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

– and –

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

Respondents

(continued)

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NATIONAL ASSOCIATION OF WOMEN AND THE LAW and
DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS
(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. The Respondent, Ms. Kanyinda, is a single mother of three and an asylum seeker from the Democratic Republic of Congo. Despite being legally able to work, she was effectively barred from doing so, not because of lack of will but because s. 3 of the *Reduced Contribution Regulation* ("*RCR*") excludes asylum seekers from Quebec's subsidized childcare program.

2. In finding that s. 3 of the *RCR* violates s. 15(1) of the *Charter*[1] by discriminating on the basis of sex,[2] the Court of Appeal of Quebec did not meaningfully consider how the other grounds claimed by the Respondent affected the nature of the discrimination she experienced. This decision follows others in which courts' intersectionality analyses have been partial or absent.[3]

3. This Court now has the opportunity to provide guidance on applying s. 15(1) of the *Charter* in cases where a claimant's intersecting characteristics are potentially relevant, as well as to reaffirm that, despite ambiguity in the law resulting from this Court's decision in *Sharma*,[4] a s. 15(1) claimant may demonstrate adverse effects through either quantitatively disproportionate impact or qualitatively differential treatment.

PART II - STATEMENT ON POINTS IN ISSUE

4. The National Association of Women and the Law and the David Asper Centre for Constitutional Rights (the "Interveners") take no position on the disposition of the appeal but argue that the Court should endorse an intersectional analysis of s. 15(1) of the *Charter* and

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[1] *Canadian Charter of Rights and Freedoms*, s. 15, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
[2] *Procureur général du Québec v. Kanyinda*, 2024 QCCA 144 at paras 100-102 [*Kanyinda*].
[3] *E.g.,Gosselin v. Québec (Attorney General)*, 2002 SCC 84 [*Gosselin*]; *Native Women's Assn. of Canada v. Canada*, [1994] 3 SCR 627; *R. v. Sharma*, 2022 SCC 39 [*Sharma*]; *Falkiner v. Ontario (Minister of Community and Social Services)*, 59 OR (3d) 481, 212 DLR (4th) 633 [*Falkiner*]; *Tanudjaja v. Canada (Attorney General)*, 2014 ONCA 852; *Boutler v. Nova Scotia Power Inc*, 2009 NSCA 17; *Sparks v. Dartmouth/Halifax County Regional Housing Authority*, 1993 NSCA 13; *Begum v. Canada (Citizenship and Immigration)*, 2018 FCA 181.
[4] *Sharma*, *supra* note 3 at para 76.

clarify that a distinction can be demonstrated with evidence of either quantitatively disproportionate impact or qualitatively differential treatment.

PART III - ARGUMENT

A. Substantive equality under section 15(1) requires recognizing that women experience multiple forms of discrimination

5. Substantive equality is the foundation of s. 15(1).[5] This constitutional guarantee of equality must be grounded in material reality. People experience discrimination as whole persons, not as an aggregate of separate characteristics. For women, this often means that when they face laws that perpetuate sex discrimination, that discrimination is inextricably entwined with other kinds based on race, parental or marital status, socioeconomic status, immigration status or other characteristics.[6] The substantive equality analysis must thus include consideration of "social, political and economic structures, systems and institutions"[7] and, where relevant, intersecting systems of subordination.

6. This Court has recognized that a law may discriminate on the basis of sex even if only a subgroup of women are adversely affected and even if some women benefit from it.[8] This Court has also interpreted sex to include considerations of pregnancy[9] and parental status/caregiving, even if not all women will become pregnant or raise children.[10] Further,

