **clearly appropriate** for the purpose of s. 15(1) to take judicial notice of certain forms of disadvantage and prejudice".[28]

20. In terms of the scope of judicial notice, it is trite law that a court may take notice of "notorious and undisputed facts, or of facts which are capable of immediate and accurate

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[26] *Weatherall v. Canada (Attorney General)*, 1993 CanLII 112 (SCC), [1993] 2 SCR 872 at pp. 877-878.
[27] *R. v. Sharma*, 2022 SCC 39 at paras. 114, 124, 128-129.
[28] *Law v. Canada (Minister of Employment and Immigration)*, 1999 CanLII 675 (SCC), [1999] 1 SCR 497 at para. 79 (emphasis added).

demonstration, by resorting to readily accessible sources of indisputable accuracy".[29] When the underlying facts meet this high threshold, judicial notice may provide part of, or the *entire*, factual matrix necessary to make out a discrimination claim. [30]

21. Once again, *Andrews* offers an example. A court may take judicial notice of pre-existing disadvantage by the group of which the claimant is a member in order for such a s. 15(1) claim to be made out.[31] In deciding the analogous ground issue in *Andrews*, this Court took judicial notice of the fact that "[r]elative to citizens, non-citizens are a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated".[32]

iii. Reasonable inference by precedent

22. Precedent recognizing a group's historical harm may enable the Court to illuminate the impact of the law on a claimant's group. For instance, in *Fraser v. Canada (Attorney General),* three retired RCMP members who took maternity leave enrolled in a job-sharing program, which was ineligible for full pension credits. These claimants argued that the pension consequences of job-sharing had a discriminatory impact on women. This Court turned to precedent for support that women face disadvantages in the workplace because of their disproportionate responsibility

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[29] *Law v. Canada (Minister of Employment and Immigration)*, 1999 CanLII 675 (SCC), [1999] 1 SCR 497 at para. 77.
[30] *Law v. Canada (Minister of Employment and Immigration)*, 1999 CanLII 675 (SCC), [1999] 1 SCR 497 at para. 77 (emphasis added).
[31] *Law v. Canada (Minister of Employment and Immigration)*, 1999 CanLII 675 (SCC), [1999] 1 SCR 497 at para. 83.
[32] *Law v. Canada (Minister of Employment and Immigration)*, 1999 CanLII 675 (SCC), [1999] 1 SCR 497 at para. 78; *Andrews v. Law Society of British Columbia*, 1989 CanLII 2 (SCC), [1989] 1 SCR 143 at p. 152.

for domestic work based on gendered divisions.[33] These claimants successfully established that their s. 15(1) rights were infringed.

23. In this case, the Quebec Court of Appeal below used the same method of inference by precedent, relying on *Fraser*.[34] In addition, the Court of Appeal accepted the evidence adduced by the claimant as supporting causation for the purposes of step one of the s. 15(1) analysis. In other words, the Court of Appeal employed a combination of evidence and reasonable inference based on precedent.[35]

24. While it is beyond the scope of BADC's role to comment on the effect of the specific evidence before the Court of Appeal and this Court, the Court of Appeal's reliance on this Court's precedent to draw a reasonable inference goes to the heart of BADC's submission: if this Court were to reject reliance on its precedent to draw an obvious inference of gender inequality, the burden would become too high for equality claimants. This is particularly so given the asymmetry of information and power between the individual and the state inherent to s. 15(1) claims.[36] Denying childcare assistance to both men and women will create a plain distinction adversely effecting women.[37]

25. Similarly, the dissent in *Sharma* used all three methods (contextual reasoning, precedent and judicial notice) to draw reasonable inferences of causation. Justice Karakatsanis held that the distinction and differential impact on the basis of race was "apparent" as the impairment reflected

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[33] *Fraser v. Canada (Attorney General)*, 2020 SCC 28 at paras. 99, 103.
[34] *Procureur général du Québec v. Kanyinda*, 2024 QCCA 144 at para. 99.
[35] *Procureur général du Québec v. Kanyinda*, 2024 QCCA 144 at para. 100.
[36] *R. v. Sharma*, 2022 SCC 39 at para. 202.
[37] See *Fraser v. Canada (Attorney General)*, 2020 SCC 28 at paras. 98-106.

a reality recognized in *Gladue* jurisprudence, amongst others.[38] Underlying this finding was the context of the overrepresentation of Indigenous people in Canadian prisons, a vestige of a troubled colonial past.[39]Justice Karakatsanis explained that "the challenged provisions *necessarily* impact Indigenous offenders differently; a distinction arises from the interaction of these provisions, against a backdrop of facts of which courts must take judicial notice. Further evidence is not required because the distinction is plain."[40]

C. Other Sections of the *Charter* Are Instructive on Reasonable Inference

26. The availability of reasonable inferences to satisfy a claimant's burden of proof under s. 15(1) is supported by how reasonable inferences routinely satisfy causation for other *Charter* provisions:

(a) **Section 7**: In *Canada (Attorney General) v. Bedford*, this Court adjudicated the constitutionality of provisions that criminalized various activities related to sex work. These provisions were alleged to infringe the sex workers' s. 7 *Charter* rights. When considering the causal connection under s. 7 between the laws and the risks experienced by sex workers, this Court held that a "sufficient causal connection standard does not require that the impugned government action or law be the only or the dominant cause of the prejudice suffered by the claimant, **and is satisfied by a reasonable inference**, drawn on a balance of probabilities". [41]

