File No. 41210

**SUPREME COURT OF CANADA**

(On appeal from a judgment of the Court of Appeal of Quebec)

**BETWEEN:**

ATTORNEY GENERAL OF QUEBEC Appellant (appellant / incidental respondent)

– and –

BIJOU CIBUABUA KANYINDA Respondent (respondent / incidental appellant)

– and –

COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE Respondent (impleaded party / incidental appellant)

– and –

ATTORNEY GENERAL OF ALBERTA ATTORNEY GENERAL OF ONTARIO ATTORNEY GENERAL OF BRITISH COLUMBIA ATTORNEY GENERAL OF CANADA

**AND:**

Canadian Constitution Foundation, the Advocates for the Rule of Law; the Refugee Centre; the Centrale des syndicats du Québec; the Black Action Defense Committee; Amnistie internationale Canada francophone; the FCJ Refugee Centre and Madhu Verma Migrant Justice Centre; the Canadian Association of Refugee Lawyers; the Charter Committee on Poverty Issues; the National Association of Women and the Law and David Asper Centre for Constitutional Rights; the Income Security Advocacy Centre; the United Nations High Commissioner for Refugees; the British Columbia Civil Liberties Association; the Canadian Council for Refugees; the Canadian Civil Liberties Association; the ESCR-Net - International Network for Economic, Social and Cultural Rights; the Canadian Association of Black Lawyers and Black Legal Action Centre; the Women's Legal Education and Action Fund Inc.; and the Association québécoise des avocats et avocates en droit de l'immigration Interveners

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## PART I: OVERVIEW

1. This appeal raises the question of whether section 15 of the *Charter* requires governments to take positive measures to remedy systemic social inequality – in this case, the inequality faced by women in accessing the labour force due to disproportionate childcare responsibilities.

2. The Attorney General for Québec argued in its Application for Leave to Appeal that lower courts need direction from this Court on the scope of governments' positive obligations under section 15 to address inequality linked to socio-economic disadvantage that exists "independently of the law."[1] CCPI agrees that this appeal provides a critical opportunity for the Court to clarify this issue – one of overriding importance to those whom CCPI represents.

3. For people living in poverty, such as the Respondent, government inaction will rarely ensure their *Charter* rights. As the facts of this case illustrate, access to benefits, subsidies, or other measures of legislative protection, is often essential to secure substantive equality in employment, income assistance, health care, and housing. Yet, when people living in poverty have attempted to advance section 15 challenges in these areas, governments and courts have frequently mischaracterized their claims as demands for "freestanding" positive rights and have preemptively dismissed them as falling outside of the scope of the *Charter*.[2] As a result, the full benefit of the *Charter*'s equality guarantee has been denied to the most disadvantaged members of Canadian society when they are most in need of its protection.

## PART II: QUESTIONS IN ISSUE

4. In *R. v. Sharma* [*Sharma*] the majority of the Court stated that section 15 does not impose "a general, positive obligation on the state to remedy social inequalities or enact remedial

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[1] Mémoire du demandeur at paras 32–34.
[2] See footnote 10 below.

legislation" while the dissenting judges expressed concern that foreclosing such obligations was "pre-emptive."[3] The present appeal directly raises this unsettled question of whether failing to ameliorate a systemic social inequality – in this case women's inequality in the labour market owing to their disproportionate responsibility for and/or inability to afford childcare – may violate section 15's guarantee of equal protection and benefit of the law.

## PART III: ARGUMENT

### i) Negative Results of the Failure to Affirm Positive Obligations Under Section 15

5. Lower courts' confusion with respect to this Court's jurisprudence on positive obligations is understandable. On the one hand, in *Eldridge v British Columbia (AG)*, the Court unanimously rejected the province's argument that "s. 15(1) does not oblige governments to implement programs to alleviate disadvantages that exist independently of state action" as a "thin and impoverished vision of s. 15(1)."[4] Similarly, in *Vriend v Alberta* [*Vriend*], the Court held that there is no basis for assuming that only a positive act, rather than an omission or legislative "silence," can attract *Charter* scrutiny, and that the courts would be abandoning their constitutional mandate if they neglected to consider the discriminatory effects of a failure to provide legislative protection from systemic discrimination present in society.[5] On the other hand, the majority in *Sharma* cited previous jurisprudence to suggest that requiring governments to take action to ameliorate social inequality would draw the courts "into the complex legislative domain of policy and resource allocation, contrary to the separation of powers."[6]

