Court File No. 41210

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

BETWEEN:

ATTORNEY GENERAL OF QUEBEC

Appellant
(Appellant)

– and –

BIJOU CIBUABUA KANYINDA

Respondent
(Respondent / Incidental Appellant)

– and –

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

Respondent
(Mise en cause / Incidental Appellant)

– and –

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PART I: OVERVIEW

[1] The CCLA intervenes to assist the Court in determining whether it is constitutional to exclude refugee claimants holding a valid work permit — and their children — from equal eligibility to Quebec's subsidized childcare program under section 3 of the *Reduced Contribution Regulation*[1] (the "***RCR***").

[2] In addition to raising fundamental questions of discrimination on the basis of sex, the CCLA argues that this case presents an opportunity to clarify the analogous grounds analysis under subsection 15(1) of the *Charter of Rights and Freedoms* (the "***Charter***") and takes the view that migration status should be recognized as an analogous ground. It affirms the flexible and practical approach to "causation" or "connection" adopted by this Court in determining the existence of an infringement under subsection 15(1) and argues that neither the principle of "incrementalism" nor issues of cost can be properly invoked to justify a discriminatory exclusion from a preexisting benefits scheme. Finally, the CCLA offers brief comments on the constitutional remedy of "reading in" as it relates to the present appeal, which concerns some of the most marginalized and vulnerable individuals in Canada.

PART II: QUESTIONS IN ISSUE

[3] In this case, the Court is called upon to decide whether section 3 of the *RCR* infringes the right to equality under subsection 15(1) of the *Charter* and, if so, whether the state has met its burden to justify that infringement under section 1.[2] If the provision is unconstitutional, the Court must then determine the appropriate remedy under subsection 52(1) of the *Constitution Act, 1982*.

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1 *Règlement sur la contribution réduite*, RLRQ, c. S-4.1.1, r.1.

2 *Canadian Charter of Rights and Freedoms*, being Part I of *The Constitution Act*, 1982, Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

PART III: STATEMENT OF ARGUMENT

I. THE ANALYSIS UNDER SUBSECTION 15(1) OF THE *CHARTER*

[4] This case offers the Court an opportunity to synthesize lessons from recent section 15 appeals[3] in the particular context of delegated legislation that provides underinclusive access to social programs, services, and benefits, and in a case that raises issues of both sex-based discrimination and the intersecting ground of discrimination based on migration status.

A. The interaction between multiple grounds in section 15 litigation

[5] The Court of Appeal relied on uncontradicted expert evidence to conclude that the impugned provision of the *RCR* reinforces, perpetuates, and exacerbates the disadvantages that women seeking refugee protection suffer, as women, in the labour market.[4] However, and in addition to this clear finding of adverse impact discrimination, the law also creates a direct and explicit distinction on the basis of migration status. While the Court of Appeal did not find it necessary to address the additional grounds of discrimination raised by the Respondent, the reality is that none of these dimensions, taken in isolation, can provide a complete picture. Instead, it is plainly the subgroup of women claiming refugee protection — and by extension, their children — who face the most severely discriminatory effects of the contested scheme.

[6] In such cases, the section 15 analysis must accommodate the interacting, multidimensional and intersectional aspects of a claimant's experience of discrimination. It has long been accepted that the discriminatory impact of an exclusionary rule can be magnified and complicated by the intersectional dimensions of a claim.[5] There is no doubt that women claiming refugee protection face compounded barriers to inclusion due to their migration status, family responsibilities, and economic precarity. At the same time, as the Court made clear in *Fraser*, a claimant in a case like

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[3] Including *Dickson v. Vuntut Gwitchin First Nation*, 2024 SCC 10 (CanLII), *R. v. Sharma*, 2022 SCC 39 (CanLII), *R. v. C.P.*, [2021] 1 SCR 679, *Fraser v. Canada (Attorney General)*, [2020] 3 SCR 113, *Ontario (Attorney General) v. G*, [2020] 3 SCR 629, *Québec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, [2018] 1 SCR 464, and *Kahkewistahaw First Nation v. Taypotat*, [2015] 2 SCR 548.

[4] *Procureur général du Québec c. Kanyinda*, 2024 QCCA 144, paras. 89-96, 100-102.