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[5] *Fraser v. Canada (Attorney General)*, 2020 SCC 28 at para 42 [*Fraser*].
[6] Human Rights Committee, General Comment 28, Equality of rights between men and women (article 3), U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000) at para 30; Kerri A Froc, "Multidimensionality and the Matrix: Identifying Charter Violations in Cases of Complex Subordination" (2010) 25:1 Can J Law & Soc 21 at 24.
[7] Margot E Young, "Unequal to the Task: 'Kapp'ing the Substantive Potential of Section 15" in Sheila McIntyre & Sanda Rodgers, eds, *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (Markham: LexisNexis Canada 2010) 183 at 194-195.
[8] *Fraser*, *supra* note 5 at para 72. See also: *Brooks v. Canada Safeway Ltd*, [1989] 1 SCR 1219 at pp. 1247-48 [*Brooks*]; *Janzen v. Platy Enterprises Ltd.*, [1989] 1 SCR 1252 at pp. 38 [*Janzen*]; *Centrale des syndicats du Québec v. Quebec (Attorney General)*, 2018 SCC 18 at para 24 [*Centrale*]; *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 at para 38 [*Alliance*].
[9] *Brooks*, *supra* note 8 at pp. 1221.
[10] *Fraser supra* note 8 at para 116.

courts have used a group composed of single mothers on social assistance to assess whether welfare laws had a differential impact based on enumerated and analogous grounds.[11]

7. Despite these recognitions, Canadian courts have struggled to adequately address intersectional claims of adverse effects discrimination.[12] For instance, some courts have simply considered one main ground and designated other characteristics relevant context,[13] or have employed multiple comparisons, evaluating each ground claimed in isolation.[14]

8. Such a fragmented approach means that discrimination risks "falling through the cracks" of the discrete, single-axis analyses.[15] Moreover, when "the claimants' characteristics are treated as severable and unrelated… the interactive nature of the sites of oppression is rendered invisible, even negated."[16] For instance, despite the reality of women's economic disadvantage,[17] the claimant's reliance on an explicit age-based distinction in *Gosselin*[18] led the majority to focus exclusively on the relative advantage of "young people," and not the gendered socioeconomic disadvantage specific to the claimant as a young, poor woman.

9. Courts' failure to adequately address discrimination as involving a complex interaction of oppressive systems creates a "static and oversimplified"[19] view of what discrimination is expected to look like in a given case. Sex discrimination is then exemplified by what is experienced by women who differ from the dominant group (e.g. white, heterosexual, citizen men) by only one characteristic, that is, the most privileged women. Such a perspective risks

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[11] *Falkiner v. Ontario (Minister of Community and Social Services)*, 59 OR (3d) 481, 212 DLR (4th) 633 at paras 78-80. See also: *Sparks v. Dartmouth/Halifax County Regional Housing Authority*, 1993 NSCA 13 at n.p.
[12] *Bjorkquist et al. v. Attorney General of Canada*, 2023 ONSC 7152 at para 90 [*Bjorkquist et al.*]
[13] See for example *Stadler v. Director, St Boniface/St Vital*, 2020 MBCA 46, at para 65 (application for leave dismissed: 2020 CanLII 92501 (SCC)).
[14] See note 3.
[15] Nitya Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity" (1993) 19 Queen's L.J. 179 at 193 [Iyer].
[16] Daphne Gilbert and Diana Majury, "Critical Comparisons: The Supreme Court of Canada Dooms Section 15" (2006) 24 Windsor YB Access Just 111 at 134.
[17] *Fraser*, *supra* note 5 at para 113; *Alliance*, *supra* note 8 at para 40; *Centrale*, *supra* note 8 at para 82.
[18] *Gosselin*, *supra* note 3.
[19] Iyer, *supra* note 15 at 192.

courts mistaking a part for the whole, and overlooking the discrimination experienced by the most disadvantaged group members.

B. An intersectional analysis is needed where claimants experience multiple forms of discrimination

10. Intersectionality is a mode of analysis developed by Kimberlé Crenshaw that critiques the unidimensional (or "single-axis") approach to understanding discrimination. An intersectional analysis allows for a richer and more nuanced understanding of equality, which is relevant to real people's experiences.[20] Crenshaw explains that Black women sometimes experience sex discrimination in similar ways as white women and racial discrimination in similar ways as Black men, sometimes they experience "double discrimination", and "sometimes, they experience discrimination as Black women – not the sum of race and sex discrimination, but as Black women."[21] For instance, racialized women may be adversely affected because a law embeds gender norms having whiteness as their implicit baseline.[22] A single-axis understanding of discrimination cannot adequately capture this discrimination.