6. The confusion regarding positive obligations under section 15 arises in part from the reference in *Sharma* to a "general" positive obligation to ameliorate social inequality and, in

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[3] *R. v Sharma*, 2022 SCC 39 [*Sharma*] at paras 63 and 205.
[4] *Eldridge v British Columbia (Attorney General)*, 1997 327 (SCC) at paras 72–73.
[5] *Vriend v Alberta*, 1998 816 (SCC) [*Vriend*] at paras 56–57, 84 .
[6] *Sharma*, at para 63.

other cases, to "a freestanding positive obligation."[7] In CCPI's submission, mischaracterizing *Charter* claims calling for positive legislative measures as claims to general "freestanding" positive rights is misleading and often prejudicial to disadvantaged members of society, especially people living in poverty.[8] As Justice Abella observed in response to the suggestion that the majority decision in *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux* [*Alliance*] amounted to affirming a freestanding positive obligation to ensure "the total and definitive eradication of gender-based pay inequities": "Setting straw men on fire is not what we mean by illumination."[9]

7. *Charter* challenges to systemic inequalities requiring positive measures from governments, are all too often mischaracterized in precisely this fashion, as claims to abstract and sweeping "freestanding" positive rights to health care, housing or other socio-economic rights that are not explicitly included in the *Charter*. Justice McLachlin's observation in *Chaoulli* that "[t]he *Charter* does not confer a freestanding constitutional right to health care," for example, has been widely interpreted by lower courts to mean that *Charter* rights to life, security and equality may not be invoked to require access to publicly funded health care.[10] The catastrophic effects of

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[7] *Fraser v Canada (Attorney General)*, 2020 SCC 28 [*Fraser*] at para 209; *Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 [*Alliance*] at para 42.

[8] On the prejudicial effect of such mischaracterizations, see *Toussaint v Canada (Attorney General)*, 2022 ONSC 4747 [*Toussaint* OSC], at paras 134–136; Martha Jackman, "One Step Forward and Two Steps Back: Poverty, the *Charter* and the Legacy of *Gosselin*" (2019) 39 NJCL 85 [Jackman, Legacy of Gosselin] at 118; Jennifer Koshan & Jonnette Watson Hamilton, "Women's *Charte*r Equality at the Supreme Court of Canada: Surprising Losses or Anticipated Failures?" in Howard Kislowicz, Richard J Moon & Kerri Anne Froc, eds, *Canada's Surprising Constitution: Unexpected Interpretations of the Constitution Act, 1982,* 237 (Vancouver: UBC Press, 2024) [Koshan & Watson Hamilton] at 249–50.

[9] *Fraser* at paras 132–133; Quoting Adam Gopnik, "The illiberal imagination: Are liberals on the wrong side of history?" (20 March 2017) *The New Yorker* 88 at 96–97. On the mischaracterizations of positive rights claims as "straw man" arguments, see also *Toussaint* OSC at paras 134–136.

[10] *Tanudjaja v Canada (Attorney General)*, 2014 ONCA 852 [*Tanudjaja* ONCA] at para 30; *Tanudjaja v. Attorney General (Canada)* (Application), 2013 ONSC 5410 [*Tanudjaja* ONSC] at para

systemic homelessness that are disproportionately born by persons with disabilities, Indigenous people and other marginalized groups have similarly been found to lie outside the scope of sections 7 and 15, because the *Charter* does not contain "a freestanding right to housing."[11]

8. Rather than engaging with issues of deference to the legislature under section 1, or through innovative dialogic remedies, courts have invoked the exclusion of "freestanding" positive obligations from the *Charter* to immunize the most critical systemic issues of life, security and inequality facing disadvantaged groups from effective *Charter* review, essentially rendering the poor, in the words of former Chief Justice McLachlin, "constitutional castaways."[12]