[5] See e.g., *Fraser v. Canada (Attorney General)*, [2020] 3 SCR 113, para. 116; *Withler v. Canada (Attorney General)*, [2011] 1 SCR 396, para. 58.

the present appeal need not establish multiple distinct grounds in order for a reviewing court to analyze their experience of discrimination in its full social context[6] — which in this case includes migration and sex, as well as closely connected issues of economic inequality, family status, and race. The fact that a person occupies multiple roles or lives multiple experiences at once — woman, parent, newcomer, refugee claimant, worker — cannot be used as a rationale to artificially narrow the goalposts of constitutional protection to their detriment.

[7] Of course, the boundaries of inclusion articulated at the first step of the test will often have consequences for the manner in which the discriminatory effects of a rule are proven or with regard to the ultimate structure of an appropriate constitutional remedy for the violation. However, much as in *Fraser* — a case where the overlapping dimensions of sex, family/parental status, the choice to work, and the choice to job-share imposed conceptual distractions on the courts below[7] — rigid arguments focused on policing the boundaries and scope of a protected group may obfuscate the discriminatory effects of the law, which in the present case are real and obvious.

B. Migration status as an analogous ground

[8] Though not decided by the Court of Appeal, the CCLA agrees with the Respondent that migration status must be recognized as an analogous ground under section 15, particularly in light of its obvious connection to systemic vulnerability, disadvantage and exclusion. Indeed, the Court's analysis in *Andrews* and subsequent cases leads almost inevitably to the conclusion that migration status — or, more particularly, the status of refugee claimant — meets the criteria for section 15 protection.[8] To the extent that such an analogous ground exists, a finding of a *prima facie* section 15 breach is inevitable in the instant case.

[9] In this regard, the Attorney General of Quebec's focus on the "immutability" dimension of the test[9] reflects an outdated, widely criticized, and conceptually inadequate approach to equality rights. This Court emphasized in *Corbiere* that analogous grounds are not limited to immutable personal characteristics, but also include attributes that are changeable only at unacceptable

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6 *Fraser v. Canada (Attorney General)*, [2020] 3 SCR 113, para. 116.
7 *Fraser v. Canada (Attorney General)*, [2020] 3 SCR 113, paras. 85-95.
8 In this regard, the CCLA adopts the position of the Respondent at paras. 96-106, relying in particular on *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143.
9 Mémoire du Procureur général du Québec, paras. 108-115.

personal cost or those associated with historical disadvantage.[10] However, this approach has been inconsistently interpreted and a continued reliance on the concept of immutability fails to explain the rationale for even certain enumerated grounds like disability, which are sometimes temporary and which the Court has repeatedly described as socially constructed and context-dependent, rather than inherent.[11]

[10] To this end, the CCLA agrees with the Respondent that this case presents an opportunity for this Court to shift more explicitly towards a multi-variable approach to the analogous grounds analysis. As advanced by Professor Sealy-Harrington, such an approach would account for factors such as difficulty of change, cost, vulnerability, historical disadvantage, and inclusion within human rights codes, alongside the traditional indicators of immutability and constructive immutability.[12] Indeed — and despite the manner in which these factors are marshalled by the Attorney General of Quebec and certain interveners against the Respondent's claim — the high numbers of refugee claimants, the risks posed by Canada-US relations in recent years, and the manner in which these individuals are uniquely vulnerable to structural delays (at both the federal *and* provincial levels) all militate in favour of recognizing migration status as an analogous ground.

C. Causation, connection, and the claimant's evidentiary burden

[11] Some interveners have seized upon the present appeal to propose rigid and novel approaches to causation under subsection 15 of the *Charter.* It is nonetheless clear that claimants under section 15 are required only to establish a clear link or connection — and not a strict causal relationship — between the state action, the protected group, and the discriminatory impact.

[12] The applicable test[13] is therefore entirely distinct from private law standards of causation. It is well-established that under section 15, the impugned law or government action need not be the only or even the dominant cause of the disproportionate impact in question.[14] Indeed, while courts

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[10] *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, paras. 13-14.
[11] See e.g., *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 SCR 703, paras. 30, 34, 53; *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] 2 SCR 504, paras. 80-81.
[12] Joshua Sealy-Harrington, Assessing Analogous Grounds: The Doctrinal and Normative Superiority of a Multi-Variable Approach, Journal of Law & Equality, Vol. 10, 2013 [SSRN].
[13] Discussed at length in *R. v. Sharma*, 2022 SCC 39 (CanLII), paras. 39-50.
[14] *R. v. Sharma*, 2022 SCC 39 (CanLII), para. 45.