(b) **Section 2(d)**: Reasonable inferences satisfy causation in s. 2(d) of the *Charter*. *Société des casinos du Québec inc. v. Association des cadres de la Société des casinos du Québec*[42] addressed whether the statutory exclusion of managers from the labour relations regime of the Quebec Labour Code[43] infringed their guarantee of freedom of association under s. 2(d) of the *Charter.* The majority held that, at the second step of the s. 2(d) analysis – where the Court considers if the impugned legislation has substantially interfered with activities protected by s. 2(d) – the state's responsibility in causing the substantial interference might

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[38] *R. v. Sharma*, 2022 SCC 39 at paras. 224-225.
[39] *R. v. Sharma*, 2022 SCC 39 at para. 114.
[40] *R. v. Sharma*, 2022 SCC 39 at para. 227.
[41] *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at para. 76.
[42] *Société des casinos du Québec inc. v. Association des cadres de la Société des casinos du Québec*, 2024 SCC 13.
[43] *Labour Code*, CQLR c C-27.

be "self-evident".[44] This confirms that a claimant may not need evidence to establish the causal connection to discharge their burden of demonstrating an infringement.

(c) **Section 1**: Similarly, this Court has repeatedly held that inferences based on "common sense" may satisfy the state's burden of proof under s. 1 of the *Charter*. In *RJR Macdonald Inc v. Canada,* Justice McLachlin (as she then was) held that the state's standard of proof may be met by inference from undisputed knowledge, warranting a more flexible standard of evidence given its high reliability: "the balance of probabilities may be established by the application of common sense to what is known, even though what is known may be deficient from a scientific point of view."[45]

Similarly, Chief Justice Dickson, when framing the boundaries of the s. 1 analysis in *R. v. Oakes*, opined that while evidence would generally be required to prove the constituent elements of a s. 1 inquiry, there may be cases where "certain elements of the s. 1 analysis are obvious or self-evident".[46] Though Chief Justice Dickson ultimately relied on multiple sources when applying the s. 1 test in *R. v. Oakes*, his observation that these may not have been necessary for the Crown to meet its burden is informative: "the degree of seriousness of drug trafficking makes its acknowledgement as a sufficiently important objective for the purposes of s. 1, to a large extent, self-evident".[47]

"Common sense" can also capture notions of harm. In *Saskatchewan (Human Rights Commission) v. Whatcott*, this Court grappled with the issue of proving harm in the context of hate speech and s. 1. The Court ultimately held that it could "use common sense and experience in recognizing that certain activities, hate speech among them, inflict societal harms."[48] This reliance on common sense, or common understandings from the "everyday knowledge and experience of Canadians" that are accepted as facts, was justified by the difficulty of establishing a causal link between hate speech and the seriousness of the harm to which vulnerable groups are exposed to by hate speech.

PART IV – COSTS

27. BADC is not seeking costs and asks that no costs be awarded against it.

PARTS V & VI – ORDERS SOUGHT & CASE SENSITIVITY

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[44] *Société des casinos du Québec inc. v. Association des cadres de la Société des casinos du Québec*, 2024 SCC 13 at para. 35.
[45] *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1995 CanLII 64 (SCC), [1995] 3 SCR 199 at para. 137.
[46] *R. v. Oakes*, 1986 CanLII 46, [1986] 1 SCR 103 at para. 68.
[47] *R. v. Oakes*, 1986 CanLII 46, [1986] 1 SCR 103 at para. 76.
[48] *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 at paras. 129-135.

28. N/A.

Toronto, ON April 22, 2025

Mohsen Seddigh & Karine Bédard

Toronto, ON April 22, 2025

Anthony Sangiuliano

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PART VII – LIST OF AUTHORITIES

A. Cases

Citation	Pinpoint(s)
Andrews v. Law Society of British Columbia, 1989 CanLII 2 (SCC), [1989] 1 SCR 143	151-152
Canada (Attorney General) v. Bedford, 2013 SCC 72	76
Fraser v. Canada (Attorney General), 2020 SCC 28	27, 58, 61, 98-103, 190-191
Kahkewistahaw First Nation v. Taypotat, 2015 SCC 30	33-34
Law v. Canada (Minister of Employment and Immigration), 1999 CanLII 675 (SCC), [1999] 1 SCR 497	75-79, 83
Procureur général du Québec v. Kanyinda, 2024 QCCA 144	87, 99-100
Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux, 2018 SCC 17	26
R. v. Oakes, 1986 CanLII 46, [1986] 1 SCR 103	68, 76
R. v. Sharma, 2022 SCC 39	38, 42-49, 55, 61, 114, 190-191, 196, 202, 224-225, 227
RJR-MacDonald Inc. v. Canada (Attorney General), 1995 CanLII 64 (SCC), [1995] 3 SCR 199	137
Saskatchewan (Human Rights Commission) v. Whatcott, 2013 SCC 11	129-135
Société des casinos du Québec inc. v. Association des cadres de la Société des casinos du Québec, 2024 SCC 13	35
Weatherall v. Canada (Attorney General), 1993 CanLII 112 (SCC), [1993] 2 SCR 872	878-879
Withler v. Canada (Attorney General), 2011 SCC 12	43, 64

B. Statutes

Citation	Pinpoint(s)
Labour Code, CQLR c C-27.	N/A

C. Secondary Sources

Citation	Pinpoint(s)
Ryder, Bruce, "The Strange Double Life of Canadian Equality Rights" (2013) The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference 63.	277-78