SCC File No. 41210

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF QUEBEC)

BETWEEN:

ATTORNEY GENERAL OF QUÉBEC

APPELLANT

-and-

BIJ BIJOU CIBUABUA KANYINDA and COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE

RESPONDENTS

(continued)

FACTUM OF THE INTERVENER, ESCR-NET – INTERNATIONAL NETWORK FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

OLTHUIS VAN ERT
66 Lisgar Street
Ottawa, ON K2P 0C1

Gib van Ert
Tel: (613) 408-4297
Email: gvanert@ovcounsel.com

Neil Abraham
Tel: (416) 419-9922
Email: nabraham@ovcounsel.com

Counsel for the Intervener, ESCR-Net - International Network for Economic Social and Cultural Rights

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RESPONDENTS

-and-

ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF ALBERTA, CANADIAN CONSTITUTION FOUNDATION, ADVOCATES FOR THE RULE OF LAW, REFUGEE CENTRE, CENTRAL DES SYNDICATS DU QUÉBEC, BLACK ACTION DEFENCE 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, ESCR-NET – INTERNATIONAL NETWORK FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS, CANADIAN ASOCIATION 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

ORIGINAL TO:

THE REGISTRAR
Supreme Court of Canada
301 Wellington Street
Ottawa, ON K1A 0J1

COPIES TO:

ATTORNEY GENERAL OF QUEBEC
Ministère de la Justice
1, rue Notre-Dame Est, Bureau 8.00
Montréal, QC H2Y 1B6

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

Counsel for the Appellant,
Attorney General of Quebec

NOËL ET ASSOCIÉS, S.E.N.C.R.L.
225, montée Paiment, 2e étage
Gatineau, QC J8P 6M7

Pierre Landry
Tel: (819) 771-7393
Fax: (819) 771-5397
Email: p.landry@noelassocies.com

Agent for the Appellant,
Attorney General of Quebec

MELANÇON MARCEAU GRENIER COHEN S.E.N.C.
871 Grande Allée Ouest, Bureau 200
Québec, QC G1S 1C1

Sibel Ataogul
Guillaume Grenier
Tel : (514) 525-3414 Ext: 330
Fax: (418) 640-0474
Email: sataogul@mmgc.quebec

Counsel for the Respondent,
Bijou Cibuabua Kanyinda

BITZAKIDIS, CLÉMENT-MAJOR, FOURNIER
360 rue Saint-Jacques
Montréal, QC H2Y 1P5

Justine St-Jacques
Christine Campbell
Tel : (514) 873-5146 Ext: 8018
Fax: (514) 873-6032
Email: justine.st-jacques@cdpdj.qc.ca

Counsel for the Respondent,
Commission des droits de la personne et des droits de la jeunesse

ATTORNEY GENERAL OF ALBERTA
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

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
Maia Stevenson
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

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

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
Tele: (514) 283-4934
Fax: (514) 496-7876
Email: francois.joyal@justice.gc.ca

Counsel for the Intervener, Attorney General of Canada

DEPARTMENT OF JUSTICE CANADA NATIONAL LITIGATION SECTOR
275 Sparks Street, St-Andrew Tower
Ottawa, ON K1A 0H8

Bernard Letarte
Tele: (613) 294-6588
Email: SCCAgentCorrespondantCSC@justice.gc.ca

Agent for the Intervener, Attorney General of Canada

FASKEN MARTINEAU DUMOULIN LLP 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) 397-7411
Fax: (514) 397-7600
Email: acraig@pcslaw.ca

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

REFUGEE CENTRE
100-2107 rue Sainte-Catherine Ouest
Montréal, QC H3H 1M6

Pierre-Luc Bouchard
Brett Gordan Howie
Tele: (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 Sherbooke 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

SUPREME ADVOCACY S.R.L.
340, rue Gilmour, Suite 100
Ottawa, ON K2P 0R3

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

Agent 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

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
Tele: (613) 562-5800 Ext: 2077
Email: yy.chen@uottawa.ca

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

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

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

Counsel for the Intervener, Charter Committee on Poverty Issues

UNIVERSITY OF NEW BRUNSWICK FACULTY OF LAW
41 Dineen Drive, Rm 204A
Fredericton, NB E3B 9V7

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

Counsel for the Intervener, 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

Agent for the Intervener, 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.clcj.ca

