S.C.C. File No. 41210

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

BETWEEN:

**ATTORNEY GENERAL OF QUÉBEC**

Appellant

and

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

Respondents

and

**ATTORNEY GENERAL OF ALBERTA, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF CANADA, CANADIAN CONSTITUTION FOUNDATION, ADVOCATES FOR THE RULE OF LAW, REFUGEE CENTRE, CENTRALE DES SYNDICATS DU QUÉBEC, BLACK ACTION DEFENSE COMMITTEE, AMNISTIE INTERNATIONALE CANADA FRANCOPHONE, FCJ REFUGEE CENTRE AND MADHU VERMA MIGRANT JUSTICE CENTRE, CANADIAN ASSOCIATION OF REFUGEE LAWYERS, CHARTER COMMITTEE ON POVERTY ISSUES, NATIONAL ASSOCIATION OF WOMEN AND THE LAW AND DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS, INCOME SECURITY ADVOCACY CENTRE, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, CANADIAN COUNCIL FOR REFUGEES, CANADIAN CIVIL LIBERTIES ASSOCIATION, INTERNATIONAL NETWORK FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS, CANADIAN ASSOCIATION OF BLACK LAWYERS AND BLACK LEGAL ACTION CENTRE, WOMEN'S LEGAL EDUCATION AND ACTION FUND INC., ASSOCIATION QUÉBÉCOISE DES AVOCATS ET AVOCATES EN DROIT DE L'IMMIGRATION**

Interveners

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# FACTUM OF THE INTERVENERS, CANADIAN ASSOCIATION OF BLACK LAWYERS AND BLACK LEGAL ACTION CENTRE

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*, SOR/2002-156)

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**MCCARTHY TÉTRAULT LLP**
1000 de la Gauchetière Street West
Suite MZ400
Montréal, QC H3B 0A2

**Karine Joizil** (kjoizil@mccarthy.ca)
**Sajeda Hedaraly** (shedaraly@mccarthy.ca)
**Natasha Petrof** (npetrof@mccarthy.ca)

Tel. : 514-397-4129
Fax : 514-875-6246

**IMK LLP**
3500 Blvd. De Maisonneuve West
Suite 1400
Westmount, QC H3Z 3C1

**Bianca Annie Marcelin** (bamarcelin@imk.ca)
**Marianne Goyette** (mgoyette@imk.ca)

Tel.: 514-934-7726
Fax: 514-935-2999

**Counsel for the Interveners,**
**Canadian Association of Black Lawyers and**
**Black Legal Action Centre**

**ORIGINAL TO: THE REGISTRAR**
Supreme Court of Canada
301 Wellington Street
Ottawa, ON K1A 0J1

**COPIES TO:**

**BERNARD, ROY (JUSTICE-QUÉBEC)**
Suite 8.00
1, rue Notre-Dame Est
Montréal, QC H2Y 1B6

**Me Manuel Klein**
**Me Luc-Vincent Gendron-Bouchard**
**Me Christophe Achdjian**
Tel: 514 393-2336 #51560
Fax: 514 873-7074
Email: manuel.klein@justice.gouv.qc.ca

**Counsel for the Appellant,**
**Attorney General of Quebec**

**NOËL & ASSOCIÉS**
2e étage
225, montée Paiement
Gatineau, QC J8P 6M7

**Me Pierre Landry**

Tel: 819 771-7393
Fax: 819 771-5397
Email: p.landry@noelassocies.com

**Ottawa Agent for the Appellant,**
**Attorney General of Quebec**

**MELANÇON, MARCEAU, GRENIER & SCIORTINO**
1717, René-Lévesque Est
Montréal, QC H2L 4T3

**Me Sibel Ataogul**
**Me Guillaume Grenier**
Tel: 514 525-3414
Fax: 514 525-2803
Email:Email sataogul@mmgc.quebec

**Counsel for the Respondent,**
**Bijou Cibuabua Kanyinda**

**ALBERTA JUSTICE CONSTITUTIONAL AND ABORIGINAL LAW**
10th Floor, Oxford Tower
10025 - 102A Avenue N.W.
Edmonton, AB T5J 2Z2