11. Indeed, failing to take an intersectional approach leaves claims to be tried on isolated grounds stripped of critical elements that would allow decision-makers to make sense of what happened and how claimant group members were affected – an approach akin to the rejected, formalistic "similarly situated" test or "mirror comparator group" analysis.[23]

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[20] See Vrinda Narain, "The Place of Niqab in the Courtroom" (2015) 9 Vienna J on Int Constitutional L 41 at 50-52; Diane Pothier, "Connecting Grounds of Discrimination to Real People's Real Experiences" (2001) 13 Can J of Women and L 37.
[21] Kimberlé Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) U Chi Legal F 139 at 149.
[22] Nitya Iyer, "Some Mothers Are Better Than Others: A Re-examination of Maternity Benefits" in Susan B Boyd, ed, *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (Toronto: University of Toronto Press, 1997) 168 at 174-75.
[23] *Withler v. Canada (Attorney General)*, 2011 SCC 12 at para 60; *Fraser*, *supra* note 5 at para 94.

C. This Court should clarify how intersectionality impacts the s. 15(1) test

a) Step 1: Grounds must be read broadly and intersectionally

12. The Court of Appeal of Quebec's finding of an infringement based on the ground of sex stems from an analysis that can be characterized as "sex-plus" immigration status rather than an intersectional approach. That is, the claimant's intersectional experience of discrimination was treated as substantially the same as a single-axis claim based on sex (analogous to employment difficulties faced by non-racialized mothers who are not asylum seekers), even if understood within some of the particularities of her subgroup of asylum seekers.[24]

13. Confirming a single-axis approach to s. 15(1) could incentivize further targeting of the most disadvantaged women in gender-based legislation, so long as the explicit distinction is based on a ground not yet confirmed by this Court as protected under s. 15 (such as immigration status). This would substantially narrow the protection of s. 15(1), while deepening intersectional gendered and racial disadvantage for women resulting from their parenting responsibilities, poverty, discrimination in employment, and other barriers they face.[25]

14. An analysis of a claimed ground (or claimed grounds) should consider whether and how it interacts with other oppressive systems or structures that feature in the case.[26] Claimants should not face additional burdens by virtue of having an intersectional s. 15(1) claim. Thus, the Interveners submit that claimants are entitled to name grounds and characteristics that are relevant to the case but should not have to demonstrate a "distinction" multiple times with each ground analyzed in isolation, nor should they need to prove that every aspect or characteristic can satisfy the test for analogous grounds for it to be considered in the analysis.

15. Accordingly, the Interveners propose the following framework for step 1. First, the court should determine if intersectional discrimination is at issue in the claim, based on the claimant raising multiple grounds under s. 15(1) or the claimant identifying a claimant group with intersecting identity characteristics. The claimant may designate this group with

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[24] *Kanyinda*, *supra* note 2 at paras 94-95 and paras 99-100.
[25] Kimberlé Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color" (1991) 43:6 Stanford L Rev 1241 at 1245-46.
[26] See e.g. *Bjorkquist et al*., *supra* note 12 at paras 94-98.

reference to grounds and related characteristics that meaningfully contribute to the law's adverse effects even if they do not all correspond to an enumerated or analogous ground. Second, the court should determine whether the claim is anchored by one or more enumerated or analogous grounds raised by the claimant. Third, it should then proceed to determine whether the claimant has shown that the law makes a distinction against this group either directly or by virtue of adverse effects, or both.

16. The factum of the Attorney General of Ontario suggests that an intersectional analysis "creates free entry to s. 15's protections for to-date unprotected grounds."[27] Respectfully, the Interveners submit that such an objection epitomizes the single-axis discrimination paradigm. It implies that "real" sex-based distinctions are those experienced by individuals who deviate from the dominant norm only on the basis of that ground, or women with intersectional characteristics who can show they are "similarly situated."