continue to use the language of "causation", the state will almost never be the singular originating "cause" of a discriminatory distinction, because preexisting disadvantage is *always* at play in equality litigation. Instead, courts look for "some sort of nexus between a particular action of the state, such as legislation, and an infringement of a *Charter* right or freedom".[15] The search for that "link" or "nexus" between the impugned law or government action and the discriminatory impact is ultimately about identifying whether the impugned law or government action has some independent, differentiated effect on the protected group or the rights claimant.[16]

[13] The structure of this analysis is not specific to section 15 discrimination claims. To the contrary, the line of cases cited at paragraph 43 of *Sharma* confirms a unified constitutional approach to the test — generally described as a "sufficient connection" or a "real link" in the section 7 context[17] — which is ultimately a threshold question about whether a *Charter* right has been engaged at all. In this sense, the applicable standard (and a claimant's corollary evidentiary burden) at this step approaches something much closer to the "connection" test applied under the discrimination provision of the Quebec *Charter of human rights and freedoms*, for which Chief Justice Wagner and Justice Côté — writing for a unanimous court — rejected the paradigm of "causation" altogether.[18]

[14] At the second step of the section 15 test, a claimant bears the burden of demonstrating that the impugned law or government action imposes burdens or denies benefits in a manner that has the effect of reinforcing, perpetuating, or exacerbating the claimant group's disadvantage.[19] Under both steps, courts are required to adopt a flexible approach to the standard and to the evidence required to meet it — acknowledging that while claimants may be capable of adducing quantitative and statistical evidence to prove the violation at issue, it may also be necessary to make their case through qualitative studies, testimony, presumption, inference, and social fact evidence.[20]

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[15] *R. v. Sharma*, 2022 SCC 39 (CanLII), paras. 43 [see also authorities cited therein: *Weatherley, RWDSU, Operation Dismantle Inc., Symes, Blencoe, Bedford, Kazemi, Kokopenace*].
[16] *R. v. Sharma*, 2022 SCC 39 (CanLII), paras. 44.
[17] See e.g., *Canada (Attorney General) v. Bedford*, [2013] 3 SCR 1101, paras. 73-78; *Kazemi Estate v. Islamic Republic of Iran*, [2014] 3 SCR 176, paras. 126 and 131-134.
[18] *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, [2015] 2 RCS 789, paras. 44-52.
[19] *R. v. Sharma*, 2022 SCC 39 (CanLII), paras. 51; *Fraser v. Canada (Attorney General)*, [2020] SCR 113, paras. 57 et. seq.
[20] *R. v. Sharma*, 2022 SCC 39 (CanLII), paras. 49-50; *Fraser v. Canada (Attorney General)*, [2020] SCR 113, para. 76.

[15] As this Court has acknowledged, this is because exhaustive and complete data demonstrating the extent of a discriminatory law or practice will rarely be available to a rights claimant. Among other factors, this is due to the inherent informational asymmetry between claimants and the state,[21] the unique rules of privilege and admissibility that limit access to certain kinds of evidence about government misconduct,[22] and the practical reality that "issues which predominantly affect certain populations may be under-documented".[23] This Court's consistent endorsement of a flexible approach to a claimant's evidentiary burden under section 15 (and in *Charter* litigation more generally) ensures that those with legitimate claims are not deprived of redress simply because the state failed to proactively document the full extent of its unconstitutional conduct.

D. State intervention and the issue of "incrementalism" under section 15

[16] As explained below, the concept of "incrementalism" is of no assistance in the present appeal, particularly given the Quebec government's abrupt and discriminatory reversal in its approach to the eligibility of refugee claimants under the *RCR* — a scheme intended to reduce discrimination and to increase women's full participation in the labour market[24].