**Leah M. McDaniel**
Tel: 780 422-7145
Fax: 780 643-0852
Email: leah.mcdaniel@gov.ab.ca

**Counsel for the Intervener,**
**Attorney General of Alberta**

**GOWLING WLG (CANADA) LLP**
160 Elgin Street
Suite 2600
Ottawa, ON K1P 1C3

**D. Lynne Watt**
Tel: 613 786-8695
Fax: 613 788-3509
Email: lynne.watt@gowlingwlg.com

**Ottawa Agent for the Intervener,**
**Attorney General of Alberta**

**ATTORNEY GENERAL OF ONTARIO**
McMurty-Scott Building, 4th Floor,
720 Bay St.
Toronto, ON M7A 2S9

**Rochelle Fox**
Tel: (416) 995-3288
Fax: (416) 326-4015
Email: rochelle.fox@ontario.ca

**Counsel for the Intervener,**
**Attorney General of Ontario**

**SUPREME ADVOCACY LLP**
340 Gilmour Street
Suite 100
Ottawa, ON K2P 0R3

**Marie-France Major**
Tel: (613) 695-8855 Ext: 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

**Ottawa Agent for the Intervener,**
**Attorney General of Ontario**

**ATTORNEY GENERAL OF BRITISH COLUMBIA**
PO Box 9280, Stn Prov Govt
Victoria, BC V8W 9J7

**Ashley A. Caron**
Tel: (778) 974-3342
Fax: (250) 356-9154
Email: Ashley.Caron@gov.bc.ca

**Counsel for the Intervener,**
**Attorney General of British Columbia**

**MICHAEL SOBKIN LAW CORPORATION**
331 Somerset Street West
Ottawa, ON K2P 0J8

**Michael Sobkin**
Tel: (613) 282-1712
Fax: (613) 228-2896
Email: msobkin@sympatico.ca

**Ottawa Agent for the Intervener,**
**Attorney General of British Columbia**

**ATTORNEY GENERAL OF CANADA**
Complexe Guy-Favreau
200, boul. René-Lévesque Ouest, Pièce 1202-23
Montréal, QC  H2Z 1X4

**François Joyal**
**Justine Malone**
**Lindy Rouillard-Labbé**
Tel: 514 283-4934
Fax: 514 496-7876
francois.joyal@justice.gc.ca

**Counsel for the Intervener,**
**Attorney General of Canada**

**ATTORNEY GENERAL OF CANADA**
Department of Justice Canada
275 Sparks Street, St-Andrew Tower
Ottawa, ON  K1A 0H8

**Bernard Letarte**

Tel: 613 294-6588
Email:
SCCAgentCorrespondantCSC@justice.gc.ca

**Ottawa Agent for the Intervener,**
**Attorney General of Canada**

**FASKEN MARTINEAU DUMOULIN**
**S.E.N.C.R.L., S.R.L.**
800 rue du Square-Victoria, Bureau 3500
Montréal, QC  H4Z 1E9

**Guillaume Pelegrin**
**Jean-François Trudelle**
Tel: 514) 397-7411Fax: (514) 397-7600
Email: gpelegrin@fasken.com

**Counsel for the Intervener,**
**Canadian Constitution Foundation**

**JORDAN HONICKMAN BARRISTERS**
90 Adelaide St. W., Suite 200
Toronto, ON  M5H 3V9

**Asher Honickman**
**Chelsea Dobrindt**
Tel: (416) 238-7511
Fax: (416) 238-5261
Email: ahonickman@jhbarristers.com

**Counsel for the Intervener,**
**Advocates for the Rule of Law**

**THE REFUGEE CENTRE / LE CENTRE DES RÉFUGIÉS**
100-2107 rue Sainte-Catherine Quest
Montréal, QC H3H 1M6

**Pierre-Luc Bouchard**
**Brett Gordon Howie**
Tel: (514) 846-0005
Fax: (514) 600-1688
Email: p.bouchard@therefugeecentre.org

**Counsel for the Intervener, Refugee Centre**

**BARABÉ MORIN**
(Les services juridiques de la CSQ)
9405, rue Sherbrooke Est.
Montréal, QC H1L 6P3

**Amy Nguyen**
**Ariane Roberge**
Tel: (514) 356-8888 Ext: 2137
Fax: (514) 356-0990
Email: nguyen.amy@lacsq.org

**Counsel for the Intervener, Centrale des syndicats du Québec**

**SOTOS LLP**
55 University Avenue
Suite 600
Toronto, ON M5J 2H7

**Mohsen Seddigh**
Tel: (416) 977-0007
Fax: (416) 977-0717
Email: mseddigh@sotosllp.com

**Counsel for the Intervener, Black Action Defense Committee**

**SUPREME ADVOCACY LLP**
Suite 100, 340 Gilmour Street
Ottawa, ON K2P 0R3

**Marie-France Major**

Tel.: (613) 695-8855, Ext: 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

**Ottawa Agent for the Intervener, Centrale des syndicats du Québec**

**MMGC**
1717, boul. René-Lévesque Est,
Bureau 300
Montréal, QC  H2L 4T3

**Julien Thibault**
Tel: (514) 525-3414
Fax: (514) 525-2803
Email: jthibault@mmgc.quebec

**Counsel for the Intervener,**
**Amnistie Internationale Canada**
**Francophone**

**UNIVERSITY OF OTTAWA**
Faculty of Law
57 Louis-Pasteur Pvt.
Ottawa, ON  K1N 6N5

**Yin Yuan Chen**
**Joshua Eisen**
Tel: (613) 562-5800, Ext. 2077
Email: yy.chen@uottawa.ca

**Counsel for the Intervener,**
**FCJ Refugee Centre and Madhu Verma**
**Migrant Justice Centre**

**MCCARTHY TETRAULT LLP**
Suite 2400, 745 Thurlow Street
Vancouver, BC V6E 0C5

**Connor Bildfell**
**Simon Bouthillier**
**Katherine Griffin**
Tel: (236) 330-2044
Fax: (604) 643-7900
Email: cbildfell@mccarthy.ca

**Counsel for the Intervener,**
**Canadian Association of Refugee Lawyers**

**PINK LARKIN**
201-1463 South Park Street
Halifax, NS  B3J 3S9

**Vince Calderhead**
**Martha Jackman**
Tel: (902) 423-7777
Fax: (902) 423-9588
Email: vcalderhead@pinklarkin.ca

**Counsel for the Intervener,**
**Charter Committee on Poverty Issues**

**UNIVERSITY OF NEW BRUNSWICK**
Faculty of Law
Rm 204A, 41 Dineen Drive
Fredericton, NB E3B 9V7

**Kerri Froc**
**Suzanne Zaccour**
**Cheryl Milne**
Tel: (416) 977-6070
Email: kerri.froc@unb.ca

**Counsel for the Interveners,**
**National Association of Women and the Law and David Asper Centre for Constitutional Rights**