17. Here, the Respondent's designation of the grounds of sex, citizenship and immigration status, as well as the patent relevance of race, signal the need for an intersectional analysis. This analysis is anchored by the ground of sex. Women bear a disproportionate share of the childcare burden in Canada, which contributes to the persistent systemic disadvantages that limit the opportunities available to women workers.[28] It is therefore open to a court to find that s. 3 of the *RCR* contains an implicit sex-based distinction when viewed "in [a] context… redolent of gender-based difference,"[29] despite the explicit distinction being immigration status. A court would therefore consider whether Ms. Kanyinda can demonstrate an adverse-effects distinction either by way of disproportionate impact or qualitative differential effects against the claimant group, mothers seeking asylum.

18. In other words, the sex-based adverse effects should be understood intersectionally to include the effects of hierarchies of race and citizenship and consider the qualitative impact on female refugee claimants specifically. A court may then conclude that, in addition to the

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[27] Factum of the Attorney General of Ontario, submitted April 7, 2025, at para 33. See also: Factum of the Attorney General of Canada, submitted April 4, 2025, at para 71.
[28] *Fraser*, *supra* note 5 at para 103 and para 113.
[29] *Centrale*, *supra* note 8 at para 155 per McLachlin CJ.

quantitative disproportionate impact identified by the Respondent, qualitative differential effects arise because female asylum-seekers have relatively little political power, are historically disadvantaged, and face language barriers, difficulty accessing employment, social isolation and economic precarity.[30] Given the likely lack of family support for caregiving, excluding female refugee claimants from subsidized daycare has a qualitatively more serious effect on them because it effectively restricts their ability to engage in paid work – resulting in social isolation, deskilling and cumulative effects of economic disparity (such as lower pension contributions).[31]

b) Step 2: Disadvantage Must be Evaluated Intersectionally in Light of Grounds Claimed

19. Intersectionality is also relevant to step 2 of the s. 15(1) test, where the claimant must show that the distinction perpetuates, reinforces or exacerbates their disadvantage. Courts must avoid a narrow reading of sex-based disadvantage, and instead "open up" the category of sex (in this case) to incorporate interrelationships with other characteristics that help us understand how the law discriminates against women.[32] As with step 1, discrimination under step 2 cannot be assessed using a single-axis paradigm. Otherwise, the more marginalized the group of women affected by the law, the less likely it is that a court will recognize that they were subjected to sex discrimination (or any discrimination).

20. Section 3 of the *RCR* "widens the gap"[33] between the claimant and others because it contributes to the feminization of poverty – particularly the depth of poverty experienced by single mothers, racialized women and newcomers to Canada[34] – and underscores refugee women's social exclusion from and devaluation of their contribution to Quebec society. Similarly, the law reinforces gendered prejudice and stereotypes specific to racialized

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[30] Factum of the Respondent Bijou Cibuabua Kanyinda, submitted March 10, 2025, at paras 65-73.
[31] *Ibid* at para 120.
[32] Shreya Atrey, *Intersectional Discrimination* (Oxford: Oxford University Press, 2019) at 149-150.
[33] *Quebec (Attorney General) v. A*, 2013 SCC 5 at para 332.
[34] Statistics Canada, "International Women's Day 2024," online: https://www150.statcan.gc.ca/n1/pub/89-28-0001/2022001/article/00009-eng.htm#n6-refa (release date March 4, 2024).

mothers who are asylum seekers (such as that they "don't want to work" but instead rely on government benefits).[35]

21. Importantly, an intersectional approach avoids improperly ascribing a beneficial purpose to a law in the analysis of its discriminatory effects. Courts in the past have tended to focus on a law's ameliorative purpose in the s. 15(1) analysis rather than where it should properly be considered, under s. 1.[36] There is a risk that, absent an intersectional approach to step 2, the overall beneficial purpose for working women will obscure the discriminatory, gendered nature of the exclusion. This approach intensifies the discriminatory effect on women facing multiple oppressions, essentially denying that the law could constitute sex discrimination against them because it favours women who are in closer proximity to the dominant group (white, upper-middle class, male citizens).