Counsel for the Intervener, Income Security Advocacy Centre

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

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

Agent for the Intervener, Income Security Advocacy Centre

BORDEN LADNER GERVAIS LLP
1000 rue de la Gauchetière 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

Agent for the Intervener, United Nations High Commissioner for Refugees

PALIARE ROLAND ROSENBERG ROTHSTEIN LLP
155 Wellington St W.
35th Floor
Toronto, ON M5V 3H1

Mannu Chowdhury
Kartiga Thavaraj
Tel: (416) 646-6302
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

Agent for the Intervener, British Columbia Civil Liberties Association

TRUDEL JOHNSTON & LESPÉRANCE
750, côte de la Place-d'Armes, suite 90
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

MCCARTHY TÉTRAULT LLP
1000 De La Gauchetière Street West
Suite MZ400
Montréal, QC H3B 0A2

Karine Joizil
Sajeda Hedaraly
Natasha Petrof
Bianca Annie Marcelin
Marianne Goyette
Tel: (514) 397-4129
Fax: (514) 875-6246
Email: kjoizil@mccarthy.ca

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

IMK LLP
Place Alexis Nihon, Tower 2
3500 De Maisonneuve Blvd. West
Suite 1400
Montréal, QuC H3Z 3C1

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

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

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

Lawrence David
Gjergji Hasa
Tel: (514) 849-7311
Email: l.david@havocats.ca

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

MCCARTHY TÉTRAULT LLP
745 Thurlow Street, Suite 2400
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

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PART I – OVERVIEW

1. People's right to equality under the *Charter* should not hinge on whether a source of the inequality they suffer is characterized as a negative intervention by the state or a failure by the state to take positive steps. Instead, the focus should remain on substantive equality. Where a claim of discrimination is premised on a government's decision not to act or to limit access to a benefit, a substantive equality analysis must consider whether the omission perpetuates the disadvantage borne by those burdened by unequal systems. Otherwise, s. 15(1) will be largely unhelpful to claimants who face discrimination not because they have been singled out and targeted, but because the law entrenches systemic inequality.

2. International human rights treaties ratified by Canada support and confirm an interpretation of s. 15(1) that does not foreclose the possibility that governments may in certain circumstances be required to take steps to ensure access to assistance or other corrective benefits that address systemic inequality. This includes the systemic inequalities that undermine women's right to equal access to work.

PART II – QUESTION IN ISSUE

3. ESCR-Net intervenes on the appropriate approach for assessing the discriminatory impacts of state omissions under s. 15(1) of the *Charter*.

PART III – ARGUMENT

A. If substantive equality is the animating norm of s. 15(1), the right must protect against systemic inequality

4. The appellant and intervening Attorneys General of Alberta and Ontario ask this Court to clarify the s. 15(1) test in ways that would effectively bar claims that the state by its decisions has played a role in cementing systemic inequality. The appellant asks this Court to largely disregard the existing systemic barriers faced by women excluded from the impugned scheme. Alberta and Ontario urge this Court to confirm that discrimination under s. 15(1) is only established where a claimant can demonstrate that state action yields new injury.[1]

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[1] Factum of the Intervener Attorney General of Alberta, at para. 12; Factum of the Intervener Attorney General of Ontario, at para. 12.

5. Those positions are inspired by the discussion of causation in *R v Sharma*, 2022 SCC 39 and this Court's statement therein that s. 15(1) does not impose a general obligation on the provinces and Canada to cure inequality.[2] Essentially, the appellant and other Attorneys General urge this Court to confirm that states are not responsible for any actions or omissions that maintain or even entrench existing systemic inequality. This position in many ways explains the very phenomenon of systemic inequality itself.

6. The provinces' approach is inconsistent with substantive equality, which is the "animating norm" of s. 15(1).[3] Substantive equality is achieved when all impacted persons can realize equal outcomes and access equal opportunities (rather than simply experiencing equivalent treatment). For substantive equality to be attained, there must be "attention to…the persistent systemic disadvantages that have operated to limit…opportunities".[4]

7. Systemic inequality and substantive inequality are fundamentally interconnected. Systemic inequality describes the barriers embedded in the systems (e.g., work, education, healthcare, government, law) people must navigate in their daily lives, which may have been erected without consideration for difference—and which serve to further ascribe value to certain traits over others.[5] These systems foster substantive inequality because they create disparities in outcomes and opportunities for individuals impacted by those systems.