**NORTON ROSE FULBRIGHT CANADA LLP**
1500-45 O'Connor St.
Ottawa, ON K1P 1A4

**Jean-Simon Schoenholz**

Tel: (613)780-1537
Fax: (613) 230-5459
Email: jean-simon.schoenholz@nortonrosefulbright.com

**Ottawa Agent for the Interveners,**
**National Association of Women and the Law and David Asper Centre for Constitutional Rights**

**INCOME SECURITY ADVOCACY CENTRE**
1500-55 University Avenue
Toronto, ON M5J 2H7

**Robin Nobleman**
**Adrian Merdzan**
Tel: (416) 597-5820
Fax: (416) 597-5821
Email: robin.nobleman@isac.clcg.ca

**Counsel for the Intervener,**
**Income Security Advocacy Centre**

**SUPREME ADVOCACY LLP**
Suite 100, 340 Gilmour Street Ottawa, ON K2P 0R3

**Marie-France Major**

Tel.: (613) 695-8855, Ext: 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

**Ottawa Agent for the Intervener,**
**Income Security Advocacy Centre**

**BORDEN LADNER GERVAIS LLP**
1000 rue de la Gauchtière O bureau 900
Montréal, QC  H3B 5H4

**François Grondin**
**Karine Fahmy**
**Amanda Afeich**
Tel: (514) 954-3153
Fax: (514) 954-1905
Email: fgrondin@blg.com

**Counsel for the Intervener,**
**United Nations High Commissioner for Refugees**

**BORDEN LADNER GERVAIS LLP**
World Exchange Plaza
100 Queen Street, suite 1300
Ottawa, ON  K1P 1J9

**Nadia Effendi**

Tel: (613) 787-3562
Fax: (613) 230-8842
Email: neffendi@blg.com

**Ottawa Agent for the Intervener,**
**United Nations High Commissioner for Refugees**

**PALIARE ROLAND ROSENBERG ROTHSTEIN LLP**
35th Floor, 155 Wellington St. W.
Toronto, ON  M5W 3H1

**Mannu Chowdhury**
**Kartiga Thavaraj**
Tel: (416) 367-6000
Fax: (416) 367-6749
Email: mannu.chowdhury@paliareroland.com

**Counsel for the Intervener,**
**British Columbia Civil Liberties Association**

**CONWAY BAXTER WILSON LLP**
411 Roosevelt Avenue
Suite 400
Ottawa, ON  K2A 3X9

**David P. Taylor**

Tel: (613) 780-2026
Fax: (613) 688-0271
Email: dtaylor@conwaylitigation.ca

**Ottawa Agent for the Intervener,**
**British Columbia Civil Liberties Association**

**CANADIAN COUNCIL FOR REFUGEES**
128 Union Street
Kingston, ON K7L 2P1

**Colin Gray**
**Peter Shams**
Tel: (416) 859-9446
Fax: (514) 439-0798
Email: colin.grey@queensu.ca

**Counsel for the Intervener,**
**Canadian Council for Refugees**

**TRUDEL JOHNSTON & LESPÉRANCE**
Suite 90, 750 côte de la Place-d'Armes
Montréal, QC H2Y 2X8

**Alexandra (Lex) Gill**
**Bruce W. Johnston**
Tel: (514) 871-8385, Ext. 219
Fax: (514) 871-8800
Email: lex@tjl.quebec

**Counsel for the Intervener,**
**Canadian Civil Liberties Association**

**OLTHUIS VAN ERT**
66 Lisgar St.
Ottawa, ON K2P 0C1

**Neil Abraham**
**Gib van Ert**
Tel: (613) 501-5350
Fax: (613) 651-0304
Email: nabraham@ovcounsel.com

**Counsel for the Intervener,**
**International Network for Economic, Social and Cultural Rights**

**IMK LLP**
Tower 2, Place Alexis Nihon
Suite 400, 3500 De Maisonneuve Blvd. West
Montréal, QC H3Z 3C1

**Olga Redko**
**Vanessa Ntaganda**
Tel: (514) 934-7742
Fax: (514) 935-2999
Email: oredko@imk.ca

**Counsel for the Interveners,**
**Women's Legal Education and Action Fund Inc.**

**HASA AVOCATS INC.**
2000 Ave McGill College
Suite 600, bureau 682
Montréal, QC H3A 3H3

**Lawrence David**
**Marine Cournier**
Tél : (514) 849-7311
Fax : (514) 849-7313
Email: l.david@havocats.ca

**Counsel for the Association québécoise des avocats et avocates en droit de l'immigration**

## TABLE OF CONTENTS

## PART I – OVERVIEW AND FACTS

1. This case concerns the constitutionality of the Québec government's exclusion of asylum seekers parents from the reduced-contribution daycare system established by the *Regulation respecting reduced contribution* under s. 15(1) of the *Charter*.[1]

2. The denial of access to subsidized childcare to asylum seekers constitutes a violation of s. 15(1) of the *Charter*, as it results in adverse differential treatment that disproportionately affects women asylum seekers—particularly those who are racialized. CABL and BLAC make two submissions with respect to the issues raised in the present appeal.

