

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

BETWEEN:

ATTORNEY GENERAL OF QUEBEC

APPELLANT

– and –

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

RESPONDENTS

(continued)

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

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PART I — OVERVIEW AND STATEMENT OF FACTS

1. Measures that seek to alleviate poverty in Canada must abide by the *Charter*. This appeal concerns the exclusion of refugee claimants from access to subsidized childcare in Québec. The Respondent, Ms. Bijou Cibuabua Kanyinda, a woman refugee claimant, was unable to work without access to subsidized childcare. Ms. Kanyinda alleges that s. 3 of the *Reduced Contribution Regulation* (the “Regulation”)¹ results in adverse effects discrimination on the basis of sex, citizenship, and immigration status, contrary to s. 15(1) of the *Charter* in a manner that cannot be justified under s. 1.

2. The Income Security Advocacy Centre (“ISAC”) is a specialty legal clinic funded by Legal Aid Ontario to advance the rights, interests, and systemic concerns of low-income Ontarians with respect to income security and employment law. Subsidized childcare is a vital income security benefit that enables participation in the workforce. This Court’s decision on the proper approach to substantive equality in the context of an under-inclusive benefits scheme will affect the client communities ISAC serves. This appeal will also have downstream effects on access to other benefits for refugee claimants, and other marginalized communities.

PART II — STATEMENT OF QUESTIONS IN ISSUE

3. ISAC intervenes to address the appropriate approach to the s. 15(1) analysis in the context of benefit schemes. ISAC makes two submissions on this appeal:

- (1) In cases where a single protected ground is at play, a contextual analysis of single-axis discrimination is essential. This approach best captures the real-world effects of impugned government action.
- (2) Complex and interconnected benefit schemes raise unique concerns at both the first and second steps of the s. 15(1) analysis. At the first step, the government’s design of a benefit scheme need not be the only or dominant cause of a disproportionate impact. At the second step, excluding women like Ms. Kanyinda from a subsidized childcare benefit is a barrier to entering the workforce. Delayed workforce entry or reduced work

¹ [*Reduced Contribution Regulation*](#), C.Q.L.R. c. S-4.1.1, r. 1, s. 3 under the [*Educational Childcare Act*](#), C.Q.L.R. c. S-4.1.1.

hours can block access to future income security benefits, further exacerbating economic disadvantage.

PART III — STATEMENT OF ARGUMENT

Submission 1: A contextual analysis on the basis of a single ground can capture the real-world effects of the impugned Regulation

4. Substantive equality looks to real-world effects.² The real-world effect of the impugned Regulation is to exclude a subgroup of women refugee claimants with childcare responsibilities, who are often racialized, single mothers, and living in poverty. Where multiple protected grounds exist, an intersectional analysis based on two or more grounds is ideal, but some cases will come down to only a single enumerated or analogous ground. A single axis of discrimination need not equate to a unidimensional analysis. Instead, a contextual analysis of single-axis discrimination is essential in pursuit of substantive equality.³

5. Contextual analysis of the claimant group’s situation is nothing new in this Court’s approach to s. 15. The majority recognized in *Fraser* “that substantive equality requires attention to the ‘full context of the claimant group’s situation’, to the ‘actual impact of the law on that situation’, and to the ‘persistent systemic disadvantages [that] have operated to limit the opportunities available’ to that group’s members”.⁴ Justice Abella applied this approach to conduct

² *R. v. Sharma*, [2022 SCC 39](#) [*Sharma*], at para. [196](#), per Karakatsanis J. (dissenting, but not on this point); *Withler v. Canada (Attorney General)*, [2011 SCC 12](#) [*Withler*], at para. [58](#).

³ Shreya Atrey, *Intersectional Discrimination* (Oxford: Oxford University Press, 2019) [Atrey] at 104 [Book of Authorities (“BOA”) Tab 1]. Professor Atrey calls this approach “contextual single-axis discrimination”.