9. The drafting history of section 15 clearly supports recognizing positive obligations as part of the *Charter*'s equality guarantee. Originally labeled "non-discrimination rights" and limited to "equality before the law and to the equal protection of the law without discrimination" section 15 was reworded to guarantee "equality rights" and to include "the equal benefit and protection of the law."[13] These changes were made in response to hundreds of submissions from women's and other equality seeking groups and experts seeking to ensure that section 15 would address

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112; *Toussaint v Canada (Attorney General)*, 2010 FC 810 at paras 73 –75; *Toussaint v Canada (Attorney General)*, 2011 FCA 213 at paras 77–79 and 109 (see, however, *Toussaint v Canada,* CCPR/C/123/D/2348/2014 (30 August 2018) and *Toussaint* ONSC at paras 134–136; *Boulter v Nova Scotia Power Inc.*, 2009 NSCA 17 [2009] N.S.J. No. 64, 307 D.L.R. (4th) 293 (C.A.) at paras 72–73; *Canadian Doctors For Refugee Care* v *Canada* (*Attorney General*), 2014 FC 651, at paras 570–71 and 741–742; *Mathur v Ontario*, 2024 ONCA 762 at paras 39, 40; *Mathur v His Majesty in Right of Ontario*, 2023 ONSC 2316 at paras 132–134; *Brown v Alberta*, 2025 ABKB 179 at paras 60–63; *Allen v Alberta*, 2015 ABCA 277 at para 35; *Wynberg v Ontario*, *2006*, 82 O.R. (3d) 561 (C.A.) at paras 222–223.

[11] *Tanudjaja ONCA* at para 30 and paras 36–37; *Tanudjaja* ONSC at para 112; Margot Young, "Temerity and Timidity: Lessons from *Tanudjaja v Attorney General (Canada)*" (2020) 61:2 C de D 469 at 482–483.

[12] *R.* v *Prosper*, 1994 65 (SCC), [1994] 3 SCR 236 at 302; Martha Jackman, "Constitutional Castaways: Poverty and the McLachlin Court" (2010) 50 SCLR 297 at 308–309, 325–327; Jackman Porter at 13–14.

[13] The complete text of the earlier versions of section 15 can be found in Robin Elliot. "Interpreting the *Charter* – Use of the Earlier Versions as an Aid" (1982) 11 UBC L Rev 11 at 37–39.

systemic social inequality, including by ensuring access to essential social programs such as childcare.[14] The prevailing view was that "section 15 equality rights are meant to create and should create a new paradigm for the definition and solution of inequality problems, new both in Canada and in comparison to other jurisdictions."[15] The right to equal protection and benefit of the law was understood as a guarantee of non-discrimination in benefit-conferring programs "but also, and more fundamentally, a positive right to appropriate and adequate government programs and positive measures to address socio-economic disadvantage."[16]

10. Moreover, as ESCR-Net will argue in this appeal, the proposition that Canadian governments have no positive obligations to address systemic socio-economic inequality through legislation and programs, is fundamentally at odds with Canada's international human rights commitments.[17] The UN Committee on Economic, Social and Cultural Rights has affirmed that "[g]uarantees of equality and non-discrimination should be interpreted, to the greatest extent possible, in ways which facilitate the full protection of economic, social and cultural rights."[18]

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[14] Bruce Porter, "Twenty Years of Equality Rights: Reclaiming Expectations" (2005) 23 Windsor YB Access Just 145 at 160, 163, 169, 172;

[15] Lynn Smith, "A New Paradigm for Equality Rights" in Lynn Smith, ed, *Righting the Balance: Canada's New Equality Rights* (Saskatoon: Canadian Human Rights Reporter, 1986) 353 at 355 quoted in Bruce Porter, "Expectations of Equality" (2006) 33 Sup Ct L Rev 23 at 27.