8. There is a feedback loop. Continued substantive inequality can reinforce systemic inequality. Those individuals in society who have access to more opportunities will benefit from those opportunities and, accordingly, find themselves in positions of privilege where they can continue to influence systems. As explained in *Eaton v Brant County Board of Education*, [1997] 1 SCR 241, at para. 67, in the context of systemic inequality faced by persons with disabilities: "exclusion from the mainstream of society results from the construction of a society based solely on mainstream attributes to which disabled persons will never be able to gain access".[6]

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[2] *R v Sharma*, 2022 SCC 39, at paras. 44-50, 63-65 ["*Sharma*"].
[3] *Fraser v Canada (Attorney General)*, 2020 SCC 28, at para. 42 ["*Fraser*"]; *Withler v Canada (Attorney General)*, 2011 SCC 12, at para. 2; *Sharma*, at para. 37.
[4] *Fraser*, at para. 42.
[5] F. Faraday, "One Step Forward, Two Steps Back? Substantive Equality, Systemic Discrimination and Pay Equity at the Supreme Court of Canada" (2020), 94 *SCLR* (2d) 301, at para. 41 ["Faraday"].
[6] *Eaton v Brant County Board of Education*, [1997] 1 SCR 241, at para. 67.

9. This Court has noted that our understanding of discrimination has shifted to recognize that "discrimination is frequently a product of continuing to do things the way they have always been done".[7] Therefore, government decisions that reinforce or perpetuate "the way [things] have always been done" could be discriminatory. State conduct that adversely impacts marginalized groups because it reinforces existing systems of inequality can be an affront to substantive inequality. By turning a blind eye to "real people's real experiences", the state can "further entrench a discriminatory *status quo*".[8] As this Court has explained, the state's failure to include "may be simply a backhanded way of permitting discrimination".[9] To ensure that substantive equality drives s. 15(1), such failures and the potential role of the state in maintaining unequal systems ought to be closely scrutinized.

10. Indeed, the s. 15(1) test itself contemplates such scrutiny; it is concerned with reinforcement and perpetuation of disadvantage.[10] It is difficult to give those terms meaning if concerns about the state's role in preserving systemic inequality do not inform states' obligations under s. 15(1). Where the state makes a decision with differential impacts that catalyze solely because of existing systemic inequality, the affected individuals ought to be able to seek recourse under s. 15(1).

B. The strict dichotomy between negative interventions and positive obligations is inconsistent with substantive equality and s. 15(1)

11. Plaintiffs who allege the state has conducted itself in a manner that entrenches systemic inequality (rather than creates a new disadvantage) face a significant obstacle. Claims of state failure contributing to disadvantage are frequently framed as "positive rights" cases by Crown defendants, who respond that such claims are unavailable. This Court has held that "s. 15(1)(1) does not impose a general, positive obligation on the state to remedy social inequalities or enact remedial legislation"[11] and governments have taken that to mean that they can resist claims about systemic inequality by saying the state cannot be required to take active steps under s. 15(1) and so cannot be held responsible for its role in maintaining unequal systems under the *Charter*.

12. If that approach is confirmed in this case, then the state would be deemed not to discriminate when it excludes some women from a scheme aimed at promoting access to work because the

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[7] *Fraser*, at para. 31.
[8] *Egan v Canada*, [1995] 2 SCR 513, at 552 ["*Egan*"].
[9] *Vriend v Alberta*, [1998] 1 SCR 493, at para. 80 ["*Vriend*"].
[10] *Sharma*, at paras. 193, 205 (per Karakatsanis J, dissenting).
[11] *Sharma*, at para. 63.

systemic barriers faced by the excluded women are being confirmed rather than created. But by ignoring the consequences faced by women excluded from the scheme due to those existing systemic barriers—which have been recognized by this Court for decades[12]—the state entrenches the substantive inequality faced by women. That entrenchment—or the continued "do[ing] things the way they have always been done"[13]—ought to form a basis for a claim that the state has "reinforced" or "perpetuated" disadvantage. Otherwise, as Professor Faraday observes, the s. 15(1) assessment rubber-stamps systemic inequality into a constitutionally "acceptable…baseline that is immune from *Charter* scrutiny"[14], regardless of the impact borne by women as a result of the interplay between existing systemic barriers and the state's decision to exclude.