⁴ *Fraser v. Canada (Attorney General)*, [2020 SCC 28](#) [*Fraser*], at para. [42](#). See also *Sharma*, at para. [196](#), per Karakatsanis J. (dissenting, but not on this point): “Because substantive equality looks to real-world effects, the inquiry is always contextual. What matters is [...] the ‘claimant group’s situation and the actual impact of the law on that situation’”, citing *Withler*, at paras. [40](#), [43](#); *R. v. Turpin*, [\[1989\] 1 S.C.R. 1296](#), at 1334; *Law v. Canada (Minister of Employment and Immigration)*, [\[1999\] 1 S.C.R. 497](#), at para. [30](#); *Quebec (Attorney General) v. A.*, [2013 SCC 5](#), at para. [51](#); *Kahkewistahaw First Nation v. Taypotat*, [2015 SCC 30](#) [*Taypotat*], at para. [18](#); and *Ontario (Attorney General) v. G.*, [2020 SCC 38](#) [*G.*], at para. [43](#). See also *Jacob v. Canada (Attorney General)*, [2024 ONCA 648](#) [*Jacob*], at para. [59](#), leave to appeal refused, [2025 CanLII 33146](#) (S.C.C.).

a “robust intersectional analysis of gender and parenting” under the enumerated ground of sex.⁵

6. A contextual approach to single-axis discrimination allows identities, conditions, and circumstances that are not captured by grounds to be factored into the discrimination analysis.⁶ The starting point is the claimant’s experience of the law. Appreciating the claimant’s context allows a court to fully understand the impact of the law on the claimant group. This is essential at both steps of the s. 15(1) analysis. ISAC proposes when, why, and how this Court can engage in a contextual analysis of a single protected ground.

7. **When** will a contextual analysis of a single protected ground be appropriate? When multiple protected grounds are in play, a true intersectional analysis, as proposed by the Respondent and some interveners, is the gold standard. But formally proving intersectional discrimination based on two or more enumerated or analogous grounds under s. 15(1) is not always possible. This may be because a claimant only pleads a single ground, the court finds a distinction on only one ground, or an additional characteristic is not recognized as an analogous ground. Single-axis contextual analysis is especially important in adverse impact discrimination cases.

8. If this Court rejects immigration status as an analogous ground, and does not find a distinction based on citizenship, the last ground standing is sex. But Ms. Kanyinda’s identity cannot be reduced to “woman”; her other identities are crucial to understanding her s. 15 claim. There are many cases where a claimant’s identity does not fit neatly into the boxes of the law, but that is not a reason to ask them to leave that identity at the courtroom door.⁷

9. Courts have been able to effectively consider factors that are not protected grounds through a contextual s. 15 analysis. In *Stadler*, the Manitoba Court of Appeal considered the claimant’s receipt of social assistance as a contextual factor in determining whether a requirement to apply early for a reduced pension was discriminatory on the basis of disability.⁸ Poverty and receipt of

⁵ *Fraser*, at paras. [77](#), [116](#), [123](#).

⁶ *Atrey*, at 105.

⁷ See, for example, *Taypotat*, at paras. [12-13](#); Jonnette Watson Hamilton & Jennifer Koshan, “*Kahkewistahaw First Nation v. Taypotat: An Arbitrary Approach to Discrimination*” (2016) 76 S.C.L.R. (2d) 243 at 256-57 [Hamilton & Koshan]. See also *Fraser*, at para. [34](#), citing Lisa Philipps & Margot Young, “*Sex, Tax and the Charter: A Review of Thibaudeau v. Canada*” (1995) 2 Rev. Const. Stud. 221 at 258.

⁸ *Stadler v. Director, St. Boniface/St. Vital*, [2020 MBCA 46](#) [*Stadler*], leave to appeal refused, [2020 CanLII 92501](#) (S.C.C.)

social assistance gave “important texture to his argument of adverse impact [discrimination]” and was necessary for “substantiating the context in which Stadler faces disadvantage as a disabled person”.⁹ This Court took the same approach to incorporating parental/family status into the analysis of sex discrimination in *Fraser* despite declining to recognize parental/family status as a new analogous ground.¹⁰

10. **Why** is a contextual analysis necessary when only one ground is at play? The history of s. 15 demonstrates the pitfalls of a strictly single-ground approach. In *Gosselin*, the majority’s analysis did not engage with the interplay of poverty, mental health, and age to determine the true impact on the claimant of lower social assistance rates for persons under 30.¹¹ Justices L’Heureux-Dubé and Bastarache, in separate dissents, both considered how Ms. Gosselin’s mental health made it challenging for her to maintain work and how her life choices were limited by deep poverty. Both judges found, based on this contextual analysis, that the statutory scheme’s age-related distinction resulted in discrimination.¹² In contrast, the majority focused narrowly on age and did not find a breach of s. 15.