3. ***First***, substantive equality cannot be achieved without an intersectional analysis and the Court should chart a course for addressing multi-ground and intersectional discrimination under s. 15 of the *Charter*. Intersecting grounds— such as gender, race, and immigration/citizenship status— compound the harm experienced by individuals facing discrimination. Moreover, discrimination on the basis of citizenship does not require that all non-citizens be affected by the impugned measure; it is sufficient that a particular class of non-citizens—such as asylum seekers—is excluded from a benefit in a manner that perpetuates disadvantage. To that end, the historical context of institutional racism embedded in immigration and refugee policies further highlights the exclusion's disproportionate impact on racialized women.

4. ***Second***, where legislation is underinclusive and denies a benefit to a group protected under s. 15(1) of the *Charter*—as is the case here—the appropriate constitutional remedy is to *read in* the excluded group. This approach ensures that the legislation complies with the *Charter* while avoiding the risk of further discrimination that may arise from alternative remedies, such as striking down the provision or suspending its application.

## PART II – ISSUES

5. CABL and BLAC take the following position on the issues raised in this appeal:

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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 [***Charter***]; *Regulation respecting reduced contribution*, RLRQ c S-4.1.1, r 1 [***Regulation***].

(i) This Court should chart a course to address multi-ground and intersectional discrimination under s. 15(1) of the *Charter*; and

(ii) Reading in is the most appropriate remedy for underinclusive legislation that denies a benefit to a protected group.

## PART III – ARGUMENT

### A. This Court should chart a course to address multi-ground discrimination under s. 15(1) of the *Charter*

6. This appeal provides a critical opportunity to clarify the legal framework for addressing discrimination arising from the intersection of multiple intersecting identities in order to fully account for the unique and compounded nature of lived experience.

#### *i) Substantive equality cannot be achieved without an analysis of the claimant group's intersecting identities*

7. At the heart of s. 15(1) of the Charter lies a pledge to address discriminatory impacts that undermine the rights of Canadians, ensuring not just equality in theory, but in substance. Time and again, this Court has emphasized that substantive equality is the "animating norm" of s. 15(1).[2]

8. The Appellant's analysis contains a critical oversight: the failure to consider the intersection of gender, race, and immigration/citizenship status as interrelated grounds of discrimination. The Appellant's segmented view overlooks the complex reality of individuals facing discrimination at the nexus of their identities. This Court must recognize the compounded nature of such discrimination to ensure a meaningful application of s. 15(1)'s equality guarantee.

9. Even if the claim can be decided by looking solely at the enumerated ground of sex,[3] an analysis that ignores the reality of intersectional discrimination is incomplete. A siloed analysis, which isolates grounds of discrimination, is insufficient to reveal the true discriminatory impact of a law. Discrimination is often not experienced on a single axis but is compounded by multiple

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[2] *Fraser v. Canada (Attorney General)*, 2020 SCC 28 at para 42 [***Fraser***]. See also *Withler v. Canada (Attorney General)*, 2011 SCC 12 at para 2; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 25.

[3] *Procureur général du Québec v. Kanyinda*, 2024 QCCA 144 at para 121.

intersecting factors.[4] The intersection of these factors creates a unique experience of discrimination that cannot be understood by examining each ground in isolation. To attain true substantive equality, the reality of the claimants—including their intersecting identities—must be considered.

10. In the case of female racialized asylum seekers, the intersection of gender, race, and refugee status exemplifies the necessity of a multi-ground analysis. A claim could be brought on the basis of each ground individually; however, it is only by considering the intersection of these grounds that the true impact of discrimination can be judicially addressed.[5]

11. Judicial approaches to multi-ground oppression under s. 15(1) have been inconsistent, with some courts adopting an intersectional lens that addresses simultaneous discrimination on multiple grounds,[6] while others persist with compartmentalized analyses that fail to capture the interplay of intersecting immutable attributes.[7] Similarly, in some cases, dissenting judges of this Court have discussed the intersection of various grounds while the majority of the Court did not do so.[8]

12. For instance, in *R. v. Sharma*, 2022 SCC 39, the claimant's s. 15 claim was dismissed because she fell short on demonstrating that the challenged provisions disproportionately impacted Indigenous offenders. Without sufficient evidence of a causal link, such as statistics or expert testimony, her claim was incomplete. Consequently, the second step of the Charter analysis was not addressed. Here, the majority's *exclusive* focus on race without considering other aspects of her identity, such as being a single mother and a woman, was challenged by the dissent which highlighted the necessity of a contextual inquiry.

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[4] Tiran Rahimian, "Parental Undocumented Status as an Analogous Ground of Discrimination", Journal of Law & Equality, September 2020 at p 124; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para 60 [***Corbiere***].

[5] *Turner v. Canada (Attorney General)*, 2012 FCA 159, at paras. 48-49.

[6] *Falkiner v. Ontario (Minister of Community and Social Services)* (2002) 59 OR (3d) 481 (CA) at paras. 70-74, 78, 81 (appeal at the Supreme Court of Canada discontinued); *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, 1999 CanLII 653 (SCC), [1999] 3 SCR 46, at paras. 113-115; *Jacob v. Canada (Attorney General)*, 2024 ONCA 648, at paras. 77-78.

[7] Jennifer Koshan, "Intersections and Roads Untravelled: Sex and Family Status in *Fraser v Canada*", (2021) 30:2 Constitutional Forum 29 at 38, referencing Justice Abella's reasoning in *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30.