13. A black and white approach to "positive rights" claims would risk government inaction never being treated as discrimination under the *Charter*, regardless of the adverse impacts of that inaction and contrary to this Court's insistence that "the essence of discrimination is its impact".[15]

14. A black and white approach to "positive rights" claims is also inconsistent with this Court's s. 15(1) jurisprudence. This Court has already identified as discriminatory certain omissions and failures by the state—the implication being that, to remedy the discrimination, the state would need to take positive steps to correct the failure. For example, in *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624, this Court found that "the failure to provide sign language interpretation where it is necessary for effective communication in the provision of health care constitutes a *prima facie* violation of the s. 15(1)(1) rights of deaf persons" and that concerns about what ought to constitute the appropriate accommodation "should not be employed to restrict the ambit of s. 15(1)".[16]

15. Two principles emerge from *Eldridge*. First, the Court confirmed that a failure to remove systemic barriers could constitute a basis for a s. 15(1) claim. Second, the Court confirmed that state concerns about how such a claim could interfere with its policy and financial choices would not go to whether there was discrimination but would instead be considered under s. 1. *Eldridge*

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[12] *Quebec (Attorney General) v s du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17, at paras. 6-9, 38; *Moge v Moge*, [1992] 3 SCR 813, at 854-856, 861-864.
[13] *Fraser*, at para. 31.
[14] Faraday, at para. 68.
[15] *Egan*, at 551.
[16] *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624, at paras. 79-80 ["*Eldridge*"].

illustrates that s. 15(1) can accommodate an investigation of the state's role in impeding or permitting access to systems by individuals who face ingrained barriers. By finding that the province failed to ensure access to the healthcare system for deaf patients, and that this failure constituted a s. 15(1) violation, this Court recognized that the focus ought to be the impact of the state's decision to act or not on those unable to meaningfully participate. This Court in *Sharma* did not overturn *Eldridge*.

16. In *Vriend*, the Court begins by noting that "s. 32 [of the *Charter*] is worded broadly enough to cover positive obligations on a legislature such that the *Charter* will be engaged even if the legislature refuses to exercise its authority" and left open the question—as this Court has done on many occasions—of whether a failure to legislate in a particular context could constitute the basis of a claim.[17] Explaining the impact of the province's failure to specifically legislate protections on the basis of sexual orientation in its human rights statute, the Court stated:

> the respondents' contention that the distinction is not created by law, but rather exists independently…cannot be accepted. [This] cruel and unfortunate discrimination… provides the context in which the legislative distinction challenged in this case must be analysed. The reality of society's discrimination against lesbians and gay men demonstrates that there is a distinction…which denies these groups equal protection of the law by excluding lesbians and gay men from its protection, the very protection they so urgently need because of the existence of discrimination against them in society.[18]

17. The Court makes it clear that the basis for the disadvantage at issue is pre-existing systemic inequality. The impugned omission did not create that inequality, but it entrenched it by affirming that it is acceptable for society to exclude gay people and they do not merit protection. The exclusion was rejected and the state was required to take the "positive" step of including protections on the basis of sexual orientation. Again, this Court in *Sharma* did not overturn *Vriend*.

18. *Eldridge* and *Vriend* have sometimes been characterized not as positive rights cases, but as cases where the province has created a scheme—public healthcare in *Eldridge* and a human rights scheme in *Vriend*—that impermissibly excludes certain people. However, that distinction between "exclusion" and "positive rights" is murky and unhelpful.

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[17] *Vriend*, at paras. 60, 64.
[18] *Vriend*, at para. 84.

19. In *Eldridge*, no express prohibition (or even an omission by virtue of the presence of a non-exhaustive list) was at issue.[19] The problem was that administrators subject to the scheme were free to make funding decisions no doubt informed by long-standing priorities and expectations. As a result, the harm was not created by the public healthcare system itself; it was the consequence of actors within the system. At the core of *Eldridge* is this Court's conclusion that it was discriminatory for the province to permit the barriers to stand.