11. A robust analysis of partial discrimination requires a contextual approach. Discrimination against some women can constitute discrimination based on sex.¹³ Failing to take intra-group diversity into account means s. 15 will not respond to the needs of the most vulnerable within the group.¹⁴

12. **How** can this court conduct a contextual analysis on the single ground of sex while still requiring a distinction based on a protected ground? Considering the full context of the claimant group’s situation does not lessen the burden on the claimant at the first step of the s. 15(1) test. In

⁹ *Stadler*, at paras. [47-49](#), [90](#).

¹⁰ *Fraser*, at paras. [116](#), [98-106](#).

¹¹ *Atrey*, at 92, 107; *Gosselin v. Québec (Attorney General)*, [2002 SCC 84](#) [*Gosselin*].

¹² *Gosselin*, at paras. [132-33](#) *per* L’Heureux-Dubé J. (dissenting), and [164-169](#), [238](#) *per* Bastarache J. (dissenting). See also [Hamilton & Koshan](#), at 256-57, regarding this Court’s difficulty grappling with the intersection of age, on-reserve status, and residential school survivorship.

¹³ *Janzen v. Platy Enterprises Ltd.*, [\[1989\] 1 S.C.R. 1252](#); *Brooks v. Canada Safeway Ltd.*, [\[1989\] 1 S.C.R. 1219](#).

¹⁴ Colleen Sheppard, “Grounds-based distinctions: Contested starting points in equality law” (2024) 35:1 Can. J. Women and L. 1 at 23, 25 [**BOA, Tab 2**].

fact, this Court has recognized that the claimant group’s situation is integral to the analysis.¹⁵ A claimant’s socioeconomic situation and historical context, for example, are often necessary to understand *how* the law causes or contributes to a disproportionate impact on the claimant group. Protected grounds are not “hermetically sealed” from other characteristics of a claimant group.¹⁶

13. It is not necessary for contextual factors to be intrinsically linked to a protected ground for the s. 15 analysis to consider them, contrary to the Attorney General of Canada’s assertion.¹⁷ In *C.P.*, Justice Abella considered race as a factor relevant to the contextual analysis of age discrimination in the criminal justice system even though age and race are in no way intrinsically linked.¹⁸ Moreover, in *Fraser*, this Court considered how economic disadvantage can be magnified for women, even though poverty is not necessarily intrinsically linked to gender.¹⁹

14. The present appeal may provide an opportunity to conduct a contextual analysis on the single ground of sex, should this court find that neither immigration status nor citizenship are engaged. Poverty is central to understanding this claim. Women living on a low income require subsidized childcare the most. The Respondent’s expert, Dr. Hanley, explains that low-income families, recent immigrants, and racialized women are especially sensitive to the cost of childcare.²⁰ These groups must carefully weigh whether it “pays to work”.²¹ If childcare is too expensive, entering the workforce will not make sense for them.

15. Sex, immigration status, race, and income also do not operate independently from each other. One vulnerability can amplify others.²² Women continue to receive inequitable pay; refugee

¹⁵ *Fraser*, at para. [57](#); *Sharma*, at para. [49](#).

¹⁶ The Constitutional Court of South Africa takes a contextual approach to single-axis discrimination in *National Coalition for Gay and Lesbian Equality and Others v. Minister of Home Affairs and Others*, [\[1999\] Z.A.C.C. 17](#) (Constitutional Court of South Africa), at para. 35. See also Atrey, at 104.

¹⁷ Factum of the Intervener, Attorney General of Canada, at paras. 72-74.

¹⁸ *R. v. C.P.*, [2021 SCC 19](#) [*C.P.*], at paras. [88-89](#).