[17] It is common ground that section 15 "does not impose a general, positive obligation on the state to remedy social inequalities or enact remedial legislation" or create a "freestanding positive obligation on the state to enact benefit schemes to redress social inequalities".[25] However, this Court has repeatedly held that once the government does act to establish a program, service or benefit, it must do so in a non-discriminatory manner.[26] As a result, it is essential that the Court has a clear understanding of the statutory and regulatory scheme in place, beginning with the fact that the claimant in the present case is not claiming a *Charter* right to childcare *per se* — only a

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[21] *R. v. Sharma*, 2022 SCC 39 (CanLII), para. 49.
[22] See e.g., *Canada (Attorney General) v. Power*, 2024 SCC 26 (CanLII), paras. 90-91.
[23] *Fraser v. Canada (Attorney General)*, [2020] 3 SCR 113, para. 57.
[24] *Procureur général du Québec c. Kanyinda*, 2024 QCCA 144, paras. 90-92.
[25] *R. v. Sharma,* 2022 SCC 39 (CanLII), para. 63; *Québec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, [2018] 1 SCR 464,para. 42.
[26] *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624, para. 73; see also *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, [2018] 1 SCR 464, para. 42; *Mathur v. Ontario*, 2024 ONCA 762 (CanLII), paras. 39-40.

right not to be excluded from her ability to access a preexisting statutory scheme on an unlawful, arbitrary, and discriminatory basis.

[18] As in *Alliance*,[27] the Attorney General of Quebec's arguments regarding "incrementalism" are therefore of no utility whatsoever to the Court. This concept, most recently articulated in *Sharma*, acknowledges that governments may sometimes need to intervene in matters of systemic inequality and the advancement of socioeconomic rights on a gradual or "step by step" basis.[28]

[19] At the outset, the question of "incrementalism" is more properly considered through the lens of the section 1 analysis — in the sense that it speaks to the necessity and proportionality of the infringement — rather than at the second step of the section 15 analysis. This is because incrementalism acts as a legal and policy justification for the existence of an imperfect benefits scheme, and not as a measure for determining whether a given law or practice results in discriminatory effects in the first place.[29] Critically, under section 1, the state bears an actual evidentiary burden to demonstrate the pressing and substantial objective animating the impugned rule, as well as to prove that the limits it imposes on *Charter*-protected rights are both minimally impairing and proportionate in the circumstances. In the instant case, the record reveals no evidence of the government's intent to exclude individuals from benefits under the *RCR* as part of some progressive or "incrementalist" project. To the contrary, the Quebec government had previously considered those claiming refugee protection eligible under the *RCR*, and then abruptly changed its position in 2018 to exclude them.[30]

[20] In any event, neither the general principle that governments are entitled to enact ameliorative schemes on an incremental basis nor the recognition that they are sometimes required to balance competing interests means that they can favour certain groups at the expense of others on an arbitrary or discriminatory basis. To accept otherwise would not only undermine the basic promise of substantive equality guaranteed by the *Charter*, it would also call into question the

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[27] *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, [2018] 1 S.C.R. 464, para. 42.
[28] *R. v. Sharma*, 2022 SCC 39 (CanLII), paras. 64-65.
[29] See e.g., *Eldridge v. British Columbia (Attorney General)*, 1997 CanLII 327 (SCC), [1997] 3 SCR 624, para. 77.
[30] See Mémoire de l'intimé, paras. 13-15.

entire corpus of jurisprudence — from *Vriend* onward[31] — addressing judicial review of constitutionally underinclusive legislation.

II. THE STATE'S BURDEN UNDER SECTION 1 OF THE *CHARTER*

[21] In the present appeal, the state's desire to benefit individuals with a "sufficient connection" to Quebec[32] finds no evidentiary basis beyond inference. The argument, which amounts to a claim that refugee claimants are simply "undeserving," was rightly analogized by the Court of Appeal to the weak (and ultimately unconstitutional) justification advanced to limit voting rights in *Frank*.[33]

[22] The Attorney General of Quebec relies on recent statistics showing an increase to the number of refugee claimants[34] to argue that any extension of eligibility would result in excessive and unpredictable costs. In addition to the fact that the supply (and shortage) of subsidized childcare is largely controlled by the Quebec government itself, this argument runs contrary to the rule against invoking "shifting purposes" to justify a limit on a *Charter*-protected right.[35] To the same end, the fact that the Quebec government's interpretive position on eligibility was reversed in 2018 casts doubt on any argument that its objective, at the time of enactment, was to exclude refugee claimants for lacking a sufficient connection to Quebec.