20. It would be troubling if *Vriend* is limited to being an "exclusion" case. If that were true, had the province introduced separate statutes addressing different genres of discrimination (e.g. an anti-sexism law, an anti-racism law), then the province could have turned a blind eye to discrimination on the basis of sexual orientation indefinitely and s. 15(1) would have had nothing to say about it, notwithstanding that the province's choice would have yielded precisely the same adverse impact as the exclusion at issue in *Vriend*. If that form-over-substance approach were accepted, it would shift the focus to the state's choice of instrument. It would be a departure from focusing on discriminatory impacts and the true root of those impacts (*i.e.,* substantive equality).[20]

21. Ultimately, rather than focusing on whether a claim invokes a "positive right", the question under s. 15(1) in cases where exclusion or failure to act is raised ought to be whether the government's choice not to intervene or to deny a benefit entrenches existing systemic inequality and therefore constitutes an approval of or tolerance for the systemic barriers faced by marginalized groups. Where the state can show that its omission or failure to act does not constitute entrenchment of existing systemic inequalities, then it may be that s. 15(1) is not infringed.

22. Consideration of state omissions and failures that confirm existing systemic inequality can be caught by the existing test under s. 15(1). The notion of confirming or entrenching existing systemic disparities is consistent with the concepts of "contribution to" under part one of the test and "reinforcement" and "perpetuation" under part two of the test. In addition, recognition that a state's particular omission can entrench systemic inequality and constitute discrimination under s. 15(1) does not impose a general and free-standing obligation on the state to cure inequality.

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[19] *Eldridge*, at para. 34.
[20] *Vriend*, at para. 82; *Egan*, at 551.

C. This approach to s. 15(1) is supported and confirmed by Canada's international human rights obligations

23. In *Quebec (Attorney General) v 9147-0732 Québec inc*, 2020 SCC 32, the Court affirmed the application of the presumption of conformity with international law to *Charter* interpretation and noted the role of international norms in providing support or confirmation for *Charter* interpretations reached by purposive interpretation.[21]

24. Canada is a party to the *International Covenant on Civil and Political Rights 1966* ("ICCPR"),[22] the *International Covenant on Economic, Social and Cultural Rights 1966* ("ICESCR"),[23] and the *Convention on the Elimination of All Forms of Discrimination Against Women 1979* ("CEDAW").[24] As these instruments are treaties legally binding on Canada, Canadian laws, including s. 15(1) of the *Charter*, are interpreted according to the rebuttable presumption that they conform with their requirements. These instruments plainly contemplate that states parties are not at liberty to tolerate certain forms of existing systemic inequality—including gender inequality—whether the inequality is created by the state itself or not. They must act.

25. ICCPR, ICESCR and CEDAW all repeatedly affirm the duty of Canada and other states parties to act proactively, including by legislation and other measures, to ensure and protect the equal right of men and women to the enjoyment of human rights.

26. The ICCPR affirms the duty of states parties to "respect and to ensure" the rights in the ICCPR without discrimination,[25] committing them to "take the necessary steps, in accordance with [their] constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights."[26] Article 26 of the ICCPR additionally prohibits discrimination on protected grounds including sex.

27. The CEDAW defines discrimination against women as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the

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[21] *Quebec (Attorney General) v 9147-0732 Québec inc*, 2020 SCC 32, at paras. 32, 22; *R v Bissonnette*, 2022 SCC 23, at paras. 99-102.
[22] *International Covenant on Civil and Political Rights 1966*, [1976] CanTS no. 47.
[23] *International Covenant on Economic, Social and Cultural Rights 1966*, [1976] CanTS no. 46.
[24] *Convention on the Elimination of All Forms of Discrimination Against Women 1979*, [1982] Can TS no. 31.
[25] ICCPR art. 2(1).
[26] ICCPR art. 2(2).

recognition, enjoyment or exercise by women…on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field".[27] Article 2 provides that states parties undertake "to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women".[28] The ambit of this duty to combat discrimination against women is expressly not limited to discrimination established by law or regulation; it reaches into discriminatory customs or practices of a non-governmental nature or origin. Article 2 is complemented by article 3, which requires states parties to take appropriate measures to ensure the advancement of women "in the political, social, economic and cultural fields". [29]

28. CEDAW art. 11 directly addresses women's right to work. Article 11(1) requires states parties to take "all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure…(a) the right to work as an inalienable right of all human beings" and "(b) the right to the same employment opportunities". Article 11(2) directly addresses women's right to work in the context of maternity and childcare: "in order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:…(c) to encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities".[30]

29. These CEDAW provisions elaborate upon similar protections afforded by the ICESCR. Article 3 of that treaty provides that states parties "undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights". These include the right to work (art. 6) and the right to just and favourable working conditions (art. 7). Article 2(1) provides that each state party undertakes to take steps to realize ICESCR rights "by all appropriate means, including particularly the adoption of legislative measures".