¹⁹ *Fraser*, at paras. [111-112](#).

²⁰ Report of Dr. Jill Hanley, “The labour implications of the exclusion of refugee claimants from Quebec’s subsidized childcare program” [Hanley Report], at paras. 27, 30-32, 34, and 49, in Dossier de l’appelant [D.A.], vol. II, pp. 78-80, 84.

²¹ *Ibid.*

²² *C.P.*, at paras. [88-89](#).

claimants and racialized people have lower than average earnings when they can find work; and refugee claimant women are less likely than refugee claimant men to be employed, exacerbating their poverty.²³

16. Only by engaging in a meaningful contextual analysis of the claimant group’s actual situation can courts properly analyze disadvantage at both the first and second steps of the s. 15(1) analysis.

Submission 2: Complex and interconnected benefit schemes raise unique concerns at both the first and second steps of the s. 15(1) analysis

A. Step 1: A benefit scheme need only contribute to a disproportionate impact

17. Under the first step of the s. 15(1) test, the government’s design of a benefits scheme need not be the only or dominant cause of a disproportionate impact.²⁴ The claimant must show some nexus between the impugned action and the disproportionate impact by establishing that the impugned action *caused or contributed to* the impact on the protected group.²⁵ In this appeal, the Court ought to assess whether s. 3 of the Regulation *contributed to* the real-world impact Ms. Kanyinda experienced.

18. The first step of the s. 15(1) analysis considers whether the impugned action contributed to a disproportionate impact on women refugee claimants, “taking full account of social, political, economic and historical factors concerning the group.”²⁶ In considering the real-world impact of s. 3 of the Regulation, this Court ought to take full account of women’s greater share of childcare responsibilities, delayed processing of refugee claims, and low-income women’s need for subsidized childcare.²⁷ This type of realistic accounting of the claimant group’s situation does not lessen a claimant’s burden under the first step of the analysis. The focus remains on how the state’s decision to exclude women refugee claimants from access to a benefit provided to others contributes to their disadvantages.

²³ Hanley Report, at paras. 20, 27, and 30 in D.A., vol. II, pp. 74, 78-79; Gillian Morantz *et al.*, “Resettlement challenges faced by refugee claimant families in Montreal: lack of access to child care” (2013) 18 Child and Family Social Work 318 at 323 in D.A., vol. IX, p. 58.

²⁴ Sharma, at paras. [44-45](#), [49](#); Fraser, at para. [70](#); Jacob, at paras. [76-77](#).

²⁵ Sharma, at paras. [44-45](#), [49](#); Jacob, at paras. [76-77](#).

²⁶ Withler, at para. [39](#); Jacob, at para. [68](#).

²⁷ Fraser, at paras. [103-104](#).

19. Groups who rely on government benefits must often do so *because* they face pre-existing disadvantage. For example, women refugee claimants need subsidized childcare because they face pre-existing social and economic disadvantage, including lack of family support and low income.²⁸ The state’s decision to exclude them from subsidized childcare disproportionately excludes them from participating in the workforce.

20. Put another way, the claimant must demonstrate that the government’s action is making things worse for the claimant group on the basis of a protected ground. The group’s pre-existing disadvantage must not release the state from accountability for actions that contribute to a differential impact on that group. Rather, the pre-existing disadvantage forms the backdrop against which the government’s action is analyzed. This is especially important in challenges to under-inclusive benefit schemes. If the state action *contributed to* the disproportionate impact, that is sufficient to satisfy the first step of the test under s. 15(1) in an adverse effects discrimination claim.²⁹

B. Step 2: Exclusion from the Regulation creates a cascade of economic disadvantage

21. Under the second step of the s. 15(1) test, the exclusion under s. 3 of the Regulation further exacerbates economic disadvantage by reducing access to future income security benefits. This Court has noted that when assessing disadvantage under the s. 15(1) test, harm may include “economic exclusion or disadvantage”.³⁰ Courts can look beyond the immediate effect of government action to additional disadvantages that logically flow from that immediate effect.³¹ This is part of considering the “concrete, material impacts the challenged law has on the claimant and the protected group or groups to which they belong in the context of their actual circumstances.”³²

22. Lack of access to subsidized childcare poses a barrier to workforce participation for low-income, marginalized women.³³ In Québec, mothers who benefit from subsidized childcare

²⁸ Hanley Report, at paras. 33-34 in D.A., vol. II, p. 80.