[23] Additionally, and as the Court of Appeal observed, the inclusion of refugee claimants under section 3 of the *RCR* would not render them automatically eligible for the reduced contribution for subsidized childcare spaces, but only for the possibility of eligibility.[36] While the Quebec government has a statutory obligation to ensure that the supply of educational childcare services keeps up with demand,[37] the question of eligibility exists independently from the number or type of actual subsidized daycare spaces in a given region. As a result, the nature of the remedy sought by the Respondent is declaratory rather than injunctive in nature: the effect of the Court of Appeal's order is simply to render the claimant group eligible for the payment of the reduced contribution, not to create a corresponding number of new daycare spaces overnight. Indeed, this issue was

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31 See *Vriend v. Alberta*, [1998] 1 SCR 493, paras. 55-56, 61.
32 *Procureur général du Québec c. Kanyinda*, 2024 QCCA 144, para. 105.
33 *Frank v. Canada (Attorney General)*, [2019] 1 SCR 3.
34 Mémoire du Procureur général du Québec, paras. 33-37.
35 See *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 334-336.
36 *Procureur général du Québec c. Kanyinda*, 2024 QCCA 144, para. 120.
37 *Loi sur les services de garde éducatifs à l'enfance*, RLRQ c S-4.1.1, section 90.0.3.

addressed at length by the Court of Appeal in March of 2024 when it refused to grant the government of Quebec a stay of execution pending its appeal to this Court. In that decision, the Court concluded that while an increase in the number of eligible families may increase political pressure on the state to address shortcomings in its delivery of affordable childcare in the province, a judicial recognition that refugee claimants with valid work permits are eligible for those benefits in no way constitutes an unmanageable burden or irreparable harm to the state.[38]

[24] In any event, absent very particular circumstances, the potential cost or administrative inconvenience of implementing *Charter*-compliant legislation simply does not constitute a pressing and substantial objective for the justification of an infringement under section 1.[39]

III. THE APPROPRIATE REMEDY

[25] The Attorney General of Quebec argues that judicial respect for the legislature's role should prevent the Court from "reading in" access to the reduced contribution for refugee claimants. However, it is well-established that where legislation improperly excludes a marginalized group, "reading in" [40] is an appropriate interpretive remedy to ensure compliance with section 15 of the *Charter* while respecting legislative intent, as affirmed for example in *Vriend*.[41]

[26] In this case, the remedy issued by the Court of Appeal is in clear alignment with the larger purposes of the statutory and regulatory scheme, namely the promotion of women's access to the labour force.[42] To this end, the CCLA notes that as a matter of statutory interpretation, the fact that refugees are eligible for the reduced contribution under subsection 3(5) of the *RCR* does not amount to an express legislative objective to refuse access to refugee claimants by inference. However, even in cases where the state *is* able to establish an express intent to exclude a particular group from the benefits of a scheme, the legislature should not be afforded any deference with regard to that intention or objective where the resulting discrimination is unconstitutional. A conclusion to

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[38] *Procureur général du Québec c. Kanyinda*, 2024 QCCA 346, paras. 14-22.
[39] *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, [2020] 1 SCR 678, paras. 152-153; *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 SCR 391, para. 147; *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 SCR 381, para. 72.
[40] *Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 698.
[41] *Vriend v. Alberta*, [1998] 1 SCR 493, paras. 153-158.
[42] *Procureur général du Québec c. Kanyinda*, 2024 QCCA 144, paras. 90-92.

the contrary would have the paradoxical effect of affording the state greater remedial deference in cases where the decision to discriminate against a particular group was intentional and in bad faith rather than simply inadvertent.[43]

[27] Finally, absent any new evidence regarding the impossibility of implementation or compliance, the fact that a Court of Appeal has refused to grant a stay of execution pending appeal to this Court (as is the case here) is a strong indicator that a remedy is workable and appropriate in the circumstances.[44]

PART IV: COSTS

[28] The CCLA does not seek costs and asks that no costs be ordered against it.

PART V: ORDER SOUGHT

[29] The CCLA takes no position on the disposition of this appeal.

PART VI: SUBMISSIONS ON CASE SENSITIVITY

[30] The CCLA makes no submissions on sealing, confidentiality, or publication orders.

ALL OF WHICH is respectfully submitted this 23rd day of April, 2025.

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[43] See generally the jurisprudence surrounding unconstitutional purposes: *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 334; *Canada (Attorney General) v. Power*, 2024 SCC 26 (CanLII), paras. 92, 107 et. seq.

[44] *Procureur général du Québec c. Kanyinda*, 2024 QCCA 346.

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