D. This Court should clarify that a claimant's qualitatively different treatment can prove a distinction under section 15(1)

22. In *Fraser*, this Court established that claimants may demonstrate a distinction under s. 15(1) based on either quantitative or qualitatively differential treatment.[37] Qualitatively differential treatment can relate to a failure to accommodate[38] or to claimants experiencing the treatment in a qualitatively different way because of their pre-existing vulnerabilities or disadvantage. For instance, in *Eldridge v. British Columbia (Attorney General)*, this Court found that the absence of sign language interpretation amounted to discrimination against Deaf patients, while in *Janzen v. Platy Enterprises Ltd.*, this Court recognized that sexual harassment was experienced by women in a qualitatively different way because it is used in a sexist society to "remind women of their inferior ascribed status."[39] In these cases, it was unnecessary for

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[35] Julian Grant & Pauline B Guerin, "Motherhood as Identity: African Refugee Single Mothers Working the Intersections" (2019) 32:4 J of Refugee Studies 583 at 591.
[36] Jennifer Koshan & Jonnette Watson Hamilton, "Women's Charter 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* (Vancouver: UBC Press, 2024) 237 at 249.
[37] *Fraser*, *supra* note 5 at paras 55-61.
[38] *Ibid* at para 55, citing *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624 at para 83.
[39] *Janzen*, *supra* note 8 at pp. 34

claimants to provide statistical proof as to how many from the claimant group were affected as compared to hearing patients or men, respectively. Similarly, in this case, the law has qualitatively different effects on refugee-seeking women (see paragraph 18), regardless of how many of them are affected.

23. Quantitative disproportionate impact highlights the "built in headwinds"[40] the law imposes against the entire claimant group (but which may not affect a particular, individual member), whereas qualitative differential impact affects all members by reinforcing their inferiority and difference from the dominant group. In *Sharma*, the majority decision was silent on the ability of claimants to demonstrate a distinction through the law having qualitatively differential impact.[41] Instead, the Court emphasized the claimant's failure to prove that the law contributed to a statistical increase in the incarceration of Indigenous peoples. Therefore, this Court should clarify that qualitatively different treatment is sufficient.

24. Accepting either type of evidence is especially important in intersectional claims where quantitative evidence may be unavailable or only available for one of the grounds claimed. Requiring quantitative evidence in these cases would result in intersectional claimants facing a higher burden of proof when compared to claimants claiming a single ground.

25. Privileging quantitative over qualitative proof also runs afoul of an intersectional understanding of discrimination, which acknowledges that discrimination operates interactively rather than on individual grounds in isolation. For example, a distinction that is based facially on national origin may be "felt more keenly" by women,[42] irrespective of the proportion of women among those subject to the distinction based on national origin.

26. The demand for quantitative data tends to reflect an additive approach to grounds, rather than a true intersectional analysis. An additive approach to sex-based distinctions, for example, essentially assumes racialized women experience the same adverse effects as more privileged

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[40] *Fraser*, *supra* note 5 at para 53.
[41] *Sharma*, *supra* note 3 at para 76; see Jonette Watson Hamilton & Jennifer Koshan, "Sharma: The Erasure of Both Group-Based Disadvantage and Individual Impact" (2024) The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference 115 at 125-128.
[42] *Bjorkquist et al.*, *supra* note 12 at paras 97-111.

women "but worse." It fails to capture the qualitative nature of discrimination that is shaped by multiple forms of power – a unique and indivisible kind of oppression that results from the interplay of the systems of power in a given context.

E. Conclusion

27. As Quebec's argument reflects in the instant case,[43] some governments now perceive their equality obligations as merely to refrain from passing discriminatory laws containing explicit distinctions or that cause quantitatively measurable, disproportionate effects based on an enumerated or analogous ground. This Court must reject such an understanding of s. 15(1), which is unable to fulfill the promise of substantive equality for all.

PART IV - COSTS

28. The Interveners do not seek costs and ask that no costs be ordered against them.

PART V - ORDER REQUESTED

29. The Interveners take no position on the outcome of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 24th DAY OF APRIL, 2025.

(agent)

Kerri Froc
Suzanne Zaccour
Cheryl Milne

[43] Factum of the Attorney General of Quebec, submitted January 13, 2025 at paras 66-68.

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