²⁹ *Sharma*, at para. [31](#).

³⁰ *Fraser*, at para. [76](#).

³¹ *Vriend v. Alberta*, [\[1998\] 1 S.C.R. 493](#), at para. [99](#).

³² *G.*, at para. [43](#).

³³ Hanley Report, at para. 27 in D.A., vol. II, p. 78, citing Cascio, E. U., & Schanzenbach, D. W. (2013). The impacts of expanding access to high-quality preschool education (No. w19735).

experience a “large and statistically significant impact” on their long-term participation in the labour market.³⁴ For women refugee claimants, entering the workforce is a prerequisite to accessing Canada’s primary social safety net. As Dr. Hanley notes, high childcare costs decrease workforce participation in the short term, resulting in reduced access to future income security benefits in the long term.³⁵

23. The interconnected nature of income security benefits in Canada means that exclusion from one benefit can create a domino effect that also prevents or limits access to other benefits, exacerbating economic disadvantage. If a woman is unable to access subsidized childcare for her children, that may delay her entry into the workforce. Delayed workforce entry or reduced work hours can block access to future income security benefits and contributory plans. For Ms. Kanyinda, exclusion from the Québec workforce due to s. 3 of the Regulation will impact both her eligibility for and her quantum of benefits from the Québec Parental Insurance Plan (“QPIP”), Employment Insurance (“EI”), the Québec Pension Plan (“QPP”), and the Canada Pension Plan (“CPP”). Each provide benefits when a person is unable to work or upon retirement. But each program is only available to individuals who have worked.

24. Like all workers, refugee claimant workers qualify for QPIP, EI, QPP, and CPP based on their contributions and work history. In assessing eligibility for QPIP and EI benefits, the programs review whether an applicant has met a minimum earnings threshold or a minimum number of “insurable hours”, respectively.³⁶ Similarly, an applicant’s participation in the workforce and

Brookings Papers on Economic Activity, Economic Studies Program, The Brookings Institution, vol. 47(2 (Fall)): 127-192, D.A., vol. V, p. 100 and Hotz, V. J., & Wiswall, M. (2019). Child Care and Child Care Policy: Existing Policies, Their Effects, and Reforms. The ANNALS of the American Academy of Political and Social Science, 686(1), 310-338, D.A. vol. VIII, p. 55.

³⁴ Hanley Report, at para. 22 in D.A., vol. II, pp. 75, citing Lefebvre, P., & Merrigan, P. (2008). Child-care policy and the labor supply of mothers with young children: A natural experiment from Canada. *Journal of Labor Economics*, 26(3), 519-548, D.A., vol. VIII, p. 141 ; Hanley Report, at para. 36 in D.A., vol. II, p. 81, citing Lefebvre, P., Merrigan, P., & Verstraete, M. (2009). Dynamic labour supply effects of childcare subsidies: Evidence from a Canadian natural experiment on low-fee universal child care. *Labour Economics*, 16(5), 490-502, D.A. vol. VIII, p. 172.

³⁵ Hanley Report, at paras. 20-21, 36 in D.A., vol. II, pp. 74, 81.

³⁶ [Act respecting parental insurance](#), C.Q.L.R. c. A-29.011, s. 3; [Employment Insurance Act](#), S.C. 1996, c. 23, ss. [7\(2\)](#), [55](#).

contributions to the insurance scheme determine whether they qualify for QPP and CPP benefits.³⁷

25. For example, consider a refugee claimant woman who can work only part-time hours because she is excluded from subsidized childcare. Because she can only work part-time, she may not accumulate enough hours of work to qualify for EI. This means she would not be able to support herself and her family if she later loses that part-time job. EI also provides benefits to workers who become unable to work due to illness or injury,³⁸ a feature that is important for many low-wage and precariously employed workers who often do not have paid sick days or disability insurance from their employer. But in this scenario, the refugee claimant woman is excluded from accessing EI sickness benefits as well.