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[27] CEDAW art. 1 (emphasis added).
[28] CEDAW art. 2(f) (emphasis added).
[29] CEDAW art. 3.
[30] See also *Convention on the Rights of the Child 1989*, [1992] Can TS no. 3, art. 18(3) ("States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible").

30. Compliance with these obligations is monitored through UN treaty bodies. These bodies have considered the meaning of the treaties in jurisprudence under ratified petition procedures, in general commentaries and in observations on reports submitted to them by states parties. The views of these bodies are not legally binding on states parties but are nevertheless recognized as authoritative and helpful in understanding the content of Canada's international obligations.[31]

31. In its *General Comment No. 16*, the Committee on Economic, Social and Cultural Rights commented, in relation to ICESCR art. 3, that states parties to the ICESCR "should reduce the constraints faced by men and women in reconciling professional and family responsibilities by promoting adequate policies for childcare".[32] Similarly, in its *General Comment No. 23*, the Committee, commenting on ICESCR art. 7, noted the role of affordable day-care services for children in ensuring equality of opportunity for promotion at work.[33] In its Concluding Observations on Canada in the most recent periodic review of compliance with the ICESCR, the Committee recommended that Canada "[p]ursue its commitment to provide affordable childcare services across the country so as to assist parents to balance family and employment responsibilities."[34]

32. The protections in the ICCPR and other instruments stretch beyond obligations on states parties to take positive steps to address gender inequality. For example, *Toussaint v Canada*, CCPR/C/123/D/2348/2014 (30 August 2018) provides a recent affirmation by the UN Human Rights Committee that the framing of a claim as one for a "positive right" is not germane to human rights challenges under the ICCPR. The Committee rejected Canada's argument—which was accepted by the Federal Court of Appeal in its adjudication of Ms. Toussaint's previous and related *Charter* claims[35]—that a challenge to an exclusion from publicly funded healthcare services amounted to a positive rights claim to healthcare. Ms. Toussaint was excluded due to her

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[31] See, e.g., *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, at para. 73; *Divito v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47, at para. 26.
[32] UN Committee on Economic, Social and Cultural Rights, *General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant)*, E/C.12/2005/4, 11 August 2005, at para. 24.
[33] UN Committee on Economic, Social and Cultural Rights, *General comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/GC/23, 7 April 2016, at para. 32.
[34] UN Committee on Economic, Social and Cultural Rights, Concluding Observations on the Sixth Periodic Report of Canada, UN Doc. E/C.12/CAN/CO/6 (2016), at para. 33.
[35] *Toussaint v Canada (Attorney General)*, 2011 FCA 213.

immigration status. The Committee found that the exclusion violated, *inter alia*, the right to non-discrimination under the ICCPR and required Canada to "take all steps necessary…to ensure that irregular migrants have access to essential health care to prevent a reasonably foreseeable risk that can result in loss of life."[36] The focus was not the nature or form of Canada's scheme, or Canada's role in creating the disadvantage faced by Ms. Toussaint, but instead on the profound consequences of the exclusion.

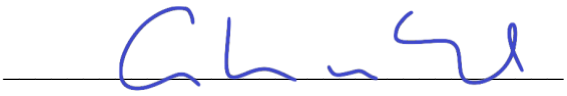
33. An interpretation of s. 15(1) that relieves governments from correcting or at least justifying systemic gender and other forms of inequality in cases where the state claims merely to be maintaining the *status quo* is inconsistent with Canada's obligations under the ICCPR, the CEDAW, and the ICESCR.

PART IV – SUBMISSIONS RESPECTING COSTS

34. ESCR-Net does not seek costs and asks that no costs be ordered against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Done at the City of Ottawa, this 24th day of April, 2025.



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Neil Abraham

[36] *Toussaint v Canada*, CCPR/C/123/D/2348/2014 (30 August 2018), at paras. 10.9-10, 11, 11.8, 13.

PART VI – TABLE OF AUTHORITIES

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Statutes, Regulations, Rules, etc.	**Rule, Section**
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Convention on the Rights of the Child 1989, [1992] Can TS no. 3	Art. 18
International Covenant on Civil and Political Rights 1966, [1976] CanTS no. 47	Art. 2, 26
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