[8] *Thibaudeau v. Canada*, [1995] 2 SCR 627 at pp 658, 724; *R. v. Sharma*, 2022 SCC 39, at para. 196.

13. It is evident that courts have consistently grazed the edges of the topic of intersectionality and multi-ground oppression over several decades, with the concept being referenced obliquely in jurisprudence, yet without ever fully engaging with it to establish a comprehensive analytical framework.[9]

14. The Court of Appeal for Ontario's approach in *Tanudjaja v. Canada* (Attorney General), 2014 ONCA 852 exemplifies this reticence. The court declined to redress the motion judge's finding that there was no need to address the claim that homelessness disproportionately impacts various vulnerable groups, such as women, persons with disabilities, and racialized individuals, due to the absence of a discriminatory law.[10]

15. Precedent has hinted at a reluctance by courts to formally recognize new analogous grounds, suggesting that existing grounds may be sufficient to address intersectional discrimination claims.[11] The hesitancy to formally recognize an intersectional analysis underscores the need for a more comprehensive framework of this concept within the current legal system.[12]Moreover, while this Court recently acknowledged the interrelation of gender and parental status,[13] this acknowledgment still falls short of providing a clear directive for future cases.

16. It is telling that human rights tribunals have already significantly engaged and recognized the implications of an intersectionality analysis for claimants.[14]

17. As such, this case presents an essential juncture for the Court to bring coherence to the analytical framework under s. 15(1), by affirming the essential need for an approach that eschews the notion of immutable characteristics as impermeable from one another. In doing so, the Court would establish a standard that more accurately reflects the lived experiences of individuals facing

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9 *Canada (Attorney General) v. Mossop*, 1993 CanLII 164 (SCC), [1993] 1 SCR 554, at p. 645.

10 *Tanudjaja v. Canada (Attorney General)*, 2014 ONCA 852 (leave to appeal to the Supreme Court dismissed, C57714) , at para 17.

11 *Fraser*, 2020 SCC 28 at para 116.

12 *Fraser*, 2020 SCC 28 at para 123.

13 *Fraser*, 2020 SCC 28 at para 116.

14 *Radek v. Henderson Development (Canada) and Securiguard Services (No. 3)*, 2005 BCHRT 302, at para. 464-465; *Comeau v. Cote and Murphy Pipeline Inc.*, 2003 BCHRT 32, at para. 131; *Dixon v. 930187 Ontario*, 2010 HRTO 256, at para. 53.

intersecting forms of discrimination.[15] The time has come for this Court to embrace the full spectrum of intersectional discrimination in its rulings.

### *ii) The historical framework of institutional racism in immigration and refugee policies is relevant to the analysis of the plight of racialized women asylum seekers*

18. Institutional racism has played a central role in shaping immigration and refugee policies in Canada to deliberately exclude or impose hurdles on racialized communities. An analysis under s. 15(1) must account for the layered and systemic discrimination faced by racialized women asylum seekers, whose immigration status and identities as both racialized individuals and women are inseparable from the issues raised in this appeal.

19. In the present appeal, the claimant's characteristics cannot be assessed without accounting for the broader systemic forces that shape their ability to navigate the immigration system, which has historically and systematically disadvantaged racialized women seeking asylum in Canada.[16]

20. This Court has previously recognized citizenship as an analogous ground of discrimination.[17] The claimant's situation must be analyzed through the intersecting grounds of non-citizenship and race, which are deeply interconnected, as LaForest J. noted in *Andrews*.[18.]

21. Historically, Canada's immigration laws have served as tools of discrimination, creating barriers for racialized communities—particularly those of non-European descent—through explicit and implicit measures. For instance, the *Chinese Immigration Act, 1885* imposed a $50 duty on Chinese persons who entered Canada, which was intended to act as an economic barrier to deter immigration.[19] Two decades later, the *1908 Gentlemen's Agreement* between the Canadian Minister of Labour and the Japanese Foreign Minister limited the amount of passports issued by

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[15] Consistent with *Egan v. Canada*, [1995] 2 SCR 513 [***Egan***]; *Corbiere*, [1999] 2 SCR 203.

[16] *Withler*, at para. 35.

[17] *Andrews v. Law Society of British Columbia*, [1989] 1 RCS 143 [***Andrews***].

[18] *Andrews*, [1989] 1 RCS 143 at p 195 (*per* LaForest J., concurring).

[19] *Chinese Immigration Act, (An Act to Restrict and Regulate Chinese Immigration Into Canada)*, SC 1885 c 71; Luke Taylor, "Designated Inhospitality: The Treatment of Asylum Seekers Who Arrive by Boat in Canada and Australia" in McGill Law Journal, vol 60-2, Montréal (QC), Université McGill, 2014.