26. Additionally, for those who meet the minimum eligibility requirements for QPIP, EI, QPP, and CPP, their contributions impact the amount of money they receive under the respective income security benefit.³⁹ Even if a woman working part-time met the minimum eligibility requirements for these future income security benefits, part-time work means reduced benefit amounts because the quantum of benefits under each scheme is based on earnings.⁴⁰ Similarly, a delayed start to employment in Canada means fewer years to contribute to CPP/QPP, and potentially fewer opportunities to secure full-time, higher-paid employment with its resulting higher CPP/QPP

³⁷ [Act respecting the Québec Pension Plan](#), C.Q.L.R. c. R-9, ss. [50](#), [105-108](#); [Canada Pension Plan](#), R.S.C., 1985, c. C-8, ss. [8](#), [44](#).

³⁸ [Employment Insurance Act](#), s. [21](#).

³⁹ [Act respecting the Québec Pension Plan](#), ss. [120-138](#); [Canada Pension Plan](#), s. [46](#); [Act respecting parental insurance](#), ss. [18-19](#); and [Employment Insurance Act](#), ss. [14-17](#).

⁴⁰ Under both CPP and QPP there are child rearing drop-out provisions that recognize that an individual's contributions may be reduced when they are the primary caregiver of a child under the age of 7. These child rearing drop-out provisions exclude contribution months where the primary caregiver had little to no earnings, if this produces an increased CPP/QPP benefit amount. However, refugee claimants are ineligible for the child rearing drop-out provisions because they are excluded from the definitions of "family allowance recipient" and "recipient of family benefits" in CPP and QPP respectively. Therefore, Ms. Kanyinda's lack of contributions when she is a primary caregiver of children under the age of 7 will lower the CPP/QPP benefit amount she will eventually receive. See [Act respecting the Québec Pension Plan](#), ss. [1\(v\)\(1\)](#), [116.3\(a\)](#); [Canada Pension Plan](#), ss. [42\(1\)](#), [48\(2\)\(a\)](#); and [Canada Pension Plan Regulations](#), C.R.C., c. 385, s. [77\(1\)](#).

contributions.⁴¹ Because CPP and QPP benefits are based on average earnings, a shorter working history with lower earnings can lead to a lower retirement benefit.⁴²

27. For women like Ms. Kanyinda, exclusion from the labour market upon arrival to Canada due to lack of affordable childcare creates a disadvantage in itself, but also creates a cascade of other economic disadvantages. At the second step of the s. 15(1) analysis, consideration of economic disadvantage should be broad enough to encompass the collateral impacts of government action.

Conclusion

28. Under-inclusive benefit schemes, like the one at issue in this appeal, can worsen inequality in ways that infringe s. 15 of the *Charter*. Refugee claimant women living on a low income need to enter the workforce to lift their families out of poverty, but they cannot do so without access to subsidized childcare. At the same time, refugee claimant women need *subsidized* childcare because they do not have enough income to afford full-cost childcare. A substantive equality analysis that ignores this reality contributes to and perpetuates the cycle of poverty. Meaningful substantive equality requires a contextual approach to sex discrimination that considers the particular subgroup affected, and a broad understanding of how state action can exacerbate economic disadvantage.

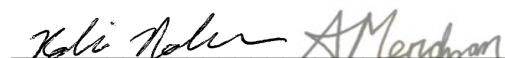
PART IV — COSTS

29. ISAC does not seek costs and asks that no costs be awarded against it.

PART V — ORDERS SOUGHT

30. ISAC takes no position on the outcome of this appeal but respectfully requests that it be determined in accordance with the foregoing submissions.

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


Robin Nobleman, Adrian Merdzan
Counsel for the Intervener,
Income Security Advocacy Centre

⁴¹ *Fraser*, at paras. [109-111](#).

⁴² [Canada Pension Plan](#), ss. [46\(1\)](#), [48\(1\)](#), [49](#), [50](#); [Act respecting the Québec Pension Plan](#), ss. [45](#), [101](#), [116.2](#), [120](#).

PART VI – TABLE OF AUTHORITIES

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