[16] Bruce Porter, "Expectations of Equality" (2006) 33 Sup Ct L Rev 23 at 27; Kerri A. Froc, "A Prayer for Original Meaning: A History of Section 15 and What it Should Mean for Equality" (2018), 38 NJCL 35 at 48–54.; Jennifer Koshan & Jonnette Watson Hamilton, "Women's *Charte*r Equality at the Supreme Court of Canada: Surprising Losses or Anticipated Failures?" in Howard Kislowicz, Richard J Moon & Kerri Anne Froc, eds, *Canada's Surprising Constitution: Unexpected Interpretations of the Constitution Act, 1982,* 237 (Vancouver: UBC Press, 2024) 237 [Koshan & Watson Hamilton] at 239; Martha Jackman & Bruce Porter, "Introduction: Advancing Social Rights in Canada" in Martha Jackman & Bruce Porter, eds, *Advancing Social Rights in Canada* (Toronto: Irwin Law, 2014) 1 [Jackman Porter] at 6–9; Jackman, Legacy of Gosselin at 96-97

[17] Motion Record of the International Economic, Social and Cultural Rights Network (ESCR–Net), Factum for Leave to Intervene at paras 16–17.

[18] Committee on Economic, Social and Cultural Rights, *General Comment No. 9 on the Domestic Implementation of the Covenant*, U.N. Doc. E/C.12/1998/24 (1998) at para 15.

Positive obligations to implement programs, such as the childcare program at issue in this case, are central to the duty to implement international human rights treaties in good faith.[19]

11. In sum, challenges to governments' failures to provide legislative or programmatic benefits necessary to ameliorate socio-economic inequality affecting section 15 protected groups do not rely on "freestanding" positive rights or "general or abstract" notions of equality as described by the Court in *Andrews v Law Society of British Columbia* [*Andrews*].[20] They demand only the equal application and full benefit of established section 15 principles to those who rely on positive measures from governments, assessed on the basis of this Court's existing equality jurisprudence, consistent with Canada's international obligations and the history of the *Charter*.

### ii) Clarifying the Substantive Equality Distinction in this Case

12. This Court explained in *Vriend* that, in cases of under-inclusive ameliorative legislative measures or benefits, like the one at issue in this appeal, the distinction to be analysed under section 15 is "simultaneously drawn along two different lines of comparison."[21] The first is between those who are offered the legislative benefit in question and those who are denied it. As Justice Cory put it: "Gays and lesbians do not even have formal equality with reference to other protected groups, since those other groups are explicitly included and they are not."[22]

13. In the present case, the parallel distinction is between parents who are provided access to subsidized childcare, and parents with similar needs who are denied access to this benefit because of their immigration status. CCPI agrees with other interveners and the Respondent that

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[19] *International Covenant on Civil and Political Rights*, 999 UNTS 171, art 2(2); *Vienna Convention on the Law of Treaties*, Can TS 1980 No 37, art 26; *Canada v Alta Energy Luxembourg S.A.R.L.*, 2021 SCC 49 at para 59. John H Currie, *Public International Law*, 2nd ed (Toronto: Irwin Law, 2008), Chapter 4: Law of Treaties at 154.

[20] *Andrews v Law Society of British Columbia*, 1989 2 (SCC) [*Andrews*] at 163 .

[21] *Vriend* at paras 81–82.

[22] *Vriend* at para 81.

immigration status should be recognized as an analogous ground of discrimination, and that the exclusion of migrant parents from a subsidized childcare program available to other parents creates a distinction on this first line of comparison. This represents what the Court described in *Vriend* as the formal equality distinction between the excluded and included groups.

14. The well-established principle that if the government chooses to provide a benefit, it must do so in a non-discriminatory way, is the product of an equality analysis that is restricted to the first, formal, line of comparison identified by Justice Cory in *Vriend*. Once offered, regardless of the nature of the benefit, it must be provided without discrimination. However, if it were true that there is no section 15 obligation to provide the benefit in the first place, a discriminatory exclusion could be remedied by revoking the benefit altogether and providing it to no one – described by the Court in *Schachter v Canada* as "equal graveyards" or "equality with a vengeance."[23]

15. The second "more fundamental" distinction, identified by the Court in *Vriend* as the substantive equality analysis, considers the differential impact of a failure to provide what is necessary to ameliorate a systemic inequality for a protected group, in comparison to those who do not require the benefit. Homosexuals compared to heterosexuals are differentially impacted by a failure to provide legislative remedies for discrimination based on sexual orientation. As Justice Corry explains in *Vriend*, the absence of remedies, "considered in the context of the social reality of discrimination against gays and lesbians, clearly has a disproportionate impact on them as opposed to heterosexuals."[24] In the present case, the parallel substantive equality analysis makes clear that the absence of access to subsidized childcare has a disproportionate, differential impact on women as opposed to men.