Japan to its citizens, which excluded immigrants based on their ethnic origin.[20] Additionally, as part of a series of exclusionary measures and practices to restrict the settlement of Black communities, *Order-in-Council PC 1911-1324* banned the entry of Black individuals in Canada for one year on the basis that their "race is deemed unsuitable to the climate and requirements of Canada."[21]

22. Finally, the *Immigration Act, 1952* gave the power to the Governor in Council to make regulations "prohibiting or limiting [the] admission of persons by reason of (i) nationality, citizenship, ethnic group, occupation, class or geographic area of origin, (ii) peculiar customs, habits, modes of life or methods of holding property, and (iii) unsuitability having regard to the climatic, economic, social, industrial, educational, labour, health or others conditions (…)", which had the potential to perpetuate racial stereotypes and discrimination in the decisions to allow entry into Canada.[22]

23. Further illustrating these systemic issues, the Federal Court has exposed how policies restricting access to social services for asylum seekers were not only punitive but designed to deter migration from "undesirable countries", thereby reinforcing racialized perceptions.[23] Restrictions on social services for asylum seekers were justified to deter asylum seekers from coming to Canada. Such policies were based on the racist stereotype that "false asylum seekers" from "undesirable countries" immigrate for economic gain.[24]

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[20] *Hayashi-Lemieux Agreement* (*1908 Gentlemen's Agreement)*, January 21, 1908, House of Commons Debates, 10th Parliament, 4th Session, Volume: 1607-1616.

[21] *Order-in-Council PC*, 1911-1324 August 12, 1911, RG2-A-1-a, volume 1021, (repealed by Order-in-Council P.C. 1911-2378); See also Steve Schwinghamer, "The Colour Bar at the Canadian Border: Black American Farmers", online at https://pier21.ca/research/immigration-history/black-american-farmers.

[22] *An Act Respecting Immigration*, 1910 SC 9–10 Edward VII, C 27 at ss 3, 38(c); *An Act Respecting Immigration*, 1952 SC 1 Elizabeth 11 C 42 at ss. 5, 61; See also Linden Allen, "*Race and Nationality Restrictions in the Immigration Act: Is a Revision Overdue?*", in Osgoode Hall Law Journal 2.2 (1961) : pp. 243-254.; Anthony H. Richmond, "*Refugees and Racism in Canada"*, Refuge: Canada's Journal on Refugees 19, no. 6 (2001): 12-20, at pp. 12-18.

[23] *Canadian Doctors For Refugee Care*, 2014 FC 651 at paras 836-838.

[24] *Canadian Doctors For Refugee Care v. Canada (Attorney General)*, 2014 FC 651, at paras 7-10, 95-99, 605, 639, 690, 798 (appeal discontinued) [***Canadian Doctors For Refugee Care***].

24. This Court should recognize the impact of these historically racist policies on the current reality of asylum seekers. These exclusionary practices have had lasting impacts, shaping the racial composition of Canada's immigrant population and reinforcing systemic barriers for racialized migrants. Indeed, Canadian courts have already accepted that immigration policies have been shaped by racial preferences, selectively attracting certain migrants while excluding others.[25]

25. Substantive equality demands that these historical disadvantages be accounted for in assessing whether the impugned provision discriminated against asylum seekers—who are disproportionately racialized—by denying them access to benefits afforded to other immigrants who have not faced these historic and present compounded barriers.[26]

### *iii) Discrimination on the basis of citizenship can take place even when select non-citizens are not affected by the impugned legislation*

26. The analogous ground of citizenship is relevant even if certain non-citizens are not affected by the impugned legislation. Contrary to the Appellant's position, which argues that the absence of discrimination based on citizenship is demonstrated by the fact that some non-citizens still qualify for subsidized daycare, CABL and BLAC submit that this argument reflects an overly narrow and essentialist view of discrimination.

27. Such an approach is inconsistent with established jurisprudence. A non-essentialist and intersectional approach is necessary, as an s. 15(1) claim can be advanced by a specific subgroup rather than the entire group.[27] This can include, as in the present appeal, refugee claimants, especially racialized women, who may face unique forms of discrimination.

28. Relying solely on the fact that some non-citizens benefit from the impugned regulation is insufficient to conclude that there is no discrimination. For example, not all women need to be discriminated against for discrimination that affects pregnant women.[28] Similarly, in the context

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[25] *Y.Z. v. Canada (Citizenship and Immigration)*, 2015 FC 892 at paras 51-52; *Feher v. Canada (Public Safety and Emergency Preparedness)*, 2019 FC 335 at paras 68-71, 196. See also *Canadian Doctors For Refugee Care*, 2014 FC 651 at paras 836-838.

[26] *Fraser*, 2020 SCC 28 at paras 48, 76-77; Statistiques relatives aux personnes arrivées à la suite d'un passage irrégulier à la frontière - Commission de l'immigration et du statut de réfugié au Canada, exhibit D-8, **Appellant's records, vol IV, pp. 48-56**.

[27] See *Fraser*, 2020 SCC 28 at para 72.

[28] *Brooks v. Canada Safeway Ltd.*, [1989] 1 SCR 1219 at p 1248.

of workplace sexual harassment, this Court noted that the fact that some female employees were not subject to the harassment did not preclude a finding of discrimination based on sex.[29] This principle is further exemplified by the fact that discrimination based on disability can exist even if the exclusion does not affect all types of disabilities.[30]

29. The same logic must apply here. As asylum seekers are necessarily non-citizens, the proper analysis of citizenship as a ground of discrimination does not require an examination of whether all non-citizens are affected by the same disadvantage. Rather, the analysis of citizenship as a ground of discrimination must account for the existence of societal variables within a group, recognizing that the indicia of an enumerated or analogous ground may not be uniformly present across the group as a whole. While certain non-citizens may not experience systemic disadvantage in a particular legal or social framework, others—depending on their circumstances, region, or legislative environment—may face significant barriers that warrant protection under s. 15(1).[31]

## B. Reading in is the most appropriate remedy for underinclusive legislation that denies a benefit to protected groups

30. To give full effect to the right to be free from discrimination entrenched in s. 15(1) of the *Charter*, constitutional defects that are identified in legislation—to the extent it is possible to do so—should be cured immediately. Courts must give effect to the *Charter*, even if doing so may appear to encroach on the parliament's role.