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[23] *Schachter v Canada*, [1992] 2 SCR 679 at 701–702.
[24] *Vriend*, at para 82.

16. The Court in *Vriend* did not address the full implications of the substantive equality comparison for positive obligations under section 15. However, because a substantive equality analysis considers the discriminatory effect of the absence of positive measures of protection "in the context of the social reality of discrimination" [25], the obligation to provide access to remedies for discrimination cannot derive solely from the decision to legislate, but rather also arises from the protected group's need for legislative protection from discrimination to address a critical issue of systemic social inequality.

17. For that reason, the substantive equality violation in *Vriend* cannot be remedied by "equality with a vengeance." While revoking Alberta's human rights law was seen by Justice Major (in partial dissent) as a possible remedy,[26] this would in no way address the inequality faced by gays and lesbians but would simply violate the rights of other disadvantaged groups. The implication of Justice Cory's substantive equality comparison in *Vriend* is that section 15 requires governments to adopt necessary measures to address systemic social inequality – in that case by providing legislative protection to gays and lesbians. Like in international human rights law, the *Charter*'s equality guarantee cannot be satisfied by doing nothing.

18. The present case is entirely analogous to *Vriend,* in that the benefit at issue is required by women to address systemic inequality in access to work, and the same two lines of distinction apply. The first line of comparison considers the differential effect of the impugned regulation on those who receive the benefit, compared to those who are denied it. Parents who, like the Respondent, are denied the benefit because of their immigration status are differentially affected in comparison to parents who receive it. The second line of distinction, "the more fundamental

[25] *Ibid.*
[26] *Vriend*, at para 196.

one",[27] considers the differential adverse effect of the absence of affordable childcare on women as compared to men. If the absence of affordable childcare is found to create a discriminatory distinction between women and men, then compliance with section 15 cannot be achieved by denying the benefit equally to all parents, or by "equality with a vengeance."

19. Drawing on the critical analysis in *Vriend*, this Court should not simply find that section 15 requires equal treatment within and because the childcare program is already in place. Instead, it should affirm that section 15 requires the positive measures the program provides because they are necessary to address the systemic inequality faced by women in the labour market as a result of their disproportionate responsibility for childcare and their inability to afford it. As the Court stated in *Fraser*: "Recognizing the reality of gender divisions in domestic labour and their impact on women's working lives is neither new nor disputable."[28]

20. Clarifying that section 15 imposes positive obligations of this nature would provide much needed guidance to lower courts and would help to ensure that section 15 analysis is grounded in its broader, remedial purposes. Like legislative protections against discrimination, positive obligations to ensure that women have access to affordable childcare should not be contingent on a legislature's choice to provide subsidized childcare but, more fundamentally, on its obligation to adopt positive measures to address systemic social inequality.

21. Recognizing that governments must take positive measures to realize the right to equality goes to the heart of section 15's promise of equal protection and benefit of the law for the most disadvantaged members of Canadian society. The suggestion that section 15 imposes no such positive obligations and that any claim to the contrary amounts to an illegitimate demand for

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[27] To use the Court's wording in *Vriend* at para 82.

[28] *Fraser* at para 104.

nonexistent rights, is unsupported by the text of section 15. It undermines the "commitment to social justice and equality" that former Chief Justice Dickson identified as a guiding value and principle of *Charter* interpretation.[29] It is belied by the *Charter*'s history and is antithetical to Canada's international human rights obligations. It has distorted the case law, and it has deprived people living in poverty of their very right to be heard.

22. For all these reasons, CCPI respectfully asks this Court to affirm in this appeal that section 15 may indeed impose positive obligations on governments to address systemic social inequality.

## PART IV: SUBMISSIONS AS TO COSTS

23. CCPI does not seek costs and asks that no costs be awarded against it**.**

## PART V: ORDER SOUGHT

24. CCPI takes no position on the outcome of this appeal.

All of which is respectfully submitted this 22nd day of April, 2025.

**Vince Calderhead** **Martha Jackman**

Counsel for the Charter Committee on Poverty Issues

[29] *R. v Oakes*, [1986] 1 S.C.R. 103 at para 64.

## PART VI – TABLE OF AUTHORITIES

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