31. Reading in is the most appropriate remedy in the context of constitutionally underinclusive legislation—that is, legislation that denies a benefit to a protected group under s. 15(1) of the *Charter*. It puts an end to the violation of the protected group's rights without encroaching on the rights of others. Reading in allows an immediate cure of the constitutional defect. The Appellant's proposal to strike down the impugned provision,[32] whether it is granted with or without a suspension of invalidity, will allow the perpetuation of the violation of the rights of the protected

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[29] *Janzen v. Platy Enterprises Ltd.*, [1989] 1 SCR 1252, at p 1288-1289.

[30] *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624, at paras. 74, 76-77; *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54 at paras 75-80; *Jacob v. Canada (Attorney General)*, 2024 ONCA 648 at para 104.

[31] *Corbiere*, [1999] 2 SCR 203 at para 61. See also *Egan*, [1995] 2 SCR 513 at p 522.

[32] Appellant's factum at para 159.

group. This result is unacceptable in the face of the recognition that the legislation is unconstitutional.

32. Striking down underinclusive legislation "deprive[s] the current beneficiaries of the advantages heretofore enjoyed while giving nothing to the victorious claimant group except bare equality of treatment".[33] This was recognized long ago by this Court when Lamer J. stated that "the nullification of benefits to single mothers does not sit well with the overall purpose of s. 15 of the *Charter* and for s. 15 to have such a result clearly amounts to 'equality with a vengeance".[34] Here, the Appellant's position would lead to the striking down of all categories of access to subsidized daycare, adversely impacting the people who receive the benefit of the legislation. Such an outcome would lead to what Justice Lamer aptly described as preferring "equal graveyards" over "equal vineyards".[35] Striking down underinclusive legislation also has other potential perverse effects. It could discourage equity-seeking litigants from seeking redress before the courts.[36] If claimants are no better off than before, they might not turn to courts for what will only amount, in effect, to a declaratory judgment.

33. Moreover, a declaration of invalidity would leave the protected group "open to blame for the blanket denial of the benefits" of a legislative scheme that used to benefits others, until the claimant went to court.[37] This would unfortunately reinforce the prejudice and stereotyping faced by vulnerable groups that s. 15(1) aims to correct. Reading in is criticized for overstepping legislative boundaries, yet it is a less intrusive alternative than striking down the impugned legislation. It allows courts to preserve the beneficial parts of a statute while extending its coverage to include those previously omitted, thereby avoiding legislative vacuums.

34. Using the remedy of reading in does not prevent the Quebec government from amending the unconstitutional regime in the future. The Appellant argues that the regime must be struck

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[33] Robert Leckey, "Remedial Practice beyond Constitutional Text" (2016) 64:1 American Journal of Comparative Law 1 at p 15 ().

[34] *Schachter v. Canada*, [1992] 2 SCR 679 at pp 701-702 [***Schachter***].

[35] *Schachter*, [1992] 2 SCR 679 at p 701.

[36] See Dianne Pothier, "Charter Challenges to Underinclusive Legislation: The Complexities of Sins of Omission" (1993) 19:1 Queens Law Journal 261 at p 307.

[37] *Halpern v. Canada (Attorney General)*, [2003] 65 O.R. (3d) 161 at para 150.

down with a suspended declaration to allow the government time to amend the regime.[38] Yet, reading in that a benefit can be provided to a protected group does not prevent the government from overhauling the regime in the future.

35. Reading in has the advantage of curing the constitutional defect without preventing the government from changing the regime. The remedy will have a temporary effect if the government wishes to change the regime, and a permanent effect if the government decides not to act. The choice, then, will be that of the government.

36. In the face of several possible constitutional remedies, "courts must identify and remedy the full extent of the unconstitutionality by looking at the precise nature and scope of the *Charter* violation".[39] A remedy tailored to the breadth of the constitutional violation is preferable than the wholesale elimination of the regime put in place by the government. Reading in the inclusion of refugee claimants in the impugned provision is not "so substantial as to change the nature of the legislative scheme".[40] Rather, it is a deferential approach that respects the legislator's intent.

## PART IV – SUBMISSIONS CONCERNING COSTS

37. CABL and BLAC ask that no costs be awarded either for or against them.

## PART V – ORDER SOUGHT

38. CABL and BLAC take no position on the outcome of the appeal.

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

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[38] Appellant's factum at para 168.

[39] *Ontario (Attorney General) v. G*, 2020 SCC 38 at para 116.

[40] *Schachter*, [1992] 2 SCR 679 at pp 709-710.

**Karine Joizil / Sajeda Hedaraly /**
**Natasha Petrof / Bianca Annie Marcelin /**
**Marianne Goyette**

Counsel for the Interveners,
Canadian Association of Black Lawyers and
Black Legal Action Centre

## PART VI – LIST OF AUTHORITIES

| | AUTHORITIES | Paragraph(s) Referenced in Factum |
|---|---|---|
| **CASE LAW** | | |
| 1. | *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143 | 20 |
| 2. | *Brooks v. Canada Safeway Ltd.*, [1989] 1 SCR 1219 | 28 |
| 3. | *Canada (Attorney General) v. Mossop*, 1993 CanLII 164 (SCC), [1993] 1 SCR 554 | 13 |
| 4. | *Canadian Doctors For Refugee Care v. Canada (Attorney General)*, 2014 FC 651 | 23, 24 |
| 5. | *Comeau v. Cote and Murphy Pipeline Inc.*, 2003 BCHRT 32 | 16 |
| 6. | *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 | 9. 17, 29 |
| 7. | *Dixon v. 930187 Ontario*, 2010 HRTO 256 | 16 |
| 8. | *Egan v. Canada*, [1995] 2 SCR 513 | 17, 29 |
| 9. | *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624 | 28 |
| 10. | *Falkiner v. Ontario (Minister of Community and Social Services)*, 2002 CanLII 44902 (ON CA) | 11 |
| 11. | *Feher v. Canada (Public Safety and Emergency Preparedness)*, 2019 FC 335 | 24 |
| 12. | *Fraser v. Canada (Attorney General)*, 2020 SCC 28 | 7, 15, 25, 27 |
| 13. | *Halpern v. Canada (Attorney general)*, 2003 CanLII 26403 (ON CA) | 33 |
| 14. | *Jacob v. Canada (Attorney General)*, 2024 ONCA 648 | 11, 28 |
| 15. | *Janzen v. Platy Enterprises Ltd.*, [1989] 1 SCR 1252 | 28 |
| 16. | *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30 | 11 |
| 17. | *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 | 7 |

| AUTHORITIES | | Paragraph(s) Referenced in Factum |
|---|---|---|
| 18. | *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, 1999 CanLII 653 (SCC), [1999] 3 SCR 46 | 11 |
| 19. | *Nova Scotia (Workers' Compensation Board) v. Martin ; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54 (CanLII), [2003] 2 RCS 504 | 28 |
| 20. | *Ontario (Attorney General) v. G*, 2020 SCC 38 | 36 |
| 21. | *Procureur général du Québec v. Kanyinda*, 2024 QCCA 144 | 9 |
| 22. | *R. v. Sharma*, 2022 SCC 39 | 11, 12 |
| 23. | *Radek v. Henderson Development (Canada) and Securiguard Services (No. 3)*, 2005 BCHRT 302 | 16 |
| 24. | *Schachter v. Canada*, [1992] 2 SCR 679 | 32, 36 |
| 25. | *Tanudjaja v. Canada* (Attorney General), 2014 ONCA 852 (CanLII) | 14 |
| 26. | *Thibaudeau v. Canada*, [1995] 2 SCR 627 | 11 |
| 27. | *Turner v. Canada (Attorney General)*, 2012 FCA 159 | 10 |
| 28. | *Withler v. Canada (Attorney General)*, 2011 SCC 12 | 7, 19 |
| 29. | *Y.Z. v. Canada (Citizenship and Immigration)*, 2015 FC 892 | 24 |
| **SECONDARY SOURCES** | | |
| 30. | Anthony H. Richmond, "*Refugees and Racism in Canada*", Refuge: Canada's Journal on Refugees 19, no. 6 (2001): 12-20 | 22 |
| 31. | Dianne Pothier, "Charter Challenges to Underinclusive Legislation: The Complexities of Sins of Omission" (1993) 19:1 Queens LJ 261 | 32 |
| 32. | *Hayashi-Lemieux Agreement* (*1908 Gentlemen's Agreement)*, January 21, 1908, House of Commons Debates, 10th Parliament, 4th Session, Volume: 1607-1616 | 21 |
| 33. | Jennifer Koshan, "Intersections and Roads Untravelled: Sex and Family Status in *Fraser v Canada*", (2021) 30-2 Constitutional Forum 29 | 11 |

| AUTHORITIES | | Paragraph(s) Referenced in Factum |
|---|---|---|
| 34. | Linden Allen, "*Race and Nationality Restrictions in the Immigration Act: Is a Revision Overdue?*", in Osgoode Hall Law Journal 2.2 (1961) : 243-254 | 22 |
| 35. | Luke Taylor, "Designated Inhospitality: The Treatment of Asylum Seekers Who Arrive by Boat in Canada and Australia" in McGill Law Journal, vol 60-2, Montréal (QC), Université McGill, 2014 | 21 |
| 36. | Robert Leckey, "Remedial Practice beyond Constitutional Text" (2016) 64:1 Am J Comp L 1 | 32 |
| 37. | Steve Schwinghamer, "The Colour Bar at the Canadian Border: Black American Farmers" | 21 |
| 38. | Tiran Rahimian, "Parental Undocumented Status as an Analogous Ground of Discrimination (September 2022)", Journal of Law & Equality | 9 |
| **LEGISLATION** | | |
| 39. | *An Act Respecting Immigration*, 1910 SC 9–10 Edward VII, C 27 | 22 |
| 40. | *An Act Respecting Immigration*, 1952 SC 1 Elizabeth 11 C 42 | 22 |
| 41. | *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 | 1-5, 7-8, 11-12, 17-18, 27, 29, 30-33, 36 |
| 42. | *Order-in-Council PC*, 1911-1324 August 12, 1911, RG2-A-1-a, volume 1021 | 21 |
| 43. | *Regulation respecting reduced contribution*, RLRQ c S-4.1.1, r 1 | 1 |
| 44. | The *Chinese Immigration Act, (An Act to Restrict and Regulate Chinese Immigration Into Canada)*, SC 1885 c 71 | 21 |